

# ***Al-Hâjat As The Basis Of Contemporary Ijtihâd***

Husnul Fatarib<sup>1</sup>, Wasim Muhammadi<sup>2</sup>, Meirison<sup>3</sup>

**Abstract:** *Al-Hâjat As The Basis Of Contemporary Ijtihâd.* This article discusses the use of the concept of *hâjat* (necessity) in the application of sharia law when there are difficulties in applying the original provisions. The *hâjat* (necessity) makes it possible for people and individuals not to apply the original law when they experience difficulties in applying it. However, the use of *hâjat* must fulfill several conditions, including (1) it should be *mu'tabarab*, not contradicting the prevailing principles of *syara'*, (2) it should be found in cases that seriously threaten religious interests, life/soul, mind, descent, and property. (3) If the *hâjat* is general for a group of people or the wider community or individuals, then this position of *hâjat* occupies an emergency position and takes place permanently for the community but temporarily for individuals. This study found the fact that some contemporary scholars no longer adhere to the principle of *hâjat* which is *mu'tabarab* or following the *maqâsid shari'ah* with all its requirements but has mixed it with pseudo-*ad-dharûrah* (emergency). Through this approach, some contemporary cases that were initially considered *harâm* (forbidden), such as forex (Foreign Exchange) are considered lawful because they are needed. In other words, even though it is not a real *hâjat* because forex is *ribâ nasi'ah*, it can be done in an emergency, as is the case with bonds that have fixed interest.

**Keywords:** *al-Hâjat*, Contemporary *Ijtihâd*

**Abstrak:** *al-Hâjat Sebagai Dasar Ijtihâd Kontemporer.* Artikel ini mengulas tentang penggunaan konsep *hâjat* (kebutuhan yang sangat mendesak) dalam penerapan hukum syari'at tatkala ada kesulitan dalam menerapkan ketentuan yang asli. *Hâjat* ini memberikan kemudahan kepada masyarakat dan individu untuk tidak menerapkan hukum yang asli manakala mengalami kesulitan/kesempitan untuk menerapkannya. Namun demikian, penggunaan konsep *hâjat* haruslah memenuhi beberapa syarat antara lain: (1) *hâjat* tersebut hendaklah *mu'tabarab*, tidak bertentangan dengan dasar-dasar *syara'* yang berlaku, (2) hendaklah *hâjat*, didapatkan dalam perkara yang betul-betul mengancam kepentingan agama, kehidupan/jiwa, akal, keturunan, dan harta benda. (3) Apabila *hâjat* itu bersifat umum bagi sekelompok orang atau masyarakat luas atau individu maka posisi *hâjat* ini menempati posisi darurat dan berlangsung secara permanen bagi masyarakat namun temporer bagi individu. Penelitian ini menemukan fakta bahwa sebagian ulama kontemporer tidak lagi berpegang kepada prinsip *hâjat* yang *mu'tabarab* atau yang sesuai dengan *maqâsid syari'ah* dengan segala persyaratannya akan tetapi telah bercampur dengan pseudo *ad-dharûrah*. Melalui pendekatan ini, beberapa kasus kontemporer yang semula dipandang *riba* seperti, forex (Foreign Exchange)

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<sup>1</sup>Institut Agama Islam Negeri Metro.

<sup>2</sup>Professor of Theology, Al Murtada University, Qom.

<sup>3</sup>Universitas Islam Negeri Imam Bonjol Padang.

E-mail: <sup>1</sup>husnulfatarib@yahoo.com, <sup>2</sup>qmuhammadi@iccora.com, <sup>3</sup>meirison.a@gmail.com

merupakan hal yang halal karena ia dibutuhkan. Dengan kata lain, meski bukanlah hajat yang sebenarnya, karena forex adalah *ribâ nasi'ah*, tapi ia dapat dilakukan dalam keadaan darurat, sebagaimana halnya dengan obligasi yang mempunyai bunga tetap.

**Kata Kunci:** *al-Hâjat*, Ijtihâd kontemporer

## Introduction

The general rule explains that the convenience and leniency provided by syara 'are not only limited to very compelling emergencies or exceptions. In certain cases, syara 'also provides convenience, concessions, or exceptions. especially when it comes to people's needs. In the development of contemporary *ijtihâd*, many cases that were originally prohibited have become permissible due to an urge (urgent need) so that they fall into the category of *dharûrat* (emergency). This is in line with the sound of a rule which says الحاجة تنزل منزلة الضرورة (an urgent need to occupy an emergency position) This *qâidah* (rule), both in general and specific, is an important *fiqh* rule and is a manifestation of the elasticity of Islamic law. For those who reject this rule, it means that they have narrowed the life of themselves and society; and it contradicts the elastic nature of Islamic law. But for those who accept it, without knowing the rules and conditions, it also has the potential to justify what is forbidden (*harâm*), which means violating the provisions of Islamic law.

Many people do not understand that *hâjat* (necessity) is actually not absolute. It has certain conditions and requirements that must be met before making it a basis for establishing law. The terms and conditions by a number of previous jurists have provided a number of criteria that can be used to distinguish which ones are *dharûri* (emergency) in nature and which are only necessities. This difference needs to be known by a *mujtahid* (jurist) so that he does not confuse the status of *hâjat* (necessity) with the status of emergency. The mixing of these two cases is a big mistake that has been made by some contemporary scholars. For this reason, before using the proposition of *al-hâjat*, we should first examine the position and the conditions of it so that it can be applied rightly.

This article explores in detail the concept of *al-hâjat* along with its terms and conditions. The goal is to operationalize it in responding to legal problems that arise in the present and the future. By understanding the essence of the concept of *hajat* with all its terms and conditions, one can not only use it appropriately but also can judge which *Ijtihâd* is valid and which is not.

## ***Hâjat* (Necessity) and Its Details**

### **Definition of *Hâjat***

*Hâjat* literally means needs, a necessity that connotes emergency.<sup>1</sup> Imam Haramain al-Juwaini was the first to discuss the issue of *hâjat*. In his book entitled *al-Burhan*. Al-Juwaini said “الحاجة العامة تنزل منزلة” الضرورة الخاصة في حق أحد الأشخاص”. (The public need is given the status of a private necessity in the right of anyone).<sup>2</sup> Al-Juwaini’s statement was later quoted by many scholars who came after him such as as-Sam’ani, al-Ghazali, Ibn Arabi, and Izzudin bin Abdi as-Salam.<sup>3</sup>

### **Types of *Hâjat***

There are two kinds of *hâjat*, namely: general *hâjat* and special *hâjat*. Al-Syatibi defines the general *hâjat* as something that is really needed so that if it is not there, the life of a person or society will be narrow or difficult.<sup>4</sup> This general *hâjat* is often discussed by Ushul Fiqh experts such as al-Juwaini and al-Ghazali. The positions of general and special *hâjat* require a detailed explanation because they both have the same legal consequences, in one sense, but different in another. This distinction is needed because many contemporary scholars refer to *hâjat* without distinguishing whether it is general or specific.

General *hâjat* can be distinguished from special *hâjat* by the following criteria:

<sup>1</sup> Ibn Manzur, *Lisan Al-Arab*, 2nd edn (Beirut: Dar al-Fikr, 1998), p. 428; Muhammad bin Ya’qub al Fairuz; Abadi, *Al Qamus al Muhibh* (al Risalah, 2005), p. 428, Beirut.

<sup>2</sup> Imam Haramain al-Juwaini, *Al-Burhan* (Cairo: Dar al-Hadits, 1990), II, p. 606.

<sup>3</sup> As-Sam’ani as-Syafi’iy, *Al-Qawati’fi Ushul al-Fiqh* (Dar al-Hadits, 2005), II, p. 790.

<sup>4</sup> As-Syatibi, *Al-Muwafaqat Fi Ushul as-Syari’ah*, p. 10.

1. The general *hâjat* provide a wider range of facilities that the special *hâjat* does not have;
2. The general *hâjat* can be enforced before an event occurs, while the special *hâjat* requires the existence of a real event in the field or is believed to occur;
3. The general *hâjat* is not limited by the period or the temporary capacity of the special event;
4. The general *hâjat* may be applied immediately, although there is no provision while the special *hâjat* is not.

The second form of *hâjat* is special *hâjat*. This *hâjat* is needed to eliminate the hardships and difficulties of the life of the *mukallaf* even though this is out of the corridors of Syara 'rules.<sup>5</sup> A special *hâjat* is independent of general *hâjat*, emergency, *rukhsah* (lightening using the argument), or the ability to leave something ordered because of illness or because of compulsion, or in certain situations such as being on a trip, or because of forgetting/not knowing the law. Unlike the general *hâjat*, where a person does not have to meet certain conditions or situations in order to be able to practice it, the special *hâjat* requires the fulfillment of certain conditions or circumstances, before he can use the reason to override the law.

### Position of *Hâjat*

It is not always necessary for the *hâjat* (necessity) of having to occupy an emergency position or have the same legal status as emergency law. Only in a few cases does it have the same status as an emergency. Imam Haramain emphasized that *حاجة الجنس (أي حاجة الجميع) قد تبلغ مبلغ ضرورة (الشخص الواحد)* (general needs occupy emergency needs for individuals). Therefore, only a few forms of this *hâjat* can occupy an emergency position or as legal as an exception. In line with this opinion, Ibn Wakil in his book says "الحاجة العامة تنزل منزلة الضرورة الخاصة في صور" (community needs occupy an emergency position for individuals in several forms).<sup>6</sup>

<sup>5</sup> Al-Amidi, *Al-Ahkam Fi Ushul al-Ahkam* (Beirut: Dar Kutub al-Ilmiyah, 1988), I, p. 61.

<sup>6</sup> Ibnu Wakil, *Al-Asybah Wa an-Nazair* (Kairo: Dar an-Nahdah al-Arabi, 1977), II, p. 370.

## Similarities and Differences between *Dharûrat* (Emergency) and *Hâjat* (Necessity)

*Dharûrat* (emergency), etymologically and terminologically, can be defined as the need for something in a situation of compulsion.<sup>7</sup> *Dharûrat* and *hâjat* both need something and have almost the same effect in changing the application of the original law. There are two perspectives on *dharûrat*, namely the perspective of *fiqh* and the perspective of *Ushul Fiqh*. In the perspective of *fiqh*, there are two kinds of emergency in a special meaning and emergency in a general sense. Emergency in a special meaning is a condition within the maximum limit that allows something that is prohibited as an exception. Al-Sayuthi emphasized that “emergency is a situation in which, if a person does not eat something that is forbidden and is leftover then he will die. Therefore he is allowed to eat it.”<sup>8</sup> Meanwhile, *dharûrat* in a general sense is an emergency that is of a lower degree and is equal to *hâjat*. Some jurists use the term emergency in the same sense as *hâjat* in several circumstances.<sup>9</sup>

*Dlarûriyyah* in the perspective of *Ushûl al-Fiqh* is a condition which is part of the needs that are emerging, and which must be realized for the continuity of religion and the world; In other words, *dlarûriyyah* is a primary need in human life both in this world and in the hereafter, which, if not realized, will destroy the life of the world and the lives of mankind. Because of that, efforts to bring about needs in the world and the hereafter are the very principal goals of *maqâshid al-syar’ah* (the purposes of religion). The benefit of *dlarûriyyah* in the perspective of *ushûl al-fiqh* is broader than the concept of *al-dlarûrah* in *qawâ'id fiqhiyyah* (fiqh rules). In *ushûl al-fiqh*, the needs of *dlarûriyyah* include the maintenance of religion, soul, mind, descent, and property (*hifzh al-dîn, hifzh al-nafs, hifzh al-'aql, hifzh al-nasl, hifzh al-mâl*). *Dlarûriyyah* in *ushul fiqh* is defined as a situation in which if it is not done, one of the five components of life (soul, body, property, and honor) will be

<sup>7</sup> Muhammad Amin al-Fairuz Abadi, *Al-Kamus al-Mubith* (Damaskus: Muhammad Amin al-Fairuz Abadi, 1995).

<sup>8</sup> As-Suyuthi, *Al-Asybah Wa an-Nazair* (Kairo: Dar al-Hadits, 1988), 1, p. 61; al-Jashas, *Abkam Al-Qur'an* (Kairo: Dar al-Ma'rifah), p. 195.

<sup>9</sup> Ibn Najar al-Futuhi, *Kaukab Al-Munir* (Kairo: Dar al-Hadits, 1979), 1, p. 133.

threatened. In these conditions the provisions regarding *rukhsah* (relief/exception) given by syara 'apply because if the original law is still applied then the *mukallaf* will perish. So, the safety of the soul is not the only measure.<sup>10</sup> For example, A person is forced to eat a carcass because only a carcass is there and if not eaten his life will be threatened. For *Ushûl al-Fiqh* experts, emergency in *qawâ'id fiqhiyyah* emphasizes the aspect of maintaining the soul (*hifzh al-nafs*) and falls into the special category of *hâjat*. Meanwhile, the activities of buying and selling, getting married, and enforcing the law are manifestations of emergencies that fall into the category of public interest.

The differences between *Dlarûriyyah* and *Hâjat* include the following:

1. *Hâjat* is often associated with general needs or العامة and is more general in nature than *Dlarûriyyah*.
2. The level of need for *hâjat* is lower than that of *dlarûriyyah* (emergency).
3. *Hâjat* is needed by humans when it is narrow and urgent and occurs more often, while *Dlarûriyyah* (emergencies) are rare situations and can make humans perish.<sup>11</sup>
4. *Dlarûriyyah* (emergency) is only valid temporarily, which is lost with the disappearance of the cause. For example, someone who is forced to eat a carcass or food that is forbidden by syara'. If the person who came afterward got the carcass, then the law was different from the person who came before. Because the first person to get it is hungry and forced, while the second is not necessarily the same as the first.
5. *Dlarûriyyah* law or also known as special *hâjat* only applies to individuals. Whereas, the general *hâjat* law will continue to apply to everyone. For example the contract of *Salam* (ordering goods).<sup>12</sup>

<sup>10</sup> Abdul Karim Zaidan, *Al-Wajiz Fi Ushul al-Fiqh* (Beirut: Muasasah al-Qurtubah, 1978), p. 311.

<sup>11</sup> Ahmad bin Abdurrahman ar-Rasyid, *Al-Hâjah Wa Atsaruha Fi al-Abkâm* (Riyadh: Dar ar-Kunuz Isybilia, 1429).

<sup>12</sup> Etymologically, *Salam* is *al-i'thâ* (الإعطاء) and *al-tasliif* (التسليف). Both mean giving. The expression *aslama ats tsauba lil al-khayyath* means: he has handed over the clothes to the tailor. Whereas in sharia terms, the *Salam* contract is generally defined by the fuqaha as: بيع موصوف

The contract of *Salam* may be made by everyone, not only for those who need it. Although basically, a contract of *Salam* is a sale and purchase that has nothing in it, so it is basically prohibited by Islam, but it is allowed because it involves the interests of the community.

6. The effect of *Dlarûriyyah* in changing the legal consequences is stronger than that of the *hâjat*. *Dlarûriyyah* (emergency) allows certain types of acts that are forbidden but *hâjat* is different. As-Shafi'iy emphasized that the *hâjat* cannot allow the *harâm* unless it has reached an emergency.<sup>13</sup> Therefore *al-Hâjat* cannot be used as a justification for taking someone's property.<sup>14</sup>

### Terms and Conditions of the Use of *Hâjat* (Necessity)

This discussion does not discuss *hâjat* which has specific arguments only but includes the two types of *hâjat* that make a *mukallaf* does something that is prohibited solely because of the *hâjat* itself without any other reason, or without any specific text that allows the act. This discussion will cover the scope of *syara* 'support for it and the extent to which the results of the interpretation of *syar'iy* texts can support this practice in real life.

Suyuthi puts general and special *hâjat* in the same position, namely being able and possible to occupy an emergency position in carrying out prohibited acts. However, on other issues, Suyuthi mentioned the

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(في الزمة ببدل يعطى عاجلا). (Buying and selling of goods that are stated in nature in exchange for payment which is carried out on the spot). Residents of Hijaz express the contract of ordering goods with the term *salam*, while Iraqis call them *Salaf*. The sale and purchase of *salam* is an object which is stated in nature as a liability or by giving cash in advance, the goods are delivered later/or at a specified time. According to the Shafi'iyah scholars, the *salam* contract may be suspended for a certain time or it can also be handed over in cash. In more detail, *salam* is defined as the form of sale and purchase with an upfront payment and delivery of goods at a later date (advanced payment or forward buying or future sale) with clear prices, specifications, quantity, quality, date, and place of delivery, and is agreed in advance. The scholars named this buying and selling with "Need sales" (*Bai 'Al-Muhawij*). Because this is a sale in which there is no item, and is driven by the urgent need of both the seller and the buyer. The owner of capital needs to buy goods, while the owner of the goods needs money from the price of the goods. Under the terms, the seller can get financing for the sale of the product before the product is actually available.

<sup>13</sup> Abu Idris as-Shâfi'iy, *Al-Um* (Bairut: Dar al-Fikr), 1, p. 80.

<sup>14</sup> Abu Idris as-Shâfi'iy, 1, p. 28.

difference as what the scholars have quoted even though it is only a gesture by mentioning the provisions that must be followed in *Ijtihād* regarding the problems related to the *hâjat* to occupy this emergency position.

*Hâjat* (necessity) does not automatically allow someone to do something forbidden (*harâm*) or leave what is obligatory. Ibn Qudamah said "it is not permissible for a scholar to directly determine the law just because of *hajat* (necessity) or just because it contains *maslahat tahsîniyah*. The determination of *hâjat* is not based on an urgent need or will. As cloning is not allowed in humans for couples who do not have/need children. Because cloning will create chaos in lineages and *hifz an-nasal* which is part of *ad-Dharûriat al-Khamsah* in *maqâshid al-shari'ah*, rejecting harm and bring benefits that must be maintained.

Imam Haramain al-Juwaini mentions certain conditions to be able to use the *hâjat* (necessity) as evidence in establishing law:<sup>15</sup>

1. Let that *hâjat* be *mu'tabar* (well-known) according to the *shari'ah*
2. In line with the *maqâshid shari'ah* and its basics.
3. Let the *hâjat* has reached the maximum limit which is uncommon in causing difficulties for *mukallaf*. Difficulties that *mukallaf* can still tolerate cannot be used as justification for actions that come out of the general provisions of *syara'*. Therefore, all difficulties in worship, *mu'amalah*, and all forms of actions that are ordered and prohibited in *syara'* cannot be used as a *hâjat* (necessity) as long as it can be borne by the *mukallaf* who carry it out.
4. Let the *hâjat* not violate the law.<sup>16</sup> This provision is in accordance with the opinion of as-Syatibi.<sup>17</sup> However, some scholars say that the conformity of *hujat* with *zahir* texts is not required because the *hâjat* permits what is prohibited. According to them, there is *ar-rukhsah* (relief/exception) which contradicts the *zâhir* *nash*, therefore, it is possible to stipulate that the *hâjat* must be in accordance with the

<sup>15</sup> As-Syatibi, *Al-ʿIrshâh*, 2nd edn (Beirut: Dar al-Maʿrifah, 1900), p. 129.

<sup>16</sup> Ahmad bin Abdurrahman ar-Rasyid, *Al-Hâjah Wa Atsaruha Fi al-Ahkam*.

<sup>17</sup> As-Syatibi, *Al-ʿIrshâh*, p. 129.



argument.<sup>18</sup> This difference in view can actually be reconciled because basically there are two types of *Nash* (legal basis), namely a). *Nash* relating to the law of origin which applies in normal conditions b). *Nash* deals with special circumstances and exceptions, which are enforced under compulsion due to urgent reasons. The legal consequences caused by the *hâjat* are not in accordance with the *shari'ah* under normal conditions but are in line with conditions of emergency and compulsion. Therefore, following the consequences of *hâjat* (necessity) is valid according to *syara'* and following the arguments that have been recognized by *syara'* as the law of origin and the law of exclusion are both legitimized by *syara'*. Furthermore, basically, under normal circumstances, the law of origin remains in effect until there is a cause which changes the consequence of the original law to the opposite with the understanding that a person cannot fulfill an urgent need except by going outside the corridors of the law and the provisions of *syara'*. Thus, the provisions of the law which are established employing *hâjat* (necessity) are the law of exemption, just to alleviate *mukallaf*.

5. Let this *hâjat* be believed to cause difficulties with strong prejudice because strong prejudice is the same as belief.<sup>19</sup> Ibn Hajar al-Haithami said, "it is enough to consider something to be desire with clear predictions."<sup>20</sup> Like a sick person who feels unable to fast, he is allowed to break the fast. As for *hâjat* which is based solely on prejudice, it cannot influence legal leniency or change legal provisions. As the rule says:

"لا عبرة للتوهم لان الرخص لاتناط بالشك"

(Prejudice cannot be used as a legal basis, because *ar-rukshah* (relief) law should not be based on prejudice).

<sup>18</sup> Al-Khadimi, *Al-Hâjah as-Syar'iyah* (Beirut: dar al-Ilm lil Malayin, 1987), p. 178.

<sup>19</sup> Syaikh Ahmad Farid, *Bahr Ar-Râiq* (Kairo: Dar an-Nahdah, 1987), III, p. 80.

<sup>20</sup> Ibnu Hajar al-Haitsami, *Tuhfab Al-Muhtâj* (Bairut: Maktabah al-Ilmiyah, 2013), VII, p. 142.

## Examples of the Application of *Hâjat*

Basically, *harâm* (forbidden) acts should not be done intentionally or accidentally. The provisions, in this case, apply to the *qat'iy* prohibition (absolute prohibition) or *ta'abbudy*,<sup>21</sup> which is prohibited because of the substance of an act or object.<sup>22</sup> Like committing adultery, drinking, and eating carcass/pork. Adultery is not permitted in any form because the prohibition is absolute. Meanwhile, drinking and eating carcass/ pork, although it is prohibited by *syara'*, but when in an emergency it becomes an exception. The exception here is given because what is prohibited is the result of the action following the rule which states that the level of the prohibition of *maqâshid* (purpose) is not the same as *al-wasâil* (medium of conduct).

One of the clearest examples of the general *hâjat* application is in the case of buying and selling in which some practices are not following the *syara'*; For example, in buying and selling debt with debt. This kind of transaction falls under the category of debt transfer (*hiwâlah* حوالة).<sup>23</sup> Even though it violates *qiyâs* (reasoning), it is permissible because the public interest requires it. Other examples that are similar to this are buying and selling transactions of *Salam* (ordering goods), buying and selling of goods that are difficult to determine the amount of and services. Transactions of this kind are not allowed in Islam because the object cannot be seen concretely, there are no restrictions on doing them, the specifications are not clear and there is no requirement for any wants or needs to arise. However, the transaction can be allowed as long as it concerns public needs. As among the examples of the application of special *hâjat*, one of them is the permission to wear clothes that are sewn while doing *ihram* (lesser pilgrimage).<sup>24</sup> When the weather is very cold or hot. People who are on *ihram* are not allowed to wear clothes

<sup>21</sup> Abdul Qodir Zaelani, 'Konsep Ta'aqquli dan Ta'abbudi dalam Konteks Hukum Keluarga Islam', *asas*, 6.1 (2014), pp. 46–56 <<https://doi.org/10.24042/asas.v6i1.1708>>.

<sup>22</sup> Ibn Qayim said 'sometimes it is forbidden because of *saddu zarî'ah* If what is forbidden is the purpose of the action, so everything that will bring it is also forbidden, see Ibnu Qayyim al-Jauzi, *Al-I'lâm Muwaqî'in* (Beirut: Dar al-Ilmi, 1977), p. 179.

<sup>23</sup> As-Suyuthi, I, p. 164.

<sup>24</sup> An-Nawawi, *Majmû'* (Kairo: Dar al-Hadits, 1978), VII, p. 359.

with stitches. The prohibition, however, can be waived when certain conditions cause the need for sewing clothes.

## The application of *Hajat* among contemporary scholars'

### 1. The case of *Ribâ* (Usury)

According to some contemporary scholars, including Muhammad as-Syahaht al-Jundi, Mahmud Syaltut, Tantowi, Muhammad Yusuf Musa, usury in savings and loan agreements is permissible but only in certain cases, for example in terms of investment certificates.<sup>25</sup> As al-Jundi stated, this kind of investment is not a problem as long as it is to fulfill the needs of the people and develop their assets; because the *hâjat* allows something that is forbidden for others.<sup>26</sup> This is in line with the opinion of Mahmud Syaltut who allows loans with usury between the farmers and the state in an emergency and very urgent. Similarly, Tantowi (former chancellor of al-Azhar). allows the state to issue investment certificates because the state needs funds from donors to finance development and to encourage public awareness to invest and save.<sup>27</sup> Muhammad Yusuf Musa. said that usury is needed in an emergency. Yusuf Musa even argued that the state could use bonds with interest to finance large projects that would benefit Muslims. He added that the prohibited *riba* is usury in which the profit is only for the owner of the capital. But if the profit is for the people then it is considered not usury. So even though it is clear that usury is forbidden, but in an emergency, there is still an exception to do so.<sup>28</sup>

Some other scholars' argue the opposite. According to them, essentially, usury itself is not needed, let alone considered as an emergency to be utilized.<sup>29</sup> The use of *hâjat*, in this case, is an apparent need, not

<sup>25</sup> Muhammad Shawi, *Al-Bunuk al-Islâmiyah* (Jeddah: Dar al-Mujtama', 1977), p. 498; Abdul Qodir Zaelani, 'Bunga Bank Dalam Perspektif Sosio-Ekonomi dan Ushul Fiqh (Studi Atas Pemikiran M. Umer Chapra)', *Asas*, 4.2 (2012) <<https://doi.org/10.24042/asas.v4i2.1678>>.

<sup>26</sup> Muhammad Syimat al-Jundi, *Fiqh At-Ta'amil al-Mâli Wa al-Masrabi al-Hadits* (Kairo: Maktabah as-Syabab, 1988), p. 89.

<sup>27</sup> As-Salus, *Al-Iqtishâd al-Islâmi* (Kairo: Dar as-Syuruq, 1987), 1, p. 387.

<sup>28</sup> Muhammad Yusuf Musa, *An-Nazar al-Islâm Wa Musykilatuna al-Hâdhirah* (Kairo: Maktabah al-Fanni li an-Nasyr, 1988), pp. 63–64.

<sup>29</sup> Muhammad Ali bina, *Al-Qard al-Masrâfi* (Beirut: Dar al-Kutub al-Ilmiyah, 2006), p. 374.

concrete, and cannot be accepted by the logic of Islamic law. Because such *hâjat*, if left out, will not bring about narrowness, while *riba* itself will create narrowness for the practitioners of the practice. Apart from that, the harm caused by usury can be seen and felt clearly by anyone, especially economists.<sup>30</sup> The financial crisis arising recently is real proof of the impact of the usury practices. If the *syara* text 'does not actually prohibit usury, then *Ijtihâd* can easily prove its prohibition because usury brings harm and difficulty, and is contrary to benefit. Allah SWT knows more about the harm that will come from usury, therefore *riba* is forbidden. Allah says in Surah al-Baqarah [2: 276]

يَمْحَقُ اللَّهُ الرِّبَا وَيُرِي الصَّدَقَاتِ وَاللَّهُ لَا يُحِبُّ كُلَّ كَفَّارٍ أَثِيمٍ

*Meaning: Allah destroys usury and fertilizes alms and Allah does not like anyone who remains in disbelief, and always sins.*

The verse above clearly states that Allah will reduce and eliminate the entire *riba* property from its owner (يَمْحَقُ اللَّهُ الرِّبَا) or remove his blessings so that they are useless and even be punished in the hereafter.<sup>31</sup> On the contrary, Allah will increase, develop, multiply, or multiply the rewards of alms (وَيُرِي الصَّدَقَاتِ). Whoever does business that leads to usury acts has forgotten the principle of desire recognized by *syara*'. Not everything that is thought or felt is a need can be used as an excuse to do something prohibited by *syara*'. Everything related to *hâjat* should be legal in a *syara*', not an artificial one. If this is not heeded, then there will be permission to steal, gamble, cheat, bribe, and others for reasons of *hâjat* and to achieve benefit.

The usury actor only hopes for profit without taking the risk of loss; They just sit at their house and wait for the results to multiply. Big capital owners put their capital in foreign banks which have weakened and even exploited Muslim countries. The farmers' needs and benefits will not be realized solely through state projects, foreign loans, deposit bonds, or

<sup>30</sup> Anonim, 'Al-Bahts', *Majallah Al-Buhuts al-Islâmiyah*, Ifta, Dakwah, Irsyad KSA 1988, p. 148.

<sup>31</sup> Muhammad Ali ash; Shabuni, 'At *Tibyân fi Ulum al Qur'ân*/Muhammad Ali ash Shabuni' (Beirut: Alam al Kitab, 1985), p. 383,

investment certificates. Other solutions that do not carry any element of usury will be more effective in improving the welfare of the community. Assets will grow and develop from *halâl* transactions over transactions made with the element of usury. Such as the *salam* contract, *mudârabah*, *musyâarakah*, *qardhul Hasan*, *murâbahah*, and much other compensation offered by *majma' fiqh al-Islâmi* and Islamic economic experts.<sup>32</sup> It is not denied that economic growth and infrastructure development on a large scale will benefit the ummah. However, to achieve this we should use methods, and media that are legal and recognized by *syara'*. If the goal to achieve the benefit is legal then the media used to achieve the goal must also be legal.

## 2. Buying a house with usury money

The fatwa of the Council of Ulama in Europe allows savings and loans with usury for Muslims who are there to buy residential houses. The Council has put forward a variety of reasons derived from the existing arguments and texts such as the emergency allows what is prohibited (الضرورة تبيح المحذورات) and *hâjat* takes the place of emergency (الحاجة تنزل منزلة الضرورة). They say that housing is part of the need for basic needs, so it is allowed for Muslims who live in Europe to buy it with an interest loan because the emergency allows things that are prohibited. This opinion is in line with the opinion of Abu Hanifah who allowed loans with usury at *Dâr al-Harbi*.

This opinion was denied by many scholars because usury is substantively forbidden (*harâm*). The *al-hâjah* in such a situation cannot be used as a basis for committing mu'amalah with usury. The Council's opinion can be tolerated if it is in a state of emergency that it is necessary to achieve a *wasîlah* (medium) that is considered *harâm* (forbidden). However, it is required that the *hâjat* itself has met the conditions of using *wasîlah* which can be justified. Because the rule says:

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<sup>32</sup> Abduraziq Jaddi Haiti, *Masharif Al-Islâmiyah Baina an-Nazar Wa at-Tatbiq*, (Kari: Maktabah al-Jinndi), p. 296.

الحاجة، the prohibition of substance must not be allowed based on needs. The question now is whether the requirements in question have complete requirements to serve as arguments and evidence so that they can be used as a basis for fatwas?

Requirements relating to homeownership that a person borrows with usury from a bank or another party, cannot be used as a legal basis for the act of usury or an approach as an emergency to allow something that is prohibited. *Al-Hâjah* in that case is personal and does not apply continuously; as it is not general *hâjat* it cannot be used as a basis for justifying borrowing with usury. If someone does not have enough money, he can rent a house to be used as a temporary residence without making a loan that contains an element of usury. If a Muslim borrows with usury then there will be an injustice against him which is done by non-Muslims or even by Muslims themselves. Allah says:

وَاللَّهُ جَعَلَ لَكُمْ مِنْ بُيُوتِكُمْ سَكَنًا وَجَعَلَ لَكُمْ مِنْ جُلُودِ الْأَنْعَامِ بُيُوتًا  
تَسْتَخِفُّونَهَا يَوْمَ ظَعْنِكُمْ وَيَوْمَ إِقَامَتِكُمْ وَمِنْ أَصْوَابِهَا وَأَوْبَارِهَا وَأَشْعَارِهَا  
أَثَاثًا وَمَتَاعًا إِلَىٰ حِينٍ

*Meaning: And Allah made your houses as dwelling places for you and He made for you houses (tents) from the skins of the cattle that you felt light (carrying them) when you walked and when you lived and (made them too) from sheep's hair, camel hair and goat hair for household items and jewelry (which you wear) up to a certain time. (Qur'an Surah al-Nahl 16: 80)*

The Prophet Muhammad stated that a good place to live is one of the three or four happiness namely: a Muslim woman, a good place to live, and a good vehicle. In contrast, bad luck for Bani Adam starts from an evil woman, a bad place to live, a bad vehicle, and, added by ibn Hibban, a bad neighbor.<sup>33</sup> In addition, the fuqaha do not oblige zakat for the dwelling which is occupied by the owner. This is because the conditions of zakat are assets that are more than necessities, while

<sup>33</sup> Ahmad bin Hanbal, *Musnad Ahmad* (Kairo: Dar al-Hadits, 1988), v, p. 219.

housing has excess assets. Even if a person owns a house he is still entitled to zakat and he is not yet obliged to perform Hajj.<sup>34</sup>

### 3. Putting investment in companies that commit usury

Some modern scholars allow investing and shares in companies that practice usury. This was done because of *al-hâjat* to develop the country's economy. They say that people are not yet able to invest with their capital so *al-hâjat* here has occupied a position of *dharûrat* that allows *mu'amalah* with usury.<sup>35</sup> They also reason that this is following the rule that says 'it is allowed as a follower but not allowed to be free or stand-alone *لا يجوز تبعاً ما لا يجوز استقلالاً*. This means that if the main goal is not something that is *harâm*, but if in the middle of the process there is something that is haram then it is allowed to do something that is haram. Riba in a company is not an objective but is related to several transactions carried out by the company. *Ribâ* or *tabi* 'is not the original purpose of the establishment of the company. Even though what is done in the process of growing wealth, is not completely *harâm*, but at least it is mixed with something that is forbidden. The mixing of *mu'amalah* which is haram while the percentage is small compared to the lawful ones, so it does not become *harâm*. In this way, it is permissible to invest in a company that meets these criteria because it is not engaged in savings and loans that use the usury system. This opinion is widely applied in Europe by Muslim immigrants.

In contrast, according to other scholars, the specification of *hâjat* in the case cannot be accepted because not only did the *hâjat* of his investment, have not left the at-Tahsiniyat case but it also did not form *al-hâjah al-'âmah* which could be valid for a long time. The *hâjat* in this case only applies to a handful of people or few business actors. What shortcomings will befall these business people if they do not invest in a company that is compatible with this usury? Meanwhile, many other business areas are still available so that their lives are still in a roomy

<sup>34</sup> Ibnu Abidin, *Hâsyiah Ibnu Abidin* (Kairo: Maktabah ar-Risalah, 2001), II, p. 284.

<sup>35</sup> Salih Marzuki, *An-Nazar Hukum al-Iktitab Aw Mutajarah Fi Ashum as-Syirkat al-Mukhtalatah* (Sikan: Dar al-Wafat, 2008), p. 7.

condition and have not yet reached a difficult condition which makes their capital diminish. Even if *al-hâjat* has complete terms and conditions, it still cannot justify what is *harâm* in substance, unless it has reached an emergency state or the same position as an emergency. *Ribâ* (usury), whether much or a little, is not allowed.

*Ribâ* (usury) is not the same as the prohibition of buying and selling *gharar* which is vulnerable to fraud. *Gharar* is allowed if the possibility of fraud or if the fraudulent practice is small so that the sale and purchase contract is still considered valid. This is different from usury because it is still considered *harâm* even in the slightest form.<sup>36</sup> With the existence of Islamic banks, the ability to make amends with conventional banks or companies related to usury is unreasonable. Because Muslims have a new option to distance themselves from usury even though the space for this Islamic bank is still limited.<sup>37</sup>

#### 4. Medication with alcohol

There are two types of alcohol: First, alcohol in the form of drinks as favored by Western society. This type of alcohol is forbidden; Second, alcohols serve as solvents in pharmaceuticals, which contain fatty, alkaline. This second type of alcohol, according to Dr. Nazih Hammad, is allowed to use because of *al-hâjah* or emergency considerations. The main problem in this matter, said Dr. Hammad, lies in the determination of the '*illat*' law (ratio legis) of alcohol prohibition; whether the prohibition is because alcohol is unclean, or because of its intoxicating nature. If the legal '*illat*' is intoxicating then drugs containing very little alcohol are still allowed.

For other scholars, the use of alcoholic drugs cannot be classified as an emergency that occupies an emergency position. This is not only because there are other options but also because the Messenger of Allah once said:

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<sup>36</sup> Athiyah Adlan Athiyah, *Mausu'ah Qawâid Fiqhiyah al-Munazhama Lil Mu'âmalat al-Mâliyah al-Islâmiyah Wa Tauji'ah an-Nazm al-Mu'asharah* (Iskandariyah: Dar al-Iman, 2007), p. 117.

<sup>37</sup> Athiyah Adlan Athiyah, *Mausu'ah Qawâid Fiqhiyah al-Munazhama Lil Mu'âmalat al-Mâliyah al-Islâmiyah Wa Tauji'ah an-Nazm al-Mu'asharah*, p. 117.



ما أسكر كثيره فقليله حرام. رواه الترمذي وحسنه من حديث جابر  
*Drinks that are drunk in large quantities can make you drunk so it is also forbidden to drink even a little.*

Another consideration is that it turns out that the negative impacts caused by alcoholic drugs outweigh the benefits. The Ministry of Health of the Middle East has appealed to stop the use of alcohol as a solvent. Similarly, the United States Government has ordered not to mix alcohol with drugs for consumption by children. This is because most drugs, such as cough medicines and respiratory injections or other drugs that are very popular among the public, contain alcohol ranging from 25 to 95%.<sup>38</sup> Alcohol in cough medicine has no significant effect on reducing the cough frequency of the child or in the cough healing process. If alcohol, even in small amounts, gets into the body, there will be several effects arise. First, alcohol is addictive so that it can make the child addicted. Second, alcohol has the potential to kill young cells that have just grown. Third, “alcohol after entering the body will stay in the blood for hours and will not metabolize in the blood. If alcohol is continually drunk, the percentage in the blood will continue to increase; If the blood alcohol level reaches 0.15-0.2 percent, it will affect the center of vomiting and it is a drunken process. Fourth, alcohol is harmful to the liver For children who are suffering from hepatitis A, the entry of alcohol into the body can lead to hepatitis cirrhosis (hardening of the liver). His cough was healed, but other illnesses got worse...”.<sup>39</sup> This fact shows that the use of alcohol in drugs, even though the percentage is small, is still *harâm*.

## 5. Medicines containing elements of pork

Abdul Fattah Idris allows the use of a new type of heparin drug derived from the intestines of pigs to treat heart infections, angina

<sup>38</sup> Al-Qahtani, *Manhaj Istimbâth Lin Nawâzil* (Kario: Dar al-Hadits, 2017), pp. 695–99.

<sup>39</sup> Kompasiana.com, “Tanggapan: Efek Obat Batuk Beralkohol pada Anak”, *KOMPASIANA*, 2012 <<https://www.kompasiana.com/ris.tan/551b1b37a333118f23b65d61/tanggapan-efek-obat-batuk-beralkohol-pada-anak>>.

pectoris, and others. His opinion is based on conditions of emergency or *hâjat* which occupy an emergency position as the *fiqhiyah* rules reads الحاجة تنزل منزلة الضرورة. According to Dr. Idris, heparin also has features from other drugs, such as being more effective and much cheaper. Dr. Idris also relies his opinion on the fatwas of scholars such as ar-Ramli, which allows treatment with the *harâm* substances if it is more effective. For some other scholars, medicines containing pork elements are clearly *harâm*; especially if heparin can be replaced so that the use of heparin cannot be considered as *hâjat*.

Halalization in this case is more difficult than in the case of consuming alcohol. In contrast to the case of alcohol, where the scholars still have different opinions about the unclean status of alcohol and whether or not alcohol is not derived from wine, in the case of pork, there is no longer a debate about its uncleanness and prohibition. In other words, the law of medicines containing pork is definitely *harâm*.<sup>40</sup>

## 6. Tender through the sale of debt by debt

Rafiq al-Misri allows bidding and bidding contracts. This practice is to sell debt with debt. In other words, they conduct debt-based tenders to other companies. A fair sale and purchase are that there is money for goods, but what happens here is a sale to the buyer who pays to the seller but the goods are not there. This is the same as buying and selling indents, or like buying and selling shares that have not yet in hands are sold to another party.

Modern scholars disagree on this matter because it is the sale and purchase of debt with debt. However, because this has occurred in various places and is difficult to avoid, while there is no alternative trade transaction that is better than it, the bidding contract with the contracted goods is an *istishnâ* (exception) contract and has become a special necessity occupying an emergency position.<sup>41</sup> This is in line

<sup>40</sup> Jaridah al-Ahram *Januari 2016*, Kamis Oktober 12 Muharram 1439 H, 2017 edition. See also Mansur bin Yunus bin Salahuddin, *Kasf Al-Qina'* (Kairo: Dar al-Hadits, 2016); *Nihayah Al-Muhtaj* (Kairo: Dar al-Hadits, 2008).

<sup>41</sup> *Istishna'* contract is a contract between the customer as the first party and a producer

with Abu Hanifah's opinion which does not require advance payment. If he pays in full before the goods are finished assembling or produced, no problem. But if he gives half payment it is a sale and purchase of *Salam* (ordering goods).<sup>42</sup>

## 8. Buying and selling futura currency

One of the practices of economic globalization is trading transactions in the currency/currency market where payments are made directly for the exchange of currencies submitted at a future time based on the value of the currency when the transaction is made. The submission is sometimes one month to six months. After that the currency exchange took place.<sup>43</sup>

This kind of futura transaction has spread all over the world and has become an irresistible fact so that contemporary scholars are looking for a legal basis. Musa Adam Isa allows currency exchange that has a time frame for delivery of the currency, taking into account the needs of the exporter and importer and the two currencies exchanged. He adheres to several legal principles, one of which is the special *hâjat* of occupying an emergency position. Musa Adam Isa explained that this futura transaction permit is an exception, or applies specifically to groups who really need it. The problem, however, to distinguish which groups really need or just speculate for the purpose to enlarge/develop capital is not an easy matter. Even though playing on the sidelines of changes in currency values when calculations and payments occur, obviously very detrimental to the economy.<sup>44</sup>

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of an item or something similar as the second party so that the second party makes an item as desired by the first party at a price agreed between the two. (Badai'i As shanaai'i by Al Kasaani 5/2 & Al Bahrur Raa'iq by Ibn Nujaim 6/185)

<sup>42</sup> Istishna' is a form of *salam* contract, thus this contract may be carried out if it meets the various requirements of the *salam* contract. And if it does not meet the requirements, then it is not justified. This is the opinion held in the Maliki & Syafi'i school of thought. (Mawahibul Jalil by Al Hatthab 4/514, Al Muqaddmat Al Mumahhidaat 2/193, Al Muhazzab by As Syairozi 1/297, *Raudhatul Thâlibin* by An Nawawi 4/26.)

<sup>43</sup> Sayid Isa, *Aswâq Wa As'âr Sharf an-Naqd al-Ajnabi* (Kairo: Dar as-Syuruq, 2016), p. 28.

<sup>44</sup> Musa Adam Isa, *As-Sharf Wa Bai' Az-Zahab Wa al-Fidhab* (Kairo: Dar al-Qalam, 2007), pp. 51–53.

## 9. Foreign exchange (Forex) trade

The scholars forbid the game of exchanging money which is forwarded (Forex) because the transaction is included in the category of *ribâ nasi'ah* which is clearly prohibited by the Al-Qur'an.<sup>45</sup> It is forbidden by the prohibition of both *maqâshid* and *hâjat* so that it cannot occupy an emergency position. This prohibition applies whether the aim is to meet the export-import needs of the currency and to maintain future changes in value or simply to seek profit from changes in currency values, all of which are included in the *harâm* category. This is because it is very similar to gambling, to the act of eating other people's property in vanity, and is detrimental to the world economy. Therefore, *Majma' Fiqh in Jeda* forbids *this kind of mu'amalah* completely.<sup>46</sup>

## 10. Zakat for Da'wah Bodies

Contemporary scholars allow the giving of zakat to da'wah bodies in Western countries that propagate Islam. They consider it to be included in the category of infak in the way of Allah and is *al-hâjah* because it will support the needs of an institution. This is the opinion of *majma' fiqh* in Makkah.<sup>47</sup>

Actually, *majma' fiqh* does not need to use the argument of *al-hâjah*, because *في سبيل الله fi sabilillah* covers all matters that are closer to Allah and not only devoted to fighting in the way of Allah. After all, the use of *al-hâjah* is to justify an act that goes outside the law of origin syara

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<sup>45</sup> The initial purpose of this money exchange was for foreign payments (especially for export and import). However, at one time there was a difference in supply and demand, causing the value of one currency to fluctuate in comparison to the other. for example: initially, the rupiah exchange rate against the US dollar was 1 USD = Rp 10,000. Due to differences in demand and availability of dollars, the exchange rate fluctuates, it could be 1 USD = IDR 9,000 or even 1 USD = IDR 13,000. The difference between these differences in exchange rates is then seen as an opportunity that can be used to take advantage of if we hold / hoard one currency. Since there is such an understanding, currencies are finally traded in a market called the forex market. Forex trading is Julia's activity to buy and buy currencies continuously and consistently to get profit. It can also be interpreted that forex trading is the activity of exchanging currencies with one another online to get profit from the exchange rate difference.

<sup>46</sup> Mubarak Sulaiman, *Ahkâm Ta'amul Fi Aswâq al-Mâliyah Mu'asharah* (Kairo: Kunuz, 2007), III, p. 966.

<sup>47</sup> Mahmud Syaltut, *Al-Islâm Aqidah Wa as-Syari'ah* (Kairo: Dar as-Syuruq, 1988), p. 124.

whereas, in zakat, nothing deviates from legal provisions, it is required by Islam. This means that the meaning of *fi sabilillah* may be expanded to the widest possible extent as long as it is within the scope of the act of drawing closer to Allah. In short, in *maqâshid shari'ah*, the giving of zakat to Da'wah institutions abroad can be justified, as long as the rights of other groups (the poor, ibn sabil, debtors, and others) must remain and be prioritized; they cannot be left all to *fi sabilillah*.

## 11. Insurance

Shaykh Abdurrahman Isa allows insurance because of the people's *hâjat* for safety and guarantees for natural disasters. This is done to reduce losses because it will be covered by the insurance company. Shaykh Abdurrahman even considers insurance to be a necessity for modern society.<sup>48</sup> However, the argument used here is not *al-hâjah*, because the conventional insurance system uses elements of high speculation, usury, and gambling, while there is another option, namely using the *ta'âwun* (cooperation) insurance system which avoids these things.

## 12. DNA testing

Dr. Ali al-Ka'bi argues that DNA can be used as proof of lineage in special cases. Because DNA has scientific power that is not built on mere prejudice and hypothesis. Evidence through DNA is very much needed, especially if two people are quarreling over their children who are switched at the hospital. DNA determines who the biological father is so that it can rule out disputes. DNA has a stronger position to be used as evidence than *qiyâfah*. because the proof through DNA has the position of *qiyâs awlâ*.<sup>49</sup> Although *Qiyâfah* and DNA have similarities, proving through DNA is more accurate. Because the use

<sup>48</sup> Ali Hafif, *At-Tâmin Majma' Buhuts Islâmiyah* (Kairo: Dar Tsaqafah, 2016), p. 617.

<sup>49</sup> *Qiyâfah* is a term used for *qâ'if* deeds, while the *qâ'if* is a person who has special expertise in seeing, connecting, and determining one's lineage with other people based on signs and similarities. According to the Shafi'i school, *qâ'if* services in determining one's lineage can be accepted as a legal provision. Genetics is a branch of biology that studies hereditary traits and variations that may arise in them. The practice of *qiyâfah* and genetics are both aimed at examining the traits of heredity. its relevance to the science of genetics developed in this modern century.

of DNA is placed as *Qiyâs Awlâ*, the use of the proposition of *hâjat* here is not necessary.

## Conclusion

The use of the concept of *al-hâjat* (necessity) in the application of *shari'ah* law occurs when individuals or communities experience difficulties in applying the original legal provisions. Although the *hâjat* provides original services for not applying that law, its use must meet certain terms and conditions. The use of the *hâjat* as a legal argument has been carried out by many contemporary scholars. However, there is a tendency among them to no longer adhere to the principle of *hâjat mu'tabarâh* (common necessity) or following the *maqâsid shari'ah* with all its requirements but has mixed with pseudo *al-dharûrah*. In other words, although the requirements for the use of *hâjat* have not been fulfilled, contemporary scholars often use the principle as an argument to allow a case that was originally forbidden on the grounds of *Sadd al-zari'ah* or because of an emergency. As not all conditions can be viewed as a *hâjat*, either specific or general, a fiqh expert must be careful in issuing fatwas.

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