

Doctrine Of Necessity: In Context “Sou Moto Case No. 1 Of 2022 Petition No.3 To 7 Of 2022”, Latest Judgement Of Supreme Court In Pakistan:A Harkening Step Towards Constitution

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Abstract

This article deals with doctrine of necessity in context of (sou moto case) SMC no. 1 of 2022 which is hearkening decision of the supreme court of Pakistan, which has effectively buried the maxim Doctrine of Necessity ,under shelter of which, severally constitution of Pakistan was abrogated many times. During the last few years, many other government of nation have been defeated the violent overthrow of an existing government, bloodless, or other forms of change because now nations knows that the states with a potent commitment to constitutional government, for them a coup d etate is particularly disturbing due to affirmation of the revolutionary government, efficaciously invalidates the supreme law land the constitution. A new regime within a constitutional framework cannot work lawfully, if it came to authority in direct contradictory of it. If the new government proceeds to perform function, it transforms into functional governing body of the state; the constitution proceeds to exist with name only. New un-elected authority can run the state on grounds of maxim of necessity. Now the recent Suo moto case no.1to 7/2022 could also be gone in favour of the existing Government, but here Apex court of Pakistan have buried the doctrine of Necessity and didn't took the doctrine as shelter for unconstitutional step, this is a hearkening step of the superior court of Pakistan as it has set forth a precedent and this research will contribute for upcoming judiciary of Pakistan and for lawyers , judges, law students, and this research would be effective precedent to be quote as a good precedent for burial of doctrine of Necessity by Apex court of Pakistan.

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1. INTRODUCTION

Necessity is recognized as the initial step towards invention. It defeats the legal values having no limitation. Necessity is that which is inescapable, ineluctable or indispensable and unstoppable. It is the situation of being essential or integral, an emergent requirement or desire. Necessity must be legitimate, instantaneous, and serious and work as a settlement or mandatory practice demanding aid. (Merriam Webster). In criminal legal definition the term necessity has been specified as a reason or defense for a individual which turns in an emergent situation, that any one do not create by self. Consequently, he imposes injury that is minute strict than injury that would have exists but for the person's conduct. For Example, a mountain walker misplaced in a thunderstorm, can announce necessity as a shelter to stealing of foodstuff and shrouds, blankets from another's tent. It is also defined as preference of evils; coercion of circumstances; less- evils defense. (Section 94 of English penal code)

The purpose of this lawful canon is to insure absolute conduct of the humankind in a society so as to privilege one another. The Islamic religion has flexibility and gives permission for a relief from the stricken attachment, observance and applicability of its law full rules in cases where it is mandatory to use doctrine of necessity warrants. The ecclesiastical rule of public well being (salus Populi Est suprema Lex) is based on Islamic ideology of necessity. The advisability as a principle is incorporated by Islamic religion, wherever it need. There are several instances through which as a quotation we can prove it. Where our beloved Holy Prophet (S.A.W) and His caliphs has found that the Quranic injunction may become a reason great difficulties and mischief in substitute of curing a injury, its application was abandoned temporary on the stance of practicality. (PLD 1977 SC 657.p.89.)

The case law of *Dudley v R and Stephins* (1884) 14 QBD 273) may be quoted to elicit the ideology of Necessity in English Law. Where two persons did a murder of a cabin boy of a crash ship. They all were grounded in a open boat having no food items for further coming twenty days. When they have to go through with death due to malnutrition, the both seamen had no other option except to kill a cabin boy due to the circumstances required Necessity. After rescue of both seamen, their trial was held for killing a cabin younger. The court gives six months imprisonment to the seamen beside of giving life sentence keeping in view the shed of Doctrine of Necessity. The justice Lord Coleridge recommended that the liable seaman may have did this act under the pressure of Necessity. The ambit to which Necessity may be use as shelter to a certain act of a personal depends upon the type of every case.

The objective of this legal canon is to ascertain proper conduct of the individuals in a society so as to aid one another. The Islamic religion has already elasticity and gives relief to a departure from the firm adherence, observance and enforcement of its legal grounds in cases where severe necessity warrants. The canon of public welfare (salus Populi Est suprema Lex) runs from the Islamic concept of necessity. The expediency as a doctrine is practiced by our Islamic religion, wherever it was needed. There are several examples which may be quoted to verify it. Where it was set up by the Holy Prophet (S.A.W) and His caliphs that the injunction of Quran may cause immense hardship and disruption instead of curing a disease, its accomplishment was temporarily abstain from on the ground of expediency. (Muhammad Afzal cheema J.Nusrat Bhutto's case).

This study will incline to boost the belief in republican system of Pakistan in the light of sou moto case No.1 of 2022. This research will signify the following areas;

1. Firstly this research has numerous effective side, this research may be beneficial for lawyers and law fraternity as the whole research will be guiding about the usage of the principles of Necessity and burial in accordance with SMC no 1 of 2022..
2. Secondly this research might be guideline for upcoming judiciary, they will be able to understand the tool of doctrine of necessity, what is it, where and where it was used and where to be used in future.
3. Lastly this research may contribute for new upcoming researcher or either those researcher who are presently doing research on this specific problem faced by the Pakistani nation, judiciary, and lawyers this research may be a fruitful thing for upcoming time and generation for legal framework.
4. This research paper has enabled to know the difficult situation and challenges faced by the legal community, Advocates, Judges, and researchers due to breaking of constitution time and again.
5. This research paper has suggested the effectiveness of the latest judgment of Supreme Court to overcome the challenges faced by the law community lawyers and judges.
6. According to my research paper some major challenges are faced by the legal community lawyers and judges due to use of unauthorized weapon of Principles of Necessity. The Doctrine of Necessity has been remained as an important challenge for legal community, lawyers, judges researchers and for nation, exceptionally in terms of its affect on the state's rule of law and democratic institutions. This doctrine has allowed the suspension of constitutional law, which has undermined the confidence of investors and citizen of Pakistan due to instability and uncertainty. Overall, Doctrine of Necessity has posed substantial challenges to nation of Pakistan, undermined democratic institutions, diminishing trust in institutions, and elevating human rights concerns.
7. To set the strategies which will be going to be effective to use this research to overcome the prevailing situation in present time and upcoming time.

As it's known that constitution of Pakistan ensured the Judicial Independence while resolving the cases, so impartiality and independence of judiciary have primary significance in deciding the matter., (Suo moto case no 1 of 2022). This is a famous and reputed case in nature as remarked by Chief Justice of Pakistan (CJP) Umar Ata Bandial said during proceeding that the Supreme Court have to taken suo motu notice of the parliamentary crisis last month after consultation with twelve Supreme court justice, all of whom agreed that it was a "constitutional matter". Courts are guardian of constitution and have to look at constitutional principles'. (Statment in Dawn News) As this judgment of supreme court having national importance, and judgments of higher courts are binding on lower courts, so this judgment would have a binding effect on lower court, and research and work on this judgment could be help full for upcoming judiciary, this research will also be effective for upcoming legal community lawyers and scholars. This research paper has set strategies to overcome the prevailing situation in present time and future time.

The shelter of Necessity and its litrature was originated through its use in the numerous dictum by the Superior judiciary of Pakistan. The matter related to such cases will be discussed in details. The reality and the legal principles set forth in these matter will be obsrvated so as to understand in better ways that why the doctrine of Necessity was worn by the Superior Court of Pakistan by digressing from the general course of law. In the case law of Maulvi Tamiz-ud- din the court in presence of justice munir validated the Governor General's emergency power and restrospective law, by using the equipment of doctrine of Necessity, which paved a way for future unconstitutional action. This case has set a dangrous precedent by which future government become able to justify their undemocratic action by using the judiciary in future, having long lasting impact on rule of law and constitutional development in country.(PLD 1955 Sind 96)

In the case matter of Usif Patel the District Magistrate Larkana has confined three people named as Usif Patel, Syed Ali Shah and Agha Muhmmad as they were reluctant to give surety under the Sindh Control of Gundas Act 1952. They file an Appeal before Federal court, and prayed from

release from Habeous carpus(illegal detention), Likewise Molvee Tameez Ud Din Case, in usif Patel Case Chief Justice Muhammad Muneer once again passed the verdict on the fact that all legislation without the assent of the Governor General passed by the Constituent Assembly are invalid. (PLD 1955 FC 387)

Another example of use of doctrine of Necessity is The State vs. Dosso case. In this case the Supreme Court of Pakistan revered the verdict of Lahore High which was enlarged in favor of Dosso. By reversing this verdict the Superem court of Pakistan legalised the martial law firstly imposed by President Iskander Mirza in 1958 which have validated the military's intervention in democratic institutions.(PLD 1958 SC 533). This verdict of Supreme Court based on Hans Kelsen's theory of legal positivism, which states about the doctrine of necessity. This doctrine of Necessity states that a successful revolution is a legal way to change a constitution, and the government's formed by this way, the laws and verdicts by such new government are valid as long as they are effective.(Henson Kelsen's theory of Positivism)

As a result the consequences of this decision were far-reaching. It have open the way for upcoming military interventions in Pakistani politics, this decision had damaged the judiciary independence, and paved a way to the abrogation of the country's first constitution. The Asma Jilani matter is assumed as a landmark verdict in Pakistan's legal history, as it is foundation of the principle of judicial review and declared the supremacy of the constitution over Martial Law regimes.

The Supreme Court of Pakistan in Asma Jilani case concluded and declared that the General Muhammad Yahya Khan's enforcement of Martial Law was illegal, and under Martial Law Regulation No. 78, the orders of detention, were invalid and having no legal effect.The Supreme court Pakistan overruled the theory, propounded by Hans Kelsen, which was used as a shelter to justify the illegal Martial Law regimes. The court declared that Hans Kelsen's theory did not provide a valid basis for the abrogation of the constitution and was not universally accepted .Furthermore, the court highlighted the significance of upholding the constitution and the rule of law and superemacy of constitution, and stated that the coup d etate commander's power to proclaim Martial Law does not automatically conferred on him with the power to abrogate the fundamental law of the state.(PLD 1972 Sc 139)

In the case of Nusrat Bhutto vs Chief of Army Staff Supreme Court has dismissed the writ unanimously. The court again in this verdict justified the military hold under the shelter of "doctrine of necessity" due to failure of the government to maintain law and order and constitutional breakdown.(PLD 1977 Sc 657)

The court stated that the Chief Martial Law Administrator (CMLA) have power to reign the country momentary, they can pass Martial Law Regulations, and having authority to make laws until fresh elections to be held. The CMLA was assumed to regain his assurance of holding fair and free elections in 90 days.

This verdict legalised the military reign lead by General Mohammad Zia-ul-Haq, who took hold of Pakistan by declaring martial law. The case set an important example in history of Pakistani constitution, allowing a shelter for military interference under the doctrine of necessity.

Likewise In Syed Zafar Ali Shah and others Vs. General Pervez Musharrf case the facts leading are mentioned as under:

That on 12-10-1999, Army took over civil government in Pakistan. The coup ensued Proclamation of Emergency in the country. The petitioner challenged the army take over on a number of grounds. The main ground was that the sacked government which was an elected government in accordance with the 229 Constitution had a legal right to complete its tenure. It was unconstitutional act to take over a democratically elected, constitutional government.

Another ground of case was that General Pervez Musharraf and his colleagues had not only violated the oath taken by them under Constitution of Pakistan but they had also committed the offence of high-treason by holding the Constitution in abeyance.

The Supreme court of Pakistan again in this verdict validated the military reign, under the shelter doctrine of necessity for restoration of stability in the country.(PLD 2000 Sc 869)

2. Data Analysis Tools

1. This research paper is based on doctrinal research, so data is collected by studying different research papers, by studying different case laws, and by studying law based books from library and by comparing the already available material with this new case law.

3. Research Methodology

The research has been made by using the doctrinal / non doctrine always and examining historical development, dissection and contrast between English, Islamic , principles, tradition phenomenon and situation on the topic of Doctrine of Necessity. This procedure is a crucial portion of my research as these rules are same in all dominion. But, enforcement of this doctrine has left ineradicable impression on Pakistani political condition, as the un_constitutionalism is uncontrolled in Pakistan. For that reason ,the concentration of my study move around to explore recent case-laws , judgments , which stands against the doctrine of necessity and all other legal equipments which provided a legal shelter to such non constitutional action of the Army and a bureaucrat Governors. In this relevance, I have been aided from the library of the High Court of Balochistan and the District & Session Court Library and library of katchery Quetta and law site available for case law in libraries, and also library of university of Balochistan as well as library of University law college Quetta.

4. Result and Discussion

As we know judiciary is independent according to constitution of Pakistan. The old enforced constitution of Pakistan also focused on independence of judiciary, as any decision took by judiciary in any country can send back the country into dwell, as the three main pillars of a state has to done their work separately, in the light of theory of separation of power, because working under pressure can lead towards the failure of justice. under pressure decision made by judiciary can lead a country in to darkness of injustice, then every powerful person in such countries tries to take hold the all necessary position to run the government according to his whim and wishes. Already we have several examples in Pakistan which sending back the country in to dwell. Abrogating a constitution is such a big step, which is always taken by military regime in Pakistan and such illegal act was legalized by judiciary in Pakistan, now awareness in peoples in Pakistan is reached to that level now they are blaming the judiciary of Pakistan openly, recent example is a sales man of a Bakers who ashamed the chief justice Qazi Faiz Essa, now this is time to mend your ways, otherwise revolution becomes the only option to b adopted by the people, breaking a constitution and legalizing of such act is not acceptable in any civilized state, constitution is running a whole state system, and abrogation of such a mandatory document is not bearable. Doctrine of necessity has been used several times in state of Pakistan. First time this doctrine was used in Pakistan by superior court Justice Munir and it's five bench member's of Federal Court in Pakistan in support of Governor Ghulam Federation of Pakistan. This was set as a bad precedent by the most superior judiciary in Pakistan. Military dictators in Pakistan took over the authority of state of Pakistan 4 times and every time superior courts of Pakistan validated their regime in their decisions. Superior judiciary in Pakistan legalized the Marshal Law`s by using the famous maxim of doctrine of necessity. This maxim clearly states that extra constitutional action can be took by any powerful authority in the state during the time of emergency. This maxim of necessity has been utilized in several developing and under developed states. This doctrine is considered as a enemy of democratic values and the constitutions of states. Amid the last few years, the Government of

many developing nations have been destructed through violent revolutions, and other forms of bloodless coup d estate. Due to ethnic, religious, political, or economic differences several states have been remained long unstable. Those countries which have strong undertaking to constitutional government, a military is particularly distressed due to recognition of the revolutionary government is capable to invalidates the constitution. A new rule can not legally exist within a constitutional structure if it came to power in direct contradiction of it. If the fresh Government remains in function, it becomes the functional body which governs the country; the name of constitution continues to exist in only. New un-elected Government is capable to run the state on basis of doctrine of necessity.

New case of suo moto case no 1/2022 has buried the doctrine of Necessity, results are discussed as under:

SUO MO TO CASE NO. 1 OF 2022 (Re: ruling by the Deputy Speaker of the National Assembly under Article 5 of the Constitution qua voting on No- confidence Motion against the Prime Minister of Pakistan) Constitution Petition No. 1 to 7 of 2022 (Re: ruling passed on 03.04.2022 by the Deputy Speaker of the National Assembly on No- confidence Motion) Date of Hearing :07.03.2022. This sou mo to case No.1/2022 decided by the apex court of Pakistan against the ruling of deputy speaker ,in which deputy speaker Qasim Khan Sauri dismissed the motion ruling that it was in breach of Article 5 of constitution,which require loyalty and obedience from citizens of Pakistan, and according to deputy speaker opposition was alleged to be in collusion of a foreign state evidence by a diplomatic cipher. This petition was decided in presence of Chief Justice Mr. Justice Umar Ata Bandial, Mr. Justice Ijaz ul Ahsan, Mr. Justice Mazhar Alam Khan Miankhel, Mr. Justice Munib Akhtar, Mr. Justice Jamal Khan Mandokhail in original jurisdiction. The Suo Moto Case No. 1 of 2022 ruminates over the ruling passed the Deputy Speaker of the National Assembly based on Article 5 of the Constitution, particularly related to the No-Confidence Motion and method of voting on it. This matter was triggered by the Supreme Court of Pakistan to states the constitutional involvement of the Deputy Speaker's verdict. To concentrate on it further, some of the Key Aspects of the matter is the Constitutional Implication to the matter analyzes the constitutional validity of the Deputy Speaker's decision and its effect on the state's democratic process. No-Confidence Motion case encompassing the voting method on the No Confidence Movement, which was initiated to remove the Prime Minister from office. This matter revolves around the Article 5 of the Constitution of Pakistan and interpretation of Article 5 of the constitution of Pakistan, which related with the loyalty inviolable obligation to law and obedience of every citizens of Pakistan to the Constitution and the law.

1. Facts Of the Case

The leaders of opposition parties moved a no-confidence motion against Deputy speaker of National Assembly namely Qasim Suri , in which they accusing him of invalidating provision of the constitution, apart from parliamentary and democratic rules and traditions. This motion took towards the resolution, which was filed with before National Assembly secretary for removal of Qasim Suri from the office of deputy speaker under Article 53(7) of the Constitution of Pakistan .The secretary stated to dispense the resolution between the members of National Assembly and submit it in the house in seven days. Qasim suri Deputy Speaker gave the contravertial ruling, while not allowing the no confidence resolution against Prime Minister Imran Khan in the session of National Assembly. The ruling of DS was that it was in breach of Article 5 of the Constitution "Loyalty to State and Obedience to Constitution and Law "because the opposition was alleged to be involved in a "collusion" with a foreign state as apparently evidenced by a diplomatic codified form, The foreign state and a "few members of the National Assembly" were said to be using the RNC process to "oust" the PM. Although this statement was not mentioned in the ruling, short order, or judgment, the alleged "foreign state" was widely identified

in media reports as the United States. On the same day, the PM Imran Khan advised the country's president to dissolve the NA under Article 58 "Dissolution of National Assembly of the Constitution and advised to prepare for new national elections. Notwithstanding, his ruling was eradicated down by the Supreme Court of Pakistan." The opposition's resolution stated that the continues violation of parliamentary and democratic traditions and constitutional rules have been done by DS of NA, the opposition leader further added that the DS instead remaining neutral favoured the government. The DS had continuously violated parliamentary practices, traditions and democratic norms and even Constitutional provisions, and during the official capacity over the House, has been failed to conduct proceedings, in accordance with the orderly manner to enable productive debate on issues of public importance," the resolution said that. "Instead of performing his role fairly and impartially, the DS has acted in a unashamed biased manner unexceptionally favouring the Govt, especially in passing laws, and has frequently underprivileged opposition members of their, democratic and inherent right to speak and raised their voices and views and the opinion of their electorate," it added. The resolution also mentioned that Qasim Suri's ruling regarding rejecting the resolution for a no confidence vote against the prime minister, further added that the Supreme Court declared the ruling in contradiction to the Constitution and the law and having no legal effect. "The DS has malafidely and willfully subverted the Constitution of Pakistan and action of DS falls within the ambit of Article 6 of the Constitution," referring to the constitutional provision about high treason.

2. Summarized Decision OF Supreme Court

The detailed judgment was delivered by Chief Justice Umar Ata Bandial, with concurring judgments by Justice Mazhar Alam Khan Miankhal and Justice Jamal Khan Mandokhail. Initially, the court said it had original constitutional jurisdiction under article 184(3) of Pakistan's Constitution, as it related to the enforcement of a basic fundamental right or the concerns of the public at large. The court established that the ruling of DS of NA Qasim suri and subsequent actions of the PM imran khan and president have "prima facie" infringed the fundamental rights of the Opposition Parties who started the RNC movement and the public at large., "the Deputy Speaker's ruling and actions of the PM and the President has destroy the right of the Opposition Parties to analyze their voting power in favor of the RNC and if become successful, for forming the next Government in exercise of their fundamental right under Article 17(2) of the Constitution." Relates to the invoking of Article 5 and "national security" the deputy speaker's ruling, the court stated that, although courts should exercise precaution and not allowed to intervene in matters of "national security", They can exercise judicial review power on narrow grounds. The court stated that "When national security is used as a defense to validate a decision by the Government whether that is prima facie controversial to constitution then the Government is under an obligation to confirm the bona fides of its defense. For that purpose Government must produce evidence to show the defense in order to get away legal analysis of its impugned action." as the alleged contents of the cipher were not presented before the court and other facts and evidence showing that the national assembly members were indulged in the conspiracy was not produce before court, "the Court cannot admit the Respondents defense that the alleged controversial contents of Article 95 of the Constitution utilize by the Deputy Speaker is protected from judicial scrutiny on the claim of national security."

The court also established that the ruling passed by deputy speakers not exempted by the immunity provided by Article 69(1), which is related to bars on courts from inquiring into procedure in Parliament "to the extent that these suffer from an irregularity of procedure." The ruling was unable to qualify for exemption as part of the internal proceedings of Parliament," as the ruling was not the result of a vote in the NA, but instead, it was a alone decision of the Deputy Speaker at the command of the Law Minister." The court also stated that the present

Constitution authorizes the Apex courts to examine and decide the sustainability of proceedings in Parliament if these are contradictory to the substantive or procedural Articles of the Constitution. Although courts will ordinarily interfere or restraint into the area's of the Legislature and the Executive and parliament, and they will interfere when each of these functionaries ultra vires their constitutionally prescribed limits and authority.

As the deputy speaker's ruling is against the constitution, "the RNC movement against the PM Imran Khan stands revived, Furthermore court in light of the Explanation to Article 58(1) of the Constitution held that a PM against whom notice of an RNC movement has been given cannot and not decided yet can not advise the president to dissolve the NA, so, the president's order also restrained constitutional legitimacy." The Apex court concluded with verdict in accordance with a settled and adopted principle of law, that when the initial order is without lawful authority having no validity and void ab initio, then afterwards entire superstructure built upon falls to the ground automatically." Therefore, the NA "stands restored with immediate effect," and in fact, "it seems to have been in existence at all times."

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