

RELIGION AND HUMAN CAPITAL DEVELOPMENT

Essays in honour of Prof. Yasir Anjola Quadri

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CHAPTER FIFTEEN



Az-Zuhayli's Conception of *Ad-darūrah* as Contained in his Commentary on Qur'an 2:173 and the Nigerian Experience

AbdulWahab Danladi Shittu

Abstract

Islamic legal maxims are universal principles of Islamic law that are expressed in concise statements to encompass general rulings in cases that fall under their subject. Sources of these principles include: the text of the Qur'an and the Tradition of the Prophet (SAW); consensus of the companions of the Prophet and that of the generation after them and; statement of the *Mujtahid*. Verse 173 of *Suratul Baqarah* is one of those verses from which these maxims were derived and for which Qur'an exegetes have variant interpretation. This work examined the view of a contemporary Qur'an interpreter, Az-Zuhayli, regarding the meaning and scope of the maxim derived from the verse with the aim of expanding the scope by identifying related legal maxims that could be adopted to accommodate some other contemporary issues. Descriptive research method was adopted and reliance was majorly on library material for data collection. Even though, laxity is not allowed in Islam, the author contended that concession is institutionalized to ease the practice of religion and therefore, the knowledge of the principle of jurisprudence should be given proper attention for the understanding and easy practice of Islam in the context of the contemporary challenges.

Keywords: Islamic Legal Maxims, Concession, Necessity, Felicity, *Mujtahid*, *fiqh*.

Introduction

Islam puts the nature of man into consideration in its various legislation in such a way that man is not subjected to difficulty on the basis of the provisions of Islamic law as adequately enshrined in Qur'an thus "... Allah intends every facility for you, He does not want to put you to difficulty..." (2:185). The implication of this is that Islamic law is needed for the removal of difficulty in human life as a result of which the law is relaxed at the time of necessity. Qur'an 2:173 is one of the verses of the Qur'an that further emphasises on Allah's mercy on mankind. Qur'an exegetes of different ages have attempted interpreting the verse in the context of the Islamic legal maxim 'Necessities permit what is forbidden'. Prominent among these exegetes is a contemporary professor of Islamic law, Az-Zuhayli, who is recognised for his moderation in discussing issues of Islamic legislation.

A Short Biography of Az-Zuhayli

Wahbah Mustapha Az-Zuhayli, a 20th century Islamic scholar, was born in the Syrian town of Dair Atiah. He graduated as a student of shariah from the University of Damascus in 1952 and acquired a certificate in the teaching of Arabic, a Masters degree and a doctorate degree all from Al-Azhar University, Cairo in 1956, 1959 and 1963 respectively. Az Zuhayli became a professor of Islamic law in 1975 while he was a lecturer at Damascus University between 1972 and 1974. He taught as a visiting lecturer in many universities among which are University of Benghazi in Libya, University of the United Arab Emirates, the University of Khartoun in Sudan and the Islamic University of Riyadh.¹

Az-Zuhayli is a member of many learned societies among which are; the royal society for research on Islamic civilization of Ahlul Bayt Foundation in Amman, Jordan, and the Syrian Majlisul Ifta Islamic Fiqh Academy in Jeddah. Az-Zuhayli is regarded as one of the foremost world experts on Islamic law and legal theory who has publications on different fields among which are; *al-Fiqhul-Islāmi wa Adillatuhu* ("Islamic Jurisprudence and its Proofs") a very long eight-volume summary of the different

schools of Islamic jurisprudence and their debates on various legal questions; *Usūlul-Fiqhil-Islāmī* ("The Roots of Islamic Jurisprudence") a two-volume treatise on Islamic legal theory and philosophy; *al-Fiqhus-Shāfi'iyyil-Muyassir* ("Easy Shafi'i Islamic Jurisprudence") *al-Fiqhul-Islāmī ala Madh-habil-Māliki* ("Islamic Jurisprudence according to the Maliki School") *al-Huqūqul-Insān fil-Fiqhil-Islāmī bil-Ishtirāki ma' al-Akhirīn* ("Human Rights in Islamic Jurisprudence concerning dealings with others") and *at-Tafsīrul-Munīr* ("The Enlightened Exegesis") a seventeen volume exegeses of the Qur'an. The opinion of the author on the meaning of Qur'an2:173 in his last mentioned work is studied in view of his jurisprudential approach to the interpretation of the verse and the relevance of his interpretation to the contemporary world.²

Maxims of Necessity (*Ḍarar*) in Islamic Law

Al Qawā'idul Fiq-hiyyah (legal maxims) are universal jurisprudence principles expressed in legal concise statement that contains general meanings.³ It is an all-inclusive rule based on legal evidences that are written accurately in comprehensive words to include all or most particular cases pertaining to *Fiqh* which come under them.⁴ These maxims are derived from verses of the Qur'an, Traditions of the Prophet, Consensus of Companions of the Prophet and that of generations after them and the words of *mujtahid* (diligent scholar). Reference is normally made to these maxims for the purpose of better understanding of the religion of Islam and in most cases, for giving alternative rulings to Islamic legislations for the purpose of making the practice of the law easy. *Ḍarar* (necessity) is one of those many situations for which a maxim is based. In the understanding of scholars of Islamic law, *Ḍarar* is a situation whereby someone reaches a limit where, if he does not relax the law of Allah on prohibition, his life will be endangered.⁵ *Ḍarar* in a narrow interpretation, is a way of preserving lives from being lost or from being badly injured, but in a broader meaning, it is all compelling situations where one has to commit an illegal act to preserve the five fundamental necessities which Imam Al-Ghazali identified as life, religion, offspring,

material wealth, and reason.⁶

The popular general basic maxim on *darar* is "*Al mashaqqatu tajlibut taysir*"⁷ (hardship begets facility). This maxim is applicable to almost all issues and branches of Islamic jurisprudence and because of its importance, the maxim is now being recognized as a fundamental one that is used as a legal concession for any recognized hardship in Islamic law. Thus, it serves the purpose of lessening and removing burdens from people.⁸ Whenever difficulties present themselves, the Law makes provisions to facilitate matters provided the difficulties are real, not imagined and not an issue of murder. This is in consonance with Allah's statement: "Allah intends for you ease and does not intend for your hardship." (Q2:185). Under this general maxim are other specific maxims which include:

1- *Ad-darūrāt tubīhul-Mahzūrāt* (Necessities make unlawful things lawful).⁹ This maxim is itself a broad principle in spite of its being classified under the grand maxim and as a popular maxim among the jurists, its interpretation is not very different from that of the grand maxim stated above. The maxim connotes that when man is faced with necessity, he is allowed to use what is forbidden as an immediate solution to his problem until he secures a lawful one provided the necessities are real.

2- *Ad-dararu yuzāl* (injury must be repelled). This maxim is presented in different languages among which is the language of the tradition of the prophet (SAW) *Lā darara wa lā ḍirāra* 'no injury shall be inflicted or reciprocated'.¹⁰ The maxim has three major aspects:

- (a) it negates the legitimacy of inflicting injury on anybody except on legal basis such as punishing a criminal or retaliating for hurt or murder;
- (b) it bans anybody from reciprocating any injury inflicted on him; and
- (c) it sets out to remove any existing injury.

c3- *Ad ʿadharu tuqaddaru bi qadriha* (necessity is estimated by the extent thereof). This maxim establishes that where necessity permits prohibited things, its rules should be treated as exceptional ones that must be limited to the period and the degree of an existing necessity.¹¹ This maxim covers all varieties of coercions whether it is due to a state of necessity or not, just like it emphasizes the limit of time in which the exceptional rules operate as understood from the verse of the Qur'an "... nor transgressing the limit..." (Q.2:173).

4- *Ad ʿdarūrah lā tubīhu haqqal ghair* (necessity does not invalidate the right of others). This maxim denotes that the right of another person should not be over ruled at a situation of necessity. If however, one is forced by an internal necessity such as hunger or an external necessity such as coercion, to infringe on another person's right, knowing fully well that such infringement will do the original owner of the right a lesser harm, such infringement is allowed on condition that the person whose right is infringed be compensated. Even when this maxim is adopted, the other person must not be in dire need of the right he is to be denied or else, the *shariah* considers him more eligible to his right.

5- *Yukhtāru ahwanus sharrayn* (the lesser of two evils is preferred). This indicates that when a person is necessitated to commit either of two actions that are both evils, he should choose to commit the lesser just as when taking a forbidden food is an evil and dying of starvation is another evil, the evil of taking the forbidden food is lesser and must be chosen against dying of starvation. This maxim agrees with a similar specific maxim '*Ad-ʿdararul ashaddu tuzālu bid ʿdararil a khaff*' (a severe injury shall be repelled with a lesser injury).¹²

6- *Al-hājah tunzalu manzilad ʿdarūrah ammatan kānat aw khāsah*. (need, whether public or private, should not be confined to compelling necessities but rather, should be extended to needs of the community as well). This maxim connotes that legally exceptional rulings should not be confined to compelling necessities alone but consideration should equally be

given to what will benefit the community.¹³ For instance, selling a non-existing article is prohibited in Islam but *shariah* recognises *salam*.¹⁴ Similar to this is the acceptability of the use of public baths even when there is no knowledge of how long the user is going to stay in the bath and what volume of water he is going to use.

Az Zuhayli and the Interpretation of Qur'an 2:173

Allah says in Suratul Baqarah

إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالدَّمَ وَلَحْمَ الْخِنْزِيرِ وَمَا أُهِلَّ بِهِ لِغَيْرِ اللَّهِ فَمَنْ اضْطُرَّ
غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ

He has only forbidden you what dies of itself and blood and flesh of swine and that over which another (name) than that of Allah has been invoked; but whoever is driven to necessity, not desiring nor exceeding the limit, no sin shall be upon him, surely Allah is Forgiving, Merciful (Q.2:173)

Four varieties of food are forbidden in this verse; animal that dies of itself, blood, flesh of swine and that on which other names than that of Allah is invoked when slaughtered. The four forbidden foods and others that could be found in other verses of the Qur'an¹⁵ are forbidden for a Muslim to consume except on condition of necessity which is contained in the last phrase of the verse "...but whoever is driven to necessity, not desiring nor exceeding the limit, no sin shall be upon him...". This concluding phrase is a restriction to four major things:

- (a) eating from what is prohibited more than is necessary,
- (b) eating from what is prohibited when one is able to find something lawful to eat,
- (c) having desire and inclination to eat from what has been prohibited and,
- (d) overstepping the limit by eating excessively from prohibited things.

Discussing what constitutes necessity, Az Zuhayli submits:

والمضطّر في رأي الجمهور: هو من ألجأه الجوع إلى الأكل، وأضيف إليه عند بعضهم: من أكره على أكل الحرام، كالرجل يأخذ العدو، فيكرهونه على أكل لحم الخنزير وغيره من معصية الله تعالى. ولم يجز جمهور العلماء التداوي بالحرام كالخمر والميتة، لقوله عليه الصلاة والسلام- فيما رواه البخاري عن ابن مسعود:- «إن الله لم يجعل شفاء أمتي فيما حرم عليهم»¹⁶

In the view of consensus of scholars, an impelled person is a person necessitated by hunger to eat (forbidden) food. Some scholars added that he is the person compelled (by another person) to take forbidden food. Like a man who is captured by an enemy and compelled to consume the flesh of pork or any other thing that is disobedient to Allah. The consensus of scholars are against taking forbidden food such as alcohol and pork for cure in view of the saying of the prophet (SAW) as reported in (the book of Bukhari) by ibn Mas'ud that "Allah does not put the cure of my *umma*h in what He had forbidden for them.

Az-Zuhayli's definition of necessity in this work is seen to be narrow because he confined necessity to the issue of food without putting into consideration that the prohibition of wine for medication as contained in the hadith which he made reference to is confined to normal condition when there is no necessity. Az Zuhayli's definition of *ad-ḍararu* in his work on jurisprudence equally confined necessity to consumption of food.¹⁷ In this work, he submitted that whoever refuses to take the forbidden food or drink at the time of severe starvation and consequently dies has sinned against his Lord. This narrow definition of the concept will definitely restrict the extension of the application of the concept to other areas such as financial institutions.

After defining the concept of necessity in Islam, Az-Zuhayli commented on the meaning of Qur'an 2:173 thus:

لكن من ألجأته الضرورة (وهي أن يصل إلى حد لو لم يتناول المحظور هلك) إلى أكل شيء مما حرم الله، بأن لم يجد غيره، وخاف على نفسه الهلاك، ولم يكن راغبا فيه لذاته، ولم يتجاوز قدر الحاجة، فلا إثم عليه، للحفاظ على النفس، وعدم تعريضها للهلاك، ولأن الإشراف على الموت جوعا أشد ضررا من أكل الميتة والدم.

وقيد الله جواز الأكل من المحرمات بقوله: غير باغ ولا عاد لنلا يتبع
الناس أهواءهم في تفسير الاضطرار، فيزعم الواحد أنه مضطر وليس
بمضطر، ويتجاوز قدر الضرورة أو الحاجة مستغلا الظرف الطارئ،
فينقاد لشهواته.

إن الله يغفر لعباده خطاهم في تقدير الضرورة، لأنه متروك إلى اجتهدهم،
رحيم بهم، إذ أباح لهم تناول المحرمات حال الضرورة، ولم يوقعهم في
الحرَج والصر¹⁸

As for somebody who is driven by necessity (such that he may die if he refuses to consume the forbidden food), to consume what is forbidden because he could not get an alternative and he feared dying although he is not interested in it and he does not take more than his need, such a person is not sinful because of his preservation of life and his non subjection of his life to perish more so, to die of hunger is more harmful than to consume an animal that dies of itself or (to consume) blood.

Allah gave a restriction to the right to eating forbidden food in his word: "not desiring nor exceeding the limit" so that people will not follow their desires in the interpretation of necessity in a way that somebody would assume himself to be driven by necessity while he is not and will thereby exceed the limit of necessity or need, taking advantage of the privilege and subduing himself to his desire.

Allah will overlook the error of His servants in proportioning necessity because it is left to the exertion of their effort. He (Allah) is kind with them for allowing them to consume forbidden food when driven to necessity and not subjecting them to offence and difficulty.

Az Zuhayli's Position on *dararu* and the Contemporary Nigerian Society

Az Zuhayli is of the opinion that the verse in discussion is on the permissibility of consuming forbidden food on conditions that:

- (a) the consumption of forbidden food is allowed under a life threatening situation and when there is no alternative;
- (b) the consumption of the forbidden food must be out of the

- interest of the person consuming it;
- (c) the consumed forbidden food must be in the proportion of the current need of the person;
- (d) to consume the forbidden food and save one's life under the above conditions is a religious obligation;
- (e) the allowed forbidden food that could be taken at necessity is not extended to the taking of alcohol for the purpose of cure even if the situation is life threatening and there is no alternative to it; and
- (f) there is no limit to what constitutes necessity; as a result, man will be forgiven for his stand provided he did not deliberately choose the side of negligence or laxity.

Az-Zuhayli's narrow definition of the concept of *ḍararu* mentioned earlier might be attached to his adoption of the view of those that forbid the use of alcohol at the time of necessity for medication. An Nawawy identified three different categories of concession (*Rukhsah*) in Islamic law and the first of which is a concession of necessity for the taking of alcohol for somebody who is choked with a morsel and cannot find water to push it down.¹⁹ Equally, a person who is being coerced and threatened by somebody to take alcohol is allowed to take the facility.²⁰ The coercion must exceed being threatened with beating or imprisonment and should extend to being threatened with death or injury on the body.²¹ Az Zuhayli supports this in his work on jurisprudence and considered it the position of consensus of scholars.²² Even when Az-Zuhayli with some other scholars disapproves of the use of alcohol for medication, he confirmed that the Shafi'I, the Hanafi and the Maliki schools allow the use of alcohol for medication at a time of necessity.²³ Zakariyya equally affirmed that some Hanafites approve of the use of alcohol for healing during dire situations while others disapprove of it.²⁴

The reliance of most scholars who disapproved of the use of alcohol for medication even when at necessity is on the event of Ṭāriq bn Suwaid, a companion of the Prophet, who was forbidden from consuming or producing alcohol and when he told the Prophet that he was producing it for medicinal purpose, the

Prophet responded thus: it is not a cure but an ailment²⁵ and the tradition of the Prophet "Allah did not put the cure of my *ummah* (community or followers) in what He had forbidden".²⁶ Notwithstanding the connotation of these two traditions and similar others, the concept of *darūrah* is a relaxation of the rule of prohibition in Islam when there is a life threatening situation. If for example, a medicine diluted with alcohol is recommended for a sick person who is unable to get an alternative to the treatment of his life threatening sickness, it may be wrong for such a person to subject his life to death even when the medicine is recommended by experts. The prohibition of alcohol for medication in the above tradition and similar others is confined to normal situation where there is no necessity or life threatening issue in the same way the prohibition of other forbidden foods is confined to a situation devoid of any necessity. Just as severe hunger may threaten life, so also does severe illness and the Islamic law is not lenient in its request for preservation of life. Even though taking alcohol is evil, dying when a solution to an ailment is available is a greater evil. In a situation of this type, one will prefer the adoption of the fifth maxim discussed above which states that: *Yukhtāru ahwanus sharrain* (the lesser of two evils is preferred). This is the position of Ar-Raghib when he stated that:

واختلف إذا اضطر إلى شيء من ذلك في دواء لا يسد غيره مسده، هل يجوز تناوله؟ والصحيح أنه يجوز للعلة التي لها أجزى تناوله للجوع، وكذا الخمر إذا اضطر إليها في دواء بحكم الأطباء أنه لا يسد غيره مسده، وأنه يفوت روحه إن لم يتناولها²⁷

Scholars differ on the right to taking anything of such (forbidden food) for medicine at a condition of necessity when there is no alternative to it. The right view is that it is allowed for the reason why it was legalized for hunger. The same thing applies to alcohol when one is in a state of necessity and doctors recommend that no other medicine can take its position and that his life is at risk in case he did not take it. Sayyid Sabiq reported the condemnation of the consumption of alcohol by jurists but immediately concluded that some scholars are of the view that necessity could permit its

consumption especially when there is a life threatening situation and an alternative to alcohol could not be gotten.²⁸

Recommendations

The maxim of necessity in Islamic law needs to be given a holistic interpretation for a better achievement of the objectives of the law. It is to this background that this work aligns with those who support the use of alcohol for medication. However, for the consumption of alcohol for medication to be considered a facility at the time of necessity, the following conditions must be met:

1. It should be taken for medication to cure a life threatening ailment that is already established and not presumed. It is only under such a situation that the issue of facility in Islamic law could be adopted and treated under the maxim: *Ad-ḍarūrātu tubīhul-Mahzūrāt* (Necessities make unlawful things lawful). The case of some Nigerian women selling herbs that are prepared or diluted with alcohol is an exemption of the situation in discussion because most of those that take it are neither faced by a life threatening ailment nor is the medicinal value of the herb prepared with alcohol confirmed by experts.
2. Sincere efforts to get lawful alternatives to alcohol must have failed before resorting to the taking of alcohol. The fact that most of the traditional alcoholic medicines in Nigeria are not taken as a last resort makes it an exemption in view of the explicit meaning of the verse: ... not desiring nor exceeding the limit... (Q.2:173) Herbal alcohol in Nigeria is consumed by some people to cure mild malaria which ordinary Paracetamol could take care of. More significantly, those who sell the herbal medicine are not qualified to diagnose ailment and confirm its being life threatening.
3. The alcohol must not be pure and undiluted. It is only an alcohol mixed with herb that could be considered taken as medicine and not the pure one. Most of the scholars that have soft mind for the use of alcohol for medication

uphold that it must not be in its pure nature but diluted with some medicinal herbs and the content must not be such that will intoxicate.

4. The efficacy of the alcohol must be guaranteed such that it will be able to serve the purpose of facility as contained in the maxim: *Ad ḍararu yuzāl* (injury must be repelled). If the certainty of the efficacy of the alcohol is not established, its consumption becomes forbidden.
5. What should be consumed of the alcohol must not exceed the proportion needed for the cure in consonance with the provision of the maxim: *Ad dararu tuqaddaru bi qadriha* (necessity is estimated by the extent thereof).
6. The taking of the alcohol must not be with desire but as a facility for necessity and when the necessity is over, the facility, consumption of such medicine should be discontinued.

Conclusion

The relevance of Islamic legal maxims on necessity in reducing hardship in the religion of Islam cannot be over emphasized. Considering the fact that Islam is undoubtedly, a religion of ease, confining the relevance of the maxims of necessity and felicity to the consumption of food or life threatening situation that is associated with hunger and coercion alone would be misrepresentation of Islamic law and its objective. If felicity in Islam is seen as a relaxation of the law of Islam on forbidden food at the time of necessity for the purpose of preservation of life and other fundamentals of religion, it needs to be given a wider scope that will accommodate issues of the same cause.

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- ¹⁴This is a situation whereby, a farmer for example, because of his desperate need for money either for his personal purpose or to facilitate his farming, takes money for the product of his farm before it is ripe for harvest.
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