A CRITICAL APPRAISAL OF NECESSITY (*ḌARŪRAH*) IN ISLAMIC LAW WITH REFERENCE TO MEDICAL FATWAS

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نظرية الضرورة الشرعية وتطبيقاتها في الفتاوى الطبية

دراسة نقدية مقارنة

بحث مقدم لنيل درجة الدكتوراه في الدراسات الإسلامية

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Abstract

This thesis is a critical appraisal of the ethical construct of *ḍarūrah* (necessity) which is invoked in ethical-legal reasoning to override prohibition laws. It studies the concept of *ḍarūrah* and its impact on the Islamic moral ordinances considering various usages of the term in classical and modern literature. The first objective of this study is to offer critical conceptual distinctions between *ḍarūrah* and closely associated terms like *ḥājah* and *ʻumūm al-balwā* to identify and compare the extent to which they modify religious proscriptions with reference to the definitive objective of the Sharīʻah; protecting the human body and life from harm. The second objective is to apply these constructs to the utilisation of oral and non-oral medical treatment with various types of unlawful means like blood transfusion. For the first time in Western academia, this thesis observes the neglected research of Sunnī Barelwi scholars at the Majlis-e-Sharʻī of Mubarakpur in India in this field. It concludes that the impact scope of necessity varies based on its meaning and that in the narrowest concessionary context it permits certain oral and non-oral unlawful medical treatments rendering them compulsory/obligatory on the patient under certain conditions. The Islamic moral laws are classified according to scriptural language differences and epistemic strengths of proofs and a feature-based evaluation is offered to prohibited acts in an academically unprecedented manner. The significance of *ʻumūm al-balwā* as a permissive and understudied construct is also revealed filling a vital gap between the scope of *ḍarūrah* and *ḥājah*. A detailed analysis of these notions results in the formulation of a fresh comprehensive taxonomy on the moral judgement of treatment on a patient based on an analysis of medicinal efficacy, the value of physician testimony, patient experience of clinical efficacy, and the purpose of treatment considering which an ethical code is also posited for Muslim physicians. This research advances our understanding of the aspects of mutability in the Islamic law to safeguard human life, body and health with reference to the four Sunnī schools of law.

In the Name of Allah, the Most Gracious the Most Merciful

I dedicate this thesis to my beloved father, my spiritual guide and mentor, His Eminence Shaykh Pir Mohammed Abdullah Ateeq Naqshbandi, may Allah Almighty grant him a long felicitous life, who always encouraged me to study to my fullest aptitude and continually prayed for my progress, and to all my teachers who educated me and nurtured me.

If whatever is written in this thesis is accurate, then praise belongs to God alone. And if there is error, it is my own for which I seek Allah Almighty's forgiveness. I hope this work is placed in my record of good deeds and that researchers find it to be a source of knowledge and benefit.

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Transliteration Table

ā	Ā	Long vowel with *alif*
ī	Ī	Long vowel with *yā* + doubled *yā* ‘iyy’
ū	Ū	Long vowel with *wāw*
ḍ	Ḍ	ض
ḥ	Ḥ	ح
ṣ	Ṣ	ص
ṭ	Ṭ	ط
ẓ	Ẓ	ظ
‘		ع
’		ء
gh		غ
th		ث
sh		ش
dh		ذ
q		ق
kh		خ

Oxford journals, the Journal of Islamic Studies was used for English transliteration.

Chapter 1. Introduction

No system of law can truly remain effective over time or be complete unless it has a robust dynamic and pragmatic structure to confront and respond to circumstances of social change, human innovation and novel forms of harms and human interests. The Islamic legal system is no different. With changing dynamics of life in every aspect, there is an ongoing condition of contingency that Muslim jurists must consider when answering questions pertaining to Islamic morals and ethics. These jurists must accomplish this task whilst working with a specific framework without compromising religious principles. A primary theme lying at the centre of such work is the circumvention of harm and hardship, something that is discussed in all fields of Islamic law, ranging from purity and prayer, to finance and medical ethics.

To ensure that Islamic moral guidance continues to stay relevant in an evolving world, Muslim jurists turn to notions of *ḍarūrah* (necessity) and *ḥājah* (need) in the Law and their rules to solve questions relating to harm and hardship. They apply these rules to enact moral judgements or alter existing ones. As scriptural guidance is confined to limited cases and in the form of general rules, early Sunnī[1] jurists devised methodologies to interpret transmitted laws and critique sources to extrapolate moral guidance in addressing new situations. Four methodologies emerged as the most popular and accepted approaches in the Islamic law due to their comprehensiveness,

[1] The term 'Sunnī' in this thesis refers to scholars who follow one of the four traditional schools, belong to the Ash'arī or Maturīdī creed and do not reject any of the agreed upon absolute essentials of its creed (Ibn 'Ābidīn, d.1836, 1992, 1:49). Goldziher (1971, p.47) acknowledged that all four schools represent "orthodox" Islam.

transmittance and coherence.[2] They became known as the Ḥanafī school of Abū Ḥanīfah (d.768), the Shāfiʿī school of Muḥammad ibn Idrīs al-Shāfiʿī (d.820), the Mālikī school of Mālik ibn Anas (d.795) and the Ḥanbalī school of Aḥmad ibn Ḥanbal (d.855). Their methodologies, legal manuals and maxims continue to make Islamic values relevant to Muslim lives in the contemporary world.

Ḍarūrah in its narrow context is a concept that overturns a normative prohibition to safeguard one of the five fundamentals of Islamic law, which are the protection of religion, life, intellect, lineage, and property. This thesis will examine its various meanings and closely associated terms in the legal literature, with their application and limitations with reference to medical issues. It will reveal that legal experts used *ḍarūrah* not only in the context of contingency but also as a normative imperative in the hierarchy of human purposes.

Although reasonings and sources from the four Sunnī schools will be evaluated and compared, this study will present scholarly approaches of Indian Ḥanafī scholars and muftis from the Majlis-e-Sharʿī of Mubarakpur towards the theory of necessity and need and their application in fatwas relating to medical treatment.

1.1 The Aims and Hypotheses

The primary aim of this study is twofold. Firstly, to critically examine the concept of *ḍarūrah*, an ethical tool for moral reasoning in Muslim juristic discourse, and its impact on normative prohibition laws to accommodate ease in context of the human body and life. This will be achieved in the first five chapters. The second aim is to apply this construct to the discussion of seeking oral and non-oral medical treatment with

[2] See: Abū Zahrah (n.d.), Bearman et al. (2006), Coulson (1964) Dihlawī (2012), Kamali (2008b) and Weiss (1998) on the development of these schools.

permissible and forbidden means, the objective of which is to illustrate the moral duty on a patient to medicate. Herein, I will study the example of blood transfusion, with special reference to a resolution of the Majlis-e-Shar'ī, to distinguish between rules of necessity and need and non-oral treatment with forbidden means. This will be realised in the sixth chapter.

There are two hypotheses for this study. Firstly, that the rationale of *ḍarūrah* (necessity) in juristic reasoning has been used in various contexts and that it is different to *ḥājah* (need) and *'umūm al-balwā* (widespread problem) in its narrowest definition and in impact scope, yet all these concepts override prohibition laws with conditions and significant difference. Similarly, jurists use the term *ḥarām* (forbidden) in various meanings, and prohibited acts are various types, hence, differences of terminology and classification affect our understanding of the impact scope of these ethical constructs.

The second hypothesis is that the necessity to save human life and one's body from severe harm is a core value of Islamic law which renders certain medical treatments compulsory (*wājib*). Simultaneously, the very same law simply permits other treatments and does not sanction others. I will examine this by applying the rationales of *ḍarūrah* and *ḥājah* and their impact on prohibition laws in the assessment of medical treatment in Chapter 6. I will explain that the scope of *ḥājah* in impacting prohibition laws is narrower than that of *ḍarūrah* and where it may not serve as a sanctioning construct for certain treatments, the construct of *'umūm al-balwā* may do so despite the absence of *ḍarūrah*. Consequently, I will critically appraise the following propositions signifying their problems:

a. The necessity to save life or normal function of the body permits all types of medical treatments or makes them morally obligatory in Islamic law.

b. *Ḥājah* does not permit any type of forbidden act.

c. Only *ḍarūrah* and *ḥājah* sanction forbidden acts.

The broader aim is to examine the Islamic legal framework for moral assessment of biomedical matters and expound on its principles and value-based characteristics encouraged by scripture and juristic interpretation. By evaluating cases of contingency that overrule prohibition laws, it aims to contribute to our understanding of the evolution of legal growth and pragmatism in the Islamic law.

Whilst academic studies on Islamic biomedical ethics and the legal construct of necessity tend to focus on Middle Eastern and Western fatwa councils,[3] this thesis studies resolutions of an Indian council known as the Majlis-e-Shar'ī of Mubarakpur regarding the theoretical and methodological considerations of *ḍarūrah* and its limitations in the moral assessment of medical questions, which no one to date has studied.[4] The council is a private organisation representing the Sunnī Ḥanafī Barelwi community[5] and mentions its activities and background in the following words,

> It was constituted on 23rd of Jamadil Akherah 1413 A.H. / corresponding to December 19, 1992 A.D. to solve the complicated problems raised by this modern scientific age in the light of Islamic Jurisprudence. Till now, 23 large and small scale seminars have been conducted under the auspices of this council (Majlis), and more than 400 complicated problems have been solved, and they have been published with the name of "Majlis-e-Sharee ke Faisle".[6]

[3] See: Ghaly (2013b; 2015) and Hanif (2010) as examples.
[4] See: Appendix for an introduction to the council.
[5] See: Bowker (2000) and Sanyal (1999) regarding the Barelwi school.
[6] See: Majlis-e-Shar'ī (c2017).

Major scholars of the Sunnī Barelwi community attend the council's annual seminars and are required to write and submit research papers on certain topics before each seminar. The council has published its resolutions and summaries of the research papers in multiple volumes, yet most of the papers remain unpublished.[7]

The Barelwi school is a Sunnī school of Muslims with a large community living in the West. Considering the impact of transnationalism and that Western Muslims rely on fatwas imported from the Muslim world (Ghaly, 2012), there is reasonable ground to suggest that the council may influence views and behaviour of South Asian Barelwi Imams and communities towards medical treatment, though a separate study is required to examine the effectiveness of the council and its impact.[8] In addition to critically appraising relevant resolutions, this study will focus on the scholarly contributions by members of this council on the subject.

1.2 The Problems and The Significance of This Study

During this study, I encountered the following theoretical and methodological problems:

1. The term *ḍarūrah* (necessity) has varying contexts and thus it can be difficult to ascertain which context muftis and Islamic bioethicists are speaking in. Mahdi et al. (2015, p.418) identify that, "this bioethical construct [i.e. necessity] is important to physician decision-making. Unfortunately, the concept is multifaceted and used in various ways by Islamic legists and even in our study does not exactly correspond to there being a life threat to the patient."

[7] See: M. Miṣbāḥī (2014).

[8] See: Black (2009) on how religious fatwas inform patient choice.

2. The term *ḥarām* also has varying usages and pinning down the exact impact scope of *ḍarūrah* and *ḥājah* is thus difficult.
3. Juristic and academic texts regarding the moral judgement to orally or non-orally medicate in need or necessity are diverse, scattered and require a holistic study and interpretation, particularly in the Ḥanafī school.
4. The concessionary rules regarding hardship in the *qawā'id* genre of Islamic law entail a conundrum if taken at face value without applying conditions and controls. Ascertaining those conditions from an inductive case study of precedents is an exhausting task and problematical as one may encounter examples in classical legal manuals that are not congruent with the conditions.

From an inductive reading of laws based on scripture, consensus and analogy, Muslim jurists formulated legal maxims as rules for concessions and facilitation in hardship.[9] A legal maxim (*qā'idah*) is, "a general rule which applies to all of its related particulars" (Kafrāwī, 2002, p.245). These legal maxims are not limited to any singular domain of law and are agreed by all the Sunnī schools, though their interpretations and applications can differ in cases. Subsequent are the relevant five maxims from A. Khān (d.1921) (2016, 1:373-375), Ibn Nujaym (d.1563) (1991;1:73-9) and Suyūṭī (d.1505) (1990) and an elaboration to the mentioned conundrum.

1. Eliminating mischiefs is more important than acquiring benefits. This maxim seemingly requires an unconditional abstinence from all and any prohibited acts (mischiefs) and appears to concur with Kantian ethics[10] that considers immoral acts to be permanently immoral despite the positive consequences they may

[9] See: academic studies by Elgariani (2012), Heinrichs (2002, pp.365-384) and Rabb (2009) on the maxims.
[10] See: Caird (1909) on this theory.

have, like speaking the truth where a lie or withholding information can save human life.

2. Necessities permit prohibited acts. This maxim completely opposes the previous one because it suggests that prohibited acts can be adopted to achieve higher objectives. It thus corresponds to the consequentialist theory of utility[11] that we should assess the morality of acts by their consequences and that good ends justify prohibited means. If taken at face value, it permits all prohibitions in a necessity.
3. Whoever is afflicted by two problems must chose the easiest of them. This maxim is based on the *āyah* (Q16:106) that excuses a person coerced by death to utter disbelief if his heart remains firm in faith. It suggests that interests and harms must be weighed and thus opposes the unconditional implication of the previous maxims.
4. Harm must be eliminated. This is based upon the *āyah* (Q22:78), "…[God has] placed no hardship in your religion…" Committing a prohibited act is a harm, thus, this maxim seems congruent with maxim one. However, saving life is a necessary objective of Law; does this suggest that maxim two is to be adopted instead? Clearly, this maxim explicates the conundrum.
5. Hardship begets ease. This is like the maxim "a matter does not bear difficulty except that it brings ease" and is based upon the *āyah* (Q2:185), "Allah intends for you ease and does not intend for you hardship...." Its scope seems broader than maxim two because it appears to permit any prohibited act under any hardship type; necessity or need.

[11] See: Mill (1977) on this theory.

These legal maxims apply to ethical dilemmas and almost every paper related to Islamic biomedical ethics or fatwa on medical treatment cites at least one of them. However, there is silence in the academic literature regarding the mentioned conundrum and the limitations of the maxims when contrasted with each other. Abdur-Rashid et al. (2013) acknowledge that the cited legal maxims require controls for accurate application, but they do not evaluate how internal consistency can be achieved. By distinguishing various usages of the term *ḍarūrah* and closely connected terms, and elaborating their respective impact on various prohibited acts, I will explain how the conundrum can be solved. Consequently, this study will contextualise and harmonise the application of these maxims to demonstrate where dispensations in prohibition laws are made and where they are not, particularly in medicine.

In my opinion, this study is significant for the following reasons:[12]

a. *Ḍarūrah* and *ḥājah* are easily confused and a misjudgement will result in juristic error in a moral assessment. Thus, a critical appraisal of terms is needed. By differing between mentioned rationales of law, I will critique Branden and Broeckaert's assertion (2011, p.175) that, "the majority of [Sunnī e-fatwas] allow donation/transplantation and transfusion only conditionally and as an exception in case of necessity."
b. It will present an alternative methodological framework to Shāṭibī's *maqāṣid* to solve moral dilemmas.
c. It can influence scholarly thought, which is important as a scholar's conceptualisation of necessity will inform how rigid or pragmatic he is in providing ethical-legal answers to biomedical questions.

[12] See also the last paragraph in the literature review.

d. It will elaborate that the juristic model to assess moral cases does not intrinsically entail binary responses; it is neither monolithic, nor is every moral case either black or white. This study will reveal 'grey areas' rooted in the epistemic nature of probability in Islamic law and the potential for acceptable scholarly difference and pragmatism.

e. Its interdisciplinary approach will connect religion with medicine and asses how both can inform and influence each other.

f. In the conclusion of Chapter 6, I will formulate novel rules to distinguish between varying moral judgements on medicating with various means for different purposes. I will create a taxonomy for this and thus, my research will advance our knowledge in the field of Islamic medical ethics.

g. It has potential to impact patient choices, the behaviour of Muslim practitioners and relevant policies.[13] I will propose an ethical code for Muslim practitioners in the main conclusion (Chapter 7) based on findings in Chapter 6.

h. A coherent and consistent approach to the application of *ḍarūrah* and *ḥājah* and their rules will not only assist a Muslim to practise his faith correctly, but also help Islamic bioethicists and muftis carefully assess and apply these concepts. It can assist health policy makers to intervene and change contexts that lead to the contingent ruling of *ḍarūrah*.

i. The discourse on certainty and probability in legal proofs can aid the understanding of certainty in brain death.[14]

j. It introduces the scholarly discourse from India to the Islamic biomedical ethics' literature that is not represented in academia before this study. Previously,

[13] For studies on fatwa influences on behaviours see Mahdi et al. (2016) and Black (2009).
[14] See: Qazi et al. (2013) on this subject.

Shanawani (2008) reported a general dearth of articles on Islamic biomedical ethics from India.

1.3 Research Questions

To achieve the mentioned aims, this study will attempt to answer the following questions:

1. What is the method for moral assessment in the Islamic law and which scholarly activities are prevalent in the modern world to answer ethical-legal questions? (See Chapter 2).
2. What is the definition of *ḍarūrah*, the different contexts in which it is applied and what are their methodological issues? (See Chapter 3).
3. What are the conditions and controls for the concessionary *ḍarūrah* and *ḥājah*? (See Chapter 4).
4. To what extent do these ethical constructs and related concepts allow mutability by relaxing or altering proscriptions and what are the differences in their impact? (See Chapter 5).
5. What are the common features of the prohibited acts that are sanctioned or not sanctioned in a necessity? (See Chapter 5).
6. How do the theoretical and methodological discussions on concessionary *ḍarūrah* and *ḥājah* apply to questions of biomedicine? (See Chapter 6).
7. What is the Islamic ethical framework to determine the ethical-legal judgement of medical treatment? (See Chapters 6 and 7).

1.4 Scope and Limitations

This thesis is an appraisal of *ḍarūrah* in Islamic legal works with special attention to its concessionary context. It examines the application of the term and connected concepts

like *ḥājah* (Chapter 3) and *'umūm al-balwā* (Chapter 5) and applies them to seeking medical treatment in Chapter 6. I have also offered a holistic value-based taxonomy in ascertaining moral laws for novel cases that involve conflicting purposes in Chapter 4. Therefore, my study broadens to *ḍarūrah* as *maṣlaḥah mursalah*, however I am unable to further examine *maṣlaḥah mursalah* as a legislative apparatus due to the word limit.[15]

In the medical context, my study will deduce moral rulings on seeking oral and non-oral medical treatment in an unprecedented manner that synthesises legal literature. This will include an examination of the Majlis-e-Shar'ī's resolution on blood transfusion. The study does not critically study organ transplantation or similar procedures, although some references to these will be made where the inviolability of the human body is discussed in *fiqh* case examples (Chapter 5).

In the assessment of *ḍarūrah* in *fiqh* cases, I will present examples of war and crime for three reasons:

1. Modern fatwas on medical matters relate to war and crime precedents in context of the human body. For example, contemporary jurists consult rules on cannibalism in life threatening hunger and ask; if cannibalising a living person's body is not allowed with their consent, is accepting their blood or organ allowed? Do political differences change the response about cannibalism and does this thereby influence prohibition laws in blood and organ donation?[16]
2. A comparison can be drawn between war and crime and examples of medical treatment, especially regarding the impact of empirical probability on prohibition laws.

[15] Refer to Būṭī (1973), A. Zarqā (2012), and M. Zarqā (2012) for this.
[16] See such examples in M. Miṣbāḥī (2000) and Chapter 5.

3. These examples uncover the inviolability of human life and body and the extent to which harm from them is mitigated in Islamic law.

The Majlis-e-Shar'ī of Mubarakpur has not been studied in the English language and it has not fully published its research papers. This study is thus limited in its assessment to the published material of the council, including its resolutions, summaries and some papers published by M. Miṣbāḥī and A. Miṣbāḥī, all of which are in the Urdu language with partial Arabic excerpts. I will primarily focus on the Ḥanafī approach, comparing it with views of the other schools to develop arguments or advance a discussion. This study is not about the role and effectiveness of the Majlis-e-Shar'ī.

Islamic theology is beyond the scope of this research, such as the implication of denying prohibition laws, debates on determinism and free-will in Islamic theodicy and the theology of suffering. Similarly, the medical ethics section does not incorporate approaches in the theology of nature or a philosophical discourse.

Although I will present a methodology for moral reasoning in Chapter 2, I will be less concerned with the theory of *ijtihād* and possibility of *mujtahids* today.

1.5 Methodology

This thesis will follow the subsequent method of research:

1. A critical discourse analysis of literature on the conceptualisation of *ḍarūrah* and its application in medicine in the Islamic law.
2. An interdisciplinary approach to integrate details regarding *ḍarūrah* in scripture, *qawā'id* literature, *uṣūl al-fiqh*, the *maqāṣid* literature, *fiqh* sources of the four Sunnī schools and academic literature.
3. A qualitative evaluation of *ḍarūrah*, *ḥājah*, *'umūm al-balwā* and their connections as ethical tools in the Islamic moral assessment of medical issues.

These connected terms will be differentiated by evaluating their similarities and differences, revealing their relationships in Venn diagrams.

4. A comparative approach to study the similarities and differences in scholarly views, particularly considering those of Ḥanafī muftis at the Majlis-e-Sharʿī of Mubarakpur in India.
5. An investigative inductive approach to classify and merge large amounts of undigested facts. This will be implemented by creating taxonomies for concepts and facts, which will aid deductive reasoning to formulate arguments and reach conclusions. For example, proof-types of Islamic law and their epistemic strengths (Table 2) and the moral judgements for medical treatment (Figure 26) will be organised in taxonomies.

There are some important methodological considerations:

1. Quotes from the Qur'an are referenced with the chapter number preceding the *āyah* number as (Q1:2). I used the translation of Professor Abdel Haleem due its academic popularity and contemporary style.
2. *Ḥadīth* references follow the popular standardized numbering system, the source to which can be found in the bibliography.
3. The Arabic diacritical method has been applied to Urdu words, and it does not apply to Arabic words found in the English dictionary like 'fatwa' and 'muftis' with exception of *sunnah* and *ḥadīth*. Proper nouns like 'Sunnī' and 'Sharīʿah' are not italicised.
4. The author-date referencing system has been consistently followed and the death date of an authority has been mentioned only the first time it is mentioned in a chapter. Hijri dates of publication have not been converted into the Gregorian year.

5. For purposes of concision and easy reading, the definite article ‘al’ has been omitted from all Arabic names, e.g. Ghazālī is not referred to as al-Ghazālī.
6. The reference to moral laws and morality in this thesis is confined to the Islamic ethico-legal rules (*aḥkām shar‘īyah*), i.e. mandatory, prohibited judgements etc.
7. When the term *ḍarūrah*/necessity is used in this study without specification, it is to be understood in the narrowest meaning as a time-bound concession unless expressed otherwise.
8. In quotes, I use single inverted commas for emphasis and underline text for the purpose of discussion.

1.6 Literature Review

This study consults classical Muslim sources and modern sources. In classical legal literature, deliberations on *ḍarūrah* can be found in four genres, all which shape and influence the modern discourse:

1. commentaries of scripture, i.e. Qur’an and the *ḥadīth*
2. texts on legal theory (*uṣūl al-fiqh*) under the section of dispensation (*rukhṣah*), *istiḥsān* in Ḥanafī texts, *maṣāliḥ mursalah* (unbounded public interests) in Mālikī texts, *sadd al-dharā’i‘* (blocking means) in Ḥanbalī texts and *bayān al-ḍarūrah* (necessary-elaboration in text pragmatics)
3. texts on legal maxims (*al-qawā‘id al-fiqhīyah*)
4. *furū‘* texts of the four *maḍhhabs*, where discussions are sporadic, particularly under laws pertaining to sick people, financial transactions, criminal law, and prohibited and disliked acts.

In the modern era, reference to necessity is particularly found in the following genres:

1. works on the philosophy and higher objectives of Islamic law (*maqāṣid al-sharī'ah*)
2. the *naẓarīyah* literature, i.e. specialist writings on the conceptualisation of necessity
3. resolutions of Fatwa councils that have enhanced the discourse on necessity, yet their approaches have yet to be critically studied
4. academic literature on necessity relating to biomedical ethics and Islamic finance
5. the encyclopaedia literature on *fiqh*, like *al-Mawsū'ah al-Kuwaytīyah al-Fiqhīyah*.

1.6.1 Academic Sources

There is a dearth of Western academic literature on a methodical appraisal of necessity and its limitations. Discussions on *ḍarūrah* are found sporadically in studies on modern biomedical or financial issues.

In *Conflicts and Tensions in Islamic Jurisprudence*, Coulson (1969, p.19) recognised that equitable preference (*istiḥsān*) "authorised departures from analogy to achieve a solution deemed more proper." He noted that accepting conjecture (*ẓann*) allowed for diversity in laws (p.23), and a realist approach to the facts of life allowed change in moral laws (p.96). Ironically, there is no reference to *ḍarūrah* and *ḥājah* or medical ethics in this short, yet relevant work.

Rosenthal (1971) studied the juristic discourse on taking the herb *ḥashīsh* on the grounds of medical necessity in medieval literature. However, he does not comprehensively investigate the moral judgement of treating with unlawful substances (*tadāwī bi'l-ḥarām*).

In an 11-page study, Muslehiddin (1973) argued that the rule of necessity enables the Islamic law to provide responses to every eventuality. He recognises there are limitations to this rule and does not make a comprehensive distinction between terms except that he recognises there is some difference in their impact, that necessity is something more pressing than need and a need can tantamount to necessity. He upholds that as along as a fatwa is an opinion without *ijmā'*, it may be changed by *ḍarūrah*, a proposition this thesis will challenge (in Chapter 5).

Schacht (1982, p.84) passingly mentioned *ḍarūrah*, asserting that it was the doctrine that, "dispensed Muslims from observing strict rules of the law," but he did not define the term, nor speak of its regulation.

The rule of *ḍarūrah* is most invoked in the academic literature on Islamic biomedical ethics. For example, Krawietz (2001) studies *ḍarūrah* in the case of organ transplantation, however, it is mostly descriptive without examination of the theoretical technicalities and limitations of the construct.

In his doctoral work, *The Fiqh of Medicine*, Yacoub (2001, pp.78-88) raises the question of seeking treatment and its limitations. He affirms that preventative and curative health measures are encouraged by Islam, yet ironically forsakes crucial discussions on clinical efficacy, the controls of medical need and necessity, the moral value of physician testimony, the difference in prohibited medicine types and their oral and non-oral utilization, and the exact moral judgement types for seeking medical treatment at varying degrees of hardship. His sections on rescue and the medical oath are of direct relevance to this thesis, and his classification of moral laws requires development as it misses the distinction between two types of disliked judgements and forbidden acts. My study fills these gaps with special attention to the Ḥanafī school,

classifying the moral judgements for medication according to their efficacy and one's physical condition.

Weiss' *The Spirit of Islamic Law* (1998) provides a good foundation for morality and probability in Islamic law, and Reinhart's *Like the Difference Between Heaven and Earth: Ḥanafī and Shāfi'ī Discussions of Farḍ and Wājib in Theology and Uṣūl* (2002) is a notable work that studies the difference between the absolutely certain and probable mandatory acts and the classification of moral laws. However, none of these works elaborate the different types of *ḥarām* acts, their features and proof-types.

Branden's *Medication and God at Interplay* (2008) is a brief yet important study on Muslim patient views about balancing trust in God with medicating. I will present a consistent typology for this issue according to treatment types in Chapter 6, expounding when refraining from medicine is or is not morally acceptable.

In *Islamic Bioethics: Problems and Perspectives*, Atighetchi (2009, p.34) rightly argues that the results of the application of *ḍarūrah* must be carefully evaluated to seek an equilibrium with other religious values. It is this evaluation that I seek to present in this thesis.

Sachedina (2011) studies examples of competing interests and the rule of 'no harm' without producing a holistic framework to solve novel conflicting interests. His examples (2011, pp.68-74) illustrate that probability affects the moral judgement of treatment, but he does not offer detail. He (2011, p.185) admits that in competing necessities of life, medieval jurists discriminated on grounds of religion, but I will argue that those who discriminated did so on basis of political differences and not entirely religion. His inclusion (2011, p.55) of the provision of health care exclusively for the poor under the *ḍarūrīyāt* interests is problematic as it connotes the provision of medical

treatment is morally obligatory, regardless of patient condition, clinical efficacy and religio-ethical value of the means. A conscientious study of Chapters 3 and 6 of my theses unveils the latter point.

Hanif (2012) studied the role and effectiveness of fatwa councils and their fatwas regarding Muslim minorities in non-Muslim countries but does not study necessity as a sanctioning tool.

Additionally, articles by Saifuddeen et al. (2014), Abdur-Rashid et al. (2013) Raissouni (2016) and Qaradaghi (2016) study the theory and application of *ḍarūrah* in biomedical issues. A common characteristic is that they confine the concept of *ḍarūrah* to the theory of *maqāṣid* espoused by Shāṭibī (d.1388) and Ghazālī (d.1111) before him, which I will argue is not aimed at assessing case-by-case moral judgements (*ḥukm shar'ī tafṣīlī juz'ī*), i.e. with consideration to implications of the Hereafter and sin, but rather to determine and rationalise universal interests (*kullīyāt*) of the Sharī'ah to maintain normal worldly order.

Isa (2015) mentioned *ḍarūrah* in its concessionary context and its application in deliberations by the National Fatwa Council of Malaysia. He recognises that 'need' can also sanction certain prohibited actions without classifying them and uses *ḍarūrah* in a context that is not life threatening to assert it sanctions the use of porcine vaccines and capsules. This thesis will argue that *ḍarūrah*, in all its usages, does not sanction absolutely certain prohibited substances for consumption and will counter Isa's conclusion that "a Muslim must consult an expert for a prescription and approval, to find out whether *ḍarūrah* really exists…"

Padela mentions *ḍarūrah* in various articles relating to health and medicine as an extreme life endangering circumstance. He (2013b, p.665) admits that, "in Islamic

bioethics, *ḍarūrah* is invoked with considerable variance and ambiguity." It is this variance and ambiguity I study in this thesis. I will challenge Qureshi and Padela's proposition (2016, p.600) that, according to the Ḥanafī school, the physician's testimony regarding the efficacy of a medicine has no bearing upon the moral status of the action to be taken by the patient. Also, in their classification of moral acts, they do not elaborate the various usages of the term *ḥarām* and their proof types.

I found two doctoral works that study necessity according to the Sunnī schools of law:

1. *Necessity (ḍarūra) in Islamic law: A study with special reference to the harm reduction program in Malaysia* by Safian (2010), who rightly examines that the concept gradually evolved into a theory and that scholars commonly gave examples to it rather than a hypothetical definition. She recognized that *fiqh* and *uṣūl* usages were different but does not comprehensively categorize definitions into broad and narrow contexts. In Chapter 3, I will critique her preposition (2010, p.79) that 'embellishments' from the *maqāṣid* are mainly permissible acts. Her section on medicating with unlawful means (2010, p.130) does not distinguish between oral and non-oral use, and the impact of this on the moral laws. Additionally, there is almost no discussion on the moral status of treatment based on physician testimony, nor on the impact of 'widespread problem' on sanctioning certain types of unlawful medicines. She does not acknowledge that medicating can become a necessity in the Ḥanafī school when certain conditions are met.
2. Mutairi's *Necessity in Islamic Law* (1997) faces similar issues as Safian (2010), except that the latter's evaluation of *ḍarūrah* in *fiqh* cases is more comprehensive. It is surprising to see his claim (p.120) that there is rarely any mention of any forbidden substance in treatment other than liquor in the legal

literature. Although he recognizes that modern authors broaden the definition of *ḍarūrah* to include fear of loss to any one of the five fundamental values and that its cause is not confined to starvation, he falls short of offering a comprehensive evaluation of the term's usage in classical literature.

1.6.2 Fatwa Council Literature

I primarily consulted the subsequent materials of the Majlis-e-Shar'ī of Mubarakpur relevant to my study:

1. Published resolutions[17] concerning:
    a. Alcohol-based medicines (no.1/2, 1994). This resolution declares the oral intake of alcohol-based medicines permissible where there is widespread problem modifying the fatwa of the Ḥanafī school from the strongest default position of prohibition. It classes alcohol as a disputedly prohibited type of *khamr* and considering that it was the first ever resolution of the council, there is no discussion in it on the efficacy of the medicine nor the value of the physician's advice and the potential impact of this on the moral judgement to its oral intake.
    b. *Ḍarūrah*, *ḥājah* and *'umūm al-balwā* (no.10, 1999). This is one of the vital and remarkable resolutions of the Majlis and its major contribution to modern Ḥanafī thought. It took the Majlis three consecutive seminars (six, seven and eight), and hours of discussion to identify precise definitions to these terms and ascertain their legal value and impact scope. In Chapters 3 and 5, I will study its definitions comparing them

[17] These are published in M. Miṣbāḥī (2014; 2018).

to other definitions. This resolution identifies four pre-requisites that establish a *ḍarūrah* to which I will elaborate and expand in Chapter 4.

c. Blood transfusions (no.12, 2000). The Majlis identifies ten circumstances in which blood is transfused and permits nine of them due to medical need or necessity. A vital contribution of it is its distinction between oral and non-oral use of substances that are definitively prohibited for consumption in scripture. However, this resolution does not discuss the efficacy of transfusion nor the value of physician testimony and their impact on the moral judgement of the procedure, as I will study in Chapter 6.

d. Physician testimony (no.37, 2008). This resolution reviews the stringent criterion of classical Ḥanafī sources to accept the advice of a physician to omit a religious duty, undertake a prohibited act or utilise an impure and forbidden medicine. The resolution relaxes the criterion based on a widespread lack of highly-expert religiously practicing Muslim physicians and the extreme hardship that would otherwise be involved. It thus allows for a Muslim to utilise such medicine and accept its prescription from a non-Muslim physician with the condition that the Muslim patient makes an independent assessment regarding it and considers it reasonable and not a deliberate attempt to undermine his religion factoring social and political contexts of medical treatment. This resolution does not make high probability of efficacy a condition to take the prohibited means, neither does it mention that a widespread problem for a specific medicine must be established for it to be permissible nor does it require the physician to have preponderant conviction regarding

its efficacy. There is also no specific discussion as to whether this permission applies to alcohol-based medicines too or not. I will study these aspects in Chapter 6.

2. Published research papers:

    a. M. Miṣbāḥī (2009a; 2009b; 2009d). His publications are the most detailed and useful for researchers of modern Ḥanafī thought as he clarifies definitions of terms like necessity and identifies their scopes of impact on prohibition laws as I explain and develop in Chapters 3 and 5. However he does not elaborate the relationship between widespread problem and public need as studied in Chapter 5. He sporadically discusses the impact of clinical efficacy on the moral judgement of treatment however it is not as comprehensive and contextualized as the proposal made in Chapter 6. Among his critical contributions is identifying the differences between oral and non-oral use of blood (Chapter 6) and between the different types of need, though in Chapter 5, I critique his explanation of an important rule concerning needs permitting extrinsically forbidden acts.

    b. A. Miṣbāḥī (2006). His work is like M. Miṣbāḥī's (2009a) in critically studying the precise definitions and legal values of need and necessity, albeit being more concise. I raise concern with his view that simple need permits any extrinsically prohibited act but not any *ḥarām ʻamalī* (Chapter 5) and his definition of this *ḥarām* (Chapter 3). He also mentions rules to counterbalance conflicting interests but with limitations identified in Chapter 4. In Chapter 5, I point that he adopted the Shāfiʻī position on widespread needs being a necessity.

c. M. Ḥusayn (2009). His paper on organ transplantation offers an important discussion on the impact of clinical efficacy on the moral judgement for treatment and he is of the view that in need and necessity it is morally compulsory to transfuse blood (Chapter 6). He made an important distinction between observable and non-observable treatments in relation to knowing the efficacy of a treatment which I disputed in Chapter 6.

The cited material does not discuss the juristic methods of reasoning in which *ḍarūrah* is rationalised, such as *istiḥsān* and *taḥqīq al-manāṭ* (see Chapter 2), and rather it focuses on the *qawā'id* and *furū'* genres of classical works and is heavily influenced by the Ḥanafī narrative. There is a general lack of mention in academic literature about the Majlis and its research-backed resolutions. The Majlis-e-Shar'ī draws guidance, specifically but not exclusively, from the ethical-legal writings and fatwas of two notable Ḥanafī jurists and Muslim ethicists, Ibn 'Ābidīn and A. Khān (M. Miṣbāḥī, 2014, p.42). I have consulted both of their works in this thesis due to their invaluable contributions to this subject. I will present A. Khān's outstanding legal contributions from *al-'Aṭāyā al-Nabawīyah fī al-Fatāwā al-Raḍawīyah* on the classification of moral laws and five-fold purposes, impact scope of widespread problem, and discussions on Islamic epistemology and its impact on treatment. Unquestionably, this thesis could not have taken its current form without guidance from his masterful Urdu/Arabic fatwas.

For purposes of comparison and appraisal, I will consult related research by the Islamic *Fiqh* Academy of India (Qāsimī, n.d.) and The International Islamic *Fiqh* Academy of Jeddah (OIC).

1.6.3 Modern Arabic Literature

In modern Arabic literature, the following works are of significance:

1. A famous study by Zuhaylī (1997) titled *Naẓarīyat al-Ḍarūrah* on the theory of necessity. It gathers precedents from *furū'* literature to conceptualise necessity, however, it lacks clarity regarding the different usages of the term in different contexts and their impact. It also does not elaborate a holistic impact scope for *ḍarūrah*, something which this study aims to achieve.

2. Bā Ḥusayn's *Raf' al-Ḥaraj* (1416AH) is a doctorate study on the mitigation of hardship in the Islamic law which broadly covers various rules and causes that engender ease. It presents conditions for the application of *ḍarūrah*, however, it does not examine its relationship with similar terms and neither its various usages with differing impact scopes.

3. Amjūḍ (2105) studied the theory of *ḥājah* in *Naẓarīyat al-Ḥājah al-Shar'īyah* since literature primarily focused on *ḍarūrah*. His work is an important contribution to examining *ḥājah* in its narrow context, however, he does not elaborate on the differing approaches towards the term like this study aims to do. Additionally, he does not apply *ḥājah* to examples of health and medicine. He rightly observed a dearth of literature on this legal construct and found only two previous studies.

4. In *Ṣinā'at al-Fatwā,* Bin Bayyah (2007) examined the theory of *ḍarūrah* and *ḥājah* and their application in the context of the *fiqh* of minorities. It identifies technical differences in terminology better than similar works; however, it does not intersect moral laws with the purposes of law and describes applications in organ transplantation and finance.

5. In *Fiqh al-Qaḍāyā al-Ṭibbīyah al-Mu'āṣarah,* Qarahdāghī and al-Muḥammadī (2011) cite resolutions of major councils from the Arab world and assesses topics relevant to my thesis, i.e. treatment with prohibited substances,

uncovering the area of nakedness in front of marriageable kin and blood transfusions. Their views will be examined for comparison purposes and their proposition (2011, p.200) that whatever is prohibited with absolutely certain Qur'anic text or sound *ḥadīth*, like flowing blood, is not allowed in medical treatment, will be academically contested.

6. *al-Masā'il al-Ṭibbīyah al-Mustajaddah* is an important contribution to the field of Islamic medical ethics by Natshah (2001). Its shortcoming is that it is does not make epistemological considerations in the assessment of treating with forbidden substances and does not distinguish between *ḍarūrah* and *ḥājah* in the narrowest contexts for this purpose. I will challenge its conclusion (2001, 1:127) that "treatment with a forbidden and impure substance is allowed though disliked."

This study advances the theory and application of *ḍarūrah* in the following aspects:

1. It classifies the usages of the term *ḍarūrah* and distinguishes it from *ḥājah*, widespread problem and their types.
2. It defines a clear impact scope for these constructs in context of prohibition laws and scholarly agreement/disagreement.
3. It presents a refined understanding of the term *ḥarām* (forbidden), its types and features of prohibited acts.
4. It integrates the classification of moral laws and the typology of purposes (*maqāṣid*) to which *ḍarūrah* belongs.
5. It evaluates the method by which *ḍarūrah* is applied in moral reasoning, an aspect previous studies do not consider.
6. It sets a methodological framework to counterbalance conflicting interests in Islamic law.

7. It solves the outward conundrum of the legal maxims on mitigating harm and necessity.

1.7 Structure of Study

Chapter 2 focuses on the sources of law and the methodological framework of ethical-legal reasoning in which *ḍarūrah* is employed as a rationale to issue or alter moral judgments. It classifies the Islamic moral laws (*aḥkām shar'īyah*) and observes juristic activities that apply them to real life scenarios. Juristic claims of 'knowledge' and 'certainty' in ascertaining God's law are also defined according to classical Islamic epistemology.

In Chapter 3, the term *ḍarūrah* is studied and classified in its varying contexts in an unprecedented way. Scholarly approaches to *ḍarūrah* in the wider scheme of religious 'purposes' are critically appraised and vital methodological concerns are revealed. The moral laws are integrated with interests/purposes, including *ḍarūrah*, forming a fresh typology based on an analysis of various types of *farḍ* and *ḥarām*.

Chapter 4 collates and appraises the conditions that constitute a *ḍarūrah* and *ḥājah* in their narrow contexts of contingency. The regulations and controls to these ethical constructs are evaluated to ensure they are not misapplied to sanction prohibited acts. The rule of mitigating harm is studied at length, covering the Islamic ethical framework to counterbalance competing interests in novel cases lacking explicit scriptural proof.

Chapter 5 studies the extent to which *ḍarūrah* sanctions prohibited acts. The prohibited acts are classified and characterised by their common features in an unprecedented way, and the scope of *ḍarūrah* in its narrow concessionary context is compared to *ḥājah* and *'umūm al-balwā* with their types, emphasising the importance of term verification.

Vital relationships between these terms are uncovered and important observations are made regarding obscure texts on the impact of *ḥājah*.

Chapter 6 applies the constructs of *ḍarūrah*, *ḥājah* and *ʻumūm al-balwā* to the moral position on seeking medical treatment. A detailed analysis of *fiqh* literature is offered on oral and non-oral treatment with various types of permissible and forbidden means, with reference to research of the Majlis-e-Sharʻī of Mubarakpur. Blood transfusions have been critically studied based on the criteria of *ḍarūrah* and *ḥājah*. Factors that affect the moral value of medicating are observed and a new taxonomy for the assessment of treatment types is proposed in the conclusion.

Chapter 7 summarises the key conclusions of this research and presents a solution to the conundrum in the legal maxims. An ethical code for Muslim practitioners is also offered.

Chapter 2. Methods of Moral Reasoning in the Islamic Law

2.1 Introduction

The purpose of this chapter is to demonstrate the intellectual effort made by Muslim jurists to ascertain moral laws for issues using various sources and methods of reasoning. It will shed light on the concept of *ijtihād*, the type of juristic activity present today to solve novelties, the meanings of attaining certainty and probability regarding Divine intent and the classification of moral laws. Methods for rationalising legal matters based on *ḍarūrah* will be particularly identified.

2.2 Sources of the Islamic Law

By surveying the scriptural laws, several Sunnī scholars inductively reasoned that the underlying objective of the Islamic law, and of every revealed law, is to safeguard five fundamental values: religion (faith), self (human life/soul), intellect (mind/sanity), lineage (progeny/posterity) and wealth (property) (Bughā, 2013, p.54; Shāṭibī, d.1388, 1997, 1:31, 2:20; Weiss, 2010, pp.601-4).[1] They are in descending order of importance according to Ghazālī (d.1111) (1993, 1:286) and Anṣārī (d.1810) (2002, 2:262). However, Shāṭibī (2004) placed lineage and wealth before intellect though his modern commentator, Darāz, changed the order and added that some jurists placed the 'self' before 'religion'.[2] These are constants of the law that are good ends, as they are inclusive of all benefits pertaining to this world and the hereafter for the individual and the community. Shāṭibī (2004, 1:23) is deemed to be the first scholar to argue that these

[1] See: Auda (2008a; 2008b) and Ghaly (2016) for modern interpretations.
[2] In Chapter 5, I will observe cases where the 'self' dominates religious prohibitions in certain cases, but not universally.

Divine purposes (*maqāṣid*) were known definitively from a holistic reading of scripture by way of induction (*istiqrā'*).[3]

The Islamic law, which aims to protect the named values, is not fully available in specifically worded rules in the Qur'an or Prophetic traditions (*aḥadīth*), instead Muslims are left to discover God's law and must articulate and formulate many of those rules themselves. Shāṭibī (2004, 5:776) accurately states, "the revealed law does not elucidate every moral judgement for each individual matter, rather it brought universal concepts and unconditional expressions that comprise unlimited matters…so there is not a single real-case except that a scholar will have an easy or difficult task in realising which evidence it falls under."

The Qur'an is the first and major source, and despite its wording being free of error due to its mass-narration[4] according to Muslim tradition, its language and textual indications vary from general to specific and clear to ambiguous,[5] therefore intrinsically allowing human interpretive intervention. The role of the Prophet was to explain the Qur'an through word and action as it declares, "We have sent down the message to you too [Prophet], so that you can explain to people what was sent for them, so that they may reflect" (Q16:44). However, most Prophetic traditions are also open to textual interpretation and critique in historic attribution.[6]

In context of their textual meanings, both sources contain the following types of words (Ali, 2000; Maḥbūbī, 1998; Ramic, 2003; Zysow, 2008):[7]

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[3] See: Hallaq (1990) and Bughā (2013, pp.648-669) for a discussion on inductive reasoning in legal thought.
[4] See its definition subsequently in this chapter.
[5] See: Interpretative methods for scriptural ambiguity and generality in Weiss (2010, pp.382-439).
[6] See: Weiss (2010, pp.252-321) for discussion.
[7] This list is not exhaustive.

1. *Al-Ẓāhir* (The Apparent): an expression with a clear meaning that is not the purpose of the speaker.
2. *Al-Naṣṣ* (The Explicit): an expression clearer than *ẓāhir* that is the driven purpose of the speaker. Both are susceptible to restriction, abrogation and an interpretation different to the obvious textual import and are thus certain in the broadest context according to Ḥanafīs.[8]
3. *Al-Mufassar* (The Explained): an expression clearer than the previous two, without being susceptible to a different interpretation or restriction. Its abrogation was possible during the Prophetic era.
4. *Al-Muḥkam* (The Perspicuous): a clear text driven by a single meaning, free of interpretation, restriction and abrogation. Both these types are absolutely certain in their textual import.
5. *Al- ʻĀmm* (The General): a word that has a single literal meaning that applies to numerous particulars, e.g. a plural noun. According to the soundest view among Ḥanafīs, its textual import is certain in the broadest context. If its generality has been restricted (*ʻĀmm Makhṣūṣ*), it is probable in its textual import.
6. *Al-Khāṣṣ* (The Specific): a word that has a single literal meaning that applies to a single object in one assignment, e.g. a proper noun. This is also certain in the broadest context in its textual import.
7. *Al-Mushtarak* (The Homonym): a word with multiple literal meanings assigned to it, e.g. *ʻayn* in Arabic which means eye, gold, entity. When a *mujtahid* selects one of the meanings based on a probable introspection, the word is termed '*al-mu'awwal*' (the interpreted).

[8] See: meaning of certainty subsequently in this chapter.

Shāfi'ī legal theorists refer to the first two as *ẓāhir* and three and four as *naṣṣ* (Ramic, 2012, p.103), therefore caution must be taken in referring to these terms.

In context of historic attribution,

1. The entire Qur'an and some *aḥadīth* are mass-narrated (*mutawātir*), i.e. in every generation, such a large number of people, for whom it is inconceivable for them to have concurred upon a lie, narrate them. According to Sunnī scholarship, these entail absolute certainty in historic attribution to the Prophet.[9]

2. Some *aḥadīth* are famous (*mashhūr*), i.e. they were initially narrated by one or two Companions and became mass-narrated in the generation of their followers. These engender a type of certainty subsequently referred to as broadest certainty.

3. Many *aḥadīth* are solitary narrations of one or two Companions (*khabar al-wāḥid)* that were not mass-narrated in the first three generations. These are probable in attribution to the Prophet. Most jurists other than Ḥanafīs, do not differ between this and the previous type.[10] However, there is a general acceptance among scholars that a solitary *ḥadīth* is epistemically strengthened and can engender inductive certainty (*'ilm nazarī*) if it is supported by compelling indicators ('Asqalānī, d.1449, 2001, 1:59; Jazā'irī, 1995).

Thus, textualism and intentionalism are salient features of Muslim juristic thought. Textualism is the approach that seeks to ground all law in a canon of foundational texts and refuses law that opposes them. Foundational texts in the Islamic context refer to the infallible *naṣṣ*, i.e. Qur'an, *sunnah* and an infallible scholarly consensus (*ijmā'*).[11]

[9] See the Islamic epistemology discussion in this chapter.
[10] See: Jazā'irī (d.1919) (1995, 1:111-5) for an analysis of conflicting views.
[11] See: M. Zarqā (2012, 2:1015) on independent reasoning against *naṣṣ* being invalid.

Intentionalism is the pursuit to discover authorial intent or 'God's moral law' in the interpretive process of texts.[12]

After the passing of the Prophet, a new source emerged, namely, the unanimous consensus (*ijmāʿ*) of the Muslim scholars or the entire Muslim community on a matter (Hallaq, 1994, p.450, ft.1). Based on the Prophetic *ḥadīth*, "my *ummah* will not gather upon misguidance" (Ibn Mājah, *ḥadīth* no.3950), Muslim jurists declared an established consensus of all *mujtahids* was infallible, and therefore opposing it in any novel ruling is unwarranted (Kafrāwī, 2002, p.465).[13] Consensus must rely on directives in the Qur'an or *ḥadīth*, but the source (*sanad al-ijmāʿ*) is not always transmitted with the consensus. Like *ḥadīth*, consensus is subject to critique in historic attribution and varies in its strength depending on the era of the consensus, thus it can be probabilistic or definitive,[14] and the term maybe used in the narrow context of 'agreement within a single school' or a 'group of jurists' (Anṣārī, 2:439; . Alternate words terms like *ittifāq* (agreement) may be used to transmit views that are not based on a definitive consensus, and the matter on which there is consensus can be something preferential and not obligatory.[15] Therefore, verifying claims of 'scholarly consensus' and their purport requires diligence.

[12] See: Weiss (1998) for a detailed discussion and Weiss (1990, pp.53-71) for objectivity in interpreting Divine speech.

[13] See: Coulson (1964, p.77), Hallaq (1994, VIII), Hurgronje (1975, p.275), Schacht (1950, pp.2, 94, 135) and Weiss (2010, pp.239-40) for an academic discussion on infallibility.

[14] See: Anṣārī (2002, 2:295) and Taftāzānī (2005, 2:120-21) for a detailed study of consensus types and their strengths. Certain types are disputed in being *ijmāʿ* among the schools however Table 1 (after p.45) presents eight types according to Ḥanafī scholars.

[15] See: Chapter 6.

Legal reasoning by way of analogy (*qiyās*) became the single most practiced method of establishing *sharī'ah* rulings upon novelties. *Qiyās* is the fourth primary source which involves extrapolating a *ratio legis* (*'illah*) from a scriptural precedent (*aṣl*)—using careful methods devised by *mujtahids* known *as masālik al-'illah*[16]—and extending its moral law to a novel ancillary case (*far'*) sharing a common rationale (*'illah*). *Qiyās* is also made with an explicit *ratio legis* in the Qur'an, *ḥadīth* or scholarly consensus, and therefore, it can be definitive or probabilistic (Zubaydī, 2015, pp.351-397). Hence, a *ratio legis* is either extrapolated by a *mujtahid* (*mustanbaṭah*)[17] or explicitly offered (*manṣūṣah*) in the named sources.

Matters that did not have scriptural proof posed a challenge to the jurists who sought additional methods to solve novelties. All the Sunnī schools concurred on inferring moral laws from various holistic general principles (*qawā'id kullīyah*) in the absence of specific detailed proofs (*adillah tafṣīlīyah*) for problems. In addition to these, they also use additional sources termed 'disputed sources' (*adillah mukhtalaf fīhā*), like 'juristic/equitable preference' (*istiḥsān*), 'utilising interests' (*istiṣlāḥ*) and 'blocking the means' (*sadd al-dharā'i'*), etc.[18] This activity was termed '*istidlāl*' by Juwaynī (d.1085), and Ibn al-Subkī (d.1370) was the first jurist to thoroughly study it and verify that it is broader than inferring laws from disputed sources because it incorporates *qiyās* too. He declared it the fifth source of law and alluded that it was an expression of *ijtihād*

[16] See: Auda (2008, p.115-117) and Zubaydī's PhD dissertation (2015, pp.65-226) on juristic differences on determining a valid rationale.
[17] Only types one, two and three *mujtahids* can extrapolate a *ratio legis* according to Ibn Kamāl's typology (Kafrāwī, 2002). See Figure 1.
[18] See: Bughā (2013) for a PhD dissertation on disputed sources.

by jurists who did not find a definitive proof to a problem.[19] *Ijtihād* is the intellectual effort jurists made to understand law from the sources of law.

2.3 Definition of *Ijtihād*

The linguistic meaning of *ijtihād* is to exhort effort or to endure difficulty (Ibn Manẓūr, d.1312, 1993, 3:135; Jurjānī, d.1413, 2012, p.66). In Arabic, a person would not use the word *ijtihād* to assert he carried a seed but would use it to say he exhorted every effort to carry a stone (Ibn Kamāl, d.1534, 2018, 3:271). In the theory of Islamic law, *ijtihād*, as defined by Āmidī (d.1233) means, "a total expenditure of effort in seeking an opinion (*ẓann*) regarding a rule of divine law (*ḥukm shar'ī*), such that the one [putting forth the effort] senses within himself an inability to do more" (Weiss, 2010, p.675).

Ijtihād, thus, is an intellectual effort of someone competent to interpret scripture and extrapolate probable (*ẓannī*) moral laws. The word "opinion" in the definition above excludes laws that are known to all Muslims as absolute essentials of belief (*ma'lūmāt min al-dīn bi'l-ḍarūrah*), such as the prohibition of liquor and the obligation of five prayers, or those laws known with certainty (*qaṭ'*) exclusively by the scholars which are beyond the scope of *ijtihād*.[20] 'Opinion' suggests a sense of probability that is not an infallible determination of the Legislator's intent, and Weiss (2010, p.686) accurately notes that it is not objectively determinable "along the lines of modern mathematics. The sense of probability can vary from one *mujtahid* to another: what is probable from one may not be probable for another." A *mujtahid's* opinion is binding on him, thus, reaching absolute certainty is not required to declare a moral judgement.

[19] See: Kafrāwī's PhD dissertation (2002) on this. He (2002, p.265) discusses juristic differences on whether *istidlāl* is a 'fifth source' or a 'method' of inferring laws from the primary four sources.
[20] All such laws are absolutely certain (A. Khān, 2016, 1:386).

Some theorists, like Rāzī (d.1210) (1997, 6:6), broaden the definition of *ijtihād* to include all domains of human study, such as the rational sciences, linguistics, sense-based knowledge, etc. This approach includes medicine, economics, theology etc. in the definition, yet in the legal corpus, the definition ought to be restricted to the domain of religious laws pertaining to human acts (*aḥkām shar'īyah 'amalīyah*), and thus Amīr Bādishāh (d.1565ca) (1351AH, 3:179) rightly explains that the definition for *ijtihād* in legal works is in fact the definition of the legal *ijtihād*.

Ibn Kamāl (2018, 3:271-3) and Qārī (d.1606) (2012, p.417) accurately claim that *ijtihād* is not confined to analogy in which a moral judgment is carried forward from a scriptural case to an ancillary case based on a common *ratio legis*. Rather, it also refers to asserting meanings determined by the inferred/congruent indication (*dalālat al-naṣṣ*) of the text and hence, *ijtihād* can occur in the presence of scriptural proof texts without opposing specific texts (*naṣṣ*). Hence, every analogy is an *ijtihād*, but every *ijtihād* is not an analogy. The former (2018) pointed that theorists, like Fannārī, Taftāzānī and Baydawi, sometimes missed this point and equated *ijtihād* to analogy. Among the contemporary scholars, S. A. Miṣbāḥī (2002, p.1) equates the two terms, though M. A. Miṣbāḥī (2007, p.78) carefully differs between the two. Eight out of 20 muftis of the Majlis-e-Shar'ī of Mubarakpur (India) equated these terms in the 22nd seminar in 2015 (N. Miṣbāḥī, 2015, pp.15-7). The final resolution (M. Miṣbāḥī, 2015), however, does not equate them.

There is an ongoing debate on the closure of the gate of *ijtihād* in the academic literature. Schacht (1982, pp.69-72) advocated that from the tenth century, Muslims formed a consensus that from that point onwards no one possessed the qualifications to perform *ijtihād* and that future legal activity was confined to the explanation and application of what was laid down by earlier *mujtahids*. Coulson (1964, p.81) and some

Muslim scholars second this view whilst others like Hallaq (1984) challenged it. In my view, the confusion regarding the meaning of *ijtihād* and its levels of function has contributed to the scholarly controversy. If *ijtihād* means the formulation of a new set of principles to extract law from the primary sources or the extraction of a *ratio legis* (*takhrīj wa tanqīḥ al-ʻillah*) from primary evidences it would be accurate to say that the early creative effort has been fully spent. But to say that all efforts have been spent in every function and activity of *ijtihād*, and that no form of it was further possible by scholarly consensus, or that it was legally prohibited, is erroneous. Three classical discussions in the legal literature disprove the claim of consensus on the closure a. the *mujtahid* typologies of the various schools, b. the scholarly difference on an era being devoid of a *mujtahid* and c. the discussion that *ijtihād* is divisible (*mutajazzī*) i.e. it can be exercised by expert jurists in one field without having expertise in others.[21] These classical discussions reveal that there is a scholarly acknowledgement of difference on the existence of *mujtahids* and of the possibility of non- independent/absolute and partial *mujtahids*.

A *mujtahid's* activity primarily involves 'interpretation' of scripture and 'extrapolation' of moral laws or of a *ratio legis*; this is because he encounters one of the two scenarios:[22]

1. **Primary proofs from the Qur'an, *sunnah* or *ijmāʻ* are present on an issue.**

    1.1 If the evidence has a single clear meaning and is absolutely certain in its textual indication and in its historic attribution to the Prophet, the purpose

[21] See: Anṣārī (2002) and Weiss (2010) for these discussions.
[22] See: Anṣārī (2002, 2:407), Kafrāwī (2002, pp.43-67), M. Khann (2007, pp.543-55), Qarahdāghī and al-Muḥammadī (2011, pp.18-20) and M. Zarqā (2012, 2:1015-6) for a detailed discussion.

of *ijtihād* is to explain integrals and conditions for acts from such texts and to apply them to real cases.

1.2 If the evidence is ambiguous or a homonym, and thus doubtful in meaning, probabilistic in meaning and or in attribution, then *ijtihād* comprises of determining the meaning, verifying proof-authenticity, ascertaining various textual implications and extracting laws for problems (Anṣārī, 2002, 2:407).

From both proof types, the *mujtahid* aims to accomplish the following:

a. extrapolate or assert a *ratio legis* from the scripture to carried laws forward to novelties

b. formulate general principles to apply to specific cases

c. where there is contradiction, determine the dominant scriptural proof by reconciling meanings, verifying abrogation or determining the stronger evidence.

All types of *ijmā'* identified in Table 1 (after p.45) are prioritised over juristic opinion like a solitary report (Anṣārī, 2002, 2:296). These activities of *ijtihād* were carried out by *mujtahids* of the formative period like Abū Ḥanīfah (d.768) and his students.[23]

2. There is no such evidence for an issue.

In this scenario, the activity of *ijtihād* is to determine moral laws for problems using analogy, casuistry, general legal maxims, universal purposes (*maqāṣid*) and public interests (*maṣāliḥ*), as well as other means. *Ijtihād fī al-furū'*, i.e. in the broader context of inferring judgements based on precedents of the legal schools and applying the fatwas of earlier jurists to real cases, will forever continue (Z. Miṣbāḥī, 2007, pp.66-7).

[23] See: M. A. Miṣbāḥī (2007, pp.81, 83) on the closure of the gate of *ijtihād* in context of formulating principles and analogy.

In these scenarios, a *mujtahid* must not formulate opinions that oppose 'absolutely certain' proofs. All jurists agree that '*ijtihād* in the place of *naṣṣ* is not valid' (A. Zarqā, 2012, p.147). *Naṣṣ* here means any evidence from the Qur'an, *sunnah* or *ijmā'* that is absolutely certain in meaning and historic attribution (M. Zarqā, 2012, 2:1015). Therefore, matters of *ijtihād* (*mujtahad fīhi*), by agreement of the four schools, are "those in which an absolutely certain proof (*dalīl qaṭ'ī*) is absent" (Ghazālī, 1993, 1:345; Rāzī, 1997, 6:27). The Majlis-e-Shar'ī of Mubarakpur (M. Miṣbāḥī, 2015, p.40) concurred on this definition and explained the proof types include "a *mufassar* or *muḥkam* verse of God's book or a similar mass-narrated *ḥadīth*." However, I surprisingly noticed that all the 20 members of the Majlis-e-Shar'ī who presented papers on the topic of juristic differences, entirely overlooked the fact that there is also a disputed area of *ijtihād*. According to Ḥanafīs, an *ijtihād* is invalid if it contradicts 'broadly certain' evidences, like a famous *ḥadīth* with an evident meaning or a consensus of the Successors[24] (*ijmā' lāḥiq*) with a prior dispute of the Companions—which is a probable proof in the narrowest context. For this reason, court judgements based on such an *ijtihād* are ineffective.[25] A note worth highlighting is that Ḥanafī scholars like Amīr Bādishāh (1351AH, 4:223) and Mullā Jīvan (d.1717) (2015, 2:214) contend the classical examples on this dispute. The agreed area of *ijtihād* is where evidence-based opinions oppose 'narrowest probable' proofs like apparent meanings of the Qur'an and *Sunnah* based on juristic methods of preference, text-conciliation and interpretation.[26] The Majlis-e-Shar'ī (M. Miṣbāḥī, 2015, p.41) rejected opinion (*ra'y*)

[24] The generation of early Muslims after the Prophet's Companions known as Tābi'ūn.

[25] In works of *uṣūl*, this is discussed under 'ignorance' and the 'etiquette of *qāḍīs*' in *fiqh* manuals. See: A. Khān (2016, 1:387), Kāsānī (1986, 7:4, 14-5), Lakhnawī (n.d., pp.131-3), Ibn al-Humām (n.d., 7:302), Ibn 'Ābidīn (1992, 1:472) and Qārī, (2012, p.394) for the disputed area.

[26] See Table 1 (after p.45) for agreed and disagreed areas of scope.

formulated by *ijtihād* that contradicts 'probable consensus' based on Anṣārī (2002, 2:296). Certainty and probability will be discussed subsequently in this chapter.

Another important point missing from the Majlis-e-Shar'ī's resolution on juristic differences (M. Miṣbāḥī, 2015, p.41) is raised by Rāzī (1997, 6:27), that a 'difference among scholars' (*ikhtilāf al-'ulamā'*) does not determine that a matter belongs to the area of valid *ijtihād*, i.e. in which opinion is permitted due to lack of scriptural proof; because the basis for a valid scholarly difference is that it must occur in the place of *ijtihād*, otherwise circular reasoning is entailed. There are examples of jurists like Ibn 'Abbās, Abū Ṭalḥah, and Abū Dharr among the Companions, who differed with all the Companions on some matters outside the scope of a valid *ijtihād*, and their opinions were denied (*inkār*) and were not deemed to prevent a consensus, nor were these Companions declared sinful because in matters requiring investigation, what may be evident to one jurist may remain obscure to another.[27]

The person inferring moral laws from scripture must be competent, and legal works have formulated different typologies to demonstrate ranks and tasks of various *mujtahids*.[28] Figure 1 presents Ibn Kamāl's widely cited typology in the Ḥanafī school.[29]

[27] See: Anṣārī (2002, 2:295, 416, 428), A. Khān (2014, 2:414; 2016, 1:387), Jaṣṣāṣ (1994, 3:297, 300-1), Lakhnawī (n.d., 3:132), Qārī, (2012, p.394-5, 461) on the varying epistemological values of scholarly differences and their impact on forming a consensus. On anomalous views, see Ṭarāblusī (2010, pp.259-265, 315-6, 344, 354-65).

[28] See: Abū Zahrah (1997, pp.338-47; n.d.), Calder (c2006), Hallaq (2001, pp.1-23), Ibn 'Ābidīn (1992), Kafrāwī (2002), Reinhart (1993), Shūshān (1998, 1:385-95) and Weiss (2010, pp.679-80) for a critical study of *mujtahid* typologies.

[29] This was cited by Ibn 'Ābidīn (1992, 1:77). Lakhnawī (d.1887) (1986) and others before him critiqued it and suggested amendments.

	Type	Activity	Limitation	Authorities
1	**Independent Absolute *Mujtahids* (Arch Imam)**	Create a principle-based methodology to interpret scripture + Extrapolate *ratio legis* from scripture for analogy (*tanqīḥ al-manāṭ)*	–	Abū Ḥanīfah, Mālik, Shāfi'ī, Aḥmad
2	**Affiliated school *Mujtahids***	Extract moral laws from primary sources based on the methodology of type one + Extrapolate *ratio legis* from scripture for analogy (*tanqīḥ al-manāṭ)*	Cannot create different principles to type one but can dispute school doctrines	Abū Yūsuf, Shaybānī
3	***Mujtahids* in Novel Cases**	Create rules for matters without precedents using hermeneutical principles of type one *mujtahids* + Extrapolate *ratio legis* from scripture for a fresh analogy	Cannot differ with type one on the principles or school doctrines	Qāḍī Khān, Khaṣṣāf, Karkhī, Ṭaḥāwī, Bazdawī
4	**Jurists of Extraction (*Aṣḥāb al-Takhrīj*)**	Interpret ambiguous and unclear statements and legal norms from types one and two + Investigate hermeneutical principles of type one, analogizing and linking cases to precedents	Cannot engage in the activities of the above types and bound by imitation	Jaṣṣāṣ
5	**Jurists of Preference (*Aṣḥāb al-Tarjīḥ*)**	Prefer school opinions + Declare which is dominant, which is more correct in narration and which is easier for people	Same as previous	Marghīnānī, Qudūrī
6	**Jurists of Distinction (*Aṣḥāb al-Tamyīz*)**	Distinguish between strongest, strong and weak positions of the school and the primary (*ẓāhir al-riwāyah*) and secondary opinions (*nādir al-riwāyah*)	Same as previous + Do not transmit weak positions	Maḥbūbī, Mawṣilī, Nasafī,
7	**Imitators (*Muqallidūn*)**	Memorise school doctrines + Completely imitate type one	Cannot engage in the activities of the above types + They are mere transmitters of school doctrines	

Figure 1 Ibn Kamāl's Typology of *Mujtahids* in the Ḥanafī School

2.3.1 Certainty and Probability in Islamic Epistemology

Some jurists like Ibn al-Humām (d.1460) include religious laws known with 'determination/certainty' (*qaṭ'*) in the definition of *ijtihād* (Amīr Bādishāh, 1351AH, 2:178), and Ghazālī (1993, 1:342) replaces probability/opinion with 'knowledge' (*'ilm*) in the definition of *ijtihād*. In the Islamic legal corpus, the legal theorists (*uṣūlīyūn*) define the words *'ilm*, *yaqīn*/*qaṭ'* and *ẓann* differently to the jurists (*fuqahā*), and so understanding the scope of *ijtihād* requires an understanding of these terms. The following is an important summary.

If a person asserts a positive or negative ascription between a subject and predicate in a statement, it will either hold a valid possible contradiction to which his heart inclines even slightly without completely disregarding it (*iḥtimāl ṣaḥīḥ ghayr sāqiṭ al-iʿtibār*), or it does not. For example, if a jurist affirms the positive ascription in the preposition "oral medical treatment is a moral obligation on the patient in a necessity to save life" based on the textual evidences he finds, his heart will either hesitantly incline to the contradictory possibility that "oral treatment is not morally obligatory," i.e. without fully disregarding it, due to the outweighing evidences that tip the side of affirmation, or he will be convinced the contradictory possibility is invalid. Subsequent is an elaboration on these possibilities:

1. The first possibility, i.e. with hesitation, is termed 'probability' (*ẓann*) in *fiqh* literature, and we can refer to it as 'mere probability' (*ẓann mujarrad*).
2. Jurists refer to the second possibility i.e. without hesitation as 'knowledge' (*ʿilm*) which comprises three types of 'certainty' (*yaqīn*):
    a. There is no possibility (*iḥtimāl*) for a contradiction at all, not even a rational one; this is termed 'certainty in the narrowest context' (*yaqīn bi'l-maʿnā al-akhaṣṣ*) and is the highest possible certainty. For example, a Muslim's propositional conviction of 'God is One'.
    b. There is no evidence-based possibility for a contradiction, though it is rationally possible; this is termed 'certainty in the broadest context' (*yaqīn bi'l-maʿnā al-aʿamm*). This includes inductive knowledge, like our knowledge of 'fire always consumes wood', which emerges over time as the result of a series of sensory experiences (Weiss, 2010, p.35). Theologians

name the latter 'empirical certainty' (*yaqīn ʻādī*).[32] For example, the person you see is your friend Zayd, but it is rationally possible that it is a jinn in his form; although this possibility is extremely weak and legally (*sharʻan*) and conventionally (*ʻurfan*) disregarded. Legal theorists and theologians intend meanings (a) and (b) by the term 'certainty', thus '*yaqīn uṣūlī/ kalāmī*' is narrower in context to '*yaqīn*' in *fiqh*.

c. There is a weak contradictory possibility which the heart entirely forsakes without even slightly inclining to it; this is termed 'legal certainty' (*yaqīn fiqhī*), 'high probability' (*ẓann ghālib*) and 'preponderant conviction' (*akbar al-raʼy*). Although the *fuqahā* mostly intend this meaning by the terms *ghalabat al-ẓann* and *ẓann ghālib*, they sometimes intend 'mere probability' by it too to distinguish them from doubt (*shakk*).

In *fiqh* literature, when jurists use 'knowledge' (*ʻilm*), they intend its broadest meaning (*al-maʻnā al-aʻamm*) which includes high probability. In *uṣūl* (legal theory) literature, knowledge (*ʻilm*) is used in the narrowest context (*ʻilm biʼl-maʻnā al-akhaṣṣ*) and refers to the first two types of certainty mentioned above. In works of legal theory, *ẓann* refers to a propositional conviction in which there is an 'evidence-based possible contradiction'. This is what Weiss (2010, p.35) calls "the preponderance, in the mind, of one of two possibilities over the other," and it comprises both mere probability and high probability, because the opposing contradiction may or may not have been entirely tipped in the mind.

[32] See: Dusūqī (d.1815) (2003, pp.58-53), Farhārī (d.1824) (1977, pp.58-9) and Sunūsī (d.1490) (2009, pp.53-4) for empirical certainty.

The above is a summary from four separate treatises of A. Khān (d.1921) (2016, 1:385-88, 601; 2:555-58, 580-84; 21:375-84) who astutely defined these terms.[33] The linkage between *fiqh* and *uṣūl* terms is my own contribution to the discussion. These careful distinctions will have perhaps the most vital role in determining the moral judgement for a patient to utilise medicine (in Chapter 6).

When commoners assert certainty regarding a matter in everyday speech, they usually intend 'high probability'. Thus, we may also refer to this as 'conventional certainty' (*yaqīn 'urfī*), but one must refrain from referring to it as '*yaqīn 'ādī*' from the word *'ādah* which means 'norm', because this may confuse high probability (*yaqīn 'urfī fiqhī/ẓann ghālib*) with empirical certainty (*yaqīn 'ādī*). Confusing these terms can have severe consequences, like abstaining from a prohibited medical treatment which requires 'high probability' (*yaqīn 'urfī fiqhī*) for it to be permissible by inaccurately assuming that it requires 'empirical certainty' (*yaqīn 'ādī*), which is a type of broadest certainty.[34]

In context of the one who possesses certainty, it is three types:[35]

1. Where a scriptural proof holds variant meanings, like a homonym, a *mujtahid* may reach a degree of certainty regarding one of them from contemplating textual and contextual indicators. This is relative certainty in a *mujtahid* (*qaṭ'*

[33] See: Ateeq (2018), M. Khann's PhD dissertation (2007) and Bā Ḥusayn (1416AH) for a study of these terms. Ghazālī (n.d., 1:72; 1993, pp.35-7) offers excellent discussions on differing *uṣūlī* vs. *fiqhī* narrowest and broadest contexts of the term '*yaqīn*'.

[34] See: M. Ḥusayn (2009) as a prime example for confusing these terms. See also M. Miṣbāḥī (2009c, 2:355, 422, 480) and N. Miṣbāḥī (n.d., pp.11-15) for discussions on the condition of 'certainty' in the efficacy of an organ transplant.

[35] Based on A. Khān (2016, 1:388). The examples of proof-types are my own. See Coulson (1969, pp.20-39) and Weiss (1998, pp.88-9, 111-2) on relative certainty in *ijtihād*.

nisbī akhaṣṣ) and is entirely based on his introspection and deduction (*naẓar*). In my view, this is 'legal certainty'. Obligatory acts of ablution in one school and not others (*farḍ 'amalī maḍhhabī*) are established with such certainty. This is prone to error and is not an absolute determination of authorial/Divine intent.[36]

2. A proof that holds a single conspicuous or explained meaning (*muḥkam*/*mufassar*) imparts necessary knowledge in the *mujtahids* and they concur on its meaning. Note the following:
    a. If such proof is only known to the scholars, they will possess relative certainty (*qaṭ' nisbī khāṣṣ*).
    b. If the commoners also possess certainty regarding such proof, it is the broadest type of certainty (*qaṭ' 'āmm*) in context of its possessors. Both these types are infallible due to consensus, and they declare authorial/Divine intent with absoluteness.

A *mujtahid* may seek *fiqhī* certainty, i.e. high probability regarding a matter, and this is usually his aspiration at the beginning of his intellectual effort,[37] thus it is possible that this is the intended meaning of 'certainty' in the definitions of *ijtihād* I cited above, although I have not discovered this interpretation to the addition of *qaṭ'* in the definition of *ijtihād* and consider it a contribution of this study. Similarly, definitions comprising the word 'knowledge' (*'ilm*) possibly refer to the broadest *fiqhī* context of the term, including high probability. According to my study of terms, definitions of *ijtihād* that only mention 'opinion/probability' do not exclude high probability, because they intend *ẓann uṣūlī*, which includes the preponderant conviction of a *mujtahid*. Proposing that

[36] See: Zuhaylī (1998, 2:1123-34) for scholarly differences on juristic error and Divine intent.
[37] Qarāfī (d.1285) (1995b, 9:3791) and Weiss (1998, p.112) note this too.

this is correct, scholars are interestingly using the *fiqh* nuance of 'certainty' and 'knowledge' in their definitions of *ijtihād* in *uṣūl* works, and this may be influenced by their double role as an author-jurist (*faqīh muṣannif*) and a legal theorist, like Ibn al-Humām.

Considering the epistemological context, A. Khān (2016) uniquely explains why Ḥanafī jurists regard *ijtihād* invalid in the presence of broadly certain proofs. Despite that there is a possibility of a contradictory interpretation in them, once a *mujtahid* reaches relative certainty that the proof for it is extremely weak or invalid, he will regard the matter certain by censuring that contradiction. Hence, he will regard the matter closed, although other jurists may not see his point or agree with his method of criticism. I have not seen this explanation in any other legal text, and it is congruent with the epistemological framework I presented above. This presses on the reader of the Islamic law to carefully verify claims of *ijtihād* not being valid on certain matters, because although some Sunnī jurists may assert this, others may disagree.[38]

See Table 1 (after p.45) for the classification of scriptural proof texts according to their epistemic strength.

2.3.2 Hierarchy of Moral laws

The objective of a *mujtahid* in *ijtihād* is to discover a moral law for a problem. Moral law (*ḥukm shar'ī*) here means the judgement for an act that is either deserving of reward, punishment, or reprimand in the hereafter.[39] All jurists except the Ḥanafīs classified moral laws into five categories. Ḥanafī legal theorists (*uṣūlīyūn*) classify them

[38] See: A. Khān (2014, 2:414-5) for examples of jurists declaring a matter not subject to valid *ijtihād*, despite it being so.
[39] Although a *mujtahid* also determines judgments like the validity of acts, they are not of concern in this thesis.

into seven types, because they differentiate between *farḍ* and *wājib*, *ḥarām* and *makrūh*, and divide *makrūh* into two separate categories based on the epistemological strength and the language indicators of the proofs (Auda, 2008, p.136; A. Khān, 2016; Khann, 2001, pp.45-7). Below is a summary of the revised classification of A. Khān (2016,1:725-39) who, through a unique inductive study of texts of Ḥanafī substantive law (*furūʿ*), determined that the jurists mentioned 11 moral values:[40]

1. Mandatory (*farḍ*) vs. forbidden (*ḥarām*): acts that are commanded or prohibited by an 'absolutely certain' (*qaṭʿī*) proof in transmission and textual implication, like the Qur'an or mass-narrated *sunnah*, in 'binding' terms. For example, five daily prayers are mandatory, and adultery and consuming *khamr* are forbidden.[41] Denying a *farḍ* and *ḥarām* is disbelief (*kufr*),[42] and omitting the former and committing the latter even once is definitively deserving of punishment in the Hereafter and a sin.
2. Compulsory (*wājib*) vs. prohibitively disliked (*makrūh taḥrīman*): acts that are demanded or prohibited by 'probabilistic' (*ẓannī*) proofs, either in transmission or textual implication, in 'binding' terms.[43] For example, paying *ṣadaqat al-fiṭr* is obligatory, and transporting *khamr* is prohibitively disliked. Denying either of them is not disbelief, but omitting the former and committing the latter, even once, is punishable with high probability and a minor sin.

[40] See: Coulson (1969, pp.82-95), Dahshān (2015, pp.447-62), Hallaq (1997, p.40), Qureshi (2016, pp.597-8), Reinhart (2002), Weiss (2010; 1998, pp.145-71) and Zysow (2008) for further study.
[41] *Khamr*, here and throughout the thesis, refers to the type of liquor that is prohibited by agreement of jurists and is different to alcohol i.e. which is made from grapes.
[42] See: A. Khān (2016, 1:385-6) for scholarly views on declaring disbelief.
[43] The term *makrūh* in its earliest juristic usage is broader than *ḥarām* and referred to acts that jurists relatively considered forbidden (A. Khān, 2014, p.418). Sometimes *wājib* is used in the meaning of *farḍ* too in the Ḥanafī school, just like other schools (A. Khān, 2014, p.433). See Chapter 3.

3. Emphasised *sunnah* (*mu'akkadah*) vs. wrong (*isā'ah*): the former is an act the Prophet persistently established with seldom omittance but emphasised. The latter act is not bindingly prohibitive and is lesser in its degree of wrongness.[44] Committing the former is deserving of reward, omitting it regularly is punishable, and omitting it occasionally is deserving of reprimand. In contrast, omitting *isā'ah*, is rewardable, committing it regularly is punishable and a sin and performing it without habit is merely reprimandable.
4. Non-emphasised *sunnah* (*ghayr mu'akkadah*) vs. slightly disliked/offensive (*makrūh tanzīhan*): the former is an act whose omission is deemed disliked in the scripture without any punishment, regardless of whether the Prophet regularly practised it or not. This is in contrast with the slightly disliked, which is discouraged without a threat of punishment. Omitting the former and committing the latter even once is deserving of reprimand (*'ītāb*), but it is not a sin.[45] The slightly offensive always requires textually non-binding scriptural evidence, which can be absolutely certain in historic attribution,[46] as opposed to the undesirable (A. Khān, 2016, 1:718, 728).
5. Desired/Recommended/Etiquette (*mustaḥabb*/*mandūb*/*adab*) vs. Undesirable (*khilāf al-awlā*): the former is deemed virtuous by the Prophet, without his persistence or warning for omittance, even if proven from a doubtful weak *ḥadīth*,[47] or by righteous scholars. Committing desired acts is rewardable and omitting them even habitually does not deserve reprimand nor punishment.

[44] *Sunnah* is sometimes used in the meaning of *wājib*, as in the *sunnah* of Eid prayer (A. Khān, 2014, p.418).
[45] A slightly disliked act falls under 'permissible' (*jā'iz*) acts (A. Khān, 2014, 1:258).
[46] According to A. Khān, it is an error to confine the slightly offensive to probable evidences.
[47] Weak reports are regarded doubtful in historic attribution.

Khilāf al-awlā is better to avoid, but its commission, regularly or occasionally, is neither a sin nor deserving reprimand.[48]

6. Indifferent (*mubāḥ*): an optional/tolerable act with no legal consequences. Its moral value depends on the intention of the person. If it is committed with a good intention, it elevates to the level of 'desirable' (A. Khān, 2003, 23:613). Most day-to-day acts fall under this value unless proven otherwise.

A. Khān intersected the following three aspects to structure this balanced hierarchy:

1. epistemic strengths of proofs
2. agent's habit of omission/commission
3. reprimand/punishment for omitting an act.

2.4 Contemporary Juristic Activities

In 2015, the Majlis-e-Shar'ī of Mubarakpur defined the scope of juristic activity for modern day jurists from a Ḥanafī perspective. With the following description, instead of unconditional *ijtihād* and *mujtahid*, the Majlis called this area of legal activity *taḥqīq* and the person engaged in it a *muḥaqqiq* (M. Miṣbāḥī, 2015, pp.25, 40):

1. *A muḥaqqiq* solves novel cases considering the principles and doctrines of the school. Where answers cannot be found in a single school, he should find solutions in other schools of law to alleviate hardship.
2. The *muḥaqqiq* cannot oppose cases of *ijtihād* that are solved by the main four *mujtahid* Imams e.g. Abū Ḥanīfah (d.768) and adopted as doctrines of the school

[48] See: A. Khān (2014, 1:251-2, 256-7; 2016, 1:737) on the difference between undesirable and slightly disliked acts, and that the latter is not a legal nor linguistic prohibition (*manhī 'anhu*). A. Khān (2014, 1:225; 2016, 1:737) argued that a desirable act is not a legal nor literal command (*amr*).

unless one of the following six causes (*asbāb sittah*) is present, in which case he can depart to a weaker position or to another *maḍhhab* for fatwa purposes:

a. necessity (*ḍarūrah*)
b. need (*ḥājah*)
c. widespread problem (*ʻumūm al-balwā*)
d. customary practice (*ʻurf*)
e. religious interest (*maṣlaḥah dīnīyah*)
f. preventing corruption (*izālat al-fasād*).

Such pragmatism is congruent with the principles of the school and the adopted view would be an ostensible opposition (*ikhtilāf sūwrī*) to the transmitted opinion of the *mujtahid* Imam, since he would have necessarily adopted the same opinion explicitly had he encountered one of these causes (M. Miṣbāḥī, 2014, p.43).

The Majlis-e-Sharʻī (M. Miṣbāḥī, 2015, p.44) specifies that the *muḥaqqiq* engaged in the above activities must possess the following qualities:

- be learned (*ʻālim*)—someone who can independently determine answers to necessary questions from Islamic sources without assistance
- have wide knowledge of the social conditions of people
- have an extensive study of the school's principles and doctrines[49]
- possess intelligence and the ability to critically investigate matters
- possess piety and integrity
- have acquired long term training to accurately implement principles and laws to novelties under somebody with the above qualities.

[49] Such that he possesses knowledge of the conditions of a matter that are not mentioned with it in the legal texts (Ibn ʻĀbidīn, 2015, p.266).

I consider the following limitations for the *muḥaqqiq*, which Kāsānī (d.1191) (1986, 7:4) mentioned for a *qāḍī*:[50]

1. He must not formulate a new opinion varying from all previous scholarly opinions, because truth (the Divine intent) does not exceed their opinions.[51]
2. His opinion must not oppose the evident (*ẓāhir*) meanings of proofs, including probable *aḥadīth*, because analogy cannot override *sunnah*. In Chapter 5, I will present scenarios in which a degree of opposition is allowed based on necessity.
3. He must not oppose scholarly consensus with analogy and opinion. Qārī (2012, p.399) and Anṣārī (2002, 2:295-6) explicitly mentioned that probabilistic consensus is weightier than analogy and scholarly opinion (*ra'y*).

According to my research, and considering the fatwa methodology of the Majlis-e-Shar'ī of Mubarakpur, contemporary juristic activities primarily comprise the following:[52]

1. *Ilḥāq bi'l-naẓīr* (casuistry), i.e. linking novelties with precedent cases in legal texts of the schools by comparing their similar features[53] where an explicit *ratio legis* is not mentioned. This is what 'Uthmānī (2014, p.295) refers to when speaking of inferring (*yastanbiṭu*) a *quasi-ratio legis* from the signs and allusions of a precedent in legal texts. He declares this the weakest of rationales and a domain of dispute.[54] Classical scholars also termed this *tajnīs*,[55] and Farfūr

[50] See: Āl Sulayman (2016) for a study of court judgements that oppose probable sources.
[51] See: Qārī (2012, pp.399-401) for various examples.
[52] See also: Kafrāwī (2002, p.421) and M. Miṣbāḥī (2014, pp.41-4).
[53] See: Calder (c2006, XV:17) on this activity.
[54] The moral judgement applied by this method is probabilistic, as there may be opposing precedents to this novelty of which the *muḥaqqiq* is not aware or a difference between the cases unknown to him which would be known to a *mujtahid*.
[55] See: Marghīnānī (2004) and its foreword by Makkī.

(2003, pp.50, 181) calls it *takhrīj*.[56] For example, declaring that a prostration of recitation from the Qur'an is not obligatory when someone hears it from an electronic device because this is like the precedent of hearing it from an echo or a bird ('Uthmānī, 2014, p.295).

2. *Taḥqīq al-manāṭ*, i.e. realisation of a rationale for a moral judgement in an ancillary case. According to Ḥanafīs, this is broader than making an analogy that must be based on an effective *ratio legis* (Zubaydī, 2015, p.394, 627). Bayḍāwī, Najjār and Subkī refer to it as *ijtihād*, and Shāṭibī declared it will forever exist till the final hour (Amjūḍ, 2015, p.107).

According to Zubaydī's examination of legal literature (2015, pp.56-58, 231-244, 351), the rationale for the judgement can be any of the subsequent three:

a. An effective cause (*'illah*) explained (*manṣūṣah*) in the Qur'an, *sunnah*, *ijmā'* or deduced (*mustanbaṭah*) by earlier *mujtahids*.[57] N. Khān (2009, pp.184-90) refers to this activity as *ijrā' al-''illah*, i.e. making an analogy based on a pre-defined *ratio legis*, and he stated it is not restricted to the earlier *mujtahids*. The Majlis-e-Shar'ī adopted this method to deduce laws (M. Miṣbāḥī, 2014, p.43).[58]

b. A legal maxim. This method is also termed *inṭibāq* and *ilḥāq bi'l-qawā'id al-kullīyah*, i.e. linking a novelty to a holistic legal maxim by bringing it under its meaning (M. Miṣbāḥī, 2014; N. Khān, 2009). A *muḥaqqiq* following a school must ensure his judgement does not

[56] See: Shūshān's M.A dissertation (1998) on *takhrīj* and *ilḥāq*.
[57] Types one to three in Ibn Kamāl's typology of *mujtahids* can extrapolate a new *ratio legis* (Kafrāwī, 2002, pp.398-405).
[58] Most Shāfi'ī scholars and some Ḥanbalīs do not accept analogy based on a cause extrapolated by the *mujtahid* (Farfūr, 2003, p.197; Zubaydī, 2015, p.393).

oppose a standard position of the school (M. Miṣbāḥī, 2014) unless there is a valid reason to, like necessity to save life.

c. A general (*ʻāmm*) or unconditional (*muṭlaq*) text in scripture. N. Khān (2009, p.184) refers to this as *istidlāl bi-ʻumūm wa-iṭlāq al-naṣṣ*, i.e. inferring the ruling for a novelty from a broad or unconditional scriptural text. Calder (c2006, p.10) cites Juwaynī (d.1085) who asserts, "it is very unlikely that a problem will arise that has no textual reference in the tradition, or which cannot be linked to the meaning of a precedent or brought under a principle."[59]

3. *Fahm al-naṣṣ*, i.e. relating rulings from all unambiguous textual indications of the Qur'an and *ḥadīth*.[60] This is not restricted to the absolute *mujtahids* (N. Khān, 2008, p.211; 2009 pp.184-90). Zubaydī (2015, pp.395-6) regards all the subsequent methods as forms of *taḥqīq al-manāṭ*. *Fahm al-naṣṣ* includes the following:[61]

   a. *Istidlāl bi-ʻibārat al-naṣṣ*, i.e. inferring rulings from express indications of the scripture (N. Khān, 2009). An express indication is an apparent meaning of the text, whether it is intended or unintended, like inferring laws from *ẓāhir*, *naṣṣ*, general and unconditional scriptural texts.

   b. *Istidlāl bi-dalālat al-naṣṣ*, i.e. assigning a ruling to a novelty using the 'inferred indication' of a Qur'anic or *sunnah* proof-text, which linguistically indicates that the ruling would apply—in addition to the

[59] Ibn ʻĀbidīn (n.d., 1:147-8) hints to this by saying, "the previous *mujtahids* did not explicitly mention rulings for all individual cases (*juzʾīyāt*) as they fell under their general principles (*kullīyāt*)."
[60] See: Ramic (2003) for *ẓāhir* and *naṣṣ*, etc.
[61] See: Ali (2000, p.66), Ramic (2000, p.18) and Weiss (2010, pp.473-493) for discussions on subsequent methods.

stated case in the text—to the unstated case due to an obvious common factor understood from the context (N. Khān, 2008, p.184; 2009, p.184). For example, the Qur'anic *āyah* (Q17:23) prohibits expressing words of slight disappointment to one's parents, and therefore it also obviously implies the prohibition of physically abusing them, because the unspoken rationale of hurting their feelings exists in both cases.[62] M. Miṣbāḥī (2014) does not state whether the Majlis-e-Shar'ī employs this or the next method in solving novelties. Ghazālī (1993, 1:305) referred to it as a type of *ilḥāq*.

c. *Istidlāl bi-ishārat al-naṣṣ*, i.e. inferring rulings from the alluded indication of scripture (N. Khān, 2008, 211). The alluded meaning is not intended but it is necessarily understood from the language after its investigation (Ali, 2000, p.161; Ramic, 2003, p.12). If there is a contradiction between the alluded meaning and evident meaning of texts, the latter is adopted (Nābulusī, d.1731, 2015, p.71).

d. *Istidlāl bi-mafhūm al-mukhālafah*, i.e. inferring rulings from the counter implications of statements of the Prophet's companions and school texts, but not from those of the Qur'an and *ḥadīth*, according to the Ḥanafī school.[63] The Majlis-e-Shar'ī adopts this and the subsequent methods (M. Miṣbāḥī, 2014, p.44).

4. *Istidlāl bi'l-ijmā'*, i.e. inferring rulings from a scholarly consensus.

[62] Such meanings can be certain or probable (Mardāwī, d.1481, 2000, 6:2892).
[63] See: Ali (2000, pp.192-209) and Weiss (2010, pp.473-493) for the Shāfi'ī view.

5. *Taghyīr al-fatwā,* i.e. altering moral advice based on necessity or need to mitigate harm and hardship from people (M. Miṣbāḥī, 2014).[64] Abū al-Ḥāj (2015, p.137) refers to this as a modern activity of *tarjīḥ* (preferring opinions). This method is an entry point for medicine and the social sciences in the ethical-legal Muslim discourse. It ensures a degree of self-renewal and openness to keep the Islamic law relevant, and thus the jurist must hold a competent world view and possess understanding of the status quo (*fiqh al-wāqi'*).[65] It involves 'opening the means,' i.e. forbidden means, to achieve greater ends, or 'blocking the means' to prevent mischievous/prohibited ends,[66] as well as counterbalancing interests (*muwāzanat al-maṣāliḥ*).

Relaxing laws due to necessity falls under asserting the realisation of a rationale (*taḥqīq al-manāṭ*) using *istiḥsān* (equitable preference) and *istiṣlāḥ* (reasoning with unrestricted interests) (Zubaydī, 2015, pp.435-458). *Istiḥsān* is to prefer a suitable moral ruling for an ancillary issue over the one provided by analogy, whether it comes from the *sunnah*, scholarly consensus, local custom, or necessity (Taftāzānī, d.1389, 2004, 3:576).[67] Coulson (1969, p.39) praises this as an eclectic principle that "has been used to adapt Islamic law to the particular temper of a particular Muslim society today." Inference based on *istiḥsān* always involves departing from one evidence to another by specifying (*takhṣīṣ*) the latter's generality or confining (*taqyīd*) its absoluteness based on an

[64] See: Qarāfī (1995a) and Ibn al-Qayyim (d.1350) (2004, pp.504-9) who wrote on this topic extensively. The former mentioned that this is an agreed upon rule of the *mujtahid* Imams, and non-*mujtahid* scholars who followed them are warranted to alter fatwas based on changing circumstances. See Būṭī (1973, pp.80-92) for a critique of rules that govern altering laws due to circumstances. See Coulson (1969) on stability and change.
[65] See: Auda (2008a, pp.201-11) for a discussion on these notions.
[66] See: Bughā (2013, pp.566-630) for a detailed study of 'means' and 'Uthmānī (2014, pp.296-312) for changing fatwas due to social conditions.
[67] See: Bughā (2013, pp.122-9) for various definitions and the agreement of the schools on the spirit of *istiḥsān*.

evidence or a greater interest (Kafrāwī, 2002, p.531). Ḥanafī legal theorists predominantly use *istiḥsān* in the meaning of departing from one analogy to another for a stronger reason, but in texts of substantive law, jurists used it predominantly in the meaning of opposing an analogy due to necessity, consensus, etc. (Bughā, 2013, p.148; Būṭī, 1973, p.20).

In his academic study of *istiḥsān*, Makdisi (1991, p.200) acknowledges that a parallel to this method in common law is the "reasoned distinction of precedent" by which a new statute prevails a precedent, which ultimately corrects legal reasoning by a better analogy. He (1991) accurately points out that *istiḥsān* "limits the cause [*'illah* in the analogy] which has been conceived too broadly and redefines it to allow for an exceptional case." *Istiḥsān* is, thus, the mechanism within the Islamic law for self-correction (Makdisi, 1991), and, by the agreement of jurists, is not a means of subjecting laws to one's personal interests (Bughā, 2013, p.124). A widely cited example for *istiḥsān* based on necessity is the judgement that a well becomes clean after a certain amount of impure water is drawn from it. This is despite analogy opposing its purity because water continues to flow from beneath and meets the impurity. The necessity here is eliminating widespread hardship from people (Ibn Amīr Ḥājj, d.1475, 1983, 3:222; Taftāzānī, 2004, 3:557).[68] Similarly, uncovering the area of nakedness for medical examination and treatment is permitted by way of *istiḥsān* based on necessity. Here, the necessity or need of the human body is prioritised and excused from the prohibition of revealing one's nakedness or looking at it.

Istiṣlāḥ is the method of bringing novelties under a general unrestricted interest that is not an effective and consistent *ratio legis* (*'illah mua'thirah*) commonly found in

[68] See: Chapter 3 for the variant uses of the word necessity.

qiyās.[69] If an interest, i.e. something that safeguards and benefits one of the five fundamental values, is 'specifically' credited by scripture, it is not considered to have been established by *istiṣlāḥ* (Būṭī, 1973; M. Zarqā, 2012, 1:100), such as consuming carrion and pork to save one's life,[70] and conducting business. If an interest is discredited (*mulghāh*) by scripture or scholarly consensus or opposes them,[71] it is ineffective and unlawful, such as dealing with usury (*ribā*), and for a terminally ill person to terminate his life (Zuhaylī, 1998, 2:754). Similarly, an affluent king will not be advised to fast 60 consecutive days for missing one obligatory fast instead of freeing one slave, which is easier for him, on the basis that the purpose of the atonement, i.e. admonishment, is not achieved by freeing a slave. This is because this advice violates the scriptural command of freeing a slave (Zuhaylī, 1998, 2:770).

However, an unrestricted *maṣlaḥah* (*mursalah*) i.e. it is not discredited nor approved 'specifically' in scripture, but falls under a scripturally approved type (*jins*) of act/general purpose, such that it benefits a fundamental value or repels harm from it; can form an appropriate rationale (*manāṭ*/*'illah munāsibah ghayr munḍabiṭah*) to assign a moral law to a novelty where a jurist cannot find a precedent in the scripture or legal texts (A. Zarqā, 2012, p.210; Zubaydī, 2015, p.451; Zuhaylī, 1998, 2:786). Mālikīs and Ḥanbalīs referred to this reasoning as *maṣlaḥah mursalah*, whereas Shāfi'īs accepted it under *qiyās munāsabah* and *ikhālah*, and Ḥanafīs accepted it under *istiḥsān bi'l-maṣlaḥah* (Bughā, 2013, pp.44-48; Ibn 'Āshūr, 2016, pp.280-4; Khann, 2003, p.552;

[69] See: Būṭī's PhD dissertation (1973) on this method of reasoning and rules.
[70] See: Chapter 5.
[71] According to Būṭī (1973, pp.174-5, 188, 201, 411) this ruling applies to interests that oppose the generality of a Qur'an or *sunnah* text or its absoluteness, even if it is a lone-narration. M. Zarqā (2012, 1:127-135) elaborates that Ḥanafīs and Mālikīs allow certain interests (like medical needs) to restrict general scriptural proofs and they would not thus count as 'discredited', contrary to Shāfi'īs and Ḥanbalīs. See Chapter 5.

M. Zarqā, 2012, 1:196, 958; Qarāfī, 1973, p.171; Zarkashī, 1994, 7:275; Zuḥaylī, 1998, 2:757-9).[72]

An example for an unrestricted interest is Muslim governments applying taxes on the citizens when the treasury funds do not suffice its defence and security. This interest is not specified in any scriptural proof and neither opposes it; it falls under the broad objective of protecting religion (Bughā, 2013, p.36).

A *muḥaqqiq*[73] only resorts to *istiṣlāḥ* to assign a rule to a novelty in the following cases:

a. when there is no specific ruling on a matter in the Qur'an, *sunnah, ijmā'* or analogy
b. the *istiṣlāḥ* does not oppose the express indications of a Qur'anic text or *sunnah* (Bughā, 2013, pp.38, 58; Būṭī, 1973, pp.129-97; A. Zarqā, 2012, p.210; M. Zarqā, 2012, 1:27-35).

This is how the Prophet's Companions solved novelties. For example, Caliph Abū Bakr (d.634) compiled the Qur'an in book form despite there being no precedent or a scriptural command on this (Bughā, 2013, p.54; Qarāfī, 1973, 1:446; Shāṭibī, 2004, 3:42).[74] In summary, *maṣlaḥah* implements the intent of the law where there are no existing rules, thus, permitting an expansive reading of the textual sources (Makdisi, 1991, pp.203, 209). It ensures the continuity and relevance of the Islamic law in every era, because rising novelties are unnumbered and prescribed laws are numbered, and it

[72] For Ghazālī's view, see Būṭī (1973, p.392), Ibn 'Āshūr (2016, p.280), Jābirī (2014, pp.190-209) and Zuḥaylī (1998, 2:759, 766, 769-774).
[73] He may also be referred to as a *mustadill* though this term is broader than *mujtahid* (Kafrāwī, 2002).

[74]See: Būṭī (1973, pp.143-160) for a critique of studies on Caliph Umar's use of *istiṣlāḥ*.

allows answering them based on the universal objectives of the Islamic law when specific precedents are absent (Bughā, 2013, p.50).

A difference between *istiḥsān* and *istiṣlāḥ* is that in the former, the interest (e.g. concessionary necessity) in a case opposes an analogy and establishes an exception to a rule, whereas *istiṣlāḥ* establishes a rule based on necessity, even if there is no opposing analogy and exception to a rule; rather, the unrestricted interest is the only proof on the matter (Bughā, 2013, p.126). The common feature between *istiḥsān* based on necessity and *istiṣlāḥ* is to facilitate moderation and avoid unnecessary hardship/harm that may result from analogy by aligning the ruling with the agreed upon principle of the *sharī'ah* that "harm must be mitigated" (A. Zarqā, 2012, p.94; Dardūr, 2014, pp.417-476). The difference between *istiṣlāḥ* and analogy is that the latter is based on a specified effective *ratio legis* whereas the former is based on a broad objective of law like 'saving life' (Zuhaylī, 1998, 2:765).

2.4.1 Criterion for Asserting a Rationale (*Taḥqīq al-Manāṭ*)

Muslims unqualified in *ijtihād* consult the *mujtahid* or a scholar versed in a *mujtahid's* dictum for advice on a legal problem i.e. a mufti. His advice is called fatwa (responsum) (Weiss, 2010, p.709).[75] The *mujtahid*'s opinion is the product for implementation in the real world by non-*mujtahid* scholars. For an accurate application of law, the mufti must be acquainted with a) the real-life circumstance through its indicators and features, such as the social norms or the prevalent conditions of people and b) the realisation of the moral judgement in that circumstance (Kafrāwī, 2002, p.468). For example, if there is a necessity or need that affects the lives of people, the mufti must carefully asses the conditions and assert the law based on the rationale of necessity or need.

[75] See: Masud (2005) and Shūshān (1998, 1:399-429) for the theory of fatwa.

Dāmād Afandī (d.1667) (n.d., 1:246) and Ibn ʿĀbidīn (1992, 2:398) cite Ibn al-Humām who says, "in real circumstances, the mufti requires a kind of *ijtihād* and knowledge of people's conditions." ʿUthmānī (2014, pp.161-2) acknowledges that even the present-day copyist mufti (*nāqil*) who conveys doctrines of the school requires a kind of *ijtihād* in ascertaining the real-life circumstance before applying a moral judgement to it. Amjūḍ (2015, pp.89-109), Faraj (2016, pp.312-328) and Zubaydī (2015, pp.277-314) explained that this is because 'applying' the law to real cases that comprise a rationale (*manāṭ*) for a moral judgement requires the following:

1. an accurate and complete conceptualization of the novelty (*taṣwīr al-mas'alah*)
2. consideration of the social and customary factors
3. consideration of the intents of people
4. consideration of the impact of the judgement on the acts of people
5. counterbalancing opposing interests (benefits) and mischiefs (harms).[76]

In taḥqīq al-manāṭ, if the novelty relates to a medical procedure, the *muḥaqqiq* must meticulously examine the medical concepts associated with the procedure and the health condition before placing a judgement on it. For example, he must ascertain the severity of the illness, the efficacy of the treatment and what it involves. This is the entry point for science in the ethical-legal Muslim discourse, and Muslim jurists must consult experts on the matter to correctly apply laws.

Shāṭibī (2004, 3:492) espoused that every religious proof (*dalīl shar'ī*) requires two premises; one comprises *taḥqīq al-manāṭ* and the other comprises the transmitted moral law. For example, consuming liquor (*khamr*) is forbidden in the Islamic law, so if the

[76] See: Chapter 4.

mufti sees a substance like *khamr*, he must ask, "is this substance *khamr*?" He must ensure that all the characteristics of *khamr* are present in this substance to affirm it is. This is *taḥqīq al-manāṭ*. Once he verifies it is *khamr* and affirms "this is *khamr*," he adds the moral rule, "every *khamr* is prohibited for consumption," and deduces, "therefore this is prohibited for consumption."

Subsequent are examples of how a mufti/*muḥaqqiq* asserts a rationale in real cases to extend moral laws:[77]

1. **'Necessity' (*ḍarūrah*) as a rationale:**

   Question: "Is this person's life endangered with high probability by his medical condition?"

   Answer: "Yes, it is."

   Hence, follows the subsequent syllogism:

   Premise one: This medical condition is a necessity.

   Premise two: All medical necessities alter prohibition laws.

   Conclusion: This medical condition alters prohibition laws.

2. **'Widespread Problem' (*'umūm al-balwā*) as a rationale:**

   Question: "Are Muslim scholars and laity widely consuming alcohol-based medicines in medical needs, and thus, is there a widespread problem?"

   Answer: "Yes, they are."

   Hence, there is the following syllogism:

   Premise one: Consumption of alcohol-based medicines is a widespread problem in medical needs.

[77] See: Chapters 5 and 6 for discussions on the examples.

Premise two: All widespread problems in medical needs relax prohibition laws.

Conclusion: Consumption of alcohol-based medicines relaxes prohibition laws.

3. **Where a rationale is absent:**

   Question: "Is the alcohol in this medicine *khamr shar'ī* by agreement of jurists?"

   Answer: "No, it is not."

   Thereafter, the *mujtahid* must ascertain if the medicine contains a disputedly prohibited *khamr*, and in case it does, the syllogism follows:

   Premise one: This medicine contains a disputedly prohibited *khamr*.

   Premise two: All disputedly prohibited *khamr* types are orally permitted in medical needs.

   Conclusion: This medicine containing disputedly prohibited *khamr* is permitted in medical needs.

The first syllogism requires medical knowledge, and the second requires social knowledge, whereas the third requires pharmaceutical knowledge. If a *muḥaqqiq* errs in the answer of the question before creating a syllogism, i.e. in the realisation of the rationale, his conclusion will be flawed. The aim of this thesis is to define the rules that govern *ḍarūrah* and *ḥājah* and their scope of impact on the prohibitions so that accurate syllogisms can be formed to answer questions like the above.

Similarly, when various circumstances affect people, the *muḥaqqiq* must verify the correct moral laws according to their correct contexts. To determine the default moral ruling (*iqtiḍā' aṣlī*) without considering any secondary factors, the *muḥaqqiq* must firstly ask, "if the present factor, social or personal, did not exist, what would be the moral judgement for this act?" For example, the permissibility of marriage—without considering the personal health or motive of a person, etc. Thereafter, he must consider

the secondary factors (*iqtiḍā' ṭab'ī*), like the agent's motive, social norms etc. and ask, "what is the moral judgement for this act in the presence of x, y, z?" For example, the moral judgement for someone intending to marry to physically harm the partner or for a marriage in which the man is suffering a terminal life-threatening illness.[78] Circumstances of necessity, need, and hardship must be considered at this second stage of juristic thinking. Shāṭibī (2004, 4:516) says, "it is not valid for a scholar, when he is asked about a matter that occurs with a certain condition in the real world (*wāqi'*), to answer it except by considering the reality as it is. Hence, if he did not answer accordingly, he erred for not considering the rationale (*manāṭ*) of the sought judgement, because he was asked about a specified rationale and he replied with an unspecified rationale."

Considering the 'impact' or 'outcome' (*ma'āl*) of asserting a moral judgement based on a certain rationale is important. The *muḥaqqiq* must ask, "will this judgement safeguard a dominant interest, or will it lead to a dominant harm?" For a competent answer, he requires profound knowledge of society and people, the spectrum of probability, and how to counterbalance competing interests.[79] Thus, I agree with Dāmād Afandī (n.d.) and Ibn 'Ābidīn (1992) that a quasi-*ijtihād* is needed to apply moral laws to real cases, even today, which I verified is termed *taḥqīq al-manāṭ*.

Some modern Ḥanafīs like Sa'īdī (1995, 3:328) opine that all novelties solved by jurists in the modern era are by using the principles of their Imams and, thus, their effort classifies as *ijtihād fī al-masā'il.* The Majlis-e-Shar'ī does not term solving novel cases

[78] See juristic approaches to this question in Bughā (2013, p.681).
[79] See: Auda (2008 pp.40-43), Bughā (2013, pp.563-592), Būṭī (1973, p.272) and Zubaydī (2015, pp.293-8, 459-470) on the method of blocking the means, and see A. Khān (2016) for a unique study of balancing conflicting means and ends in the Islamic law. See Dardūr (2014, pp.395-416) on considering the ends. See Chapter 4 for counterbalancing unrestricted interests (*maṣāliḥ mursalah*).

today *ijtihād fī al-masā'il* nor *takhrīj al-furū',* both of which are activities of jurists mentioned in *mujtahid* typologies.

2.5 Conclusion

This chapter set out to identify the methods of legal reasoning and type of juristic activity prevalent among Sunnī jurists today. I elaborated that jurists aimed to ascertain the Divine intent and moral laws by interpreting scripture, and they aspired to reach a degree of certainty. I have proposed that this certainty includes relative high probability and that definitions of *ijtihād* that only mention *ẓann* refer to the *uṣūlī* context and include high probability. This is an important contribution that establishes a commonality between varying definitions of the term.

I identified that the purpose of *ijtihād* is two-fold: a) to elaborate and interpret scripture and b) to formulate rules for novelties for which there is no specific scriptural evidence. Classical *mujtahids* extrapolated *ratio legis* to moral judgements in scriptural laws, which contemporary jurists can use to apply moral laws to novelties. *Qiyās*, therefore, is not synonymous to *ijtihād*, though several scholars liberally equated between these terms.

I observed that by agreement of the jurists, a *mujtahid* can formulate a competent and valid scholarly opinion where absolutely certain scriptural evidence is not opposed. The presence of a difference of opinion does not justify that a matter belongs to the scope of *ijtihād*, because some scholarly differences have been rejected and declared outside the agreed scope. I explained that members of the Majlis-e-Shar'ī of Mubarakpur who wrote on the scope of *ijtihād* did not address a vital point: Ḥanafīs identified their own scope of a valid *ijtihād*, so if other schools opposed it, they rejected those views outright

and considered them to be outcomes of an invalid *ijtihād*. Figure 2 identifies the disputed area of *ijtihād* in context of various proof-types.

	Epistemic Proof Strength	**Proof Type**
Agreed Invalid Area of *Ijtihād*	Absolutely Certain	*Muḥkam*/*Mufassar* Qur'anic *āyah* or mass-narrated *ḥadīth*
Disputed Area of *Ijtihād*	Broadly Certain/Probable	Famous *ḥadīths*/Late Consensus of the Followers with prior dispute of the Companions
Agreed Valid Area of *Ijtihād*	Narrowest Probable	Solitary *ḥadīths*

Figure 2 Area of *Ijtihād* in Context of Scholarly Agreement and Disagreement

I contributed to the discussion of 'relative certainty' by providing proof-text examples to demonstrate the three possible groups of people who can reach certainty regarding a moral law. I compared two epistemological approaches on probability and certainty among Muslim scholars and elaborated that certainty and probability were used in different contexts by the legal theorists from those of the jurists. In Chapter 6, these notions will be applied to medical questions to discover their impact on the answers. My key contribution is the distinction between conventional certainty (*yaqīn 'ādī*) and empirical certainty (*yaqīn 'urfī*); the former is high probability (*ghalabat al-ẓann*) and the latter is broadest certainty (*qaṭ' bi'l-ma'nā al-a'amm*). A misapplication of these terms can have severe consequences, like prohibiting medical treatments that require

the latter in efficacy and not the former. Figures 3 and 4 illustrate the scholarly terms used in Islamic epistemology.

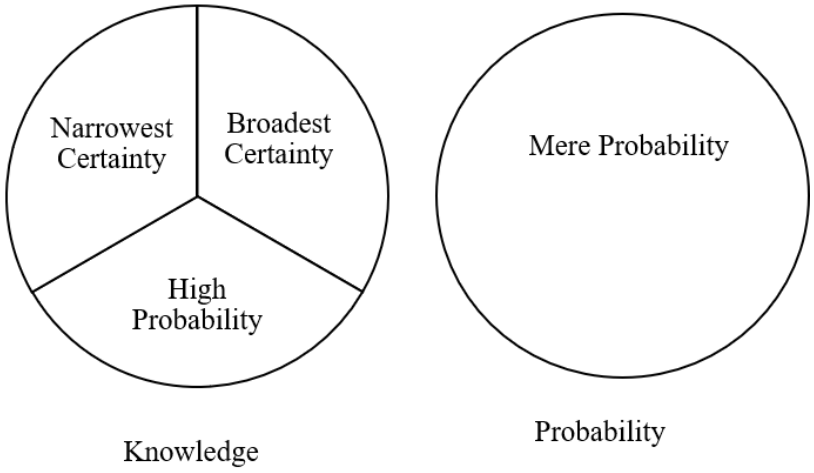


Figure 3 ʻIlm in Relation to *Ẓann* in *Fiqh*

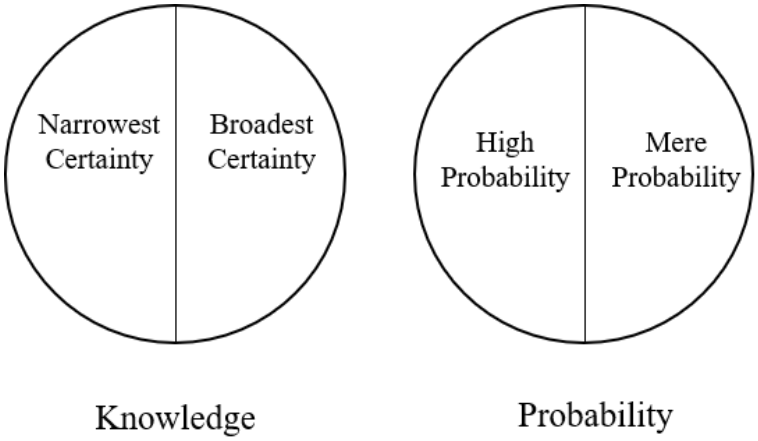


Figure 4 ʻIlm in Relation to *Ẓann* in *Uṣūl al-Fiqh*

I presented the Majlis-e-Shar'ī's notion of *taḥqīq*, which identifies juristic activity within restrictions of classical Sunnī schools, particularly the Ḥanafī school and the qualities of a *muḥaqqiq* who is competent to answer novel questions. I contributed the following limitations to his task:

- He must not oppose evident meanings (*ẓāhir*) of the Qur'an or *sunnah*

- He must not innovate a new opinion regarding a matter on which there is prior difference
- He cannot extrapolate a new *ratio legis* for a fresh analogy, as this is the task of high-ranking *mujtahids*.

Although there are many methods/sources a *muḥaqqiq* can use to answer novelties, I presented ten most common of them, all of which do not require stringent conditions of *ijtihād*. M. Miṣbāḥī (2014) does not state whether the Majlis-e-Shar'ī accepts inferring laws from congruent and inferred meanings of scripture for a *muḥaqqiq*, something which I added to the task of *taḥqīq*. I argued that the source of *istiḥsān* based on *ḍarūrah* allows pragmatism and permits the merciful spirit of the law to prevail the prohibition laws which I will critically observe subsequently. I observed that *istiṣlāḥ* is used to formulate new laws and alluded to Ḥanafīs allowing certain interests (those that involve unusual hardship or harm) to restrict general proof texts; this too, I will examine subsequently. Through these activities, jurists continue to 'make the law' relevant to society and the lives of people, and therefore I agree with Ibn 'Ābidīn that issuing a fatwa according to people's conditions involves a quasi-*ijtihād*.

I elaborated that *taḥqīq al-manāṭ* is a form of *ijtihād*, an intellectual effort in its broadest context, that will always continue in every era by scholars and the public in asserting rationales for moral laws. "Is my condition a medical need or necessity?" "Is this religiously prohibited medicine or procedure allowed for me in my condition?" To answer these questions, patients and physicians always engage in *taḥqīq al-manāṭ*. I elaborated that the rationale in this method is broad and incorporates necessity and need, both of which are the concern of my thesis. Through examples, I explained that jurists employ *taḥqīq al-manāṭ* to declare a medical necessity, and thereafter they formulate a syllogism to present an appropriate moral law to a question. I identified that

the constructs of *ḍarūrah* and *ḥājah* have been discussed under the following principles/methods of law in *uṣūl al-fiqh* literature:

- *Istiḥsān*
- *Istiṣlāḥ* (*maṣlaḥah mursalah*)
- *Taḥqīq al-Manāṭ*

The aim of *ijtihād* and *taḥqīq* i.e. juristic research identified by the Majlis-e-Shar'ī is identical, i.e. to reach an opinion regarding a moral law on a question. For a comprehensive and renewed approach to moral laws, I presented a summary of A. Khān's classification (2016) who, through an inductive study, expounded that Ḥanafī jurists spoke of 11 moral values in texts of substantive law (*furū'*), thus, increasing the oft-cited five or seven categories mentioned by legal theorists (*uṣūlīyūn*). This is the first time in western academic study that A. Khān's hierarchical re-structure of moral values is presented. The values reveal that Islamic moral laws do not dichotomise human acts into binary extremes of black and white. The declaration of 'good/virtue' and 'evil/vice', in context of the consequences in the hereafter, is a matter of the unseen which can only be known by the Qur'an and *ḥadīth*, both of which vary in the degree of textual clarity and the latter varies in its historic attribution from absolutely certain to doubtful. A salient feature of his classification is that the strength of the proof alone is not enough to establish sin, because even the slightly offensive acts can be proved from absolutely certain scripture. Instead, the language emphasis must also be assessed. This will aid in understanding the impact of legal need subsequently.

Chapter 3. A Critical Appraisal of *Ḍarūrah* in the Islamic Law

3.1 Introduction

Necessity is a legal construct of the Islamic law that is invoked in juristic assessments of ethical-legal matters to facilitate ease by relaxing laws or to legislate new laws. The aim of this chapter is to assess the concept of necessity considering different scholarly approaches and contexts with reference to a variety of legal corpus.

In the previous chapter, I observed that *taḥqīq al-manāṭ*, i.e. to realise a moral judgement for a case based on a rationale like necessity, is a juristic activity that continues to make the Islamic law relevant to the lives of Muslims. Necessity can continually apply to modern questions by way of *taḥqīq al-manāṭ,* since it is a pre-defined *ratio legis* (*ʻillah manṣūṣah*) for precedents of hunger and coercion in the primary proof-texts, as this chapter will demonstrate. Scholars competent to undertake *taḥqīq* according to the Majlis-e- Sharʻī can issue edicts (fatwas) based on necessity.

3.2 Definition of *Ḍarūrah*

3.2.1 Linguistic Meaning of *Ḍarūrah*

In the Arabic language, *ḍarūrah* is a noun derived from *iḍṭirār* which means, "a compelling need" (Ibn Manẓūr, d.1312, 1993 8:46). Zabīdī (d.1791) (n.d., 12:387) asserts, "*iḍṭirār* means needing something" and "*ḍarūrah* is need (*ḥājah*)." Jaṣṣāṣ (d.982) (1984, 1:156) recorded that *ḍarūrah* was simultaneously used with *iḍṭirār*. The root of *iḍṭirār* is *ḍarar* which denotes harm. *Iḍṭirār* signifies a compelling situation of harm in which a person cannot act with choice. Hence, a *muḍṭarr* is someone forced to

do something against his will.[1] From these sources, we can adduce that the linguistic meaning of *ḍarūrah* comprises the following:

a. harm
b. needing something
c. an unavoidable circumstance in which a person has no choice but to face the consequences or is forced to act against his will.

3.2.2 Technical Meaning of *Ḍarūrah*

In the legal textual corpus, *ḍarūrah* has been used in the subsequent varying contexts.

3.2.2.1 *Ḍarūrah* as a Universal Objective of the Law *(Maqṣad Kullī)*

This is the context which the *maqāṣid* works of legal theory are concerned with and it is also discussed under *maṣlaḥah mursalah*. *Ḍarūrah* in this context refers to the five fundamental values which are 'essential' to normal order in society whose collapse will precipitate worldly chaos (Anṣārī, d.1810, 2002, 2:262; Bin Bayyah, 2007, pp.195-6; Ghazālī, d.1111, 1993, 1:286; Shāṭibī, d.1388, 2004, p.221). For example, 'preserving the human self' and 'preserving the intellect' are *ḍarūrah*. These are regarded as the end objectives of God in His legislation of laws, thus, *ḍarūrah* in this context is not a circumstance of constraint or concession, rather, it is a purpose of God.

Shāṭibī (2004) enumerates *ḍarūrah* among the objectives of revealed laws saying, "all injunctions of the Sharī'ah turn to the preservation of its objectives (*maqāṣid*) in creation. These objectives do not exceed three types: the first are the 'necessities', the second are needs and the third are embellishments." Below are the definitions for the objectives of law and their examples according to Shāṭibī (2004):

[1] See: Lane (n.d.).

1. ***Ḍarūrah*** (necessity): Its cessation would precipitate social and economic chaos and entail punishment in the Hereafter. It is five types: the preservation of religion, life, lineage, intellect and property. Just retaliation (*qiṣāṣ*) was stipulated to preserve life; *jihād* was validated to preserve faith; theft, adultery and consuming liquor were banned to protect wealth, well-being of progeny and the probity of the intellect respectively. Its examples include 'consuming any prohibited foods and drinks' and 'wearing any prohibited clothes' to save life.
2. ***Ḥājah*** (need): Its cessation or absence entails hardship or harm to any of the five universal values without endangering social order. Society would struggle in the absence of such needs such as scriptural legal concessions in acts of worship, like shortening the prayers for travellers and excusing the sick from fasting. Similarly, contractual obligations like forward sale (*salam*)[2], lease and rent (*ijārah*) are permitted for the ease of people, despite both being sales of something non-existent at the time of sale and thus innately prohibited according to sound analogy. Its examples include 'consuming permissible foods' and 'wearing permissible clothes'.
3. ***Taḥsīn*** (luxury/embellishment): It enhances the quality of the five values and worldly order and its absence does not result in any hardship or harm. Its examples include 'removing filth from the body and clothes', 'all forms of purification', 'covering the area of nakedness'[3], 'refraining from impure foods and drinks' and 'refraining from the sale of impure substances', like blood.

[2] A sale in which the buyer makes a pre-payment to have an item delivered on a fixed date in the future.

[3] Nakedness (*'awrah*) for the male in front of a marriageable person, other than his wife, is between his navel and knees (including the latter according to *Ḥanafī*s, but not according to Shāfi'īs and Ḥanbalīs), and for a woman is her entire body with exclusion of her face, hands and feet (Zuhaylī, 1998, 1:743).

As attributive nouns of *maqāṣid*, cited examples are commonly referred to as *ḍarūrīyāt*, *ḥājīyāt* and *taḥsīnīyāt*. Shāṭibī (2004, p.231) asserts, "the greatest purpose of these three objectives is the preservation of the first one; the category of necessities…they are the principles of religion, the foundations of the Sharī'ah and its universal values."

The preservation of these values is attained in two ways (Shāṭibī, 2004):

1. by sanctioning (committing) whatever establishes them
2. and eliminating (omitting) whatever endangers their existence.

3.2.2.2 Narrowest Meaning of *Ḍarūrah* (*al-ma'nā al-akhaṣṣ*)

Technical meanings of *ḍarūrah* that share a common feature that it 'safeguards a fundamental value from cessation' are placed hereunder. I identified the following two contexts for the narrowest technical meaning:

a. *Ḍarūrah* as an 'extreme circumstance of constraint'

Ḍarūrah in this context is a compelling state of constraint that endangers the existence of human life or any other fundamental value (A. Zarqā, 2012, p.209). This legitimises certain forbidden acts and is a concession (*rukhṣah*). *Rukhṣah* is a legal ruling relaxing or suspending by way of exception under certain circumstances an injunction of a primary and general nature (Peters and Haar, 2012). My discussion on *ḍarūrah* in the subsequent chapters will pertain to this concessionary context unless I express otherwise.

I identified two types of juristic usages of the term in this context:

i. Definitions characterised by 'saving one's life or organs from loss or severe harm'

These definitions mention *ḍarūrah* in the narrow context of the human self (*nafs*). In classical works of legal maxims, Ḥamawī (d.1686) (1985, 1:277), a Ḥanafī, Suyūṭī

(d.1505) (1990, p.61) and Zarkashī (d.1392) (1985, 2:319), both Shāfiʿīs, defined *ḍarūrah* as, "the limit a person reaches where if he did not consume something forbidden, he would die or draw near death, and this [state] permits consuming prohibited things." Jaṣṣāṣ (1984, 1:159), a Ḥanafī, defines it in his *tafsīr* as, "fearing one's life or a limb if he avoids eating."

Dardīr (d.1786) (n.d., 2:183), a Mālikī, asserts, "*ḍarūrah* is to save lives from loss or severe harm." Shirbīnī (d.1570) (1994, 6:158), a Shāfiʿī, classifies it as, "a fear of increase in the condition or time of a fatal illness" and "a fear of death."

This usage is directly based on the Qur'anic context of *ḍarūrah* in life-endangering starvation which is mentioned subsequently.

ii. Definitions characterised by 'protecting any of the five fundamental values from severe harm and loss'

I consider the Majlis-e-Sharʿī of Mubarakpur's following definition of *ḍarūrah* to belong to this type: "a compelling circumstance in which safeguarding one or all of the five fundamental values depends on the commission or omission of an act" (M. Miṣbāḥī, 2018, 1:276). The difference between this and the previous definition is that it incorporates all five values and not just human life; thus, it is the most comprehensive definition in the context of concession and severe hardship. The Majlis-e-Sharʿī of Mubarakpur claimed to have adopted A. Khān's approach—mentioned subsequently—but I argue that it slightly amended its definition restricting it to the circumstance of constraint and therefore does not entirely represent the latter's approach. This is because the Majlis' aim is to focus on the notion of *ḍarūrah* that relaxes or alters existing laws and thus is concessionary.

Jurists of the modern era attempted to offer a definition that incorporates all fundamental values in context of constraint. Zuhaylī (1997, pp.63-5) asserts, "necessity is a new circumstance of danger and severe hardship a person faces who as a result fears injury to his life, organs, offspring, mind or property. Under such circumstances, committing an illicit act or neglecting or delaying an obligation is rendered mandatory or permissible." Mubārak (1988, p.28) defined *ḍarūrah* as, "the fear of ruin or severe harm to one of the five fundamentals of oneself or of others if one did not repel what would certainly or most probably cause ruin or harm."

M. Miṣbāḥī (2009a, pp.68-72), a senior member of the Majlis-e-Shar'ī of Mubarakpur, surveyed legal literature and identified that *ḍarūrah* in this context is realised in the six subsequent scenarios:[6]

1. life-endangering starvation/thirst (*makhmaṣah*)
2. life-endangering duress (*ikrāh tāmm/muljī*) i.e. a genuine threat of death, severe beating or destroying one's limb or parts including the tips of the fingers (Ibn 'Ābidīn 1992, 6:129)
3. required meaning of a text (*iqtiḍā al-kalām*), i.e. a contextual requirement for an ellipted part of an utterance believed to be essential to the meaningfulness of the whole text
4. extreme harm (*ḍarar shadīd*), i.e. it endangers one of the five values
5. severe illness (*maraḍ shadīd*), i.e. it makes a person incapable of observing duties in their required ways, like not being able to stand and pray obligatory prayer

[6] See also Bin Bayyah (2007, p.193-4), Ibn 'Ābidīn (d.1836) (1992, 2:238, 6:129), Maḥbūbī (d.1347) (1998, 2:429) and Wizārat al-Awqāf (1993, 28:192).

6. severe extenuating excuse (*'udhr shadīd*), i.e. a scenario of illness in which a person cannot avoid the nullifiers of prayer and is thus excused.

I agree that *ḍarūrah* as a circumstance of constraint applies to all these scenarios except for the third scenario, because it is a matter of semantics unrelated to safeguarding the five fundamental values. It is correct that ellipted utterances are a *ḍarūrah* if the soundness/validity of the meaning depends on them, but *ḍarūrah* in this context is beyond our discussion. Additionally, most of these scenarios are restricted to the value of the human self (life/organs) and do not apply to the other values.

An example of *ḍarūrah* in this context includes being excused for consuming prohibited foods when experiencing life-endangering starvation, as understood from the 'express indication' of the Qur'anic *āyah* (Q6:119). Another example is the permission to consume such foods under duress by threat of death, as proven by way of 'inferred indication' from the same *āyah* (Ibn 'Ābidīn, 1979, p.271).

b. *Ḍarūrah* as 'something indispensable for the existence of the five values'

This refers to an act or substance whether it is utilised in a compelling circumstance of contingency or not and thus it is not restricted to such a circumstance whilst accepting *ḍarūrah* as a normative imperative. This *ḍarūrah* belongs to the classification of the acts of agents and their purposes and those of the scripture. However, unlike Shāṭibī's approach (2004), this meaning incorporates the consequences of the hereafter and includes all religious duties despite the absence of some of them not precipitating normal worldly order.

I identified this context in A. Khān's various fatwas discussing the classification of objectives as five instead of three, incorporating the objectives of God and of people.

In a detailed fatwa on defining wasteful use of water, A. Khān (2006, 1b:843) provides concise definitions to the five objectives with examples of food, clothing and shelter, for the value of the human self, and the example of ritual ablution for the value of religion. Below is a summary of his definitions and examples:

1. ***Ḍarūrah*** (necessity) is 'something indispensable for survival' of any of the values, such as a small room for one to be able to enter inside for shelter, a few bites of food to end starvation and enable a person to offer mandatory (*farḍ*) acts, and a piece of cloth to cover the area of nakedness. In ablution, pouring the minimal amount of water to the point that it flows over every single part of a limb that must be washed (face, hands and feet) is in the degree of *ḍarūrah*. *Ḍarūrah* incorporates the *farḍ* in Islamic law.
2. ***Ḥājah*** (need) is 'something in the absence of which harm is inflicted', such as a room that protects from the severity of seasons, consuming an amount of food that provides energy to offer necessary (*wājib*) and emphasised *sunnah* acts, clothes suitable to protect against weather conditions,[7] covering the amount that when uncovered would render prayer prohibitively disliked or be deemed against acceptable social norm (*muruwwah*), including a shirt[8] and trousers. In ablution, fulfilling the emphasised *sunnahs*, such as washing the hands, rinsing the mouth and nose three times with minimal amount of water are all examples of need. *Ḥājah* incorporates *wājib* and emphasised *sunnah* acts in the Islamic law.

[7] All footgear is a *ḥājah* for humans.

[8] Walking publicly without covering the upper torso renders a male unfit to bear testimony in court in the Ḥanafī school and covering it is therefore a *ḥājah* (Shaykh Niẓām, 1310AH, 3:469). Similarly, Nawawī (d.1277) (1392AH, 4:31) mentioned there was consensus that covering the navel and knees was a part of civil norm (*muruwwah*).

3. ***Manfa'ah*** (benefit) is 'something that does not cause harm when absent, though its presence enhances and enriches the primary purpose', for example, tall walls in a spacious house, vinegar and vegetables for food, and wearing a turban for prayer. An example in ablution is to use an amount of water that does not leave a person in doubt regarding the fulfilment of *sunnah* during each of the three times of washing. Benefit incorporates non-emphasised *sunnahs* and desirable acts.
4. ***Zīnah*** (beautification) is 'something in addition to a primary purpose that increases moderate beauty and embellishment but does not benefit the actual purpose'. *Zīnah* is not totally unbeneficial, unlike the non-essential purpose (A. Khān, 2006, 1b:937), but it does not benefit the original purpose. For example, unique structural design in the walls of a house for splendour, colouring and presentation of food, and a preferred style of cutting/tailoring one's clothes. Likewise, in ablution, to wash a part of the foreleg above the ankle—a desirable act (*mustaḥabb*)—also belongs to the category of z*īnah*.
5. ***Fuḍūl*** (non-essential) is 'an unbeneficial thing that does not enhance a primary purpose and is excessive'. For example, gold and silver ornaments and expensive fabrics to adorn the interior of a house, eating desserts and dry fruits after a meal, wearing trousers that fall below the ankles and deliberately washing a limb four times in ablution. Acts under this class vary from being morally indifferent and disliked to morally forbidden.[9]

[9] Therefore, *fuḍūl* must not be equated with words like *isrāf* and *tabdhīr* that are used for wasteful spending in aspects of sin (A. Khān, 2006, 1b:937).

Although A. Khan's examples are of intrinsically permissible acts and for mere explanation, his definitions for necessity and need are broad and include prohibited/disliked acts that become mandatory or compulsory to utilise.

3.2.2.3 Broadest Meaning of *Ḍarūrah* (*al-ma'nā al-a'amm*)

In this context, *ḍarūrah* incorporates the meaning of safeguarding one of the five values from loss and the technical meaning of a need (*ḥājah*), i.e. something whose absence harms a fundamental value or causes it unusual difficulty without endangering its existence.

I identified the following three juristic usages of *ḍarūrah* in this context:

a. *Ḍarūrah* as a 'practically unavoidable circumstance' *(muta'assir al-iḥtirāz)*

Jurjānī (d.1413) (2012, p.138) defined *ḍarūrah* saying, "it is derived from *ḍarar*, i.e. harm, and refers to a contingency that cannot be avoided." In this context, irrespective of whether one of the five fundamental values are threatened, it is a circumstance involving 'practical difficulty' or 'impossibility' to avoid something (*ta'assur wa ta'azzur iḥtirāz*). This meaning resonates *ḍarūrah's* linguistic aspect of 'lacking choice' and is found in the following examples of *fiqh* literature:

1. Shurunbulālī (d.1659) (2011, pp.100-1) excused cleansing clothes that come in contact with a little amount of mice droppings and the droppings of carnivorous birds due to *ḍarūrah,* i.e. them being difficult to avoid.[10] Regarding carnivorous birds, Marghīnānī (d.1197) (n.d., 1:38) asserts, "they excrete from above and protecting oneself is very difficult; therefore, *ḍarūrah* is established."

[10] See: Chapter 5 for the 'widespread problem' in avoiding urine sprinkles.

2. Ḥanafīs like Zayla‘ī (d.1343) (1313AH, 1:324) excused dust particles that enter a fasting person’s mouth and the remaining water after rinsing the mouth from nullifying the fast based on the *istiḥsān* that these are ‘unavoidable matters’ (Dardūr, 2014).
3. If there is a tear in the footgear, a person cannot wipe over it instead of washing the foot during ritual ablution, but small tears are tolerated due to the difficulty of avoiding them despite there being no danger to any of the five values. Sarakhsī (d.1096) (1993, 1:100) asserts, “a minor tear is excused due to *ḍarūrah*.”
4. Whilst discussing the ritual bath, A. Khān (2016, 1:576) classified three scenarios for hardship (*ḥaraj*) in context of purification:
    a. *“Maḍarrah* [harm]: there is harm in making water reach an area, such as the inner eye.
    b. *Mashaqqah* [difficulty]: like a woman undoing her braids [for a bath].
    c. *Diqqah* [inconvenience]: after becoming aware, there is no harm or hardship, yet there is inconvenience in taking care and being mindful of something, like mosquito excreta.” Thereafter he states, “it is known that whatever is allowed in a *ḍarūrah* is measured by its amount,” indicating that the last type and *ḍarūrah* are interchangeable. Avoiding mosquito excreta is very difficult; thus, one has no control over preventing contact with it.

This meaning (a) is found in *uṣūl* works too. In the discussion of the appropriateness of an *‘illah* in the chapter of analogy, Maḥbūbī (d.1347) (2005, 2:162) declares that the inability of an infant to marry and the roaming nature of cats share a common class (*jins*), i.e. a *ḍarūrah*, to establish the legitimacy of adult guardianship (*wilāyah*) in the former and the judgement of the latter’s remnant water being clean. Dropping the

judgement of impurity from a cat's remnant water is not due to severe harm to one of the five fundamentals, rather, it is due to the difficulty of preventing cats from entering the home and making contact with utensils (Qārī, d.1606, 2012, p.411). The latter is an example of 'widespread problem' which I will evaluate in Chapter 5 and thus *ḍarūrah* in this meaning includes widespread unavoidable problems (*'umūm al-balwā*).

b. *Ḍarūrah* as 'a difficulty that has no alternative'

This context is different to the previous one in that in this meaning a person chooses to act in a certain way due to the absence of alternative options, as opposed to facing an unavoidable circumstance. Below are some examples:

1. Marghīnānī (n.d., 3:46) allowed shoemakers to use pig-hair to sew sandals declaring it a *ḍarūrah*, "because the job cannot be done without it," despite footgear not being a *ḍarūrah* upon which life or organs depend, rather, it is a *ḥājah* as evident from A. Khān's definition (c).
2. Ḥaṣkafī (d.1677) (1992, 6:370) asserts, "a male physician can look at the area of bodily illness in a woman by an amount of the *ḍarūrah*, because *ḍarūrah* is measured by its amount, just like it is permissible for a midwife to look." M. Miṣbāḥī (2009d, p.66) elaborates on this by saying, "*ḍarūrah* means there is no practicable alternative option to this," regardless of whether the patient fears for her life or organs.[11]
3. The abovementioned necessity of establishing guardianship for an infant is also in this context.

[11] See: *'awrah* subsequently in this chapter.

c. *Ḍarūrah* as 'hardship' *(ḥaraj)*

Hardship is a broad term that applies to both *ḍarūrah* and *ḥājah* in their meanings of constraint; however, *ḍarūrah* has been used broadly as hardship.

Examples for this meaning in *fiqh* and *uṣūl* literature are subsequent:

1. Citing Ibn ʿĀbidīn, A. Khān (2013, 1:378) espouses that inserting medicine into the rectum by a syringe (*iḥtiqān*) is not permissible to increase sexual ability which is a mere benefit (*manfaʿah*) but is permissible for the *ḍarūrah* of an illness. The contrast with benefit, which involves no harm, indicates that *ḍarūrah* here is not restricted to life-endangering illness.[12]
2. Qārī (2012, p.415) mentioned that the widespread hardship (*ḥaraj*) regarding the purity of wells (mentioned in Chapter 2) is a *ḍarūrah* and must be mitigated due to the Qur'anic *āyah* (Q22:78), "…[He] placed no hardship in your religion…"
3. In works of legal theory, the Ḥanafī concept of *istiḥsān* based on *ḍarūrah*[13] refers to necessity in this broadest meaning, which relaxes the law where an analogy entails hardship (Dardūr, 2014, p.149; Kāfī, 2004, p.59). For example, classical Ḥanafīs consider lending bread to one's neighbour by its quantity rather than weight a *ḍarūrah* and permissible by way of *istiḥsān*, because its weight is something customarily negligible and people are often in need of lending bread to one another, whereas the exchange ought to be by weight according to analogy (M. Zarqā, 2012, 1:91-3).

[12] See: A. Khān's definition of *manfaʿah* in this chapter. See also section 6.5 on necessity on medical fatwas.
[13] See: Chapter 2.

3.2.2.4 *Ḍarūrah* as 'Need' (*Ḥājah*)

Modern researchers like Bin Bayyah (2007, p.194), Kāfī (2004, p.61) and Mubārak (1988, p.29) identified the synonymous usage of *ḍarūrah* with *ḥājah* in *fiqh* literature. I found the subsequent two examples:

1. Mawṣilī (d.1284) (1937, 1:13) declares that a person in major ritual impurity, "must not enter the mosque unless for a *ḍarūrah*," and then expounds, "if he is in need (*iḥtāja*) to enter, he must perform dry ablution and enter it."
2. Ibn ʿĀbidīn (d.1896) (1992, 1:382) explained that the condition of *ḍarūrah* that warrants one to follow another school in combing obligatory prayers during travel meant "a circumstance comprising a kind of difficulty."

Similarly, I found that *ḥājah* is also used in the meaning of *ḍarūrah* in the context of constraint. Mutairi (1997, p.17) accurately points that, "such usage is a matter of tolerance in language and it does not denote their similarity in legal effects." For example, A. Bukhārī (d.1330) (n.d., 2:237) and Sarakhsī (n.d., 1:248) refer to the life-endangering hunger in which there is a concession to consume carrion as *ḥājah*.

3.3 *Ḍarūrah* in the Primary Proofs

Many proof-texts in the Qur'an and *sunnah* sanction necessity as a basis to prevent harm and override prohibition laws. The following 11 Qur'anic verses are of immediate relevance to necessity in its various aspects.

Reference to *iḍṭirār*:

1. "He has only forbidden you carrion, blood, pig's meat, and animals over which any name other than God's has been invoked. 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 forgiving" (Q2:173).

2. “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 their immediate need, God is forgiving and merciful” (Q16:115).
3. “…but if any of you is forced by hunger to eat forbidden food, with no intention of doing wrong, then God is most forgiving and merciful” (Q5:3).
4. “Why should you not eat such animals when God has already fully explained what He has forbidden you, except when forced by hunger?” (Q6:119)
5. “…I find nothing forbidden for people to eat, except for 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” (Q6:145).

Concession due to extreme duress:

6. “…With the exception of those who are forced to say they do not believe, although their hearts remain firm in faith, those who reject God after believing in Him and open their hearts to disbelief will have the wrath of God upon them and a grievous punishment awaiting them” (Q16:106).

The principle of ease and averting harm:

7. “…God wants ease for you, not hardship…” (Q2:185) and (Q5:6).
8. “God does not burden any soul with more than it can bear…” (Q2:286).
9. “God wishes to lighten your burden; man was created weak” (Q4:28).
10. “… [The Prophet] who makes good things lawful to them and bad things unlawful, and relieves them of their burdens, and the iron collars that were on them…” (Q7:157).

11. "…He [God] has chosen you and placed no hardship in your religion…" (Q22:78).

The following *aḥādīth* support the notion of necessity and the objective of ease:

1. "Harm may neither be inflicted nor reciprocated in Islam" (Ibn Mājah, *ḥadīth* no.2341).
2. "Following the religion is easy" (Bukhārī, *ḥadīth* no.39).
3. "When I command you something, obey it as much as you are able to" (Bukhārī, *ḥadīth* no.7288).
4. "The Prophet was not given a choice between two matters except that he chose the easiest one as long as it was not a sin" (Muslim, *ḥadīth* no.2327).

Scholars have also cited incidents of necessity in the life of the Prophet in which ease was granted to people. See Mutairi (1997, pp.32-33) and Safian (2010, pp.42-8) for examples.

These texts denote that God has excused people from religious injunctions when they are in genuine unusual hardship. Thus, necessity constitutes a judgement of relaxation (*takhfīf*). Based on an inductive study of these proofs, Muslim scholars agreed that 'eliminating hardship' 'facilitation' and 'averting harm' are definitively proven objectives of the Islamic law (Ibn ʿĀshūr, d.1973, 2001, pp.189-91) on the basis of which the legal maxims cited in Chapter 1 were formulated.

There are five references to *iḍṭirār* in the Qur'an and all of them pertain to saving life in starvation. The literal exclusion in *āyah* four indicates that the prohibition in dietary laws is restricted to other than the circumstance of extreme starvation. Thus, prohibited foods are not only excused but also permissible (*mubāḥ*) to consume at such a time, and consuming something permissible to save life is morally obligatory (*farḍ*) (Ibn ʿĀbidīn,

1992, 1:35).[14] Due to the brevity of these texts, one is not able to fully ascertain the parameters of the impact of necessity in various aspects of law.

The assumption that necessity is used to sidestep the Sharī‘ah is false because the scripture gives necessity the credence to relax laws. A person following the rule of necessity, therefore, is not opposing the Law of God, rather, is obeying it.

3.4 A Critique of Approaches to *Ḍarūrah*

This study carefully distinguished between various juristic usages of the term *ḍarūrah* and is perhaps the first of study to clearly identify them with such detail and categorisation. Previous academic studies do not delve into this depth. For example, Mutairi (1997, pp.10-5) presents definition (a-i) as the classical definition and (a-ii) as the modern definition of *ḍarūrah*. He overlooks the broadest usages of the term. Safian (2010) almost entirely follows Mutairi (1997) in her analysis of *ḍarūrah* except that she offers a detailed analysis from a historical perspective and justifies that (a-ii) is ‘more’ comprehensive. It is accurate that the dominant use of the term is (a-i), i.e. in context of constraint and concession that permit saving life by unlawful means, which is influenced by the Qur’anic notion of *iḍṭirār*. However, A. Khan’s usage (b) in the narrowest context is perhaps the ‘most’ comprehensive as it accepts it as an act in normal and contingent circumstances as I will further explain. It cannot be ignored that jurists have used the term in varying broader contexts which entail different legal effects, but I strongly argue that due to the latter reason, the term *ḍarūrah* ought to be used in the narrowest technical meaning so that its legal effects are not confused with the effects of *ḥājah*.

[14] See: Chapter 5 for Type One prohibited acts and the technicality of terms.

3.4.1 Shāṭibī's Approach to *Ḍarūrah*

Shāṭibī (2004, p.221) defines the class of *ḍarūrīyāt* as, "whatever is indispensable for the continuity of religious and worldly interests in such a way that if it is annulled, normal worldly order would not remain sound and in the Hereafter one would be deprived of salvation and its rewards, and would face a clear loss."[15]

Shāṭibī observes *ḍarūrah* in the context of *ḍarūrīyāt*, i.e. primary objectives of the law around which all the religious laws revolve. These are end objectives that prevent total chaos in the normal worldly order. For example, eating something (unconditionally) and buying and selling (unconditionally) are necessities to ensure the preservation of 'human life'. However, eating 'halal' food and conducting 'permissible' sales are complementary needs (*ḥājīyāt*) for the worldly order, and avoiding *ḥarām* food and sale of *ḥarām* items is an embellishment because this 'avoidance' does not disrupt normal worldly order, but rather makes it better. These are his examples of human habits and transactions. Let us now look at religious observances. Shāṭibī places praying obligatory prayer under *ḍarūrīyāt* as it is an end objective, the concession to lie down and pray it due to sickness under complimentary needs and performing the ritual ablution for prayer and covering the area of nakedness under embellishments because they are not end objectives.

This approach is characterised with the following features:

1. *Ḍarūrah* is the highest objective of law and never a means to something else, e.g. preservation of life.
2. Complementary needs and embellishments perfect *ḍarūrah*.

[15] Underlined by myself for the purpose of discussion.

3. *Ḍarūrah* is the basis for the lower objectives, and so if it is completely ruined, they are too, but not vice versa.

In Shāṭibī's view, the indicator to determine *ḍarūrah*, thus, is 'normal worldly order'. I fail to see how 'salvation in the hereafter' could also possibly be an indicator, although Shāṭibī claims to include this in his taxonomy (see underlined definition above). If Muslims ate only unlawful foods, the worldly order would remain sound, but this would entail punishment in the Hereafter. This is also the case if Muslims did not perform the ritual ablution or cover their areas of nakedness to pray because obligatory prayer is not valid without them.

The concern with this view is that it disregards consequences of the Hereafter because it is not evaluated by the scale of moral laws as Shāṭibī (2004, p.235) himself mentioned. Thus, I argue that it cannot be applied as a model to assess ethical-legal cases. For this reason, I differ with academic studies like Saidudden et al. (2014) that propose the application of this *maqāṣid* framework to solve bioethical dilemmas.

It would be irrational to assume that Shāṭibī considered this model for moral assessment or that he evaluated it with reference to scriptural promises of reward or punishment and the moral laws. It is unquestionable that he knew that avoiding unlawful foods and sales, performing ritual ablution for prayer and covering one's area of nakedness are moral obligations (*farā'iḍ*), yet he classes them all under embellishments. Thus, it would be a fallacy to assess all needs and embellishments as morally non-obligatory recommendations and to restrict all moral obligations to necessities according to Shāṭibī's taxonomy of objectives.

Maḥbūbī (2005, 2:148) also mentions the three-fold classification of objectives and unequivocally asserts that they are 'worldly' interests, in that they are classified by their

impact on the normal functioning of the world as opposed to being religious interests. This also supports my argument that this approach to *ḍarūrah* cannot justify ethical-legal judgements.

3.4.2 A. Khān's Approach to *Ḍarūrah*

Kamali (2008a, p.18) precisely acknowledged that there was a gap in literature to evaluate *maqāṣid* based on the indicator of the moral norms and scriptural injunctions. In order to accommodate moral norms with the taxonomy of objectives and to ensure that the said disparity is removed, so that not only worldly order is maintained in their definitions but the Islamic notion of salvation in the Hereafter is also accounted for, an alternative interpretation is needed to ensure this taxonomy is suitable for moral reasoning. After exhaustive research and careful attention to sources, having discovered A. Khān's deliberations (2006, 1b:843) on the types of purposes led to a different approach, one which overcame the concerns raised above. This approach, to my knowledge, has not been academically studied before.

A. Khān evaluates the objectives in terms of moral laws and for each of the five fundamentals places mandatory (*farḍ*) acts, whose absence poses a threat to worldly order or salvation in the Hereafter, in the degree of *ḍarūrah*; morally compulsory acts (*wājib*) in the degree of *ḥājah;* and merely recommended acts (*mandūb*) in the degree of *taḥsīn*. The basis for this approach is that whatever necessarily fulfils the preservation of a fundamental value is also necessary, and so all mandatory moral means to mandatory observances are also necessities respectively, such as purification for prayer. Hence, vital means that serve higher objectives are also *ḍarūrah* in this approach. This moral-law approach to the purposes can be traced back to Sulamī (d.1262) (1997, p.116; 2000, 2:71), who categorised both worldly and religious interests into necessities, needs and embellishments, and declared carrying out

mandatory acts, as well as avoiding forbidden acts, as *ḍarūrah,* and the carrying out of an emphasised *sunnah* as *ḥājah*.

A salient difference between this approach and Shāṭibīs and Sulamīs is that it follows a division of objectives into five (*ḍarūrah, ḥājah, manfaʿah, zīnah* and *fuḍūl*) instead of three (*ḍarūrah, ḥājah, taḥsīn*), something that can be traced back to Ḥamawī (1985, 1:277). The latter did not intersect the moral laws with the classification and thus A. Khān identified and filled this gap. The five-fold classification is also different in that Shāṭibī narrowly classifies objectives according to the 'purposes of God' behind laws, whereas the former also comprises the 'human purposes' in their acts and thus adds *fuḍūl* and categorises *zīnah* and *manfaʿah* separately.

3.4.2.1 Methodological Considerations in A. Khān's Approach

The above cited classification of A. Khān (2006) evaluates the first three objectives according to the worldly or religious harm that their absence entails to one of the five fundamentals with examples of the human self and religion. The fourth objective, *zīnah,* does not yield harm nor any benefit to the fundamentals. He places all commands (e.g. mandatory, compulsory, etc.) under the first four interests and all prohibitions (e.g. forbidden, prohibitively disliked, etc.) exclusively under *fuḍūl*, in addition to the indifferent (*mubāḥ*). By doing this, A. Khān implies that *fuḍūl* is something that does not engender any worldly or religious benefit, even though it may or may not engender harm at different degrees.

However, A. Khān does not clearly state the distinction between 'committing' a prohibited act and 'avoiding' it. It is vital to make this distinction because committing any of the prohibitions is *fuḍūl*—as he rightly asserts—however, this varies, because avoiding the forbidden is a *ḍarūrah* and avoiding the prohibitively disliked and wrong

acts is a *ḥājah*, as these entail punishments in the Hereafter (M. Miṣbāḥī, 2009a, pp.133,137). The other argument for this distinction is that avoiding the forbidden is mandatory, which is a *ḍarūrah*, and thus avoiding the forbidden is also a *ḍarūrah*. Therefore, ruining a *ḍarūrah* and inflicting severe harm on a fundamental value is *fuḍūl* and forbidden, and refraining from this is a *ḍarūrah*. Similarly, the destruction of a *ḥājah* is *fuḍūl* and prohibitively disliked or a wrong, and to refrain from this is a *ḥājah*. For example, 'committing' the forbidden act of abstaining from food to the point of death is a *fuḍūl* in the worldly sense (causing extreme harm to oneself), and 'refraining' from such abstinence is a *ḍarūrah*. Likewise, 'committing' the prohibitively disliked act of wearing only trousers to pray the daily prayer is *fuḍūl* and 'abstaining' from it is a *ḥājah*.

In Shāṭibī's classification (2004), this distinction is not made, nor is it possible, because he equates 'carrying out' certain mandatory acts, e.g. all ritual ablutions and covering the nakedness, to 'avoiding' certain prohibited acts, e.g. 'refraining' from consuming impure foods, all under *taḥsīn*. Had Shāṭibī regarded the consequences of the Hereafter in his classification, he would have refrained from placing abstinence from forbidden acts and fulfilment of mandatory acts under *taḥsīn*.

In another fatwa on concessions, A. Khān (2016, 1:376) defines the five objectives slightly differently, making the above-mentioned distinction more noticeable. Rather than referring to the objectives as 'things', he (2016) calls them 'acts' saying,

> "if an act is such that religion, intellect, progeny, self and wealth depend upon it, and without it these would perish or draw near to cessation, it is the degree of *ḍarūrah*. For example, learning tenets of faith and its absolute necessities is a *ḍarūrah* of religion; 'abstaining' from *khamr* and adultery is a *ḍarūrah* for the

> intellect and progeny; eating and drinking an amount to keep oneself alive is a *ḍarūrah* for the self; and earning a livelihood and deterring theft is a *ḍarūrah* for wealth. If these purposes are not jeopardized by the absence of the act but are affected with harm and difficulty, then it is *ḥājah,* such as lighting a candle inside one's home [for visibility]…if the absence of an act does not cause harm but its presence benefits the primary purpose, it is *manfa'ah,* such as placing several candles in the room of a house. If the primary purpose does not benefit from this act, but is done with moderation, then it is *zīnah,* such as lighting a lamp in the house instead of a candle. If the act does not engender the previous advantage at the least or it is excessive, it is *fuḍūl,* such as putting up decorative lighting in the house without a good intention."

In the underlined text of this passage, A. Khān clearly states that abstaining from a forbidden act is a *ḍarūrah*. This reinforces the significance of my distinction between carrying out a forbidden act, which is categorised as *fuḍūl,* and avoiding it, which is categorised as *ḍarūrah*. This distinction also applies to all other prohibitions, and thus carrying out a prohibitively disliked act is a *fuḍūl,* but avoiding it is a *ḥājah,* etc. This citation reveals that the definition of *ḍarūrah* incorporates all five fundamental values and thus belongs to the narrowest context identified above.

My elaboration of A. Khān's approach towards *ḍarūrah*—and the other objectives—reveals it is the most comprehensive definition in the narrowest technical sense because it incorporates all morally mandatory acts as *ḍarūrah*, whether or not they are concessions in relation to all five fundamental values. Other narrowest definitions either restrict *ḍarūrah* to a circumstance of constraint and concession (a-ii) or limit it to saving life (a-i).

3.4.3 An Analysis of Shāṭibī's *Taḥsīn* in the Context of Uncovering the *'Awrah* for Medical Treatment

A person studying Shāṭibī's examples of *taḥsīn* (2004, p.223) will notice several moral obligations placed under it. For example, 'all praiseworthy mannerisms' are included, such as speaking the truth and establishing justice, removing impurities, purification, covering the area of nakedness, refraining from eating impure and unlawful foods and from wrongful killing of children, women and Christian priests during war. M. Zarqā (2012, 1:104) is one of the few who accurately presents Shāṭibī's view by saying, "it becomes apparent that matters of *taḥsīn* include desirable (*mandūb*) acts that are recommended to seek refinement and virtue, such as the etiquettes of eating etc., and also include some mandatory (*farḍ*) acts of the Sharī'ah that are strictly emphasised, such as covering one's nakedness." Kāfī (2004, p.48) also noticed this and briefly notes that the *maqāṣid* and interests-taxonomy is a separate discussion from the classification of moral laws. Hence, Safian's claim (2010, p.79) that, "the rulings in this category (i.e. *taḥsīn*) are mainly indifferent (*mubāḥ*) or permissible" is erroneous.

Covering one's area of nakedness (*'awrah*) is a very good example to understand the implication of the difference between the approaches. In the context of medical questions, many fatwas prohibit medical procedures in which there is some benefit for a person but no need or necessity on the grounds that marriageable kin must look at the area of nakedness in a person. For this reason, Muslim scholars may consider a procedure forbidden despite the absence of an explicit prohibitive proof text in the primary proofs regarding it. Such prohibited acts are not innately prohibited and are

termed '*ḥarām li-ghayrihī*', i.e. forbidden due to an external factor (extrinsically forbidden).[16]

The two foregoing approaches in interpreting the objectives reveal two different answers one would initially expect from fatwas regarding medical procedures involving uncovering the *'awrah*, given that Shāṭibī's taxonomy of objectives is also employed for moral assessment. According to Shāṭibī, covering this area belongs to *taḥsīn* because its absence does not jeopardize worldly order. According to A. Khān, covering the male genitals and the surrounding area is at the degree of *ḍarūrah*, and covering the thighs and knees falls under *ḥājah* due to the varying epistemic strengths of the commands discussed by A. Miṣbāḥī (2006, p.60) and M. Miṣbāḥī (2009d, p.33).

If we employ Shāṭibī's approach to place a moral legal ruling on uncovering the *'awrah* for purposes of mere benefit (*manfa'ah*) for an individual, we would conclude that revealing the *'awrah* is permissible because it is an embellishment. Thus, we could legitimise all cosmetic procedures on this area and contraceptive procedures for purposes of mere beauty and benefit. The irony is that it is almost impossible to find any fatwa that allows such procedures unless a necessity or need is established, because unnecessary uncovering of the *'awrah* is deemed prohibited. Take the following examples:

1. Sulamī (2000, 2:165), Shaykh Niẓām (1310AH, 5:330) and A'ẓamī (2007, 16:91) explicitly permit a male to uncover his *'awrah* in front of others for circumcision, which is an emphasised *sunnah* and a religious symbol (*shi'ār*).[17]

[16] A discussion on this type of forbidden is imminent. Note, extrinsically forbidden acts can also be addressed in the primary texts.
[17] An emphasised *sunnah* that is also a religious symbol is a *ḥājah*. A'ẓamī (2007, 16:233) later quotes another passage from Shaykh Niẓām seemingly contradicting his

2. Sulamī (2000) permits doctors to look at the *ʿawrah*—excluding the genitals for which a necessity is needed—where there is *ḥājah* and opines there is a need to look at the genitals of persons engaging in unlawful sex in order to give testimony against them.
3. M. Miṣbāḥī (2009a, p.33) cites *al-Hidāyah* that the moral law for uncovering the knee is less severe than the thigh and that for the thigh is less severe than the genitals. Thereafter, he explains that a necessity is required to uncover the genitals. For example, for a woman to have a contraceptive coil fitted by someone other than her husband is permissible when there is a genuine fear of the loss of a body function or affliction of a life-threatening condition. A *ḥājah* would not be enough to carry out the former.
4. M. Miṣbāḥī (2009d, p.65) upholds that IVF treatment is not permitted unless there is a necessity, and a desire to have children is not one. An exception is made for the midwife who can look at the female genitals during childbirth.
5. A. Miṣbāḥī (2006, pp.57-60) argues that the prohibition of looking at the thigh is proven from a solitary *ḥadīth* and therefore uncovering it, and the area near it, is prohibitively disliked and only requires a *ḥājah* to permit uncovering it. As for uncovering the genitals, he also requires a necessity.
6. Contrary to the above, Abū Zahrah (1997, p.303) opines that the prohibition of uncovering and looking at the *ʿawrah* is *ḥarām li-ghayrihī*, i.e. a means that leads to forbidden intercourse and thus can be overridden by a mere *ḥājah*.

previous statement asserting an adult male can carry out his own circumcision where possible and is not permitted to undergo the procedure from another unless it is his wife.

3.5 Purposes (*Maqāṣid*) in the Context of Islamic Moral laws (*Aḥkām*)

As discussed above, A. Khān's appraisal of the human and Godly objectives is based on the indicator of moral laws (*aḥkām taklīfīyah*). Islamic medical ethics are essentially connected with legal discussions around the admissibility, obligation, or forbiddance of a treatment or procedure. For this purpose, a comparative study of moral laws with the *maqāṣid* and interests-taxonomy is vital, as this is the framework in which judgements are made. Previous studies like Abdur-Rashid et al. (2013), Isa (2015) and Saifuddeen et al. (2014) elaborate on Shāṭibī's framework as the basis for ethical reasoning but do not intersect it with moral laws. In the previous section, I pointed to a fallacy in this approach. Figure 5 intersects moral laws with the classes of *maqāṣid* considering A. Khān's approach.

	Moral Laws
Necessity	Mandatory
Need	Compulsory Emphasised *Sunnah*
Benefit/Beauty	Non-Emphasised *Sunnah* Desirable
Non-essential	Indifferent, committing a forbidden, prohibitively disliked, wrong, slightly disliked or undesirable act

Figure 5 Intersection of *Maqāṣid* with Moral Laws According to A. Khān

3.5.1 Moral Laws & Their Proof-Texts

An evaluation of the *maqāṣid* with moral laws requires an evaluation of the epistemic nature of proof-texts that establish these laws. Considering A. Khān's approach, I will classify the Islamic primary proofs according to two factors: their epistemic strength and the type of textual command or prohibition they contain. The types of proofs that establish a mandatory and forbidden act[18] are therefore at the degree of *ḍarūrah*, and those that establish a compulsory or prohibitively disliked act[19] are at the degree of *ḥājah*. Kamali (2008a, p.17) identified that the *maqāṣid* can be appraised on the indicator of proof-texts too, according to their speculative or definitive nature, but he did not present such an appraisal. This study aims to also fill this gap.

The subsequent discussion is based on A. Khān's (2006, 1a:240) investigative study of the moral norms. He argued that transmitted proof-texts can epistemically yield certainty, probability or doubt, in both aspects of historic attribution (*thubūt*) and textual purport (*dalālah*), the combination of which results in nine possible proofs when correlated. In context of the language of the command or prohibition, he advocates that transmitted proofs may contain language that is binding, emphatic or merely recommending carrying out an act or abstaining from it. These three language possibilities correlating with the epistemic possibilities, constitute a total of 27 classes of proofs. A. Khān (2006) is unique in surveying existing Ḥanafī literature to present this refined reading of the proof-texts with moral laws. Before A. Khān, classical scholars such as Ṭaḥṭāwī (d.1816) (n.d., 4:169) and Ibn ʻĀbidīn (1992, 1:70) had presented only four transmitted proofs for moral laws presented in Figure 6.

[18] Here I mean the agreed upon *farḍ* among Sunnī schools, such as the four mandatory acts of ablution, and not the disputed and broadly certain *farḍ* acts, such as including the elbows in the ablution.
[19] These include the disputed *farḍ* acts of the schools.

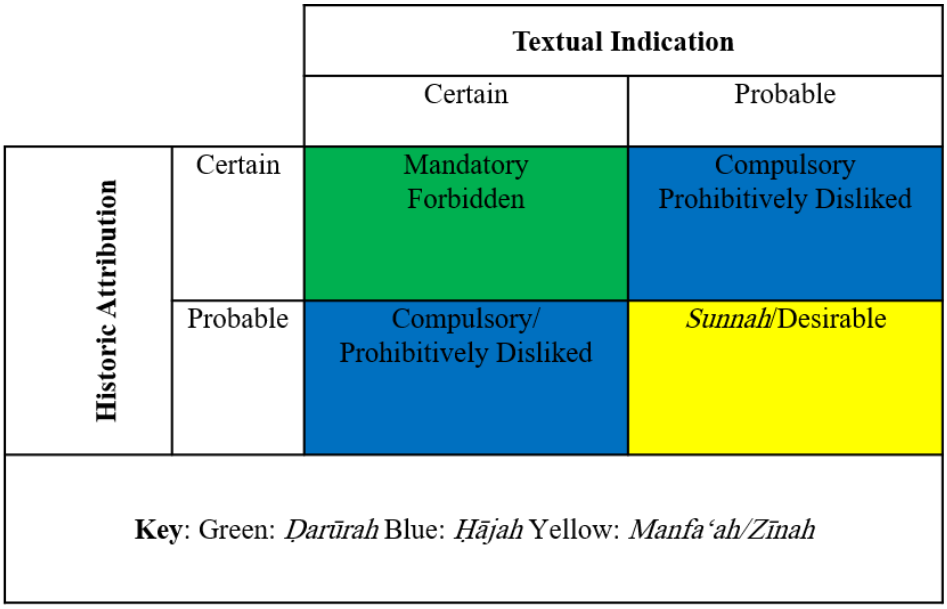


Figure 6 Classical Classification of Moral Laws and Their Proofs

According to these scholars, only one category of proof establishes a mandatory/forbidden act, two types establish the compulsory, and one establishes *sunnah* and desirable acts. According to A. Khān's 27 classes of proof types from the Qur'an and Sunnah, only one class establishes mandatory/forbidden acts, three establish compulsory/prohibitively disliked acts, four establish a *sunnah*/slightly offensive acts and 19 establish desirable/undesirable acts. Figure 7 below illustrates that A. Khān (2006) comprehensively studied the moral laws with their proofs.

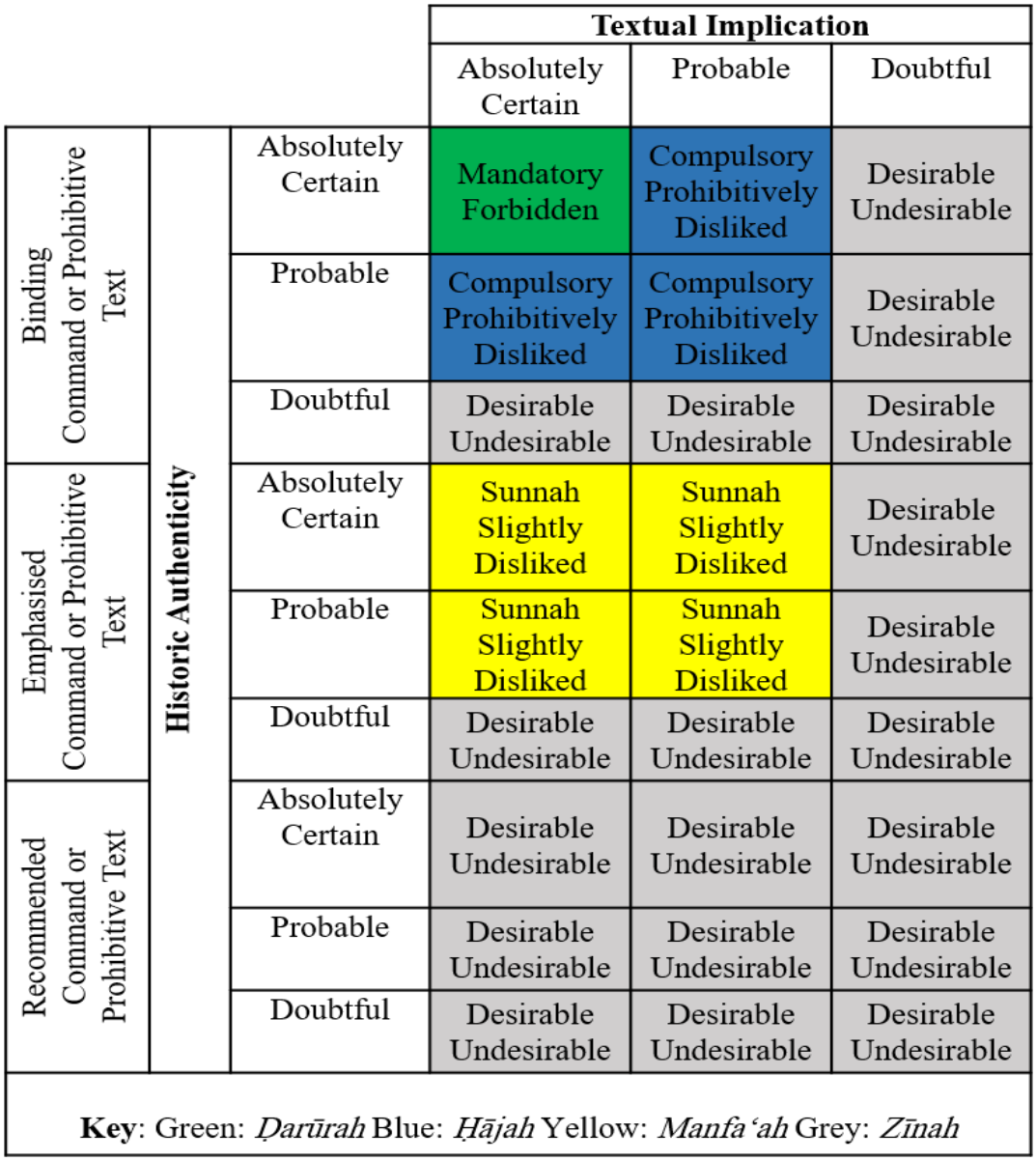


Figure 7 A. Khān's Re-Classification of Moral Norms and Their Proofs

3.5.2 An Analysis of A. Khān's Evaluation of Moral Norms

Citing classical *fiqh* texts, A. Khān (2006) illustrated that doubtful sources such as weak *aḥadīth* cannot establish *sunnah* acts, and therefore disagreed with the classical classification and differentiated between them and desirable acts. However, A. Khān (2006) does not draw a distinction between the two types of *sunnah* or between the slightly disliked and *isā'ah* in relation to their proofs although he has presented a lengthy and unique discussion on their definitions. This is perhaps an indication that

they have similar proofs with a qualitative difference in the language indicator; one that emphasises the act with a threat of punishment for habitually leaving/committing an act and reprimand for leaving it occasionally, and one that does not. The former is an emphasised *sunnah* and *isā'ah*, and the latter is a non-emphasised *sunnah* and slightly disliked (A'ẓamī, 2008, 1:283).[20] A vital feature of A. Khān's difference with earlier scholars is that he argued that one cannot ignore the language type of the command and prohibition. He was therefore able to observe that even *sunnahs* and desirable acts can be proven from absolutely decisive texts when the command is non-binding (*ṭalab ghayr jāzim*).[21] This means that not every absolutely certain text from the Qur'an or Sunnah constitutes a *ḍarūrah*, a key finding from A. Khān's study.

However, in this classification, A. Khān (2006) does not consider the fact that some *mujtahids* may reach certainty regarding a text and its injunction, whereas others may consider it probable.[22] For example, one *mujtahid* may uphold that the generality (*'umūm*) of a proof-text is not compromised and no other proof specifies it, and therefore deems it certain in the broadest meaning. Others may argue against such a *mujtahid* and show a proof, which to the former is unacceptable, to specify the same text.[23] As a result, where the first *mujtahid* reaches certainty that the textual indication bindingly requires a person to carry out an act, he will proclaim it mandatory, albeit it being disputed. Classical jurists declared such disputed acts as the 'probable

[20] See definitions of moral norms in Chapter 2.

[21] Subsequently I argue that even the indifferent can be proven from absolutely certain proofs like slaughtering a cow.

[22] Though A. Khān is the one who masterfully presents this notion earlier in the same fatwa (2006, 1a:250). It is thus evident that he does not intend to be exhaustive in his classification of moral laws when intersecting them with their proofs.

[23] See examples in Khann (2003).

mandatory'[24] (*farḍ ẓannī*) and 'mandatory in action' (*farḍ 'amalī*) in contrast with acts 'mandatory in belief' (*i'tiqādī*), which are undisputed and necessary for Muslims to not only act upon but also believe in (Ibn 'Ābidīn, 1992, 2:4). We may also call the former a *farḍ maḍhhabī*, i.e. that which is mandatory in one school but not another.

A mandatory ruling upon which all *mujtahids* agree is one that everyone must believe (*farḍ i'tiqādī*), and therefore, its proof can only be an 'absolutely certain' proof. In Chapter 2, I elaborated that this can only be either a *muḥkam*/*mufassar* of the Qur'an or of a mass-narrated *ḥadīth*. A. Khān (2006, 1a:281) offers 12 examples of disputed mandatory acts in ritual ablution alone according to Ḥanafīs. For example, washing the arms without any qualification is an undisputed mandatory, though including the elbows is mandatory only according to the Ḥanafīs, without which they consider ablution incomplete. Zuhaylī (1985, 1:366-77) also enlists disputed and undisputed mandatories in ablution according to the four Sunnī schools.

Ḥanafī *mujtahids* follow the rule that if a solitary *ḥadīth* elaborates an ambiguous (*mujmal*) Qur'anic *āyah*, a 'mandatory act' can be proven from it if the *ḥadīth* indicates that the absence of the prescribed act renders the whole action void. The derived act is not attributed to the probable report but to the Qur'anic *āyah* (Ibn 'Ābidīn, 1992, 1:95), rendering the established law certain in the broadest context. On this basis, Ḥanafī jurists declared wiping a quarter of the head and performing the last sitting in prayer mandatory acts (Ibn 'Ābidīn, 1992, 1:451; Shurunbulālī, 2002, p.241).

[24] Here 'probable' is in the broader meaning and is the same as relative certainty. See Chapter 2.

A. Khān (2006, 1a:240-2) defined the undisputed mandatory as a law "in which a *mujtahid* reaches the highest level of certainty that is required in the principles of faith[25] regarding the textual command, and this is not possible except where there is scholarly agreement." He added,

> "if he [the *mujtahid*] does not reach this level [and thus there may be disagreement], the law is termed 'compulsory in belief' (*wājib i'tiqādī*). If the *mujtahid* investigates the evidences that he encounters and reaches certainty regarding the binding command in them, in the sense that he reaches the knowledge that an act remains invalid without it, it is termed 'mandatory in action' (*farḍ 'amalī*). If he does not reach certainty [but has preponderate conjecture] regarding this, then it is 'compulsory in action' (*wājib'amalī*) in the meaning that the act will be valid (*ṣaḥīḥ*), yet imperfect without it. However, whether one will have fulfilled that responsibility is probable."

A. Khān (2006), however, does not explain two things:

1. The proof types for the different mandatories and the 'compulsory in action' (*wājib 'amalī*) (as opposed to 'compulsory in belief' (*wājib i'tiqādī*).
2. Whether a similar categorisation to that of mandatory is possible in the 'forbidden', resulting in undisputed and disputed types of forbidden (*ḥarām*).

In my understanding, the disputed mandatory is only proven from proofs that are certain in the broadest context, because not all *mujtahids* reach certainty regarding their

[25] This is where the opposing possibility is believed to be rationally non-existent and impossible. See Chapter 2.

purport, though some may,[26] and a 'compulsory in action' is proven from the narrowest-probable proofs since the interpretation opposing the obvious one, in the view of the *mujtahid*, is supported with evidence he deems unsatisfactory.

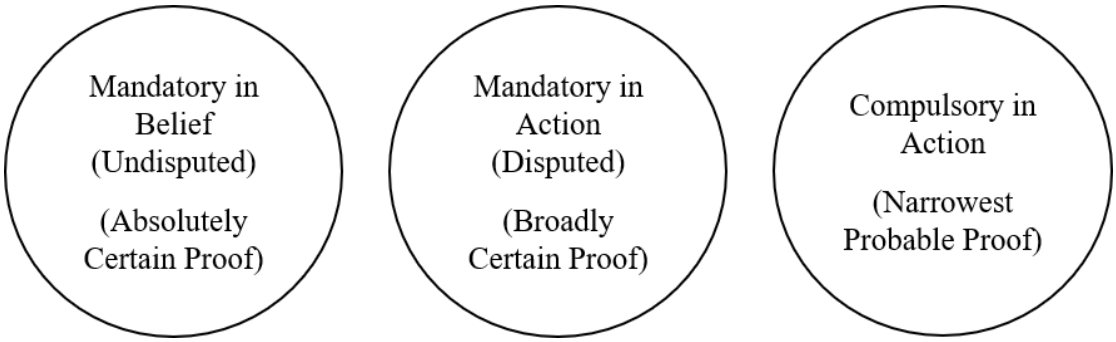


Figure 8 Refined Classes of Mandatory and Compulsory in Context of Broadly Certain Proofs

Reinhart (2002) indicates to some of these intricacies regarding the 'mandatory' and rightly points that our understanding of *uṣūl al-fiqh* is profoundly altered when the Ḥanafī approach is considered, one that has not been comprehensively studied in Western academia, compared to the Shāfi'ī and Ḥanbalī approaches. He (2002, pp.226-230) accurately observes that the Ḥanafī position is very likely the archaic Islamic legal position because Ḥanafīs draw distinctions between the *farḍ* and *wājib* acts considering the former is proven from absolutely certain Qur'anic evidence and the latter from probable *sunnah*. Additionally, they consider the denial of *farḍ* to take a person out of the Muslim community as opposed to the denial of *wājib*. Reinhart (2002) demonstrates that later Shāfi'ī, Mālikī and Ḥanbalī scholars held views coinciding with the Ḥanafī distinctions acknowledging that the justification for *farḍ* acts is firmer than other

[26] Even though other *maḍhhabs* do not call this proof 'certain', Ḥanafīs agree it is probable in the broadest meaning. See Chapter 2.

obligations and that theological aspects are also to be considered for the terms. This collaboration therefore adds weight to the Ḥanafī position.

In context of the forbidden, I would argue that a *mujtahid* will obviously deal with the same spectrum of texts and encounter the same epistemological issues encountered in the mandatory, and therefore it logically follows that it be categorised in a similar way. Thus, where a textual indication is bindingly prohibitive, there arise three possibilities:

1. All *mujtahids* agree because the proof is absolutely certain, such as committing adultery and unlawful killing. This is the undisputed 'forbidden in belief' (*ḥarām i'tiqādī*).
2. One *mujtahid* reaches certainty because the proof is broadly certain in his view.[27] This is the disputed 'forbidden in action' (*ḥarām 'amalī*) and may differ among schools, and thus be called *ḥarām maḍhhabī.*
3. A *mujtahid* does not reach broadest certainty regarding the injunction. This is the 'prohibitively disliked'.

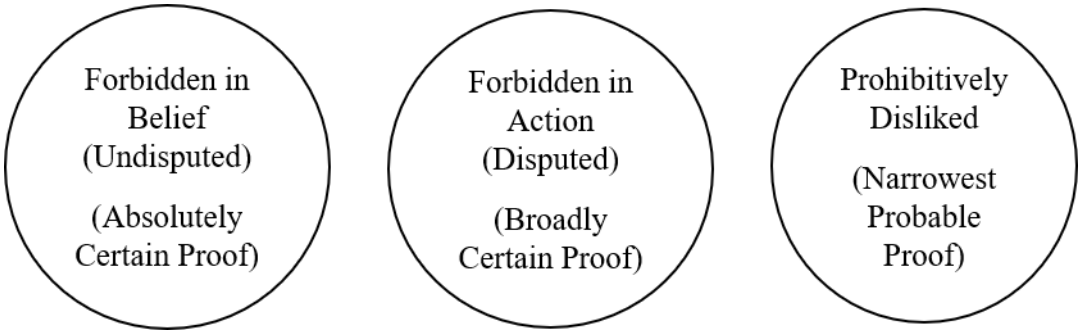


Figure 9 My Suggested Re-classification of the Forbidden and Prohibitively Disliked in Context of the Broadly Certain Proofs

However, finding a clear precedent to support this postulated re-classification of the forbidden is no easy task. In classical works, the closest discussions are around

[27] See: Table 1 (after p.45).

Shaybānī's difference with Abū Ḥanīfah, regarding the lack of difference between *ḥarām* and *makrūh;* Abū Ḥanīfah declares *makrūh* as halal and Shaybānī declares it a 'probable *ḥarām*' (Marghīnānī, n.d., 4:450; Ṭaḥṭāwī, 1997, 4:169). Badrān (d.1927) (1401AH, p.131) points out that if the proof was probable, Mālik (d.795) and Ibn Ḥanbal (d.855) termed the forbidden act *makrūh*. There is no further discussion as to whether a probable *ḥarām* can be further divided into '*ḥarām* in action', where the proof is broadly certain, and 'prohibitively disliked', where the proof is probable in the narrowest context.

A. Miṣbāḥī (2006, p.79), a Ḥanafī and member of the Majlis-e-Shar'ī, passingly mentioned '*ḥarām* in action', but did not provide a definition to it. As a result, ambiguity arises between *ḥarām* in action, the prohibitively disliked, and the undisputed *ḥarām*, especially because he claimed that *ḥarām* in action was absolutely certain[28] and abstaining from it was at the degree of *ḍarūrah*. He, however, mentions '*ḥarām* in action' is the opposite of '*farḍ* in action', which consequently supports my delineation. M. Miṣbāḥī (2009b, pp.78-79, 86) does not mention '*ḥarām* in action', but speaks of the 'probable *ḥarām*' which he uses in two varying contexts:

1. He (2009b, p.86) distinguishes between the 'probable *ḥarām'* and 'prohibitively disliked' in that the latter has no scriptural proof, though the former is proven from probable scripture. He argues that preparing *khamr* and carrying and serving it is a probable *ḥarām,* because it is proven from a probable solitary *ḥadīth*, yet other advantageous use of *khamr,* such as its medicinal application in the eyes, ears, nose or on the external body, is only prohibitively disliked due to the lack of scriptural proof.

[28]He contrasts 'certain' with 'probable', which indicates the former is absolute certainty, whereas *ḥarām* in action is proven from broadly certain proofs.

2. He (2009b, pp.81-2, 89) also equates the 'probable *ḥarām*' to the 'prohibitively disliked', both of which are proven from either *ijtihād,* in the absence of primary proof, or from probable scriptural proofs.

Restricting the prohibitively disliked unconditionally to 'not having any scriptural proof' cannot be accurate, because I have shown under moral laws and their proof-texts from A. Khān and other jurists, that it is proven from probable proofs. I suggest that this outward contradiction regarding the 'prohibitively disliked' can be solved as follows:

1. If an act is novel and is included under a general prohibitive text[29], a universal legal maxim or is adjudged by way of analogy due to a common *'illah,* it is prohibitively disliked 'without explicit proof'. See the discussion on innovations subsequently.
2. If there is explicit probable scriptural proof prohibiting an act, it will not be a novelty and will be prohibitively disliked 'with explicit proof'.

Hence, when studying *fiqh* texts, including those of modern authors, one must bear in mind that probable *ḥarām* may or may not be synonymous to prohibitively disliked.

Type of Binding Prohibition	**Proof Class**	**Proof Type**
Undisputed *Ḥarām*	Absolutely Certain	*Muḥkam*/*Mufassar* Qur'an/ Mass-narrated *Ḥadīth*
Prohibitively Disliked (Meaning 1)	Probable	Analogy
Probable *Ḥarām* (Meaning 1)	Probable	Solitary *Ḥadīth*
Prohibitively Disliked/Probable *Ḥarām* (Meaning 2)	Broadly Certain Narrowest Probable	*Ẓāhir*/*Naṣṣ*/*Mu'awwal* Qur'an/Solitary *Ḥadīth*/ Analogy

Figure 10 Existing Research on *Ḥarām* and the Prohibitively Disliked in Context of Proofs

[29] Like the specified *'āmm*.

Type of Binding Prohibition	Proof Class	Proof Type	Corresponding Command Type
Undisputed *Ḥarām*	Absolutely Certain	*Muḥkam/Mufassar* Qur'an/ Mass-narrated *Ḥadīth*	Undisputed *Farḍ*
Probable *Ḥarām* (in Action)	Broadly Certain	*Ẓāhir*/*Naṣṣ*/Unspecified *'āmm* from Qur'an/Mass-narrated/famous *Ḥadīth* *Muḥkam/Mufassar* famous *Ḥadīth*	Probable *Farḍ* (in Action)
Prohibitively Disliked	Narrowest Probable	*Mu'awwal*/Specified *'āmm* from Qur'an/Solitary Ḥadīth *Ẓāhir/Naṣṣ/Muḥkam/ Mufassar* from Solitary *Ḥadīth*	Compulsory

Figure 11 A Posited Classification of the *Ḥarām* and Prohibitively Disliked Corresponding to the Binding Commands & Their Proofs

3.5.3 A Critical Revision of Moral Laws & Proofs in Context of the Purposes

Having refined the mandatory and forbidden moral laws, and after having added broadly certain transmitted proofs to the discussion, a more comprehensive study of moral laws can be made in which the legal proofs increase from the nine that A. Khān (2006) identified (Figure 7) to 16, adding 12 more proofs to those that Ibn 'Ābidīn (1992) and others identified (Figure 6). In correlation with the three types of textual commands/prohibitions mentioned by A. Khān, the proofs rise to 48 in total, in contrast to A. Khān's 27. Table 2 (after p.105) gathers these proof types and fills the gaps discovered from A. Khān's observations which separate the *sunnahs*, slightly disliked and wrong, and add disputed mandatory and forbidden types. Note that when the epistemic strength of the textual indication correlates with that of the historic attribution, the lowest epistemic strength will always dictate the final strength of the proof. For example, a text which is absolutely certain historically and probable in

meaning, it will be valued as probable and not certain, even if it is from the Qur'an. The epistemic strengths of proofs have been identified in each box in Table 2 (after p.105).

To identify exact proof types for each moral law from the primary sources and in correlation to the presence/absence of scholarly consensus, refer to Table 1 (after p.45). Subsequent is a brief commentary on Table 2 (after p.105).

A. Undisputed Mandatory/Forbidden in Belief (*I'tiqādī*)
    1. Only one class of proofs establishes this.
    2. None of the Sunnī legal schools differ on such acts.
    3. Committing the mandatory and omitting the forbidden are *ḍarūrah*.
B. Disputed/Probable Mandatory/Forbidden in Action (*'Amalī*)
    1. Only three classes of proofs establish these.
    2. Because these are proven from broadly certain proofs and declared by the founding Imam, a Ḥanafī jurist below the *aṣḥāb al-tarjīḥ* is not warranted to dispute these, however, *mujtahids* from categories above this or a non-Ḥanafī jurist may (A. Khān, 2014, 1:179, 195).[30] This is because these proofs are broadly probable, as explained in Chapter 2.
    3. Because of the consequence of sin and punishment, committing the probable mandatory and omitting the forbidden in action are *ḥājah* according to Ḥanafīs, but not necessarily according to others.
C. Compulsory (*Wājib 'Amalī*)/Prohibitively Disliked
    1. Only five classes of proofs establish these. None of the proofs are certain, however, the command is binding, and the *mujtahid* does not reach certainty regarding it.

[30] See: Figure 1.

2. Because of the consequences of sin and punishment, committing the compulsory and omitting the prohibitively disliked are *ḥājah* considering the Ḥanafī school, but may only be at the level of *taḥsīn*/*manfaʿah* in the other schools.

D. Emphasised *Sunnah*/Wrong

1. These are proven from nine classes of proofs, all of which contain an emphatic command, even if they are absolutely certain.
2. Committing the *sunnah* and omitting the wrong are *ḥājah* because of the consequence of sin and punishment when repeatedly committed/omitted.

E. The remaining four moral laws below these are lower than *ḥājah* and not directly relevant to my study except that it is noteworthy that the non-emphasised *sunnah* and the slightly disliked are established from all proof types that contain a recommendation, including absolutely certain proofs. My observation thus opposes Bin Bayyah (2007, p.231), who places all acts proven from absolutely certain proofs under *ḍarūrah,* without investigating the kind of textual command/prohibition they contain. Considering my observations, it is not enough to consider the epistemic value of an evidence to ascertain its position in the taxonomy of purposes, but rather a careful investigation of the language is also required.

F. All prohibitions are established from the same proofs as their opposite commands.

G. Committing disputed mandatory acts and omitting disputedly forbidden acts within and across schools are at the degree of *ḥājah*.[31] This finding is vital for

[31] I later discovered that M. Miṣbāḥī (2009, p.133) agreed to this in a brief note but stipulated various conditions for leaving the school in the Majlis-e-Sharʿī fatwa (no.32,

people who follow one of the four Sunnī schools as it shows that matters of valid *ijtihād*,[32] even those a legal school considers 'mandatory', may be overruled by a purpose of *ḥājah* and a *ḍarūrah* is not always required. I will elaborate this further under the impact of *ḍarūrah*.

3.5.3.1 Disputed Moral Laws and Sin

Figure 12 subsequently summarises vital observations made above intersecting the notion of sin, i.e. deserving punishment in the Hereafter, with the moral laws.[33] Note that in disputed matters, what may be a sin in the eyes of one *mujtahid* may not be in the eyes of another, due to a differing interpretation of texts (Ya'qūb, n.d., p.249). The only matters in which sin is absolutely certain, and thus leaving such acts or committing them is inexcusable and definitely evil (*munkar*), are the undisputed mandatory and forbidden. Ibn al-Humām (d.1460) (n.d., 2:192), Nābulusī (d.1731) (2011, 1:349) and Ghazālī (2004, 2:326) mentioned that *munkar* is only an act forbidden by agreement of all Sunnī schools. The former (n.d.) asserts, "every matter belonging to *ijtihād* is unaccounted. This is why a Ḥanafī must not rebuke a Shāfi'ī for eating a lizard, hyena, or any animal upon which the name of God is not invoked, and a Shāfi'ī must not rebuke a Ḥanafī for drinking a [non-intoxicating] beverage of fermented dates/raisins (*nabīdh*)" (A. Khān, 2008b, pp.276-79; N. Khān, d.1880, 2008, p.67). Nābulusī (2011) cites this passage and adds, "the public preacher (*wā'iẓ*) must not prohibit any matter permitted by any one of the founding Imams,[34] but nevertheless, he should prohibit matters upon which all of the Imams have agreed on its forbiddance, such as adultery and usury…." However, the counter-implicate of Ghazālī's passage is that a Shāfi'ī

2006) cited in M. Miṣbāḥī (2014, pp.287-9). See Bin Bayyah (2007, p.211) who also mentions this point.

[32] See: Table 1 (after p.45).

[33] I do not examine minor and major sins.

[34] I.e. *mujtahids*.

may rebuke a Shāfiʿī for consuming the non-intoxicating *nabīdh*.[35] This suggests that a follower of a school will be sinful 'in the eyes of his Imam' if he abandons a disputed *farḍ* or commits a disputed *ḥarām*. Ibn ʿĀbidīn (1992, 1:95) upheld that a person who leaves such a mandatory act without a valid interpretation (*ta'wīl*) commits a sin and is a transgressor (*fāsiq*). Mālik ibn Anas (d.795) is quoted to have only agreed upon matters such as adultery and consuming *khamr* being *ḥarām,* and in disputed matters he would say, "I dislike so and so" instead (Bin Bayyah, 2007, p.67).

		Deserving Punishment for Single Action (sin)	Deserving Punishment for Repeated Action (sin)	Deserving Reprimand for Single Action	Deserving Reprimand for Repeated Action	Absolutely Certain Proof	Broadly Certain Proof	Probable Proof
Abstaining from a Command	Undisputed Mandatory	✓	✓	✓	✓	✓	x	x
	Disputed Mandatory	✓	✓	✓	✓	x	✓	x
	Compulsory	✓	✓	✓	✓	x	x	✓
	Emphasised *Sunnah*	x	✓	✓	✓	✓	✓	✓
	Non-Emphasised *Sunnah*	x	x	x	x	✓	✓	✓
	Desirable	x	x	x	x	✓	✓	✓
Committing a Prohibition	Undisputed Forbidden	✓	✓	✓	✓	✓	x	x
	Disputed Forbidden	✓	✓	✓	✓	x	✓	x
	Prohibitively Disliked	✓	✓	✓	✓	x	x	✓
	Wrong	x	✓	✓	✓	✓	✓	✓
	Slightly Disliked	x	x	x	x	✓	✓	✓
	Undesirable	x	x	x	x	✓	✓	✓

Figure 12 Moral Laws & Their Proofs in Context of Possible Sin and Reprimand in the Hereafter

Figure 12 illustrates that only the undisputed mandatory and forbidden entail sin by agreement of jurists. In Islamic biomedical ethics, researchers must differentiate between varying types of prohibitions as their consequences differ. The importance of this distinction will be highlighted further by examples in Chapter 6. The grey areas in

[35]See also Bin Bayyah (2007, pp.66, 174).

Figure 12 highlight the aspects that this thesis has contributed to existing academic research on the moral laws in context of their proof-texts.

3.5.3.2 Innovations and *Ḍarūrah*

Another important discussion here is that a novelty may be regarded as *ḍarūrah* despite the lack of an explicit scriptural proof for it. The reason for this is because Sunnī scholarship has argued that at any point of time, after the Prophetic era, if the nature of a novelty is such that the existence of one of the five fundamental values (religion, self, etc.) comes to depend on it, the novelty will become a *ḍarūrah*, and if its absence harms it or brings it difficulty, it becomes a *ḥājah*.

Regarding innovation (*bidʿah*), classical scholars, including Sulamī, ʿAbd al-Ḥaqq Dihlavī (d.1642) and ʿAsqalānī (d.1449), uphold that if the novelty agrees with 'the general proofs' and 'maxims' of the religion and supports its 'purposes', its moral ruling will vary from compulsory to desirable, and if it opposes any of these, it will vary from forbidden to disliked.[36] For example, learning Arabic syntax (*naḥw*) and placing vowels on the Qur'an are compulsory innovations, because non-Arabs cannot correctly understand and read the Qur'an without them, even though their admissibility is not proven from any explicit scriptural proof. Similarly, there is no explicit command for a woman to cover her face, but many classical scholars held that it became compulsory (*wājib li-ghayrihī*) due to poor moral and social conditions (M. Miṣbāḥī, 2014, p.477). This supports what I mentioned earlier that whatever serves as a pre-condition to a mandatory act will also be regarded a mandatory. However, the abovementioned scholars are careful in the selection of terminology and refer to such novel acts as 'compulsory' (*wājib*) instead of 'mandatory' (*farḍ*). A reason for this may

[36] See: N. Khān (2008, pp.38-43, 89-91) for a critical study of their discussions.

be the lack of explicit primary proofs and that these acts are not mandatory in themselves, but due to the greater purpose they serve. Though these are termed compulsory for protecting a primary objective, they are at the degree of *ḍarūrah* and not *ḥājah*, as N. Khān (2008, pp.41-3) noted.

Ironically, in contrast to *wājib*, these scholars use the term *ḥarām* for reprehensible innovations that destroy a fundamental value. This is even though such innovations are not reprimanded by any explicit proof and are not forbidden in themselves. One is compelled to ask why they do not refer to these acts as *makrūh* or to the *wājib* as mandatory instead, as this would maintain consistency in the use of terminology. One supposition is that *wājib,* in relation to innovation, is in its broader meaning, which includes *farḍ* (Ibn ʻĀbidīn, 1992, 6:314), and thus the use of *ḥarām* is also consistent. However, the forbidden act will be *ḥarām li-ghayrihī*, i.e. due to an external factor and not intrinsically, and refraining from this is also a *ḍarūrah* (N. Khān, 2008). Another possibility is that stronger language is used for prohibitions to deter people from unlawful acts. N. Khān (2008) cites Dihlavī and Qārī who mention that if, however, the novel act harms a fundamental value without destroying it, it is prohibitively disliked.[37] Refraining from this would therefore be at the degree of *ḥājah*.

Considering that a novelty can also be a *ḍarūrah*, the latter's sources are subsequent:

1. a scriptural proof that approves a *ḍarūrah* by way of:
    a. *ʻIbārat al- naṣṣ,* i.e. explicitly in the text, such as the example of dire starvation in the Qur'an (Q2:173).
    b. *Dalālat al-naṣṣ,* i.e. implicitly signifying that cases of necessity, other than the one explicitly mentioned, are also valid. For instance, Ḥanafī

[37] Above, I differentiated between this and the probable *ḥarām*.

jurists infer extreme coercion with a genuine threat of death or severe injury (*ikrāh muljī*) to be a case of necessity implicitly understood from the Qur'anic exception of dire starvation (Ibn ʿĀbidīn, 1992, 6:134; A. Miṣbāḥī, 2006 p.34). According to Ḥanafī legal theorists, any act proven in these two ways is proven from the language of the text itself, though Shāfiʿīs consider the latter a form of analogy (Zuhaylī, 1998, 1:354).

2. Where a specific *naṣṣ* is absent, analogy is made on the grounds of a shared *ratio legis* stipulated by the primary sources (*ʿillah manṣūṣah*) in a precedent. An innovation can be declared a *ḍarūrah* based on such an analogy.
3. Where a *ratio legis* is not stipulated, a novelty is accepted as a *ḍarūrah* if it falls under a broader purpose accepted by the scripture, such as 'repelling harm and hardship' (A. Zarqā, 2012, p.210; Zuhaylī, 1998, 2:786). This is an inference of a judgement for a novelty by including it under the generality of a primary proof (*istidlāl biʾlʿumūm*). Refraining from many innovations is declared a *ḍarūrah* due to the degree of harm they cause without a specific *ratio legis*. This source of reasoning is termed *istiṣlāḥ* and *maṣlaḥah mursalah* by Mālikīs and Ḥanbalīs, *istiḥsān* by Ḥanafīs, and Shāfiʿīs accept it as *qiyās munāsabah*.

These sources reveal that necessity is connected to the primary sources in some way; explicitly, implicitly, by generality or analogy. Declaring an act or circumstance as *ḍarūrah* by these sources is within the remit of jurists competent in *taḥqīq*, as defined in Chapter 2.

3.5.3.3 Qualitative Differences in *Ḥarām* Due to External Factors

The above examination of *ḥarām* signifies that its types are not equal in their epistemic nature and neither in their consequences. For example, an innovation may be regarded extrinsically forbidden (*ḥarām li-ghayrihī*), whereas this term is also used for acts

mentioned in scripture, and this why a further analysis of *ḥarām* is required. Sunnī legal theorists define an intrinsically forbidden act (*ḥarām li-'aynihī*) as one in which the act itself requires prohibition due to intrinsic evil value (A. Khān, 1998, 14:552; Maḥbūbī, 2005, 2:395; Zuhaylī, 1998, 1:82). In other words, the Sharī'ah declares the act forbidden by its essence and from the point of its inception (Kāfī, 2004, pp.41, 124). For example, innate immorality does not separate from the acts of lying, robbery or adultery, and thus they are intrinsically *ḥarām* acts. This is even though they are also a 'means' to destroying fundamentals, like wealth and lineage.

In contrast, an extrinsically forbidden act (*ḥarām li-ghayrihī*) is that which itself does not require prohibition, rather, an external factor engenders prohibition by association to it (A. Khān, 1998, 14:552; Zuhaylī, 1998, 1:82). In other words, if the external factor is separated from the act, the act itself would not be prohibited as it does not contain a mischief (*mafsadah*) the Law abhors. Examples include, travelling for unlawful purposes, praying in prohibited times, in stolen clothes or on illegally possessed land. Other examples of extrinsic *ḥarām* are subsequent:

1. Fasting on Eid day, which is immoral due to an external factor, i.e. to disregard God's invitation to eat food on that day.
2. Trading after the call for prayer on Friday, which is immoral due to the external factor that it diverts a person from hastening to prayer. However, it is possible that a person trades on his way to prayer without hindrance. A. Khān (2016, 16:552) rightly argues there is no reason for jurists to declare such acts as *makrūh* instead of *ḥarām* when the proof is absolutely certain, even though they are forbidden as means and not ends in themselves.
3. Believing in the forbiddance of *ribā* is an absolute necessity of Islamic faith—denial of which is disbelief—even though it is extrinsically *ḥarām* due to the

sanctity of others' wealth and not intrinsically forbidden (A. Khān, 2008, p.260; 2014, 2:164). This was also agreed in the 22nd Indian Majlis-e-Shar'ī fatwa (M. Miṣbāḥī, 2015).

4. Sexual intercourse during menses is also extrinsically forbidden, and like *ribā*, its prohibition is known with absolute certainty in the religion. Ibn 'Ābidīn (1992, 1:297) asserts some jurists did not declare its denial disbelief, as it was not intrinsically forbidden despite its ruling being absolutely certain. Nevertheless, he (1992, 2:292-3) preferred the view that it was disbelief.
5. Looking at the opposite gender of marriageable kin is innately permitted but prohibited due to the potential consequence of unlawful relations. Therefore, when this consequence is absent, looking is permitted. Hence, Shāfi'ī jurists declare the permissibility of a male to look at females for the purpose of necessary education (Suyūṭī, 1990, p.180), and almost all jurists permit both genders to look at each other before marriage (Kāfī, 2004, p.126).
6. Looking at the nakedness (*'awrah*) of an opposite gender of marriageable kin. Abū Zahrah (1997, p.303) and Kāfī (2004, p.126) permit medical procedures on this area where there is a *ḥājah* if the consequence of sin is absent.
7. The act of a woman uncovering her face in front of marriageable kin is a probable forbidden/disliked act due to external factors according to some jurists. In the Prophetic era, women did not cover their faces until jurists argued that people became weak in piety and God wariness, and due to moral and social factors, fatwas of covering the face were issued (M. Miṣbāḥī, 2014, p.478).
8. Bin Bayyah (2007, p.319) upholds that covering the hair for women is a probable compulsory act due to an external factor, namely that uncovering it opens the means to unlawful relations. Hence, uncovering the hair, in his view,

is not an intrinsically prohibited purpose, rather it is a prohibited means that leads to a prohibited end.

9. Men were banned from wearing gold, silver and silk to maintain gender distinction. Therefore, the Prophet permitted his companion ʻArfajah ibn Asad to have an artificial nose made from pure gold (Aḥmad, *ḥadīth* no.19006) as the purpose was a valid cosmetic one at the degree of *ḥājah* as there was no suitable alternative.
10. According to Bin Bayyah, receiving interest (*ribā)* is intrinsically prohibited as an end objective (2007, p.238), and the act of giving interest to another is prohibited as a means only, like accounting and bearing testimony for interest-based transactions. Therefore, Shāfiʻī and Ḥanafī jurists permit a person with a *ḥājah* to take an interest-based loan.[38]
11. A. Khān (1998, 14:552-558, 569, 576) issued several fatwas in 1920 asserting that it became extrinsically compulsory (*wājib li-ghayrihī)*, due to socio-political circumstances, that Indian Muslims continued slaughtering the cow in parts of India that had not yet banned the slaughter. He advocated it was extrinsically forbidden (*ḥarām li-ghayrihī*) to stop religious sacrifice of the cow in such places, as this implied a defamation of Muslim values and an eradication of an Islamic symbol (*shiʻār*), despite that intrinsically it is morally indifferent (*mubāh*), though with absolutely certain primary proofs.[39] Hence, theologically, no Muslim would differ on the admissibility of slaughtering the cow.

[38] Suyūṭī (d.1505) (1990, p.179), Ibn Nujaym (1985 p.91) and M. Miṣbāḥī (2009a, p.155) declare this is a personal *ḥājah* at the degree of *ḍarūrah*, a notion I discuss in Chapter 5.

[39] Another example of an absolutely certain indifferent is hunting animals after exiting the *iḥrām* (*Ḥāshiyah Ḥussāmī*, Anon, n.d., p.248, note 9).

Other sources that study the extrinsic forbidden include Abū Zahrah (1997, p.317), Anṣārī (2002, 1:436; 2:438), Bin Bayyah (2007, p.238), Ibn al-Najjār (d.1564) (1415AH, 3:92-6), Kāfī (2004, pp.43, 123, 126), Maḥbūbī (d.1347) (1998, 1:403-6), Sulamī (d.1262) (1997, p.192) and Zuhaylī (2006, pp.783-5). Ibn al-Qayyim (d.1350) (2004, pp.558-571) and Qarāfī (d.1285) (n.d., 2:82) are among the earlier sources and most explanatory of this prohibition.

The Ḥanbalī and Mālikī schools refer to that which is prohibited as an end purpose as *muḥarram al-maqāṣid*, against that which is prohibited as a means, i.e. *muḥarram al-wasā'il* (Bin Bayyah, 2007, pp.231, 320; Qarāfī, 1973, 2:33).[40] Bin Bayyah (2007) advocates that avoiding the former is at the degree of *ḍarūrah* and the latter is *ḥājah*, and that the prohibited ends override laws from absolutely certain texts, and prohibited means only override probable and 'weaker' texts. He implies the former is absolutely certain and the latter is probable, and thus they have varying degrees of effectiveness. I disagree with this and have shown that the prohibition of trade after the Friday call is proven from an absolutely certain text, though it is not intrinsically *ḥarām*. Therefore, the epistemic strength of the text must be separated from the kind of act itself as prohibitions of purposes can be probable, just as prohibitions of means can be absolutely certain.

[40] See: Chapter 2.

	Scriptural Proof Type	*Ḥarām* Ends	*Ḥarām* Means
Bin Bayyah	Absolutely Certain	✓	x
	Probable	x	✓
This Study	Absolutely Certain	✓	✓
	Broadly Certain	✓	✓
	Probable	✓	✓
	No Explicit Scriptural Proof	x	✓

Figure 13 Different Scholarly Approaches to *Ḥarām* Means and Ends and their Proofs

3.5.3.4 A Revised Intersection of Purposes with Varying *Ḥarām* Types

Modern studies on need and necessity unconditionally declare avoiding an intrinsic *ḥarām* at the degree of *ḍarūrah*, and extrinsic *ḥarām* at the degree of *ḥājah* (Amjūḍ, 2015, p.118; Kāfī, 2004, p.42; A. Miṣbāḥī, 2006 p.62; M. Miṣbāḥī, 2009a, p.84). However, they do not explain the kinds of proofs these are established from as I have presented above. Additionally, I disagree with this binary classification of the *ḥarām* types. Subsequent is a summary of the usages of the term *ḥarām* with reference to the taxonomy of purposes:

1. Intrinsic *ḥarām* from an explicit absolutely certain proof is undisputedly *ḥarām* in belief at the degree of *ḍarūrah*, such as adultery, disbelief and consuming *khamr*.
2. Intrinsic *ḥarām* from a broadly certain (e.g. general text) or probable proof (explicit/implicit) is at the degree of *ḥājah*. The former is a *ḥarām* in action (*maḍhhabī*) and the latter is a prohibitively disliked. For example, non-oral use of human blood or milk is prohibitively disliked (M. Miṣbāḥī, 2009b, p.75).
3. *Ḥarām li-ghayrihī* from an absolutely certain proof is at the degree of *ḍarūrah* 'if it destroys a fundamental value'. Examples include trading after the call to Friday prayer and breaking one's fast during the month of Ramadan (Q2:185).

4. *Ḥarām li-ghayrihī* from an absolutely certain proof is at the degree of *ḥājah* 'if it harms a fundamental'. For example, intercourse during menstruation (Q2:222) does not destroy the lineage of the child, yet the child is unlawful because of unlawful sex (M. Miṣbāḥī, 2009a, p.133).[42]
5. *Ḥarām li-ghayrihī* from a probable proof is prohibitively disliked. Refraining from it is therefore a *ḥājah*. For example, carrying and preparing *khamr* as mentioned above (M. Miṣbāḥī, 2009b, p.78).
6. *Ḥarām li-ghayrihī* innovation with no explicit scriptural proof and one that 'destroys a fundamental value'. Refraining from it is a *ḍarūrah*. An example of this would be formulating new theological arguments against the absolute necessities of Islamic faith.
7. *Ḥarām li-ghayrihī* innovation that has no explicit primary proof and 'harms a fundamental value' without jeopardising its existence is prohibitively disliked,[43] refraining from which is therefore a *ḥājah*. An example of this is formulating and disseminating novel theological arguments against absolute necessities of Sunnī creed.[44]

The logical relation between *ḥarām li-ghayrihī* and an explicitly proven *ḥarām* from primary proofs is therefore of generality and specificity (*'umūm wa khuṣūṣ wajhī*).[45] Some explicitly proven *ḥarām* acts are *ḥarām li-ghayrihī*, and therefore, some *ḥarām li-ghayrihī* acts are explicitly proven. However, some *ḥarām li-ghayrihī* acts are not

[42] Ibn 'Ābidīn (1992, 1:297) does not state whether it harms or destroys a fundamental.
[43] I have not seen a reference to this as extrinsic *ḥarām*, rather it is commonly referred to as the prohibitively disliked innovation.
[44] Safeguarding and teaching the articles of Sunnī creed is at the degree of need and safeguarding and teaching the absolute necessities of Islam is a necessity (M. Miṣbāḥī, 2009a, pp.66, 132).
[45] Like that between the colour 'white' and 'paper' i.e. some papers are white and some white items are papers, but some white items are not papers, like a white horse.

proven from primary proofs (i.e. innovations), and some *ḥarām* acts proven from proof-texts are not *ḥarām li-ghayrihī,* such as intrinsic *ḥarām*.

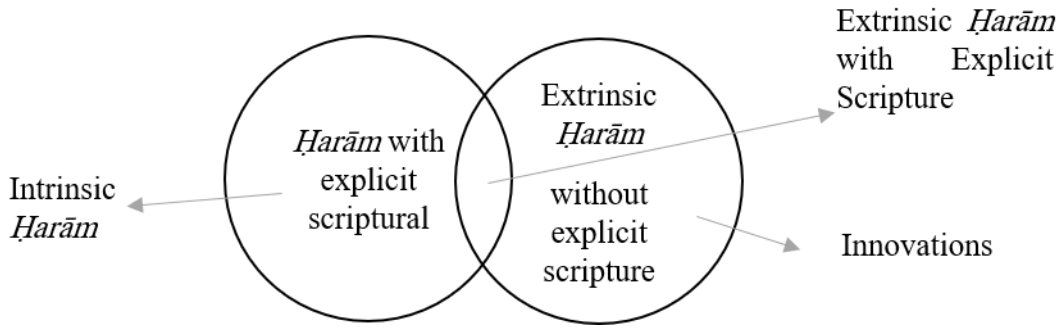


Figure 14 The Relation Between *Ḥarām* with Explicit Proof and *Ḥarām li-Ghayrihī*

	Prohibitions	**Commands**
Necessity	• Intrinsic *Ḥarām* (type one) • Extrinsic *Ḥarām* (types three, six)	• Undisputed Mandatory (absolutely certain)
Need	• Intrinsic *Ḥarām* (type two) • Extrinsic *Ḥarām* (types four, five, seven) • Wrong	• Disputed Mandatory (broadly certain) • Compulsory (probable) • Emphasised *Sunnah* (probable)

Figure 15 Revised Intersection of the Avoidance of Various *Ḥarām* and Observance of Command Types with Necessity and Need

3.6 Conclusion

This chapter elaborated various technical usages of the term *ḍarūrah* in works of *fiqh* and legal theory. These usages were organised into varying contexts based on whether the term implied merely destroying one of the fundamental values (religion, life, etc.) or harming it too without jeopardizing it. Considering these contexts, I observed that there were eight technical usages of the term. Existing academic literature does not organise or present the notion of *ḍarūrah* in such a comprehensive manner.

I elaborated that Shāṭibī's concept of *ḍarūrah*, which is widely studied in academic studies, is not intended to enact moral judgements for acts. A. Khān's approach places

all morally mandatory acts under *ḍarūrah*, whether there is a circumstance of constraint or not, and thus is the most comprehensive approach towards the term whilst distinguishing it from *ḥājah*. It is difficult to locate and assess, as it is sporadically scattered through his large fatwa collection.

Using A. Khān's approach to the five-fold classification of purposes instead of Shāṭibī's three-fold classification, this chapter examines moral laws considering:

- varying epistemic proofs, including broadly certain proofs in correlation with the types of textual commands/prohibitions
- the exact transmitted proof-types, like *mu'awwal* solitary *aḥadīth*
- refined classes of mandatory and forbidden
- possible areas of disagreement between the four Sunnī schools
- what constitutes sin in Islamic law according to all jurists or some jurists, and what does not at all.

In terms of moral laws, I conclude:

- Not every mandatory/forbidden judgement is agreed upon by jurists.
- Not every act termed *ḥarām* is intrinsically forbidden, absolutely certain and undisputed, and neither is it necessarily established in explicit scripture.
- Extrinsic *ḥarām* can be at the degree of *ḍarūrah* or *ḥājah* and has five types. Hence, it is not always probable, contrary to M. Miṣbāḥī's claim (2009b, p.139).
- Probable *ḥarām* and prohibitively disliked are used in varying meanings and sometimes synonymously in Ḥanafī sources, yet both are at the degree of *ḥājah*.
- Based on the above, 'not allowed' can refer to any type of *ḥarām* mentioned and 'prohibitively disliked', varying from *ḍarūrah* to *ḥājah.*

- Some Ḥanafīs used the term ‘disliked’ for forbidden ‘means’ that are proven from absolutely certain proofs, which was unnecessary.
- It is posited that the ‘forbidden’ could be divided according to the division of ‘mandatory’ and in context of the broadly certain proof.

I explained that the extrinsic *ḥarām* may be theologically equal to the prohibition of consuming *khamr*—whose denial is disbelief—as elaborated by A. Khān and Ibn ʿĀbidīn in the examples of *ribā* and intercourse during menses. I also divided the extrinsic *ḥarām* into two degrees, necessity and need, using the reasoning of classical scholars that divided innovation according to its degree of harm. An interesting example for such a *ḥarām* is of slaughtering cows, an act intrinsically indifferent with absolute certainty, yet A. Khān argued abolishing it entirely was extrinsically forbidden due to socio-political factors in India.

In modern biomedical and legal discussions, I suggest that terms for moral laws ought to be standardized to avoid confusion and to maintain consistency and clarity regarding the hierarchical order of laws in the taxonomy of purposes. I propose that the unconditional use of *ḥarām* should be exceptionally used for the undisputed and absolutely certain type, ‘probable *ḥarām’* and *ḥarām maḍhhabī* for the ‘*ḥarām* in action’ and acts declared *ḥarām* by individual schools and with a broadly certain proof, and ‘prohibitively disliked’ for prohibitions with probable proof in the narrowest context or if the matter is a novelty.

A. Khān’s study of moral laws with their proofs does not mention the difference between the two types of *sunnah* and slightly offensive from wrong; this is a gap I filled, based on his research, to further refine the types of *ḥājah* in moral laws.

In terms of the proofs for moral laws:

- I increased the possibilities of proof types for moral laws to 48.
- I explained that not every proof text termed ‘certain’ signifies undisputed absolute certainty.
- I argued that A. Miṣbāḥī (2006) did not accurately separate between *ḥarām* proved from broadly certain proofs and the undisputed *ḥarām* .
- Not every proof termed ‘probable’ is in the narrowest meaning as mandatory acts within schools are proved from broadly probable proofs.
- According to my refined revision of the Ḥanafī legal moral theory, every absolutely certain proof establishes an undisputed mandatory and forbidden where the text is bindingly prohibitive; every broadly certain proof establishes a disputed mandatory and forbidden where the text is bindingly prohibitive; every probable proof establishes a compulsory and prohibitively disliked judgement where the text is emphatically prohibitive. These are the most important moral laws in relation to medical questions as they entail immediate sin according to at least one of the legal schools.

In terms of purposes of law and agents, I conclude the following:

- Readers must differ between necessity in its broad vs. narrow and concessionary vs. non-concessionary meanings.
- According to A. Khān’s approach, all undisputed moral mandatories fall under necessities as opposed to Shāṭibī’s approach. Thus, Safian (2010) erred in asserting that Shāṭibī’s embellishments only included permissible acts.
- All disputed moral laws, where the primary text is either binding or empathic, fall under needs and not necessities, despite the possibility that one may find jurists referring to disputed obligatory acts of their school as necessities.
- Something declared a *ḥājah* in one school is not necessarily a *ḥājah* in another.

- All needs and necessities are not established from explicit proof-texts. Classical scholars declared some innovations as necessities and needs by way of analogy, *istiṣlāḥ* or inclusion under general scriptural texts and legal maxims.
- Carrying out a novel act lacking explicit primary proof that protects one of the five fundamentals is a *ḍarūrah,* despite classical texts referring to it as a compulsory act and not obligatory.
- Abstaining from an innovation that brings destruction to any fundamental value is at the degree of *ḍarūrah,* though it is extrinsically forbidden.

Some absolutely certain proofs establish slightly disliked and undesirable acts avoiding which are embellishments. This opposes Bin Bayyah's view who confines absolute certain proofs to necessity without a qualitative evaluation of the proof's language.

This chapter intersects the spectrum of moral laws, with its intricacies, with the taxonomy of objectives including necessity and need, and reveals several gaps and inconsistencies in studies of terms and concepts.

Chapter 4. A Critical Study of the Conditions for *Ḍarūrah* and *Ḥājah*

4.1 Introduction

In the previous chapter, I demonstrated that the Majlis-e-Shar'ī of Mubarakpur defines necessity as a circumstance of extreme constraint in which one of the fundamental values is endangered. In such circumstances, a forbidden means may or may not be sanctioned to protect the threatened value, depending on which of the two is more important in the scripture in that case. This chapter aims to set out the controls and limitations for the concessionary concepts of necessity and need in which prohibited means are permitted.[1] I will broaden the discussion on necessities from those in the scripture and legal works of the four schools to novel cases counted as *maṣlaḥah mursalah* with focus on the preservation of life and body. This chapter, therefore, does not study necessities that are intrinsically obligatory, although acts may become obligatory by virtue of the necessity.

Additionally, Islamic law requires its followers to bear some degree of difficulty in carrying out its laws. Such required acts of hardship and harm are not incorporated in this study of need or necessity.[2]

4.2 Conditions for a Valid *Ḍarūrah* and *Ḥājah*

To declare necessity legally valid for which a prohibited act can be justified, it must meet a certain criterion. Below are the conditions I gathered from various legal texts

[1] In normative ethics, such circumstances are termed 'doctrine of double effect' (Thomson, 1999, pp.138-141).
[2] Like *ḥudūd* punishments and acts of worship that must be performed despite difficult weather conditions (Ibn Nujaym, d.1563, n.d., 1:268; A. Miṣbāḥī, 2006, p.26).

that establish a valid necessity that permits prohibited means (A. Miṣbāḥī, 2006, p.50; M. Miṣbāḥī, 2009a, p.95; Zuḥaylī, 1985, 4:2603):

1. Extreme hardship must genuinely exist to relax laws, or an established future possibility of severe harm to one of the five primary purposes, for example, losing one's life or bodily function must be highly probable (*ẓann ghālib*) or empirically certain.[3]
2. The necessity must be genuine according to the values/purposes of the Islamic law.
3. There must be high probability or empirical certainty that the alternative means will ward off necessity.
4. A permissible means must be absent to utilise the prohibited means to ward off harm.
5. One may only commit a prohibited act if the experts regarding that act verify and endorse it relieves hardship.
6. The necessity of another person can become a duty of the one who can alleviate it. Thus, it is not a condition that the necessity is one's own to relax laws.
7. Necessity must only be accommodated by an amount that eliminates it.
8. Lastly, the utilisation of a forbidden means must not incur an equal or greater level of harm.

I gathered the following conditions for a valid need (*ḥājah*) that sanctions some forbidden acts to circumvent harm (Amjūḍ, 2015, p.110; A. Miṣbāḥī, 2006, p.62; Dardūr, 2014, pp.456-66):

[3] See: Chapter 2.

1. The need must be in accordance with the purposes of the Islamic law; it must serve a valid purpose to repel harm or hardship from one of the five fundamentals and must not be utilised as a sanctioning tool beyond its scope.
2. The need must be present or highly probable for it to relax laws and extenuate people and a mere possibility of harm or hardship will not qualify the need as valid.
3. Circumventing hardship in a need must not endanger something at the degree of necessity. A need therefore must not beget a greater harm.
4. It must not comprise a justifiable degree of hardship which is acceptable and commonly present in prescribed religious acts and observances.
5. The circumstance of hardship or harm in a need must be mitigated by an amount of certain forbidden means that eliminates it and not more than it.

4.2.1 A Critical Analysis of the Conditions of *Ḍarūrah*

4.2.1.1 Condition One: Presence or Imminence of Hardship

Bā Ḥusayn (1416AH, p.438) and Zuḥaylī (1985, 4:2603, 2612) advocate a necessity is established by way of certainty or probability that one will die, and a person is not required to remain patient to the point of death for a necessity to establish. Nafrāwī (d.1714) (1995, 2:286), a Mālikī, and Nawawī (d.1277) (1997, 9:41), a Shāfi'ī, also expressed this view. Bin Bayyah (2007, p.193) cites Zurqānī (d.1710), from the Mālikī school, who asserts that the probability (*ẓann*) of death suffices to establish a necessity; certainty is not required. According to my study of terms in Chapter 2, 'probability' possibly means the narrowest type of probability (*ẓann akhaṣṣ*), which refers to both mere probability and high probability, because it is contrasted with certainty in an

empirical context, and is mentioned unconditionally.[4] For example, there will be empirical certainty regarding the imminent death of someone who is brutally injured in a way that habitually ends life, and high probability, if the injury mostly results in death but not always.

According to Ḥanafīs, mere probability is not enough to establish a necessity. Ḥamawī (d.1687) (1985, 1:255), a Ḥanafī, asserts, "a highly probable inevitable matter, is as though it actually exists" (*al-ghālib ka'l-mutaḥaqqaq*). On this basis, M. Miṣbāḥī (2009b, p.39) argues that where there is a high probability (*ẓann ghālib*) that patients will turn up for blood transfusions, it is permissible to form blood banks to attend their necessities and needs if monitoring is carefully observed. Ibn 'Ābidīn (1992, 4:422) espouses that 'high probability' is established in either of the three ways: a) physical signs of the patient; b) patient experience; c) and advice of a highly skilled non-transgressing[5] Muslim physician.

There appears to be agreement that a speculative future possibility (*iḥtimāl*) of losing life or a limb, bereft of the three means to reach high probability, does not constitute a valid necessity (Bā Ḥusayn, 1416AH, p.438).[6] Hence, 'absolute certainty' and a 'present' state of extreme hardship are not required for the laws of necessity to take effect. When reading the writings of M. Miṣbāḥī (2009a, p.93), Bā Ḥusayn (1416AH, p.442) and A. Miṣbāḥī (2006, p.50) on necessity, the former point is not elaborated, though M. Miṣbāḥī (2014, p.171) later elaborated this in a marginal note on the resolution of the Indian Majlis-e-Shar'ī on necessity. I believe Kāsānī's example

[4] See: Chapter 2 on terms.
[5] Someone who observes religious duties and does not publicly commit prohibited acts i.e. *mastūr*.
[6] Such a possibility was ruled out by the Majlis-e-Shar'ī of Mubarakpur (M. Miṣbāḥī, 2014, p.171).

(d.1191) (1986, 7:177) explains this further, “if someone is threatened of starvation by someone unless he commits a [forbidden] act, it would not be permissible to commit it unless his hunger reaches a point in which he fears the loss of life or limb.” Thus, having reached the point of death is not a condition to establish a necessity, rather reaching a point in which a genuine highly probable fear for it develops is enough. In the discussion of *tayammum*, Kāsānī (1986, 1:148) argues that, “being afraid of the cause that leads to death is like being afraid of death itself,” both of which permit breaking an absolutely certain obligatory fast, leaving the absolutely certain position of standing in obligatory prayer and performing dry ablution with an injury or small pox, if there is fear that the illness will increase with water. In the chapter of coercion, Kāsānī (1986, 7:176-7) reinforces that necessity is only established when the coerced believes, with preponderant conviction (*ẓann ghālib*), that the coercer will inflict severe harm. Therefore, if he believes, with preponderant conviction, that the coercer will not inflict harm if he remained patient and abstained from consuming carrion (forbidden with absolute certainty) to the point of life-threatening starvation, he must not hasten to eat it. If the coerced has preponderant conviction that even if he waited to the dire circumstance, the coercer would not retract, consuming the carrion is permissible for him immediately before the circumstance of dire starvation rises.

4.2.1.2 Condition Two: Genuine Hardship

For either need and necessity to be valid, they must be genuine and acceptable according to the Islamic law. This means the case for which an unlawful means is utilized must preserve one of the five fundamental purposes or repel harm from them without jeopardizing a greater interest or inflicting an unacceptable harm. Ghazālī (d.111) (1993, 1:174) accurately pointed that *maṣlaḥah* (interest) linguistically means to gain benefit, but in context of the Islamic law, it means to protect one of the primary

purposes of the law, and *mafsadah* (mischief) is anything that harms them. Self-interests unfounded in the scripture and texts of law cannot be deemed necessities or needs. I will elaborate the types of valid interests in conflict scenarios subsequently in this chapter and the next.

4.2.1.3 Condition Three: High Probability or Certainty in the Efficacy of Means

The Majlis-e-Shar'ī of Mubarakpur stipulated this in its resolution on necessity (no.10, 1998) (M. Miṣbāḥī, 2014, p.171). In my observation, there is a difference of opinion among Sunnī jurists regarding the epistemic degree of the alternative's efficacy in repelling harm in different dilemmas of necessity. Abū Yūsuf (d.798), for example, is elaborated to have held that mere probability was enough for one to orally consume a forbidden medicine like camel urine to repel greater harm if there is no alternative, though the standard fatwa position of the Ḥanafī school is that of Abū Ḥanīfah (d.768), which requires certainty of efficacy (M. Miṣbāḥī, 2009b, p.47). If there is empirical certainty (*yaqīn 'ādī*), there is no dispute that utilising forbidden medicine is permissible and in fact obligatory in some circumstances. [7] In the classification of prohibited acts in the next chapter, I will present examples of double effect, like rescuing an unborn child, wherein classical Ḥanafī jurists do not stipulate high probability/certainty in the efficacy of the means to sanction acts. This is also the case with examples of duress to suicide mentioned later in this chapter.

Ghazālī (1993, p.180) took a cautious approach towards necessities in saving lives by a novel means.[8] In his view, if the novel means opposes absolutely certain scripture and does not have a similar precedent, and thus, cannot be judged by analogy, it is only

[7] See: Chapter 6.
[8] This is a *maṣlaḥah mursalah* and I will elaborate his position subsequently.

permissible if there is certainty in its efficacy and its benefit is universal for all Muslims. For example, he upheld that a person in dire starvation would only be permitted to cut a piece of his thigh and consume it if there is certainty that this will save his life, because this is an interest without precedent, otherwise it is forbidden and such certainty cannot be reached. This is contrary to the soundest view in the Shāfi'ī school as I will elaborate under Prohibited Type Three Acts in the next chapter. In contrast, Ghazālī (1993) permits a person severely affected by gangrene[9] to amputate his hand to save life because it is analogous to making an incision in the body for cupping and bloodletting, wherein minimal harm to the body is caused to repel a greater harm.

4.2.1.4 Condition Four: Lack of Permissible Means

Lack of immediate resources or timely inaccessibility to an alternative means to avert hardship in a necessity or need ought to be added to absent alternatives when the chances to obtain an alternative are unlikely or doubtful. The reason for this is because jurists do not base judgements on unlikely and dubious circumstances, and the certainty or high probability of the necessity/need takes precedence over the unlikeliness of the alternative provision. In the next two chapters, I will further look at lacking alternatives in widespread problems and medical needs.

I found that this condition was sometimes compromised in certain cases. For example, in life threatening starvation, the *muḥrim*[10] is allowed to consume game instead of pork because the latter's prohibition is severer in the Qur'an according to Shaybānī. However, if there is a dog, a game is not permitted as its prohibition is lesser (Ibn

[9] A medical condition in a limb that either engenders severe pain or loss of sensation because of diabetes, atherosclerosis and peripheral arterial disease (NHS, 2018a).

[10] A person in the state of *iḥrām* for pilgrimage in which there is restriction on hunting.

‘Ābidīn, 1992, 2:267; Ibn Nujaym, 1985, 1:289; Zayla‘ī, 1313AH, 2:386) and this is an excusable alternative, though it is not intrinsically permissible to consume.

4.2.1.5 Condition Five: Consulting Expert Opinion

Zuḥaylī (1997, p.65) added this condition and it categorically confirms the importance of having a multi-disciplinary approach on bioethical matters and that legally a fatwa on such matters cannot be sound unless it consults experts of the field of medicine. Sarkhasī (d.1096) (13:110) says, “on any matter, the opinion of the people of expertise is to be turned to, such as in ascertaining the monetary value of a product. This is based on the Qur’anic statement, “so ask the people of remembrance if you do not” [Q16:43].” Ibn Qudāmah (d.1423) (1984, 6:109), a Ḥanbalī, Zarkashī (d.1392) (1985, 2:256) and Nawawī (1997, 7:83), both Shāfi‘īs, upheld that in order to ascertain the severity of a life threatening condition, the opinion of two expert and reliable Muslim physicians was required.[11] Ḥanafīs uphold that a single reliable Muslim physician’s testimony, patient experience and present symptoms can also establish a necessity (Ibn ‘Ābidīn, 1992, 4:422).[12]

4.2.1.6 Condition Six: Necessities of Others

The only source I discovered that added this condition is the Majlis-e-Shar‘ī of Mubarakpur in its resolution on necessity (no.10, 1998). It advocates that wherever there is evidence that another person’s necessity becomes a responsibility of another in the Islamic law, that is where the rule of necessity will override proscriptions for a person who is not directly in the circumstance of necessity (M. Miṣbāḥī, 2014, p.170). Examples include, leaving obligatory prayer to rescue a drowning person if one has the

[11] See: Faraj (2016) for a detailed study on consulting expert opinion in fatwas.
[12] See: Chapter 6.

ability, even if the time of prayer lapses, and the midwife delaying obligatory prayer to save the life of a child during labour when it is endangered (M. Miṣbāḥī, 2014, p.168; Shurunbulālī, d.1659, 2002, p.381).

I found a similar example in Shāfi'ī texts regarding one's animals. Nawawī (1997, 9:89) declares if there is no alternative, it is 'morally compulsory' for the owner of a dog that is suffering dire starvation to feed it and save its life even if he must snatch the sheep of another person[13] who is not in a similar situation. Quoting another example, a person is deemed sinful for travelling for the obligatory pilgrimage whilst leaving his dependants without enough provisions to sustain normal lives; however, there is no sin if he fears that someone who he is not legally responsible for will die, though it is disliked (Shaykh Niẓām, 1310AH, 1:221). Zuhaylī (1985, 4:2615) asserts it is morally compulsory on a person to share his food with someone in dire necessity if he is not in the same circumstance. Sarakhsī (d.1096) (1997, pp.171, 174, 193) categorically acknowledged food in excess of one's benefit has the right of other needy people connected to it and that one is sinful for eating an amount harmful to his health as it impinged on the rights of others.[14] He (1997, p.186) asserted that if a neighbour died of starvation and the locals knew of his condition yet abstained from helping him, they are all sinful.

In moral ethics, this condition corresponds to the doctrine of acts and omissions wherein moral theorists hold that people are culpable for omissions where they have ability to prevent bad things happening to others (Baggini and Fosl, 2010, pp.114-116; Thomson, 1999, p.36). In the next chapter, I will present life-threatening scenarios in which people may offer to save another by allowing bodily harm to themselves and juristic

[13] Where the owner refuses to sell the sheep, and he is compensated.
[14] I will further discuss this in Chapter 6 as a preventative health measure.

differences regarding this. These scenarios will illustrate that sometimes an omission of an act is legally required despite entailing a highly probable risk of losing another life and so the rule of necessity has its limitations.

4.2.1.7 Condition Seven: Measured Mitigation of Necessity

This condition ensures quantitatively minimising harm caused due to necessity to repel greater harm. Jurists derived it from various laws; two of them are the following:

1. A person is only allowed to steal/snatch an amount of someone else's possessions in life-threatening cases that can relieve him from the necessity without incurring any sin (A. Zarqā, 2012, p.188).
2. According to most jurists, a person in dire hunger is only allowed to consume an amount of forbidden food that saves one from dying based on scripture (Q2:173). Mālik (d.795) advocated that he can eat to satiation since God had excluded certain forbidden substances under necessity (Jaṣṣāṣ, d.982, 1984, 1:16; Nafrāwī, 1995, 2:286). Shāfi'ī initially upheld that consuming the forbidden substance to satiation is allowed but later he retracted from this opinion (Nawawī, 1997, 9:44; Zuhaylī, 1997, p.304).

Ghazālī (1971, p.245) espouses that if there is an extinction of lawful foods to the degree it endangers the lives of most people, they can eat unlawful foods in excess of the necessary amount because prohibiting this would lead the entire Muslim community to sickness and ruin, in effect, jeopardizing the Muslim rule and state from normal

functioning.[15] I have not seen the latter discussed in Ḥanafī sources and agree with its reasoning.[16]

This rule also applies to need and therefore a physician must not look at and touch an area of another's nakedness beyond the need of examining symptoms or treatment. Similarly, a patient wearing a bandage on a wound must not cover an area more than required for healing, as the sound part of the body must be washed in bathing and ritual ablution (Amjūḍ, 2015, p.116).

4.2.1.8 Condition Eight: Avoiding Equal or Greater Harm

This condition stipulates that if the means to save a fundamental value like life or body functions inflicts an equal or greater harm, quantitatively or qualitatively, it cannot be utilised to ward off a circumstance of necessity. Classical texts (Ibn Nujaym, d.1563, 1999, 1:76-7; Suyūṭī, d.1505, 1990, p.86; Zarkashī, 1985, 2:321) stipulate this in the following legal maxims: "one is bound to take the lesser of the two evils;" "harm must not be eliminated by an equal harm;" "a qualitatively greater harm is mitigated by the smaller harm." Similarly, a harm in need affecting a fundamental value cannot be accommodated if it endangers greater harm to any of the values like jeopardising its existence (Amjūḍ, 2015, p.119). Subsequent are some examples where this condition is met:

[15] A detailed discussion on this is subsequent in the next chapter where I will elaborate his teacher, Juwaynī, created this example.

[16] Ḥanafī jurists accept novelties mentioned in texts of other schools if they do not contradict the rules of their school (Calder, c2006, XVI:222). See, for example, the phrase *qawā'idunā* in Ibn Nujaym (n.d., 2:216, 337, 3:309, 5:32, 6:290).

a. To save one's life, a person dying from hunger cannot snatch the food of someone else also dying of starvation if it only suffices the owner (Ibn Nujaym, 1985, 1:279).

b. If a person is coerced by death to jump off a cliff, and it is a height from which there is a possibility of surviving, the coerced must jump to save his life. If there is no chance of survival, Abū Ḥanīfah advocates the coerced can chose either of the two equal harms, whereas Shaybānī (d.805), his student, asserts that he must not jump as this is identical to suicide (Atāsī, d.1908, n.d., 1:70; Kurdī, 2012, p.71). It is evident that jurists who permit jumping in this case do not follow the condition of the high probability of success in taking forbidden means where the case of double effect is life-endangering either way.

c. If one is coerced by death to jump into fire or is on a boat which is on fire in the ocean, a person is allowed to choose whichever he regards to be the lesser harm according to Abū Ḥanīfah and one opinion of Abū Yūsuf (Dāmād Afandī, d.1667, n.d., 2:434). Shaybānī presented four scenarios: a) if he has hope in surviving in both acts although he fears possible death, he can choose either of them, b) if he has certainty of dying in one act and some hope of survival in the other, he must act to save himself, c) if he has certainty that both acts will entail death, he must remain patient and must not throw himself overboard and d) if the fire reached him and only then he realised and decided to jump, he is excused (Sarakhsī, 1971, pp.1509-10). Abū Ḥanīfah advocates that waiting in the boat for the fire to reach him is an act of the agent like jumping into the water, so he has a choice before it reaches him (Sarakhsī, 1971).[17]

[17] The modern phenomena of jumping out of a tall building in a life endangering fire is analogous to this.

4.2.2 Counterbalancing Conflicting Interests in New Ethical Circumstances

In Chapter 2, I observed that when assigning ethical-legal judgements to unprecedented cases by *istiṣlāḥ*, a *muḥaqqiq* must weigh conflicting interests and harms. Such cases have no clear solution in scripture and do not have an analogous precedent (*nazīr juz'ī*) to which they can be linked. Here I aim to weigh *ḍarūrah* as a *maṣlaḥah mursalah* with conflicting interests from the five fundamental values. Ghazālī's cases of cannibalising one's thigh and extinction of halal are examples of such a necessity to save life.

In his assessment of studies on the relationship between the five fundamental values and their prioritisation, Kamali (2008, p.16) declared that the academic discussion is still in its early stages. Having surveyed existing academic research, I found that to appraise the degrees of benefits/interests and harms, three aspects must be considered (Amjūḍ, 2015; p.122; Auda, 2008b, p.18; Mutairi, 1997, p.180; Safian, 2010):

1. the levels of interests by prioritising the fundamental values
2. the scope of these values
3. the possibility of their realisation.

Regarding the fundamental values, most Muslim jurists prioritised them in the following order: religion, life, intellect, lineage and property—with the last interest being the least important in circumstances of conflict. So, in the case of conflict between these, the modern and classical literature on legal maxims and *maqāṣid* regarding necessity overwhelmingly agree that circumstances preserving religion come before those that preserve life, and Ghazālī was the first jurist to point out this hierarchy (Auda, 2008b, p.18).[18] Each of these values has three degrees of importance which must

[18] Zuḥaylī (1998, 2:1056) notes that Ghazālī placed lineage before intellect but this is contrary to the latter's *al-Mustaṣfā* (1993, 1:174).

also be distinguished: necessities, needs and embellishments. Therefore, the spectrum of possible conflicts is two-dimensional:

a. In the context of 'a single value', e.g. life, the necessities precede needs and embellishments.
b. In the context of a conflict between the varying degrees of 'two different values', e.g. needs of religion against necessities/needs of life. On this aspect, Western academic discussions are scarce. For example, Mutairi (1997), Shahzad (2009) and Auda (2008a) only point in this direction, and Safian (2010) almost overlooks it in its entirety.

As for the scope, some interests may affect a larger number of people than others. Thus, public interests can conflict with private interests at different degrees. Though the above cited academic studies point to this aspect, they avoid applying the theory into principle cases by combining the possible circumstances of conflicts, to identify prioritised solutions, particularly when the degrees of interests vary in two different values. For example, these studies mention individual needs of wealth against public needs of wealth (in the same value) but ignore private religious necessity against public necessity/need of life (in different values). I aim to fill the mentioned gaps in this chapter to reveal a holistic image of how Islamic moral theory seeks to reduce harm and weighs varying competing interests in a broad context in the absence of scripture and legal precedent.

4.2.2.1 A Qualitative vs. Quantitative Study of Counterbalancing Conflicting Interests

I explained above that academic literature is limited in what it offers regarding conflicting interests (*maṣāliḥ*) when they conflict at different degrees of benefits/harms.

To carefully study the possible conflicts, it is important to arrange the types of interests (i.e. necessity, need and embellishment) in order of the greater to lesser harm which they entail, both qualitatively and quantitatively, as follows (Ibn ʿĀshūr, 2001, p.299; Kurdī, 2012, p.71; Sulamī, d.1262, 2000, 1:41-2):

a. Qualitative order of interests descending from greater harm to least:
    1. Necessity
    2. Need
    3. Embellishment[19]
b. Quantitative order of types of interests descending from greater harm to least:
    1. Great/public (*ʿām*), i.e. affects a larger number, e.g. greater necessity.
    2. Small/private (*khāṣṣ*), i.e. affects a smaller number, e.g. smaller need.

In total, there are six possible types of interests, at varying degrees, when correlated with quantity (three qualitatively different interests multiplied by two quantitatively different interests). In addition to this, there are five fundamental values in which these six degrees can be present. In total, there are 30 possibilities as visible in Figure 16.

[19] Here Shāṭibī's term is used to broadly include 'benefit' and 'beauty' represented in A. Khān's approach. See Chapter 3.

Conflict of Interests	Great Necessity	Small Necessity	Great Need	Small Need	Great Embellishment	Small Embellishment
Great Necessity	x	GNC	GNC	GNC	GNC	GNC
Small Necessity	GNC	x	SNC	SNC	SNC	SNC
Great Need	GNC	SNC	x	GND	GND	GND
Small Need	GNC	SNC	GND	x	SND	SND
Great Embellishment	GNC	SNC	GND	SND	x	GE
Small Embellishment	GNC	SNC	GND	SND	GE	X

Red: Great necessity (GNC) dominates **Blue:** Small necessity (SNC) dominates.
Green: Great need (GND) dominates **Grey:** Small need (SND) dominates. **Orange:** Great embellishment (GE) dominates **White (x):** Interests are equal

Figure 16 Counterbalancing 30 Conflicting Interests in a Single Fundamental Value (e.g. human life)

Regarding need and necessity, Figure 16 reveals the following:

1. Great/Public necessity (red) is the strongest interest and always overrides competing interests, lesser in harm, and thus has five scenarios. The lesser interests are a ‘smaller’ necessity, ‘great’ and ‘small’ needs, and ‘great’ and ‘small’ embellishments. For example, saving lives of a hundred dying people takes priority over healing one thousand ill people in non-life-threatening cases.
2. Small/Private necessity (blue) has four possible scenarios of conflicting interests. They are a ‘great’ and ‘small’ need, and a ‘great’ and ‘small’ embellishment all of which is overridden by necessity. For example, saving one life takes priority over treating ten ill people in non-life-threatening cases.
3. Great/Public need (green) overrides three scenarios of conflicting interests, namely, ‘small’ need, and a ‘small’ or ‘great’ embellishment.
4. Small/Private need overrides two possible scenarios of conflicting interests, namely, ‘small’ or ‘great’ embellishment. For example, the provision of a hundred prosthetic legs to disabled people is more important than spending

limited resources on something less important regardless of how much pleasure it brings.

According to Condition Eight of necessity, a harm cannot be inflicted to ward off a harm that it equates to. In novel cases, equality means belonging to the same fundamental value and the same degree of interest. Hence, a qualitatively small/private necessity of life does not overrule a similar one. The six boxes marked with a cross in Figure 16 represent this rule. A legal precedent is that of a breastfeeding mother who is not permitted to abort a living foetus in a highly likely circumstance that her new born will draw near death because her breast milk has finished whilst the father does not have sufficient money to hire a wet nurse to breast feed it (Atāsī, n.d.,1:57). The parents are to do what is in their reasonable means to care for both lives and trust God having exhausted their means.

The pivotal rule to understand here is that, in Sunnī legal theory, a qualitatively higher degree of interest can never be overridden by a lower one, even if it is quantitatively greater. For example, necessity can never be overridden by need, even it is affecting a greater number, and likewise, need can never be overridden by embellishment in any case. We can apply this rule to physicians that must morally and legally provide immediate assistance to a dying person requiring oxygen (qualitatively smaller necessity) over assisting five patients who have broken their arms in non-life-threatening conditions (greater need). This approach, therefore, is contrary to the moral theory of utilitarianism which aims to maximise happiness for a greater quantity without discriminating qualitatively.[20] Triage at hospitals follow similar rules, where detailed scoring systems are used to identify degrees of harm[21] to prioritise patients

[20] See discussion on resource distribution subsequently.
[21] See: Rull, G. (2014), UK MHTS (n.d.) and University College London Hospitals (n.d.).

with both physical injury and mental health problems. Further research is needed to intersect these systems with the Islamic discourse on need and necessity.

4.2.2.2 A Holistic Appraisal of Conflicting Interests

Existing academic research in English, as cited above, briefly mentions that the higher interests override lower interests but do not provide a comprehensive study. Secondary sources on interests in Urdu and Arabic delve deeper into the conflicting possibilities. In Urdu, A. Miṣbāḥī (2006, pp.51-55) for example, counterbalances conflicting interests qualitatively (necessity vs. need) but does not present a comprehensive analysis of quantity or details of conflicts with opposite values, other than the oft-cited exceptions of saving life under coercion. Kurdī (2012) counterbalances the five values, qualitatively and quantitatively in context of the degrees of harms/benefits but does not study conflicts between different values (e.g. religion vs. life).

Below I will attempt to counterbalance every possible interest, quantitatively and qualitatively, in the context of conflicts that arise within a single value and between different values. Based on a holistic reading of sources on prioritizing interests, I have formulated three rules that weigh and solve all conflict scenarios:[22]

Rule One. When competing interests belong to the 'same degrees' and differ in the 'value types', the highest values will override the lower types. See Figure 17 (green shade).

Rule Two. When conflicting interests belong to 'different degrees', the greater degrees will supersede regardless of the 'type of value'. See Figure 18.

[22] See applications subsequently in this chapter.

Rule Three. When conflicting interests belong to the ‘same degrees’ of the ‘same value types’, the interests of a larger quantity will outweigh the interests of a smaller quantity. See Figure 17 (blue shade).

Note that the ‘degrees’ are necessity, need and embellishment, and the ‘value types’ are the fundamental values, namely religion and self, etc.

		Necessity					Need					Embellishment				
		R	S	I	L	W	R	S	I	L	W	R	S	I	L	W
Necessity	R	R-G	R	R	R	R										
	S	R	S-G	S	S	S										
	I	R	S	I-G	I	I										
	L	R	S	I	L-G	L										
	W	R	S	I	L	W-G										
Need	R						R-G	R	R	R	R					
	S						R	S-G	S	S	S					
	I						R	S	I-G	I	I					
	L						R	S	I	L-G	L					
	W						R	S	I	L	W-G					
Embellishment	R											R-G	R	R	R	R
	S											R	S-G	S	S	S
	I											R	S	I-G	I	I
	L											R	S	I	L-G	L
	W											R	S	I	L	W-G

R: Religion **S:** Self **I:** Intellect **L:** Lineage **W:** Wealth **G:** Greater in Quantity

Figure 17 Conflicts of ‘All Types’ of Interests (religion, etc.) in the ‘Same Degrees’ (necessity, etc.)

Highlighted boxes in Figure 17 provide the following solutions to conflicts:

Green: conflicting interest degrees are the same, but the value types are different, and therefore, the highest types dominate.

Blue: conflicting interest degrees and value types are similar, and thus, the quantitatively greater type (abbreviated "G") dominates.

		Necessity					Need					Embellishment				
		R	S	I	L	W	R	S	I	L	W	R	S	I	L	W
Necessity	R						RNC	R	R	R	R	RNC	R	R	R	R
	S						S	SNC	S	S	S	S	SNC	S	S	S
	I						I	I	INC	I	I	I	I	INC	I	I
	L						L	L	L	LNC	L	L	L	L	LNC	L
	W						W	W	W	W	WNC	W	W	W	W	WNC
Need	R	RNC	S	I	L	W						RND	R	R	R	R
	S	R	SNC	I	L	W						S	SND	S	S	S
	I	R	S	INC	L	W						I	I	IND	I	I
	L	R	S	I	LNC	W						L	L	L	LND	L
	W	R	S	I	L	WNC						W	W	W	W	WND
Embellishment	R	RNC	S	I	L	W	RND	S	I	L	W					
	S	R	SNC	I	L	W	R	SND	I	L	W					
	I	R	S	INC	L	W	R	S	IND	L	W					
	L	R	S	I	LNC	W	R	S	I	LND	W					
	W	R	S	I	L	WNC	R	S	I	L	WND					

R: Religion **S:** Self **I:** Intellect **L:** Lineage **W:** Wealth **G:** Quantitatively Greater **NC:** Necessity **ND:** Need

Figure 18 150 Conflict Possibilities Between 'All Types' of Interests in 'Different Degrees'

Highlighted boxes in Figure 18 provide the following solutions to conflicts:

White: conflicting degrees are different (e.g. necessity vs. need) as well as the value types (e.g. self vs. religion), so the higher degree is prioritised and not the fundamental type.

Blue: conflicting interests belong to the same fundamental types (e.g. self vs. self), and the highest degree (e.g. necessity) is prioritised.

		Necessity					Need					Embellishment				
		R	S	I	L	W	R	S	I	L	W	R	S	I	L	W
Necessity	R	R-G	R	R	R	R	R	R	R	R	R	R	R	R	R	R
	S	R	S-G	S	S	S	S	SNC	S	S	S	S	SNC	S	S	S
	I	R	S	I-G	I	I	I	I	I	I	I	I	I	I	I	I
	L	R	S	I	L-G	L	L	L	L	L	L	L	L	L	L	L
	W	R	S	I	L	W-G	W	W	W	W	W	W	W	W	W	W
Need	R	R	S	I	L	W	R-G	R	R	R	R	R	R	R	R	R
	S	R	SNC	I	L	W	R	S-G	S	S	S	S	SND	S	S	S
	I	R	S	I	L	W	R	S	I-G	I	I	I	I	I	I	I
	L	R	S	I	L	W	R	S	I	L-G	L	L	L	L	L	L
	W	R	S	I	L	W	R	S	I	L	W-G	W	W	W	W	W
Embellishment	R	R	S	I	L	W	R	S	I	L	W	R-G	R	R	R	R
	S	R	SNC	I	L	W	R	SND	I	L	W	R	S-G	S	S	S
	I	R	S	I	L	W	R	S	I	L	W	R	S	I-G	I	I
	L	R	S	I	L	W	R	S	I	L	W	R	S	I	L-G	L
	W	R	S	I	L	W	R	S	I	L	W	R	S	I	L	W-G

R: Religion **S:** Self **I:** Intellect **L:** Lineage **W:** Wealth **G:** Quantitatively Greater **NC:** Necessity **ND:** Need

Figure 19 90 Conflict of Interests Involving the Human Self/Body from 225 Hypothetical Conflict Possibilities and their Solutions

Figure 19 illustrates all conflicting scenarios with a focus on the 'self' that includes the human body and life. Highlighted boxes in Figure 19 provide the following solutions to conflicts:

Yellow: Forty-two scenarios in which protecting the human-self is prioritised over all other value types and degrees.

Red: Thirty conflict scenarios in which protecting the other values dominates the human-self, either because they belong to a higher degree or because they are a lower type when the degree is the same.

Blue: Nine scenarios in which the value of the self conflicts with another value of the self, and the one with the highest degree is prioritised, and where the degree is the same, the one that affects a greater number (S-G) dominates.[23]

Figures above illustrate a holistic image of conflicting interests totalling 225 possible conflict scenarios, 90 of which involve the human self (life and body functions) at different degrees. As noted above, these rules are only followed in the absence of scripture (Bughā, 2013, p.54; Ibn ʿĀshūr, 2016, pp.278-9). Kamali (2008a, p.16) accurately pointed that rulings of the Qur'an, Sunnah and juristic *ijtihād* are not universally evaluated according to the order of the values. The reason is because mentioned interests do not dictate the law according to almost all Sunnī jurists, contrary to the Muʿtazilites and Ṭūfī (d.1316), rather the primary sources dictate the law and the particular interests.[24] This argument is also strengthened by Qarāfī (d.1285) (1973, 1:36) and M. Zarqā (2012, p.34), who concur that the legal maxims in the *Qawāʿid* literature, which generally include the interest conflict rules, are not absolutely and comprehensively universal. Therefore, we find *al-Qawāʿid al-Fiqhīyah* genre dedicate discussions on *mustathnayāt* i.e. 'judgements exempted from the general rules' and this prompted jurists like Ibn Nujaym, Qāḍī Khān (d.1196) and Ibn ʿĀbidīn (2015, p.230) to argue that a fatwa must be based on precedents in legal texts, and not a general rule of the law (unless a precedent is absent).

[23] See: Ghazālī's view for examples subsequently.
[24] See: Bin Bayyah (2014) and Zuḥaylī (1998, 2:811-27) for a comparative study of views.

The wisdom and benefit underpinning a scriptural injunction is often not its *ratio legis* (*'illah*) and moral judgements in the scripture are based upon causes mentioned in it and not the wisdoms understood from it ('Uthmānī, 2014, pp.241-4). Therefore, the explicit *ratio legis* will overrule the interest hierarchy specified above. However, where the issue is absent entirely, the interest can be taken as the basis (*manāṭ*) to solve novelties, and whatever falls under the class of the interest, such as protecting life, religion etc., will be weighed per the conflict rules (Ibn 'Āshūr, 2016, p.109; 'Uthmānī, 2014). This section thus advances the discussion on innovations and interests presented in Chapter 3.

4.2.3 Applications to the Rules on Counterbalancing Conflicts

The rules reflected in these charts apply to conflicting interests:

1. in a personal circumstance of a person
2. between different people.

4.2.3.1 Conflict of Interests in a Personal Circumstance

1. Rule One (p.139) asserts where the 'degrees are the same, the higher type of interest' will dominate. In relation to oneself, saving one's own limb is a lower interest than saving one's own life.[25] For this reason, incurring a life-threatening illness or a threat of death extenuates a person to amputate his limb without obligation (Kāsānī, 1986, 6:230; Taftāzānī, 2005, 2:415).[26]
2. Rule Two (p.139) asserts where 'the degrees of interests are different', 'the higher degree', for example, necessity, will override the lower degree, for

[25] Unlike the limbs of others that are equal to their lives. See the subsequent chapter.
[26] Even if another person amputates it, as the conflict here is in one's personal circumstance only (Kāsānī, 1986, 6:230).

example, need, regardless of the type of interest. For this reason, the preservation of religion in the form of a valid *jihād* to protect Muslim borders dominates the preservation of the self at the degrees of need and necessity according to classical jurists (A. Miṣbāḥī, 2006, p.53).

4.2.3.2 Conflict of Interests Between People

The personal interest of one person will dominate the personal interest of another person 'if it is greater in its degree, regardless of the type' (A. Miṣbāḥī, 2006, p.53). Examples are subsequent:

a. The personal necessity (higher degree) of an individual to save body functions and life overrides another person's personal need (lower degree) to protect wealth, etc. I have not seen an explicit moral judgement for this exact conflict, except for some scenarios mentioned by Ḥanbalī jurists (Zuḥaylī, 1998, 2:786), but I assume there is a mere dispensation (*rukhṣah*), because taking another's belongings, regardless of whether they are his needs, necessities or embellishments, is a mere dispensation that is lesser in priority than life.[27]
b. The personal need (higher degree) of an individual to protect life and body functions overrides the embellishments (lower degree) of others in religion, life, etc. However, I have not seen an explicit legal text that allows or disallows a person to steal or snatch the belongings of another that are his embellishments for a personal need to protect against non-life-threatening harm, such as to repel unbearable hunger that does not threaten life. I found that some Shāfi'īs forbade snatching/stealing the

[27] The example found in legal works (Zuḥaylī, 1998) is of taking another's wealth, which is a lesser harm to save life and not the one I created.

belonging of others in a need, and Ibn Taymīyah (d.1328) permitted a person to take a jumper of another person in need without consent, in very cold weather, if one is willing to pay the owner in return (Amjūḍ, 2015, p.117).

c. If someone suffering from hunger—below the point of death—possesses an amount of food beyond need (*ḥājah*), the ruler can force him to sell it to other hungry people in a similar or worse condition (Kurdī, 2012, p.72). Thus, a quantitatively greater need/necessity of life overrides a smaller need of life. However, if a person dying of hunger has an amount of food to suffice himself (smaller necessity), the Muslim ruler cannot force him to sell it to a few people to alleviate their non-life-threatening hardship (greater need) (Kurdī, 2012, p.72). I would add, nor are those at lesser need morally allowed to steal the food of such a person. Thus, a quantitatively smaller necessity (*ḍarūrah*) of life overrides a quantitatively greater need (*ḥājah*) of life.

d. Regardless of quantity, the need of the human body/self outweighs embellishments in Islamic law. Muslim authorities responsible for distributing medical resources ought to follow this rule. Subjective criteria, such as people's preferences for colours that fall under embellishments, should not become a means to jeopardise resources that serve a quantitatively greater or smaller need (*ḥājah*) of patients. So, for example, if a thousand patients desire a shade of a prosthetic leg that costs more than manufacturing a single shade where funds are limited and can produce only half of that colour, the fund allocating authority must prioritise serving the need of more patients over the colour choice

of a greater or smaller quantity of people. Hence, due to a genuine lack of funds, the need of a greater number is to be fulfilled, and not the desire (embellishment) of a greater or smaller number. However, if the cultural sensitivity of this matter reaches a point where a greater harm is entailed, then the colour disparity should be met to a satisfactory level, and the prosthetic need of as many possible in this circumstance should be fulfilled.[28] I added 'genuine' to lack of funds because decision-makers can exaggerate figures, and the value of wealth is lesser than the soundness of intellect (mental state). This example is of a difficult dilemma in which several values must be carefully counterbalanced.

e. If the chances of cure and survival in a living person are minimal although his heartbeat can be continued on a ventilator for a long period, scholars of the Majlis-e-Shar'ī differed if this is permissible.[29] Seventeen scholars discouraged this yet considered it permissible considering the 'purpose' of treatment was sound yet they ignored the efficacy of the means. Eleven scholars considered it forbidden (*mamnū'*) primarily considering the efficacy of the means to cure. The reasons they listed for its prohibition were wasting money on something inefficient, increasing the psychological burden of the family, violating bodily sanctity and prolonging the patient's harm. However, all of them agreed that once a patient is dead, keeping him on the ventilator for a long period is forbidden but there is no discussion on brain death.[30]

[28] See: A black woman's case in Martin (2003).
[29] See: M. Mushāhidī (n.d.) for a summary of the papers of the 25th seminar.
[30] See: M. Miṣbāḥī (2009c, p.432) and N. Miṣbāḥī (n.d.) for discussions on brain death.

f. If the treatment for cancer carries a burdensome cost with minimal or doubtful chances of success or a chance of control for a short time, the value of life cannot override that of wealth, be it his own or someone else's, due to poor clinical and medicinal efficacy.[31] The last two cases highlight the significance of empirical efficacy on the prioritisation of values.

4.2.3.3 Ghazālī's View on *Ḍarūrah* as a *Maṣlaḥah Mursalah*

Complications in conflicts increase when a larger quantity of people are involved, as evident from the example of allocating medical resources. Similarly, solving a fresh conflict between a quantitatively greater necessity of life/body parts and a quantitatively smaller necessity is difficult. I will elaborate, subsequently and in the next chapter, that the legal schools disputed in various case-by-case examples relating to this scenario.

Ghazālī (1971, p.246; 1993, pp.175-180) is cautious in accepting novel cases of saving lives by taking others and upholds that a quantitively greater necessity (*ḍarūrah*) only overrides a smaller one if it 'universally' applies to an entire community or nation and not just a larger number of people. He (1993, 1:77) claims there is no scholarly difference (*lā khilāf*) that a greater number of people affected by necessity 'to save a life' are not permitted to take the lives of a smaller quantity and presented the following three examples:

a. Where two people are forced to kill another person to save their lives, the Sharī'ah does not prioritise the greater quantity, nor does it consider

[31] See Chapter 6 for efficacy.

their personal virtue a reason for preference.[32] The defence of duress by threat of death will not be excused.

b. In dire starvation, the Sharī'ah does not prioritise saving several lives by cannabilising the human body of another,[33] since cannabilism is forbidden with absolute certainty.

c. Where a non-Muslim combatant intends to kill ten Muslims in a war and makes one Muslim a shield, the ten Muslims are not allowed to attack the non-Muslim combatant due to the innocent captive.

The last example is disputed by Ḥanafīs, and so Ghazālī's claim of there being 'no scholarly difference' must be regarding the Shāfi'ī school. For example, in war ethics, Sarakhsī (1971, pp.1446, 1509-10) declared it is permissible to set war boats of non-Muslim combatants on fire during war in a case where some Muslims, innocent wives of the combatants and children are on board without intending to kill the latter groups. Likewise, he also deemed it permissible to attack non-Muslim combatants who are holding Muslim children as shields in a fortress. In the Ḥanbalī school, Ibn Qudāmah (1968, 9:288) permitted the latter too.

Ghazālī (1971; 1993) strongly opposed the latter judgements. He used this rule to solve the following novel dilemmas:

1. If a boat carrying a group of people is about to drown and the only way to save most people on board is by throwing one of them overboard, it is forbidden to discard anyone. This is because of the following: a) there is no accepted precedent in the law to select a person in such a case, not even by casting lots

[32] Thus, a learned person will not be prioritised over an unlearned person in matters of life and death.

[33] This forbiddance is regarding someone alive and not a deceased about whom there is difference of opinion, as mentioned in the next chapter.

(or throwing dices) and b) the interest to save a few people does not universally benefit all of the people. It is also not certain that the remaining people will survive, and certainty in efficacy of the means to repel harm is a condition for novel cases according to Ghazālī. Therefore, they must all rely on God and accept fate.

This eleventh century example provides an Islamic response to the famous Dudley and Stephens (1884) case in which two men were shipwrecked and decided to kill the cabin boy for food. The defense of necessity was not accepted, and they were convicted of murder.[34] However, I would argue that if the discriminatory measures pronounced by most Shāfi'īs and cited in the next chapter are accepted, they may also apply here as a selection method for human jettison. Nawawī (1997, 18:394) passingly cites the life-boat dilemma but does not mention a method for discrimination. Sarakhsī (1971, p.1561), a Ḥanafī, explicitly discriminates based on political differences where abstaining from human jettison is highly likely to drown the boat if the intention is not to kill. Muḥammad ibn 'Alī (d.1948) (n.d., 4:70), a Mālikī, mentioned that in his school, drawing lots for human jettison is permissible after the luggage is thrown off board, and slaves are to be treated equal to free persons. Therefore, a different view to Ghazālī exists, and there is no agreement among jurists.

2. In a Muslim land, where an enemy's army advances using Muslim prisoners as a shield—possibly including children—it is permissible for the Muslim army to attack the invaders to protect the entire Muslim community and Islamic rule.[35] Ghazālī (1971) espoused that in this example if there is high probability[36] that

[34] See: E-Law Resources (n.d.).
[35] See ethical approaches to the 'human shield dilemma' in Thomson (1999, pp.139-40) and the 'principle of double effect' in Baggini and Fosl (2010, pp.132-4) for similar reasoning.
[36] He calls it, "probability close to certainty."

> if an attack is not launched, all of the Muslims including the captives will be killed, a universal harm will be established, one that puts the Islamic rule and governance, as well as the entire community and its social values, at genuine stake.[37] Therefore, taking the life of a smaller quantity of Muslim shields, even if they may never have sinned, is pardoned. He (1971) accurately noted that Ḥanafīs did not require high probability of success in this example, and thus Condition Three of necessity is not needed to sanction this attack.[38]

According to Ghazālī, certainty is not required for the legitimacy of taking an unlawful means analogous to a scriptural precedent in a necessity to save life. However, does Ghazālī make 'certainty' and 'universality of benefit' conditions for every necessity that has no precedent in the law and only falls under the general interests to promote benefit (*maṣāliḥ mursalah*)? Qaradāwī argues that Ghazālī declared these conditions only in the context of 'saving lives' and not in other conflicts of interests.[39] My opinion is that Ghazālī does stipulate these conditions for all the fundamental values and not just life, as he (1971, p.180) clearly says at the end of his discussion, "so interests [without qualification] are accepted with these conditions." Qurṭubī (d.1273) held that if these two conditions are met, no two scholars would disagree on the validity of taking action in necessity, and Ibn al-Munayyir argued that stipulating them for interests is a claim without evidence (Bin Bayyah, 2014, p.534). In my view, the most appropriate explanation to Ghazālī's conditions was offered by Ibn al-Subkī (d.1370) (1998, 2:439) that they are only required to 'definitively' accept an interest when the necessity

[37] This is how Ibn al-Subkī explained Ghazālī's position in *al-Ibhāj* (1995, 3:184), and the latter (1993, p.175) himself mentioned this.
[38] All Sunnī schools agreed on the permissibility of this attack with the overwhelming majority not requiring certainty in its success (Wizārat al-Awqāf al-Miṣrīyah, n.d., p.64).
[39] See: Qaradāwī (2015).

contradicts absolutely certain scripture, and not in the absence of scripture. The cited case contradicts absolutely certain primary proofs on the forbiddance of taking innocent human life.

Moreover, if we carefully read Ghazālī's example of the army in *al-Mustaṣfā* (1993, pp.175-180), he illustrates there is not only a conflict between two groups of people but that the Muslim territory is also at stake. Therefore, the conflict is between life and the preservation of religion because the territory is a place where Islamic rule and society are protected. Hence, this example is unlike the examples of two people under duress to murder an innocent person and of the human jettison wherein there is a lack of universality of benefit since a small group of people benefit, because the conflict is between different values: the necessity of a higher type (religion) with that of a lower type (self). It is also different to Ghazālī's example of ten Muslims saving their lives by killing one human shield, because here the Islamic territory is not at stake, and so there is no contradiction in his statements either.

I disagree with Kurdī (2012) and Mutairi (1997) who declare the conflict in the example of the Islamic territory is only between the greater and smaller quantity of lives (single value conflict). In the literature of legal maxims too, this example is commonly found under the following legal maxim: "a harm affecting a greater quantity is mitigated by a harm affecting the smaller quantity" (Wizārat al-Awqāf al-Miṣrīyah, n.d., p.64). In my view, the examples of human jettison and ten Muslims vs. an army befit this maxim, but not the example of the Islamic territory that involves different conflicting values. My proposition is also strengthened by Maḥbūbī (2005, 2:165) and his commentator Taftāzānī that the war example involves conflict between the value of 'religion' and the 'human-self'. From the example of setting boats on fire and attacking a fortress, we find that Ḥanafī and Ḥanbalī jurists warrant taking innocent human shields of a smaller

number in a war, whilst Ghazālī's rule of universality of benefit opposes these views. Thus, these cases ought not to be cited under the legal maxim relating to quantity. A similar example is the forbiddance of removing organs of a smaller number of impoverished people without their consent for the benefit of a few elite people.

4.3 Conclusion

This chapter set out to gather and critically observe the conditions required to establish a necessity and need. To ensure that people do not use these concepts as a licence to do as they subjectively desire, jurists present various conditions for establishing a necessity and need and thereby sanction unlawful means to protect the fundamental values of human life and body. Note that these conditions are not collectively and explicitly mentioned in classical texts and were extracted from classical cases by various scholars I cited.

I mainly focused on the study of the conditions of a necessity in the concessionary context and illustrated the differences of opinions among the Sunnī schools in some of its conditions, like accepting the probability of danger to life as a valid necessity, consuming forbidden foods more than a necessary amount, and Ghazālī's condition of certainty in the efficacy of a novel case that contradicts absolutely certain scriptural values. The conditions to establish a need were briefly presented to illustrate that in the narrowest concessionary contexts, the two terms differed.

I demonstrated that in some cases, ammendments were made to these conditions. For example, lesser forbidden alternatives are regarded as valid alternatives to prevent utilising severer prohibited substances, like consuming dog meat in life-endangering hunger instead of pork, thus Condition Four is altered. I observed that in a non-standard view of the Ḥanafī school, mere probability of efficacy is enough to consume forbidden

medicine where there is no alternative. This will be studied further in Chapter 6. Thus, Condition Three is not universally agreed in necessity. According to Ḥanafīs, a condition of medical necessity is not only known from the physicians as it can be judged by a patient's symptoms and personal experience too, and therefore Condition Five is not universal.

A vital matter identified in this chapter is the degree to which altruism is emphasised in the legal corpus. The example of rescuing someone drowning signifies the moral responsibility on Muslims where they can assist in preventing severe harm. Therefore, the necessity of other people can become the necessity of oneself. Hence, there is no condition that the necessity must be one's own for it to relax laws, given that a person does not put himself in an equal or greater harm to relieve another.

By observing rules in conflict scenarios between fresh cases without precedents of varying degrees of different values, both qualitatively and quantitatively, e.g. needs of religion against necessities/needs of life, this chapter fills a primary gap in Western academic literature in presenting and observing a detailed holistic scheme of counterbalancing interests in Islamic law. Academic literature briefly speaks of competing interests, albeit not comprehensively. I identified a total of 225 hypothetical possibilities of conflicts, 90 of which are in context of the human-self (life/body) in which the body and life is prioritised in 51 scenarios. The value of the intellect is additional to this.

Figures on competing interests illustrate how the Islamic law envisages degrees of harm and mitigates it in fresh situations unsolved by scripture. These figures apply only to *maṣlaḥah mursalah.* I demonstrated that in Sunnī legal theory, a qualitatively higher degree of interest can never be overridden by a lower one, even if it is quantitatively

greater. This approach is contrary to the moral theory of utilitarianism which aims to maximise happiness for a greater quantity without discriminating qualitatively. I applied the rules from these figures to solve various ethical dilemmas, including human jettison and boat ethics, allocation of limited resources, and war ethics. I observed that a monolithic ethical approach, like consequentialism and Kantianism, in solving the dilemmas is not adopted by Muslim jurists.

Ghazālī (1993) only allowed taking innocent lives in a fresh and unprecedented case where the entire Muslim community is endangered in a war, based on his condition of universal benefit to permit novel acts that oppose certain scriptural values. In my view, the conflict is not entirely between saving a greater number of lives by taking a smaller number, rather it is between protecting the value of religion, which is safeguarded by the Muslim land, and the life of the innocent, in which case the necessity of religion is prioritised. I observed that Ḥanafī and Ḥanbalī jurists did not require the condition of universal benefit, and therefore allowed taking lives of human shields for greater purposes in war dilemmas. However, I did not find a single example where taking innocent lives was permitted beyond war dilemmas. This observation is strengthened by the cited prohibition of taking the life of another under duress by death.

Considering the discussion on counterbalancing fresh conflict scenarios, when a question rises to a *muftī* involving competing interests that belong to a class of accepted acts or broad interests in scripture, first he must carefully ascertain if there is a precedent in the primary sources, legal works of schools or consensus to link it to, and if there is no precedent, he can utilise the method of *istiṣlāḥ* to solve it using the detailed charts I formulated. This discussion reinforces the discussion in Chapter 3 on intersecting the *maqāṣid* taxonomy with innovations, and with the school-based moral theory, which holistically appraises moral judgements in context of the primary proofs, their epistemic

type and language. An unrestricted and universal prescription of the prioritization rules to solve dilemmas does not represent a valid Islamic ethical approach and is not acceptable in any of the Sunnī schools since the conditions of *istiṣlāḥ* would apply.

Chapter 5. A Critical Appraisal of the Impact and Scope of *Ḍarūrah* and *Ḥājah*

5.1 Introduction

The aim of this chapter is to examine the impact of necessity and need, in their concessionary contexts to save human life and body from harm, in various domains of prohibition laws so that their scopes become clearly distinguished. I will consult legal texts from the four schools of law to present a holistic view, and a comparative assessment will be carried out on the understudied deliberations by *fiqh* councils in India, primarily, the Majlis-e-Shar'ī.[1] In Chapter 3, I demonstrated that jurists used the word *ḍarūrah* broadly to refer to *ḥājah*, and here I will argue that blurring the line between these two varying constructs of pragmatism in their narrowest contexts can have serious consequences for people with medical needs since the scope of their impact is dissimilar. Emphasis will be placed on the fundamental value of the human life and body which will enhance our understanding of how Muslim jurists accommodate human conditions involving physical harm or hardship to override scriptural proscriptions. Herein also, I will introduce concepts that overlap with necessity and need focusing on their differences especially in sanctioning forbidden acts. Consequently, this chapter will set the foundation to discuss medical matters and the degree to which harm is mitigated in them in the next chapter.

Where the conditions of necessity and need are established, they will affect a spectrum of laws, either by changing the moral judgements (*taghyīr al-ḥukm*) or relaxing them

[1] For example, I consult M. Miṣbāḥī and A. Miṣbāḥī, who are members of the Majlis-e-Shar'ī of Mubarakpur, and Qāsimī for deliberations at the Islamic Fiqh Academy of India.

(*takhfīf*), i.e. excusing their consequences e.g. sin. Where a forbidden act becomes a necessity to save one of the fundamentals, to disregard the danger and declare the means unconditionally forbidden is unacceptable to traditional Sunnī scholarship and is an extreme form of conservatism. Qarāfī (d.1285) (1973, 1:177), a major Mālikī, asserts, "uncompromising rigidity upon all transmitted laws at all times is misguidance in religion and is obliviousness to the purposes upheld by Muslim scholars and the predecessors." Ibn ʻĀbidīn (d.1836) (1992, 2:125), a major Ḥanafī, asserts, "many of the moral laws change with the changing of time due to necessity, because had the original judgement continued, it would inflict harm and difficulty upon people and would violate the rules of the Sharīʻah that are based upon ease, convenience and repelling harm and mischief. Therefore, you will find that reliable authorities within schools differ with the transmitted position (*naṣṣ*) of their arch Imam…"

5.2 The Impact and Scope of Necessity (*Ḍarūrah*)

Below is my attempt to identify key areas in which a circumstance of necessity to save human life or body function is effective and its limitations to relax laws:

a. Matters of disputes (*umūr ijtihādīyah*) in the four Sunnī schools, including disputed prohibited and mandatory (*farḍ ʻamalī*), disliked and compulsory (*wājib*) moral ordinances, are overridden by both necessity (*ḍarūrah*) and need (*ḥājah*) (M. Miṣbāḥī, 2009a, p.137). These include matters established from all broadly certain and probable primary sources, analogy and all secondary sources.[2] 'Prohibited' refers to all act types that are disputed in the four schools and are placed under need in Figure 7 in Chapter 3 and Table 2 (after p.105). Belief (*īmān*) in the proscription of a disputed forbidden act is not mandatory

[2] See: Highlighted grey areas of Table 1 (after p.45) and Figure 2.

nor a necessity of religion. There is no justifiable reason to declare the omission of a disputed forbidden to be a necessity. A. Khān (d.1921) (2003, 23:640) cites an agreement among Sunnī jurists that a person is permitted to leave the standard position of one school, in disputed matters, for another opinion, under necessity.

b. Necessity permits various absolutely certain prohibited acts, intrinsic and extrinsic, whereas need permits only acts prohibited with probable proofs (M. Miṣbāḥī, 2009a, p.137) and according to my observation, this includes broadly certain and disputedly prohibited acts.

Classical and modern legal texts mention three possible types of prohibited acts one may utilise as means to ward off the circumstance of necessity, only two of which Sunnī jurists excuse to save life or body parts (Kāsānī, d.1191, 1986, 7:176-7; Qārī, d.1606, 2012, p.472). Subsequent is the classification of prohibited acts and their case examples with an attempt at identifying their similar and different features.

5.2.1 Prohibited Type One Acts

The necessity to save life renders utilising the forbidden means into a mandatory act, and therefore, changes (*taghyīr*) the moral judgement. Necessity, therefore, 'opens the forbidden means' to reach necessary good ends.[3] To omit the means is a sin and forbidden.[4] Subsequent are some examples of such acts:

a. Eating and drinking unlawful substances, like carrion, pork, blood and consensual type of liquor (*khamr*), in life-threatening starvation or duress

[3] This is contrasted with 'blocking the means' in Chapter 2. Qarāfī was perhaps the earliest jurist to speak of opening the means as a term (Auda, 2008a, p.241), though the notion predates him.

[4] Unless a person is genuinely unaware of the absence of prohibition (Farfūr, 1999, 2:546; Ḥaṣkafī, d.1677, 6:134).

with a severe threat to destroy life or a bodily function. These are absolutely certain sole rights of God[5] for which He makes an exception under necessity after the prohibition of eating unlawful foods in the Qur'an (Q6:199), signifying that the forbidden object is not only excused but is also mandatory (*farḍ*) and halal to consume (Kāsānī, 1986, 7:177).[6] However, this is not agreed upon as Abū Yūsuf from Ḥanafīs, Shīrāzī from Shāfi'īs and some Ḥanbalīs held these acts are excused but not mandatory (Zuḥaylī, 1985, 4:2602).

b. If lying is the only means to save an innocent person from a likely murder, it is morally compulsory (*wājib*) (Anṣārī, d.1810, 2002, 1:27; Ḥamawī, d.1687, 1985, 1:293; 'Illīsh, d.1824, 1989, 7:87; A. Miṣbāḥī, 2006, pp.37-8). Similarly, it is compulsory for a person to lie to a thief about the trusts of people he holds (Ḥamawī, 1985; Ibn 'Ābidīn, 1992, 6:427; 'Illīsh, 1989), and Ghazālī (d.1111) (n.d., 3:138) ruled the same for protecting one's own property. Ghazālī (n.d.) asserted the following rule, which Ibn 'Ābidīn (1992, 6:427) also accepted, "For every praiseworthy end that can be obtained by speaking the truth or lying, lying is forbidden. If it can be reached by lying only, then it is permissible (*mubāḥ*) if the purpose is permissible, and compulsory if the purpose is compulsory." I noticed that Ibn 'Ābidīn (1992) interpreted 'lying' for permissible ends as using words with double meanings and only permits an explicit lie for a compulsory end.[7]

[5] Right of God in this chapter denotes something God ordained that must be obeyed like his commands and prohibitions.

[6] The exemption for starvation from prohibition is proven from *'ibārat al-naṣṣ* of the *āyah* (Q6:119) and for duress by threat of death from *dalālat al-naṣṣ* (Ibn 'Ābidīn, 1979, p.271).

[7] I will elaborate this further under 'simple need'.

c. Leaving obligatory prayer immediately becomes compulsory if a non-Muslim desires to accept Islam or if a person is crying for help and one thinks he can help (A. Miṣbāḥī, 2006, p.37; Shurunbulālī, d.1659, 2002, p.382).

Below are some important considerations:

1. Considering the first example, Jaṣṣāṣ (1984, 5:16) pointed out that every act whose immorality is only known by revelation falls under Type One and becomes compulsory to utilize under necessity. I would argue that this rule cannot be universalized, because abstaining from prayer and hajj are also immoral due to revelation but fall under Type Two (see subsequently). Also, the evilness of lying is understood from pure reason, yet it also falls under Type One.
2. Belief in the prohibition of lying is from the absolute essentials of Islamic faith, just like the prohibition of liquor (*khamr*) and adultery. Lying becomes extrinsically virtuous due to external circumstances (*ḥasan li-ghayrihī*), i.e. the ends, which in the example above are the preservation of the self and wealth (Anṣārī, 2002, 1:27).

By comparing the examples, I examined that all acts with the following features belong to Type One:

1. They are prohibited with absolute certainty in the Qur'an.
2. The prohibition is due to the 'sole' right of God.
3. The primary texts exclude (*istithnā'*) necessity from the prohibition of these acts (Ibn ʿĀbidīn, 1992, 1:35).
4. The forbidden act is permitted as the prohibition is removed per most jurists.

5. The obligation of preserving life in these examples is stronger than abstaining from the forbidden means and is prioritised.

Features one, three and four are present in the legal texts. I created feature two from the examples and by contrasting them to examples of the other types and later I found Sarakhsī (d.1096) (1993, 24:139) mentioned this. Considering this, acts involving the rights of people combined with the rights of God or solely theirs cannot render into compulsory means under necessity to save life, as I will later examine. The cited acts are commonly described as 'permissible' (*mubāḥ*), which here means compulsory. Note that *ibāḥah* has been used in two different meanings in legal texts: a. 'permissibility' which signifies the prohibition is lifted, and this can be a 'compulsory' act b. 'permission' which is a dispensation (*rukhṣah*), as elaborated in the next type.

5.2.2 Prohibited Type Two Acts

The necessity to save one's life does not change the moral nature of the forbidden act but extenuates the agent by removing the sin for committing it, and a dispensation (*rukhṣah*) is made. This is a relaxation (*takhfīf*) of the law. Here too, the good end justifies the prohibited means, though utilising it is not morally compulsory and there is reward for being patient and leaving it, relying on God and accepting fate. I gathered the following examples:

a. The prohibition of uttering disbelief can never cease as it is intrinsically immoral (*qabīḥ li-dhātihī*) and it belongs to the sole rights of God i.e. it does not impinge on any personal right of a human, though it is excused under duress by death or destroying a limb due to Qur'anic provision (Q16:106) (Ibn Malak, d.15th Century, p.373; Ibn Nujaym, d.1563, 1936, 3:137;

Zuḥaylī, 1985, 6:4432).[8] Shāfiʿīs and Ḥanbalīs opined that this was excused under less severe forms of duress too. This is not compulsory, and there is reward if he refrains from it. Note here that saving one's life is permissible by outwardly denying a principle of faith if the heart remains content with belief (Maḥbūbī, n.d., 3:341; A. Miṣbāḥī, 2006, p.40).

b. The prohibition of insulting the Prophet of Islam and praising gods of other faiths under a genuine threat of death was excused by the Prophet himself in the story of ʿAmmār ibn Yāsir (d.657) when the idolaters forced him to do this; this is so long as there is firm belief in the heart (Ḥaṣkafī, d.1677, 1992, 6:134; Kāsānī, 1986, 7:177).

c. Omitting sole rights of God in worship, like prayer, fasting and Hajj or hunting in the state of *iḥrām* (Ḥaṣkafī, 1992, 6:134; Ibn ʿĀbidīn, 1992, 2:238). The sin is lifted in one's personal necessity to save a life in omitting these acts, however, to omit them to rescue another person from such harm is compulsory and belongs to prohibited Type One. This disparity signifies the importance given to rescuing others from severe harm over oneself when their value of life conflicts with one's religious observance.[9] However, it must be conditioned that one does not bring upon oneself an equally severe and highly probable danger in the rescue as harm must not be mitigated by a similar one.

[8] Zuḥaylī (1985, 6:4432) adds agreed upon acts of disbelief here too, such as prostrating to an idol. Zubaydī (2015, p.312) declared this is a need (*ḥājah*), though this is contrary to the standard view in all four Sunnī schools unless he uses this term broadly to apply to necessity.

[9] See necessities of others under counterbalancing interests previously. A. Khān (2003, 21:207) asserts, to rescue others in these circumstances is a scriptural imperative.

d. Snatching the property of someone else is violating a sole right of people.[10] The prohibition of taking another's property is lifted when the owner gives consent. This act is excused in duress by the threat of death and dire starvation because compensation is possible, whereas death or destruction of a limb cannot be rectified (Farfūr,1999, 2:548; Jaṣṣāṣ, 1984, 5:16; Kasānī, 1986, 7:177). The person in necessity is required to compensate the owner afterwards as the right of ownership cannot be abolished (Ḥamawī, 1985, 1:289).

e. Destroying one's personal property is forbidden due to its sanctity. Hence, if a person is killed protecting his wealth, he is rewarded with martyrdom as mentioned in a *ḥadīth* (Kasānī, 1986, 7:177). However, if a person is coerced to do this by threat of non-severe harm to the body or imprisonment, it is forbidden to destroy one's wealth (Kasānī, 1986).

f. According to Shāfi'īs, it is permissible to perform surgery on a deceased person in order to remove a valuable item of someone else that the deceased swallowed, and according to some Ḥanafīs, it is only permissible if it entered the body after death (Ibn Nujaym, 1985, 1:285) or if the person deliberately sinned by swallowing it (Ibn 'Ābidīn, 1992, 2:238); otherwise, the sanctity of the body is greater than property, and so such surgery would not be permitted. Ibn al-Humām (d.1460) (n.d., 2:142) cited Jurjānī's reasoning in the case of sin from Mawṣilī's *al-Ikthiyār* saying, "the body ought (not) to be cut because the right of a [wronged] person supersedes the

[10] Ambiguous and corrupt sales and usury involve the right of God too in which other's wealth is taken wrongfully (Bin Bayyah, 2007, p.204). Forceful occupation of another's property is greater in prohibition than drinking *khamr* (Ibn 'Ābidīn, 1992, 6:135) since the former is violating rights of people, though theologically the prohibition of both is from absolute necessities of faith.

right of God and the right of the aggressor."[11] Mawṣilī's text (1937, 4:168) actually reads "it ought to be cut" in the affirmative sense, thus, Ibn al-Humām's quote contains an error. This implies that the human body has two rights connected with it, one of God and the other of the human, and both can be compromised due to a sin relating to the property of others. Contrarily, Ibn Nujaym (n.d., 8:233) asserts the dignity of the deceased is either the sole right of God or the sole right of the deceased, and in both cases, it is overridden by the right of owner of the property.

g. If a person in the state of *iḥrām* faces dire starvation, he is allowed to consume game[12] instead of the property of others without consent, because according to Ḥanafīs, the right of a person over his property dominates the right of God who forbade hunting in this state and eating a game (Ibn ʻĀbidīn, 1992, 7:276; Zaylaʻī, d.1343, 1313AH, 2:386). Likewise, this person is not permitted to consume the human body in the presence of a game, because there is the right of God and the right of the person over his body, whereas abstaining from the game is only the right of God due to this prohibition. Hence, the former is greater in harm even though the latter has two aspects of prohibition: 'hunting game' and its 'consumption' (Ibn ʻĀbidīn, 1992, 7:276; Ibn Nujaym, 1985, 1:289).

These acts are not attributed with permissibility (*ibāḥah*) under necessity but by dispensation (*rukhṣah*) and to save one's life or body parts, they remain intrinsically

[11] See: Atighetchi (2009, p.166) for a study on 'sinfulness' being a moral argument to permit taking organs from donors in Muslim discourse.

[12] A. Miṣbāḥī (2006, p.40) upheld that it is not compulsory for him to save his life because the forbiddance of hunting prey is the right of God and proven from the express indication of the Qur'an (Q5:95).

immoral. Careful distinction must therefore be made between the terms: dispensation, necessity and permissibility.[13]

Acts with the following features fall under Type Two:

1. Those whose commission or omission is prohibited by the Qur'an or Sunnah.

2. Rights of God or His Prophet, or 'sole' rights of people that can be rectified.

3. Their immorality can never cease, but the sin can be waived.

4. Under necessity, these acts are 'excused' in the primary texts but not 'excluded' (*mustathnā*) from prohibition (Ibn 'Ābidīn, 1992, 1:135).

5. The preservation of life and inviolability of the human body in these examples are not stronger than abstaining from the forbidden means, yet the prohibited means is excused.

I presented feature three from legal texts above and added feature four, because only the Qur'an and Sunnah can inform us when a sin is not recorded. I also created features one and two by carefully comparing the examples. As a rule, Ibn 'Ābidīn (1992, 6:133) mentioned that every act whose obligation (*farḍīyah)* is proven from the Qur'an falls under Type Two prohibitions. I have added examples from the Sunnah too.

5.2.3 Prohibited Type Three Acts

The necessity to save a life does not sanction the act that remains permanently prohibited. Hence, utilising such means remains a sin, and the end never justifies the forbidden means. I would add that therefore in the subsequent scenarios, one must rely

[13] See: Safian (2010, pp.59-70) and Mutairi (1997, pp.223-38) for a study of these terms.

on God and accept fate, as Ghazālī added in the novel case of the drowning boat.[14] I found the following examples:

a. Rape is forbidden even for a person under duress by death or severe harm to the body (Kāsānī, 1986, 7:177). The reason for this is that destroying a child's lineage is equivalent to killing it and is thus a violation of the following: a. the right of God who prohibited adultery; b. the right of the child; c. the dignity of the woman—which falls under the value of the self, according to Ḥanafīs.[15] Contrarily, if a woman is coerced by death, she is allowed to subject herself to rape to save her life because saving herself from it is the right of God which has conflicted her right to live, and so the latter will precede.[16] This is also an example of a human right for the preservation of honor conflicting with the right of life in which the latter is prioritized.

b. Killing, severely beating or destroying a bodily function is prohibited, such as cutting a limb of another person, even if he permits.[17] This is because as well as these acts being prohibited in the Qur'an (Q33:58; 6:151), they combine the rights of God and His people that cannot be rectified (Jaṣṣāṣ, 1984, 5:16). This ruling applies even if a person is under duress to murder (Ḥaṣkafī, 1992, 6:134; Kāsānī, 1986, 7:177) and a body part of another person is equal to one's life (Farfūr, 1999, 2:545; Taftāzānī, d.1389, 2005, 2:415). Both parties are equal in their right over life and limb, and so one

[14] See: previous chapter.
[15] See: Bāburtī (d.1348) (n.d., 5:273), Ibn Quṭlūbughā (d.1475) (1993, p.167), Maḥbūbī (1998, 2:431), and A. Miṣbāḥī (2006, p.44) who declared that refraining from adultery is the sole right of God, but Jaṣṣāṣ (1984, 5:16) held that rape violated a woman's right over self-esteem too.
[16] Maḥbūbī (1998, 2:431) espouses there is no existing right for a possible future child for it to be ruined by rape.
[17] There is difference of opinion here as evident from subsequent examples.

does not take precedence over the other (Ibn Nujaym, 1936, 3:136). Ibn Nujaym (1985, 1:276; n.d., 8:233) explains that these acts are not sanctioned in the scripture, implying there would be permission if they had been. These acts are forbidden even if the other person permits them or remains silent (Kāsānī, 1986, 7:177; Zarkashī, d.1392, 1985, 2:208).[18] ʻIllīsh (d.1824) (1989, 4:55), a Mālikī, asserts cutting another Muslim's fingertip is forbidden even under a threat of death and claimed consensus on the prohibition of killing others and cutting their limbs under severe duress. However, Shaykh Niẓām (1310AH, 5:39) cites *al-Muhīṭ al-Burhānī* and Ibn ʻĀbidīn (1992, 6:136) cites *Khānīyah* to endorse that ruining another's limb in this circumstance is permitted in a weak position of Ḥanafī school. Ibn ʻĀbidīn (1992) cites Ṭūrī who upholds that being killed is a greater harm than destroying another person's limb, and therefore, cutting their limb is permissible under duress by threat of death, but not if the threat is equal or less. Ibn ʻĀbidīn expresses hesitation in accepting this position.[19] M. Miṣbāḥī (2009c, p.431) declares this a weak position in the Ḥanafi school.

Note that the sanctity of one's life is more important than that of his own limb, and therefore, if a person is threatened by death to ruin his own limb, he is permitted[20] to destroy it if he wants. In relation to one's own body, classical scholars deem body parts equal to wealth, the purpose of which is to protect oneself (Ibn ʻĀbidīn, 1992, 5:94;

[18] This indicates that a person cannot willfully subject his body parts to destruction. However, he will not be liable to any financial losses if he consents (as mentioned in the cited sources).

[19] Ibn ʻĀbidīn's concluding expression (1992, 6:136) "*ta'ammal"* literally means 'observe this matter attentively' and is often mentioned to express apprehension without detailing the reason.

[20] I could not find a text that explicitly says it becomes compulsory. Perhaps this is because there is no certainty that cutting/destroying the limb will save one's life.

‘Illīsh, 1989, 4:55; Kāsānī, 1986, 6:230, 7:297; M. Miṣbāḥī 2009c, pp.501, 517; A. Miṣbāḥī, 2006, p.54; Shaykh Niẓām, 1310AH, 5:39; Taftāzānī, 2005, 2:415). As for in relation to others, one’s body parts are not treated like wealth, says Taftāzānī (2005), “because people do not donate their organs to others to protect them.” Based on its counter-implication, this passage can be interpreted to mean that if people did donate their organs, body parts of others can be treated like wealth and thus this passage is a potential argument in favour of living organ donations. I have not discovered this point in any other work. Nawawī (1997, 9:45) asserts that in the Shāfi‘ī school, a person is allowed to cut his own thigh or another part of the body in dire starvation to consume it with the condition that there is no alternative.[21] He explains, if the fear of death due to cannibalism is equal or greater than starvation, then cannibalism is forbidden without dispute. If the harm of cannibalism is lesser than the circumstance of necessity, the soundest of the two views is that it is permissible, but not compulsory (Nawawī, 1997). Scholars who permit organ donation present these precedents to argue that if one has the right to cut his limbs, he holds the right to donate them (‘Itr, 2000, p.114).

c. A person suffering dire starvation is not permitted to cannibalise the body of another living person to save his life, even with his consent (Ibn ‘Ābidīn, 1992, 5:97; Ibn Nujaym, 1985, 1:280; M. Miṣbāḥī 2009c, p.431; Taftāzānī, 2005, 2:416; A. Zarqā, 2012, p.196). Nawawī (1997, 9:43) restricted this to the legally protected person (*ma‘ṣūm*),[22] and there is no dispute about such people. As for the apostate and *ḥarbī*, i.e. a non-Muslim not paying taxes (*jizyah)* to Muslim rulers or with whom they have no peace (*amān*)

[21] Ghazālī’s opposing view was presented under Condition Three of necessity in the previous chapter.
[22] Muslims and non-Muslims with peace agreements with Muslim rulers.

> agreements, he upheld that cannibalising their bodies is permissible in life-threatening hunger. As for a Muslim who commits a major sin deserving of execution, like the married adulterer, the soundest of the two opinions is that of the majority in the school; cannibalising him is permissible in life-endangering hunger (Nawawī, 1997). The *dhimmī,* a non-Muslim living in a Muslim country and paying taxes (*jizyah*), or non-Muslims with peace agreements with Muslims, are all legally protected. It is for this reason that it is prohibited by agreement to cannibalise their bodies in life-threatening hunger.[23] These precedents have been used in fatwas for and against organ donations.[24]

Note that most Shāfi'īs, and some Ḥanbalīs and Mālikīs,[25] permit a Muslim experiencing life-threatening hunger to cannibalise a deceased human body—without discrimination of faith— because the sanctity of the living is greater than the sanctity of the deceased, unless it is a Prophet.[26] However, jurists elaborate that a non-Muslim is not allowed to cannibalise the body of a Muslim to save his life (Ibn 'Ābidīn, 1992, 7:277; Ibn Nujaym, 1985, 1:276; Nawawī, 1997, 9:43; Shirbīnī, d.1570, 1997, 6:160). It is not clear if the *dhimmī* is excluded from this. M. Miṣbāḥī (2009c, p.500) cites Ibn Qudāmah, a Ḥanbalī, who says some Ḥanafīs also permit consuming a deceased in dire starvation. Ibn Nujaym (1985, 1:289) says, "it is better [for the person in the state of

[23] On division of abodes and political relations, see differing views in Sa'īdī (1995, 4:391-4) and M. Miṣbāḥī (2014, pp.208-10).

[24] See: Atighetchi (2009, pp.21-23, 161-197) for political dimensions of Islamic bioethics and discriminatory attitudes in organ transplantation fatwas.

[25] In the Mālikī school, it is one of the two sound opinions (Mawwāq, 1994, 3:77; Nafrāwī, 1995, 2:286).

[26] This is a hypothetical example as Muslims believe there is no prophet after the Prophet Muhammad. However, it reflects a discriminatory measure that is based on the doctrine of infallibility for prophets.

iḥrām[27]] to consume the game instead of human meat," which by counter implication[28] implies that when there is no alternative, one may consume the human body. Ibn Nujaym (d.1597) (2002, 2:142) asserts that this ruling is preferential, however, if one chooses to cannibalise the human, it is permissible. M. Miṣbāḥī (2009c) adjudges that the view implied by Ibn Nujaym is a weak one. Despite this, it has been used as a precedent to permit deceased organ donation in contemporary fatwas.[29] Discriminating between a legally protected body and an unprotected one in dire starvation, Shirbīnī (d.1570) (1997, 6:160), a Shāfiʿī, and Nawawī (1997, 9:44) claimed, "cooking and roasting a legally protected human body is not permissible [in life-threatening starvation] as this is a violation of its respect and one can chose to eat cooked, roasted or raw meat of legally unprotected bodies." Contrarily, Ibn ʿĀbidīn (1992, 4:105), a Ḥanafī, asserts "humans are legally dignified, even non-Muslims, and dignity is in the [human] form and appearance, and therefore, breaking the bone of a deceased disbeliever is not allowed."[30] Ibn al-Humām (n.d., 6:425) also held that the non-Muslim body is Islamically dignified as a human being.

d. Striking one's parents lightly or severely[31] and reviling them is prohibited (Q17:23) even if a person is coerced with a threat of death or severe bodily injury (Atāsī, n.d., 1:56; Ibn Nujaym, 1936). The right of his parents and the right of God—due to His prohibition from these acts—cannot be overruled by the right of a person to preserve life.

[27] The state of a pilgrim when travelling to observe the rituals of Hajj or Umrah which has special conditions that must not be violated, including the forbiddance of catching, killing and eating game.
[28] For a study on inferring laws from this implication, see Ali (2000) and the fatwa of the Majlis-e-Sharʿī of Mubarakpur (M. Miṣbāḥī, 2014, p.44).
[29] See: M. Miṣbāḥī (2009c) for examples.
[30] See: Atighetchi (2009, pp.164-5) for contrasting views on non-Muslim organs and Nawawī's view in example (c).
[31] Severe harm would destroy a body function.

e. Reviling or striking fellow Muslims is prohibited because the Prophet forbade this in His Sunnah, like the prohibition of violating the sanctity of another's wealth (Ibn Nujaym, 1936). He is narrated to have said, "The whole of a Muslim is inviolable for another Muslim: his blood, his property, and his honour" (Muslim, *ḥadīth* no.2564). Kāsānī (1986) placed this under Type Two acts under duress by threat of death if striking did not threaten another's life because, "its harm is lesser than the one inflicted on the coerced, and a Muslim would accept this amount of harm to himself to save the life of his brother." However, Ḥaṣkafī (1992, 6:136) placed this under Type Three acts, and so did A. Miṣbāḥī (2006, p.44). Ibn ʿĀbidīn (1992, 6:136) cited legal texts that favor Kāsānī's position. The prohibition of causing harm to Muslims is not only in the Sunnah, but also in the Qur'anic *āyah* (Q33:58) that is unconditional, general and not restricted to severe harm and therefore, I venture to think these acts fall under Type Three.[32] However, it may be possible to reconcile between the views by making this Type Two, if the stricken or reviled willfully consents to such acts to save a life, and Type Three, if he does not. This would suggest that one may consent to waive their right of preserving honour.[33]

According to my analysis, acts with all the following features fall under Type Three:

[32] Unless primary proof permits reviling fellow Muslims under necessity, something which I have not seen for other than the exception exclusively made by the Prophet for himself.

[33] However, I could not find a unequivocal legal precedent in the classical works I consulted that permit a person to voluntarily waive their right over their body, as in offering their body to a person dying in hunger to consume it, though major sins can cancel this right as cited under the conditions of necessity. This is an argument used by scholars who oppose living transplants of kidneys.

1. Acts that are prohibited with absolute certainty in the Qur'an in express and congruent meanings.
2. Where the rights of people that cannot be rectified are involved—whether God's rights are involved or not.
3. Intrinsically forbidden acts whose immorality never ceases, and neither is the agent absolved of sin.
4. Acts that are not exempted under necessity in the primary texts.
5. The obligation of saving a life in these examples is not stronger than abstaining from the forbidden means, rather the means is stronger and prioritised.

I took features one and four from Ibn ʿĀbidīn (1992, 6:133,135), three from Mullā Jīvan (d.1717) (n.d., p.318) and created two myself by analysing the cited examples. The prohibitions of rape and executing someone without a right in the law are consensual. However, feature three is disputed if we apply it to all humans, because Shāfiʿīs permit cannibalism of living legally unprotected persons and any deceased persons other than Prophets under necessity to save life, and according to some weak opinions, Ḥanafīs do too as mentioned above. Additionally, feature four is not unanimously agreed upon, as jurists who permit consuming the deceased body consider it included in the sanction of consuming corpse (*maytah*) in the Qur'an (Q6:145) in a necessity though the soundest opinion in the Mālikī and Ḥanafī school is that the human body is not intended in this *āyah* (Mawwāq, 1994, 3:76; Nawawī, d.1277, 1997, 9:41).

The cited classification of prohibited acts –mentioned in classical and modern sources to date– is not comprehensive because it does not classify two more types of acts I identify subsequently:

Prohibited Type Four Acts: In these acts, the necessity changes (*taghyīr*) the forbidden means into a permissible (*mubāḥ*) one that is neither compulsory (*wājib*) nor

a mere concession (*rukhṣah*). I have only discovered this type in prohibitions that do not impinge on the rights of people. For example, a person praying obligatory prayer is permitted to leave prayer and delay it from its prescribed time deliberately due to a valid excuse (*'udhr*), such as to protect flock from a hunting wolf and to protect his property or that of another, as long as it is a dirham's worth (Ibn 'Ābidīn, 1992, 1:654; Shurunbulālī, 2002, p.382). In war ethics, Muslim jurists consider it permissible for Muslim warriors to wear the attire of the enemy in the battlefield to overcome them (A. Miṣbāḥī, 2006, p.39).

Prohibited Type Five Acts: These involve prioritising the life of a living person over another's bodily inviolability because the former's survival entirely and physically depends on forsaking the latter. Even though rights of people that cannot be rectified —like those in Type Three acts—are overridden in these acts, taking the forbidden means becomes compulsory like Type One acts. Like Type Three acts, these are not exempted under necessity in the primary texts. Type Three acts are different because the survival of one interest does not physically depend on the other in them. Type Five acts therefore share mixed features of Type One and Type Three acts. Note that the subsequent two acts are not sanctioned in scripture and are fresh cases of necessity based on *maṣlaḥah*.

a. According to the majority of Sunnī jurists, it is compulsory (*wājib*) to remove the child from the womb of a deceased mother by dissecting it if there are signs that the child is alive and the chances of it being removed alive are greater. This is because "the sanctity of the living is greater than that of the dead" (Mawwāq, d.1492, 3:77; Ḥusayn, M., 2009, p.427; Suyūṭī, d.1505, 1990, 1:87; A. Zarqā, 2012, p.202). Shaykh Niẓām (1310AH, 1:157, 5:360,) cited the permission from Shaybānī (d.805) and Abū Ḥanīfah and required empirical certainty or high

probability of life before the procedure without discussing the possibility of survival. Ibn Nujaym (1999, 1:76) conditioned there to be 'hope for survival' but did not explicitly stipulate certainty or high probability. Nawawī (1997, 5:301) elaborated that survival was only possible after six months of pregnancy, "otherwise there is no benefit in violating the sanctity of the mother's body." Mālik ibn Anas (d.795) forbade this due to the lack of survival in most cases. Later jurists of his school, like Saḥnūn (d.854) and Qaysī (d.820), permitted it (Mawwāq, 1994, 3:77). Muṭī'ī (d.1935), a Ḥanafī shaykh from Azhar in the recent past, also held that the success of saving a child was rare in such circumstances, whereas the sanctity of the mother's body is certainly established, and hence he regarded the surgery forbidden (Qarahdāghī and al-Muḥammadī, 2011, p.520). He therefore made the certainty of efficacy in the prohibited means a condition to save the child whereas abovementioned Ḥanafī sources do not require this. The reason for this, in my view, is that a) survival entirely depends on dissecting the mother and this is a case of double effect in context of the human body and life and b) dissecting the deceased mother's body is a lesser harm than allowing the death of the living child (Kāsānī, 1986, 5:130). Condition Three of necessity therefore does not apply. I have previously argued that the knowledge of efficacy of such procedures is to be determined by the medical expert.

b. Ḥanafī jurists upheld that if a foetus endangers the pregnant mother's life, it is compulsory to remove it from her womb. If it dies and can only be removed by cutting it into pieces, it is permissible to do so, but if it is alive then cutting it is not allowed (Ibn 'Ābidīn, 1992, 2:238; Shaykh Niẓām, 1310AH, 5:360). Ibn 'Ābidīn (1992) advocates the midwife would have to insert her hand in the birth

passage to cut the child.[34] The mischief of uncovering the genitals in front of the midwife is lesser than the mischief of endangering life, and the life and body of a living child in the womb is treated equally to the life and body of the living mother unlike the deceased child.

Type Four and Type Five acts are an important contribution of this study as their features are different to the classical classification of prohibited acts. Examples of Type Five acts reveal that the sanctity of the living is superior to that of the deceased. Whether this rationale is confined to Type Five acts in which one interest depends on another exclusively, requires further study.

5.2.4 Rules on Prioritising Conflicting Rights in Prohibitions

From the above prohibition examples based on scripture and legal precedents, we can formulate the following rules for necessity whilst intersecting the rights of God with those of people:

1. The right of people 'to preserve life' precedes the sole right of God 'over His prohibitions' in the examples of,
    - uttering disbelief under duress by a severe threat
    - breaking one's prayer and delaying it from its prescribed time to save others
    - hunting for the *muḥrim*
    - a woman subjected to rape under coercion
    - consuming *khamr* and pork in dire hunger.[35]

[34] Today, the suitable method is determined by the obstetrician or perimortem caesarean specialist.
[35] These are severer than the prohibition of robbery and theft in the rights of people (A. Khān, 2003, 23:619) as property can be rectified.

2. The right of a living person ‘to preserve life’ precedes the right of the deceased in the aspect of human sanctity in the following examples:

    - Cannibalising a dead body of even a Muslim to save life according to Shāfi‘īs and some Ḥanafīs, and of a living legally unprotected person according to Shāfi‘īs
    - Protecting the pregnant mother
    - Protecting the living foetus.

3. The right of a human ‘to preserve life, body or sanctity’ does not override the ‘same right’ of another to protect life, body functions and sanctity in the following examples:

    - two people in dire starvation and only one with food
    - one coerced by a death threat to amputate another person’s limb or to take their life
    - the compelled to revile or strike his parents.

This rule has exceptions in war ethics e.g. human shields, according to Ḥanafīs and Ḥanbalīs, as discussed in the previous chapter.

4. The right of a human ‘to preserve life’ precedes his personal right of ‘protecting his limbs’ in the example of someone coerced by death to cut his limb.

In the examples where a person’s right ostensibly conflicts with God’s right, the jurists gave the following two explanations for prioritising the human right:

a. Humans have needs and are weak unlike God (Farfūr, 1999, 2:546; Ibn ‘Ābidīn, 1992, 2:156, 6:478; Ibn al-Humām, n.d., 3:176, 6:98; Ibn Nujaym, n.d., 3:39; M. Miṣbāḥī, 2009a, p.98).

b. It is God who guides us to respect a human's right in such conflicts, therefore, humans are following God's instruction and not disobeying Him (A. Khān, 2003, 21:207) since He based His rights upon ease for people (Ibn al-Humām, n.d., 4:423).

5.3 The Impact and Scope of Need *(Ḥājah)*

In Chapter 3 I explained that a *ḥājah* according to the elaboration of A. Khān (2006; 2016) is an act whose absence engenders hardship or harm to any of the five fundamental values without endangering their existence. Carrying out all disputed mandatories (*farḍ 'amalī*) within schools, compulsory (*wājib*) and emphasised *sunnah* acts, teaching absolute essentials of Sunnī doctrine, whose denial does not take one out of Islam, are all types of a permissible need. The disputed prohibitions (*ḥarām 'amalī*) within schools, the prohibitively disliked (*makrūh taḥrīman*) and offensive acts (*isā'ah*) are all examples of prohibitions and abstaining from them is a need. However, committing them becomes a need when their absence harms one of the five fundamental values. Whilst considering its types and the limitations of their impact, subsequently I will study the impact of need on laws when it is a 'prohibited act' to 'repel harm' (*daf' al-maḍarrah*) from humans. In other terms, I will focus on need as the circumstance of hardship and non-life-threatening harm to humans that sanctions certain prohibited measures.

5.3.1 Ambiguity and Confusion Regarding the Impact of Need

The scope of *ḥājah* is hard to pin down in the legal works. This is due to the outwardly contradictory and unclarified statements one encounters and the varying uses of the word 'necessity'. For example, A. Zarqā (2012, p.210) argues that if a need opposes a specific primary proof, then it is not permissible, even if one finds benefit in it. If this

notion is taken at face value, uncovering the *ʻawrah* for visualisation for a non-life-threatening illness in a medical procedure would not be permitted, whereas M. Zarqā (2012, 1:161) considers it permissible. So, what is an accurate interpretation to this statement? A. Zarqā does not elaborate whether the opposed primary text is probable or absolutely certain, and nor does he comment on whether it establishes an extrinsically or intrinsically prohibited act. Additionally, he does not explain what the moral judgement would be if this need was public or tantamount to necessity, or if it was private or public and opposed a general primary proof text instead of a specific one. These compelling discussions remain unaddressed.

ʻUthmānī (2014, p.274) also highlighted that the legal discourse on need was scarce and pinning its rulings down was very difficult. He claimed to have never seen a clear distinction in the aspect of impact between need and necessity in the legal texts, and thus rests the judgements rising from need subjectively with the trained intelligence and competence of a skilled mufti. Other jurists and researchers have said the following regarding the impact of need:

1. Ḥamawī (1985, 1:277) and Suyūṭī (1990, 1:85) assert, "need does not permit the forbidden act," without offering any further explanation.
2. Zarkashī (1985, 2:25) states, "a private need permits the forbidden act," without explicitly qualifying the type of forbidden.
3. A. Miṣbāḥī (2006, p.59) upholds, "need cannot impact matters of consensus nor the *ḥarām* in action (*ʻamalī*)." This means it cannot sanction consensual prohibitions.
4. Bin Bayyah (2007, p.207), A. Miṣbāḥī (2006, p.62), Kāfī (2004, p.127), Amjūḍ (2015, p.123) and Raḥmānī (n.d., p.15) assert that need only permits extrinsically forbidden acts and not the intrinsically forbidden.

5. Suyūṭī (1990, 1:88) asserts, "when need spreads publicly, it becomes a necessity."
6. Bin Bayyah (2007, p.207) adds, need can also impact "probable prohibitions," without explaining if he refers to the intrinsic or extrinsic type.
7. He (2007) also argued that simple public need does not permit a prohibited act from an absolutely certain proof-text.
8. 'Uthmānī (2014, p.272) opines need cannot impact definitively prohibited acts in scripture, whether it be private or public, unless it rises to necessity.
9. S. Aḥmad (n.d., p.380) argues if need becomes widespread and abstaining from it entails harm, it relaxes prohibited acts. However, he does not explain which types of acts.
10. M. Miṣbāḥī (2009a, p.151) argues need can sanction absolutely certain prohibited and consensual matters. He too, however, does not clarify the type of need and acts it permits.

The ambiguity regarding the limitation of need rises due to the lack of differentiation in these assertions between the following issues:

1. public and private simple needs, and those tantamount to necessity and their varying scopes
2. the types of prohibited acts and their domains in law, i.e. rights of God or people, like acts of worship, purification, consuming unlawful foods or medicines
3. the different types of impacted prohibited acts, intrinsically, extrinsically and epistemically, which I identified in Chapter 3
4. the relation between public need and widespread problem (*'umūm al-balwā*).

Below I will attempt to study need in these aspects, and therefore, this study is perhaps the first academic and holistic attempt to incorporate these aspects to identify the impact

and limitation of a need in the Islamic law to distinguish it from legal necessity. See 5.3.9 subsequently for my observations on the cited scholarly views.

5.3.2 Types of Legal Need

Classical scholars divide need into two types (M. Miṣbāḥī, 2014, p.167; Suyūṭī, 1990, p.88; Zarkashī, 1985, 2:25; M. Zarqā, 2012, 2:1005; Zuḥaylī, 1985, 5:3426):[36]

1. Private (*khāṣṣah*): a need of people belonging to 'one class or profession' that do not make up most of the people in a province (made up of various towns) nor a country, even if it is a single person. For example, the class of visually impaired people and the class of travellers are excused from congregational and Friday prayers due to such need, whether they are scholars or commoners. Similarly, the need of the impoverished to take an interest-based loan, a prohibited act, is also private. If most people of a province are not ill, the need rising from their illness will remain private.
2. Public (*'āmmah*): a need that affects 'most people' throughout a province/region, country or across borders. For example, hiring and renting property is a public need as it affects most people of a province or a country today. Rental agreements are against sound analogy and general maxims of the law and thus ought to be prohibited, but they are permitted due to a public need that is based on scriptural evidence and custom from the Prophet era (A. Zarqā, 2012, p.211). If most people of a province fall ill, the need rising from their

[36] There is no agreement over the meaning of a private and public need, and definitions for them in classical legal texts are almost impossible to locate, except for Shāṭibī. See Kāfī (2004, pp.178) and Bā Ḥusayn (1416AH, p.55) for various definitions. I have based mine upon the Indian Majlis-e-Shar'ī's interpretation (M. Miṣbāḥī, 2014, p.167) with slight alteration as it is the widely accepted one and most appropriate to the discussion.

illness is public. These definitions are close to those of public and private customs (Ibn ʿĀbidīn, n.d., 2:132; M. Miṣbāḥī, 2009a, p.232), except that omitting customs may or may not incur hardship/harm.[37] It is noteworthy that Ibn ʿĀshūr (d.1973) (2001, p.373) referred to this as a 'time-bound public *ḍarūrah*' and espoused that legal texts ignore it.

Below is a comparison between the two types of need:

1. A need of a single class of people, such as the 'ill', can either be private or public depending on the quantity of people it affects. A class (*nawʿ*) here refers to a group of people who share the same purpose or are affected by the same problem or concern (M. B. Lakhnawī, d.1925, 2013, p.4). If a single class makes up most people in a province or country, their need will be public, such as buyers, hirers and employees. Based on the definitions above, the need of a single class of people remains private if it is restricted to a few towns smaller than a province. M. Miṣbāḥī (2014, p.167), on the contrary, upholds that public need is not restricted to one class and comprises several classes. My argument is that renting property is a 'public need', per the latter too, of tenants, a specific class of people, where most people of a province are renting. On the other hand, the need of the impoverished to take an interest-based loan is a 'private need' where most people of a province are not impoverished. Thus, I disagree with the Islamic Fiqh Academy of India (Qāsimī, n.d., p.16) too which unconditionally considers the need of a specific profession as a private one.

[37] M. Miṣbāḥī (2000, p.213) argued that harm and hardship were not integral to the definition of custom and later pointed (2009a, p.341) that abandoning custom may cause hardship, thus custom and need can coexist, with which I agree.

2. Both types of need include permissible and forbidden needs, although my discussion is regarding needs in which forbidden acts are commissioned or substances are utilised to ward off harm/hardship.

3. Another common feature in them is that both can rise to the degree of necessity (Atāsī, n.d., 1:75; A. Zarqā, 2012, p.209). Therefore, one must differ between 'simple need' (*ḥājah maḥḍah*) and 'need tantamount to necessity' (*ḥājah bi-manzilat al-ḍarūrah*) when studying the effects of need. A vital point to note pertaining to the above elaboration is that a public need that spreads across a province or country does not automatically render into a necessity, according to Ḥanafī scholars as I will elaborate, unless it leads to a cause whose absence endangers the existence of any of the five fundamental values.[38] Thus, there are four types of need:

1. simple private need
2. simple public need
3. private need tantamount to necessity
4. public need tantamount to necessity.

Despite the lack of thoroughly refined elaborations in existing literature, as acknowledged by 'Uthmānī (2014, p.317), subsequently I attempt to critically examine their impact on utilising prohibited acts and their limitations.

[38] Ghazālī, however, held that need became tantamount to necessity when it became public (Kāfī, 2004, p.264), and Bin Bayyah (2007, p.203) accurately pointed that Suyūṭī too should have made it clear that public need is not always tantamount to necessity.

5.3.3 Simple Private Need (*Ḥājah Khāṣṣah Maḥḍah*) and Its Impact on Undisputed Prohibitions

If there is no exemption for a circumstance of a simple private need in the Qur'an or the *sunnah,* it does not permit undisputed prohibited acts established from absolutely certain proofs[39] from the Qur'an, *sunnah* or *ijmā',* whether they are prohibited intrinsically or extrinsically. If there is, 'the simple need will be excused from the prohibition'. Such exemptions are found in the rights of God relating to acts of worship and purity. A. Khān (2003) names 21 exemptions in ritual ablution alone, like the simple need to avoid washing inside the eyes despite them being within the area of the face that is obligatory to wash based on the generality of the *āyah*, "…Allah does not intend to make difficulty for you, but He intends to purify you" (Q5:6) (M. Miṣbāḥī, 2009a, pp.120-2).

The basis for a general exemption in these rights of God where there is physical hardship is that the cited *āyah* was revealed in specific context of purification, and the *āyah*, "He has chosen you and has not placed upon you in the religion any difficulty" (Q22:78), is in the context of worship.

Therefore, the five types of prohibited acts mentioned under necessity remain forbidden under simple private need, unless scripture makes an exemption. However, I discovered a minority of jurists disagreed regarding absolutely certain Type Two acts under simple private need:

1. Ḥanbalī jurists permitted a person in a simple private need in which one faces bodily harm to take the belongings of another without prior permission and to

[39] This was unanimously agreed by the Majlis-e-Shar'ī of Mubarakpur (M. Miṣbāḥī, 2014, p.168).

reimburse them later, such as in using their bucket to draw water for consumption from a well or wearing their clothes to protect the body from the cold (Amjūḍ, 2015, p.118; Zuḥaylī, 1998, 2:785-7). They allowed a simple private need that does not have a specific exemption in scripture to excuse Type Two absolutely certain forbidden acts involving rights of people that can be rectified where the higher interest of one's body and life conflicts with that of another's belongings.[40] Apart from this, I did not find any other legal precedent signifying that a simple need excuses prohibited acts connected to the rights of people.

2. Under Prohibited Type Two acts, I mentioned that some Shāfi'īs and Ḥanbalīs opined that uttering a statement of disbelief was excused under less severe forms of duress that fall under simple private need. They inferred this understanding from events in the lifetime of the Prophet.

This study compels me to strongly disagree with Amjūḍ (2015, p.123), Bin Bayyah (2007, p.207) and Kāfī (2004, p.127), who unconditionally assert that need permits extrinsically forbidden acts, because as I have demonstrated in Chapter 3, some of them are definitively prohibited in scripture, like sexual intercourse during menses, which are not permitted in needs.[41]

[40] Under Type Two prohibited acts, I gave examples of confiscating and destroying another's wealth which was not permitted under simple need according to Ḥanafī scholars, as in saving oneself from non-life-threatening physical harm. Hence the rule remains disputed in this aspect.

[41] See: Figures 13, 14 and 15.

5.3.3.1 Examples of Scripture-Based Exemptions in Simple Need

In acts of worship and purification, jurists like Ibn al-Humām and A. Khān understood that the *āyah* of hardship (Q5:6) was general and exempted all types of needs in relation to the human body. However, they did not universally apply this to all domains of law, including those involving the rights of other people and their bodies. It is almost impossible to find legal precedents for this *āyah* to exempt people under physical or financial need to impinge on the rights of other people, especially those that are forbidden with absolute certainty and mentioned under prohibited act Type Three, such as cutting someone's limb or killing them.

Below are three examples of definitively mandatory acts that are excused to omit directly in scripture in a simple need:

Example 1. A traveller and sick person are permitted to leave a mandatory fast which is proven from an absolutely certain proof-text in the Qur'an (Q2:184), whereas the hardship of travelling and sickness is at the degree of simple need. The exemption for the sick and travellers from fasting in Ramadan follows directly in the Qur'anic *āyah* that makes fasting obligatory.

Example 2. Hastening to Friday prayer is an absolutely certain mandatory in the Qur'an (Q62:9), and omitting it is extrinsically forbidden as it leads to missing the prayer. However, omitting it is permissible for those excused in the Prophetic *aḥadīth* from praying the Friday prayer, including those with simple needs. The traveller and the sick are excused by express indication (*'ibārat al- naṣṣ*) and anyone who genuinely fears threat from an oppressor if he attends the congregational prayer, a physician who's absence puts patients at risk of harm and an old aged physically weak person are

excused by way of inferred indication (*dalālat al-naṣṣ*) due to hardship (Ibn ʿĀbidīn, 1992, 2:154; Marghīnānī, d.1220, 2004, 2:85; Ṭaḥṭāwī, 1997, p.505).

Example 3. Although lying is prohibited with absolutely certain proofs, Muslim jurists such as Ghazālī (n.d., 3:137) and his commentator Zabīdī (d.1791) permit speaking an explicit lie in cases of simple need, such as during times of war, reconciling between severed people, and when spouses intend to keep heart of the other when their relationship faces harm. This is due to the Prophet's *ḥadīth* narrated by Umm Kulthūm who said, "I did not hear the Prophet excuse lying except for three: a person who says something with the intention to reconcile people, a person who says something in wartime and a husband who says something to his wife or she says something to him" (Ghazālī, n.d.). However, Ibn ʿĀbidīn (1992, 6:427) and Ḥamawī (1985, 1:293), contrary to Ghazālī, take the view that in these cases of simple need, words with double meanings (*tawriyah*/ *maʿārīḍ*) ought to be used and not explicit lying, and this is the interpretation they ascribe to lying in the cited narration. Explicit lying is only permitted under necessity and in cases of simple need, as an alternative to it is present (Ḥamawī, 1985). Thus, the jurists' ethical take on lying is reminiscent of the principle of utility in contemporary ethics, which is strongly opposed by Kantianism.

In these examples, acts proved from absolutely certain commands/prohibitions in the primary proofs, are exempted in simple needs by primary proofs, either by way of express or inferred indication, otherwise simple private needs cannot override absolutely certain commands/prohibitions especially if they impinge on the rights of others.

5.3.4 Simple Public Need and Its Impact on Undisputed Prohibitions

Here I intend to examine simple public need more closely. If an exemption exists in scripture regarding a simple public need, there is no contention on its permissibility. However, if there is no exemption, can it sanction and outweigh any type of absolutely certain prohibition? Bin Bayyah (2007, p.207) unconditionally argues that simple public need does not permit a prohibited act from an absolutely certain text (*naṣṣ*). After rigorous study, I conclude that if such need becomes a widespread problem (*ʻumūm al-balwā*), i.e. religious scholars and commoners are all involved in utilising a forbidden means/substance to ward off difficulty, then certain forbidden means become permissible.[42] If it is not a widespread problem, it cannot override absolutely certain and agreed upon laws unless there is specific exemption in scripture.

5.3.4.1 The Relationship Between Public Need and Widespread Problem

The precise definition of widespread problem is nowhere to be found in the classical literature, which is why scholars attempted to define it by surveying its examples. The most accurate definition in my view is presented by M. Miṣbāḥī (2009a, p.2163) as, "a condition or state due to which the laity and scholars are all engaged in a forbidden act, and abstaining from it is either very difficult or causes harm and hardship to the preservation of [the fundamental purpose of] religion, life, intellect, lineage or wealth." After a detailed deliberation, the Majlis-e-Shar'ī of Mubarakpur adopted this definition in its final resolution (no.10, 1999) (M. Miṣbāḥī, 2014, p.179).

A public need is not by default a widespread problem because the former does not require the involvement of scholars in the act. A problem is regarded as widespread if

[42] This is based on the Majlis-e-Shar'ī's subsequent definition of widespread problem.

when it is present, it affects all kinds of people in almost every instance, including religious scholars. However, a public need requires most people of a province to be engaged in the act, even if there are no scholars involved. Similarly, need does not require the act to be prohibited, as a permissible means may be a need, but may not be a 'problem' (*balwā*). According to A. Khān's classification (2003) of needs, obligatory and emphasised *sunnah* acts are also needs, and yet they are not widespread problems. Thus, the two can mutually coincide (M. Miṣbāḥī, 2009a, p.17), and due to this, some researchers, like S. Aḥmad (n.d., p.385), inaccurately assumed that widespread problem and public need are synonymous. All public needs are not extenuating excuses, like forward sale, yet all widespread problems are extenuating excuses (*aʿdhār*) and concessions to warrant the forbidden means.[43]

Jaṣṣāṣ (1994, 3:166) used the term *ʿumūm al-balwā* and *ʿumūm al-ḥājah* interchangeably, and *al-Mawsūʿah al-Fiqhīyah al-Kuwaytīyah* (1988, 6:31-3) explicitly mentions that *balwā* is a widespread problem affecting many people and was used in the meaning of a public need, and at times as a 'widespread necessity'.[44] M. Zarqā (2012, 1:161) referred to *wafā* sale among the people of *Bukhārā* region as a 'widespread problem' and later as a 'public need' (2012, 1:210). These sources signify that the two terms can coincide, but I have observed they are not synonymous.

5.3.4.2 Two Types of Widespread Problem and their Effects on Laws

Widespread problem is of two types:

[43] Suyūṭī and Ibn Nujaym count widespread problem among extenuating excuses like sickness (Wizārat al-Awqāf, 1989, 16:257).
[44] This is different to the usage of the term in the extinction example of Juwaynī.

1. **Unavoidable Problem:** This is when individuals have no control and choice to abstain from the prohibited act/substance. In respect of its impact, the preferred opinion in the Ḥanafī school is such widespread problem relaxes the absolutely certain prohibited acts (M. Miṣbāḥī, 2009a, p.173). I agree with Ibn al-Humām (n.d., 1:204), Shilbī (d.1896) (1416AH, 1:74) and A. Khān (2003, 10:43) that utilising forbidden means in such a case is excused from the prohibitive text. For example, protecting one's body and clothes from small sprinkles of urine is practically unavoidable and like a necessity as there is no choice. It thus relaxes (*takhfīf*) the scriptural judgement on the impurity of urine and restricts (*takhṣīṣ*) it to other than these sprinkles (M. Miṣbāḥī, 2000, p.199; 2009a, p.175).[45] Widespread problem cannot, however, cancel or overrule the scriptural evidence entirely, so urine sprinkles do not become clean, however, they are excused. Note that this relaxation is not based on subjective opinion, as Ibn al-Nujaym (1999, 1:72), Zaylaʿī (1313AH, 1:74) and Bāburtī (n.d., 1:206) inaccurately assumed, rather it is facilitated in the cited *āyah* of the Qur'an (Q5:6) on hardships directly in the context of purity, as explained by Ibn al-Humām (M. Miṣbāḥī, 2009a). The unavoidable widespread problem, therefore, has a stronger basis to restrict prohibitions proved from general proofs of the scripture and *dalālat al-naṣṣ*, as well as to permit affected persons to leave standard fatwa positions of the school and adopt weaker ones or those of other schools.

A. Miṣbāḥī (2000, p.157) asserts that in the Ḥanafī school, this relaxation applies to absolutely certain 'impurities' and 'other disputedly prohibited acts'. I will argue in

[45] The *aḥadīth* on urine's impurity are famous (broadly certain), and there is absolutely certain scholarly consensus on it (M. Miṣbāḥī, 2000, p.192).

Chapter 6 that disputedly prohibited acts, such as oral intake of alcohol-based medicines, are relaxed in medical needs when there is widespread problem.[46] The Islamic Fiqh Academy of India 'unconditionally' permitted absolutely certain prohibited acts due to lack of alternative in such need (Qāsimī, n.d., pp.17, 568). I disagree with this standpoint, because the inability to refrain from an act is unlike lacking an alternative. A vital point is that jurists refer to this type of problem as 'necessity', as in the example of the blood of fleas which is excused in a small amount, due to it being widespread and difficult to avoid (Bā Ḥusayn, 1416AH, p.438; Shurunbulālī, 2011, p.100).[47]

2. **Avoidable Widespread Problem:** This is when individuals have control and the choice to abstain from the forbidden act/substance. The impact of this problem remains vague even in M. Miṣbāḥī's detailed study (2009a, pp.157-178), which does not elaborate if it is warranted to relax or restrict the absolutely certain prohibitions. According to my analysis, where scriptural permission is absent and the prohibition is probable (in the widest and narrowest meanings), such a problem relaxes all 'disputed laws', including those that are probable in the narrowest or broadest meanings,[48] as well as those pertaining to impurities, financial transactions and impermissible acts, such as consuming medicines made with substances forbidden in probable and disputed proofs.[49] I based this judgement upon various examples scattered in existing studies of M. Miṣbāḥī (2000, pp.193, 200; 2009a, pp.17-8), A. Khān (2003, 10:43) and Qāsimī (n.d., pp.223-4, 397). For example, A. Khān (2003) opined that wearing any piece of

[46] M. Miṣbāḥī's examples (2009a, p.169) reflect this.
[47] See: Chapter 3.
[48] See grey shades in Table 1 (after p.45).
[49] See: Chapter 6.

> clothing[50] coloured in a dye (*purya*) mixed with legally disputed spirits was permissible due to the widespread use of such clothes among the Muslims of India, though it was avoidable as alternatives were present. However, people would have incurred some hardship in pursuing these alternatives because they were accustomed to wearing such dyed clothes. The relaxation in this ruling is somewhat intriguing, as wearing coloured clothes is an act of mere beauty (*zīnah*), yet hardship is present.

M. Miṣbāḥī (2009a, p.176) quotes M.A. Lakhnawī (d.1886) who restrictedly accepted the impact of widespread problem in the domain of purity and impurity, but not in the prohibition or admissibility of acts. A. Khān (2003, 10:43) objected to this view and presented various legal precedents of accepting it in financial transactions from Ibn ʿĀbidīn.[51]

[50] Be it a need like a shirt or a mere benefit like a waistcoat.
[51] A. Khān's view is consistent with Anṣārī (2002, 2:160-1) too.

	Impurities	Acts of Worship	Other Prohibited Acts
Avoidable Widespread Problem	A. Khān allowed wearing clothes dyed with 'disputed' spirits - Definitive impurities are not excused (I agree)	A. Khān excused 'probable/disputed' acts, such as Friday prayer in villages (I agree) - M. A. Lakhnawī disagrees	A. Khān & Ibn 'Ābidīn permitted 'probable/disputed' acts and financial dealings (I agree) - Oral intake of 'definitively prohibited' medicine is NOT excused due to lack of alternative and harm, but 'disputedly prohibited' medicine is excused (Chapter 6) - A. Miṣbāḥī explicitly asserts the 'definitively' prohibited are not excused (I agree)
Unavoidable Widespread Problem	A. Khān & Ibn al-Humām excused 'definitive and disputed' impurities like small sprinkles of urine (I agree) - M.A. Lakhnawī agrees - Ibn al-Nujaym & Bāburtī disagree - Unavoidable means 'inability to abstain from problem'	- Omitting prostration due to physical hardship/harm is excused based on dispensations in observances - Unavoidable denotes 'inability to abstain from the problem due to hardship'	- India's Islamic Fiqh Academy 'unconditionally' permitted 'definitively' prohibited acts due to lack of alternative (I disagree)

Figure 20 Views of Ḥanafī Scholars Regarding the Impact of Widespread Problem in Various Domains of Law and its Limitations

	Impurities	Acts of Worship	Other Prohibited Acts
Definitive Scripture/Agreed Upon Laws	Unavoidable Only	Unavoidable Only	Unavoidable Only
Disputed/Probable Laws /No Scripture	Avoidable/ Unavoidable	Avoidable/ Unavoidable	Avoidable/ Unavoidable

Figure 21 Permissive Impact of The Types of Widespread Problem on Laws in The Presence/Absence of Scripture

5.3.5 Simple Needs (Public/Private) and their Impact on Prohibitions from *Dalālat al-Naṣṣ*

As for prohibited acts established by way of *dalālat al-naṣṣ* in scripture, I argue that simple public need can sanction them, even where there is no specific scriptural exemption. This rule implies that where a prohibited act proved from an inferred indication in a primary proof-text becomes a simple public need, it is no longer prohibited since the need restricts (*takhṣīṣ*) the prohibitive textual implication to acts other than the need. I have not seen this rule explicitly stated in any of the texts I consulted, however, I formulated it on the basis that Sunnī jurists accept that a widespread Muslim custom (*'urf 'āmm*) warranted this effect. However, omitting a custom does not necessarily involve a hardship according to classical jurists (Miṣbāḥī, 2000, p.213).[52] When a widespread custom, devoid of hardship, can restrict acts established by *dalālat al-naṣṣ* from a prohibition, hardship is a greater reason in simple public need to restrict such primary proofs. Examples of simple public need include the sale of *wafā*[53] among the people of the Bukhārā region, renting wells, paying the owner of a flour-grinding machine an amount of the flour he grinds in return for his service where these practices have spread over a province, all of which are principally forbidden as they contradict sound analogy and are matters forbidden in primary proofs by way of *dalālat al-naṣṣ*, yet are permitted due to simple public need (M. Miṣbāḥī, 2009a, pp.167-71).

[52] Note that a widespread custom of Muslims cannot cancel an explicit law in the primary proofs entirely, though it can specify a general proof (*'āmm*). See Bā Ḥusayn (1416AH, pp.355-6) and M. Miṣbāḥī (2009a, pp.237-8) for various approaches.

[53] A buy-back sale in which the seller sells his belonging on the condition that he can buy it back when he can afford it. The purpose of the seller is to obtain immediate cash for his needs from a sale rather than taking a loan.

As for simple private need, I argue that this may also permit some acts prohibited by way of *dalālat al-naṣṣ* because if it does not, it would equate to private custom (*'urf khāṣṣ*) in its impact in which harm is absent, and this is not plausible due to the presence of harm/hardship in private need.[54] I cited Ibn 'Ābidīn (1992) in Example 2. earlier who elucidates this but I did not find this discussed in any other work I consulted.

5.3.6 Simple Needs (Private/Public) and their Impact on Probable/Disputed Proofs and Moral Judgements

Based on my previous observations, simple need permits disputed prohibited acts and those with moral judgements lesser in severity,[55] such as the prohibitively disliked and wrong acts that are classed at the degree of need in Table 2 (after p.105) in the domains of

- acts of worship
- purity/impurity
- consuming disputed foods
- wearing/using disputed objects
- financial transactions.

Subsequent is a summary of the assessment. A simple need, public or private, sanctions all disputed matters (*umūr ijtihādīyah*) within and among the schools, permitting the commission of:

a. The disputed forbidden, the omission of the disputed mandatory and all lower types of moral judgements, including standard fatwa positions in schools based

[54] A private custom is a practice of the commoners and learned of one or two cities but does not spread through a province or country (M. Miṣbāḥī, 2009a, p.232).
[55] According to sin/reprimand in Figure 12.

on juristic analogy and secondary disputed sources of the law (Bā Ḥusayn, 1416AH, p.104; Bin Bayyah, 2007, pp.227, 271; Kāfī, 2004, pp.130-32; M. Miṣbāḥī, 2009a, pp.133, 137, 147).[56] For example, if someone experiences a severe hunger but not to the point of death and has no alternative, he can consume foods prohibitively disliked in the school he follows (M. Miṣbāḥī, 2009a, p.138) and those relatively forbidden in the other schools. Similarly, if a person encounters physical hardship that causes harm in washing the disputed mandatory areas in ritual ablution, he is excused. However, Sarakhsī (d.1096) among the Ḥanafīs is noted to have disputed this in some instances where a probable *ḥadīth* existed, even if the need was widespread, but his opinion is weak (Bā Ḥusayn, 1416AH, p.102). A discussion on simple private need and prohibited medicines is subsequent in Chapter 6 where an important amendment to this rule will be presented.

i. The disputed acts can be intrinsically or extrinsically forbidden at the degree of need as categorised in Figure 15. For example, carrying and preparing liquor (*khamr*) is extrinsically and probably forbidden due to a solitary *ḥadīth*, yet it is permitted under a valid need, unlike consuming it (M. Miṣbāḥī, 2009b, p.86). Hence the external application of liquor (*khamr*) is also permitted under such need since the absolute prohibition is regarding its consumption and not the latter.[57]

ii. The disputed acts can be morally wrong, slightly disliked and undesirable proved from absolutely certain proofs, since omitting

[56] See: Table 1 (after p.45) and Table 2 (after p.105) to identify exact types.

[57] See: Chapter 6.

them is at the degree of need, benefit or embellishment.[58] Therefore, to assert that simple need cannot override any absolutely certain proof text is a fallacy. The language of the text, i.e. whether it contains a binding imperative, emphatic ruling or mere recommendation must also be examined when assessing the epistemic nature of laws in scripture, as I have previously argued. M. Miṣbāḥī (2009b, pp.82-96) attempts to prove this scope for simple need but does not elaborate the types of moral judgements like this study and only mentions the prohibitively disliked and probable proofs.

b. In context of the human body, moral judgements classified at the degree of need in Chapter 3 are permitted in a simple need to protect it from harm. A further study is required to identify the limitations of simple private and public needs in relation to probable rights of people in the absence of scriptural provision.[59]

c. Ḥanafī and Mālikī jurists consider it permissible for followers (*muqallids*) of their schools to leave the fatwa position of their Imam for an opinion of another school if the former entails hardship at the degree of simple need (‘Uthmānī, 2014, pp.202-238).[60] The Majlis-e-Shar‘ī of Mubarakpur also ruled that a follower of the Ḥanafī school can leave the fatwa position in circumstances of need and necessity, though there was significant disagreement between the members over the pre-conditions.[61] Hence, simple need, private or public, is

[58] See: Table 2 (after p.105) and Figure 5.

[59] Ghazālī’s *Shifā al-Ghalīl* (1971) is a good starting point as it delves into relative examples of boat ethics.

[60] Bin Bayyah (2007, pp.211, 227, 271) conditioned it must not be extremely weak, namely, an anomalous (*shādh*) opinion that opposes sound interpretations of scripture. See also Tarāblusī (2010, p.345) and ‘Uthmānī (2014, p.231).

[61] See: M. Miṣbāḥī (2009c, p.287; 2018, 2:163-177) for a summary of the views.

prioritised over the preferred and fatwa positions of schools that are based upon differences of interpretations of scripture or lack of it all together.[62] This internal school-based ethos aims to minimise unbearable hardship and harm and accommodate needs of its adherents and wider needs of Muslim communities at large.

Contrary to necessity, Atāsī (n.d., 1:75) accurately states that according to the Ḥanafī school, 'simple need' cannot do two things: a) change a prohibited judgement of Type One definitively prohibited acts, as in drinking liquor (*khamr*), into a compulsory (*wājib*) one, and b) excuse (*tarkhīṣ*) Type Two acts, such as utterance of disbelief. However, under simple need, I mentioned some Ḥanbalīs did permit Type Two acts that involved sole rights of people that can be rectified, and some Shāfi'īs and Ḥanbalīs permitted Type Two acts that involved rights of God. In Chapter 6, I will further expound that medical needs can morally compel one to seek cure, if the medication is not definitively prohibited.

5.3.7 A Need Tantamount to Necessity (*Ḥājah bi-Manzilat al-Ḍarūrah*)

This need and its scope of impact is the most difficult to understand in the literature. I found three approaches to explain it, and none of them signify that needs unconditionally override definitively prohibited laws.

Approach One: To elaborate the meaning of need tantamount to necessity, Anṣārī (2002, 2:262) gave the following two examples:[63]

[62] An amendment to this rule will be discussed in Chapter 6.
[63] Before Anṣārī, Juwaynī (d.1085) (1997, 2:282) and Ghazālī (1971, 1:1246) outlined these distinctions.

a. Hiring services (*ijārah*) are a need as a universal concept (*kullī*), but some types (*juz'īyāt*) of hires, such as hiring a wet-nurse to breastfeed a child, are at the degree of necessity; this is because the lack of a wet nurse would endanger the life of a child. In my observation of this example, the need is a commission of an act 'prohibited' by analogy, because hiring something for consumption is forbidden, but paying a wet-nurse is permitted in the Qur'an (Q65:6) and is established from a long practice from the Prophetic era (A. Zarqā, 2012, p.212). The class of hiring services is a need, but one of its types is a necessity for individual children who do not drink the milk of any other and there is a highly probable fear for the loss of the child's life or severe harm, resulting in this type being a necessity. Before a high probability of severe danger to the child, the need of hiring a wet-nurse is permitted due to the cited proofs.[64]
b. Sale transactions are a need as a universal concept, but the sale of an amount of food and clothes that save one's life is a necessity in individual cases. Here the need is the commission of an 'obligation'.

Juwaynī (1997, 2:282) precisely observed that if the class of a specific act like rental agreements was forbidden, despite it being a need as a class, it would bring (financial) ruin to some individuals and thus from this aspect, rental agreements are a need tantamount to necessity. In the example of Anṣārī, if hiring wet-nurses was forbidden by analogy, some children would face the fear of death. Note that the class of 'hiring services' is a 'public need'.

[64] In Chapter 4, I explained that once a highly probable fear of danger to life or a body part is established, a necessity is established.

In my observation, the cited examples are different to 'wearing clothes' and 'eating and drinking', which as a generic universal concept are broader than a necessity and need as utilising varying amounts are a necessity or a need.[65]

Anṣārī (2002) asserts, "due to the small number of particular examples, these universal needs (sales/hiring services) do not leave the boundary of need [and elevate to necessity]." The Majlis-e-Shar'ī of Mubarakpur (fatwa no.10, 1999) unanimously adopted Anṣārī's elaboration and declared the following: "a need rises to the level of necessity when it leads to a cause (*sabab*) upon which the existence of one of the five values directly depend. For example, rental agreements, upon which the five values do not depend, form a need that is tantamount to necessity, because a person will draw near death or die without a home due to the severity of heat or cold" (M. Miṣbāḥī, 2014, p.167). In most cities today, if rental agreements were declared prohibited, there would be social and economic chaos (M. Miṣbāḥī, 2014).

Considering Anṣārī's view, the individual act upon which the survival of a fundamental value rests is a necessity, and thus, its scope and effect would be no different to it, even if the universal class it belongs to is a need whose scope remains of that as a need. Accordingly, the Majlis-e-Shar'ī of Mubarakpur agreed that "simple need does not relax the definitively prohibited acts unless the need arises to a necessity due to a strong cause, which then relaxes (*takhfīf*) definitively prohibited laws" (M. Miṣbāḥī, 2014).

Citing Ibn Nujaym (1999, 1:78), M. Miṣbāḥī (2009a, p.154; 2018, 1:274) further advocated that both private and public need can rise to a necessity.[66] For example, a needy person can take an interest-based loan when there is no suitable alternative to

[65] See: Chapter 3.
[66] In its resolution (no.10, 1998), the Majlis-e-Shar'ī of Mubarakpur (M. Miṣbāḥī, 2014) did not elucidate that both types of needs can be tantamount to necessity.

ward off harm (Ḥamawī, 1985, 1:294). In my observation, the universal concept of 'taking a loan' is a need, and taking it on an interest basis in a circumstance where a fundamental value is endangered and no alternative option is present is a necessity; this is despite the fact that it is not proven from scripture, a Prophetic custom or scholarly consensus.[67] 'Uthmānī (2014, p.273) declared this a simple necessity, whilst M. Miṣbāḥī (2014, p.167), Raḥmānī (2012, 3:171) and the Islamic Fiqh Academy of India (Qāsimī, n.d., pp.398, 361, 365) declared it a need tantamount to necessity, and A. Miṣbāḥī (2006, p.57) referred to it as a need. In my view, this confusion rises because 'Uthmānī (2014) does not distinguish the generic class of taking a loan, which is a need, and its cited type, which is a necessity. It is true, however, that referring to the latter as a necessity would remove confusion in respect of its impact, but jurists take its universal class into consideration and name it need tantamount to necessity. The reason for the permissibility of taking an interest-based loan, therefore, is a circumstance of necessity, and not because it is a need or 'extrinsically prohibited', and neither because of it being a 'prohibited means', which is therefore lesser in prohibition than 'prohibited ends', as argued by Bin Bayyah (2007, p.206) and Raḥmānī (2012). In the discussion of intrinsic and extrinsic prohibitions, I argued that the severity of a prohibition was determined by the epistemic strength and language of scripture.[68] Thus, an extrinsically prohibited act with absolute certainty is more severe than a probable intrinsically prohibited one. I also, therefore, disagree with scholars like Raḥmānī (2012, 3:171) who unconditionally assert that taking a loan in a need is permissible, because a needy person (*muḥtāj*) in such case is in a circumstance of necessity.

[67] This example disproves 'Uthmānī 's view (2014) that such need must be established in scripture or custom from the Prophetic era.
[68] See: Chapter 3.

Approach Two: Zarkashī (1985, 2:24) and Suyūṭī (1990, 1:88), both Shāfiʿīs, advocated that when a need becomes public, it becomes like a necessity. A. Miṣbāḥī (2006, p.57), a Ḥanafī, also held this view. However, cited scholars do not speak of a private need tantamount to necessity. I suggest that these scholars are restating the principle which Juwaynī (1980) formulated from the extinction of halal example—mentioned subsequently—that when the need involving prohibited acts is widespread and there is no alternative, to the point that it leads to a cause, such as malnourishment, which endangers fundamental values, then the need to utilise definitively prohibited means for individuals is like a necessity in that it makes prohibited Type One acts morally compulsory. Therefore, my observation is that, the rule of Zarkashī and Suyūṭī does not apply to every public need, but only to those that lead to a cause that endangers one of the five fundamentals.

Juwaynī (1980, pp.475-504), a Shāfiʿī, creates the following example for a novel need that is not proved explicitly in scripture, which Ghazālī (1971, 1:246) seconds.[69] Let us assume that avenues of earning and consuming halal are almost extinct and prohibited means have spread across the earth.[70] The only meat[71] available to consume is pork and there is a need to eat in excess of necessity to ensure that bodies are nourished and well maintained for day-to-day duties and continuity of normal life. He argues this would be permissible, not only in the example of food, but also in expanding homes and wearing clothes to the extent of need with absolutely certain prohibited means too, as these interests are congruent with the established purpose of the Sharīʿah to maintain normal order of the world. Restricting people to the amount of necessity in food, shelter and

[69] I did not find this example in any Ḥanafī source.
[70] I was surprised to see Ghazālī (1971) assert that his era (11th century) was not far from this condition. Ibn Taymīyah (d.1328) (2005, pp.11-34) objected to the presence of such a circumstance.
[71] Juwaynī (1980) considers meat essential for nutrition and good health.

clothing would lead to extinction of humans through malnourishment and illness, and eventually the world would be destroyed, resulting in the extinction of religion and the symbolic observances of Islam. Thus, everyone would be permitted to purchase, consume and wear certainly forbidden things and live in a house made from forbidden means, such that one's needs are fulfilled, more than the amount in necessity and less than that in luxury.[72] Note that here the widespread problem is a widespread necessity which denotes that necessity and widespread problem can also coincide, in which case the scope of a necessity is warranted to circumstances of need. In my view, such a scenario is not possible for a private need.

Considering Anṣārī (2002) above, 'eating' food and 'wearing' clothes to save one's life are necessities, and 'buying' clothes and food are needs tantamount to necessity, hence in the example of Juwaynī, widespread necessity coincides with need tantamount to necessity.

Approach Three: Contrary to the above, 'Uthmānī (2014, pp.318-9) argued that a need only rises to a necessity if the primary sources explicitly establish it, and he points that this blurs the lines between a need and necessity. He fails to recognise the intricate difference identified by Anṣārī (2002) above. Furthermore, he overlooks the innovations that form necessities and *maṣlaḥah mursalah*,[73] as shown in Juwaynī's novelty (1980) of the extinction of halal, and thus I consider 'Uthmānī to have erred in asserting that every need tantamount to necessity requires a scriptural proof or Prophetic custom to permit it.[74]

[72] See: Chapter 3 for A. Khān's examples of necessity and need in these contexts.
[73] See: Chapter 3.
[74] See the Majlis-e-Shar'ī's fatwa (no.10, 1998) in M. Miṣbāḥī (2014, p.177) for types of customs and their impact scope.

		Primary Sources for Intrinsic/Extrinsic *Ḥarām*			
		Absolutely Certain Proofs (Explicit Indication)	*Dalālat al-Naṣṣ* (Implied Indication)	Broadly Certain Proof-Texts	Narrowest Probable Proof-Texts
Types of Need	Simple Private Need	X unless there is scriptural exemption, as in the rights of God in worship/purification	✓	✓	✓
	Simple Public Need	X unless there is a scriptural exemption in the rights of God in worship/purification, or if there is unavoidable widespread problem in impurities	✓	✓	✓
	Need Tantamount to Necessity (Private/Public)	✓ Prohibited Act Types One, Two and Four	✓	✓	✓

Figure 22 A Refinement of Eight Types of Prohibitions Sanctioned by Four Types of Need

5.3.8 Permanent vs. Temporary Judgements in Needs

Note that hiring services, *salam* (forward sale) and *istiṣnā'* (order to manufacture sale) are public needs that oppose sound analogy (Ibn Nujaym, 1985, 1:294), yet the former two are permitted by a Prophetic expression and the latter by scholarly consensus. Moreover, they are not extenuating excuses (*a'dhār*) like sickness, therefore they are

permanently permissible, regardless of the presence/absence of hardship/harm in individual cases (Atāsī, n.d., 1:76; A. Zarqā, 2012, p.211-2).[75]

As for needs that are not established in the scripture or Prophetic custom and contradict sound analogy, if they fall under a purpose of the Sharī'ah and are thus regarded a *maṣlaḥah mursalah*[76], they will be accepted when the need arises, and not permanently. Similarly, needs that rise from genuine excuses, such as sickness, travel and coercion etc., are bound to the presence of those excuses (Wizārat al-Awqāf, 1989, 16:257). I therefore disagree with Raḥmānī's unconditional view (n.d., p.15) that the judgements of public needs are permanent.

In Juwaynī's example of halal extinction, the relaxation of the law is bound to the presence of a widespread necessity, and thus I also disagree with the unconditional proposition of 'Uthmānī (2014, p.319) that needs tantamount to necessity take permanent rulings, although some of them like rental agreements and *salam* do have permanent rulings.

In my view, the basis for a permanent judgement is scripture, Prophetic custom, Muslim consensus and for the act to belong to a domain other than extenuating excuses. This discussion is according to the Ḥanafī school. As for in the Ḥanbalī school, once a dispensational need becomes public, the presence or absence of hardship in individual cases does not affect the permanency of the permissibility (Dawsarī, 2000, p.340).

[75] This is a forward sale in which the buyer pays in advance for an item the seller will provide at a pre-agreed date in the future.
[76] See: Chapter 2.

5.3.9 Contextualizing Contentious and Ambiguous Statements on the Impact of Need

Given that a detailed study on legal need has been presented with its types and impact scope, we can now revisit the cited statements made by scholars previously[77] in light of my findings.

1. A. Miṣbāḥī (2006, p.59) erred in claiming that the disputed mandatory (*farḍ ʻamalī*) and forbidden acts (*ḥarām ʻamalī*) across the Sunnī schools are proved from absolutely certain proofs, because as I examined in Chapter 3, these are proved from proofs that impart broadest certainty (*qaṭʻī aʻamm*) and are probable in the broadest context. Had their sources been absolutely certain, dispute would not have risen among the jurists regarding them (A. Khān, 2003, 1:181). Such matters fall within the scope of *ijtihād* and scholarly difference.[78] A. Miṣbāḥī (2006) therefore erred in asserting that simple need did not sanction *ḥarām ʻamalī* acts.
2. Additionally, he (2006, p.62) mistakenly equated 'intrinsically forbidden' to the absolutely certain and 'extrinsically forbidden' to the probable, and thus asserted that [simple] need did not override the former. I demonstrated in Chapter 3 that this dichotomy is inaccurate and that both types of forbidden can be certain and probable, and simple need sanction both types if they are probable. As a result of this, the assertion of A. Miṣbāḥī (2006, p.62), Kāfī (2004, p.123) and Amjūḍ (2015, p.123) that simple need permits an extrinsically forbidden act (*ḥarām li-ghayrihī*) without epistemically qualifying it to the probable one is flawed unless they consider all such prohibitions to be probable

[77] See: Section 5.3.1.
[78] See: Table 1 (after p.45).

which is also a fallacy. Their assertion can be correct if they are referring to extrinsically forbidden acts that are novel and not expressed in scripture.

3. Bin Bayyah's assertion (2007, p.207) that mere need can override 'forbidden means' without qualifying it to the probable means is problematic. He does make it clear, however, that a mere need cannot override an absolutely certain *naṣṣ* by sanctioning a prohibited act proved by it.
4. Bin Bayyah's statement (2007) that public need does not permit definitively prohibited acts is contended where an exemption exists in scripture, where it is tantamount to necessity as in Juwaynī's example of extinction or an unavoidable widespread problem.
5. M. Miṣbāḥī (2009a, pp.119, 151) ambiguously asserts that simple need[79] sanctions some consensual and absolutely certain prohibitions, yet the examples he offers are for private needs tantamount to necessity.
6. Zarkashī's wording (1985, 2:25) of the rule, "the private need permits forbidden acts," refers to the probable prohibitions as his examples are of probable *aḥadīth* or scriptural exemptions.
7. A. Zarqā (2012, 2:1007) is also ambiguous on the question of need conflicting proof-texts and asserts without qualification, "need cannot violate a proof-text (*naṣṣ*) but overrides analogy and general legal maxims." I would interpret this to mean a 'simple need' cannot override an 'absolutely certain' prohibition since widespread unavoidable problems and certain needs tantamount to necessity are warranted this scope and restrict (*takhṣīṣ*) the scriptural proof.

[79] He (2009, p.147) contrasts need with 'need tantamount to necessity' on the following page, which indicates the simple need is intended.

8. Considering the elaborated impact of simple need, the unconditional resolution (no.10, 1998) of the Majlis-e-Shar'ī of Mubarakpur (M. Miṣbāḥī, 2014, p.168) which reads, "it is agreed that a need cannot relax definitive prohibited acts" could have been better worded. The resolution ought to have precisely stated "a simple private need for which there is no exemption in scripture, cannot relax the absolutely certain prohibited acts" to exclude public needs that are widespread problems, needs tantamount to necessities, needs with exemptions in scripture.
9. The resolution of the Islamic Fiqh Academy of India (Qāsimī, n.d., p.568) vaguely and unconditionally accepts widespread problem to impact definitive prohibitions without identifying the exact pohibition types.
10. M. Miṣbāḥī (2009a, p.152) rightly argues that need can change (*taghyīr*) the moral judgement of a forbidden act to 'permissible' (*mubāḥ*), but he does not clarify a) it is need tantamount to necessity, b) nor that the prohibited act is Types One and Four mentioned earlier in this chapter.
11. I consider A. Miṣbāḥī (2006, pp.60-1) to have erred in upholding that only the undisputed forbidden moral law is proved from absolutely certain proofs. The existing literature I consulted does not differentiate between various types of absolutely certain moral judgements in the context of the 'textual indication' when discussing the impact of need. Such distinction is required to understand the impact of need on moral laws. In Table 2 (after p.105), I demonstrated that all absolutely certain textual indications did not always establish an undisputed forbidden act; some established the wrong, slightly disliked and undesirable moral judgements. Despite being prohibitive in the language, though not bindingly, and absolutely certain in historicity and indication, these judgements

are lesser in the degree of importance than the undisputed forbidden, as omitting them is a need, and thus they are permitted in cases of simple need. Considering this, I oppose generalizing statements like "need cannot impact definitive moral judgements," as this includes moral laws lower than the undisputed forbidden which are overridden by all needs.

12. A classic example of a statement on need whose interpretation is contentious among modern researchers can be found in Ḥamawī (1985, 1:277) and Suyūṭī (1990, 1:85). The statement reads, "need does not make the forbidden (*ḥarām*) act permissible (*mubāḥ*) and permits opening the fast." Some scholars claim this denotes that need (without qualification) cannot permit any type of forbidden act, whether certain or probable (M. Miṣbāḥī, 2009b, p.137). M. Miṣbāḥī (2009b, p.139) opposed this view and argued that forbidden here means the 'intrinsically and absolutely certain forbidden', and so the statement signifies that a simple need does not permit an intrinsic *ḥarām*, however, it can permit an extrinsic *ḥarām* to which the latter part of the contentious statement (i.e. 'opening the fast') indicates. In his view, breaking the obligatory fast is extrinsically forbidden since consumption of food and drink is not intrinsically forbidden, rather it is prohibited due to the days of Ramadan. I disagree with both interpretations because of the following:

    a. The first view totally disregards the examples of exemptions I presented from the primary sources where need overrides absolutely certain forbidden acts. It also overlooks the cases in which simple need overrides judgements from probable proofs, such as uncovering the knee and a part of the thigh above it from the *'awrah* for medical treatment.

b. M. Miṣbāḥī (2009b) overlooks the epistemic strengths of extrinsic *ḥarām* elaborated in Chapter 3. Simple needs cannot sanction every extrinsically forbidden act and can only sanction those that are probable (in the narrowest and broadest meaning) unless there is scriptural exemption.

c. An absolutely certain Qur'anic proof (Q2:185) makes an exemption for the sick from fasting in Ramadan, which is the reason why simple need in fasting permits breaking the fast. The reason is not that it is extrinsically forbidden in nature, contrary to M. Miṣbāḥī (2009b).

If we accept M. Miṣbāḥī's interpretation as a rule, it suggests that a 'simple need can override all extrinsic forbidden acts, even if they are prohibited with absolute certainty' unless he strictly means innovations that harm a fundamental value.[80] Ḥamawī (1985) and Suyūṭī (1990) do not insinuate this meaning and simple need cannot permit any type of absolutely certain forbidden acts, intrinsic or extrinsic, unless an exemption for it exists in the primary proofs, to which the second part of the contentious statement points.

Considering my elaboration, need in this statement denotes 'simple need', and 'forbidden' denotes 'absolutely certain forbidden', intrinsic or extrinsic. I consider these as the apparent and immediately perceived meanings to the words; 'need' and '*ḥarām*'. Therefore, the latter part of the statement (breaking the fast) denotes that; if scripture itself has made a provision for someone in simple need, it can override an absolutely certain prohibition as the sick person is excused from fasting from the same absolutely certain proof-text that obliges fasting (Q2:185). According to my explanation, this statement therefore insinuates that 'simple need does not permit

[80] See: Chapter 3.

absolutely certain prohibited acts,' and it corresponds to my elaboration on the scope of simple private/public need above.

5.4 Conclusion

This chapter set out to rationalize that the Islamic law does not support an extreme and uncompromising form of conservatism to its observances and adherence to prohibition laws. It has demonstrated that God's laws accommodate conditions affecting people's lives, sanity, health and wealth, and provisions are made to meet physical and intellectual needs. This study contributes to our 'knowledge of terms' used in legal texts relating to the conditions of health and physical wellbeing as follows:

1. The word 'necessity' is used in the following meanings other than its technical narrowest one:
    a. need, e.g. the person in a necessity to take a loan is referred to as a 'needy'
    b. unavoidable widespread problem
    c. need tantamount to necessity
    d. an act whose absence engenders harm/hardship.
2. Hardship (*ḥaraj*) is a broad concept that comprises necessity, simple needs, widespread problems and needs tantamount to necessity.
3. Juwaynī presented a novel case of necessity endangering the lives of all people, which is a 'widespread necessity'. However, this term is also used synonymously with widespread problem that does not endanger life.
4. When an act belonging to a class of needs becomes a necessity, i.e. upon which life or preserving the body depends, it takes the scope of necessity, and thus it is neither strictly considered a need in respect of its class, nor a mere necessity.

Instead, jurists call it ‘need tantamount to necessity’. For example, the act of ‘eating’ is broader than a necessity and need, as an amount of food to save life and body functions is a necessity, and to prevent sickness and physical weakness is a need, whereas ‘purchasing’ food is a need as a class and a necessity when it is to save life. The latter is what Anṣārī (2002) and the Masjlis-e-Shar‘ī of Mubarakpur determined as need tantamount to necessity. My study is perhaps the first academic study to delineate these differences with such meticulousness and identify that the lines between need and necessity are not blurred.

5. I observed that a definition for widespread problem has not been discovered in the classical literature and the Majlis-e-Shar‘ī of Mubarakpur provided an accurate one in its fatwa (no.10, 1998). My study reveals a relationship between public need and widespread problem in an unprecedented way. I argue that both can coexist, but all public needs are not widespread problems, and nor vice versa. A widespread problem is established if those who are engaged in the prohibited act are almost every time affected by it, including the religiously practising scholars as well as the laity, even if the problem is not prevalent in the entire province.
6. The term ‘permissibility’ (*ibāḥah*) in Type One prohibited acts refers to the act being mandatory and not merely indifferent. Here concession (*rukhṣah*) coincides with permissibility, as opposed to in Type Two acts where there is no permissibility, yet there is dispensation.

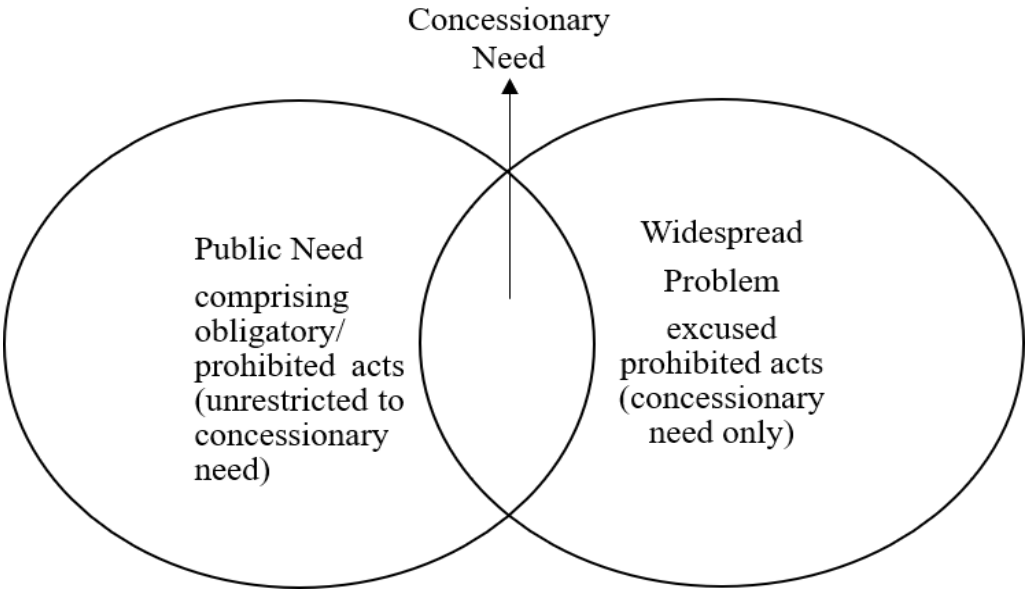


Figure 23 The Relationship of Public Need, Concessionary Need (A Circumstance of Hardship/Harm) and Widespread Problem Verified in This Study

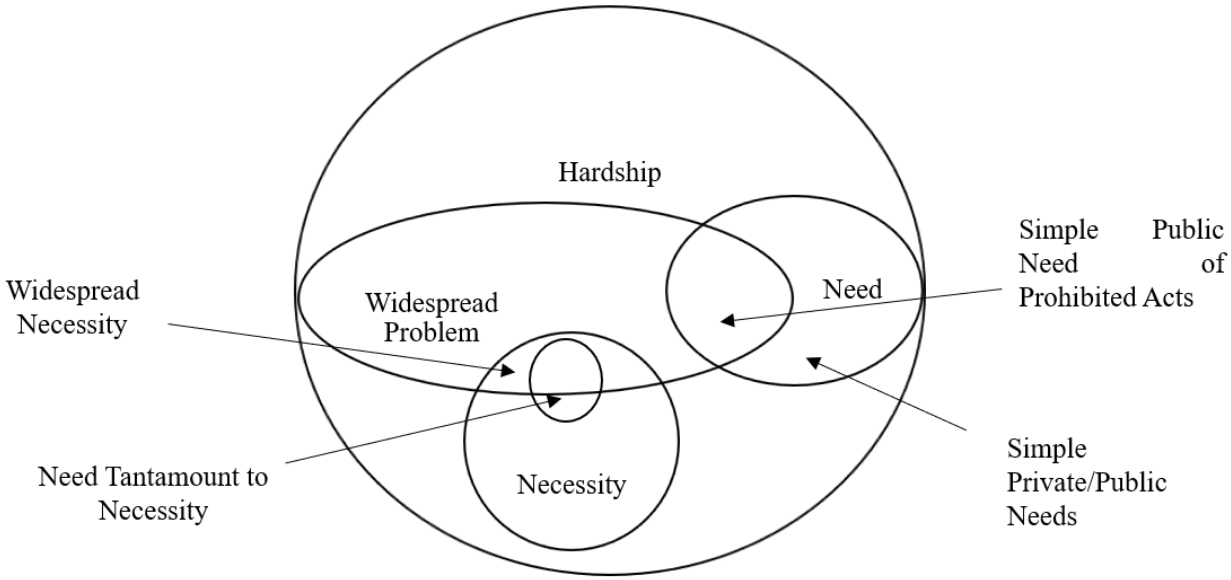


Figure 24 The Relationship Between Hardship, Various Concessionary Needs and Necessities Verified in This Study

In terms of mutability in prohibition laws to accommodate conditions of one's life and body functions and limbs, this study has made vital contributions in understanding the limitations of sanctioning prohibited acts and their possible reasons. Personal choice

and control are absent in a necessity, a need tantamount to necessity and unavoidable widespread problem, so only these three types of hardships involve *iḍṭirār*. In my view, harm and hardship restricted to such types sanction absolutely certain prohibitions. Where one has choice and control to refrain from an act, as in simple needs and avoidable widespread problems, lower prohibition types can be overridden, because repelling hardship and harm from the human body and life is a fundamental purpose of the Islamic law. To reach these conclusions, 'prohibition types' and 'proof types' taxonomized in previous chapters were carefully intersected in the discussion.

In context of necessity and its examples in the legal textual corpus, I critically demonstrated its limitations. Necessity makes prohibited Type One acts mandatory to utilise, excuses Type Two prohibitions and does not warrant Type Three prohibitions. The value of life and body 'opens the prohibited means' (*fatḥ al-dharā'i'*) in Prohibited Types One and Two, wherein the end justifies the means, and these values are more important than Type One values. In context of the prohibited acts one may have to encounter in a necessity, I have contributed to the academic understanding of prohibition types by creating key features for each one from its examples and adding Prohibited Type Four and Five acts based on similarities and differences of the acts. This advances our understanding of the classical three-fold classification of proscriptions found in works of *uṣūl al-fiqh*. The feature-based analysis of Type Three prohibitions, which are not warranted under a necessity to save life, helps identify that acts that impinge on absolutely certain rights of others that cannot be rectified can never be justified to save a human life or any of its body parts unless the survival of one necessity entirely depends on the violation of another as in Type Five acts. This symbolises the importance the Islamic law bestows to respecting the body parts and

lives of others and is an argument against organ transplantation, the analysis of which is beyond the scope of my study.

The feature-based analysis also had helped identify that even if acts are proved from the same proof-type, they vary in their severity based on other qualitative factors like rights of people/God. For example, snatching someone's property is greater in prohibition than drinking liquor (Ibn ʿĀbidīn, 1992), though theologically, the prohibition of both is from absolute necessities of faith. This signifies that when such two acts conflict, a careful observation must be made beyond looking at the epistemic strength of a proof's historic attribution and indication to determine the solution and qualitative features to prohibitions.

In addition to explicating the limitations of necessity, this thesis has drawn clear distinctions between its notion and various types of needs and their impact scopes. It identifies that simple need (public/private), which is not a widespread problem, does not permit absolutely certain prohibitions, intrinsic or extrinsic, however, it can permit innovations extrinsically prohibited and probable prohibitions, as long as a greater harm is not ensued. I identified that some simple needs were explicitly mentioned in the sacred scripture whilst others were examined and identified by jurists. I provided examples of scriptural concessions to accommodate simple needs, where otherwise omitting/committing acts is absolutely certain in prohibition, such as lying for a greater interest, which is congruent with the principle of utility in contemporary ethics. Exemptions are made in express indications of scripture, and jurists added to the exemptions by way of inferred indication (*dalālat al-naṣṣ*) due to hardship, as in the exemption from Friday prayer for a physician whose absence puts patients at risk of harm. I have not found exemptions for people under physical or financial need to impinge on the rights of other people also in a circumstance of need. I argued that public

and private needs can restrict acts prohibited from inferred indication of scriptural proofs and thus this study uniquely advances our understanding of how human needs may impact interpretation of scriptural laws.

According to my study, need tantamount to necessity is no different to necessity in its scope. The difference between the two is a technical one in the meaning albeit there is ambiguity and certainty regarding it in previous studies. I have identified that if a public need involves scholars and the laity to adopt a forbidden act, it becomes a widespread problem which excuses definitively prohibited substances/acts only in an 'unavoidable' circumstance, according to the strongest view in the Ḥanafī school, and those lesser in prohibition, extrinsic or intrinsic. It also permits 'avoidable' disputed and probable prohibited acts, 'even if alternatives are present'. This clarity is not present in the writings or resolutions of the Majlis-e-Shar'ī. My study observes that 'avoidable widespread problem' cannot restrict absolutely certain prohibitions, and thus it removes the lack of clarity in the existing literature, including the works of A. Miṣbāḥī (2006) and M. Miṣbāḥī (2009a), that does not differ between the different impact scopes of the two types of problems. I support the view that such problems are not restricted to matters of impurity alone, but also affect prohibited acts. Both types of widespread problem warrant adopting weak positions within the school and those of other schools. Widespread problems can become public needs if most people of a province are affected by the problem that is a prohibited act, and the scope of the former will apply. Widespread problem is always an extenuating excuse, as opposed to public need in its broad context, hence its judgement will be restricted to the presence of the problem. Identifying this relation between the two terms is a key contribution of this thesis.

As for the relation between widespread problem and necessity, I elaborated from Juwaynī's example of extinction (1980) that both concepts can also coincide, in which

case the scope of a necessity is warranted to the circumstances of need to maintain normal order of the world, but I have not seen this example in any Ḥanafī text. I also elaborated that in this example, the necessity to 'buy' food in a life-endangering circumstance is a need tantamount to necessity, and to 'eat' an amount that saves life is a necessity. Therefore, 'widespread problem' and 'need tantamount to necessity' can also coexist, and the impact scope of necessity will apply. The reader may not find these subtle yet important distinctions between the technical notions in previous studies.

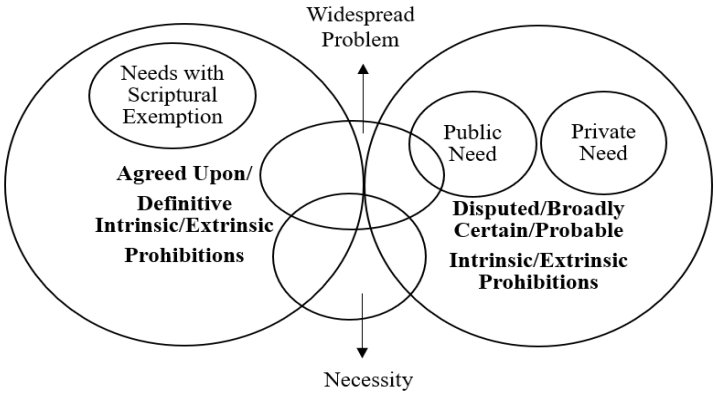


Figure 25 Impact Scope of Necessity and Various Needs in the Context of a Circumstance of Hardship/Harm on Prohibition Laws Verified in This Study

In context of human life and the body, I observed that jurists equated parts of another living person's limb, like the finger tips, to the entire limb in context of its sanctity, and considered the loss of a limb similar to the loss of life in examples of starvation and duress. I explained that a standard position in the Shāfi'ī school, and a weak opinion in the Ḥanafī school, permitted cutting the limb of another living human to save life under duress by death. These precedents can be used for and against living organ donations.

In contrast, the sanctity of one's own life is more important than that of his own limb and in relation to one's life, classical scholars like Ibn 'Ābidīn, 'Illīsh, Kāsānī and Taftāzānī deem body parts equal to wealth; the purpose of which is to protect life. I could not find a classical text that explicitly allowed a person to voluntarily cut a limb

for someone else by waiving the right over his own body. To the contrary, I cited various sources arguing that a person in a necessity of starvation is not permitted to cannibalise the body of another living person to save his life, even if the latter consents. Nawawī (1997) demonstrated that political dimensions paved a way into legitimising acts that were otherwise forbidden.

Nawawī (1997) asserts that a person can cut his own thigh or another part of the body in dire starvation to consume it with the condition that there is no alternative and that the fear of death due to cannibalism is not equal or greater than the fear of death from starvation. Therefore, the standard view of the Shāfiʿī school does not require certainty or high probability of efficacy in the means in all novel necessities and hence, Condition Three of necessity is not required in this case.

As for the sanctity of a deceased body, it is treated differently by most Shāfiʿīs, and some Ḥanbalīs and Mālikīs who permit a Muslim experiencing life-threatening hunger to cannibalise a deceased human body—without discrimination of faith and political affiliation—because they regarded the sanctity of the living greater than the sanctity of the dead. Ḥanafīs mentioned this reason in the case of removing a dead foetus to save the life of a mother. Ibn al-Humām accepted sin as a legitimate reason for dissecting the body of a deceased person to recover one's stolen property which he swallowed, and thus the value of property is prioritised in this example over the sanctity of the dead body due to sin. An important discovery is the error found in Ibn al-Humām's *Fatḥ al-Qadīr* in a quote from *al-Ikhtiyār*. The latter accepts dissecting the body to recover another's valuables whereas the former's quote rejects it. This example emphasises that readers of classical texts must turn to original sources to verify texts wherever possible. These precedents can be used as justifications for and against the permissibility of post-mortems, which is beyond the scope of my study.

In the examples of treating body parts like wealth and consuming game instead of human meat, I observed that inferences using counter implication can be made to justify utilising the body parts of other people to save one's life.

In context of rights, I observed that there are two views on there being the right of God and the person over his body simultaneously, and the woman's right to her honour is overridden by her right to live in the case of rape under a death threat. From various examples, I extrapolated that God's rights over his prohibitions and commands including religious observances are based on ease for His people. Based on a careful reading of the examples of prohibited act types and their features, I formulated three rules on conflicting rights.

Moreover, I identified three approaches regarding 'need tantamount to necessity' and demonstrated that that it has not been clearly explained in terms of its defintion and scope in classical texts in a way that fully distinguishes it from a simple necessity. That said, Anṣārī (2002) is an exception. However, there does not appear to be agreement on a private need rising to necessity, nor is there clarity on its exact impact. My study has contributed in advancing these discussions and comparing the approaches aiming to find connections between terms and their impact on moral laws. In my view, need tantamount to necessity not only relaxes laws but also changes judgements in prohibited Type One acts. I based this on the various classical examples of needs tantamount to necessity, which are,

a. either established in scripture or customs from the Prophetic era, like hiring wet-nurses, or
b. novel interests, without explicit scriptural proof or established Prophetic custom, like consuming definitively prohibited food more than a necessary

amount in Juwaynī's example of widespread necessity or taking an interest-based loan for someone in a necessity to avert harm. Thus, I regard 'Uthmānī's opinion (2014) that only scripture or Prophetic custom can validate a need as a possible error considering the Ḥanafī school.

This study is perhaps the first academic and holistic attempt to intersect the following aspects:

a. various terms connected to necessity and their scopes
b. types of extrinsic and intrinsic prohibited acts in various domains of law, e.g. rights of God or people, such as acts of worship, impurities, consuming unlawful foods, and medicines in sickness, or cutting another person's body part
c. and permanency of judgements in needs.

I argued that the basis for a permanent judgement in a need, according to the Ḥanafī school, is a) it being proven from scripture, Prophetic custom or Muslim consensus, and b) for the act to belong to a domain other than valid excuses. Thus, lease/hire contracts are always permissible, even where hardship is absent.

I observed that there is confusion around the scope of need and pinning its rulings down was very difficult. Major credit is due to the Majlis-e-Shar'ī of Mubarakpur which debated, defined and determined the scope of need in an unprecedented way. I have presented my detailed contentions and revisions to some of the research carried out by its members and to views scattered in the modern legal corpus with the aim to synthesise discussions.

Having read this chapter, a critical reader of the Islamic law realises the importance of distinguishing between closely connected terms like necessity and need when reading

legal texts and fatwas so that their respective scopes are not misjudged. Similarly, muftis and writers on matters of law, especially in the domain of Islamic medical ethics, must use terms prudently. My suggestion is that necessity ought to be used strictly in its narrowest meaning i.e. of constraint and concession, to avoid confusion over its impact, because technical terms and their scopes are now well defined.

Chapter 6. Seeking Treatment for a Medical *Ḍarūrah* and *Ḥājah*

6.1 Introduction

In Chapters 4 and 5, I examined that protecting human life and the body parts with their functions is an absolutely certain objective of the Islamic law. The Prophet encouraged maintaining good bodily health and said, "a physically strong believer is better and more beloved to God than a physically weak believer" (Muslim, *ḥadīth* no.2664). Moreover, he encouraged seeking medical treatment for sickness, as this chapter will elucidate, because the believer is deemed to be God's viceregent on earth. A successful viceregent must be healthy and fit to contemplate and consolidate divine duties, and this is only possible if he cares for his health and well-being.

To protect this objective, Muslim jurists apply the ethical-legal constructs of necessity and need in fatwas concerning medicine and ensure that Islamic law endures its relevance in the modern world. Certain methods of *taḥqīq*, which I presented in Chapter 2 such as *ilḥāq* and *ijrā' al-'illah*, are employed in these fatwas, some of which are resolutions of fatwa councils where collective efforts are exhorted to ascertain Islamic moral judgements on novelties. The aim of this chapter is to examine these methods in fatwa literature, and to apply the constructs of necessity and need to the following:

a. the admissibility of seeking medical treatment (*tadāwī*)
b. utilising forbidden treatments, orally and non-orally.

Here I will critically analyse the constructs of need and necessity whilst drawing upon discussions of prohibition, epistemic strengths of proofs, moral judgements and certainty in Islamic epistemology. I will also focus on how competing interests are balanced in these discussions. My study will refer to the fatwas of the Majlis-e-Shar'ī

of Mubarakpur (India) and views of its members that remain unstudied in Western academia.

6.2 The Admissibility of Seeking Medical Treatment

Seeking medical treatment is termed *tadāwī* in Arabic. Almost all Sunnī jurists consider seeking medical treatment permissible based on provisions for it in the Sunnah. Nawawī (d.1277) (1997, 14:191) asserts that only some extreme Sufis forbade it on the pretence that preordained decree cannot change, and thus treatment did not have any benefit. A. Ḥamawī (d.1320) (2004, p.325), disregarding the odd view declared, "there is agreement that medical treatment is permissible, and the jurists differed if seeking it was more virtuous or abstaining from it."

I have carefully examined the juristic views on seeking medical treatment and categorised them into five groups:

1. Most Ḥanafīs and Ḥanbalīs consider it merely permissible (*mubāḥ*) without any offense (*karāhah*). Legal manuals such as Mawṣilī's *al-Mukhtār* (d.1284) (n.d., 2:409) state that abstaining from medical treatment is not a sin, even if it results in death, yet if someone fasts and does not eat until he dies, he has committed a sin. The reason for this disparity is that medical treatment is not certainly effective, contrary to consuming food, so there is no sin in rejecting clinical treatment (Dāmād Afandī, d.1667, n.d., 2:252; Shaykh Niẓām, 2009, 5:409).
2. Some jurists consider medical treatment permissible (*mubāḥ*), yet undesirable (*khilāf al-awlā*). Ibn Juzayy (d.1356) (n.d., p.295) ascribed this view to a minority of the earlier Muslims (*salaf*) and most of the saintly sufis on the basis that relying upon God (*tawakkul*) and submitting (*tafwīḍ*) to His will in illness is better. Ibn Taymīyah (d.1328) (1995, 21:564) states that Aḥmad ibn Ḥanbal

(d.855) considered abstaining from medical treatment a virtue. Ghazālī (d.111) (2004, 4:287) offers six contexts to this view, one being that the medical means was unlikely to heal a chronic condition (*mawhūm al-naf'*).

3. Some jurists consider medical treatment desirable (*mustaḥabb*). This is the view of the Shāfi'ī and Mālikī schools (Nawawī, 1997) and of Kāsānī (d.1191) (1986, 5:127) from the Ḥanafīs. Zuḥaylī (1998, 2:1476) asserted that Shāfi'īs consider it a *sunnah*.
4. Some jurists consider it unconditionally compulsory (*wājib*). Ibn Mufliḥ (d.1362) (1997, 2:217) ascribed this opinion to some Ḥanbalīs.
5. Some consider it compulsory (*wājib*) if there is 'knowledge' that the treatment will heal and save life or a bodily part or function. However, there is difference over the degree of efficacy required:
    a. Some Ḥanbalīs (Ibn Mufliḥ, 2003, 3:239) and Shāfi'īs consider probability (*ẓann*)[1] to be enough. Qalyūbī and 'Umayrah (1995, 1:403), both Shāfi'īs, cite Isnawī (d.1370) who espouses, "abstaining from medical treatment is forbidden in an injury where a person is likely (*yaẓunnu*) to lose a limb, and it is permissible to rely on the statement of a non-Muslim [physician] in medicine, as long as it does not oppose the *Sharī'ah*."
    b. Some Ḥanbalīs and Ḥanafīs require certainty in clinical efficacy for the lawful medicine to be morally compulsory. Ibn Taymīyah (1995, 18:12) held this view saying, "some medical treatments are compulsory, like those in which a person has knowledge that there is no alternative to save his life,

[1] '*Ẓann*' in *fiqh* texts refers to 'mere probability' and opposes the broadest meaning of 'knowledge' (*'ilm bi'l-ma'nā al-a'amm*), which includes 'high probability' (A. Khān, 2003, 1b:655).

> just as it is compulsory in dire necessity to consume corpse." In *fiqh* texts, 'knowledge' and 'certainty' include high probability (A. Khān, d.1921, 2003, 1b:655). The Ḥanafī *al-Fatāwā al-Hindīyah* (Shaykh Niẓām, 1310AH, 5:355) also propagates this view in obliging medical treatment if it cures like water quenches thirst and food ends hunger and abstaining from it is forbidden (*maḥẓūr*). This knowledge refers to empirical certainty that exists in causes and effects due to the example of food. Qalyūbī (1995) also espouses that, "it [seeking medical treatment] is not unconditionally compulsory as it is compulsory for a person in dire hunger to consume corpse, due to the lack of certainty (*qaṭ'*) in its benefit." If the medical means is prohibited, there is difference of opinion among Ḥanafī jurists, and a discussion on this topic will ensue.

These views denote that the element of efficacy in medical means is vital to place a moral obligation on a Muslim to seek medical treatment. As it is a sin in view of these jurists, it implies that its abandonment is deserving of punishment in the Hereafter.

Ghazālī (2004, 2:290) is one of the earliest jurists who espoused that the moral judgement of medical treatment depends on the purpose of the agent; where the means is probable, treatment will be disliked, or if the purpose is fulfilling a sin, it will be forbidden, and for some people it may be undesirable or desirable, depending on their intents and circumstances. If the condition is chronic and the treatment is unlikely to be effective, it is undesirable and against reliance upon God. He (2004, 2:292) argues that if treatment is certainly effective like bread and water in hunger, no jurist has ever said it is to be forsaken. The latter point suggests a consensus.

One of the aims of this chapter is to fill a vital gap in the legal literature that can potentially reconcile between ostensibly varying views regarding medical treatment especially in the Ḥanafī school. I will draw upon legal texts to show that seeking medicine falls under those acts whose moral judgement changes considering its end-purpose and means, which is congruent with Ghazālī's cited view and like the judgment for earning a livelihood (*kasb*).[2] Accordingly, medical treatment may be a necessity, need, mere benefit, beautification or a non-essential act, like utilising blood in a medical need.

Some western academics entirely overlook the diversity of these views. In his research studying Muslim attitudes to medical treatments, AlKhawari (2003, p.186) claimed, "medical treatment of disease is not only a right but also an obligation in Islam. A sick person is obliged to seek treatment." Similarly, in his book pertaining to cultural competence in caring for Muslim patients, Rassool (2014, p.91) declared, "regardless of the cause, it is obligatory for the sufferer to seek treatment." On the contrary, I ascertained that there is no homogenous view in Islamic law on seeking medical treatment.

6.2.1 Fatwa of the International Islamic Fiqh Academy

The International Islamic Fiqh Academy of Jeddah (1992) sponsored by the Organisation of Islamic Cooperation (OIC) issued a fatwa (no. 67/5/7 on 09-14th May 1992) in which it accepted these views in relation to different medical circumstances. It states the following:

[2] See: A. Khān (2016, 16:551) and Ibn Kamāl Bāshā (d.1468) (2018, 3:381) who declared earning a livelihood obligatory for some purposes and indifferent for others.

"the grounds for seeking medical treatment is that it is legislated due to proofs from the Qur'an, verbal and practical sunnah, and due to its purpose of preserving the human body, which is a universal objective of Islamic legislation. The ethical rulings for medical treatment differ according to the circumstances and people:

- It is compulsory on a person who, if he were to abstain from it, would either lose his life, a limb, become disabled, or his illness would harm others, like people afflicted with infectious diseases.
- It is desirable for a person who, if he were to abstain from it, would become physically weak but not to the degree previously mentioned.
- It is merely permissible for a person who does not fall under the previous two conditions.
- It is offensive if there is fear of causing complications greater than the illness to be cured."

6.2.1.1 Analysis of The Fatwa

1. The fatwa does not mention the degree of knowledge required regarding the success of the treatment in the first scenario. It therefore leaves ambiguity in relation to the obligation of medical treatments that are merely probable (*maẓnūn*) and highly probable (*maẓnūn bi-ẓann ghālib*) to cure but not empirically certain.
2. The conditions for the desirability of abstaining from medical treatment have been forsaken altogether. For example, it is virtuous (*afḍal*) to leave the treatment if it is unlikely to cure a chronic disease, as argued by Ghazālī (2004).
3. It does not specify the exact ethical judgement of the last scenario and is ambiguous in the offence being slight (*tanzīhan*) or severe (*taḥrīman*).

4. Also, it does not differ between the varying probabilities of the fear mentioned in the last scenario and does not mention how this impacts the ethical judgement.
5. It adopts the Shāfiʿī stance on the desirability of utilising medical treatment under non-threatening circumstances of illness.
6. It does not define medical treatment (*tadāwī*), and thus there is no categorical expression if these ethical judgements also apply to surgical treatments. If this fatwa applies to surgical treatments too, it obliges surgery in the first circumstance.
7. The fatwa is correct in implying that the moral judgement in treatment varies based on circumstances. This is reminiscent of Ghazālī's approach (2004).

6.3 Scriptural Evidences for Seeking Medical Treatment

The Prophet is narrated to have made the following statements regarding medical treatment:

1. In reply to some Bedouins who asked, "Messenger of God, should we seek medical treatment?" he replied, "yes, servants of God! Seek medical treatment, for God did not create an illness except that He created its cure, except for old age" (Ibn Mājah, *ḥadīth* no.3436).
2. "God did not reveal a sickness except that He revealed a cure to it" (Bukhārī, *ḥadīth* no.5678).
3. "God revealed sickness and cure, and made for every sickness a remedy, so seek it and do not medicate with unlawful [means]" (Abū Dā'ūd, *ḥadīth* no.3874).

4. “For every sickness there is a cure, so when a remedy ends sickness, he [the sick] is cured by God’s permission” (Muslim, *ḥadīth* no.2204).

6.3.1 Legal Analysis of the *Aḥādīth*

1. The permissibility of seeking cure is known from the express meaning (*‘ibārat al- naṣṣ*)[3] of these *aḥadīth*. From their alluded meaning (*ishārat al- naṣṣ*),[4] we learn that medical tests and scans to identify an illness are also permissible since accurate prognosis depends on an accurate diagnosis.
2. The Prophetic command (*amr*) to seek medical treatment would have entailed it is mandatory (*farḍ*). The reason for this is that commands necessitate action (*luzūm al-‘amal*) if proven with absolute certainty, but *ḥadīth* one is a solitary *ḥadīth* that is corroboratively accepted by jurists and scholars (*mutalaqqā bi’l-qubūl*), and it has the potential of establishing a compulsory (*wājib*) ruling. However, the Prophet himself abstained from medical treatment on numerous occasions, and this indicates it is not compulsory, as abstaining from a compulsory act is a sin.[5]
3. The solitary *ḥadīth* number one has been corroboratively accepted (*mutalaqqā bi’l-qubūl*) by Sunnī jurists from the era of the Companions who agree that seeking medical cure is permissible where it is likely to cure (Zuḥaylī, 1985, 2:1476), and thus, it epistemically rises to the status of a famous report in being broadly certain in its historic attribution.[6] It is for this reason that it restricts the proofs for covering the *‘awrah*, which are absolutely certain,[7] to normal

[3] The intended import of the utterance.
[4] A presupposed, calculable and undriven meaning signified by the utterance.
[5] See: Figure 12.
[6] See: Table 1 (after p.45).
[7] Nawawī (1972, 4:30) declared there is “no scholarly dispute,” signifying a consensus, on the purport of the solitary *ḥadīth*, “a man must not gaze at the nakedness of another man and nor must a woman gaze at the nakedness of another woman.” Similarly, by

circumstances other than for medical treatment due to illness (Shehzad, K., n.d., p.10, 69). As for uncovering the *ʿawrah* in a medical procedure for a mere benefit (*manfaʿah*) and not illness, such as for therapies to increase sexual potency where there is no illness, this *ḥadīth* will not apply (A. Khān, d.1921, 2003, 21:208; Shehzad, n.d., p.69). A prohibitive argument that emerges in fatwas[8] on IVF treatments is that the female is required to uncover her *ʿawrah* in front of marriageable men. However, one can argue that the purpose of IVF is to seek a cure for fertilization since infertility is an illness[9], albeit without physical pain, so there is a valid need to uncover the *ʿawrah*, and *ḥadīth* one restricts the proofs for covering it as stated above. In contrast, women intending birth control for reasons other than a legal medical necessity or need in which there is no alternative, cannot reveal their private parts to another person to carry out a contraceptive method, like fitting a coil, as it falls outside the permission in the cited *ḥadīth* (M. Miṣbāḥī, 2009d, p.32).

4. "Servants of God" is a plural noun that incorporates all genders of all ages. Thus, medical treatment is permitted for everyone, regardless of age, gender and sanity. It also indicates that recourse to medical treatment does not violate reliance on God as one remains a servant of God in utilising His provisions. I will subsequently elaborate that omitting certain treatments on the proposition of God's omnipotence and reliance on Him results in a sin.[10]

scholarly consensus (*ijmāʿ*), it is forbidden for a person to gaze at the nakedness of the opposite sex. Clearly, this epistemically raises the issue to certainty in prohibition as the absence of dispute and scholarly agreement is present from the era of the Companions.

[8] See: M. Miṣbāḥī (2009d) as an example.

[9] See: World Health Organisation (c2019).

[10] See: Branden (2008, pp.194-208) on the interplay of reliance on God and medication.

5. The negation of illness and affirmation of cure in *ḥadīth* one indicates that all illnesses are curable, whether humans have discovered a treatment or not, permitting medical treatment for every illness and encouraging humans to discover remedies. On this basis, A. Khān (2016, 16:700) issued a fatwa declaring it permissible, according to Abū Ḥanīfah, for a Muslim physician to treat a vaginal illness of a prostitute that prevents her from sexual intercourse, even if she has no pain. Her intent does not affect the physician's role because it is possible that she requires the treatment for lawful intercourse.[11]
6. Surgical treatments are a type of *tadāwī* and included in the purport of these *aḥadīth* (Shehzad, K., n.d., pp.14, 131; Wizārat al-Awqāf, 1988, 11:115). Considering this, it is permissible to undertake surgery to the body for a valid need/necessity if cure is likely and there is no fear of greater harm. Shehzad, K. (n.d.) draws upon legal precedents in the Ḥanafī school, like removing kidney stones, caesarean section, amputating a limb affected with a life-threatening disease and removing an extra finger from the hand, which are all permissible. The named sources cite the *ḥadīth* in which the Prophet himself was treated by cupping in which an incision is made in the body for medical purposes. Similarly, the Prophet himself cauterized (*iktawā*) the body of Sa'd ibn Mu'ādh and other companions to prevent infection due to the lack of an alternative effective method (Wizārat al-Awqāf, 1988). Note that the human body's sanctity proven from the often quoted absolutely certain Qur'anic *āyah* (Q17:70) is restricted to circumstances other than medical treatment due to the strength of *ḥadīth* one. Hence, one can accept surgery to his/her body if there is

[11] There is no discussion here on uncovering her *'awrah*, and this fatwa cannot justify hymen surgery. See a fatwa on hymenorraphy in Atigetchi (2009, p.117) and Eich (2008, p.77).

an illness at the degree of need or necessity, and this will not be considered a violation of its sanctity. *Al-Fatāwā al-Hindīyah* (Shaykh Niẓām, 1310AH, 5:360) permits removing "any extra abnormal part" from the human body despite the absence of physical harm, as it is restoration of normal significant bodily figure (*jamāl maqsūd*).[12] Hence, medical treatment involving surgery to the human body to preserve a purposeful benefit, i.e. significant figure of a body part is allowed (M. Miṣbāḥī, 2009b, p.102). This signifies that a hermaphrodite who urinates from the vagina can have the penis surgically removed if it is a non-functional part of the body. However, there is no medical necessity or need for a person to subject his body to surgical treatment to remove an organ or a part of it for another person in need or necessity, as in kidney transplants, so this would not fall under the implication of the cited *aḥadīth*. This is one of the strongest arguments against living organ donation.[13]

7. The last *ḥadīth* indicates a Muslim must believe it is God who cures from sickness and made medicine an outward/empirical means of cure, and that a Muslim must only seek treatment with this belief.

6.4 Medical Treatment with Prohibited Means

Above, I argued that seeking medical treatment is permitted by agreement of jurists and compulsory, according to some, if there is no alternative and cure is certain or likely. However, three vital questions require critical study:

1. What are the juristic stances on medicating with forbidden means?

[12] A body part's significance is determined by the financial compensation (*diyah*) an offender must pay in the chapter of compensations (*kitāb al-diyāt*) in legal texts. If a full compensation is due, the bodily part's lost benefit is a basic and significant purpose of the part in beauty or function, as in cutting the nose, a part of the tongue and all the eyebrows and eyelashes (Marghīnānī, n.d., 4:462).
[13] See: Dhahabi, M. (1993) who uses this argument and Atighetchi (2009).

2. How do the types of prohibition in the means, identified in Chapters 3 and 5, relate to the permissiveness of medical treatments?
3. What is the bearing of a medicine's efficacy on the moral judgement to orally or non-orally utilise forbidden/permissible medicine in a necessity and need?

6.4.1 Prohibited Medicines in Scripture

Muslim jurists take guidance from the following *aḥadīth* regarding forbidden means:

1. "God revealed sickness and cure, and made for every sickness a remedy, so seek it and do not medicate with something unlawful" (Abū Dā'ūd, *ḥadīth* no.3874).
2. The Prophet's companion, Ibn Mas'ūd reported to have said, "God has not placed your cure in things he forbade upon you" (Bukhārī, 1422AH, 7:110).
3. A companion, Ibn Suwayd, asked the Prophet about medicating with liquor (*khamr*) to which he replied, "it is an illness and is not medicine" (Muslim, *ḥadīth* no.1984).
4. "Whoever medicates with liquor, God will not cure him" (Ibn Abī Shaybah, *ḥadīth* no.23498).
5. The Prophet is narrated to have permitted 'Arfajah ibn As'ad to have an artificial nose made from gold after his silver one had decayed (Abū Dā'ūd, *ḥadīth* no.4232).
6. Abū Hurayrah said, "the Messenger of Allah forbade foul (*khabīth*) medicine, i.e. poisonous" (Aḥmad, *ḥadīth* no.9756).
7. The Prophet is reported to have ordered the sick community of *'Uraynah* to consume the urine and milk of she camels (Bukhārī, *ḥadīth* no.233).

6.4.2 Analysis of Juristic Views on Prohibited Medicine

In previous chapters, I examined that saving one's life and body functions from destruction and its causes is a fundamental purpose of the Islamic law. However, there

is an array of juristic views regarding the question of utilising prohibited medical means to treat illness, which are summarised below.

Shāfi'ī School: According to the majority view in the Shāfi'ī school, the following principles are observed in relation to the use of medication:

a. Intoxicating substances, including liquor, are forbidden for oral and non-oral use due to the cited *aḥadīth*.
b. Other forbidden and impure substances are permitted for oral and non-oral use when the following two conditions are met:
    i) They are mixed and dominated by another permissible substance.
    ii) There is no alternative.

Shāfi'īs permitted this to speed up the healing process too, which is regarded a legal need (Nawawī, 1997, 9:50-1; Shirbīnī, d.1570, 1997, 1:79; Wizārat al-Awqāf, 1988, 11:119-2, 1993, 28:202).

Muslim World League's Islamic Fiqh Council inclined to the former view in its fatwa (on 10th January 2002), forbidding medicine containing undisputed *khamr* "in every circumstance" due to the ostensible meaning of the *ḥadīth* (Qarahdāghī and al-Muḥammadī, 2011, p.202). This forbiddance includes necessity to save life, orally and non-orally, even if there is no alternative. However, the Council permitted oral intake of small non-intoxicating amounts of disputed alcohols, such as ethanol, in medicines where there is no alternative and an upright Muslim physician prescribes it. OIC'S Islamic Fiqh Academy of Jeddah also concurred on this legal ruling in fatwa no.11 (on 16th October 1986). However, the council permits utilising disputed alcohols for external use, like disinfectants and antiseptics on bodily wounds.

Mālikī School - Mālikīs generalised the oral and non-oral forbiddance to include every impure and *ḥarām* substance whether it be liquor or carrion and anything God prohibited. Thus, *ḥarām* here means forbidden with absolute certainty in the Qur'an. They exclude external use of these substances when there is fear of death (under necessity) and declare it permissible (not obligatory) (Wizārat al-Awqāf, 1988, 11:121).

Ḥanbalī School: Ḥanbalīs generalised the oral forbiddance to include every impure, *ḥarām* and repulsive substance (*mustakhbath*),[14] such as the urine of halal animals, despite them not considering it as impure (*najis*). However, they excluded consuming camel urine due to *ḥadīth* 6. They permitted all non-oral use (unconditionally for necessity and need) and permitted consuming poisonous medicine if there was high probability that it will repel a greater harm (Wizārat al-Awqāf, 1988, 11:121).

Ḥanafī School: From the early jurists of the school, two views are cited in the sources:

1. Abū Yūsuf permitted forbidden medicines where there is no alternative, generalising the permissibility in *ḥadīth* 6 for camel urine to filthy and clean forbidden substances by way of analogy, although he considered the urine of halal animals filthy, unlike Ḥanbalīs (Ibn 'Ābidīn, d.1836, 1992, 1:210). The latter source explains that the ostensible prohibition in abovementioned *aḥadīth* 1 and 2 is restricted to the circumstance of having a choice, a possible alternative and where there is a lack of probability (*ẓann*) in the medical efficacy, according to Abū Yūsuf. Abū Yūsuf, thus, permits orally taking disputed forbidden medicines that are 'merely probable' in efficacy without obligation. I have not discovered a single Ḥanafī text that declares Abū Yūsuf, a) required a legal necessity for such medicine, or b) high probability in efficacy, thus I construe

[14] Substances that sound people would consider filthy to consume, like phlegm.

his view pertains to the circumstance of medical need where there is no alternative.

2. Abū Ḥanīfah does not permit forbidden medicines unless certain conditions are fulfilled. It is erroneous to assume he entirely and unconditionally forbade such treatment. Ibn ʿĀbidīn (1992, 1:210) cites Nābulusī (d.1731) who asserts, "medicating with unlawful means is not permissible if it is merely probable (*ẓannī*) to cure,[15] however, if the efficacy [of the unlawful medicine] is known with certainty,[16] then it is permissible by agreement [of Abū Ḥanīfah and his students], as explained in *al-Muṣaffā*." Ibn ʿĀbidīn (1992, 5:228) explains Abū Ḥanīfah's view in the following words: "what is said concerning medicating with something forbidden as unlawful, is not unconditional. Seeking cure from forbidden things is forbidden when cure is not known, as for when it is known and there is no alternative, it is permissible."

Knowledge in the broadest context regarding a medicine's efficacy includes 'preponderant conviction'.[17] Thus, Abū Ḥanīfah's prohibition is regarding oral treatment that is 'merely probable', as it is based on the forbiddance of consuming camel urine. Jurists of the school generalized this view to include all prohibited substances, as evident from Ibn ʿĀbidīn (1992) and similar interpretive texts. Khusraw (d.1540) (n.d., 1:310) accurately pointed that despite some jurists refer to camel urine as *ḥarām*, it is disputed and prohibitively disliked.

[15] According to Abū Ḥanīfah.
[16] Certainty here is contrasted with mere *fiqhī* probability, thus it refers to empirical certainty or high probability.

[17] See: Chapter 2.

6.4.2.1 Analysis of Early Ḥanafī Views on Prohibited Medicine

Below are Ḥanafī texts that transmit the views of early Imams on prohibited medicine with my observations:

1. Marghīnānī (n.d., 1:24), from the 12th century, states, "according to Abū Ḥanīfah, consuming [a halal animal's urine] is not permissible (*la yaḥillu*) because one does not have certainty regarding its efficacy, so the prohibition is unchanged. According to Abū Yūsuf, consuming it as medicine is permissible due to the incident in the *ḥadīth*, and according to Shaybānī (d.805), consuming it as medicine or otherwise is permissible because it is clean." The counter-implicature of this text is that if there is certainty in the efficacy, Abū Ḥanīfah permits it. Also, certainty is mentioned in a *fiqh* matter, thus it refers to high probability.[18]
2. Ibn ʿĀbidīn (1992, 5:228) explains the view of Abū Ḥanīfah as follows: "if the forbidden substance is specified [for treatment] to deter self-ruin, then it is permissible [*yaḥillu*] to consume, like carrion and alcohol in life-threatening hunger/thirst (*makhmaṣah*)." 'Specified' means there is no alternative, and the examples of alcohol and carrion indicate the forbidden means is certainly effective like them, i.e. empirically certain, for it to be permissible. However, likening it to consuming alcohol in life threatening thirst indicates utilizing it is obligatory and not merely permissible.
3. 16th century Ibn Nujaym (n.d., 1:122) and Ibn ʿĀbidīn (1992, 1:210) mentioned that Abū Ḥanīfah did not permit drinking camel urine at all as medicine, contrary to Abū Yūsuf, because in *ḥadīth* 6, the Prophet knew from revelation that the people of *'Uraynah* will be cured, which cannot be known to others

[18] See: Chapter 2:

> today. They reasoned, "the physician's testimony [about a medicine] is not a conclusive evidence (*ḥujjah qaṭ'īyah*)," as some people may be cured, and others may not, due to differences in bodily natures. And unless certainty is attained, forbidden medicine is not allowed according to Abū Ḥanīfah. Similarly, Ḥaṣkafī (d.1677) (1992, 1:210) mentioned that the school's strongest position is 'prohibition' (*mana'*) where the efficacy is merely probable (*maẓnūn*), and 'permissibility' where there is 'knowledge' and lack of an alternative.

'Permissibility' in the above texts means moral obligation on the basis that the moral judgement of the forbidden means has changed to being lawful. I observed in Chapter 5 that in the cases of coercion, Muslim jurists referred to morally obligatory means to save life as 'permissible', so the two terms are synonymously used. Here too, permissible refers to the morally obligatory. The obligation of utilising empirically certain forbidden medicine like bread and water is because it is included in the exclusion of the Qur'anic *āyah* (Q6:119), "Why should you not eat such animals when God has already fully explained what He has forbidden you, except when forced by hunger?" by way of *dalālat al-naṣṣ*. This is an exclusion (*istithnā'*) in a prohibition (*ḥurmah*) which signifies the excluded substances are lawful (*ḥill*) in a necessity and utilising such means to prevent life or body endangering harm is obligatory (Ibn 'Ābidīn, 1992, 6:134). Therefore, in my view, the certainly effective forbidden medicine in a necessity changes to an intrinsically permissible one and is obligatory to utilise despite it being forbidden with absolute certainty. Avoiding this medicine entails a sin, like avoiding Type One prohibitions in duress by death.

An important observation regrading Abū Yūsuf's opinion is that it is not the fatwa position of the Ḥanafī school, which permits disputedly unlawful means, merely

probable in efficacy, in circumstances of need. This determines a key rule regarding the legitimacy of need, which is that despite there being a valid medical need, jurists of the school can determine if a view can be adopted by its adherents or not. This rule challenges an absolute and universal prescription to legitimise all disputedly prohibited[19] acts in simple private needs, a view specifically held by M. Miṣbāḥī (2009a), yet ironically also congruent with his fatwa (2014, p.120) on alcohol-based medicines.[20] Thus, *maḍhhab* constraints can restrict the impact scope of legal need identified in Chapter 5, although the construct of widespread problem (*ʻumūm al-balwā*) can warrant such acts, i.e. when most ill people of a city, including the learned people, utilise the forbidden means. Similar to this is the school's constraint on utilising legally 'disputed' alcohol-based medicines, which according to the fatwa position of Shaybānī are unlawful in medical needs. The non-fatwa opinion, albeit a very strong permissive one, is of Abū Ḥanīfah and Abū Yūsuf, and the justification for adopting the former view is to "block the means entirely" (*li-sadd al-bāb bi'l-kullīyah*) due to "prevalent corruption among people" (A. Khān, 2016, 17:307). The fatwa of the Majlis-e-Sharʻī (no.1/2, 1994) on alcohol-based medicines does not ground the permissibility for disputed alcohol-based medicines on a 'simple private need' of a patient, which is Shaybānī's view, instead it permits it on grounds of a widespread problem.[21] This vital feature of my study contributes to our understanding of the school's authority to restrict 'disputed actions' in simple medical needs and to legitimise them in widespread needs.

[19] *Ḥarām* acts within a school.
[20] This difference seems due to the difference in the school between medication with alcohol vs. non-alcohol medicines.
[21] See: M. Miṣbāḥī (2014, pp.120-1) for the fatwa.

By comparing the Ḥanafī views on medicating with camel urine, we see that Abū Ḥanīfah and Abū Yūsuf agree on the 'permissibility'[22] of forbidden medicine where the following are found:

a. 'knowledge' in the efficacy of the medicine, which includes high probability
b. no suitable alternative
c. a legal necessity to save life.

However, they differ where there is:

a. mere probability in efficacy, which is the *fiqh* context of the word *ẓann*
b. a circumstance of need.

In Chapter 2, I explained that the word 'knowledge' has broad and narrow contexts. Understanding them allows us to interpret the juristic views in different meanings. In the narrowest meaning it includes empirical certainty, and in the broadest meaning it includes high probability. A. Khān (2003, 23:344) acknowledges that the condition of 'knowledge', regarding the efficacy of a medicine, includes medicines highly probable in efficacy, albeit not empirically certain. This means that according to Abū Ḥanīfah and the fatwa position, it is permissible to utilise a forbidden medicine that is 'highly probable' in efficacy in a necessity. I strongly argue in favour of this since 'knowledge' in *fiqh* texts usually refers broadly to 'high probability' (A. Khān, 2003, 1b:655), and this interpretation does not lead to a contradiction in Abū Ḥanīfah's view.

A. Khān (2003, 23:342-3) surveyed the Ḥanafī legal corpus and demonstrated that the fatwa of prohibition for utilising forbidden means for medical purposes in the Ḥanafī texts is due to the absence of one or more of the three conditions cited above, even where juristic texts ostensibly prohibit the medicine without mentioning the conditions.

[22] I previously interpreted this as moral obligation.

Hence, a critical appraisal of legal texts on this issue requires painstaking diligence and knowledge of the connotations of terms.

Although the reported difference of Abū Ḥanīfah and Abū Yūsuf is specifically regarding oral intake of camel urine mentioned in the *ḥadīth*, a disputed substance, which the former considered merely probable in efficacy, it seems that later Ḥanafīs extended this dispute to the undisputed medicines on the basis that if probable prohibitions are not permissible, absolutely certain forbidden substances have greater reason for prohibition. They also applied these conditions to non-oral use, and thereby generalised the position of Abū Ḥanīfah due to the lack of high probability/certainty, as in the example of the prohibition of writing the Qur'an in an amulet with blood to stop a life-endangering nose bleed (A. Khān, 2003, 23:340-9).[23]

Offering the school's fatwa position on utilising various prohibited types of medicines, except for *khamr*-based medicines, *al-Fatāwā al-Hindīyah* (Shaykh Niẓām, 1310AH, 5:355) states, "it is permissible for a sick person to drink blood and urine for a medical reason, as well as to eat carrion, when a Muslim physician informs him that his cure is in this and there is no permissible alternative. And there are two opposing views if the physician says the healing will hasten with these means. As for if it is permissible for a sick person to consume liquor [*khamr*, i.e. undisputed type] if there is no alternative, regarding this there are two views." Ḥamawī (1985, 1:375) cited this passage from *al-Nihāyah* and immediately added, "this is because the prohibition has ceased. Do you not see that the person suffering life-threatening thirst is excused to consume alcohol and the one suffering life threatening hunger can consume carrion?" Ibn 'Ābidīn (1992, 1:210-1, 3:122, 5:228) asserts this permission is contrary to the strongest position of

[23] A practice mentioned in classical texts to prevent a severe nosebleed and discouraged.

the school (*ẓāhir al-maḍhhab*), however, it is the fatwa position (*wa 'alayhi al-fatwā*). Note that adherents of the school are not to follow the strongest view[24] and that jurists do not require the chemical transformation of the impure substance into something different to allow it.

The above cited text from *al-Fatāwā al-Hindīyah* indicates that Natshah (2001, 1:113) erred in claiming 'juristic agreement' on the prohibition of medicating with human urine. Also, M. Miṣbāḥī (2009b, p.52) erred in saying there is agreement in the school on the cited passage, whereas according to Abū Ḥanīfah, certainty/high probability of efficacy is absent in the example of consuming blood and urine as medicine. This study reveals that Zaydān (2003, p.168) is ambiguous in asserting that Ḥanafīs require certainty to permit forbidden medicines without classifying the degree of sickness.

6.4.2.2 Oral vs. Non-Oral Use of Various Prohibited Medicines

A vital discussion on distinguishing between oral and non-oral use of prohibited substances for medicinal purposes, at the degree of need and necessity, is needed to contextualise juristic views among Ḥanafīs and to place accurate moral judgements on treatment.

Firstly, the Qur'anic *āyah* (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…" has two significances:

a. An intended spoken primary significance (*manṭūq maqṣūd*) that is to forbid the 'oral intake' of blood, as the attribution of 'prohibition' to 'blood' etc. is to be understood by the customary usage of that substance which is its 'consumption' and thus, only oral intake is prohibited with absolute certainty. The *āyah* is

[24] This is like the fatwa on alcohol-based medicines I will subsequently mention.

muhḥkam/*mufassar* in this meaning, and upon this there is scholarly consensus. Ibn ʿĀbidīn (1992, 3:730) states, "[Ibn Nujaym] supports the statement of *al-Khānīyah* in *al-Baḥr* that the prohibition of a specific substance ought to be understood as prohibiting its action, so when one says, 'this food is forbidden for me', it means consuming it is forbidden, and 'this cloth is forbidden for me' means wearing it is forbidden." Ghazālī (1993,1:187) and Ibn al-Humām (d.1460) (n.d., 5:88) also affirm this, and Anṣārī (d.1810) (2002, 2:41) mentioned a consensus of the early Muslims (*salaf*) on this.

b. An apparent yet unintended (*mafhūm ẓāhir ghayr maqṣūd*) significance that is to prohibit any use of blood, oral or non-oral. The *āyah* is *ẓāhir* in this meaning and is susceptible to restriction (*takhṣīṣ*). If it is restricted, its textual indication is merely probable (*ẓann fiqhī*), and if it is not, the indication is certain/probable in the broadest context (*qaṭʿī aʿamm*).

The difference between these two significances results in the consumption of blood being intrinsically forbidden (*ḥarām li-ʿaynihī*) with absolute certainty and the non-oral use being forbidden with probability, and thus prohibitively disliked (M Miṣbāḥī, 2009b). Non-Ḥanafī jurists indiscriminately argue that the *āyah* unconditionally and generally forbids the use of the named substances (Qarahdāghī and al-Muḥammadī, 2011, p.543). This critical approach is based on the Ḥanafī rules of differing between the types of prohibitions.[25]

Considering the said distinction in significance, Ḥanafī jurists declared that wearing silk is prohibited for males yet praying on a silk prayer mat is permitted (Ibn ʿĀbidīn, 1992, 6:354), since the scriptural prohibition of silk is regarding its customary usage, and that is the primary spoken purport of the prohibition. This distinction is particularly

[25] See: Chapter 5 for qualitative differences between forbidden acts.

relevant for discussions on injecting or externally applying unlawful products to the body that are primarily prohibited for consumption, such as pigs, yet studies on porcine vaccines/creams miss this vital distinction.[26]

Medicating with externally prohibited (*ḥarām li-ghayrihī*), yet intrinsically permissible, solid intoxicators, like opium, is treated differently in the school. Such substances are prohibited when they intoxicate. They are allowed orally in a non-intoxicating amount and non-orally in any required amount, whether there is a need or necessity (A. Khān, 2003, 24:193-4). The Ḥanafī fatwa that, "whatever intoxicates in a large amount, its small amount is also forbidden," is only regarding fluids (Ibn ʿĀbidīn, 1992, 4:42).

The following examples reveal that later jurists of the Ḥanafī school considered 'non-oral use' of prohibited substances 'prohibitively disliked', and not 'prohibited with absolute certainty':[27]

1. Maḥbūbī (n.d., 4:364) states, "consuming *khamr* sediment and combing one's hair with it is prohibitively disliked. Disliked here means prohibited because the sediment is a part of alcohol. The word disliked is mentioned instead of prohibition due to the lack of an absolutely certain proof-text."
2. Marghīnānī (n.d., 4:399) declares the insertion of *khamr* in the urethra is prohibitively disliked since the benefit is non-oral.
3. Qāḍī Khān (d.1196) (n.d., 3:117) upholds it is prohibitively disliked for a woman to apply *khamr* to her hair to soften it for combing it, because the Prophet said, "the one who forbade consuming *khamr*, forbade its sale and

[26] See: Padela (2013; 2014) as an example. Studies primarily focus on the transformation of the substance.
[27] If there is widespread problem, cited acts would be permitted in needs.

taking benefit from it." Note, that the mentioned purpose is an embellishment/benefit and I could not find this *ḥadīth* in any other source.

Complemented with my observations, below are Ḥanafī legal texts that permit 'non-oral use' of 'forbidden medicines' in a 'need':

1. Sarakhsī (1993, 15:126) asserts, "there is no harm for a person to insert a woman's breast milk in the eye or drink it as medication, because these are places of need and necessity [respectively]." This implies that consuming something prohibited with absolute certainty is only permissible under necessity, but if it is prohibited with probability, as in inserting breast milk in the eye, it is 'permitted' in need.
2. *Al-Fatāwā al-Hindīyah* (Shaykh Niẓām, 1310AH, 5:355) affirms the latter and added, "there is dispute among later jurists regarding an adult's consumption of the breast milk of a woman without necessity." Note, the dispute is regarding consuming breast milk in need, not the permissibility of its non-oral use and its use in necessity.
3. Ibn 'Ābidīn (1992, 3:211) states, "[Ibn al-Humām] says in *al-Fatḥ*: the specialists of medicine establish there is benefit for a painful eye in the milk of a breastfeeding woman. The jurists (*mashāyikh*) differed on this. Some said it is not permissible and others said it is permissible when one knows it will cure conjunctivitis. There is no obscurity in that reaching true certainty is very difficult, and so the meaning of 'knowledge' [in their statement] is high probability, otherwise their view is also forbiddance." This text implies if there is high probability (*yaqīn fiqhī*) in the non-oral use of breast milk, which is a prohibited act with probability, it is 'permissible', otherwise it is not. Therefore,

if the probable prohibited act is 'merely probable' (*ẓannī*) in efficacy, it is 'not' permissible in 'need'.[28]

Below are my vital inferences from these texts:

1. Substances forbidden with absolute certainty for consumption like blood are prohibited with probability for non-oral use. However, if the means is 'highly probable or empirically certain',[29] they are 'permissible' under private and public need to protect the human body from highly probable harm or to restore or preserve normal bodily form/functions.
2. Despite being prohibitively disliked, if non-oral use of absolutely certain oral prohibitions is 'allowed'[30] under private need where there is 'high probability' (*ẓann ghālib*/*yaqīn fiqhī*) in its efficacy, such as adults consuming human milk, all lesser types of forbidden substances thus have a justification for being non-orally permissible in a necessity, private and public need.
3. I argue that 'moral obligation' must extend to 'non-oral use' of medical treatments in a necessity, like blood transfusions, if there is empirical certainty (or high probability in their efficacy as I will subsequently argue), since non-oral benefit from flowing blood is prohibited with probability.[31]
4. 'Oral intake' of blood or urine is morally obligatory in a necessity if there is no suitable alternative and there is empirical certainty (or high probability as I will

[28] Figure 26 follows this rule.
[29] I will explain later that permissible here means compulsory. A merely probable effective means prohibited with probable proof is not permitted in medical need in line with the view of Abū Ḥanīfah, contrary to Abū Yūsuf. Figure 26 follows the former's view.
[30] I will subsequently argue this is compulsory if known through a source that engenders preponderant conviction.
[31] See: Figure 26.

subsequently argue) that it will save one's life, despite being forbidden with absolute certainty.

5. The permission to utilize forbidden medicines in a necessity is in accordance with the rule formulated in Chapter 5 that, "the right of people to save life precedes the sole right of God over His prohibitions." Above, I have observed that medical needs can also precede the right of God over some of His prohibitions (i.e. prohibitively disliked acts).

6.4.3 The Impact of Medical Efficacy on the Moral Judgement of Utilizing Medicine

Is medical treatment morally obligatory/compulsory for a sick person according to the Islamic law and is it a necessity? To answer these questions, I will narrow my study to the Ḥanafī school.

Some Ḥanafī texts are open to interpretation regarding the ethical-legal status of medical treatment with absolutely certain prohibitions in a necessity whilst equating medical treatments to the Qur'anic exclusion of consuming alcohol and carrion to save life. I construe that they denote 'moral obligation' of treatment due to this comparison. Examples include the following:

1. The above cited passage from Ḥamawī (1985), who said if a Muslim physician informs a patient that his cure is in consuming blood and urine whilst there is no alternative, he can consume them. Immediately after, he cites *al-Nawāzil* saying, "this is because the prohibition has ceased. Do you not see that the person suffering life-threatening thirst is excused to consume alcohol and the one suffering life-threatening hunger can consume carrion?" In Chapter 5, I explained that in Type One prohibited acts, the cessation of prohibition entails obligation to consume alcohol. By comparing treatment to these acts, Ḥamawī

indicates that a physician's prognosis is morally obligatory upon the patient where there is lack of alternative and a necessity. He mentions a 'Muslim physician' to indicate that preponderant conviction regarding a medicine's efficacy can be reached. Later, I will study the moral implication of a physician's testimony.

2. Similarly, 'Aynī (d.1451) (2010, 3:154-5) states, "seeking cure with a forbidden substance is permissible when healing is certain, like consuming carrion in a life-threatening condition…" If the efficacy in medicine is like food and water, it is obligatory to consume, as I will subsequently explain in the classification of means to repel harm. 'Permissible' here thus means 'morally obligatory' due to the comparison with consuming carrion which is obligatory to save life.
3. Ḥaṣkafī (1992, 1:210) states, "medical treatment with forbidden substance is disputed. The school's standard position (*ẓāhir al-maḍhhab*) is prohibition. It is said that it is excused if cure is known and no other medicine is known, like alcohol is excused for the thirsty person, and upon this is the fatwa." Ibn 'Ābidīn (1992, 1:210) cites Nābulusī that if there was certainty, there would be agreement on its 'permissibility'. 'Permissibility' and 'excused' here mean moral obligation, because certainty in efficacy, like that in food and drink, makes utilising the means to save life obligatory.
4. *al-Fatāwā al-Hindīyah* (Shaykh Niẓām, 1310AH, 5:354-5), citing Qāḍī Khān, declared that if there is 'certainty' that extracting blood from the body would save one's life, it would be a sin 'not to extract' it, and also pointed that the lack of certainty in medicine grounds a lack of 'obligation' to treat sickness, unlike eating food to save one's life, which is certainly effective. This clear text

declares moral obligation of medical treatment in necessity when there is empirical certainty in the efficacy.

These juristic views regarding the certainty of efficacy and moral obligation signify that jurists go beyond scripture to epistemology to place moral judgements on treatment. As a class, Muslim jurists considered medicines probable in efficacy, and therefore do not oblige people to treatment in a necessity or need. Accordingly, Qāḍī Khān (n.d., 3:246-7) records the Ḥanafī fatwa position as follows, "if someone suffers from diarrhea or ophthalmia and does not medicate until he becomes weak and consequently dies, the jurists say, he is not sinful. And if someone is starved and does not eat whilst he is able to, he is sinful, and it is obligatory upon him to eat an amount that rids hunger. If a person is sick and the physician advises him to have blood drawn and he does not undertake the procedure and dies as a result, he is not sinful because there was no certainty that he would have been cured by this."

Sunnī jurists commonly divide the means to repel harm into certainly, likely and unlikely effective. *Al-Fatāwā al-Hindīyah* (Shaykh Niẓām, 1310AH, 5:355) citing *al-Fuṣūl al-ʿImādīyah* states,

"Means to remove harm from the body are three types:

1. Certainly effective (*maqṭūʿ*), such as water that eliminates the harm of thirst and bread of hunger.
2. Likely effective (*maẓnūn*),[32] like cupping, phlebotomy, drinking scammony[33] that is a laxative and all other types of medical treatments, like curing heat with

[32] Probable in the narrowest meaning, which includes high probability.
[33] A discussion on this is subsequent.

cold substances and cold with hot substances. These are outward [worldly] means in medicine.

3. Unlikely and speculatively effective (*mawhūm*), like cautery and amulets (*ruqyah*).[34] Abstaining from the certainly effective means is not reliance upon God, rather, it is forbidden [thus disobedience of God] when death will ensue. As for the unlikely means, the condition of reliance on God is to abstain from it[35]… and the middle type is likely to benefit, like medical treatments by outward means known to the physicians; their utilization does not violate reliance on God, contrary to the unlikely means. Abstaining from the former is not forbidden, as opposed to abstaining from certain means."[36]

According to my research, the earliest source for this classification is Ghazālī (2004, 4:283). According to the study of terms in Chapter 2, a certainly effective means refers to something that is empirically certain, such as the effect of satiation from food. The likely effective means to repel harm refers to the narrowest probable, which includes high and mere probability due to its contrast with the empirically certainly effective means. Its example of scammony will be studied subsequently. Yacoub (2001, p.85) placed "an attempt at arresting severe hemorrhage" under the first category of acts and declared it "a duty (*farḍ* or *wājib*)." He mistakenly referenced Ghazālī, however, the example can be supported by the precedent of the duty to abandon obligatory prayer to rescue someone drowning.

[34] This is a psychological method to assist laity who are weak in their reliance on God.
[35] See: Nawawī (1972, 3:90) for varying views.
[36] See: Branden (2008, pp.194-208) on the interplay of reliance on God and medication. See A. Khān's (2016, 16:729-778) two detailed fatwas declaring contagion and spread of plagues as speculative causes of harm and reliance on God, and Stearns (2008, pp.38-54).

The inquisitive mind asks, if cure from medicine is 'probable/speculative', then why is it permissible to uncover one's *'awrah* in front of the physician for a medical assessment, which I observed in Chapter 5, is an 'absolutely certain' prohibited act? If the former is allowed, should medicating with definitively prohibited urine be allowed too? Nābulusī (2001, pp.106-7) takes up this difficult question and reasons that looking at one's nakedness is not intrinsically prohibited, rather it is prohibited due to the 'speculative' fear of illicit relations. In a patient, this fear is competed with the 'speculative' fear of death (*tawahhum al-halāk*) if a medical assessment is not undertaken and a medicine is not prescribed accordingly. So, due to competing speculative factors, the prohibition to uncover one's nakedness is not established, and the fear of losing a person's right to preserve life precedes the competing factor due to his neediness. As for when one omits medicating with urine, the fear of death is speculative, and urine is intrinsically forbidden; so, there are no competing speculative factors to prevent the prohibition. This relatively technical reply emphasizes that human needs are given special status in ascertaining moral judgements in extrinsically prohibited acts. However, it is grounded on the view that medicines are speculative or merely probable in efficacy, and therefore, Nābulusī (2001) declared that anal intercourse analogously remained forbidden with absolute certainty for a husband and wife, even if physicians advised him that this was the only cure to his sickness.

We find jurists differ on whether empirical certainty can be reached in medical efficacy, particularly Ḥanafīs, who varyingly interpreted the condition of 'knowledge'[37] needed to permit unlawful medicines, as follows:

[37] Cited above in Ḥaṣkafī and Ibn 'Ābidīn (1992).

1. M. Miṣbāḥī (2009b, p.47) and M. Ḥusayn (2009, p.422) assert the highest degree of knowledge possible for medicines is high probability (*ẓann ghālib*/*yaqīn fiqhī*), thus, when an alternative is absent, treatment with such forbidden medicines is 'permissible' in a legal necessity. The former cites Ibn ʿĀbidīn (1992, 1:210), who citing *al-Nihāyah*, asserts, "utilizing unlawful medicine is permissible if one has 'knowledge' that there is cure in it and does not know of an alternative medicine. [This is] because the prohibition ceases for medicinal treatment, like the permissibility of liquor and corpse for the dire thirsty and hungry… ʿAbd al-Ghanī [al-Nābulusī] added that there is no apparent difference in the jurists' statements due to their agreement on the permissibility under necessity." Thereafter, Ibn ʿĀbidīn concludes, "it is apparent that high probability (*ghalabat al-ẓann*) is attained from repeated experiments and not knowledge, unless the jurists intend high probability by the term knowledge (*ʿilm*), and this is widespread in their speech." It is from this last part that M. Miṣbāḥī concludes that certainty here means 'high probability' and not 'empirical certainty'.
2. A. Miṣbāḥī (2006, p.57), a member of the Majlis-e-Sharʿī of Mubarakpur, acknowledges that jurists 'permit' utilizing a medicine which is 'empirically certain' or highly probable to cure.
3. Aʿẓamī (d.1948) (2011, 3:506) requires 'knowledge' of the efficacy like that in bread and water for the unlawful medicine to be permissible, which is empirical certainty.[38] He espouses this, i.e. empirical certainty, is not attainable, and thus forbidden medicine is not permissible in the Ḥanafī school.

[38] This is certainty in the broadest context, due to God's norm (*ʿādah*) in creating effects after causes.

4. A. Khān (2003, 23:344; 2016, 3:580) argues that the highest degree of epistemic knowledge attained from the most effective and repeatedly experimented medicine is probability (*ẓann*). I interpret probability here to refer to 'high probability' (*yaqīn fiqhī*), a type of narrowest probability, because he contrasts probability (*ẓann*) with knowledge, which in its narrowest meaning applies to certainty in the narrowest and broadest meanings, including empirical certainty.[39] A. Khān based this view directly on Ibn 'Ābidīn's statement, "one cannot attain knowledge from the statement of the physicians."[40] Citing the classification of *al-Fatāwā al-Hindīyah* above, A. Khān (2014, 5:291-2) also professes, "what appears to me—and God knows best—is that any medical treatment that is certainly effective,[41] its facilitation and costs would be compulsory (*wājib*) on the father if the child does not have his own wealth. Facilitating all lesser treatments (merely probable or unlikely effective) are not compulsory upon him [for his child], as they are not compulsory for himself, so how can they be compulsory on him for his children?"[42]

A. Khān is clearly not speaking in hypothetical terms and suggests medical treatments can be certain. I propose that there is no contradiction in his two positions, just as it is the case in the former one, because he refers to the knowledge people have of medicines 'from physicians', as evident from his quotation of Ibn 'Ābidīn, and in the latter he speaks of the efficacy of a medicine which is known by the patient through experience. I cited *al-Fatāwā al-Hindīyah* (Shaykh Niẓām, 1310AH, 5:355) above, which by counter implicature obliges medical treatment if it cures like water quenches thirst and

[39] See: Chapter 2.
[40] A. Khān (2016, 3:581) asserts he has a unique research on the topic of experiments and certainty, but I could not find it despite a thorough search for it.
[41] Whether in a need or a necessity.
[42] See: Figure 26 in which I adopted this position.

food ends hunger. I also cited Ibn ‘Ābidīn who claimed that the prohibition ceases in certainly effective unlawful medicines which alludes to the same view that some treatments can be certainly effective.

Furthermore, A. Khān (2003, 23:340-9) acknowledges that the word ‘knowledge’ in the statement of the Ḥanafī jurists, “utilizing forbidden means is permissible if it is *known* to cure” can possibly mean high probability, and thus he forbade writing an amulet consisting of Qur’anic words with blood or urine, even if there is a necessity to save life, since the effects of amulets are speculative (*mawhūm*), unlike medical treatment. Here, he approves Ibn ‘Ābidīn’s view adopted by M. Miṣbāḥī, that high probability in clinical efficacy ‘permits’ unlawful medicine.

Additionally, M. Ḥusayn (2009, pp.422, 426), a member of the Majlis-e-Shar‘ī of Mubarakpur, argues that we must differ between observable and non-observable medical treatments, i.e. surgical and non-surgical. Those we can empirically observe, such as surgical treatments or applying medicines to observable parts of the body, must not be equated with those that cannot be observed in a similar way, like orally consumed medicines. Throughout time, the former has been empirically observable, as has its desired effects too, and Muslim logicians and theologians declare knowledge of the observable phenomena (*ḥissīyāt*) as empirically certain, as opposed to oral intake of medicine.

One can counter the latter’s argument by the examples of water and food, which are certainly effective means to end starvation, though they are orally consumed. Similarly, there is empirical certainty in that an excessive overdose of any medicine will result in certain harms and that a certain amount of alcohol consumption will intoxicate. Therefore, the effects of oral medicine can also be empirically certain based on

experience (*tajrabah*), and it is this that determines the degree of knowledge one reaches in causes and effects.

I. Miṣbāḥī (2009, 2:480), another member of the Majlis-e-Shar'ī council, considered some medicines can be empirically certain.

6.4.3.1 The Case of Scammony

Scammony is an Asian plant that was primarily used as a drastic purgative to relieve constipation (Al-Snafi, 2016). Classical scholars like Ghazālī (1993, 1:37), Simlālī (d.1494) (2004, 1:619) and Zarkashī (d.1392) (1985, 2:357) placed the knowledge of 'scammony is a laxative' under certain propositions that people familiar with its repeated experiment (*tajrabah*) knew with certainty, although it is orally taken.

Below are some key observations regarding scammony:

1. The empirical certainty from repeated causes and effects (*dawrān*) is known from firsthand observation of the senses and a rational judgement of the mind. The proposition that 'lemon is sour' is doubtful for someone trying it for the first time without prior knowledge of it, merely probable (*ẓannī*) for someone having limited repeated experience of it, but empirically certain for someone who has long-term experience of consuming it (Simlālī, 2004, 1:620; Tawnkī, ft.1, n.d., p.232; Zarkashi, 1985, 2:357).[43] This view classifies 'scammony as a laxative' under certainly effective means to repel harm, and thus opposes *al-Fatāwā al-Hindīyah* cited earlier.
2. Due to some obstacles, scammony may not be effective just like food, but in their absence, it is certainly effective, and this is known through corroborative and long-term experience (Isnawī, 1999, 1:133; Subkī, d.1355, 1995, 3:75). A

[43] This certainty is attained by experiment and observation (*ḥaqq al-yaqīn*).

person suffering from severe leptin resistance will not feel satiated even after a meal. This does not entail that food does not satiate. Similarly, a person suffering a severe disorder of mouth bitterness cannot taste the sweetness of honey, which in result does not negate the empirical certainty of it being sweet (Taftāzānī, d.1389, n.d., p.59). In the absence of these conditions, scammony and food are certainly effective (Simlālī, 2004).

3. We find two ostensibly contradictory views of Ghazālī. In *al-Mustaṣfā* (1993, 1:37), he professes, "physicians are certain that scammony is a laxative like you have knowledge that water quenches thirst," and in his *Iḥyā* (2004, 1:73), as cited earlier, he places "consuming a laxative" under a likely and probable means. In the latter, he also declares that knowledge by experience engenders empirical certainty in which there is no doubt like that in knowing that heated scammony is a laxative. According to my proposition, there is no contradiction as the sources of knowledge differ in Ghazālī's examples. The physician has certainty due to corroborative long-term experimental observation,[44] and in the latter source, the patient does not have experience that engenders certainty, rather, has a probable testimony of a physician.
4. Sīmāwī (d.1420) (n.d., 2:142), a Ḥanafī jurist, places some medicines under the domain of experiments (*mujarrabāt*) that are empirically certain in efficacy and espoused that "scammony and sekanjabin[45] are cures for excess bile and easing bowel movement just like water and food are cures for thirst and hunger, except that curing with food and water is obvious (*jalīy*) and known to everyone, while the latter is obscure (*khafīy*)[46] except to specific people. Hence, it joins with the

[44] Observation only (*'ayn al-yaqīn*) or with personal experience too (*ḥaqq al-yaqīn*).
[45] A traditional Iranian drink made of honey and vinegar.
[46] Not known to all.

first type of means to avert harm [i.e. empirically certain] for whoever has experienced it."

Considering the above observations, I advocate the following:

a. Repeated long-term experiments of a medicine can yield empirical certainty regarding its effects, regardless of whether it is oral or non-oral.
b. Most ill people do not have repeated long-term experience for most medicines and rely on a physician's testimony, thus the notion that most people do not attain such certainty regarding a medicine's efficacy is accurate. It may be for this reason that A'ẓamī (2011, 3:506) asserted there was no empirical certainty for a patient regarding a medicine's efficacy.[47]

6.4.3.2 Certainty from the Testimony of Physicians and Moral Duty

Considering the above observations, especially Ghazālī's statements, one must distinguish between the following:

a. the certainty of a medicine being effective in and of itself, which a patient can know with certainty or high probability by way of personal long-term experience (*ḥaqq al-yaqīn*), or a physician by observation (*'ayn al-yaqīn*)
b. the physician's testimony (*khabar*) to a patient.

These two independent information sources differ in the degree of knowledge they engender.

Below are additional supportive evidences for this distinction:

a. Ibn 'Ābidīn (1992, 2:422) states that high probability 'regarding one's medical condition' is attained from three sources, 1) physical symptoms, 2) the patient's

[47] See also I. Miṣbāḥī's explanation to A'ẓamī's view in M. Miṣbāḥī (2009c, 2:361).

experience, 3) and the testimony of a non-transgressing[48], highly skilled physician. People tend to accept such a physician's word with 'certainty', i.e. their hearts forsake the opposing possibility. This is high probability/legal certainty.

b. A. Khān (2016, 3:358) and Ibn 'Ābidīn (1991, 1:211) espoused that 'knowledge (*'ilm*) that breast milk will cure one's ailing eyes' cannot be reached from a physician's statement, though they agree that knowledge in the meaning of high probability can be reached from it, i.e., knowledge in the broadest context.[49]

c. Nābulusī (2001, p.105) appears to hold a different opinion to the above two and says, "there are numerous patients for whom all physicians prescribe a medicine with certainty that it will cure them, yet when the patient takes the medicine, he is not healed, and so the certitude of physicians regarding cure is a probable conviction (*ẓann*) of theirs. It is not permissible for a person to commit an absolutely certain prohibited act to achieve a [merely] probable (*maẓnūn*) end." Nābulusī seems to deny reaching all degrees of certainty from the testimony of physicians regarding medicinal efficacy. We could possibly interpret his statement to make it congruent with the views expressed above that he speaks of medicating for mere needs and therefore forbids utilizing definitively prohibited medicines.

[48] Someone who observes religious duties and does not publicly commit prohibited acts (*mastūr*). Other jurists assert he must be religiously upright (*'ādil*). See Abu Ghuddah (2016), Qarahdaghi (2016) and Raissouni (2016), regarding the physician's personal morality. See also Ziadeh (1990) on the concept of *'adālah*.

[49] High probability here is in its commonly used meaning other than mere probability (A. Khān, 2016, 3:555). See Chapter 3.

d. ʿAynī (2000, 1:446) asserts, "the testimony of physicians is not a definitive proof (*ḥujjah qaṭʿīyah*), and some people may be cured whilst others are not due to their different bodily natures."

The first two examples establish that according to Ḥanafīs, the testimony of a single highly skilled physician can:

1. establish a medical necessity for the patient, as risks to life, body or sanity with high probability ground a legal necessity
2. engender legal certainty (*yaqīn fiqhī*) in a patient that a certain medicine will cure. Nābulusī (2001) seems to oppose this view.

According to Ḥanafīs, the highest degree of knowledge a person can reach from physicians, thus, is high probability/preponderant conviction (*ẓann ghālib*), i.e. in which the apprehender entirely forsakes the opposing possibility, regardless of the number of reliable physicians who prescribe a medicine. This is classed as 'certainty' in the legal context and in the terminology of Sufis and most scholars (Ghazālī, 2004, 1:72).

Among the Shāfiʿīs, Ghazālī (2004, 3:381) acknowledges that if all physicians and experts in medicine informed an ill person that a certain herb will certainly cure him, he would accept their statement to be true and trust it without having to ask for medical proofs due to 'mass-narration and external signs,' such as them being more learned than him in medicine, "unless he is idiotic and stubborn." He indicates that a patient can reach 'certainty in the narrowest context' regarding the efficacy of a medicine from the testimony of numerous physicians, like that in mass-narrations, but would physicians declare such certainty in their assertions? The answer is most likely to be negative. His view opposes Nābulusī (2001).

Moreover, Taftāzānī (n.d., p.69), Ghazālī (1993, 1:107-8) and Jazā'irī (d.1919) (1995, 1:119-123) argued that a solitary testimony supported with definitive external indicators (*qarā'in*) yields inductive certainty (*'ilm istidlālī*). Rāzī (d.1210) (1997, 4:284) elaborates this with the example of a patient's testimony regarding his condition, "when a person tells us he is thirsty, visible signs of thirst on his face and tongue entail knowledge of his truth. When a patient informs a physician of pain in a body part whilst crying and with other symptoms, thereafter a physician treats that area in a manner that had the patient not spoken the truth, the treatment would have killed him; here we gain knowledge regarding the truth of his cry." Knowledge here means inductive high probability.

The following Ḥanafī texts denote a 'moral duty' on the patient to act is grounded by the testimony of physicians:

a. Zayla'ī (d.1343) (1313AH, 1:333) espoused, "we [Ḥanafīs] say that the escalation of the sickness and its prolongation may lead to death (*halāk*), so avoiding this is morally compulsory. The way to know this is by the patient's careful observation (*ijtihād*) of his condition, so when he reaches preponderate conviction, he must open his fast, and likewise, when an upright expert Muslim physician informs him to do so." In a threat lesser than this, he is merely excused, not obliged, to abstain from fasting due to scriptural exemption. Thus, a highly probable imminence of the circumstance of necessity from a highly probable single testimony determines a moral compulsion to abstain from fasting: a highly probable means to avoid worsening of an illness. Here the moral compulsion is in a 'preventative health measure'.
b. Sīmāwī (n.d., 2:125) declares, "a breastfeeding child suffers an intestinal ailment and his life is feared, while physicians are assertive (*za'ama al-aṭibbā'*)

that if the wet nurse drinks the medicine the child will be cured and she is required to drink it during the day of Ramadan, she will be told to drink it if the physicians are highly skilled." Note here that 'physicians' is a plural and the quality of skill engenders high probability, whilst the circumstance is a necessity and the medicine is highly probable in efficacy according to the physicians.

c. Ibn 'Ābidīn (1992, 1:148) cites Ibn al-Humām that if a physician informed a patient that the water from his infected eyes is pus, or he has preponderate conviction (*ẓann ghālib*) from the signs regarding this, it is 'morally compulsory' for him to repeat ablution for each prayer. Here, the moral compulsion is based on the advice of a physician.

The Majlis-e-Shar'ī of Mubarakpur issued a fatwa (no.37, 2008), approved by 103 Indian scholars and jurisconsults, which declared that due to the widespread shortage of religious highly skilled Muslim physicians, the qualities of religiosity and high skill are no longer required to allow medication that would otherwise be impermissible (M. Miṣbāḥī, 2014, p.317). They argued this would entail hardship (*ḥaraj*), as millions of Muslims visit physicians lacking these qualities and utilize their medicine, and so they would be left stranded without treatment. The fatwa stipulates the following two conditions for this permission:

1. The physician is not known to discriminate against Muslims and the political and social conditions are not biased towards them, especially for internal treatments.
2. The patient must make a personal investigation and judgement (*taḥarrī*) about the non-Muslim or non-practicing Muslim physician's prognosis, if his heart is satisfied that it is not a deliberate attempt to undermine his religion and that it

will benefit him, he can follow it, even if it involves forsaking religious duties like prayer and fasting.

Any intelligent reader would immediately realize that the fatwa, written in context of the Ḥanafī school, does not consider this permission a moral duty, and no such indication is present in it, hence, accepting a treatment from non-Muslim or non-practicing Muslim physicians would not be morally compulsory in a medical need or necessity, regardless of its efficacy, unless one has successful experience of it. The fatwa acknowledges that to determine medical conditions, some technological aids may engender empirical certainty, for example, to determine a fractured bone from an x-ray image. M. Miṣbāḥī (2009b, pp.93, 101) declares that one's medical condition and symptoms can determine a preponderant conviction that the unlawful medicine is to be utilized and thus he inaccurately permits it, whilst forsaking the efficacy of the medicine. He cites Ibn ʿĀbidīn (1992, 2:422) on this, however, a careful read of the latter's text shows he only declares 'symptoms' as a highly probable source to establish a medical condition, as cited above, and not to legitimize unlawful medications.

Among Western academic studies, Qureshi and Padela (2016, p.600) inaccurately claimed that in the Ḥanafī school, "the fact that a physician may inform a patient of their own certainty regarding a treatment has no bearing upon the moral status of the action to be taken by the patient," and add, "however, Ḥanafī jurists hold that certainty over clinical efficacy is to be arrived at by the patient." These passages relate to the physician's testimony about a medicine's efficacy and any other action related to health. They extrapolated these claims from Sīmāwī's assertion (d.1420) (n.d., 2:143) that if a person knows 'from experience' that a specific treatment eliminates illness like water quenches thirst, it is empirically certain. I have critically examined that 'high probability,' i.e. legal certainty, can be reached from the testimony of physicians, and

that is enough to ground moral compulsion (*wujūb*) in the Ḥanafī school. Therefore, Qureshi and Padela (2016) overlook the judgement of 'moral compulsion' (*wujūb*) which can be established by the testimony of a highly skilled and religious physician or a group of experts. Their conclusion that, "some Shāfi'ī jurists allow for high probability to ground moral obligations," whilst ignoring Ḥanafī sources that are congruent with this, is therefore misleading due to inadequacies in thoroughly surveying the Ḥanafī literature on the matter.

6.4.3.3 Moral Duty of Treatment Based on High Probability in Medicinal Efficacy

My observation that patients do not reach knowledge in the narrowest context[50] based on the testimony of physicians forms the reason as to why Ḥanafī jurists do not consider taking medicine a moral obligation (*farḍ*) merely based on such grounds. According to Ḥanafīs, patients do not hold the conviction that the medicine will cure them like bread and water end hunger.

However, I argue that this judgement is accurate regarding seeking a 'merely probable' cure for a sickness. If there is a 'high probability' to end life or body-threatening harm in a 'necessity' by orally or non-orally utilizing a prohibited medicine known to the patient from either experience or the testimony of a reliable Muslim physician, it is 'morally obligatory' (*farḍ*) to utilize regardless of the type of prohibition. This applies to all prohibitively disliked and intrinsically permissible medicines too.[51] I consider legal texts that mention the 'permissibility' (*jawāz*) of utilizing the means in such circumstances to be interpreted as 'morally obligatory'; this is based on my analysis[52] in the examples of coercion where jurists used the term permissible in the meaning of

[50] I.e., certainty in the narrowest and broadest meanings.
[51] See: Figure 26.
[52] See: Chapter 5.

moral obligation. The *āyah* (Q6:119), "He has explained in detail to you all what is forbidden to you except when you are forced towards it," includes such medicines by way of *dalālat al-naṣṣ*.

The general Qur'anic *āyah* (Q2:195), "do not contribute to your destruction with your own hands," indicates that omission or commission of an act that endangers life is prohibited, and thus utilisation of a means that is empirically certain or highly probable to save life is morally obligatory (*farḍ*). M. Miṣbāḥī (2000, 1:195), G. Ḥusayn (2009, 2:355) and M. Ḥusayn (2009, 2:423), members of the Majlis-e-Shar'ī, upheld this view too with the condition that the patient has the ability to undergo the treatment, although they use the term *wājib* (morally compulsory) instead, which is interchangeably used with *farḍ* in the Ḥanafī school.

Moreover, in Chapter 5 I analyzed that Ḥanafīs upheld if there is a genuine severe threat under duress to one's life or body part, it is 'morally obligatory' to consume an absolutely certain forbidden substance, like undisputed liquor, if a person has preponderate conviction that the coercer will inflict life or body-endangering harm. Here, the moral duty to consume liquor is based on the high probability of a threat and of the success of the means to prevent harm. In my view, declaring that high probability engenders a moral duty under duress but not in the case of forbidden oral or non-oral treatment is an inconsistency, as both are cases of necessity.[53] In both examples, the individual is in a dilemma of accepting highly likely death or utilising the unlawful means to save life, which is highly likely to save him. The example of all prohibited medicines highly probable in efficacy therefore can be attached (*ilḥāq*) with prohibited Type One actions under duress.

[53] I adopted this position in Figure 26.

Using the example of uttering statements of disbelief in coercion if the coerced has preponderant conviction that it will save his life, we can similarly argue that a medicine's high probability of efficacy ought to minimally excuse its use, orally or non-orally, even if it is prohibited with absolute certainty. The prohibitions of substances are less severe than the prohibition of uttering statements of disbelief, as the preservation of faith is the highest fundamental value in Islam. If the latter is excused to save life, the former has greater reason to also be excused. Since highly probable unlawful medicines fall under Type One prohibited acts studied in Chapter 5, they will therefore become obligatory in necessities.

As for moral duty in 'medical needs', I could not find an explicit legal precedent that declares treating with medicines, empirically or legally certain in efficacy, is compulsory in a need, with exception of A. Khān (2014, 5:291), even if there is a widespread problem. The only possible meaning of 'problem' in such a need is that there is no suitable alternative, not that one is physically unable to avoid the treatment like being unable to avoid urine sprinkles. Hence differing between these two meanings of unavoidable problem is vital as the latter excuses absolutely certain prohibitions whilst the former does not, as verified in Chapter 5.

Moreover, I discovered a line of reasoning to support that medicating with highly probable intrinsically permissible and prohibitively disliked medicines, orally and non-orally, is compulsory in a medical need, but this not the case for undisputedly prohibited medicines.[54] Speaking of diet and risks to health, A. Khān (2016, 16:557) declares that eating food in an amount that is 'highly probable' to cause sickness and indigestion is 'prohibited' (*ḥarām*), and an amount more than one's stomach full without the former

[54] I adopted this in Figure 26.

fear is ‘prohibitively disliked’. This is a preventative measure, and the likelihood of harm to one’s body as a result of one’s action therefore determines the moral judgement of that act. The cited food is ‘intrinsically permissible’, but ‘extrinsically prohibited’ due to the associated harm. ‘Prohibited’ here means probable in prohibition (*ḥarām ʻamalī*) due to the absence of an absolutely certain proof-text. Note, A. Khān’s line of reasoning also applies to harms associated with the qualitative nature of foods and their risks too.

I would argue that A. Khān’s line of reasoning can be applied to curative health measures and omitting ‘intrinsically permissible’ treatment to repel harm from the body. Therefore, if high probability of ‘inflicting harm’ is enough to prove a ‘probable prohibition’, a ‘high probability in efficacy’ to ‘avert harm’ ought to ground a ‘probable obligation’ (*farḍ ʻamalī*), or at least a moral compulsion (*wājib*). If this reasoning is accepted, taking ‘intrinsically permissible medicines’ in ‘medical needs’, orally or non-orally, are compulsory.[55]

Similarly, highly probable ‘prohibitively disliked’ medicines ought to be compulsory considering the efficacy to achieve the purpose of repelling harm/sickness. I infer this from A. Khān’s rule (2016, 16:558-9) that if the competing interests have the same moral judgement, such that the end purpose is compulsory (a need), omittance of which is a prohibitively disliked, and the means are prohibitively disliked, omittance of which is a compulsory and a need, then whichever’s basis for priority is greater determines the moral judgement of the act. In the context of treatment in a need, according to my opinion, humans are needy regarding their bodies and health, whereas God is not in need, so their need ought to override the prohibition of God in prohibitively disliked

[55] I adopted this view in Figure 26.

acts if it does not violate the rights of any other people.[56] We know that God is compassionate towards the needs of people and excuses them to abandon absolutely certain obligations, like fasting during Ramadhan, if it harms the body, even without endangering its functions or life.[57] Thus, the purpose's judgment ought to prevail.

A. Khān's view (2014) cited above about treatment being compulsory on the father for his child, regardless of need or necessity, if it is certainly effective, can also form a foundation for making highly probable treatments compulsory if certainty is interpreted to mean high probability.

These observations therefore call for reinterpreting legal Ḥanafī texts that assert there is no sin for dying without taking medicine. To synthesize between legal texts, texts that declare there is no sin for abandoning treatment ought to be restricted to 'where high probability of death or severe damage to the body or sanity is lacking,' i.e. the sickness is lesser than the degree of necessity 'whilst cure from the medicine is merely probable or speculative'. According to the Ḥanafī school, if the medicine is highly probable or empirically certain in efficacy and the illness is life or body-endangering, there would be a sin for omitting it if the patient has preponderant conviction regrading it from experience or a highly skilled and religious Muslim physician's testimony. Additionally, legal texts that imply that omitting medication in a medical need is not a sin restrictedly refer to any merely probable medication or absolutely certain prohibitions, like consuming blood and swine. These vital observations are original contributions of this study to reconcile legal texts and shed new light on the school's position on medication using its lines of reasoning.

[56] See: Chapter 5 and Nābulusī (2001, p.107) regarding prioritising human need.
[57] See: scriptural exemptions for human needs in Chapter 5.

In the fatwa (no.10, 1999) on the conditions for a valid necessity, the Majlis-e-Shar'ī of Mubarakpur agreed, "there must be certainty or at least high probability that the utilization of the forbidden means will save one's life, intellect, religion, lineage or wealth, because the permission to utilize the forbidden means is based on this noble purpose" (M. Miṣbāḥī, 2014, p.171). Here I assume the broad term 'permission' was used instead of 'moral obligation' to include Type Two prohibited acts[58] under the necessity of coercion, which are excused, yet intrinsically prohibited.

6.4.3.4 Contextualizing Claims of *Ijmā'*

1. In his Qur'anic exegesis, Qurṭubī (d.1273) (1964, 2:221) declared scholarly consensus (*ittifāq al-'ulamā*) on the prohibition of 'taking benefit' (*lā yuntafa'u bihī*) unconditionally from blood, implying oral or non-oral utilization. One may infer from this that all types of benefit from it are forbidden with absolute certainty (Miṣbāḥī, 2009b). In context of the types of consensus, all scholarly agreements are not absolutely certain proofs. Some agreements are probable (Table 1 after p.45). Albeit, the consensus can be absolutely certain, as well as probable, regarding a slightly disliked act (Table 2 after p.100). For example, A. Khān (2016, 1:712) after citing Nawawī, who declared consensus on the prohibition of wasting water, even if a person was at the sea, asserts, "this is slightly offensive." The former agreement is probable since it is a solitary testimony of the author and thus it proves a probable forbidden or prohibitively disliked act, which is sanctioned in necessity and need.

2. Shīrwānī (1972, 3:183) cited al-Qāḍī 'Iyāḍ who declares there is 'scholarly consensus' that seeking medical treatment is not obligatory (Qureshi, 2016, p.601). This study presented views that seem to oppose this statement yet can be reconciled in

[58] See: Chapter 5.

that the claim of *ijmā'* is regarding merely probable medicine in efficacy and not empirically certain or highly probable medicines.

6.5 Fatwas on Blood Transfusions

In a study of 70 English Sunnī e-fatwas, Branden and Broeckaert (2011) made references to 17 fatwas on blood transfusion. The findings are surprising because "nearly half of these fatwas allowing for blood donation do so without mentioning any restriction or problem whatsoever. The other half of the fatwas contain the same elements for a conditional approval of transplantation/transfusion, as found in the arguments pro organ transplantation" (Branden and Broeckaert, 2011, p.172). This signifies that half of these fatwas require the condition of necessity to permit blood transfusion. The others most likely take medical need for granted to permit transfusion as it is not explicitly mentioned. Rassool (2014, p.261), who aims his work at nurses in the practical field, restrictively professes that blood transfusion is considered under a "definite risk to the receiver's life" and he overlooks the distinction between a medical need and necessity. Studies by Black (2009) and Atighetchi (2009, p.167) on fatwas, surgery and transfusions also reveal that the literature discusses the case of necessity with little or no mention of need.

A critical reading of fatwa literature on blood transfusion reveals that there are two approaches in using the term 'necessity' which blur its notion:

a. **Necessity to save life:** Among the contemporary scholars that confine the permissibility of blood transfusions to a legal necessity to save life are Dhahabī (1993, p.33), Abū Sinnah (1987) and Abū Zayd (1988, 2:40).
b. **Necessity to restore health:** This is a broad phrase because it applies to both need and necessity and it is congruent with the broader definition (c) of *ḍarūrah*

as a hardship caused by illness (Chapter 3). The circumstance of saving normal body functions or one's life with a blood transfusion that has no alternative is a legal necessity. Averting pain or harm from the body that does not endanger body functions or life with a transfusion is a legal need. ʿĀlam (1991, p.291) used this broad meaning for the permissibility of blood transfusions.

One must therefore carefully ascertain the context in which a scholar uses the term necessity, because the conditions and scope for need and necessity differ.

6.5.1 Legal Justifications for Blood Transfusions

Human blood is intrinsically forbidden (*ḥarām li-ʿaynihī*), making each drop of it prohibited and impure like undisputed liquor and urine, and its prohibition is the sole right of God,[59] like that of carrion. The prohibition regarding its oral consumption is absolutely certain in the Qur'an (Q2:173; 16:115) under the indiscriminative prohibition of flowing blood, and is probable regarding its non-oral use, as explained in light of the intended and unspoken meanings of the *āyah* above. Nawawī (1972, 3:200) declared there is Muslim consensus regarding its impurity.

Analogy (*qiyās*) with other human body parts requires the prohibition of blood transfusions since seeking benefit from another person's body is unlawful for violating human sanctity.[60] Also, flowing blood is impure by absolutely certain scriptural evidence and consensus and seeking benefit from impure substances is forbidden. Considering this, the default judgement (*iqtiḍā' aṣlī*) to non-orally utilise blood is prohibitively disliked, before considering secondary factors (*iqtiḍā' ṭabʿī*). A strict and linear approach would ban all uses of blood, like the religious view of Jehovah's

[59] See: Ṣ. Miṣbāḥī (2009, 2:450) on rights.
[60] See: M. Miṣbāḥī (2009b, pp.61-73) for five legal differences between fluids of the body and organs.

Witnesses, who strictly interpret the Bible to abstain from blood, regardless of medical need or necessity.[61] In the Islamic law, the prohibition can be overridden considering the legitimate principle of *istiḥsān* based on necessity and need to preserve health and the body. This signifies that the interest of restoring health overrides the competing prohibition of non-orally utilising impure substances and benefitting from a regenerative fluid of another's body.

Permissive fatwas on blood transfusion reject its analogy with non-fluid human body parts and declare it analogous to wet nursing (Rispler-Chaim, 1989, p.205) and inserting breast milk in infected eyes by way of casuistry (*ilḥāq*). Ḥamawī's passage (1985) on consuming blood is an explicit precedent for blood transfusions; if drinking it is allowed with conditions, transfusing it must also be. Qarahdāghī and al-Muḥammadī (2011, p.545) referenced the Prophet's permission for bloodletting for health purposes to justify injecting blood into the body and said it was a greater purpose to take benefit from the blood and save a life than to waste it. Hence, the arguments of 'violating human sanctity' and that 'humans do not own their bodies' are not an obstacle to transfusion, which are commonly cited in fatwas against organ transplantation. Making an incision to the body to donate blood is analogous to phlebotomy and cupping that jurists agree are permissible probable means to avert harm due to scriptural permission.

6.5.2 Fatwa of The Majlis-e-Shar'ī on Blood Transfusion

In its fatwa (no.12, 2000) on using blood for medical purposes, the Majlis-e-Shar'ī of Mubarakpur states (M. Miṣbāḥī, 2014, pp.194-6),

"There is permission (*ijāzat*) for a blood transfusion in the following scenarios:

1. Saving the life of a patient.

[61] See: Official Website of Jehovah's Witnesses (c2019).

2. Saving the body parts from deformity.
3. Protecting the significant bodily features (*jamāl maqṣūd*), [such as] protecting the circles of the eyes or any other bodily limb that cannot be protected by any permissible means. There is no permission to protect the insignificant bodily features (*jamāl ghayr maqṣūd*).[62]
4. A. If there is unbearable pain when the illness continues for several days without transfusing, it is permissible, otherwise it is not.

   B. If there is a fear of developing incisional hernia[63] due to loss of blood, it is permissible (as it can happen after surgery).
5. Transfusion is permissible in the second and third subsequent scenarios, but not the first:
   a. The patient is sound without tension, and the shortage of blood is below 15%.
   b. There is some tension, unsettledness and paleness, the body is cold, and the patient is sweaty and thirsty. Standing up causes him drowsiness and he stumbles. The blood is short by 1 to 2 liters, i.e. 20% to 30%.
   c. The patient experiences excessive tension, sensory disorder, heavy breathing, excessive coldness like ice in the hands and feet, cold in the entire body and excessive thirst. The shortage of blood is between 2 and 2.5 liters, i.e. 40% to 70% and there is no production of urine.
6. If there is a high probability that unless blood is transfused, a body part will dysfunction, transfusion is permitted. In all the above cases, the permission is measured by the extent that alleviates the condition".

[62] See: ft.12.
[63] Where tissue pokes through a surgical wound in one's abdomen that hasn't fully healed. See: hernia in NHS (2018b).

It adds, “the prohibition of orally intaking blood is based on absolutely certain proof and all other methods of benefit from it are prohibited with probability in the Ḥanafī school.”

The council also discussed the legal reasoning for allowing a person to donate blood when there is no legal necessity or need for him to donate. It concluded that, “the necessities of other Muslims are also regarded. For example, leaving an obligatory prayer to rescue a drowning person is compulsory, therefore, when another Muslim experiences circumstances of need or necessity, donating blood to him is permissible. Drawing benefit from a part of the human body under necessity and need becomes permissible as Shāmī [Ibn ʻĀbidīn] records.” Thereafter the council provides a legal precedent to prove that inserting human milk in the eye to cure conjunctivitis, where there is high probability it will cure, is permissible.

The fatwa concludes stating, “if the patient does not have access to blood except by purchasing it, he is permitted to buy it in a necessity and need. However, the money is not clean for the seller.[64] In such circumstances, a Muslim patient may take or buy blood from a Muslim or a non-Muslim.”

6.5.2.1 Analysis of The Fatwa

Having considered the original judgement and secondary factors for the admissibility of blood transfusion, scholars of the Majlis-e-Sharʻī attempt to apply the concepts of necessity and need to real-life patient conditions. This is the stage of *taḥqīq al-manāṭ*, i.e. applying theoretical judgements to real circumstances after identifying the correct basis (*manāṭ*), be it a *ratio legis* (*ʻillah*) shared by a similar precedent or a universal

[64] Unless the buyer is a non-Muslim (M. Miṣbāḥī, 2018, p.78).

interest (*maṣlaḥah*)[65] like necessity or need. In Chapter 2, I referred to this juristic activity as *ijrā' al-'illah*—an activity of *taḥqīq*.

1. The fatwa carefully distinguishes between patient conditions and issues judgements accordingly, however, the academic source for the medical information is not provided.
2. Scenarios one, two, three, and six are all necessities, and if there is a high probability of improvement or cure from transfusing blood and this is known from a highly skilled religious Muslim physician or patient experience, it is morally compulsory on him. If transfusion is advised by any other qualified physician, it is merely permissible based on a later fatwa of the Majlis (no.37, 2008) on physician testimony. This fatwa does not make these distinctions nor declares a moral duty on the patient with the condition of ability, although two of the council's members, M. Ḥusayn (2009, 2:428) and G. Ḥusayn (2009, 2:256), declare transfusion as morally compulsory in necessity and need.
3. Scenarios four and five (b) and (c) are medical needs, and transfusion may be compulsory or merely permissible depending on the physician's testimony or patient's experience with transfusion. This fatwa does not make these distinctions, nor does it declare a moral duty on the patient.
4. Scenario five (a) is a non-essential act (*fuḍūl*) and prohibitively disliked; this is because it is a non-oral use of blood without a valid need.
5. The fatwa declares protecting significant body features as a necessity, since saving the body from significant harm is a necessity. Hence, the concept of necessity must not be restricted to saving life alone. However, the reader is not

[65] See: Amjūḍ (2015, p.104-6) for the discussion on the *manāṭ*, i.e. the basis on which a matter is judged.

informed of the difference between significant and non-significant bodily features and must turn to M. Miṣbāḥī's individual fatwa (2009b, pp.101-3).[66]

6. The fatwa does not discuss whether widespread problem is established in blood transfusions, neither does it intersect the discussions on the probability of success and types of physician testimonies.
7. M. Miṣbāḥī (2018, p.58, 345) reveals that the two most senior members of the council, without naming them, regarded all forms of treatment with blood as forbidden, some members restricted transfusions to the condition of necessity and most permitted it in a valid need too. Four of the 19 members who submitted their researched answers consider blood donation unlawful (M. Miṣbāḥī, 2018, p.347). It may be for this controvesy that the fatwa downplays the terms and substitutes 'moral compulsion' of transfusing in a necessity with 'permission' where there is high probability of success.
8. The fatwa does not prohibit or even discourage transfusing the blood of non-Muslims in Muslim patients as other fatwas do, like M. Shafi (d.1976) (2000, p.42). This may be due to the potential impact such a legally insignificant discouragement could have on the masses considering their social and political conditions. Black (2009) found that some fatwas recommended that Muslims avoid transfusing the blood of non-Muslims whilst others did not.
9. It permits blood from non-Muslim donors in needs too, a point scarcely covered in other fatwas.[67] Branden (2011, p.172) found that e-fatwas mentioned that 'necessity' was required to transfuse the blood of non-Muslim donors in Muslims, and donating blood to non-Muslims or sinful people was not a

[66] See: ft. 12.
[67] See: Atighetchi (2009, p.167) for various fatwas.

religious obstacle, unless the former was [a soldier] in the moment of waging war upon Muslims.

10. The fatwa does not mention donating to non-Muslims and there is no discrimination in the permisson based on the patient's religiosity.
11. It permits purchasing blood for a medical need, due to the lack of an alternative, although blood is not legally a valid sale item. Hence, need is an exception to the norm despite the money remaining unlawful for the seller. Scholars who consider organ transplantation obligatory or merely permissible could potentially use this reasoning as a basis to buy organs when they are not freely available. Eight of the 19 council members who researched this topic prohibited purchasing blood (M. Miṣbāḥī, 2018, p.349).
12. The fatwa does not mention establishing blood banks, as more time was required to debate its answer, although the questions raised for deliberation included it (M. Miṣbāḥī, 2018, p.352). Half of the members who researched the matter forbade blood banks (M. Miṣbāḥī, 2018, p.250). M. Miṣbāḥī (2009b, p.39; 2009c, 2:318) and other members argue in favor of blood banks where there is a regular need or an emergency, and qualified sincere physicians supervise them. Only four members referred to donation as a "virtuous act to help humanity" (M. Miṣbāḥī, 2018).
13. The precedent cited for the permissibility of 'donating' blood is that of leaving prayer to rescue someone, whereas the latter is morally compulsory, yet the former is merely permissible. The council does not consider donation a moral duty. This is in line with Branden (2011) who did not find any e-fatwa that declares donation a morally compulsory act, but some did encourage it as an act of 'ongoing charity'.

14. The fatwa does not mention, like the fatwas of M. Shafi (2000, p.42) and OIC's Islamic Fiqh Academy (1989) in Qarahdāghī and al-Muḥammadī (2001, p.555), that blood transfusion does not establish a prohibition of marriage between the donor and beneficiary like in the case of breastfeeding, and thus spouses can donate blood to each other.

6.6 Conclusion

This chapter fills a vital gap in the Ḥanafī legal literature by intersecting discussions of need and necessity in means and end-purposes with types of prohibitions to evaluate moral judgements for treatment based on medicinal efficacy. I synthesise and classify my findings into the subsequent rules:

1. If the purpose (end) of medical treatment is a legal necessity, thus, 'obligatory' (*farḍ*), like protecting one's life, body part(s), or sanity from highly probable ruin or severe unbearable harm, the rules for medicating are as follows:
    a. If the oral or non-oral use of any 'permissible or prohibited' medicine is 'empirically certain or highly probable' in repelling harm, it is an 'obligation' (*farḍ*) and a necessity, unless there is a permissible alternative for the prohibited medicine. Refraining from it is a sin and it does not oppose reliance on God; rather, it is an oct of obedience. According to Ḥanafīs, this includes medicating with all types of alcohols if they have such efficacy. High probability can be reached from patient experience or, and the testimony of a highly skilled religious Muslim physician, as quoted from Ḥamawī (1985) and Ibn 'Ābidīn (1992). Ghazālī (2004) declared there is juristic consensus on the permissibility of using a certainly effective means in a necessity. Here necessity not only relaxes (*takhfīf*) the moral judgment, it also changes (*taghyīr*) the

prohibition to intrinsic permissibility, as in Type One prohibited acts in life-endangering hunger and coercion. The reader will find that Ḥanafī jurists refer to such medicine as 'permissible' (*jā'iz*), although it is morally obligatory. This type of medicine is connected (*mulḥaq*) with the unlawful substances, like pork in the Qur'anic exclusion (Q6:119); Ibn 'Ābidīn (1992) declared acts under coercion are connected to them. According to the Majlis-e-Shar'ī's fatwa (no.37, 2008) regarding physicians, if the patient's knowledge of such medicine is from a non-Muslim or a non-practising Muslim physician, utilising it is 'merely permissible' and a mere benefit (*manfa'ah*), unless the patient has preponderant conviction from experience or a highly skilled religiously observing Muslim physician.

b. If the medicinal means is 'undisputedly prohibited' and 'merely probable' in efficacy, it is prohibited and is a non-essential act (*fuḍūl*). Utilising it is a sin and one must rely on God. I formulate this rule from the Ḥanafī permission of averting necessity with only a highly probable unlawful means and juristic statements that if a person dies without consuming medicine, he is not sinful. Using the reasoning of the Majlis-e-Shar'ī's fatwa (no.37, 2008) on physicians, I propose if such a medicine is prescribed by any qualified physician, it is 'merely permissible' and a mere benefit (*manfa'ah*) if the patient is satisfied that the prescription is not a deliberate attempt to undermine his religious views. Thus, the prohibition in this rule is based on having merely probable experience or information from unqualified people, like other patients or friends and family, regarding its efficacy. However,

widespread problem (*ʻumūm al-balwā*) can permit such treatments. Considering the impact scope of necessity in Chapter 5, a Ḥanafī patient can adopt an opinion outside the Ḥanafī school in this scenario.

c. If the medicinal means is 'disputedly prohibited' or 'prohibitively disliked' and 'merely probable' in efficacy, it is not permissible and is a non-essential act (*fuḍūl*). I suggest this rule considering the conditions of the fatwa position on consuming camel urine elaborated in this chapter and base it on Condition Three of averting the circumstance of necessity which is that the prohibited means must be highly probable in warding off the circumstance according to the Ḥanafī school. This rule challenges the unconditional prescription for necessity to permit all probable prohibitions and requires there to be high probability in the means for its permission. According to the Majlis-e-Sharʻī's fatwa (no.37, 2008), such medicines are allowable if advised by a qualified physician, whose testimony is a merely probable source of information. However, widespread problem (*ʻumūm al-balwā*) can permit them and a permissive opinion from another school can be adopted in this scenario due to necessity.

d. If the medicinal means is 'intrinsically permissible' and 'merely probable' in efficacy, it is 'merely permissible' to utilise, orally or non-orally, and a benefit (*manfaʻah*). Refraining from it is not a sin even if the patient dies and it does not oppose reliance on God. Examples includes medicating with small unharmful amounts of plants whose large amounts intoxicate, poison or cause drowsiness.

2. If the purpose (end) of treatment is a legal need, thus, ‘compulsory’ (*wājib*), like eliminating a condition that harms the normal function of the body or mind without endangering them, then the following rules apply:
    a. If the medicinal means is ‘intrinsically permissible’, ‘empirically certain’ or ‘highly probable’ in efficacy, the purpose is prioritised over the means. Thus, treatment ought to be ‘compulsory’ due to the purpose, orally and non-orally, and a legal need with the condition of having the ability. Refraining from it is a sin and it does not oppose reliance on God, rather, it is an oct of obedience. For example, treating severe constipation with an unharmful dose of scammony or laxative.
    b. If the ‘intrinsically permissible’ medicine is ‘merely probable’, it is ‘merely permissible’, orally and non-orally, and a benefit (*manfaʿah*). Refraining from it is not a sin and utilising it does not oppose reliance on God. Treating with solid intoxicators, like cannabis, in a non-intoxicating and unharmful quantity is a possible example for this or the last rule, depending on its efficacy.
    c. If the medicinal means is ‘undisputedly prohibited’, yet ‘empirically certain’ or ‘highly or merely probable’ in efficacy, it is a sin to utilise it, a non-essential act (*fuḍūl*) and opposes reliance on God, even if there is a widespread problem. This rule is in line with the scope of need identified in Chapter 5 and is formulated according to Nābulusī (2001, p.105) and the maxim of A. Khān (2016, 16:559) that when the purpose is lower in its moral gradation than the means, the moral judgement of the means prevails the purpose, particularly if it is prohibited. However, if a reliable physician prescribes it, it is permissible to utilise based on

the precedent of drinking blood and urine in sickness when advised and the Majlis-e-Shar‘ī’s fatwa (no.37, 2008).

d. If the medicinal means is ‘disputedly prohibited’, yet ‘empirically certain or highly probable’ in efficacy, it is two types:
    i. Prohibited alcohols according to the Ḥanafī fatwa; consuming them is a sin and a non-essential act (*fuḍūl*) unless there is a widespread problem (*‘umūm al-balwā*). This is based on the proposition that fatwa positions of the school can restrict the impact scope of a need; a contribution unidentified in other studies. If it is prescribed by a reliable physician and there is no widespread problem, it is also permissible based on the unconditional purport of the Majlis-e-Shar‘ī’s fatwa (no.37, 2008) on physicians.
    ii. Other than disputed alcohol-based medicines; utilising it is ‘morally compulsory’ orally or non-orally if the efficacy is known by patient experience. If a physician prescribes such a medicine, without patient experience, it is ‘merely permissible’ for the patient based on the Majlis-e-Shar‘ī’s fatwa (no.37, 2008) on physician qualities.

e. If the medicinal means is ‘disputedly prohibited’, like alcohol or non-alcohol substances, and ‘merely probable’, it remains prohibited in a medical need unless there is widespread problem or is prescribed by a physician according to the Majlis-e-Shar‘ī’s fatwa (no.37, 2008) which will render it ‘merely permissible’.

f. If the medicinal means is ‘prohibitively disliked’ and ‘empirically certain or highly probable’ in efficacy, the judgement of the purpose is prioritised over the means if there is no alternative. I carefully inferred, from A. Khān (2016, 16:559), that oral or non-oral treatment ought to be ‘compulsory’ in this circumstance and a legal need with the condition of ability. For example, undergoing a blood transfusion in non-life-threatening conditions when its efficacy is known from experience or a highly skilled religious Muslim physician. If the physician does not possess these qualities, transfusion will be ‘merely permissible’ and a ‘mere benefit’ (*manfaʿah*).

g. If the medicinal means is ‘prohibitively disliked’ or ‘disputedly prohibited’ and ‘merely probable’ in efficacy, according to patient experience, it ought to remain orally or non-orally ‘prohibitively disliked’ and ‘disputedly prohibited’ due to mere probability. I extrapolated this from the precedent of having ‘knowledge’ that inserting breast milk in the eyes will cure the person (Ibn ʿĀbidīn, 1992) and the fatwa position on consuming camel urine. This rule challenges the view presented in Chapter 5 and that of M. Miṣbāḥī (2009a, p.136; 2009b, p.53) in that simple need unconditionally sanctions all prohibitively disliked acts, without considering the clinical efficacy. However, widespread problem (*ʿumūm al-balwā*) can permit such treatments and according to the Majlis-e-Sharʿī’s fatwa (no.37, 2008), if such a medicine is prescribed by a qualified physician, it is ‘merely permissible’ if the patient is satisfied with it.

3. If the purpose (end) is a mere benefit (*manfaʿah*) or a lesser purpose for the body without involving harm, the prohibitive judgement of the means is prioritised, thus all types of prohibited and prohibitively disliked treatments remain as such, even if they are empirically or legally certain, and are classed as non-essential acts (*fuḍūl*). For example, inserting medicine into the rectum by a syringe (*iḥtiqān*) is not permissible to increase sexual ability, unless there is an illness (A. Khān, 2016, 1:378). Examples like combing the hair with *khamr* sediment, etc. are cited above.

		Human Purpose		
		Necessity	**Need**	**Benefit/Beautification/ Non-Essential**
Means to Repel Harm (e.g. Medicine)	Empirically Certain (Undisputedly Prohibited)	Obligatory Necessity	Prohibited Non-Essential	Undisputedly Prohibited Non-Essential
	Empirically Certain (Disputedly Prohibited)	Obligatory Necessity	Compulsory Need (non-alcohol)	Disputedly Prohibited Non-Essential
	Empirically Certain (Prohibitively Disliked)	Obligatory Necessity	Compulsory Need	Prohibitively Disliked Non-Essential
	Empirically Certain (Intrinsically Permissible)	Obligatory Necessity	Compulsory Need	Permissible Benefit/Beautification/Non-Essential
	Highly Probable (Undisputedly Prohibited)	Obligatory Necessity	Prohibited Non-Essential	Undisputedly Prohibited Non-Essential
	Highly Probable (Disputedly Prohibited)	Obligatory Necessity	Compulsory Need (non-alcohol)	Disputedly Prohibited Non-Essential
	Highly Probable (Prohibitively Disliked)	Obligatory Necessity	Compulsory Need	Prohibitively Disliked Non-Essential
	Highly Probable (Intrinsically Permissible)	Obligatory Necessity	Compulsory Need	Permissible Benefit/Beautification/Non-Essential
	Merely Probable (Undisputedly Prohibited)	Prohibited Non-Essential	Prohibited Non-Essential	Undisputedly Prohibited Non-Essential
	Merely Probable (Disputedly Prohibited)	Prohibited Non-Essential	Prohibited Non-Essential	Disputedly Prohibited Non-Essential
	Merely Probable (Prohibitively Disliked)	Prohibitively Disliked Non-Essential	Prohibitively Disliked Non-Essential	Prohibitively Disliked Non-Essential
	Merely Probable (Intrinsically Permissible)	Permissible Benefit	Permissible Benefit	Permissible Benefit/Beautification/Non-Essential

Figure 26 A New Taxonomy of Means to Repel Harm for Various Human Purposes Considering Religious Prohibitions, Moral Duty and Efficacy Based on Patient Experience According to the Ḥanafī School

Note that Figure 26 is based on the patient's own experience of efficacy and does not consider widespread problem nor physician testimony thus the rules formulated earlier in this conclusion must be consulted especially for merely probable medicines in

necessity and need. My study formulates a taxonomy for reliance on God and treatment, and proposes that in the rules above, where the treatment is,

a. morally obligatory/compulsory, omitting it opposes reliance and is disobedience
b. merely permissible, utilising it does not oppose reliance on God
c. prohibited or prohibitively disliked, utilising it opposes reliance on God.

This taxonomy of medical conditions and means to treat them is an original contribution of the thesis which advances our understanding of the Islamic law in relation to medicine and health. It is founded on a critical appraisal of legal texts presented in the chapter and an elaboration of juristic terms, like probability, knowledge etc. Special focus was placed on the Ḥanafī school and on the neglected fatwas of the Majlis-e-Shar'ī of Mubarakpur and deliberations by its members on medical treatment. By offering careful distinctions in means and ends, I have reconciled between legal texts that assert medicating is not compulsory, with others that indicate medicating is compulsory. To achieve this, I drew upon legal texts to show that seeking medicine falls under acts whose moral value changes based on the end purpose and type of means.

Figure 26 reveals that I identified 14 scenarios (green highlighted boxes) in which omitting medical treatment entails a sin; eight in a necessity and six in medical needs. Their common feature is that the means to avert harm is empirically certain or highly probable in efficacy. Hence, medical treatment is sometimes classified as a necessity or a need, and jurists go beyond scripture to epistemology to place moral judgements on treatment. These rules allow us to revisit legal Ḥanafī texts that assert there is no sin for dying without taking medicinal means to be restricted to the scenarios that are not obligatory/compulsory. Additionally, legal texts that imply omitting medication in a medical need is not a sin restrictedly refer to any merely probable medication or

absolutely certain prohibitions, like consuming blood and swine. In all circumstances where merely probable medicines are not allowed, speculatively efficient ones are prohibited too. These vital observations are original contributions of this study that shed new light on the school's position on medication using its framework of reasoning.

In context of rights, medical needs of people, in addition to necessities, precede the right of God over some of His prohibitions. The interests of human life, body and sanity precede the interests of avoiding impurities and unlawful substances in these rules. However, these rules must not be deemed as a prioritization of the human life and body over the interest of religion (*dīn*) in the hierarchy of fundamental values, rather they ought to be considered as obedience and consistent with the principles that 'harm is to be mitigated' and 'hardship is averted in scripture'.

In context of interpreting scripture, this study distinguishes between an intended spoken prohibition of substances in scripture and an unspoken prohibitive indication, and thereby differs between oral intake of prohibited substances and their non-oral use. This is particularly relevant for deliberation on non-oral use of unlawful products, which are primarily prohibited for consumption, such as pigs, yet studies on Muslim views on porcine vaccines miss this vital distinction and focus on transformation.

This chapter examined how the word 'knowledge' in its varying contexts (Chapter 2) impacts the legitimacy of an action and allows us to interpret juristic views in different ways. Thus, if knowing that a medicine will cure means 'high probability' according to Abū Ḥanīfah, there would be no dispute in the school regarding utilizing it in a necessity, even if it is forbidden with absolute certainty. High probability and preponderant conviction (*ẓann ghālib*) are regarded as certainty in *fiqh* texts, and regarding a medicine's efficacy, it can be achieved by patient experience or the

testimony of a highly skilled religious Muslim physician. I cited various Ḥanafī texts that ground a moral duty on the patient to act based on the testimony of physicians, and thus demonstrated that Qureshi and Padela (2016) erred in denying this in their academic assessment of the Ḥanafī school.

In all circumstances of moral obligation/compulsion to take medicine, if the testimony is from a non-Muslim physician or non-practising Muslim physician, and there is no other basis for high probability, like patient experience, the treatment will be merely permissible and not compulsory. This is congruent with the Majlis-e-Shar'ī's fatwa (no.37, 2008) on the qualities of a physician and M. Miṣbāḥī's view (2009b, pp.38-9, 100-1) that to ascertain a medical condition as a necessity, or to warrant a forbidden medicine, the conditions of Islam and expertise are no longer applicable due to a common shortage of such physicians and the hardship this would entail.

My taxonomy of treatment was only possible due to the fatwas of later Ḥanafīs and their reasoning. The disputes of earlier Ḥanafī Imams primarily revolved around, a) disputed camel urine and b) disputed liquors. I explained that Abū Yūsuf appears to permit, without obligation, oral intake of disputed forbidden medicines that are 'merely probable' in efficacy, and his view pertains to the circumstance of medical need where there is no alternative. It is not the fatwa position for medical needs for adherents of the school. This study contributes to our understanding of the school's authority to restrict 'disputed actions' in simple needs, unless there is widespread problem. It reveals the strength of the construct of widespread problem (*'umūm al-balwā*), which sanctions disputedly prohibited medicines that are not otherwise permitted in medical needs according to fatwa positions of the school. This is to the extent that even if the medicine is 'merely probable' in efficacy, like some disputed alcohol-based medicines or even prohibitively disliked medicines, it would be permissible to utilise, both orally and non-

orally. The latter point is in accordance with the Majlis-e-Shar'ī's fatwa (no.1/2, 1994) on medicines containing alcohol. Hence, if there is widespread problem, Abū Yūsuf's position on camel urine can be followed, though a simple private need does not allow it. Moreover, the fatwa position on medicating with disputed alcohols reveals that opposing non-fatwa views of a school may also be very strong in evidence but overridden by a greater purpose determined by social factors. Hence, the scope for pragmatism in laws due to widespread problem is greater than that for simple private needs.

I argued that although jurists classified medicines as probable means to avert harm from the body, a medicine's efficacy could possibly be highly probable or empirically certain. This point allows students of the Islamic law to accurately contextualize the oft-cited classification of medicine (*al-Fatāwā al-Hindīyah*, Sīmāwī etc.) under probable means to avert harm as follows:

a) Classical judgements are relative to the prevalent medicines of the medieval era, like Greek medicine. The pharmaceutical world has enormously developed today, especially in palliative care, and so experts of this field must be consulted to pass judgements of empiricism and efficacy on modern medicine. Conceptualizing the novelty accurately (*taṣwīr al-mas'alah*) before passing a moral judgement on it is a condition for a valid juristic assessment.
b) The classification places a broad judgement on the entire class of medieval medicines, although some of them were highly probable or even empirically certain in efficacy in known conditions and after repeated long-term experiments, like scammony.
c) It places medicines under probable means when a person does not have experience of their efficacy, or when there is a probable testimony regarding it.

A. Khān's fatwa (2016) declares it permissible, according to Abū Ḥanīfah, for a Muslim physician to treat a vaginal illness of a prostitute that prevents her from intercourse, even if she does not experience pain. This implies the physician bears no sin for the wrongdoings of his patients and ought to treat patients regardless of their attributes or possible intentions where the purpose may also be lawful. This woman may require treatment for lawful intercourse, but to inquire this is not within the professional remit of the physician. This reasoning also applies to blood transfusions to non-Muslims and sinful Muslims.

In the ethical-legal literature on medication, I noted the following:

1. Certain western academics entirely overlook the diversity of juristic views on medication, like AlKhawari (2003) and Rassool (2014, p.91) who unconditionally declare medical treatment a moral obligation on Muslims. On the contrary, my study of the juristic views of the four Sunnī schools demonstrates there is no homogenous view in Islamic law regarding seeking medical treatment. At the very least, it is permissible with permissible means.
2. Natshah (2001, 1:113) erred in claiming 'juristic agreement' on the prohibition of medicating with human urine.
3. M. Miṣbāḥī (2009b, p.52) erred in saying there is 'agreement' in the Ḥanafī school that consuming blood and urine as medicine was intrinsically indifferent (*mubāḥ*) in a necessity.
4. Without elaborating the degree of the purpose, Zaydān (2003, p.168) is ambiguous in asserting Ḥanafīs require certainty to permit forbidden medicines.
5. The Islamic Fiqh Academy's fatwa that declares treatment in a medical necessity as compulsory is ambivalent regarding the efficacy of the medicine.

6. The scholarly consensus mentioned by Qurṭubī (1964) on the prohibition of taking benefit from blood is probable and overridden by human necessity and need, thus a critical appraisal of consensus types is vital when permitting prohibited acts.
7. Human necessity and need are prioritized over the consensus on the impurity of blood mentioned by Nawawī (1972).
8. By turning to the original work of Ibn ʿĀbidīn (1992), I observed that M. Miṣbāḥī (2009b, pp.93, 101) misconstrued his text espousing that one's outward condition and symptoms can determine a high probability that permits unlawful medicine, whereas Ibn ʿĀbidīn declared 'patient symptoms' as a highly probable means to establish 'one's medical condition', as did Rāzī (1997), and not 'medicinal efficacy'.

As for transfusing blood, it is a novel practice—unprecedented in the Prophetic and medieval era—whose prohibition is not explicitly mentioned in primary scripture. Jurists therefore turn to methods of *taḥqīq* to ascertain its judgement. I studied the Majlis-e-Shar'ī's fatwa (no.12, 2000) in which the dominant view of scholars does not forbid blood transfusion by analogy to human organs, rather it permits it based on juristic preference (*istiḥsān*) of necessity and need. However, there is resistance among some of the senior scholars of the council in legitimising blood transfusions and forming blood banks, but the dominant view is permissive, although the Majlis-e-Shar'ī's fatwa appears to downplay legal terms and not oblige patients to transfusion in any circumstance.

Citing studies by Black (2009), Branden and Broeckaert (2011) and Rassool (2014), I demonstrated that fatwa and academic literature on blood transfusions and medical treatment primarily addresses necessity. Legal need is scarcely mentioned, and the

Majlis-e-Shar'ī's fatwa (no.12, 2000) presents various medical conditions that are needs without explicitly distinguishing them from necessities. I also identified that the term 'necessity' in fatwa literature is sometimes used broadly to include need. My taxonomy of medicine reveals that blurring the lines between these two terms has significant implications on legitimising medicinal treatments.

According to the taxonomy I formulated above, my observations on blood transfusions are as follows:

1. Medical needs also sanction blood transfusions, as this is a prohibitively disliked act prior to considering the purpose, which a valid need can legitimize.
2. High probability or empirical certainty of efficacy in a need or necessity make transfusion morally compulsory/obligatory with the condition of ability if it is advised by a highly skilled, non-transgressing Muslim physician, or if this is known to the patient by experience.
3. Mere probability of a blood transfusion's efficacy in a necessity or need merely permits transfusion when it is advised by a non-Muslim physician or where there is a widespread problem, even an avoidable one, a construct of pragmatism that the Majlis-e-Shar'ī did not discuss under blood transfusions. Considering the latter basis is important because need and necessity only warrant blood transfusions if there is no alternative, whereas widespread problem permits acts despite the presence of alternatives.
4. Where blood transfusion is permitted or compulsory, it must not inflict equal or greater harm on either the donor or the beneficiary, like infectious conditions.
5. Bodily fluids, like blood, milk and urine, can be utilised as means for the needs and necessities of others with conditions. In such cases, prohibitive arguments found in fatwas on organ transplants, like 'lack of body ownership', 'the violation of human

sanctity' and 'impurity of substance' are overridden by the end-purpose and due to the efficacy of the means.

The rules I formulated in Figure 26 can be applied to medical matters with careful assessment of each one and weighing the interests, including:

- passive euthanasia in which medicine is withheld from a dying patient
- brain death and removal of life support equipment
- withholding food and nourishment from people in deep comas
- cardioversion
- rescue and cardiopulmonary resuscitation (CPR)
- organ transplantation
- preventative health measures and diet
- avoiding contagious illnesses
- harm reduction programmes (e.g. of Malaysia)
- genetic testing to ascertain medical conditions of the living and unborn
- rights and responsibilities of patients, carers and physicians
- social responsibility and the state duty to provide healthcare.

Chapter 7. Main Conclusion

The aim of this research was to examine the construct of *ḍarūrah* (necessity) in Islamic moral reasoning broadly in relation to the human body and life and medical fatwas specifically. Although modern and classical sources in the four Sunnī schools were consulted, special reference was made to the neglected Urdu fatwas of the Majlis-e-Shar'ī of Mubarakpur (India) and the research of its members who represent the Sunnī Ḥanafī Barelwi school in South Asia. In this context, this research covered four areas:

1. the theoretical analysis of necessity as a rationale to depart from existing moral laws or to formulate new laws
2. the difference between *ḍarūrah* and closely associated terms like *ḥājah* and *'umūm al-balwā*, and between their impact scopes on prohibition laws
3. case analysis of necessity in the *fiqh* and *qawā'id* literature in varying contexts, like war, crime, medicine; all of which pertain to the value of the human 'self'
4. *ḍarūrah* and *ḥājah* in context of the moral duty towards medical treatment with lawful and unlawful means, orally and non-orally, particularly, blood transfusion.

7.1 Methods of Juristic Moral Reasoning

Chapter 2 presented a framework for juristic moral reasoning in the Sunnī traditions. It began by identifying that *ijtihād* was the intellectual process that enabled jurists to assert moral laws to novelties and interpret scripture. It was argued that the language-indication and historicity of scriptural texts allowed for scholarly interpretative differences. This resulted in a non-monolithic and diversified interpretation of the Islamic law with obvious advantages for Muslim communities that encountered diverse social and economic settings.

Regarding the definition of *ijtihād*, I observed that some scholars added acquiring 'knowledge' and 'certainty' regarding a matter in its definition, and I proposed that these terms include relative certainty and high probability. The chapter identified vital differences between types of certainty and the degrees of probability and knowledge in Islamic epistemology in relation to knowing Divine intent by *ijtihād*. It proposed that one *mujtahid* may acquire certainty regarding a moral judgement due to indicators and signs known to him, whilst it was also possible that all *mujtahids* reached the same certainty. This distinction helped identify that what may constitute a valid *ijtihād* or difference of opinion according to Shāfiʿīs, for example, may not be valid according to Ḥanafīs. Thus, Ḥanafīs narrow the scope of *ijtihād* in the presence of scriptural texts and this is evident from Figure1. Ironically, the Majlis-e-Sharʿī does not observe this issue in its resolution on *fiqh* differences.

In Chapter 6, the concepts of 'certainty', 'knowledge' and 'high probability' were intersected with the empirical efficacy of medical treatment to comprehend the moral duty of treatment on a patient. I identified that in *fiqh* texts, the term 'knowledge' was used broadly to include high probability, and that high probability was also used in two different meanings. I argued that confusing these notions, as well as confusing 'conventional certainty' (*yaqīn ʿurfī*) and 'empirical certainty' (*yaqīn ʿādī*) in legal texts, can entail severe consequences, like prohibiting medical treatments that require the latter in efficacy and not the former.

Without delving into the theoretical discussion of the possibility of full or partial *ijtihād* today, I observed that it was possible for a well-versed scholar of the Islamic law to involve in ten various types of juristic activity to identify and assert moral laws to novelties. The Majlis-e-Sharʿī declared such juristic activity as *taḥqīq* and the scholar

who employs its techniques as a *muḥaqqiq*, although it only mentioned some of these methods. In Chapter 6, I applied these methods in medical questions on treatment.

I identified that the word *taḥqīq* was also used in the works of legal theory for a type of *ijtihād* or intellectual effort known as *taḥqīq al-manāṭ;* scholars and the laity perpetuate the existence of this phenomenon, even to date in varying ways. Chapter 2 set out the criterion for *taḥqīq al-manāṭ*, i.e. realisation of the rationale for a moral law in a real case, and I agreed with Zubaydī that it can possibly include *istiḥsān* and *istiṣlāḥ* as rationales of reasoning. In this criterion, I identified how *taḥqīq al-manāṭ* is the window to intersect discussions of the social sciences and medicine with the Islamic law.

The following methods/sources in Islamic legal theory were identified as those in which necessity is offered as a rationale for moral laws:

1. *Istiḥsān* based on necessity is a phrase used by Ḥanafīs for a source of reasoning to exclude matters from rules of strict analogy that engender harm or hardship, and thus necessity here refers broadly to *ḥājah* too.
2. *Istiṣlāḥ* based on necessity is a term used by Mālikīs for a method of reasoning to assert a moral law for a new question that was not specifically proved or disproved in scripture.
3. *Taḥqīq al-manāṭ* based on the rationale of necessity.

I demonstrated that jurists of all schools invoked the construct of necessity to formulate new laws or amend existing laws, although they may have differed in the name of their reasoning.

Chapter 2 also observed that Islamic moral laws were a mutual concern of *ijtihād* and *taḥqīq*. A. Khān's understudied classification of the moral laws (2016) was presented that adeptly differs between *ḥarām, makrūh taḥrīman* and *isā'ah*, all of which involve

a sin. Unlike his predecessors, he skilfully divided the moral laws into 11 categories, without straying from classical sources. With these clear hierarchical differences in the moral laws, it became possible in Chapter 5 to diligently differ between the impact of necessity and need and demonstrate that the latter can override an absolutely certain slightly offensive act (Table 2 after p.100). In Chapter 3, I expanded upon A. Khān's classification of the moral laws in context of the scriptural proof-texts based on his research on the relatively certain proofs and the classes of 'wrong' and 'slightly offensive' acts.

7.2 The Concept of Necessity

The definition and usage of the term *ḍarūrah* (necessity) in legal texts was observed in Chapter 3 where eight technical usages were identified. In its narrow context, according to the *qawā'id* and *uṣūl* literature, *ḍarūrah* refers to an 'act' or 'substance' that safeguards one of the five fundamental values from cessation, or a 'circumstance' of hardship in which one of the five fundamental values depends on the commission of an act or its omission.

In Chapter 5, I identified it is sometimes also used in the following meanings:

a. widespread necessity (halal extinction example)
b. widespread problem (blood of flea's example)
c. need tantamount to necessity

I defined these terms to distinguish them from necessity in its narrowest meaning and their scopes. In Chapter 6, I identified that '*ḍarūrah*' in some medical fatwas was being referred to the act or circumstance to restore normal health, regardless of if one's life

or body limb is endangered or not. I pointed that this usage is no different to *ḍarūrah* in the broadest context as a hardship whose cause is sickness (definition c, Chapter 3).

I have demonstrated that *ḍarūrah* is also used in a wider context than a compelling circumstance of constraint, as a normative imperative and purpose. I elaborated that there were two approaches to *ḍarūrah* in the context of 'purposes': one of Shāṭibī and the other of A. Khān, with the latter's approach being traceable back to Sulamī and Ḥamawī. I argued that Shāṭibī's approach disregards the consequences of the Hereafter in the assessment of individual examples for the purposes and thus cannot be employed to justify ethical-legal judgements for individual (*juz'ī*) acts nor was this his intended objective. For example, covering the area of nakedness is an embellishment according to Shāṭibī, yet it is morally obligatory. A. Khān's approach intersects moral judgements with a five-fold classification of purposes and places all moral obligations under *ḍarūrah*, including covering the area of nakedness. This finding has a significant negative implication for utilising Shāṭibī's approach for the 'moral' assessment of individual medical issues. This chapter also classified '*ḥarām*' into seven types with their scriptural proof-types and intersected them with the five-fold purposes. This allowed to demonstrate that abstinence from varying *ḥarām* types was classed at the varying degrees of necessity and need.

An important finding in Chapter 3 regarding moral laws is that disputedly obligatory (*farḍ*) and forbidden (*ḥarām*) acts in schools are classed as *ḥājah* and not *ḍarūrah*. This is because all moral judgements based on probable or broadly certain scriptural proofs, including those mentioned, are susceptible to difference of opinion and thus belong to *ḥājah*. This is important because I identified that medical 'needs' permit such forbidden acts. In the discussion on innovations, I identified the word '*wājib*' (compulsory) was

used for some types of *ḍarūrah*, and thus one must be careful in the assessment of such acts according to the five-fold purposes.

This study assessed *ḍarūrah*, in its broad and narrow contexts as 1) a construct to suspend or relax normative laws as in *istiḥsān* based on *ḍarūrah* and in the legal maxim 'necessities permit unlawful acts' 2) a *maṣlaḥah mursalah*, i.e. a legislative construct to formulate new laws and b) a basis to prefer (*tarjīḥ*) one moral rule over another because of hardship/harm.

7.3 Conditions for Necessity, Need and Counterbalancing Interests

7.3.1 Conditions for Necessity and Need

Chapter 4 set out eight conditions to establish a necessity i.e. that constitute a life endangering circumstance which sanctions prohibited acts, although I demonstrated that amendments in conditions three, four and five were tolerated in specific *fiqh* cases. Conditions were compiled from multiple sources, including an Urdu fatwa (no.10, 1999) of the Majlis-e-Shar'ī of Mubarakpur. They signify that the rule of necessity can only apply in cases of existing severe harm, highly probable imminent danger to life or body parts and in the absence of viable alternative means. Despite an approach of objectivity to *ḍarūrah*, Chapter 6 identified that in *fiqh* literature, jurists acknowledged that the subjective feelings of the patient regarding his condition and symptoms were also considered. The Majlis-e-Shar'ī made a vital contribution in declaring that the necessity of others becomes one's own and thus prohibition laws are lifted, but considering the classification of prohibition types in Chapter 5, a case-by-case assessment is required to sanction prohibited acts.

Condition Eight of necessity to avoid equal or greater harm in saving one's life or body allowed me to weigh competing interests in double effect dilemmas. Examples of this condition revealed that the efficiency of the means to circumvent harm was disregarded in some cases and Chapter 6 demonstrated that in medical treatment, efficacy of the treatment is a vital element in determining the moral judgement of treatment.

An important contribution of Chapter 4, absent in similar academic works, is that it sets six conditions for a legal need to alter prohibition laws. Applying constructs of necessity and need, in accordance with their conditions and controls, ensures that juristic assessment based on them does not step outside the spirit of the Islamic law. Necessity and need that warrant departing the default requirement for a moral judgement (*iqtiḍā' aṣlī*) to one that considers secondary factors (*iqtiḍā' ṭab'ī*), like degrees of harm, cannot be bereft of an objective criterion.

7.3.2 Counterbalancing Conflicting Interests

In Chapter 4, Condition Eight of necessity requires establishing an equilibrium in fresh moral judgements. Thus, I formed rules and figures from an inductive study of competing interests to demonstrate solutions. I offered three rules to solve all possible conflicting interests between the five fundamental values that are neither specifically prohibited nor legitimised in scripture (*maṣāliḥ mursalah*). I elaborated that these rules can only be employed by *istiṣlāḥ* and employing them universally as a normative typological framework for assessments of all ethical questions would undermine the existing *fiqh* assessments of cases made by classical *mujtahids* and their qualitative dimensions in scripture. These rules can be summarised further into two broad maxims:

1. When the harm involved is ‘qualitatively different’ (e.g. necessity vs. need), the qualitatively greater interest (e.g. necessity) overrides all conflicting possibilities, both qualitatively and quantitatively.

2. When the harm is ‘qualitatively similar’ (e.g. necessity vs. necessity), the quantitatively greater interest overrides all conflicting possibilities.

Special reference was made to conflict scenarios involving the human body and life. This holistic typological framework to solve unprecedented ethical dilemmas classed as *maṣlaḥah mursalah,* which weighs interests qualitatively and quantitatively, signifies that Islamic law differs to the moral theory of utilitarianism which aims to maximise happiness for a greater quantity without discriminating qualitatively. I also observed that a strict Kantian approach in every case of prohibited acts was far from the Islamic ethical discourse.

In novel cases of necessity, I contextualised the position of Ghazālī, elaborating that he made ‘certainty in efficacy’ and ‘universal benefit’ conditions for every necessity that had no precedent, and not just for necessities to save a life as Qaradāwī espoused. However, I suggested that Ghazālī only required these conditions to ‘definitively’ accept a necessity when it contradicts scripture. As for when there is no such contradiction, this stringent criterion is not required. This is a vital contribution to understanding Ghazālī’s oft-cited position on *maṣlaḥah mursalah*.

This study makes an important revelation about the meaning of the ‘value of religion’ when the hierarchy of fundamental values is intersected with prohibited acts (Chapter 4). Considering numerous *fiqh* cases cited in Chapters 4 and 5, I suggested that where

the value of religion is necessarily prioritised over human life, ‘protection of religion’ refers to one of the following possible meanings:

1. ‘Protecting the abode of Islam’ (*dār al-Islām*); for example, a valid jihad to defend the borders of the Muslim territory is higher in value than individual human life. This meaning was offered in Ghazālī’s example of the human shield.
2. ‘Upholding faith in the heart’ (*īmān*); For example, one is excused to utter disbelief to save his life or body in extreme coercion but must not disbelieve by heart.
3. ‘Obeying scriptural prohibitions’, i.e. Type Three prohibited acts that are unexcused in scripture, like refraining from cutting another person’s body part to save one’s own body or life.

In my view, ‘the preservation of religion’ in the mentioned context does not generally refer to religious duties like prayer, fasting and obeying prohibitions in dietary laws, because they are overridden by the value of human life and health according to the conditions of necessity and need and based on the elaborated scriptural concessions.

7.4 The Impact and Scope of Necessity, Need and Widespread Problem

In Chapter 5, I contrasted and compared the scope of necessity with similar constructs of ethical reasoning. With special reference to the members of the Majlis-e-Shar‘ī, I

identified the precise scopes of impact on various types of prohibition laws for the subsequent constructs:

1. necessity (private or widespread)
2. need tantamount to necessity
3. private need
4. public need
5. unavoidable widespread problem
6. avoidable widespread problem

Thus, this study is perhaps the first academic and holistic attempt to intersect the following aspects:

a. terms connected with necessity and their scopes
b. types of extrinsic and intrinsic prohibited acts in various domains of law, e.g. rights of God and people, religious observances, impurities, dietary and medicine laws, and war and crime
c. permanency and temporality of judgements
d. relaxation (*takhfīf*) and alteration (*taghyīr*) of moral laws.

I observed that *ḍarūrah* can override matters of dispute and all prohibition types except Type Three due to the irrecoverable rights of others. *Ḥājah* cannot override any of the prohibited acts types mentioned for necessity and can only override matters of dispute among *mujtahids*; this is irrespective of whether they are broadly certain or probable prohibitions.

Under the prohibited act types in Chapter 5 and Chapter 4, a spectrum of *fiqh* cases weighing mischiefs and interests were given in context of the human body and life including cases of duress, crime, cannibalism, war, and boat ethics. Considering these,

I classified prohibited acts and identified their common features to ascertain act types that were sanctioned to protect the objective of human life and body. These cases revealed the scope and limitations of the argument of human sanctity of the living and the deceased, as well as some political dimensions that could possibly influence medica fatwas by way of casuistry (*ilḥāq*). I identified a three-fold classification of prohibited acts in classical legal works, and this study has contributed to it in determining the common features that characterise them and by virtue of them I added two more act types. This feature-based analysis of cases enabled me to observe that all legal necessities of life and body can relax or change prohibition laws if they 'do not impinge on the irrecoverable rights of others' unless the necessity of life of one person physically depends on the violation of the bodily right of another. Thus, I was able to formulate rules based on the features so that moral questions can be assessed with this feature-based analysis of acts to determine the prohibition types of acts and to ascertain whether a necessity sanctions them.

In Chapter 5, I make a valuable contribution to the conceptualisation and impact scopes of private and public needs and widespread problems. I also counter the universalisation and unconditionality of the notions that a) any *ḥājah* engenders a permanent judgement of ease contrarily to necessity and b) *ḥājah* permits all extrinsically forbidden acts. I also distinguished between scriptural and non-scriptural *ḥājah* and appraised several contentious and ambiguous statements on the scope of need. I distinguished between private and public *ḥājah* and demonstrated that the latter can overlap with *'umūm al-balwā* and take its scope unlike the former. Citing Juwaynī, I inferred that widespread problem can also coincide with necessity.

A vital contribution regarding widespread problem is the identification of the 'avoidable type', in which I agree with A. Khān that it permits matters of prohibition

too, like dietary and medicine laws, and that it overrides disputed, broadly certain and probable prohibitions, but not absolutely certain prohibitions. Citing A. Khān, I argued that the presence of a permissible alternative did not affect the utilisation of the forbidden means in either types of widespread problem, which is an obvious facilitation of ease for people. I identified a common feature between necessity and the unavoidable widespread problem which was that they can relax absolutely certain prohibitions due to the agent's lack of choice.

Citing the examples of Ḥanafī fatwa positions on consuming 'disputedly prohibited' camel urine and alcohol-based medicines in Chapter 6, I identified that the Ḥanafī school restricted certain 'disputed' actions in 'simple medical need', and thus the scope of need to override all matters of dispute (Chapter 6), as proposed by M. Miṣbāḥī (2009a), is constrained. This suggests that a case-by-case assessment for the rules of need is required, and thus an amendment can be made to the rule, namely, that 'need overrides all disputed matters and allows for the utilisation of weak opinions unless the fatwa position of a school explicitly disallows it'. However, in such cases, the construct of 'widespread problem' can be invoked to permit such prohibitions, as evident from the Majlis-e Shar'ī's permissive fatwa (no.1, 1994) on alcohol-based medicines that is not based on the construct of need but rather on widespread problem. This adjustment signifies the vital gap which widespread problem fills to facilitate ease for people where need is restricted.

Similarly, in Chapter 6, I demonstrated that prohibitively disliked and disputedly prohibited medicines that are 'merely probable' in efficacy are not sanctioned in necessity or need. I inferred this from Condition Three of utilising highly probable means in necessity (Chapter 4), from the contrariwise indication of the *fiqh* cases of inserting breast milk in the eyes and from Abū Ḥanīfah's fatwa position on consuming

camel urine for medical needs (Chapter 6). This is a restriction to the rule of necessity that it allows all prohibited acts except Type Three, considering Condition Three of necessity. However, according to the Majlis-e-Shar'ī's fatwa (no.37, 2008) on physician testimony, such medicines are merely allowed without obligation if advised by a qualified physician or if there is a widespread problem.

Defining 'need tantamount to necessity' was difficult as I identified three approaches in Chapter 5 and agree with Anṣārī that it can change prohibition laws, rendering acts obligatory like a simple necessity. I argued that some needs tantamount to necessity took permanent judgements whilst others were bound to the presence of hardship. This delineation helped to formulate a rule regarding the permanency of judgements in needs, namely, that relaxation in a need is permanent where it is not an extenuating excuse and is established from scripture, Prophetic custom or Muslim consensus.

7.4.1 Solving the Conundrum in Legal Maxims

Chapter 1 presented an ostensible conundrum between legal maxims on mitigating harm. Discussions in Chapters 4 and 5 on weighing interests and sanctioning various prohibited acts signify that these maxims cannot be unconditionally employed to answer ethical-legal questions. This study proposes that to accurately understand their applicability and limitations, one must intersect the maxims with the five-fold purposes cited by A. Khān (2016) (Chapter 3) as subsequently explained.

First legal maxim 'eliminating mischiefs is more important than accruing benefits': Discussions on the conditions and impact scope of necessity and need in Chapters 4 and 5 clarified that committing certain types of prohibited/sinful acts (a mischief) in a necessity and need relating to life or the human body is excused/allowed and thus excluded from this maxim. Hence, the purposes of necessity and need allow accruing the benefits of safeguarding human life and normal body functions from harm

or cessation by undertaking certain mischiefs according to their limitations identified in Chapter 5. For example, a need of the human body permits prohibitively disliked and disputedly prohibited acts but not the undisputed and absolutely certain prohibited acts. Hence, this maxim cannot be generalised to ban the utilisation of all proscriptions/mischiefs in all five purposes. The 'purpose' must be weighed against the 'means' in the application of this rule since certain benefits are more valued in safeguarding than avoiding certain mischiefs.

Second legal maxim 'necessities permit prohibited acts': The limitations to the impact of necessity were discussed in Chapter 5 and it was identified that the 'purpose' of necessity to save life or a normal body function does not permit/excuse Type Three prohibitions. Thus, the ends do not justify the means in this circumstance. It was also explained that necessity rendered Type One and Type Five acts into obligatory/compulsory and thus 'permission' (*ibāḥah*) in this maxim includes moral compulsion/obligation (*wujūb*). Equally, it incorporates the mere relaxation (*takhfīf*) of laws in Type Two prohibitions without there being a consequence of sin whilst the act remains prohibited. In the mentioned circumstances, the ends justify the means as signified by the maxim. Necessity also permits all less severe types of acts which incur sin however I identified the disputedly prohibited/prohibitively disliked medicinal means that are merely probable in efficacy are only permitted if there is a widespread problem or that they are prescribed by a qualified physician (Chapter 6).

Third legal maxim 'whoever is afflicted by two problems must choose the lightest of them': The reader must consider this maxim in context of the discussions on counterbalancing conflicting novel interests (Chapter 4) and the scopes of necessity and need in context of prohibited act types (Chapter 5). This study elaborates that the lightest of the two problems cannot be a greater mischief/prohibition like Type Three

prohibitions in relation to the purpose like saving one's life. Thus, a person cannot murder someone even under a genuine duress by death to save his own life. Additionally, for this purpose, Type Two prohibited acts are merely excused, and their utilisation is not compulsory.

Fourth legal maxim 'harm must be eliminated': Chapter 5 reveals that harms must be counterbalanced and if the harm is severe thus a circumstance of necessity like the harm endangering one's life or body limb/function it is eliminated by utilising Type One, Two, Four and Five prohibited acts. However, a person in necessity is not morally obliged to utilise Type Two and Four acts and is prohibited from utilising Type Three acts. Harm in needs and widespread problems is to be mitigated considering their scopes of impact (Chapter 5) and taxonomy of treatment in Chapter 6.

Fifth legal maxim 'hardship begets ease': The word hardship incorporates the circumstances of necessity, need and widespread problem which beget ease by sanctioning different types of prohibitions according to their identified limitations in Chapter 5. Need does not beget ease in the prohibited acts like necessity and necessity does not beget ease in every prohibition type. Hence, this maxim and the previous one cannot be employed as a general prescription to permit all prohibited acts in a necessity or need relating to life and the human body/health and the means must be assessed case-by-case with the end purpose to identify if the ends justifies the means or not.

As for mere benefit (*manfa'ah*), beautification (*zīnah*) and non-essential (*fuḍūl*) purposes, they do not permit any acts that entail a sin (all types of *ḥarām*, prohibitively disliked and wrong acts), and thus they are precluded from all above mentioned legal maxims that relax proscriptions. Committing slightly offensive or unrecommended acts for these purposes however does not incur sin.

This synthesis advances the study of legal maxims on harm in a holistic manner and solves the apparent paradox. This was only possible after classifying the moral laws (Chapter 3) and prohibited act types and identifying their features (Chapter 5), demonstrating the impact scopes of necessity and need (Chapter 5) and observing their conditions (Chapter 4).

7.5 Seeking Medical Treatment and Blood Transfusions

This study observed that Islamic law identifies harm in a broad context that is not restricted to physical and mental health and extends to the possibility of punishment and reprimand in the Hereafter. Thus, jurists refer to scripture and classical sources of law to seek guidance on medical treatment with prohibited means, weighing the risk factors of this world and the next.

Chapter 6 offers key contributions to the *fiqh* of medicine, advancing our understanding of the Islamic law in several contexts. For example, I presented a detailed perspective on the moral duty on a patient to medicate by formulating a novel taxonomy of rules for medical treatment based on five-fold purposes of treatment, oral and non-oral utility of twelve possible means, various prohibition laws and moral judgements, three types of medicinal efficacy and their knowledge source for a patient according to a critical assessment of Ḥanafī texts. I identified the circumstances in which a patient is morally obliged to medicate and when he is not and established that medical treatment cannot be declared a necessity or a need until certain conditions are met. This discussion was contingent upon a refined contextualisation of classical legal texts that assert medical treatment is not morally compulsory on a dying person with texts that suggest certain treatments were highly effective. This consequently allowed me to formulate a taxonomy of reliance on God in medical hardships.

Additionally, I studied the sources of medical information for a patient and their bearing on the moral duty of treatment. I explained that high probability and preponderant conviction in a patient can be reached from experience and the testimony of a highly skilled religious Muslim physician but not from the testimony of a non-Muslim and non-practising Muslim physician; hence, their treatment will never yield a moral compulsion unless the patient has successful experience. I observed that the Majlis-e-Shar'ī invoked the rationales of *'umūm al-balwā* and hardship to waive strict conditions of religiosity and high qualifications from physicians to legitimise unlawful medicines prescribed by them, without differentiating between alcohol-based medicines and non-alcohol medicines. This reveals the Majlis' stratagem of pragmatism. This discussion also clarified the permissive impact of *'umūm al-balwā* on utilising the 'merely probable disputedly prohibited' and 'merely probable prohibitively disliked' medicines in harms at the degree of necessity as well as need whilst overriding the conditions of highly probable efficacy of means to ward off harm. This is a vital contribution of this thesis as it reveals how moral laws are adjusted with the construct of widespread problem where necessity is bound by its limitations.

An important contribution of Chapter 6 is the attention drawn to the distinction between oral intake of prohibited substances and their non-oral use based on the interpretational difference of 'intended' and 'unintended' meanings of scripture. I pointed that this discussion is of immediate relevance to the non-oral use of porcine and similar substances in a necessity, need and widespread problem although current academic studies do not mention it.

The following 14 aspects were carefully intersected in this thesis to critically appraise medical discussions:

In context of the means:

1. type of means, e.g. a substance (blood) or a procedure (transfusion)
2. substance type, e.g. liquid (blood) or solid (opium)
3. rationale for the prohibition, like poison, impurity, intoxication or scripture, e.g. gold for men
4. oral vs. non oral use
5. prohibition type i.e. various types of *ḥarām* and prohibitively disliked acts
6. the medical efficacy
7. widespread utilization of the means
8. the patient's source of knowledge for the medicinal efficacy e.g. physician testimony or personal experience
9. physician qualities (religiosity, trustworthiness)

In context of the purposes:

10. the severity of the medical condition (life/body endangering, etc.)
11. five-fold classification of purposes (necessity, need, mere benefit, etc.)
12. their moral judgement (obligatory, compulsory, etc.)
13. the possibility of sin (scriptural aspect)
14. the spiritual aspect of relying on God.

Chapter 6 cited a threefold classification of means to repel harm in *fiqh* texts which was contextualised in relation to medicine. I argued that jurists of the medieval period placed medicines under merely probable means to avert harm based on the underdeveloped pharmaceutical field or the lack of patient experience of the medicine. The example of scammony indicates that they also recognised some medicines as empirically certain in efficacy; hence, it is inaccurate to universalise the claim that, today, all medicines fall under the category of merely probable means to avert harm

based on such texts. Modern pharmaceutical developments must be assessed for claims of efficacy.

In the conclusion of Chapter 6, I summarised my critique to numerous academic claims made by Qureshi and Padela (2016), AlKhawari (2003), Rassool (2014) and Natshah (2001), and I offered valuable observations to the fatwas by the Islamic Fiqh Academy and the Majlis-e-Shar'ī of Mubarakpur and writings of its members, particularly M. Miṣbāḥī. I established that it is an error to claim that Ḥanafīs do not ground a moral duty on the patient to treatment. Two claims of *ijmā* were contextualised in this chapter: regarding the prohibition of deriving benefit from blood and the non-obligatoriness of medical treatment. These were aligned with the findings presented in the chapter. It is emphatically pointed that all claims of *ijmā* must be carefully verified in aspect of historic attribution and type, as outlined in Chapter 2, and contextualised whilst considering the impact of necessity and need, as mentioned in Chapter 5.

7.5.1 Blood Transfusions

Citing various academic studies, I observed that fatwa and academic literature on blood transfusions concentrated mainly on necessity, whilst need is scarcely mentioned. English sources that use the word 'necessity' do not usually specify its exact context. Blurring the lines between the two terms has significant implications on sanctioning prohibited treatments due to their varying impact scopes and the taxonomy of treatments presented in Chapter 6.

I offered 14 important observations on the Majlis-e-Shar'ī's fatwa (no.12, 2000) on blood transfusions, the most notable of which are its permission for transfusion in medical needs, its tone to 'merely permit' blood transfusion possibly due to an ongoing scholarly dispute of two of its senior scholars on the matter, and that only four of the 18 muftis who researched the topic termed blood donation a 'virtuous act to help

humanity'. Another important aspect of this fatwa is that it permits a patient in a need or necessity to purchase blood if it is not available for free, although eight (half) of the researchers initially disagreed with this. The fatwa also permits transfusing blood from non-Muslims without any hesitation. These scholarly attitudes may inform us of patient behaviours from South Asia, particularly those belonging to the Ḥanafī Barelwi school.

In the conclusion of Chapter 6, whilst advancing the Islamic discussion about blood transfusions, I offered five significant observations by intersecting the novel taxonomy of treatment and knowledge source for the patient. I observed that blood transfusion is classified as non-oral use of human blood and is not definitively *ḥarām,* and thus, it can be morally obligatory or compulsory for a patient in certain circumstances. When there is a widespread problem, even an avoidable one, or where the knowledge for transfusion comes from a non-Muslim physician, it is merey permitted for a Muslim patient, even if the transfusion is merely probable in its efficacy for his condition. It is important to observe that arguments of 'human sanctity', 'body ownership, and 'impurity of substance' are overridden for a need for a blood transfusion.

7.5.2 Proposal of an Islamic Ethical Code for Muslim Health Practitioners

This study also contributes to our understanding of the patient-physician relationship and identifies the moral value of physician-testimony and clinical advice. I propose the subsequent ethical guidelines for Muslim health practitioners in context of the ethical-legal discussions of this study:

1. It is prohibited for the physician to employ his knowledge to the harm of people because it opposes the fundamental absolutely certain religious values of protecting human life, body, dignity and mind.

2. It is obligatory on the Muslim practitioner and patient to acquire the Islamic ethical-moral knowledge relating to their medical field, as it is obligatory on a merchant to learn the Islamic conduct of business.
3. It is morally compulsory on the physician to inform the patient of a highly probable or empirically certain efficient treatment in a need or a necessity to save their life or body part or function, like it is morally obligatory for a person praying an obligatory prayer to leave it and rescue someone drowning nearby.
4. The practitioner is only required to utilise the principle of beneficence, i.e. to avert harm from the patient, within the remit of his professional ability and without paternalistically violating respect for the patient's autonomy to the final decision of treatment. Thus, the practitioner must not impose his religious views on the patient. What may constitute a moral obligation in the eyes of the physician may not be such in the opinion of the patient due to the latter's knowledge-source or imitation of a different scholarly opinion.
5. If the patient's condition is life-endangering and seeking consent is likely to fail the immediate action to save life, only then is it morally compulsory to intervene without patient consent. This is based upon the example of rescuing the pregnancy of a deceased woman.
6. The practitioner must not delay the treatment process without an equally strong justification, nor neglect it where there is a moral duty to act, otherwise he will incur a sin.
7. The practitioner is not accountable for the sins of the patient after they are cured as an outcome of the treatment. The former is to treat the sickness or ailment regardless of the sins of a patient might later commit. This is based on the fatwas permitting donating blood to non-Muslims and sinful people.

8. The necessity of life precedes the necessity of mental health and brain function in case of contradiction, and the mental/life/bodily necessity of a single person precedes the medical need of multiple people. Where resources are scarce, patient preferences in embellishments/mere benefits/beautification are overridden by meeting the needs of patients without discrimination based on personal virtue.
9. Practitioners must consult competent scholarship for ethical-legal queries, and it is suggested that biomedical resources from fatwa councils, including the Majlis-e-Shar'ī, are consulted to ensure a diverse cultural and religious sensitivity is employed in practice. Deriving medical guidance directly from primary sources and general legal maxims is a complicated task and must be surrendered to those qualified to interpret them. Refer to the conundrum in the legal maxims as an example.
10. The advice of an upright and proficient Muslim physician can yield high probability/preponderate assumption in a patient and establish a moral obligation on him to undertake unlawful treatment in a medical necessity, according to the Shāfi'ī and Ḥanafī schools (Chapter 6). Therefore, the moral obligation of treatment for the patient is based on his knowledge of the practitioner's virtues. Hence, the latter must strive to maintain his trustworthiness and expression of religiosity in his profession and assist the patient in making an ethical decision by providing information about his position, credentials and experience in the field when offering a treatment.
11. Supporting evidences like x-ray images can strengthen the single testimony of a reliable physician and impart inductive certainty in a patient, like a solitary report that is strengthened by contextual indicators (Chapter 2).

12. Practitioners must consider the limitations of necessity and need to repel or prevent harm using forbidden means. Thus, transfusing blood more than a patient's need is prohibitively disliked and a sin.
13. Where a practitioner analyses a dilemma involving two harms, he must justify the dilemma by weighing the conflicting interests and must not treat patients with a means that is likely to engender equal or greater harm. For example, the likeliness of causing allergies and harm to the immune system must be ruled out before blood is transfused in an equal bodily need. However, a lesser harm is tolerated to repel a greater one if there is no alternative, like transfusing blood to save life if it will cause a non-life endangering curable illness.
14. Practitioners must not treat patients in circumstances involving forbidden acts like uncovering the prohibited bodily area in the absence of need and necessity, even if there is some other health or cosmetic benefit (Chapter 3). A reasonable assessment to ascertain a need and possible alternatives to uncovering the body must be carried out prior to the treatment, especially if it involves an opposite gender.
15. The practitioner and midwife are permitted to delay the daily obligatory prayer beyond its time where there is a high probability of severe harm to body or life of the patient in their absence. Similarly, they may miss the obligatory Friday congregation and that of the five daily prayers to treat simple private needs of patients, without incurring sin, where the patients depend on them entirely (Chapter 5). Practitioners therefore must regularly carry out an objective assessment of their clinical responsibility in relation to congregational prayers.

16. In circumstances of necessity or need for blood transfusions, forming blood banks is allowed, and it is ‘morally compulsory’ to maintain a high-quality standard in its administration to minimise possible harms.
17. In medical dilemmas involving forbidden means, the Muslim practitioner must exhort his fullest effort to facilitate a permissible treatment. If, for example, there is negligence on the practitioner’s part in not prescribing an accessible alternative and treats the patient with the prohibited means, he will be sinful according to the type of prohibition unless competent Muslim scholars have declared a widespread problem regarding that treatment, like alcohol-based medicines.
18. A Muslim practitioner is allowed to prescribe an alcohol-based medicine to Muslim patients despite it being merely probable in efficacy and there being a permissible alternative. The basis for this is the widespread problem of such medicines declared by the Majlis-e-Shar‘ī’s fatwa (no.1, 1994).

7.6 Suggestions and Areas for Further Research

The subsequent suggestions are made:

1. Fatwa councils like the Majlis-e-Shar‘ī of Mubarakpur are suggested to consult a variety of biomedical and social science experts in the process of *taḥqīq*, at the stages of ‘conceptualisation’ of a matter and ‘realisation’ of a rationale in a real circumstance. For example, biomedical scientists and jurists must collaborate to identify the type of data required to establish moral obligation/compulsion in specific medical treatments using clinical and statistical evidence, and risk factors of nontreatment. Similarly, modern

techniques of social research ought to be employed to help ascertain 'widespread problem'.

2. Academic discussions in this thesis do not imply that they are consistent with cultural behaviours. For example, many Muslims would place reliance on God before the efficacy of the medicine and testimony of a highly reliable and upright Muslim physician, as though they are uncomplimentary. Thus, it is suggested that more educational efforts be made by Muslim scholars and institutes to disseminate the *fiqh* of medicine.
3. South Asian fatwa councils are suggested to issue edicts in English and Arabic and disseminate them through various channels for maximum accessibility.
4. It is suggested that Muslim jurists join ethics committees to improve religious and cultural sensitivity in the healthcare provision in countries where Muslims are a minority, and to collaborate in making ethical decisions for patients, possibly employing the methodological framework of this study.
5. It is suggested that mainstream Muslim educational boards and seminaries that govern, teach and train scholars and apprentices in fatwa, develop a cohesive syllabus for Islamic biomedical ethics and integrate it as a subdiscipline of *fiqh* due to its growing and evolving significance.

I believe the following areas require further research:

1. intersection of the Islamic discourse on need and necessity with various triage scoring systems
2. incorporating quantitative standards of clinical efficacy into the juristic discourse

3. intersection of the classification of certainty with various medical cases, like brain death, organ transplantation, and preventative health measures and diet
4. analysis of juristic literature on mental health in context of necessity and need
5. the political dimensions of Islamic medical ethics and their impact on patient behaviour
6. a social research on the impact of the Majlis-e-Shar'ī's fatwas on the Sunnī community in the West
7. a study of other understudied fatwas of the Majlis-e-Shar'ī that invoke the principles of necessity and need, and of similar councils that author in Urdu
8. a detailed holistic study of A. Khān's fatwas discussing necessity and need and their possible applications for Muslims living in non-Muslim countries.

In sum, this research expands our understanding of the mutable and immutable aspects of the Islamic law in context of religious scripture and school doctrines and offers valuable insight into the inherent ethical frameworks and controls to assign moral judgements to cases of necessity and need.

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(Note: The definite article ‘al’ is omitted at the beginning of authorities)

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Glossary

Consequentialism an ethical theory that determines the morality of an act based on the outcome and consequences it produces irrespective of the means. This is also identified as the teleological and utilitarian theory. See Kantianism.

Dalālat al-naṣṣ an inferred/congruent indication of a text is a linguistic implication that the judgement would apply—in addition to the stated case in the text—to the unstated case due to an obvious shared factor understood from the context.

Ḍarūrah necessity in its narrowest concessionary context is a condition in which any of the five fundamental values is threatened unless certain acts are pursued, or substances are utilised. Such acts and substances are also referred to as *ḍarūrah*. The rule of necessity permits certain forbidden acts and thus provides a consequentialist solution in dilemmas.

Ḍarūrīyāt *(sing. ḍarūrī)* the highest of the universal classes of Godly purposes in Shāṭibī's classification of interests such as preserving human life and body.

Farḍ a moral obligation and duty on a sane adult Muslim. It can be consensual or disputed among schools.

Fatwa a legal verdict or opinion on the moral and legal value of something deduced by a competent scholar (mufti) based on primary proofs or legal texts of schools.

Five Fundamental Values of the Islamic law are the preservation of religion, life, intellect, lineage and property.

Ḥājah a need is something in the absence of which harm is inflicted on any of the five fundamental values, yet their survival is not threatened. It is also used in the meaning of a circumstance. This meaning is broadly included in the meaning and rule of necessity.

Ḥājīyāt the middle universal class of Godly purposes in Shāṭibī's classification of interests.

Ḥarām li-ghayrihī acts that are not forbidden due to intrinsic value but due to external factors as opposed to *ḥarām li-'aynihī*. Both types can be explicitly established in scripture and the former includes certain new acts not mentioned in scripture.

'Ibārat al- naṣṣ an express indication is an apparent intended or unintended meaning of a clear text.

Iḥtimāl a possibility, whether it is merely something validated by the mind and unsupported with empirical evidence or it is supported with evidence. For example, the possibility that a medicine will not cure.

Ijrā' al-'illah to assert an effective *ratio legis* i.e. common attribute that is explicated (*manṣūṣah*) in in original case in the scripture or is deduced by the *mujtahids* (*musṭanbaṭah*) in a new case to assign it an ethical-legal judgement

Ilḥāq bi'l-naẓīr casuistry is to link novel cases with precedent cases in legal texts of the schools by comparing their similar features where an explicit *ratio legis* is not transmitted. This provides case based moral reasoning for rising moral questions and muftis turn to classical legal literature to find paradigms cases.

Kantianism a branch of deontological ethics attributed to Emanuel Kant who argued that certain acts are intrinsically right or wrong irrespective of their consequences. See consequentialism.

Mafhūm al-mukhālafah the counter implication of a statement for example the implication that treatment is morally compulsory if there is certainty of efficacy in the statement "because medicine x is not decisively efficient, therefore it is only permissible to utilise"

Maqāṣid al-sharī'ah the three-fold objectives of the Islamic law underpinning all its legal judgements, the necessities, the needs and the embellishments that serve the five fundamental values.

Maṣlaḥah mursalah an unrestricted interest that seeks to promote benefit or prevent harm to one of the five fundamental values. It is evoked as a broad rationale in novel cases lacking direct scriptural guidance to assign moral judgements.

Qaṭ'ī a'amm an attributive judgement of something being highly certain i.e. in accordance with reality in relation to a person due to overwhelming signs and evidence though a rational possibility of error and contradiction exists. Note that another person may not acquire the same certainty on the same matter and thus it is relative.

Qaṭ'ī akhaṣṣ an attributive judgement of something being broadly certain i.e. in accordance with reality and unmistakable without their being the possibility of error or opposing proposition.

Taḥqīq al-manāṭ realising a rationale in a real-life case or situation whether it is an effective *illah* or a construct of reasoning e.g. *ḍarūrah* (see also *ijrā' al-'illah*). This requires an accurate perception of the empirical reality and enables the Islamic law to continually apply.

'Umūm al-balwā a widespread problem is a condition in which the laity and scholars are all involved in a forbidden act whilst abstaining from it is either very difficult or causes harm to one of the fundamental values.

Wājib a moral judgement that compels commission or abstinence from an act. It can be extrinsic or extrinsic like certain innovations. It is sometimes synonymously used with *farḍ*.

Yaqīn 'urfī fiqhī legal or conventional certainty in a proposition holds a weak contradictory possibility which the heart forsakes. Certainty in *fiqh* works refers to this meaning and assertiveness in it is lesser than that in empirical and absolute certainty. It is also called preponderate assumption (See *ẓann ghālib*).

Yaqīn uṣūlī/kalāmī Theological certainty in a proposition has no possibility of contradiction either rationally or due to lack of evidence. Certainty in works of legal theory and theology refers to this meaning as opposed to works of *fiqh*.

Yaqīn 'ādī empirical certainty in a proposition is attained by normative behaviour of nature and is induced from repetitive sensory information like the certainty that fire burns. Certainty in works of legal theory and theology includes this meaning as opposed to works of *fiqh* unless expressed.

Ẓann probability is an affirmation or negation of a proposition with a possibility of contradiction. This is expressed by the term 'likely'.

Ẓann ghālib probability in which a contradiction to a proposition is possible whether the heart accepts the contradiction, even as a weak one, or lets it go. The former is termed 'probability' by agreement of theologians and jurists and the latter is termed 'certainty' according to jurists and in everyday conventional speech. *Ẓann ghālib* is mostly used in the latter meaning and is expressed by the term 'most likely'

Appendix: An Introduction to the Majlis-e-Shar‘ī of Mubarakpur

In 1985, Sunnī Barelwī scholars of India initiated a nationwide effort for collective juristic deliberation, and an ‘All India Shariah Board’ was formed under the leadership of a prominent figure ʿAllāmah Arshad al-Qadirī (d.2002) and senior scholars of al-Jāmi‘at al-Ashrafīyah. However, this effort was halted after four seminars in 1987 for various reasons (M. Miṣbāḥī, 2009c, p.21). For approximately six years, many matters requiring religious deliberation continued pending until 1992, when al-Jāmi‘at al-Ashrafīyah of Mubarakpur took the lead and inaugurated the Majlis-e-Shar‘ī, a council of Muslim jurisconsults to provide religious guidance to the rising challenges of an evolving world, based on the mutual consultation of experts in academic fields and religious scholars (M. Miṣbāḥī, 2014, p.457).[1]

Since its inception, the Majlis has conducted 26 seminars in India, most of which took place at al-Jāmi‘at al-Ashrafīyah’s site in Mubarakpur. The Majlis postponed the seminars after the second seminar in 1994 for about three years and resumed them in 1997. Between September 1997 and February 2000, it conducted seven seminars (3rd to 9th). Since 2006 (the 13th seminar), the Majlis has continually organized an annual seminar (M. Miṣbāḥī, 2009c, pp.22-23).

Over 27 years, the Majlis has researched, discussed and issued guidance on 71 topics comprising a few thousand specific questions relating to medicine, finance, religious observances, etc. (ʿAzīzī, 2019, p.6; M. Miṣbāḥī, 2014, pp.26, 60). The Majlis deems this service as a revival of the traditional collective effort of consultation (*shūrā*) embraced by Abū Ḥanīfah in the early formation of the Ḥanafī

[1] At the 20th seminar, 42 academics and specialists of various academic fields, mainly from Aligarh University, attended the meetings (M. Miṣbāḥī, 2014, p.457).

school (M. Miṣbāḥī, 2009c, p.21; 2014, p.53). Through the organization of formal scholarly deliberation and consultation, the Majlis aims to minimize the possibility of error in fatwas, unify scholarly opinions and ensure that *muftīs* at various offices of fatwa conceptualize modern issues accurately before issuing religious guidance to the public (M. Miṣbāḥī, 2009c, p.37). Such a collective effort advantageously adds weight to the final resolution and reduces the potential of scholarly conflict in the public domain.

Organizational Setup

The Majlis-e-Shar‘ī is a department of al-Jāmi‘at al-Ashrafīyah with a written constitution. It is privately funded by generous donations of members of the public, and scholars and sufi shaykhs that share its ethos and vision (‘Azīzī, 2019, p.16).

Current Senior Committee Members (*Arkān-e-Majlis*)

The senior committee comprises 11 scholars (M. Miṣbāḥī, 2014, p.293, 541):

1. Head (*sarparast*): Mawlānā ʿAbdul Ḥafīz ʿAzīzī. His role is to set the agenda of the Majlis and ensure it is executed.
2. President (*ṣadr*): ʿAllāmah Muḥammad Aḥmad Miṣbāḥī. He oversees the seminars and ensures the ethos and principles of the Majlis are followed. It is his task to craft the wording for the final resolution.
3. Convenor (*nāẓim*): Muftī Muḥammad Niẓāmuddīn Miṣbāḥī. His role is to manage the discussions and roles for the seminar. He is also responsible for writing up the research questions, inviting scholars and overseeing the publication of the materials pertaining to the Majlis.
4. Mawlānā Naṣīruddīn Miṣbāḥī
5. Mawlānā ʿAbd al-Ḥaq Raḍawī

6. Mawlānā Shamsul Hudā Miṣbāḥī (UK)
7. Mawlānā Badr-e-ʿĀlam Miṣbāḥī
8. Mawlānā Ṣadr al-Warā Miṣbāḥī
9. Mawlānā Muḥammad Nasīm Aḥmad
10. Mawlānā Mubārak Ḥussain
11. Mawlānā Nafīs Aḥmad Miṣbāḥī

Miṣbāḥī is the epithet given to graduates from al-Jāmiʿat al-Ashrafīyah (Mubarakpur) and though the senior board consists of some of its own top scholars, the research carried out by the Majlis is not confined to Miṣbāḥī scholars as I point subsequently.

Ethos[2]

The Majlis-e-Sharʿī introduces itself to represent the Ahl al-Sunnah wa'l-Jamāʿah (Sunnī school of thought). Its sources of guidance are the Qur'an, Sunnah, scholarly consensus, and reliable fatwas of the Ḥanafī school. It utilizes *qiyās* for guidance on novelties where there is a predefined *ratio legis*, but a fresh analogy is not made as this is the task of a *mujtahid*. In cases of differing views among its research scholars, the opinions of Ibn ʿĀbidīn of Damascus, Aḥmad Raẓā Khān; his son and deputy Muṣṭafā Razā Khān and his student Amjad ʿAlī Aʿẓamī are prioritized. However, this is contingent upon there being no substantial justification to deviate from them, like necessity, widespread problem, need, etc. Where the views of lower ranking *mujtahids* are not in accordance with the Ḥanafī school, the existence of valid grounds, such as necessity, may render it permissible to accept such views. Inference based on counter implication (*istidlāl bi-mafhūm al-mukhālafah*) of juristic texts is accepted as a valid type of reasoning. In the final resolution, strength

[2] See: M. Miṣbāḥī (2014, pp.41-44) for the details of the cited summary.

of evidence and reasoning is prioritized over the quantity of differing participants regardless of how senior or junior they maybe (M. Miṣbāḥī, 2014, p.58-9).

Method

The Majlis selects important topics that require collective effort to reach religious decisions. A question paper is drafted and sent to Muftis and research scholars widely across India and to other parts of the world where the Majlis has established contacts, such as Pakistan, the USA, UK, Holland, South Africa, Zimbabwe and Mauritius (M. Miṣbāḥī, 2014, p.295). This paper contains details of a selected problem with guidance from the wider field, like medicine, and lays out the religious texts and precedents that relate to the problem. Scholars are invited to give their written opinions on the matter with supporting reasons. Their papers are collected, and their opinions and evidences are thoroughly summarized and organized by someone appointed by the Majlis to identify similarities and differences in the scholarly papers. These important summaries have been published for up to the 20th seminar so far (M. Miṣbāḥī, 2014).

Thereafter, the Majlis arranges an annual seminar to facilitate scholarly debate to reach a decision on the matter. The dates/timings for the seminar are announced several months in advance on al-Jāmi‘at al-Ashrafīyah’s website and in the monthly journal *Māhnāmah Ashrafīyah* (online). Invitation letters are sent to research scholars and *muftīs* who submit their initial findings and opinions for further investigation. Free residential and dining facilities are offered to the attending scholars over the course of the seminars, which sometimes last up to 4 days. Onsite provisions are made and managed by staff and students of al-Jāmi‘at al-Ashrafīyah.

The seminar usually commences with a recital of the Qur'an, a eulogy of the Prophet, an opening statement (*khuṭbah-e-istiqbālīyah*) by the chairperson and a presidential statement. Thereafter, the written summary of the collated research, difference of opinions, evidences, and the suggested areas for investigation (*tanqīḥ ṭalab umūr*) are recited before the attendees for discussion by a board member. The seminars are broken down into meetings, and each meeting has its convenor. Young and old, students and teachers are all allowed to ask questions, raise objections, and offer insight. One of the aims of the seminar is to train senior students of al-Jāmī'at al-Ashrafīyah in the etiquettes of fatwa and scholarly discourse (M. Miṣbāḥī, 2009c, p.21; 2014, p.54-5, 76).

Where a decision is finally reached, the president writes the conclusion and presents it to the attendees for a final review (M. Miṣbāḥī, 2014, p.54-5). Where a conclusion is not reached, even after discussions in following seminars, the matter is surrendered to a senior panel (*fayṣal* board) for a decision, but this has only occurred in four instances (M. Miṣbāḥī, 2014, p.89). Where opinions remain resolutely divergent, views of all parties are documented and released, but this has only occurred in two discussions so far (M. Miṣbāḥī, 2014, p.54).

Publications and Dissemination

The Majlis primarily disseminates its resolutions comprising an introduction, the resolution and core lines of reasoning via its monthly journal *Māhnāmah Ashrafīyah*, which is available freely online on al-Jāmi'at al-Ashrafīyah's official website: http://www.aljamiatulashrafia.in/.

The Majlis has established its own publishing service and to date, it has published six volumes comprising its proceedings, opening seminar statements from senior

members, research papers, summaries of research papers and resolutions. The subsequent table represents the published and unpublished data of the Majlis-e-Shar‘ī’s seminars.

	Seminars 1-8	**Seminars 9-20**	**Seminars 21-26**
Resolutions	Published	Published	Published
Summaries	Published	Published	Unpublished
All Research Papers	Published 6/9 topics	Unpublished 41 topics	Unpublished 21 topics

Appendix Table 1. A Summary of Published and Unpublished Seminar Materials of the Majlis-e-Shar‘ī

I am pleased to note that in 2019, I encouraged and co-coordinated the electronic digitization of all the original research papers for the Majlis-e-Shar‘ī, which totaled in 11,415 pages. This was to ensure the preservation of the unpublished valuable research held in the form of a single hardcopy in several volumes. However, the Majlis committee have not expressed any plans to make all these papers accessible to researchers at the current moment, although some of them are published as detailed in the appendix table 1. The subsequent table 2 collates details of the Majlis’ research on medical issues to date.

	Seminar	Resolutions Concerning Medicine	Year	Number of Digitized Research Pages
1	1st	Alcohol-Based Medicines	1994	147
2	6th-8th	Organ Transplantation	1999	190
3	6th-8th	The Use of Human Blood	2000	216
4	6th-8th	Necessity, Need, Widespread Problem, Mitigation of Harm and Hardship	1999	512
5	13th	Inserting Medicine in the Eyes and Ears During Fasting	2006	612
6	15th	The Physician's Testimony and the Qualifications of Islam and *ʿAdālah*	2008	254
7	19th	The Value of DNA Tests in the Islamic Law	2012	209
8	20th	*Ṭawāf al-Ziyārah* in the Presence of an Extenuating Excuse	2013	(unknown)
9	20th	Genetic Tests	2013	144
10	21st	Blood Banks	2014	100
11	23rd	Medical Treatment During Fasting	2016	542
12	25th	Postmortems/Autopsy	2018	252
13	25th	Life Support Systems	2018	84
			Total Pages	**3262 (+)**

Appendix Table 2. The Majlis-e-Shar'ī's Research Papers Concerning Medical Issues in Manuscript Form