

## The eleventh lecture

- **The act is not subject to the rule of permissibility:** The reason for permissibility is known as: “a restriction on criminalization that excludes from the scope of some acts,” as it works to negate and eliminate the legal element of the crime, which leads to denying the occurrence of the crime accordingly. If the legal element is one of the elements of the crime and its essence is This element is the illegal character of the act, so the reason for its permissibility comes to return the act to its origin of legality by denying the legal element of the crime by giving the legal character to that committed act. Accordingly, the reasons for permissibility assume that the act is initially subject to a criminal text and acquires, based on that, an illicit character. Then the reason for permissibility comes to take the act from the circle of criminalization to the circle of permissibility, thus returning it to its origin of legality. By becoming the act legitimate, the legal element of the crime is negated, and this necessarily results in its incompleteness. The elements of the crime, the absence of responsibility for it, and the impermissibility of imposing the penalty. The reasons for permissibility in Islamic jurisprudence are summarized in: exercising the right, repelling the wrongdoer, enjoining good and forbidding evil, a state of necessity, performing a duty or using authority, as will be explained in turn:
- **The use of the right:** The wise street if authorized a person right, it inevitably requires the permissibility of the means that lead to the use of that right, ie the permissibility of acts aimed at the legitimate use of the right, and here lies the reason for the permissibility of the use of the right, and accordingly, the general conditions for the use of the right is the existence of the right in itself as a legitimate interest approved by the street and bestowed upon it protection, and proved that the act is a legitimate means of its use, which is achieved by the commitment of its limits as it does not recognize Islamic law With absolute rights for every restriction, and the good faith of the perpetrator, which is a condition of a personal nature, as it assumes the identification of the motive for the act, and verification of its conformity with the purpose of the right.

The applications of the use of the right are many and numerous multiplicity of rights determined by law, and the most important rights that raise the use of research in the permissibility of the acts used are the right of discipline, which allows some acts of light beating and takes the form of disciplining the wife and disciplining the young, medicine for

the purpose of treatment and equestrian or sports in all its diversity and differences, as the scope of permissibility expands to all games approved by sports custom.

- **Payment of the assailant "legitimate defense":** It is the use of the necessary and appropriate force to repel the danger of a situation that threatens the soul or money, whether this danger threatens the right of the assailant or the right of another person, and whether this threat affects the soul or money, and therefore the payment of the assailant assumes an act that really threatens the danger, and then assumes another act facing that danger to pay it and protect the threatened right from prejudice and waste.

Based on the previous definition, the payment of the assailant assumes two acts: the act of the assailant and the act of payment, where Islamic law requires in each act conditions that must be met in order to be able to have the payment of the assailant as a legitimate system, as it requires in the act of the assailant to be an illegal act, and this condition is related to justifying the act committed by the assailant to pay the danger, which is the protection of an interest that the street saw as worthy of protection, and that the danger is immediate in two forms: The first where the assault has not yet begun, but it is about to begin, and in this picture the act of payment tends to prevent the assailant from starting his prayer, the second: that the assault has already begun but has not yet ended, and in this picture the act of payment tends to prevent the Sal from continuing to pray, and limiting the solutions to the danger in these two pictures means excluding it when the danger is in the future and when the assault has already been achieved and ended, where in such a case the goal is negated From justifying the act of payment, which turns into revenge and taking revenge, which is rejected by the Sharia, which came to combat such dangerous acts on the entity and security of the Islamic community.

The act of payment is required to be necessary to ward off the danger, that is, it is the only means available to the worshiper to pay the danger imminent him, if the assailant can get rid of the danger through an act that does not harm anyone, it is not permissible for him to perform the act that harms the assailant, in addition to the proportionality of the act of payment with the gravity of the danger without exaggeration or exceeding, if the serum can ward off the danger by an act of certain gravity may not It is prevented by a more serious act, for necessity is estimated by its value, and what is more than that is not necessary.

- **Enjoining good and forbidding vice:** The command of virtue and the prevention of vice as one of the reasons for permissibility is represented in a statement or act that constitutes

a crime at its origin, but the context in which it was said whether it was a word or was committed in it if it was an act took it out of the circle of criminalization to the circle of permissibility again, for example, that the statement includes violence that affects the consideration of the addressee, or the act was the destruction of money, such as spilling alcohol consumed by a person or destroying gambling tools or forbidden fun, If it is proved that the conditions for permissibility are met, i.e. the conditions for the promotion of virtue and the prevention of vice, the previous act or statement is permissible, as the person who issued such statement or act shall not bear any responsibility and no penalty shall be determined against him.

Some modern jurists call the promotion of virtue and the prevention of vice the term "public legitimate defense" in contrast to the payment of the assailant, which is called the term "private legitimate defense", on the basis that the payment of the assailant is a defense of the personal interest of a particular person who may be the one who is responsible for him and may be another person, while the promotion of virtue and the prevention of vice is a defense of the general interest of the Islamic community as a whole.

The nature of the command of virtue and the prevention of vice requires the availability of conditions, some of which are due to the nature of the condition as an imposition and a reason for permissibility, and some of them are due to its purpose, and these conditions are summarized in assignment, Islam and ability, and in addition to these conditions, the question is whether the commanding of virtue and the prohibition of vice must be charged or authorized to do so by the guardian.

- **State of necessity:** It is a set of circumstances that have nothing to do with man, so he does not cause it, but is the result of the forces of nature, threatening a person with danger where he can only get rid of him by committing a criminal act.

The scope of the danger threatened by the state of necessity is wide, as it may threaten the same person or his money or the same third party or his money, and therefore the act that comes to him forced to maintain his right or the right of others is a permissible act is not prohibited in his coming, but that his coming is considered a duty, and the basis of this weighting is the theory of conflict between interests and the balance between them and the necessity of weighting the most important, as is the case in the payment of the assailant based in turn on the balance between interests.

The danger posed by the state of necessity is required to be grave and immediate, and the act that avoids the danger requires two conditions, namely that this act is necessary to ward off the danger, there is no other means than it, and that it is in its gravity commensurate with the gravity of the danger, which is a translation of the principle of "necessity is estimated as much" does not exceed it and does not exceed its amount, and the consequence of proving the state of necessity and the availability of its conditions entails the permissibility of the act and this adaptation entails all the effects of the reasons for permissibility in general, so do not arise The taxpayer has a responsibility and no penalty is imposed on him by extension, and the effect of permissibility extends to all

### **The second requirement: the material element**

Since the beginning of its spread, Islamic law has known the principle of no crime or responsibility, and therefore no punishment as long as the accused does not issue material acts under which he translates his criminal intentions to the outside world, advanced in that and much ahead of positive legislation, which remained until late holding the criminal accountable for his inner intentions, even if it remained trapped in himself, he did not embody them in tangible materials to the outside world, with the use of various methods of coercion and violence to push him to show his intentions and hold him accountable for them in philosophy. Strange to logic and reason that refuses such ideas.

Thus, it was established in Islamic criminal jurisprudence that there is no crime without material that appears to the tangible outside world, which is proven in many hadiths of the Messenger of Allah, may God bless him and grant him peace, including his saying, peace be upon him: "God Almighty transgressed for my nation what they did or did not do themselves unless they worked or spoke," and also saying: "Those who are good and did not do it, good things were written for him, and those who are bad and did not do it did not write anything for him."

The material element of the crime is decomposed into three basic elements, respectively: the act, the criminal consequence and the causal relationship between the act and the result, as will be explained successively.

### **The first section: action**

An act is a behavior that has been given an illegal character by the law, which is therefore suitable for being criminalized and therefore deserving of punishment. The act has two

forms: a positive form represented by “coming”, “doing”, “committing”, or “tangible physical movement”, where the person commits an act. The Wise Law has forbidden it, and its negative form is represented by pure “abstinence” or “reluctance”, where the person abstains from what the Wise Law has commanded him to do, and takes a negative position at a time when he should take action and take a positive position. Accordingly, the forms of the action carried out by the material objects of the crime are as follows:

➤ **Positive act:** The positive act means that the offender comes to an organic movement, that is, moving a member of his body in a way that would prejudice an interest protected by criminal legislation, as this movement, whether by hand, leg, tongue or any member results in an attack on the interest protected by Sharia, and this movement is required to be voluntary, i.e. issued by a full free will that is not subject to any pressure or coercion of any kind, which made some know the positive act As a "voluntary organic movement", it in turn decomposes into two components as follows:

- **Organic movement:** It is a tangible physical entity resulting from the movements of the members of the body may be any member of the body without depending on a specific member, aims through this movement to achieve certain physical effects represented in the assault on the interest protected by the street, ie the achievement of criminal purposes and objectives, and therefore this organic movement is the one that brings out the idea that was trapped by its owner to the ground of tangible reality.

- **Voluntary characteristic:** the act does not carry out any organic movement, but this organic movement must be stemming from the will that controls the movements of the members by which the crime is committed and directed towards the illegal act to infect the protected interest, and then the direction of the organic movement towards the realization of the act is a voluntary trend, otherwise it did not constitute a criminal act carried out by the crime.

➤ **Negative act:** or what is also known as abstention, which is the failure of a person to perform a certain positive action that the wise street has ordered to be done, provided that performing that work is a legitimate duty that the taxpayer must perform or under a contract, or voluntarily if he can do it without posing a danger to him.

Some cases of abstention constitute religious crimes with an eschatological penalty on the Day of Judgment, such as refraining from paying zakat and praying, and some of them are worldly crimes with a worldly penalty that is decided after being proven by a judiciary, such as refraining from giving testimony, refraining from paying due alimony, and refraining from breastfeeding her child.

The jurists divided abstinence into two parts:

- **Simple abstinence:** It is the abstention of danger or omission with a formal legal result only, as it is based on the mere negative position carried out by the abstention without requiring a specific tangible material result, the mere reluctance of the person where he must take the initiative is carried out by the crime, and an example is the failure of the witness to perform the testimony that he was assigned to perform, and the refusal of the obligor to alimony to perform it, and therefore the material element of this type of abstention is based on only one element, which is the act of abstention.

- **Compound abstinence:** It is the abstention of damage or abstention with a tangible material result, as this reluctance results in a tangible change in the outside world resulting from these reluctances represented in the assault on a right or interest, for example, the mother's refusal to breastfeed her son, which results in the death of the infant or the deterioration of his health, and the refusal of a prison guard to provide food or drink to the prisoner, resulting in his death or damage to his interest, and therefore the material element of this type of abstention is based on three elements: The act of omission, the criminal consequence and the causal relationship between the act and this result.