

The Theory of Necessity and Exceptional Circumstances as an Exception to Void and Null Administrative Decisions

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Abstract

The theory of exceptional circumstances is one of the important and complex theories in contemporary administrative thought, and this theory finds its basis in Islamic Sharia before being recognized by positive laws, where the fundamental pillar of Islamic Sharia is justice, fairness, and the protection of rights. This study aims to answer the extent to which administrative decisions issued during exceptional circumstances are legitimate. The study concluded that administrative actions under the theory of exceptional necessity and according to its conditions do not constitute a demolition of the principle of legality or a violation of the system, regardless of the severity of the violation. Instead, it is an action that serves the public interest and preserves the constitution and entity of the state. The study also recommended that administrative bodies must prove the existence of genuine and documented exceptional circumstances justifying the application of the necessity theory, avoiding its use without convincing reasons, and applying it with wisdom and caution.

Keywords: *Exceptional Circumstance, Administrative Decision, Invalidity, Nonexistence*

INTRODUCTION

Adhering to the principle of legality is an obligation imposed on administrative actions; therefore, when the administration issues its decisions, these decisions must be in accordance with the provisions and rules of the system. Conversely, the administration may find itself facing exceptional and emergency circumstances. Should it then adhere to the system's provisions even in the presence of these rare circumstances, or is it permissible for it to contravene the system and rules of jurisdiction to address such conditions? These situations often require swift decision-making and necessary actions to preserve the state's entity, its security, and the public interest. Are these decisions, issued by the administration out of necessity and in violation of the system, valid and enforceable decisions or invalid decisions subject to annulment? And are they subject to judicial review, or are they considered beyond the reach of judicial oversight, granting the administration complete freedom in action?

This study aims to answer these inquiries and questions, after first explaining the essence of this theory, then its conditions and when it may be adopted, as well as detailing the consequences of its application.

RESEARCH METHODOLOGY

The research methodology in the theory of necessity and exceptional circumstances as an exception to invalid and nonexistent administrative decisions relies on using an analytical approach to elucidate the nature of this theory, its conditions, when it can be adopted, and the effects of its application. It also addresses the administration's stance in the face of necessity and exceptional circumstances and the legal status of its decisions in such cases.

The Concept of the Theory of Exceptional Circumstances

Legal scholars have not provided a precise definition for exceptional circumstances, and they typically describe

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the elements and criteria for exceptional circumstances instead. This is due to several reasons mentioned by some scholars, which can be summarized in the following points:

Firstly, this theory does not require a definition as the term "exceptional circumstances" is sufficient to express its concept (Ali, 1977).

Secondly, due to these necessities being associated with different places and times, what may constitute a circumstance in a specific time or place may not be so in another (Ali, 1977).

Thirdly, it is difficult to create a comprehensive definition that encompasses all cases of exceptional circumstances because there are many instances of circumstances that vary with time and place, making it impossible to consolidate them into a single rule or case (Al-Sharqawi, 2013; Fan and Sheng, 2023).

Nevertheless, a group of legal scholars have endeavored to establish a general concept for this theory. Of interest in this research is the concept of this theory in relation to the administrative system and, more precisely, the administrative decision. The application of the theory of exceptional necessity is no longer limited to administrative control only, like in the case of war or a public epidemic, but its application has broadened to include any threat or harm that may affect the state's public facilities or interests, necessitating urgent and exceptional intervention by the executive authorities, even if it requires temporarily deviating from the principle of legality, to preserve public facilities and interests (Abdul Wahab, 2006; Ali, 1977). Some have stated that this theory implies that certain administrative decisions, which would be considered irregular under normal circumstances, are deemed regular by the judiciary if it is proven that these decisions were issued to protect the public order or to facilitate public services, due to an exceptional circumstance that led to the issuance of these decisions. In such cases, the administration is freed from the legal restrictions imposed on it under normal circumstances, to wide-ranging powers not provided for in the system (Al-Tamawy, 1979).

From the aforementioned concept, it can be deduced that this theory is a judicial one, which legitimizes the administration's actions that originally deviate from the system, after investigating the reasons and the administration's adherence to the following restrictions and conditions.

Conditions for Applying the Theory

I did not find in the Saudi regulations or the Board of Grievances specific guidelines for the use of this theory at the level of the executive authority, as is the case in comparative systems. Since the Kingdom of Saudi Arabia applies the provisions of Islamic Sharia, which governs all its courts and systems, as stated in Article 1 and Article 7 of the Basic Law of Governance, and since this theory exists in the books of Islamic Sharia scholars, I will research the conditions of this theory in Islamic jurisprudence books and then apply it to the administrative decision and its implications.

This theory, the theory of exceptional necessity, is discussed by jurists under the rule: "Necessities permit prohibitions." This subsidiary rule falls under two major rules: "Hardship begets ease" and "No harm nor reciprocating harm." Jurists have mentioned several conditions for this rule, among the most important are:

The First Condition: The necessity must be actual: To apply this rule, the necessity must have occurred in reality, or it is highly probable, because the state of necessity does not stand on doubt or illusion. Permissibility due to necessity is not established merely on suspicion (Al-Suyuti, 1990; Ibn Nujaym, 1999). Islamic Sharia jurists require this condition because most reasons for concessions are speculative and not real, making their action based on an incorrect principle, and thus their action becomes illegitimate and contrary to Sharia (Al-Suyuti, 1990; Ibn Nujaym, 1999). An example of speculative concessions is that Islamic law allows a traveler to shorten the four-unit prayer and to break the fast, but he is not allowed to take these concessions until he actually starts traveling and leaves the populated area.

The Second Condition: The necessity must be compelling: Meaning, the permissible means to remove this existing harm are unattainable, necessitating a deviation from legality to avert the incurred harm. Therefore, Islamic Sharia jurists have limited compelling necessity with controls, including reaching a level of hardship where one fears the loss of one of the five essentials like preserving life, wealth, honor, progeny, and intellect

if the prohibited or the forbidden is not committed. Preservation of the five essentials is not possible except through this prohibited means. It must be certain that preservation of the five essentials is not possible unless this prohibition is committed, exceeding the legal boundaries, like eating dead meat out of necessity to save life (Iqbal, 2021). This means that as long as it is possible to remove the harm through any permissible means that comply with Sharia and the principle of legality, it should be pursued.

The Third Condition: Necessity must be proportionate: The commission of the prohibited or violation should be limited to the extent necessary to avert the actual harm. Anything beyond the necessary extent remains prohibited (Al-Suyuti, 1990; Ibn Nujaym, 1999). This condition is reinforced by the jurisprudential rule stating: "What is permitted due to necessity is limited to its extent," thus restricting the rule: "Necessities permit prohibitions." Whoever commits the violation due to necessity should not exceed or expand but limit it to the necessary extent to remove the harm.

The Fourth Condition: Adherence to the duration of the exceptional necessity: This condition means that what is permissible due to exceptional compulsion is not absolute, but rather defined by the duration of the harm. Once the harm ceases, the concession drops, and things return to their normal state (Khatab, 2009; Justaniah, 2010). This is affirmed in Article (24) of the Judicial Regulations, which states: "If the obstacle ceases, the prohibition returns."

These four conditions set by Islamic Sharia jurists apply to the administration's actions during times of necessity. The administration must adhere to the principle of legality and the system when issuing administrative decisions. It is not permissible to grant the administration broad powers to face abnormal circumstances, which sometimes lead to violations of the state's established systems, except under specific and collective conditions and controls. All these conditions must be present, as one does not compensate for the absence of another. These conditions, which I have diligently derived from the conditions set by Islamic Sharia jurists, considering them the governing principles of judicial rulings and systems in Saudi Arabia, can be summarized in the following points:

The First Condition: The presence of a severe danger or exceptional situation: A severe danger refers to anything threatening the external security of the Kingdom, such as wars and threats to its sovereignty, safety, or the right to security and survival, as well as anything threatening the internal security of the Kingdom, such as threats to its unity, systems, or economy, and natural hazards and disasters like volcanoes, earthquakes, pandemics, and general diseases threatening the health and safety of the community like the pandemic experienced globally during "Corona," as affirmed in Articles sixty-one and sixty-two of the Basic Law of Governance.

This led the Supreme Court to consider the Coronavirus pandemic as an exceptional circumstance, as stated in its decision No. (45/M) on 8/5/1442 AH: "The Coronavirus pandemic is considered an exceptional circumstance if the obligation or contract cannot be fulfilled except at an unusual loss, and it is a force majeure if fulfillment becomes impossible."

The Second Condition: The impossibility of averting the occurring harm through ordinary regulatory means: That is, if the administrative authorities can issue decisions in accordance with the enforced systems under normal circumstances to face these conditions, then it is not permissible for them to violate the systems and deviate from the principle of legality under the pretext of necessity or emergency.

Some system commentators have mentioned that the administrative inaction according to the systems under normal circumstances does not mean impossibility, but severe difficulty suffices. If the administration followed the system in facing this emergency, it would hinder it from addressing these difficult circumstances (Al-Tahravi, 1992).

The Third Condition: The administration must limit itself to the necessary extent to confront the imminent danger: The goal of this theory is the public interest and the preservation of the state's security and stability. Therefore, it was obligatory not to expand the administrations in adopting this theory. The administration must not use this theory except in the narrowest limits and areas; necessity is measured by its extent. Therefore, it should also return things to their normal state as soon as possible, and as soon as the intended goal of such

decisions and actions is achieved, which is what jurists meant by saying if the obstacle ceases, the prohibition returns.

Thus, all conditions and controls must be met, and with the collective fulfillment of these conditions and their suitability for the incident, an exceptional regime arises. The task of gathering these conditions and verifying them falls on the administrative judiciary, making the judge the creator of the new exceptional regulation, as he examines the appropriateness of violating the system under exceptional circumstances (Shatnawi, 2004). The distinction was made between the judicial theory of exceptional circumstances and the constitutional powers of the administration, as the former is derived from the judiciary, while the latter derives its authority from the constitutional texts. Although there is a difference in their source, (Al-Tamawy, 2016) affirmed that there is nothing to prevent their simultaneous application (Al-Bajalan, 2015).

In light of the aforementioned controls, the administration's action under the theory of exceptional necessity and according to its previous conditions does not constitute a demolition of the principle of legality and violation of the system, regardless of the severity of the violation. Instead, it is an act that serves the public interest and preserves the constitution and entity of the state.

Implications of Applying the Exceptional Circumstances Theory on the Validity of Administrative Decisions

The Basic Law of Governance stipulates the necessity of state action during emergencies and the presence of dangers threatening the state and its security. The law grants His Majesty the King the right to declare emergencies in case of war or anything threatening the security and stability of the Kingdom of Saudi Arabia. It also entitles him to take swift measures to address the emergency and danger as per Article Sixty-One and Article Sixty-Two of the Basic Law of Governance. The law also ensures the protection of citizens' rights and their families in emergencies, as mentioned in Article Twenty-Seven, Basic Law of Governance. Therefore, the state is obligated to protect the rights of the Saudi community in exceptional circumstances, leading the administration to directly intervene to protect the community and ensure the operation of facilities and public interests by issuing administrative decisions exceptionally, which may result in violations of the system and the principle of legality. This is because the emergency situation may compel the executive authorities in the state to take measures that encroach upon the powers of the regulatory and judicial authorities or overstep the authority of a ministry or another entity unrelated to it administratively and organizationally, aside from the administration possibly issuing some decisions without following the regulatory procedures required by the system under normal circumstances for the sake of expedited measures. Adhering to the existing system would disrupt the operation of facilities and public order.

Government agencies and bodies are required to intervene to address these difficult situations, but this intervention does not grant the administration absolute freedom in taking what it deems appropriate. Instead, its actions and decisions fall under judicial scrutiny to monitor the appropriateness of the administration's decisions in exceptional circumstances. If the administration deviates from the controls mentioned in the previous section, it has the right to cancel what it has issued as it constitutes an irregular act (Abdullah, 2008). Researching the rulings of the Board of Grievances, as the supervisory authority over the executive powers' actions in exceptional circumstances, we found only one ruling, which may not provide a clear picture of the established practice in the Board of Grievances. Therefore, we will return to the roots of the issue in Islamic Sharia jurisprudence, through which we understand the effects of the administration's use of this theory.

Islamic Sharia jurists have stated that Sharia laws were legislated to preserve the five essentials: "religion, life, intellect, progeny, and wealth," and anything leading to their preservation is considered a realized interest, and anything leading to their loss is considered a corruption that must be removed and lifted (Al-Shatibi; Al-Ghazali, 1993). Jurists have based the necessity theory on two principles: "Necessities permit prohibitions," and "No harm nor reciprocating harm." These principles and their derived subsidiary rules have a basis in the Holy Quran and the Prophetic Sunnah, indicating that Islamic Sharia jurists, when they applied this theory and its encompassing judgments and jurisprudential branches, were based on principles derived from established Sharia evidence, demonstrating the permissibility of adopting and applying this theory.

Applying the necessity theory, the concept of "Imarat al-Istila" (Leadership by Seizure) is recognized in Islamic political theory, where a person forcibly takes control of a territory until the Imam grants him the leadership of this territory, allowing him to manage its political, economic, and administrative affairs. With the Imam's permission for him to lead this territory, his leadership becomes permissible and effective, thus moving from prohibition to permissibility (Al-Farra, 2002; Al-Mawardi).

Necessity permitted this person to forcibly enter this city, maintain security, enforce God's limits, command good, and forbid evil. Once the governor's authorization for him to lead this city arrives, the state of necessity ends, and all his actions before the authorization are permissible and produce their effects.

Therefore, the administration's actions and decisions during exceptional circumstances, which may violate the system, are permissible and legitimate provided the conditions and controls of this theory are met. It is essential that the harm has already occurred, has a clear impact on preserving public order and the operation of the state's public facilities, that it is impossible to avert the harm with the regular regulatory rules for normal circumstances, that the administration's deviation from the system is minimal without expansion or excess, and finally, that the general purpose of these measures is to achieve the public interest. Then, the judge should permit the administration's action and not prevent compensation to the affected party if actual harm and causation are proven, based on the jurists' principle stating: "Compulsion does not invalidate the right of others" (Al-Qarafi, 1998; Ibn Rajab, 1999).

Supporting what Islamic Sharia jurists have decreed, I find that the Board of Grievances has followed this approach where the Administrative Court ruled in a lawsuit filed by a claimant seeking to annul the compensation committee's decision, which was formed in violation of Article Seven of the Real Estate Expropriation for Public Utility Law issued by Royal Decree No. M/15 on 11/3/1424H, on the grounds that the committee's composition was non-compliant. Although the court acknowledged that the compensation decision was void due to a fundamental procedural flaw, as the formed committee was in violation of the one stipulated in the system, making the flaw a significant procedural error, it dismissed the lawsuit citing exceptional circumstances accompanying the decision issuance.

RESULTS

Research Findings on the Necessity Theory and Exceptional Circumstances as Exceptions to Invalid and Nonexistent Administrative Decisions The study points to the following conclusions:

There is no consensus on establishing a comprehensive and definitive definition of exceptional circumstances, as exceptional circumstances vary with different times and places.

The theory of necessity and exceptional circumstances is inherent in Islamic thought, where jurists have set rules and controls derived from the texts of the Holy Quran and the purified Sunnah.

The theory of necessity and exceptional circumstances serves as an exception to invalid and nonexistent administrative decisions, allowing for the annulment or bypassing of administrative decisions that conflict with the public interest or cause harm to citizens.

In cases of necessity and exceptional circumstances, the judicial or administrative authority can intervene to annul invalid or nonexistent decisions and take necessary measures to protect public rights and interests.

The administration's action under the theory of exceptional necessity and according to its conditions does not constitute a demolition of the principle of legality or a violation of the system, regardless of the severity of the violation. Instead, it is an act that the public interest requires and that preserves the constitution of the state and its entity.

This theory is necessary to ensure the integrity of administrative decisions, prevent injustice and abuse in their application, and enhance the principle of the rule of law and justice in society.

RECOMMENDATIONS

Based on the findings from the study of the necessity theory and exceptional circumstances as exceptions to

invalid and non-existent administrative decisions, the following recommendations can be proposed:

Administrative bodies should apply the theory of necessity and exceptional circumstances cautiously and wisely, avoiding its misuse to justify invalid or non-existent decisions.

Administrative bodies must demonstrate the existence of genuine and documented exceptional circumstances that justify the application of the necessity theory, and not resort to it without convincing reasons.

Judicial bodies should be cautious in evaluating cases based on the theory of necessity and exceptional circumstances, ensuring that the circumstances justifying its application are clearly present.

Administrative bodies should follow transparent and objective procedures in applying the theory of necessity and exceptional circumstances, ensuring that decisions are based on legal and ethical standards.

Administrative bodies should be prepared to provide evidence and proofs of the exceptional circumstances and justify the application of the necessity theory, cooperating with judicial bodies in this regard.

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