



AL-QUDWAH

ISSN(P): 2959-2062 / ISSN(E): 2959-2054

<https://al-qudwah.com>



***Doctrine of Necessity in Western and Islamic Political Thought;
A case study of Pakistan legal frame work***

ABSTRACT

This study explores the dynamic interplay between Western and Islamic theories of necessity, particularly in Pakistan's legal system. Juxtaposing Western legal philosophy with Islamic principles settled through ahadith and Quran verses and so also principles settled by the different Imams, it analyzes how diverse traditions address exigent circumstances. Through case studies and historical underpinnings, the research illuminates how these differing concepts converge and diverge, shaping legal discourse and the evolution of law in a society where multiple philosophies and religions coexist. It explores the historical roots and evolution of the necessity theory in both Western and Islamic traditions, delving into the diverse arguments and viewpoints put forth by various thinkers and schools of thought. The analysis extends to the contemporary context of Pakistan, where the constitution acknowledges both divine sovereignty and popular sovereignty. Notably, the doctrine of necessity has been employed to rationalize military coups and constitutional changes. The article assesses the interplay and potential conflicts between Western and Islamic perspectives on necessity, considering the ramifications for the legitimacy and authority of governance in Pakistan.

Keywords: Necessity, United States, Darurah, Prophet, Waleed bin Mughera, haram, Hadith, Holy Quran, Law, Supreme Court, People, Hens Kelson, Federal Court, Fidyah.

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Date of Submission: 23-10-2024

Acceptance: 05-11-2024

Publishing: 10-11-2024

Web: <https://al-qudwah.com>

OJS: [https://al-qudwah.com/
index.php/aqrj/user/register](https://al-qudwah.com/index.php/aqrj/user/register)

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INTRODUCTION

Doctrines refers to a rule, principal or a theory and the word necessity refers to which a condition arising out of circumstances that compels a certain course of action¹

Doctrine of Necessity is a legal but controversial theory which is mostly not accepted by modern jurisprudence which allows those action which are otherwise unlawful but due to necessity it becomes lawful, hence we can say that Necessity knows no law

It provides that in exceptional situation one can violate the law, if he abides by law, it will have greater implications rather than violating it, it is based on maxims: "that which otherwise is not lawful, necessity makes lawful", "safety of people is supreme law", and "safety of state is supreme law"²

In other words; 'The legal doctrine of necessity is in reality the acceptance of necessity as a source of authority for acting in a manner not regulated by law but required, in prevailing circumstances, by supreme public interest, for the salvation of the State and its people'³

Origin of Doctrine of Necessity:

The doctrine of necessity finds its origins in legal theory and practice, with notable contributions from scholars like Hans Kelsen and Henry de Bracton. Hans Kelsen argued that, in exceptional situations, the legal system should prioritize fundamental principles and values to protect the well-being of the population, significantly shaping the doctrine's understanding and application. Henry de Bracton, an English jurist, explored the concept of necessity in relation to legal authority, contending that under certain extraordinary circumstances, individuals might be justified in taking actions that would otherwise be considered unlawful. His ideas laid the ground work for the recognition of the doctrine of necessity in English common law⁴. Hans keelson provide this concept of necessity through his Book "Pure Theory of Law" originally published in German in 1934 as "Reine Rechtslehre" later on it was translated in English in 1967 as pure theory of Law.

This doctrine is upheld by maxims such as "Necessity knows no law", "Salus populi suprema lex." And "Necessity is mother of the inventions" These maxims emphasize that during extraordinary situations, the imperative of necessity can supersede established legal norms, making the welfare of the people the ultimate law.

In summary, the doctrine of necessity acknowledges that during times of crisis or conflict, exceptional measures may be required to ensure national security and safeguard the well-being of the population. It provides a framework for balancing legal principles and addressing urgent needs during extraordinary circumstances.

American Civil War⁵

Facing the Civil War's existential threat to the Union, President Lincoln embraced the controversial doctrine of necessity. This allowed him to suspend the writ of habeas corpus (a fundamental legal protection) and implement other extraordinary measures to maintain order and preserve the nation. While these actions faced legal challenges, most notably in *Ex parte Merryman*, Lincoln persisted in their use in specific regions deemed crucial to the war effort.

¹ SBLR 2012 vol 1) Page 247

² SBLR 2012 vol.1) Page 247

³ *The Attorney General of the Republic v. Mustafa Ibrahim*, 1964, CLR 195.

⁴ Wickramaratne, J. (2020). *Doctrine of Necessity: Stumbling Against the Same Stone in Pakistan-A Mistake Not to be emulated in Sri Lanka*. Available at SSRN 3598986.

⁵ <https://eerdword.com/abraham-lincolns-doctrine-of-necessity/>

This balancing act between security and liberty remains a subject of debate and offers valuable insights into wartime leadership.

United States v Holmes⁶

A desperate attempt to save a sinking boat with 65 passengers and 17 crew led to a controversial decision: throwing overboard some of those onboard. While this action resulted in accusations of criminal homicide, the court ultimately recognized the act as justifiable due to the extreme circumstances, establishing a potential defense based on the doctrine of necessity.

Regina V Dudley and Stephens (1884)⁷

Facing imminent death in a lifeboat without provisions, castaways Thomas Dudley, Edwin Stephens, and young Richard Parker were pushed to extremes. After enduring days without food and water, Dudley and Stephens reluctantly agreed to sacrifice Parker for their own survival. This act, while born of desperation, resulted in their trial for murder. Although the court acknowledged the dire circumstances, they ultimately ruled that taking an innocent life, even under extreme necessity, remains unjustifiable. While initially sentenced to death, Dudley and Stephens' punishment was later commuted to six months of imprisonment. The Parker case remains a complex legal and ethical question, raising important issues surrounding necessity and the boundaries of survival. In above cases, we found that the use of necessity was found valid but in the case of life and death, in which such illegal steps are regulated subject to this Doctrine.

Necessity in view of Ahadith and Quranic verses

Word necessity in Arabic language referred as *DARURAH*, which is an injury that cannot be avoided. *Darurah* also is the state of hardship and some would say that 'Necessity forces me too so such and such'⁸

1 Dire need for something (shiddat al-hajah)	2 The state in which one is being forced to do something (al-ilja)	3 The intensity of darar which is injury or harm
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Necessity according to HADITH

Begging is forbidden except in cases of need outlined in Hadith.: one of the *SHABA* called Qabisah said:

In debt, a man sought the Prophet's help. The Prophet offered support from incoming charity. He then declared begging forbidden except in three cases: 1) Debt repayment until cleared, 2) Disaster-struck individuals until basic needs are met, 3) Poverty confirmed by three people, until sufficient aid is received. Any other reason for begging was deemed forbidden.⁹

From reading above we can clearly understand that under which circumstances necessity can be used in above mentioned hadith Qabisah was under a scarce condition means leading life

⁶ https://people.brandeis.edu/~teuber/U.S_v._HOLMES.pdf

⁷ <https://www.casebriefs.com/blog/law/criminal-law/criminal-law-keyed-to-kadish/the-justification-of-punishment/regina-v-dudley-and-stephens/>

⁸ Ibn Faris, Mu'jam maglyis al-lu'ah, word: dart.

al-Jurjāni. a -Ta'arif. word: darūrah

⁹ Sahih Muslim Hadith NO; 2271

become so much difficult so Prophet said only under 3 condition begging is allowed means by using necessity we can do prohibited things subject to threat of life.

Abu Waqid al-Laythi stated: A man asked the Prophet about permissible of haram meat in a land of hunger. The Prophet allowed it if they had neither morning drink nor evening milk, nor stored dates.¹⁰

Hence Prophet has allowed to eat prohibited things if there is a condition in which it is threat to your life, you can eat those things in necessity if that necessity is subject to your life.

Necessity according to Holy Quran:

In various verses of Quran, it is stated about invoking of necessity in different situations including severe hunger and do or die situation

Some of verses are as follows:

1. "He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of God. **But if one is forced by necessity, without willful disobedience, nor transgressing due limits**, then is one guiltless. For God is Oft-forgiving most Merciful."¹¹
2. "Forbidden to you (for food) are: dead meat, blood, the flesh of swine, and that on which hath been invoked the name of other than God; that which hath been killed by strangling, or by a violent blow, or by a headlong fall, or by being gored to death; that which hath been (partly) eaten by a wild animal; unless ye are able to slaughter it (in due form); that which is sacrificed on stone (altars); (forbidden) also is the division (of meat) by raffling with arrows: that is impiety. This day have those who reject faith given up all hope of your religion: yet fear them not but fear Me. This day have I perfected your religion for you, completed my Favor upon you, and have chosen for you Islam as your religion. **But if any is forced by hunger, with no inclination to transgression**, God is indeed Oft-forgiving, Most Merciful."¹²
3. "Why should you not eat of what is slaughtered in Allah's name when he has already explained to you that **He has forbidden to you except when compelled by necessity** Many 'deviants' certainly mislead others by their whims out of ignorance, indeed Allah better knows those who cross limit"¹³
4. Say, "I do not find within that which was revealed to me anything forbidden to one who would eat it unless it be dead animal or blood spilled out or the flesh of swine- for indeed, it is impure- or it be [that slaughtered in] disobedience, dedicated to other than Allah, **But whoever is forced by [by necessity],neither desiring [it] nor transgressing [its limit]**, then indeed, your Lord is forgiving and merciful."¹⁴
5. He has only forbidden you to eat carrion, blood, swine and what is slaughtered in the name of any other than Allah, **But if someone is compelled by necessity-neither driven by desire nor exceeding immediate need-then surely Allah is All-forgiving, Most Merciful**¹⁵

In light of above verses Allah clearly stated in Quran for the situations leading towards invoking Necessity. As meat of Dead animal, flesh of swine(which repeatedly prohibited in different verses), all those animals which slaughtered except by name of Allah are

¹⁰ Ahmad bin hambal, musnad ahmad ibn hambl, musnad al-basriyyin hadith no; 21391 and 21394

¹¹ Surah Al-Baqarah 2:173

¹² Surah Al-Maaida 5:3

¹³ Surah Al-Anaam 6:119

¹⁴ Surah Al- Anam 6-145

¹⁵ Surah An-Nahal 16-115

prohibited in Quran, But if it invokes situation of extreme Hunger to one which gives serious threat to one's life he may Eat the flesh of Swine, meat of Dead in that Necessity situation but with some restrictions as Allah has Knowledge of our intentions if we intending to taste that meat then this is prohibited and it leads towards extreme penalty according to Quran.

Necessity in Different aspects of life:

In Illness: If a sick person is unable to commit himself a certain ruling in Islamic law because of doing it would cause increase in pain or increase in illness or damage to an organ, he is required to do it in a way that will not harm him. (Such as during the course of injury if one have wounds and if it is contacted by water during WADU, such wounded people is allowed not to wash that wounded area if it get harm from water)

Quranic verses supporting necessity during illness:

In the realm of fasting, Quran stated that: The month of Ramadan in which was revealed the Qur'an, a guidance for mankind, and clear proofs of the guidance, and the Criterion (of right and wrong). And whosoever of you is present, let him fast the month, and *whosoever of you is sick or on a journey, (let him fast the same) number of other days*. Allah desireth for you ease; He desireth not hardship for you; and (He desireth) that ye should complete the period, and that ye should magnify Allah for having guided you, and that peradventure ye may be thankful.¹⁶

As in above verse it is clearly stated that we have to keep fasts during month of Ramadan but if one is compelled by illness so he can keep fasts after being healthy, Or if someone is so ill and have fear to life by keeping fasts his illness will be increased or if someone is old and can't keep fast so he in that situation is not tie from his liability but he will have to give FIDYAH¹⁷, it means a condition has created in which you are exempted from certain laws due to necessity as Quran stated ; (2:184)

“Fasting for a limited number of days. So, whoever among you is ill or on a journey [during them] - then an equal number of other days [are to be made up]. And upon those who are able [to fast, but with hardship] - *a ransom [as substitute] of feeding a poor person [each day]*. And whoever volunteers good [i.e., excess] - it is better for him. But to fast is best for you, if you only knew.”¹⁸

FIDYAH in Hadith; Abu Bakr heard from Ibn Abbas reciting the following verse from the Quran: "And for those who can fast, they had a choice either to fast or to feed a poor person for every day." (2:184) Ibn Abbas explained that this verse is not abrogated, but rather it applies to elderly men and women who are unable to physically bear the hardship of fasting. In such cases, they can fulfill their obligation by feeding one poor person for each day they are unable to fast¹⁹

About HAJJ: it is written that if a pilgrim is ill or has an ailment in their scalp that necessitates shaving, they must make a compensation. This compensation can take three forms: fasting, feeding the needy, or offering a sacrifice.²⁰

Regarding Ablution in Holy Quran; O Believers! Abstain from prayer when you are intoxicated until you can comprehend what you are saying. Similarly, avoid prayer while in a state of ritual impurity, except when traveling. In such cases, you may perform Tayammum if

¹⁶ Surah Al-Baqarah 2-185

¹⁷ Fidia allowed only to those who missed or exempted from fasting due to illness, old age

¹⁸ Surah Al-Baqarah 2-184

¹⁹ Sahih al-Bukhari 4505

²⁰ Surah Al-Baqarah 2-196

water is not readily available. Tayammum involves striking your hands on pure earth and then rubbing your face and hands with the dust. Indeed, Allah is Forgiving and Compassionate.²¹

In light of Above verses we can say during any genuine reason we are also not exempted from the course of obligatory liabilities such as in Surah Nissa 4:43 clearly stated that if we are on any journey or on any place where we can't find pure water, so in that situation also we are not exempted from our obligations we can do (Tayamum) in such situation and complete our Obligations in that situation, Means in necessarily situations we are not allowed to skip our obligations but we can lead to mitigation by delaying all the rules or using alternatives.

1. **In Hardship situations:** If someone is in such place where there is nothing to eat and drink except Prohibited things (*Wine & swine*) so he may eat meat of Swine as per need not exceeding limited or he is thirsty, he can die due to thirst and water is not available so he can drink alcohol but in limit, if he can survive by drinking one sip so he is only allowed to drink one sip as in Holy Quran under necessity prohibited things are allowed²²
2. **Caliph Umar not followed HADD punishment in Famine:** The punishment for theft according to the Shari'ah is the cutting off of the thief's hand. This has been stated clearly in the Qur'an which says:
*As for the thief, the male and the female, amputate their hands in recompense for what they have committed, as a deterrent punishment from Allah. And Allah is Exalted in Might and Wise.*²³

Caliph Umar, however did not apply this ruling in the year of famine because he thought that such a ruling is not applicable in such a situation since famine had forced people to do so, and a compelled person has the right to save his life even if he takes someone else's property without his permission. So 'Umar has been reported as saying on one occasion when he did not apply this ruling" By God, if I had not known that you have used those boys and subjected them to hunger to the extent that if one of them had eaten what Allah has prohibited, it would be lawful for him, I would have cut off their hands.²⁴

Hence in the lights of above actions of companion of Prophet S.A.W, we come to conclusion that if one is forced by Necessity the prohibited became valid for him this was proved by Caliph Umar R.A in certain situations of famine as in Quran Allah clearly set punishment for theft that their hands should be chopped off but, during period of Companion Umar it emerged situation of famine and people were forced to theft for saving their lives in scarce conditions so, Caliph Umar didn't punish those who stole, however Quran also stated that if someone being under compulsion of necessity the Prohibited became valid for him as stated below verse:

*He has explained to you in detail what He has forbidden you, except that to which you are under compulsion of necessity.*²⁵

3. **Use of unlawful substances in Medicines:** Some lifesaving drugs contain prohibited substances such as
 - *As in Anesthesia creates unconsciousness,*
 - *Use of Pig in preventing blood clotting medicines (hypothyroidism).*

²¹ Surah Nisa 4-43

²² Surah Al Anam 6:119

²³ Surah Al Maidah 5:38

²⁴ I'lam, Vol.3, pp.22-3.

²⁵ Surah Al-An'aam 6:119

- ***Alcohol in Medication etc.***

These are prohibited in Islam but if we cannot use these it can lead to endanger the life, modern jurists such as **Ibn Hazm, Muhammad Abduh** stated that it is permissible to use wine in medication because it is the state of necessity²⁶

Doctrine of Necessity in view of Fiqah and according to different Islamic Scholars

AL-Zarkashi, al-Siyut and al-Hamawi al- Hanafi have defined necessity as; it is a situation in which he reaches at a limit where if he does not use a forbidden things, he will die or be about to die²⁷

AL-Dardir from the Maliki school stated: Necessity is preserving lives from being lost or from being greatly injured²⁸

Ibn Qudamah has defined it as; Allowing necessity is the state in which one fears losing one's life if one abstained from eating²⁹ In a famous book *Durar al-hukkam* by Ali hayder; Necessity is a compelling situation where one has to commit an illegal act³⁰

In short, all these definitions stated following elements

- ***There must be a fear of losing life or a fear of severe injury***
- ***This fear is to be wiped out by eating wiped a prohibited thing***

Link of necessity with Maslahah Al-Mursalah

Maslahah Al-Mursalah (Public Good)

Maliki and Hambli recognized Maslahah Al-Mursalah, it states that if a problem is arising, in order to solve that problem, no any order is available in Sharriah, so the way in which public feels good so it is acceptable, this is not for spiritual matters but it is for the matters of personal life.

Conditions of the consideration of Maslahah Al-Mursalah

- 1) The interest should be rest within the spirit of shariah and must not be in contradiction with the Quran Sunnah and analogy
- 2) the interest must be general and prevent to people as a whole
- 3) the interest must remove hardship from the people and the interest should be necessity³¹

²⁶ Hashiyat Ibn Abidin vol.1, p.228, Al Muhalla vol.1, p.174.

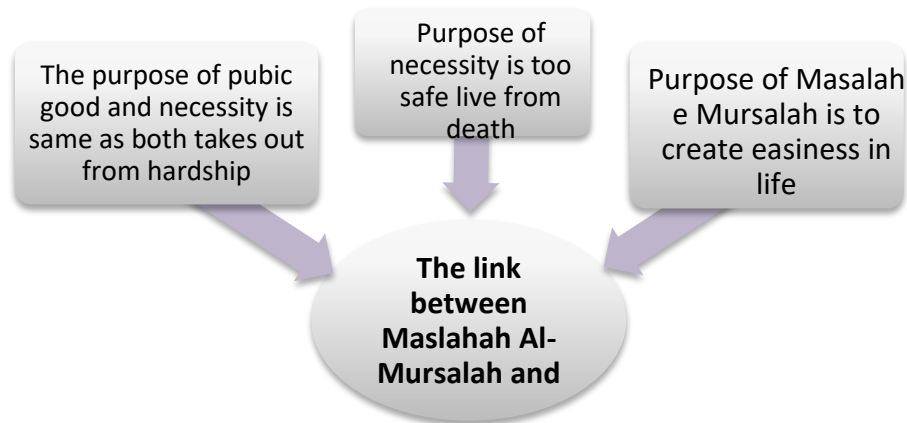
²⁷ Manthfa, vol. 2, p. 319, Ashb, p. 61, Ghamz vol. 1, p. 277.

²⁸ Saghir, vol. 2, p. 183

²⁹ Mughni, vol. 8, p. 595

³⁰ Darurah, p.10.

³¹ Mustasfa V.2 P;489



It is not important in public good that there should be a state of necessity, but by creating necessity it is important that it is threat to life.

"Masalih Mursalah" is a term in Islamic jurisprudence (Fiqh) that refers to "public interest" or "welfare considerations." It is a concept used by Islamic jurists and scholars to make legal rulings or decisions in situations where there is no explicit guidance in the Quran or Hadith (the narrations and actions of the Prophet Muhammad) but where there is a perceived benefit or harm to the public or society. Masalih Mursalah allows scholars to use their reasoning and judgment to determine what would be in the best welfare of the community

Maslahah mursalah is often used to address new and emerging issues that were not present during the life of the Prophet Muhammad (peace be upon him). For example, the use of modern technology such as the internet and social media raises a number of new legal questions. Maslahah mursalah can be used to develop new rulings that are consistent with the spirit of Islamic law, even if there is no explicit precedent for them.

However, it is important to note that maslahah mursalah is not a carte blanche for scholars to make up new laws.

There are several conditions that must be fulfilled before a maslahah can be considered mursalah:

- It must be a genuine public interest, not a private or individual interest.
- It must be real and tangible, not speculative or hypothetical.
- It must not be outweighed by any opposing harm.
- It must be consistent with the overall objectives of Islamic law, such as justice, mercy, and the promotion of human well-being.

Some examples of maslahah mursalah include:

- The establishment of a banking system to facilitate economic activity.
- The development of infrastructure such as roads, bridges, and hospitals.
- The regulation of new technologies such as the internet and social media.
- The development of new educational and healthcare programs.

Maslahah mursalah is a powerful tool that can be used to address the challenges of the modern world in a way that is consistent with the spirit of Islamic law. However, it is important to use it carefully and responsibly, in accordance with the conditions outlined above. In short Maslahah Mursalah can be invoked in necessity where there is public good but that easiness should not create an unnecessary hype which is in conflict with Quran and Sunnah, it is important to provide easiness subject to Shariat and Morality.

Istihsan:

Istihsan is a related concept in Islamic jurisprudence, where jurists exercise juridical preference based on public interest. While Masalih Mursalah considers broader public interest, Istihsan focuses on the interests of individuals and specific cases. Istihsan is an identical principle given by Imam Abu Hanifa, It is one of the secondary sources of law, Imam Malk and Imam Hambl believed on it but Imam Shaafi doesn't support this principle. Sometimes through Qiyas (Analogy) a difficult order is driven and it became very difficult to follow, in order to create easiness Istihsan occur, but that easiness should be subjected to Sharriah.

Istihsan Acc to different fiqh Scholars:

SARAKHSI: Istihsan is setting aside an established analogy in favor of a superior evidence, that is the Quran, the Sunnah or a stronger qiyas³²

Al Sarakhsi says that: Qiyas and Istihsan are in reality two types of Qiyas. One is *jali*, but its effect is weak, therefore, it has been called Qiyas. The other is *khafi* (concealed), but its effect is stronger, therefore it has been called Istihsan, that is, *qiyas mustahsan* (approved, preferred). The preference is due to effect and no because it is manifest or concealed. It is like this world and the hereafter: this world manifest whereas the hereafter is concealed³³

Al Bazdawi: Istihsan is moving away from implications of analogy to an analogy that is stronger than it, or it is restriction of analogy by evidence that is stronger than it.³⁴

Al Halwani: defines Istihsan as giving up analogy for stronger evidence from the Holy Quran, Sunnah and Ijma³⁵

Ibn al- Arabi: Istihsan is to abandon exceptionally what is required by law because applying the existing law would lead to departure from some of its proper objectives, accordingly he has divided Istihsan in four division:

- 1) Leaving evidence on the grounds of consensus (IJMA)
- 2) Leaving it on ground of custom (urf)
- 3) Leaving it on the grounds of public interest (maslah)
- 4) Leaving it on the grounds of hardship and necessity.³⁶

Form above definition we can found that Qiyas has been superseded by another qiyas so called Istihsan in order to remove hardship, in Istihsan jurist can bypass the already present custom, qiyas and he can derived another analogy based on Sharriah.

Example of Istihsan:

Abu Hanifah on deciding the issue of the person who eats during fast due to forgetfulness, Abu Hanifah has been reported to have exclaimed: "Had it not been for the report by the people, I would have said that he should repeat his fast." What he meant by this was that strong application of the rules of fasting requires that anyone eating food has broken the fast.

³² Sarakhsi Vol-2, p 200-2

³³ Al Sarakhsi, al- Mabsut, vol 10,151.

³⁴ Usul al- Bazdawi, Kashf al-Asrar vol.4,7-8.

³⁵ *ibid*

³⁶ Ahkam vol 2, P: 57.

A report from the Prophet (peace be on him) stated that "liability for three things has been lifted from my Ummah: forgetfulness; mistake; and duress." This is an example of Istihsan where a text has been preferred over analogy, and by means of which an exception has been created³⁷

Link of Istihsan with necessity:

Necessity has been recognized by the Qur'an and the Traditions of the Prophet as a well known source for abandoning the existing law.

While both Istihsan and recognizing necessity aim to alleviate hardship, their approaches differ subtly. Istihsan, as envisioned by Hanafi jurist al-Sarakhsi, seeks ease and convenience within existing legal frameworks. It allows for departures from strict analogy (qiyas) when such application would cause excessive hardship, offering rulings that promote public welfare and ease human burdens. Al-Sarakhsi likened this principle to a fundamental religious tenet: avoiding hardship, as enshrined in the Quran's message to believers. Essentially, Istihsan acts as a flexible tool within legal structures, bending towards solutions that ease burdens without straying entirely from established norms, as stated in Quran.

"God intends facility for you and does not want to put you in hardship."³⁸
(Surah Baqarah)

Similarly, one can link necessity with Istihsan as: In Islamic teachings, a woman's right to cover her body is balanced with the understanding that situations can arise where revealing parts of it becomes necessary. For instance, medical examinations might require temporary unveiling. This flexibility emerges from the principle of Istihsan, which allows legal scholars to consider exceptional circumstances and favor rulings that ease burdens and facilitate well-being. This means that respecting an individual's modesty isn't in conflict with seeking necessary medical care, and both aspects can be harmonized within Islamic principles³⁹

As necessity is a ground in which we can surpass the law in order to avoid hardship i.e.: acc: to analogy pure water is permissible for ablution but in case of wells in which dirt or carcasses of animals have fallen, if we remain adherent to analogy it means nonuse of these wells, and this would cause hardship to the people. The principle of necessity requires the use of these well be permitted by observing formal cleaning methods, hence Istihsan in this case is justified by necessity in removing hardship.⁴⁰

In Islam, it is a well principle that forbidding of sale which does not exist at the time of sale. However, in terms of Istihsan, *Salam* (advance sale in which the price is determined) has been accepted on the conditions that the time of delivery is fixed and that the parties are able to meet the conditions of their agreement. This exception is according to the tradition of prophet that said: "the prophet prohibited the sale of non-existent objects but he permitted

³⁷ Abd al- Aziz al-Bukhari, kashaf al asrar, vol.4,7.

³⁸ Surah Baqarah 2:185

³⁹ Mabsut, vol 10, P 145

⁴⁰ Sarakhsi vol 2 p 203, kashf vol 4 p 11

salam⁴¹”, in another hadith the prophet said: “those who pay in advance must do so for a specified measure and weight with a specified time fixed.⁴²

In Islamic law, scholars highlight the case of "Istisna", a contract for the manufacture of goods, as a prime example of exceptional "Istihsan" (juristic reasoning based on public interest). This contract allows someone to order specific goods from a craftsman, even though the object doesn't yet exist, with a price agreed upon at the outset. This seemingly unconventional practice is validated by "Istihsan" due to its practical benefits, enabling both the customer to fulfill their needs and the craftsman to secure work and payment.

In another example, Strict analogical reasoning in court typically demands absolute witness trustworthiness for testimony to be admissible, but flexibility exists. While judicial decisions rest on truths revealed by just witnesses, exceptions are made in situations where finding such figures proves impossible. In such cases, the judge, through "Istihsän," holds the authority to accept imperfect witnesses to safeguard the rights of the people, acknowledging the need for practical solutions even when strict analogy might fall short. This nuanced approach recognizes the importance of both upholding truth and ensuring justice, even in challenging circumstances.⁴³

Limitations of Istihsan:

Everything is accepted In society until it does not cause any dis comfort to any person or cause any disturbance in society, in Istihsan a jurist can derive his own opinion by bypassing the already present analogical deduction because maybe the new opinion cause ease to that person or the older one cause any disturbance or discomfort to a person or a society. Therefore, anything that does not disturb the social order or cause injustice or oppression is acceptable, as long as it does not go against the sharia, as stipulated in the below mentioned hadith:

Holy Prophet stated that: *A Muslim is a brother of another Muslim so he should not oppress him, nor he should hand him over the oppressor. Whoever fulfilled the needs of his brother, Allah will fulfill his needs; whoever brought his Muslim brother out of discomfort Allah will bring him out of the discomforts of the day of resurrection, and whoever screened a Muslim, Allah will screen him on the day of resurrection.*⁴⁴

ISTISHAB. (Presumption of Continuity):

The word Istishab means the continuance of companionship. Technically it means presumption of continuance of an earlier rule or its continued absence.⁴⁵ In Islamic law, it refers to the principle that a ruling established for a particular case or situation continues to apply unless there is evidence to indicate that it has been abrogated or superseded. This means that if a certain action was considered lawful or unlawful in the past, it is presumed to remain so unless there is a clear reason to believe otherwise.

⁴¹ Sahih al Bukhari vol 3 p 44; kitab ul salam hadith no 3

⁴² Sunan Abu Dawood, Hadith no 3456

⁴³ Zahrah, p.246, Kamali, Principles of Islamic Jurisprudence, p.257.

⁴⁴ Sahih Bukhari vol 3, book 43, hadith 622, https://www.iium.edu.my/deed/hadith/bukhari/043_sbt.html

⁴⁵ Al Sarakhsi, kitab al usul vol 2,223

According to Malki, Shaafi and Hanbali, Istishab is a perfect proof, that is, on both side negative and positive, Acc: to Hanafi, Istishab is a proof restricted to negative side only, it is proof for denying something but not for establishing a claim.⁴⁶

General principle forms the basis of Istishab:

- **Rule of permissibility:** The presumption is that all things are permitted (except prayer matters), unless prohibited by the shariah. This rule applies to beneficial things alone, like food, drink and benefiting from all good things. It is known that spilling blood without justification is prohibited, indulging in sex without lawful permission is prohibited.

i.e.: IJMA remains continue if dispute arises within Ulama(scholars) after IJMA, so it is believed that even after dispute between ulama, IJMA will still remain in force.

- **Rule of Prohibitory:** the presumption is that all things are prohibited unless shariah permits them.

Drinking wine is prohibited but medicine which contain alcoholic substance are allowed.

- **Presumption of Liability (INNOCENT UNTILL PROVEN GUILTY):** this principle means that there is no presumption of liability against anyone, and all liability has to be proved, in it the burden of proof lies on the person making a claim

e.g.: A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father. If no evidence were given on either side, B would be entitled to retain his possession. Therefore the burden of proof is on A⁴⁷

- **Certainty does not give way to doubt:** this means that once a thing is established beyond doubt, it can be set aside through equally certain evidence.

e.g.: if a person is sure that he has done ablution and then he doubts of having ablution or not, it will be believed that he is pure until certainty of ablution prevails, but if doubt prevails over certainty than that person has to perform ablution again.

Link between ISTISHAB and NECESSITY:

The link between Istishab and Necessity lies in their complementary nature. Istishab provides a general presumption of continuity, while Necessity allows for exceptions to be made to that presumption in specific cases.

Can Istishab be used to justify rulings based on Necessity:

When legal questions arise in novel situations with no direct guidance in Holy Quran and Sunnah, Istishab, the principle of continuity, offers a bridge. It presumes that rulings from relevant past cases remain applicable unless compelling reasons necessitate divergence. This presumption of continuity ensures stability while leaving room for necessary adjustments through other legal tools like Necessity, creating a flexible and responsive legal framework.

⁴⁶ <https://islamicbankers.files.wordpress.com/2015/08/presumption-of-continuity-141.pdf>

⁴⁷ Art 117 of Qanoon e Shahadat Ordinance 1984

i.e. The prohibition of eating pork: This prohibition is based on the Quran and Sunnah. However, in a situation of extreme hunger where no other food is available, the principle of Necessity could allow a person to eat pork to avoid starvation⁴⁸

The obligation to pray five times a day This obligation is also based on the Quran and Sunnah. However, if a person is sick or injured and unable to stand or kneel, the principle of Necessity may allow them to pray in a sitting or lying down position, as stipulated in hadith that:

*Umran Ibn al-Husayn said 'I was affected by hemorrhoids, and I asked the prophet what to do in prayer and he said: ' Pray standing but if you cannot do so, pray sitting and if you cannot do so, pray lying down on your side.'*⁴⁹

Sadd al- Dhari'ah (Blocking the lawful means to an unlawful End):

The principle of Sadd al- Dhari'ah is attributed to Maliki and Hambli School but Shaafi and Hanafi do not accept it. This term means “blocking the lawful means to an unlawful end”, it literally refers as “blocking the means” and refers to the practice of prohibiting activities that are not haram(forbidden) but could lead to haram consequences.

Sadd al- Dhari'ah always refers for public good.

The principle is not concerned with unlawful acts, because those are prohibited anyway. It is concerned with lawful act that maybe prohibited as they lead to unlawful result.

Jurists divides lawful acts into three kinds:

- **Those lawful acts that rarely leads to harmful results:** the interest by performing such acts is greater than the injury to be caused.

e.g. vineyards for grapes, grapes are used for a large number of purposes, but they may also be used for making wine hence the benefits are more than harms.

- **Acts that usually lead to harmful result:** the injury in these acts are more than the benefits.

e.g. the sale of arms during waves of terrorism, renting out property to one who will use it for unlawful purposes, selling of grapes to a winery, like the cultivation of poppy from which opium will be made here cultivation is legal but it is general fact that cultivation of poppy will be used to make opium hence blocking the lawful act in order to avoid unlawful result.

Link between Sadd al-Dhari'ah and Necessity:

Resorting to blocking or opening means may be based on necessity as well as public interest. In this regard necessity leads to different sorts of rulings in order to prevent injuries before they materialize. It would lead to the lawful act being prohibited, or to the unlawful act being permitted, or to release from fulfilling one's legal obligations.

1. **Prohibiting lawful act:** a woman, denied inheritance by her terminally ill husband's last-ditch divorce in hopes of excluding her, finds justice through the principle of necessity. This exception, acknowledging the husband's ill intent and potential

⁴⁸ See Surah Baqarah 2:173

⁴⁹ Sahih Al Bukhari vol 2 page 41

hardship for the wife, grants her rightful inheritance, proving that even seemingly rigid laws can bend to prevent injustice in dire circumstances. Giving her the right to inherit prevents divorce being a means for such abuse⁵⁰, here divorce is not applicable although divorce is lawful but if husband pronounce divorce in death bed in order to exclude wife from the right of inheritance so that divorce is not acceptable here Sadd al-Dhari'ah refers that blocking husband rights in order to avoid circumstances.

e.g. 'Umar ibn al-Khattab corresponded with Hudhayfah regarding his marriage to a new Jewish wife, urging him to reconsider the union. When Hudhayfah sought clarification from 'Umar regarding the marriage's legality, 'Umar affirmed its permissibility within Islamic law. However, 'Umar expressed concern that if Hudhayfah's example was followed, it might lead to a trend of marrying non-Muslim women (ahl al-kitab) while leaving Muslim women without suitable matches. Additionally, in an alternate version, 'Umar was apprehensive that Muslims might engage in unions with non-Muslim prostitutes. Despite the Quran allowing such marriages and 'Umar's awareness of this, he believed that safeguarding the interests of Islamic society at that time necessitated discouraging such practices, viewing it as imperative despite its permissibility within Islamic jurisprudence.⁵¹

These cases showcase the potent interplay between public interest and preventing harm, a cornerstone of Islamic law's "blocking the means" principle. By prohibiting a lawful act like Hudhayfah's marriage, potential societal harm from widespread non-Muslim marriages is averted. While the Qur'an allows such unions, the broader "state of necessity" – in its broader sense of safeguarding public well-being – justifies this intervention. Though the immediate danger might seem unclear, the long-term consequences of unchecked non-Muslim marriages, as perceived by 'Umar, elevate it to a matter of societal necessity. Here, the law bends not to address individual harm, but to preemptively shield the larger Muslim community, a crucial facet of this dynamic principle.

2. PERMITTING UNLAWFUL ACTS:

An unlawful act maybe treated as lawful due to state of necessity in order to save from expected injury as:

- a) Supporting an enemy at war with Muslims is typically forbidden, as it strengthens their hand and potentially harms Muslims. However, in dire situations where Muslims lack the means to defend themselves and their land, a unique exception arises. To avert greater harm and secure a ceasefire, offering financial aid to the enemy becomes permissible, even if it appears counterintuitive. In this specific context, the temporary legalization of an otherwise forbidden act serves to protect the greater good and safeguard the Muslim community.⁵²
- b) Across Islamic legal schools, offering bribes is generally considered a grave offense. However, Maliki and Hanbali jurists recognize a rare exception: when facing an oppressor and lacking alternative means to protect oneself or secure undisputed rights. This permission hinges on several conditions: the oppressor's actions must cause demonstrably greater harm than the bribe itself, and the individual's rights must be

⁵⁰ Bidayah vol 2 p 82-83

⁵¹ Tarikh al tabari vol 3 p 588, Jami al-bayain vol 4 p 366-367

⁵² Muwafaqat vol.2 p.352

demonstrably proven. In essence, this exception acknowledges the desperate need to escape oppression, even if it involves a morally questionable act. However, it's crucial to remember that this permission remains conditional and shouldn't be construed as a blanket endorsement of bribery.⁵³

Political Aspect of Theory of Necessity in Islam:

As from above reading we got to know that in Islam necessity can be invoked in the situation of life and death, where it is the dire need of something and if you do it, it will go against the shariah but it should be done due to the situation of life and death but under some certain limits same as one can do anything from his mind without knowing the consequences of that work as Allah has strongly disagreed in Quran from those who make their own hypothesis without just- justification.

Surah Mudasir⁵⁴

[Leave Me 'to deal' with the one I created alone, [11] and blessed with abundant wealth [12] and children present before his eyes, [13] and for whom I smoothed the way 'to success'. [14] Yet he is greedy for more. [15] By no means! He has been 'stubbornly' hostile to Our revelations. [16] I will soon overwhelm him with hardship. [17] He thought and plotted. [18] So woe to him for what he plotted! [19] And once more, woe to him for what he plotted! [20] Then he looked around, [21] frowned and scowled, [22] then turned his back and acted arrogantly, [23] and said, "This is nothing but 'the work of' a human being. [24] I will cast him into Hellfire. [25] And what will make you realize what Hellfire is?[26]

As Allah Mentioned and highlight Waleed bin Mugerah (well known Ruler & wealthiest man in Arab) He despite willfully knowing the reality that Prophet is Apostle and Quran is Revealed book of Allah Almighty he was knowing the fact and being a Ruler of the Quraish nation, The people of Quraish was about to become part of Islam on his saying, but he for the sake of keeping pleasure of Abu jahl another ruler and making him happy and supported him, he said that Prophet is a Poet and Magician and Quran is poetry of Prophet Despite knowing reality that Prophet is true apostle of Allah and Quran is holy book of Allah, but he refused that to support another ruler and in the fear that majority of Quraish shall be converted into Islam by knowing the Reality so he made his own statement & in necessity supported another ruler Abu jahl, then Allah Almighty in Surah Al-Muddasir stated that "I have given him wealth⁵⁵ and given him obligated sons⁵⁶ but he(Mugerah) ignored apostle and my Ayahs(Quran)⁵⁷ I will put him(Mugerah) on mountain of fire⁵⁸ and Allah put lanat on him(Mugerah) again and again⁵⁹ and Waleed bin Mugerah said Prophet a Magician⁶⁰ and Quran is book of men⁶¹and then Allah stated nearly I will him in Hell⁶²

In Tafseer of Surah al-Muddasir From Ayah 12 to 26 there is Stated about two Rulers and Wealthiest Men (Waleed bin Mugerah and Abu jahl), When Waleed bin Mugerah Supported Abu Jahl and keep him in pleasure and for sake of his pleasure and created his own Necessity supported him and Given statement against Prophet and Holy Quran despite knowing the

⁵³ *ibid*

⁵⁴ Surah Al -Mudasir 74 Ayat 11-26

⁵⁵ Surah Al-Muddasir 74:12

⁵⁶ Surah Al-Muddasir 74:13

⁵⁷ Surah Al-Muddasir 74:16

⁵⁸ Surah Al-Muddasir 74:17

⁵⁹ Surah Al-Muddasir 74:19-20

⁶⁰ Surah Al-Muddasir 74:24

⁶¹ Surah Al-Muddasir 74:25

⁶² Surah Al-Muddasir 74:26

Fact, So Allah Almighty Condemn his Statement Against Prophet and Quran and revealed ayahs of Surah Muddasir In which Allah Almighty stated to put him in Hell, Mughera stated against Prophet and Holy Quran on his own, whatever comes in his mind he stated against Holy Prophet, and Allah Almighty has strictly condemned it in strong words that no-one should dare to speak against the reality

By reading this, we can clearly extract that for the sake of supporting someone and supporting those who are in power is strictly prohibited, even if they are wrong just like in this case that Prophet is indeed true apostle of Allah, Despite Mughera knowing about it he supported another ruler which is strongly opposed by the Allah Almighty hence one should not support one who is wrong (come what may).

Theory of Necessity in Islamic Republic of Pakistan:

Theory of necessity which has very bad consequences on the history of Pakistan, as Pakistan remains under usurpers those who hampers the rule of law, who rules a democratic country more than a democratic elected government, due to this theory these usurpers were allowed to rule legitimately, this theory proven to be costly and set a black precedent in Pakistan, we have earlier discussed about the usage of this theory in western concept and in Islamic concept, where it could only be use under intense circumstances where necessity is subjected to death so necessity can be invoked, Pakistan so called the Islamic republic, the country which has deep roots in Islamic Ideology, still uses the theory which is against the norms of Islam as in Surah Mudassir Allah Almighty has strongly disagreed with those who did any discussion on their own despite knowing the fact same as in Pakistan, invoking necessity in order to support the ruler is against the Islamic terms and the law of Land.

Introduction of Necessity in Pakistan's Legal System:

Theory of necessity invoked by none other than the Chief Justice of federal court Justice Muneer, who introduces a theory in order to support a ruler, he uses a theory which was unknown to the judicial system of Pakistan.

Justice Muneer for the 1st time uses theory of necessity in the case "Governor General reference to the Federal Court"⁶³

Era of Justice Muneer invoking Doctrine of Necessity:

Previously in the case of federation of Pak v Molvi Tameezudin⁶⁴; federal court led by CJ Muneer held that if there is no assent so there will be no law hence clinching the writ power of Sindh Chief court, in result the 1st Constituent Assembly remains dissolved, secondly in the case of Usif Patel v The Crown⁶⁵ Federal Court again led by CJ. Muneer held that GG has no validation power, no ordinance power, no constitutional framing power, the decision of Federal Court put the country in a greater constitutional crisis of than, when the GG had dissolved the Constituent Assembly, commenting on this situation, the central law minster H.S Suhrawardy frankly stated the position said that the country is facing with the grave situation⁶⁶, there was no federal legislature was present to validate the laws which were declared ultravires by federal court.

Thirdly In GG reference to federal court⁶⁷ Federal court was asked by GG to advise me (GG), under this, FC under CJ. Muneer validates all the laws which were declared invalid by FC in

⁶³ PLD 1955 FC 435

⁶⁴ PLD 1955 FC 240

⁶⁵ PLD 1955 FC 387

⁶⁶ Dawn 15 April 1955

⁶⁷ PLD 1955 FC 435

Usif Patel case, Justice Muneer introduced *doctrine of necessity* in which he allowed to validate the laws retrospectively, J. Muneer allowed GG allegedly power by using necessity, from this case Doctrine of Necessity was introduced in Pakistan, the same year of 1955, Justice Muneer again uses *doctrine of necessity* in the case of The Federation of Pakistan v Ali Ahmed Hussain Shah⁶⁸ in which he again validate two acts which were supposed to declared as invalid under judgement of Molvi Tameezudin still these act was validly approved as a result of federal court judgement in Governor Generals Reference on the basis of the doctrine of necessity, as earlier in Molvi Tameezudin case FC under CJ Muneer decided that no assent means no law but here in approved using doctrine of necessity, invoking doctrine of necessity two times in the same year proven to be shaken the democratic norms of Islamic Republic of Pakistan.

RULER supporting RULER:

As we know that administrative control of superior judiciary lies in the hands of Chief Justice, he is considered as the representator of the superior judiciary, same as the PM as the head of the Govt, President as the head of state and the Army Chief as the chief of Army.

In the case of *STATE V DOSSO*⁶⁹, On 7 oct 1958, Pakistan was experienced with 1st ever martial law under Ayub Khan as the Chief Martial Law Administrator, he abrogated the 1st Constitution, his martial law was challenged in Dosso Case at Supreme Court, here Supreme Court declared the martial law legitimate, Justice Muneer invoked another alien theory of Hens kelson, *he stated kelson's theory of Law and State*, In which justice Muneer in order to support a ruler imposed an alien theory in which he describe that if it occurs to change in system and the population of that state did not resist so that change will be considered as legitimate, justice Muneer shows consent on the martial law ruler, who acquired power in an indirect and unconstitutional way and seized constitution of 1956 and give his own LFO and also seized FR, SC which considered to be Savior of Constitution and FR's given an absolute assent to Military ruler and despite condemning and declaring Martial law in democratic state invalid, and CJ not only give assent to Ayub Khan but also set a precedent for future Martial laws to be declared as legitimate.

Impact of Necessity:

As From overiewing and highlighting era of CJ Muneer we observed that he not only initiate Alien Theory of Necessity in Pakistan in which he himself seemed and observed to be double minded and frustrated, in Tameezudin Case⁷⁰ he said *no assent no law* but in GG reference case⁷¹ and The Federation of Pakistan v Ali Ahmed Hussain Shah⁷² he then himself declined from his own decision and Said *Laws can be validate retrospectively*, where he initiate an alien Theory and said *necessity knows no laws* and set a precedent for future cases that any illegal act can be validate by SC through invoking and using that precedent of Necessity. Then in *State v Dosso* he introduced another Alien theory in Islamic republic and not only validated martial law but also supported that martial law ruler in a Democratic state, by invoking kelson's theory he opened the gate for upcoming Martial law rulers. Out of 76 years of Pakistan since its inception, Pakistan is ruled 33 years by dictators, and the credit to giving permission to martial law rulers lies at none other than the stone founder CJ Muneer. As Allah almighty in above mentioned story of Mugerah and Abu jahl when Ruler supports

⁶⁸ PLD 1955 FC 522

⁶⁹ PLD 1958 SC 533

⁷⁰ PLD 1955 FC 240

⁷¹ PLD 1955 FC 435

⁷² PLD 1955 FC 522

ruler over right and true Allah Almighty not only strongly condemned but set punishment for Waleed bin Mugerah in Surah Muddasir⁷³, Hell and fire is punishment for that act, and in the case of Pakistan history CJ Muneer Being head of judiciary also supported another illegal ruler despite demanding fair and righteous elections from Martial law ruler, CJ did act same as of Waleed bin Mugerah.

these constitutional cases significantly impacted Pakistan's political landscape. The entire constitutional and administrative framework was severely shaken, and the legal justification for the arbitrary actions of an unfit governor-general required complex legal maneuvering and abstract reasoning. The federal court, facing a self-created legal quagmire, imported the alien concept of "civil or state necessity" to escape the mess, unaware of its potential harm to Pakistan's future constitutional path. Chief Justice Munir, central to this maneuver, cannot be absolved of responsibility for setting Pakistan on an uncertain and costly constitutional and political course..⁷⁴

BURIAL OF NECESSITY:

As mentioned earlier that martial law rule was validated due to necessity, many steps of usurpers were successfully ratified by CJ Munir by using State Necessity in MOLVI TAMEZUDDIN and DOSSO CASE and GG REFERENCE CASE but in the case of ASMA JILLANI's⁷⁵, SC under Chief justice Hamood ur Rehman rejected the reference of Dosso case where theories of kelson and validation of martial law was discussed, in its decision SC rejected the doctrine used in Dosso case, While Kelsen's theory lacked universal acceptance and wasn't a fundamental principle of jurisprudence, nor did it aim to justify totalitarianism, the court emphasized the existence of Pakistan's Objective Resolution, which vests legal sovereignty solely in God. Therefore, relying on Western theories was deemed unnecessary. Furthermore, the court declared the transfer of power from Ayub to Yahya and all of Yahya's subsequent actions, including the imposition of martial law, as unconstitutional and void.

Impact of Asma Jilani case:

The Asma Jilani case proved pivotal in weakening the concept of dictatorship in Islamic states. By rejecting the "Doctrine of Necessity," it paved the way for democracy in Pakistan. This landmark case led to the creation of the interim Constitution of 1972 and the permanent Constitution of 1973. The judgment forced then-civilian Martial Law Administrator Bhutto to lift martial law, highlighting the limitations of imposing Western ideals on non-Western, Muslim countries like Pakistan. As enshrined in the 1973 Constitution, sovereignty in Pakistan ultimately rests with Allah Almighty.⁷⁶

Re-birth of necessity:

As discussed earlier Supreme court took a bold decision by declaring invalid the martial law and buried the theory of necessity but after 5 years necessity was invoked again by honorable supreme court itself going against its own settled judgement, Necessity was re-birth, again Martial law was declared legitimate in the case of **Nusrat Bhutto's v COAS**⁷⁷ due to state necessity between political parties (PNA and PPP), SC allowed Zia to hold power and even allowed to alter the constitution due to the requirements of State necessity and welfare of the people.

⁷³ Surah Al-Muddasir 74:26

⁷⁴ P;89, Constitutional and Political History of Pakistan by Hamid Khan

⁷⁵ PLD 1972 SC 139

⁷⁶ Art 2 A of the constitution of the Islamic Republic of Pakistan,1973

⁷⁷ PLD 1977 SC 657

In another case called **Zafar Ali Shah v General Pervez Musharraf**⁷⁸ SC again validated the martial law by describing it as the State necessity, SC held that a situation was arisen In which there was no any remedy was available and the intervention by the armed forces become inevitable thus that intervention was validated on the basis of doctrine of state necessity and the principle of *Salus populi suprema lex* as embodied in Begum Nusrat Bhutto case. As it is saying that *OLD HABITS DIES HARD*, SC went two steps more forward SC allowed Musharraf to continue for the period of 3 years and allowed to alter the constitution ignoring the bitter experience of the past when Zia was allowed to alter the constitution in which he changed the whole face of the constitution.

Critical Analysis:

As we have discussed earlier about the concept of necessity In Islam and how necessity uses In the Islamic Republic of Pakistan, Holy Quran permitting necessity in the case of life and death in which Allah Almighty allows to eat prohibited things within the limits, As stated in Surah Mudasir when one ruler (Mughera) supported another ruler (Abu-Jahl) over right and true prophet and book of Allah almighty, Allah clearly stated in Quran⁷⁹ that I will put him Hell that he supported Ruler and make his own theory by his mind about prophet and Quran similarly CJ Munir did he Supported Martial law and Martial ruler despite condemning wrong as wrong and he should have declared martial of Ayub khan illegal despite making his own mind created theories which haven't used in the sense in which the theory initiated, here the story of Mugerah is parallel with CJ Munir that he did same as Mugerah did, Mugerah also supported a ruler by creating his own statements so did by CJ Munir, Mughera supported Abu jehal's narrative about Holy Prophet, Mughera supported even he knows the truth despite having knowledge of Holy Prophet truthfulness although Allah Almighty has condemned it in strong words, same as in Pakistan in the Governor general reference case, CJ Munir endorsed theory of necessity in which he validate the laws retrospectively by invoking the theory of state necessity without taking due steps, due to doctrine of necessity Martial laws were validated, as in Dosso case, CJ Munir again take the side of Kelson theory of law and state, in which he emphasizes that if change is not resisted by the population of territory so this change is acceptable, by invoking this theory CJ Munir bypassed the Constitutional Machinery, due to this theory many martial laws were declared valid even Dictators were allowed to amend the constitution, validation of martial laws of Ayub set a black precedent in the history of Pakistan, after Ayub, martial law of Zia, Emergency of Musharraf was declared legal by taking the support of CJ Munir's imported theory but court for the 1st time took a gallant decision by taking the transfer of power from Ayub to Yahya, martial of Yahya was illegal hence in result of this much anticipated decision, democracy was restored resulting in the birth of 1973 constitution, 1st general elections, but soon again old habit dominated again Martial law of Zia was declared legal, SC bypassing its own well settled precedent, the Asma Jilani case established that Western legal theories are not universally applicable and may evolve over time. Their applicability is further limited by societal norms and religious beliefs. In Pakistan, instead of relying on these mutable and abstract concepts, we should draw our inspiration from the immutable Islamic principles bestowed upon us by Allah Almighty. Our ground norms, the fundamental principles of our legal system, are deeply rooted in our Islamic faith, which transcends mere religion and encompasses a comprehensive way of life. Founded on the bedrock of Islamic ideology, Pakistan's governance must adhere to its fundamental principles. Any deviation from this path, Allah forbid, would amount to a fundamental restructuring of the nation's political framework, essentially dismantling its very

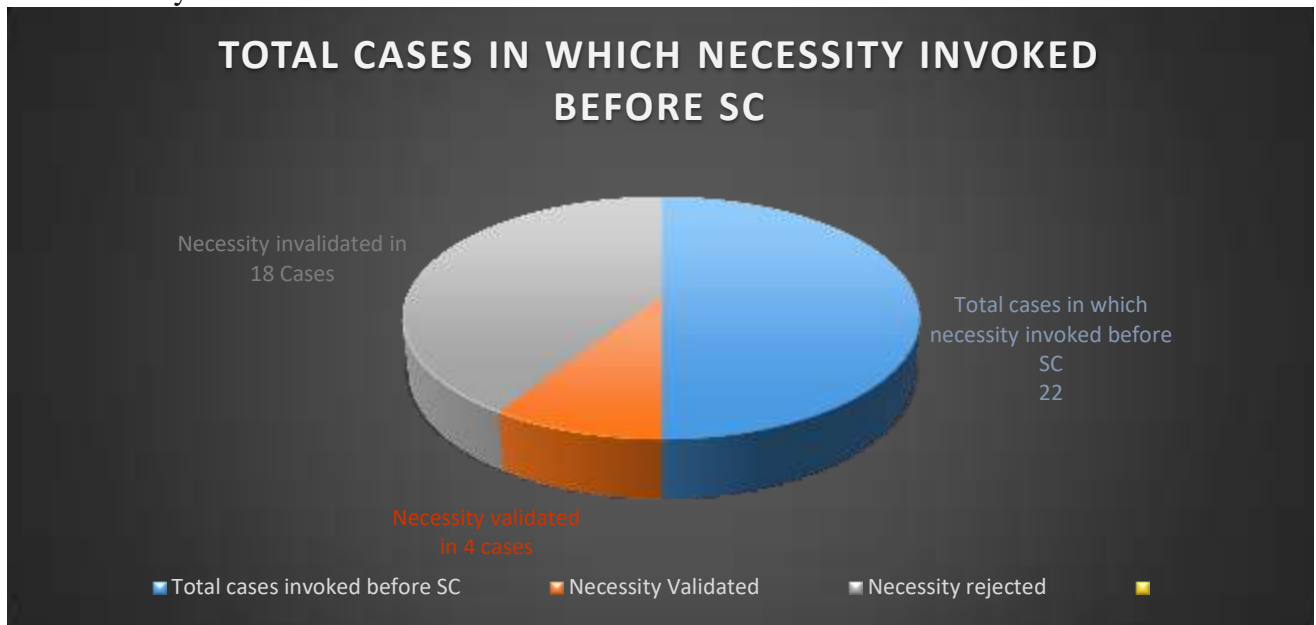
⁷⁸ PLD 2000 SC 869

⁷⁹ Surah Al-Muddasir 74:26

core concept. The objective resolution is not just a formality but it embodies the spirit and fundamental norms of the constitutional concept of Pakistan, so invoking the doctrine of necessity by its introducer CJ Muneer results in the breach of not only land law but Islamic norms also, Justice Munir did something which Waleed bin Mugerah did, In result Allah Almighty has set a punish for him means Allah Almighty has disagreed with those who even knows the truth support evil, here Justice Muneer being in the condition of extracting facts he supported rulers earlier GG Ghulam Muhammad and then Ayub Khan, due to this theory Pakistan suffered a lot from abrogating approximately 2 years old constitution (1956) even its born period is more than its life to the giving powers to General Musharraf to amend the Constitution under the pretext of Doctrine of Necessity.

GRAPHICAL DATA:

During our research we found number of cases in which doctrine of necessity was invoked before SC but in majority of the case, doctrine of necessity was invalidated in different cases but still the doctrine of necessity has affected the most even it is invalidated more than validation, Researchers found 22 PLD cases in which necessity invoked before SC. SC validated only 4 cases and invalidated 18 cases out of 22 PLD cases.



CONCLUSION:

In short Doctrine of necessity has caused a wide disruption for Pakistan on national level as well as international level, today no country believes on the Pakistan Democratic Govt due to the uncertainty of the tenure (today one is PM tomorrow is absconder), in broad sense it has shaken the roots of Pakistan's Democracy, if we take a recent example Gulf countries giving loan, doing investment subject to the surety given by Military, Countries such as Saudi Arabia, Qatar, and the UAE putting a lot of pressure for guarantees for the continuation of policies from the all-powerful army that their future investment would not face issues of non-implementation, these countries are justifying in demanding that the army act as a guarantor due to the political instability.⁸⁰

⁸⁰ Institutionalizing army's role in business (DAWN 7 Aug. 2023)
<https://www.dawn.com/news/1768861>

Pakistan's basic norm is objective resolution⁸¹ which set that the Sovereignty belongs to Allah Almighty and the authority to be exercised by the people of Pakistan within the limits prescribed by him is a sacred trust.

It further states that the State shall exercise its powers and authority through the chosen representatives of the people⁸²,

Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed.⁸³

While reading this we can ask question to ourself, Is Pakistan is on the track of its basic norm? constitution say sovereignty belong to Almighty Allah and authority exercised is sacred trust, either that authority is administrative or judicative, is it used as a sacred trust? Basic norm of Pakistan state that powers and authority enjoyed by its chosen representative, what we have done, Pakistan's military has more experience of ruling then a civil democratic govt, Islam supports Doctrine of Necessity in the situation of life and death, from validating the dissolution of 1st Constituent Assembly to legitimating the Martial law using the pretext of necessity, at that time is there was the situation of life and death! validating the dissolution and martial law disrupt Pakistan, our basic norm supports democracy, what kind of democracy remains when we validate the martial law by importing theory of necessity.

Almighty Allah has shown strong dis-satisfaction when chief of Banu Makhzum (Walid bin Mughera) who opposed the message of Islam despite knowing the fact because he was blinded by his pride, wealth and power and supported a ruler despite having knowledge of fact, same as if we link it into the context of Justice Muneer invoking necessity (A western theory), we can clearly emphasized that invocation of doctrine of necessity and validating martial law is same as Mughera did(supporting a ruler due to the greed of power), this theory give confidence to usurpers to come forward and rule under the shadow of this western theory and so also doctrine of necessity is not acceptable in Islam under Fiqah shadow as different principle of Fiqah developed by Imam Abu Hanifa, Imam Malik, Imam Hunbal or Shafi doesn't support any act which can lead a society into disturbance, it is very astonishing that a country which is founded upon the principle of 2 nation Theory, 2nd country on the face of earth which is created in the name of Islam after Madina state, a western political thought in the name of doctrine of Necessity was imposed by the state organ who is responsible for the establishment of rule of law without realizing the Impact of the decision to society just to please the ruler of time. Whenever it is actual time to stand for establishment of rule of law judiciary of Pakistan always seems failure. Every martial Law has been declared legal on the basis of Doctrine of Necessity by the Judiciary of Pakistan when it is challenged in court , in Asma Jilani case martial law was declared illegal only for the purpose because at that time martial law Govt was over and powers had been transferred to the Zulfiqar Ali Bhutto, it is quite possible that if at the time of decision martial law was still intact decision would have come different. Last martial law is still valid under Zafar Ali shah decision afterwards in so many cases judiciary has criticized Doctrine of Necessity but when martial law is challenged in case Supreme court doesn't stand as it should be if we look into the history. ALLAH has clearly condemned this kind of acts in Quran as refer in Surah Mudassir and so also it is condemned under the ahadith too further there is no space for western Doctrine of necessity under Fiqah Principles established by different Islamic school of thought. There is no single principle available in Islam which can support and legalized unlawful martial law, dissolving assemblies, here that doctrine of necessity is a lawful act but it's usage has caused great disturbance to public at large hence as per all the principles of Islam it is unacceptable and

⁸¹ Art. 2A of the Constitution of the Islamic Republic of Pakistan, 1973

⁸² *ibid*

⁸³ *ibid*

prohibited despite it is being lawful but the consequences of its usages are unlawful and cause disturbance in society.

Proposals:

As we discussed that this theory was against the basic norm of Pakistan and Islam here are some brief proposals:

Bold decisions

As we observed that our judiciary always bend the knees before Military rulers who came to acquire power through irregular way not only our judiciary proven to be supportive for Dictators but they also legalize their way of acquiring power by i.e., invoking strange theories which were proven to be very costly for Pakistan (A democratic state). These decisions not only supported one dictator but also set precedent for other dictators to come forward and do whatever they want to do with a democratic state, and the whole credit for the decisions goes to Mr: J Munir for whom our country suffers and ruled by dictators 33 years out his 76 years. Judiciary is what the judge or CJP is because everything represented by his head unfortunately our judiciary has experienced judges like J Munir who curtail the power of rule of Law, through these strange theories and allowing and inviting Dictators to rule in a Democratic state through illegal way, in the history of Pakistan we have seen that mostly judges supported ruler by giving biased decision such as allowing them to amend the constitution, but what if they supports rule of law at the time usurper by giving brave and bold decision, Judges has to be strong in order to make the institution strong, we have seen Justice AR Cornelius who always stood with the law, his decent notes in MOLVI TAMEEZUDIN case representing the visions of Quaid e Azam, again in *Mehdi Ali Khan*⁸⁴ case In an attempt to secure fundamental rights within the context of a military state, J.A.R. Cornelius crafted astute dissenting opinions. This served to highlight the intrinsic link between justiciable rights and the exercise of judicial power, underscoring the crucial role of the judiciary in safeguarding individual liberties even under challenging circumstances. In Ayub Khan regime, Ayub Khan by ordinance banned Student wing of Jamaat e Islami under Criminal Law Amendment Act of 1908, SC lead by Chief Justice AR Cornelius in the case of *Abul Ala Maudoodi*⁸⁵ declared that Criminal Law Amendment Act of 1908 was held repugnant to the freedom of association, and SC declared the ban as unconstitutional. This judgement is one of the most important ones in the constitutional law of Pakistan upholding the fundamental rights, J. AR Cornelius gave this decision against the act of Ayub Khan in the presence of Ayub Khan in govt.

In a recent development SC J. Minallah while hearing death penalty appeal against Mushraff observed that there was a history whenever someone was strong, no one spoke against him but when the power of the strong declined, then came Asma Jilani's decision, a reference to SC judgement that Gen Yahya Khan's martial law in 1972 was illegal.⁸⁶ It means judges have to show bravery, in order to make the institution brave, judges have to make themselves brave.

Timely Decisions:

As we observed that Asma Jilani case was the only case in judicial history of Pakistan in which martial law was declared illegitimate and it is considered as the bold decision since it declared martial law illegal, but if we go into the deep we found that General Yahya who ruled from 1969 to 1971, but his Martial Law was declared invalidate in 1972 means the

⁸⁴ PLD 1959 SC 387

⁸⁵ PLD 1964 SC 673

⁸⁶ The Express Tribune (December 02, 2023)

martial declared illegal after his regime, this is like giving death penalty to a dead person, we count this decision of our judiciary as a BOLD decision but if we analyze it in deep sense we found this wasn't a bold decision, this could be counted as bold if this decision was announced in the presence of Yahya Khan our judiciary could have cut the wings of Dictators timely by giving timely decisions, if Asma Jilani case was brought earlier or judiciary declared martial illegal in the presence of Dictator than may be other dictator shows hesitation while curtailing democratic process.

Rigid Precedent:

As we discussed that In Asma Jilani case SC declared martial law null and void, Pakistan being a common law country where you have to follow precedents, following precedent is constitutional duty, SC itself has not stood on its already decided case in which martial law was declared invalid, just after short time SC validate the martial law of Zia and emergency of Musharaff despite having a strong decided case.

In order to bid farewell to these theories courts itself has to stand with their decided cases, in a separate case⁸⁷; Islamabad high court has decided that the Doctrine of necessity is Alien to the rule of law.

Accountability of Martial law- endorsing judges:

Those judges who validate the martial laws, imported theories should have to be held accountable so that no-one dares to support usurpers, this is also been observed by SC⁸⁸ that those judges who gave way to martial laws in country should also be held accountable, here CJ Qazi Faiz Essa emphasis that It was necessary to go into the past and plan better for the future and become a nation.

Declare Martial Law/Doctrine of Necessity illegal:

Since the inception, Pakistan has gone through several martial laws imposed by usurpers, these all martial law was declared valid by honorable courts except the martial law of Yahya which was declared illegal after Yahya left the power but it set a precedent for the future but that precedent did not stay for too long because the next martial of Zia was declared valid in Nusrat Bhutto case, and the emergency of Musharaff was also declared valid in Zafar Ali Shah case, since then theory of necessity in declaring martial is legal, still martial law/emergency of Musharraf is not declared invalid by judiciary, Pakistan has an history of 4 martial laws but latest one is still validate up to the date, for what judiciary is waiting? Is it giving another chance to usurpers, Theory of necessity maybe discussed in various cases and declared void but the martial law of Musharaff is still valid, in order to block the way, it should be declared void in order to avoid future consequences, judiciary has to take the stand in order for the better democratic future of the *ISLAMIC REPUBLIC OF PAKISTAN*.

These were some of the proposals which should be considered in order to run the smooth democratic process.

Once Sir Winston Churchill stated:

“DEMOCRACY IS NOT THE BEST SYSTEM, BUT I DO NOT KNOW A BETTER ONE.”

⁸⁷ 2012 PLD 365

⁸⁸ The Express Tribune (Paper December 02,2023)