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THE DOCTRINE OF STATE NECESSITY IN PAKISTAN

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> Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves.
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> —William Pitt,
> Speech in the House of
> Commons, November 18, 1783

I
INTRODUCTION

During the last few years, the governments of many emergent nations have been overthrown through violent revolutions, bloodless *coups d'etat,* or other forms of upheaval.[1] Many of these countries have been long unstable due to ethnic, religious, political, or economic differences.[2] In countries with a strong commitment to constitutional government, a *coup* is particularly traumatic because acceptance of the revolutionary government effectively invalidates the constitution. A new regime cannot lawfully exist within a constitutional framework if it came to power in direct contravention of it.

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1. As one commentator has noted, the military *coup d'etat* has become the most common means by which governments are overthrown.

> Organized violence is endemic in the society of the emergent states, but of the various types of violence mentioned in the preceding chapter the *coup d'etat* is the most widely prevalent. But it is a phenomenon of the independence era. Before 1963, with the exception of Egypt (1952) and Sudan (1958), military interventions in the politics of the emergent states had been confined to the independent countries of Latin America, Asia and the Middle East. Since that date, however, from its first occurrence in Togo in January 1963, the military *coup d'etat* has engulfed practically the whole of the African continent, and its endemicity shows no sign of forseeable abatement. No less than nineteen countries have experienced it, some more than once. Dahomey with its four coups in six years tops the scale. The tally is distinctly disquieting.

B. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 219 (1973).

2. *See id.* at 173-74.

If the new government continues to function, it becomes the fundamental governing principle of the country; the constitution continues to exist in name only.

Nevertheless, the courts in several of these countries have relied upon the doctrine of necessity in an effort to legitimize the new governmental structure under the effectively invalidated constitution.[3] The necessity doctrine provides a justification for otherwise illegal government actions taken during an emergency.[4] These courts argue that any constitution implicitly recognizes the necessity defense. Consequently, the courts may legitimize even the most extreme measures on the ground that they are necessary to save the state.

One of the most recent cases utilizing the necessity defense, *Bhutto v. Chief of Army Staff,* occurred in Pakistan.[5] In that decision, the Pakistan Supreme Court validated General Zia-ul-Haq's successful 1977 *coup d'etat* against Prime Minister Zulfihar Ali Bhutto's duly constituted government. This Article will both explain and critique the *Bhutto* court's use of this rather limited doctrine to validate such an acute political transformation. After a brief discussion of the narrow confines of the necessity defense, its narrow application in the United States, and the more expansive interpretation of the doctrine in Third World countries, the Article will focus upon the recent decision of the Supreme Court of Pakistan. This discussion will include both the history of the Pakistan court's pre-*Bhutto* efforts to resolve constitutional crises and an analysis of the *Bhutto* decision itself. This Article will illustrate the inappropriateness of using the doctrine of necessity when evaluating the legitimacy of a revolutionary government. Not only does its use fail to achieve the goals of political stability, constitutional governance, and effective judicial review, its application is counterproductive to the realization of these goals.

II

THE NECESSITY DOCTRINE

A. GENERAL

State or civil necessity is a common law doctrine which provides a justification for otherwise illegal government conduct during a public emergency.[6] Courts must severely circumscribe this common law defense because a loosely-imposed standard of necessity makes

3. *See infra* notes 56-189 and accompanying text.
4. *See infra* notes 6-17 and accompanying text.
5. *See infra* notes 158-89 and accompanying text.
6. As early as 1672, a British court held that "the law for necessity dispenses with things which otherwise are not lawful to be done. . . ." Manby v. Scott, 1 Lev. 4 (1672).

it possible to justify substantial violations of constitutional rights and alterations of the governmental structure.[7] This doctrine is inappropriate to any judicial consideration of the legitimacy of a *coup,* revolution or other acute governmental upheaval.[8]

Necessity is a doctrine which bridges the sometimes considerable gap between what the law allows the government to do and the government's actual response to an emergency. It has no relevance where emergency state action is taken pursuant to specific statutory or constitutional authorization.[9] Rather, it is only relevant where an injured party can make a *prima facie* showing that the government has violated the law.

Glanville Williams lists a dozen maxims recognizing the doctrine, from sources which include Bracton, Coke, Hale, and Bacon. Williams, *The Defense of Necessity,* 6 CURRENT LEGAL PROBS. 216, 218 (1953).

The doctrine involves more than just the typical considerations which enter into a judicial determination. "In a manner of speaking the whole law is based upon social necessity; it is a body of rules devised by the judges and the legislature to provide for what are felt to be reasonable needs." *Id.* at 217. An emergency is the *sine qua non* of the doctrine. The Privy Council has defined emergency as follows:

> [T]he natural meaning of the word [emergency] is capable of covering a very wide range of situations and occurrences, including such diverse events as wars, famines, earthquakes, floods, epidemics and the collapse of civil government. . . . "A state of emergency is something that does not permit of any exact definition: it connotes a state of matters calling for drastic action. . . ."

Ningkan v. Gov't of Malaysia, 1970 A.C. 379, 390.

7. Courts can easily abuse the doctrine by using it to justify measures which are unnecessary to cope with the emergency at hand. Even Oliver Cromwell understood this potential, when he stated before Parliament, "Necessity hath no law. Feigned necessities, imaginary necessities . . . are the greatest cozenage men can put upon the providence of God . . . ." Speech to Parliament, September 12, 1654 in 4 CARLYLE, CROMWELL'S LETTERS AND SPEECHES 74 (1870), *quoted in* Radin, *Martial Law and the State of Seige,* 30 CAL. L. REV. 634, 640-41 (1942). Milton called necessity "the tyrants plea," PARADISE LOST, Book 4, line 393, *quoted in* Williams, *supra* note 6, at 229, while Selden said "[t]here is not anything in the world more abused than this sentence, *Salus populi suprema lex esto*." TABLE TALK, tit. People *quoted in* Williams, *supra* note 6, at 229.

8. *See generally* S. A. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 502 (3d ed. 1977).

9. In France, the exercise of emergency power is governed by the Constitution and is popularly known as *état de siege*. For an excellent discussion, see Radin, *supra* note 7. Other civil law countries, particularly those in Latin America, share this feature with the French. Kelly & Pelletier, *Theories of Emergency Government,* 11 S.D.L. REV. 42, 51 (1966). *See also* C. FAIRMAN, THE LAW OF MARTIAL RULE 66-72 (2d ed. 1943).

In Great Britain, Parliament granted extensive emergency authority to the Executive during the 20th Century. These measures included the Defense of the Realm Acts (DORA) during the First World War, and the Emergency Powers (Defense) Act during the Second World War. *See* S.A. DE SMITH, *supra* note 8, at 504-07; E.C.S. WADE & A.W. BRADLEY, CONSTITUTIONAL LAW 716-25 (7th ed. 1966); O. HOOD PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 499-510 (3d ed. 1962); Fairman, *supra* note 9, at 72-79; Marx, *The Emergency Power and Civil Liberties in Canada,* 16 MCGILL L.J. 39, 44-47 (1970).

For a discussion of the use and frequent abuse of constitutionally-authorized emergency powers in emerging nations, *see* B. NWABUEZE, *supra* note 1, at 173-80.

Although the doctrine is infrequently invoked, its judicial application is enormously significant. It typically pits a seemingly meddlesome court squarely against an executive who is deeply committed to an unlawful course of conduct purportedly to save the state. If narrowly and carefully applied, the doctrine constitutes an affirmation of the rule of law. Where the doctrine is so expansively applied that it provides a revolutionary regime with *carte blanche* authority to exercise its will, however, the rule of law is affirmed only in the most transparent way.[10] This latter application of the doctrine deceptively transforms naked power into legal authority.[11]

Doctrinally, courts should be reluctant to permit deviations from constitutional norms. Approval must be reluctant because courts, in reviewing a state necessity claim, must consider the legitimacy of readjusting fundamental political, social, and legal values. This consideration must be made in cases where the challenged state action affects individual rights as well as in cases involving changes in the governmental structure.[12]

Individual rights, whether grounded in statutes, the common law, or a written constitution, are the result of complex value judgments and a balancing of countervailing interests. In considering the propriety of depriving an individual of a right, a court must recognize that the balancing of the individual interests against the interests of society has already taken place. For a court now to alter this balance to favor the interests of society is a difficult task. The judiciary must unravel the various considerations which entered into the initial balancing of societal and individual interests. The courts should only legitimize a deviation from this initial balance if the societal interest threatened by the emergency which prompted the suspension of the right is substantially more serious than the societal interest originally compromised in the creation of the individual right. Only the existence of an extraordinary emergency should per-

10. At first glance, this transparent commitment appears to provide a beleagured judiciary with the means to retain some control over a regime. Further analysis will reveal the fallacy of this initial impression.

11. As early as 1637, in R. v. Hampden, Judge Croke insisted that the distinction between power and legality must be maintained. The case concerned the legality of a tax levy by the Crown without the approval of Parliament. In response to the contention that because similar cases had occurred in the past such a levy is permissible, Croke stated that "[W]e are not to argue what hath been done *de facto,* for many things have been done, which were never allowed; but our question is, what hath been done, and may be, *de jure*." R. v. Hampden, 3 St. Tr. 825, 1167 (1637).

12. In response to what he perceives as an emergency, an executive might usurp legislative power by enforcing temporary measures involving denial of jury trials to members of a particular religion. Such measures would violate both the fundamental assignment of power and individual rights to jury trial and equal protection of the laws. If, however, the legislature had authorized these measures, only individual rights would be affected.

mit a reconsideration and readjustment of the balancing of these competing values.[13]

The use of the necessity doctrine to justify usurpation by one governmental branch of the power of another is far more problematical. The typical situation involves executive usurpation of legislative authority. Where an executive seeks to exercise legislative authority in response to an emergency, the primary issue is not whether the necessity justifies the measures themselves, but whether the emergency justifies a short-circuiting of the legislative process and a change in the existing balance of powers.[14]

There are no circumstances, short of the physical inability of the legislature to convene in a timely manner, which would legitimize this kind of usurpation. While enforcement of a statutory enactment or protection of a constitutional right might impede necessary relief in a given emergency situation, a sitting legislature is not such an obstacle. A legislature is a functioning entity, fully capable of responding to any set of circumstances. The contention that legislatures act too slowly in emergency situations is erroneous. First, a reasoned response is often a better response. Second, the alacrity with which a legislature acts can vary depending on the situation. There are no inherent barriers in the legislative system that prevent expedient action when it is necessary.[15]

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13. An example may serve to illustrate this point. Assume that a statute in the state of Utopia requires police officers to bring all arrested persons "immediately" before a magistrate in order to set bail. Under such a statute, the necessity defense cannot be used to justify a lengthy police interrogation of a suspected murderer on grounds that the interest in securing a conviction is greater than the interest in securing a quick pre-trial release. Whether, in fact, the police are "correct" about the relative importance of the police action is irrelevant. The balancing between the societal interest in obtaining a conviction and the individual interest in bail has already taken place. Since the statute is by its terms applicable to individuals suspected of any crime, the court may not readjust the relative weight of these interests.

An emergency not provided for in the statute may, however, justify a violation of the statute by the police. For example, if the alleged suspect had knowledge of the whereabouts of a diabetic kidnapping victim who was in dire need of insulin, the court might permit any necessary interrogation. The societal interest at stake in that case is not simply bringing a criminal to justice, but in saving the life of a particular individual. Even if the necessity doctrine were available, it would never justify brutality or torture. The individual right not to be tortured would constitute a right beyond compromise. *See generally* People v. Sirhan, 7 Cal. 3d 710, 737-38, 497 P.2d 1121, 1138, 102 Cal. Rptr. 385, 402 (1972) (emergency exception to warrant requirement recognized; no need for warrant where pressing emergency to ascertain existence of a possible conspiracy to assassinate presidential candidates or high government officials); People v. Dean, 39 Cal. App. 3d 875, 886, 114 Cal. Rptr. 555, 562 (1974) (emergency exception to *Miranda* requirements recognized; necessity to find location of kidnapping victim overrides individual suspect's interest in fifth amendment protection).

14. *See infra* notes 50-55 and accompanying text.

15. In discussing the importance of the legislature in dealing with insurrections, one advocate of emergency powers legislation has stated that:

The actual motivation for the usurpation of legislative authority is the belief that the legislature will hamper efforts to alleviate an emergency by either rejecting or restricting the scope of emergency measures. From both a theoretical and practical standpoint, usurpation on these grounds is indefensible. Society's allocation of authority to the legislature to enact laws is a fundamental principle of governance which defines the essential power relations in a state. When one branch of government compromises this allocation, the result is, in essence, a new form of government with an entirely altered political power structure. When an executive exercises legislative authority or when the courts approve such a usurpation of authority, such conduct can have no legal validity in reference to the existing political and constitutional system. Neither the executive nor the judiciary is in the position to determine what another branch should do in response to an emergency.[16]

The practical consequences of legitimizing the legislative usurpation can be devastating. The executive branch is the most corruptible, and unless it is kept in check, the executive may see emergency situations as an opportunity for self-aggrandizement. By approving, in principle, the usurpation of the authority of one branch of the government by another, the court facilitates the usurpation of its own authority. Once the power balance shifts too heavily in favor of the executive branch, courts will become increasingly incapable of ruling against it. Ultimately, for the executive, naked political power transforms into lawful power to exercise its will.[17]

> The legislature is the best qualified branch of government to make the initial determination of the legality of riot control measures. While the judiciary must be the final judge of the constitutionality of the measures employed, its determination will come after the damage is done. Similarly, while the executive is the best qualified branch to evaluate the severity of a given situation and the effectiveness of the various measures available, it will base decisions as to legality more on expediency than on an evaluation of the constitutional implications. Only the legislature can effectively evaluate both the legal and practical implications of alternative methods of suppressing disorder. It has the facilities to make reasonable predictions both as to what will be required by future emergencies, and the probable outcome of subsequent constitutional evaluation by the judiciary.

Comment, *Martial Law,* 42 S. CAL. L. REV. 546, 574 (1969).

16. Even if the executive or the court is objectively correct in its assessment of legislative incompetence, the usurpation is, nevertheless, legally indefensible. The principle behind any power allocation is that, overall, it will vindicate itself. By virtue of the fact that it is the legislature, the decisions within its competence are the only acceptable ones.

17. The principle that no emergency can justify executive usurpation of legislative authority is well-recognized in British constitutional law. *See* Williams, *supra* note 6, at 229. (discussing R. v. Hampden, 3 St. Tr. 825 (1637), an early occasion in which this principle was articulated.)

B. The Doctrine Under The United States Constitution

1. General

The long and extensive American experience with the necessity defense provides the best example of the defense's operation in a constitutional system. The Supreme Court has recognized that during an emergency the protection of certain individual rights may lawfully give way to more significant interests. The Court has not been so generous, however, with emergency measures affecting the separation of powers. Where the President attempts to legislate without congressional authorization, the Court has refused to uphold the action regardless of the claimed necessity.

The Court has long recognized the power of the State and federal governments to infringe upon civil liberties during an emergency. The emergency can be a war, an insurrection, an economic depression, or a natural disaster. The authority to infringe is a limited one; nothing more than what is necessary to alleviate the danger is tolerable. As early as 1851, the Court in *Mitchell v. Harmony*[18] insisted that a response to an emergency must be carefully fashioned so as not to exceed its necessity.[19]

2. Judicial Review of Emergency Measures

The Court has approved a wide range of infringements on individual rights as necessary to cope with an emergency.[20] In *Moyer v. Peabody,*[21] the Court sustained the authority of the Governor of Colorado to detain a labor leader for two and one-half months, and held that such detention did not violate the petitioner's right to due process under the fourteenth amendment.[22] Moreover, the Court

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18. 54 U.S. (13 How.) 115 (1851).

19. The Court laid out the circumstances that must be present before a soldier may confiscate the property of a citizen during a state of martial law.

> [T]he danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. . . . Every case must depend on its own circumstances. It is emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

Id. at 134.

20. For an excellent discussion of the measures that are allowable, given an emergency, see Comment, *Martial Law,* 42 S. CAL. L. REV. 546, 555-75 (1969). *See also* MacDermott, *Law and Order in Times of Emergency,* 17 JURIDICAL REV. 1 (1972).

21. 212 U.S. 78 (1909).

22. *Id.* at 85-86. Petitioner, president of the Western Federation of Miners, was arrested on the governor's order after the governor had declared a county that was undergoing labor strife to be in a state of insurrection. Placing heavy reliance upon the governor's extensive authority under Colorado law to quell an insurrection or invasion, the Court held that "[w]hen it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the

deferred entirely to the judgment of the executive with respect to whether a state of insurrection actually existed and if the actions taken in response were necessary.[23]

The Court subsequently rejected this deference to the executive's judgment in *Sterling v. Constantin*.[24] In *Sterling,* the Governor of Texas declared martial law in the oil fields to enforce oil production quotas.[25] No violence or other emergency had precipitated this declaration; instead, the Governor's actions came after oil producers had successfully challenged in court a state statute that limited oil production.[26] In ruling that the district court properly enjoined the enforcement of martial law in Texas, the Court rejected the Governor's contention that his actions as executive "can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law."[27] Relying upon the Civil War decision *Ex parte Milligan,*[28] the Court found that such a contention had "no support in the decisions of this Court."[29] The Court relied upon the Supremacy Clause of the United States Constitution in rejecting the state's claim to authority, a claim which amounted to an absolute prerogative during emergencies.[30] The Court found such a proposition to be anathema to our constitutional structure.[31]

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necessities of the moment. Public danger warrants the substitution of executive process for judicial process." *Id.* at 82-85. One commentator has noted that "[m]ilitary control by state authorities during labor disputes has seldom been administered with an even hand. Generally the strikers are branded as insurgents, and the open shop is enforced." C. FAIRMAN, *supra* note 9, at 92-93.

23. "It is admitted, as it must be, that the governor's declaration that a state of insurrection existed is conclusive of the fact." 212 U.S. at 83.

24. 287 U.S. 378 (1932). "[*Sterling*] exploded the myth that declarations of martial law were conclusive and unreviewable." Weiner, *Martial Law Today,* 49 MIL. L. REV. 89, 92 (1970). *See* Fairman, *Martial Rule in Light of Sterling v. Constantin,* 19 CORNELL L.Q. 20, 23 (1933).

25. *Sterling,* 287 U.S. at 387.

26. *Id.* at 389.

27. *Id.* at 402.

28. 71 U.S. 1 (1866).

29. *Sterling,* 287 U.S. at 402.

30. In rejecting the governor's position, the Court stated:

> [If the governor's assertion of authority to override the federal courts] . . . could be deemed to be well taken, it is manifest that the fiat of a state governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases . . . upon [the governor's] assertion of necessity.

Id. at 397-98.

31. The Court also stated that:

> [F]or, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis, destroys every guaranty of the Constitution, and effectually renders the military independent of and superior to the civil power. . . . Civil liberty and this kind of martial law cannot

3. *War-time Emergency Measures*

Even during an undisputed emergency such as a full-scale war, the Court will inquire into the necessity of extraordinary measures. In *Hirabayashi v. United States,*[32] in which the Court upheld the extensive curfew regulations applicable to Japanese-Americans living on the West Coast,[33] it did so only after independently evaluating the need for those measures.[34] Given the nature of the intrusion, the existence of war with Japan, and the constitutional responsibilities of the President and Congress for carrying out the war,[35] the Court found the measures taken to be necessary.[36]

Korematsu v. United States[37] tested the limits of the Court's deference to congressional and executive judgment. The Court upheld,

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endure together; the antagonism is irreconcilable; and in the conflict, one or the other must perish.

Id. at 403. The Court reasserted its power of judicial review when it stated, that "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Id.* at 400-01.

Even after *Sterling,* governors in various states continued to use their martial law authority in some of the most arbitrary ways possible. *See generally* Comment, 59 KY. L.J. 547 (1970); C. FAIRMAN, *supra* note 9, at 91-92.

32. 320 U.S. 81 (1943).

33. The curfew required that all persons of Japanese ancestry residing in a "military area" be inside their residence between the hours of 8:00 p.m. and 6:00 a.m. *Id.* at 83.

34. The Court stated that:

> [O]ur inquiry must be whether in the light of all the facts and circumstances there was any substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion.

Id. at 95.

35. The Court concluded:

> Since the Constitution commits to the Executive the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.

Id. at 93.

36. "[T]he danger of espionage and sabotage to our military resources was imminent, and that curfew order was an appropriate measure to meet it." *Id.* at 104.

Justice Murphy, in concurrence, reminded Congress and the Court that while a certain amount of deference was being paid to congressional and military judgment concerning proper pursuit of the war effort, this deference is tempered by a recognition that certain rights are so significant that no conceivable necessity could suspend them. Even during a war, Justice Murphy insisted, the Court still determines which of many rights are alienable.

> [T]he broad guaranties of the Bill of Rights and other provisions of the Constitution protecting essential liberties are [not] suspended by the mere existence of a state of war. It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution.

Id. at 110 (Murphy, J., concurring).

37. 323 U.S. 214 (1944).

as a legitimate exercise of the war powers, the total exclusion of Japanese from the West Coast during the Second World War.[38] At least in theory, the Court affirmed the principle that only necessity could justify such drastic, extensive, and systematic treatment of an entire race.

> Compulsory exclusion of large groups of citizens from their homes, except under circumstances of *direst emergency and peril,* is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.[39]

4. "Open-Courts" Doctrine

Even during the most severe emergencies, the Court has held that under no circumstances will military tribunals conduct the trials of citizens. Only where the civil courts are no longer open and functioning, due to an invasion, can military tribunals convene.

The Court first articulated the "open-courts" rule in *Ex parte Milligan,*[40] a Civil War case involving an Indiana resident who was sentenced to death by a military tribunal for conspiracy to overthrow the government.[41] In dismissing the "conviction," the Court considered it determinative that there were no armed hostilities occurring in Indiana during Milligan's trial.[42]

The Court reaffirmed this principle of necessity in another World War II decision, *Duncan v. Kahanamoku*.[43] The Court reversed the convictions of a civilian tried by a military tribunal while the territory of Hawaii was under martial law.[44] The Governor declared martial law under authority of the Hawaiian Organic

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38. *Id.* at 219.

39. *Id.* at 220 (emphasis added).

Justice Murphy, in dissent, took issue with the majority over the necessity for these drastic measures. He regarded the displacement of the Japanese-Americans as a too-crudely fashioned response to the possible Japanese invasion of the West Coast, and therefore exceeding the traditional constraints of the doctrine. Although the danger may have justified the removal of disloyal persons from the West Coast, there was no justification for doing so strictly on the basis of race or without hearings. *Id.* at 235.

The *Korematsu* decision, along with the evacuation and detention order that the Court upheld, have been subject to considerable criticism. *See generally* P. IRONS, JUSTICE AT WAR (1983).

40. 71 U.S. (4 Wall.) 2 (1866).

41. *Id.* at 107.

42. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

> . . .Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.

Id. at 127.

43. 327 U.S. 304 (1946).

44. *Id.* at 316.

Act.[45] The Court found that the term "martial law," as used in the Act, did not envision the replacement of civil courts with military tribunals.[46]

While the Court based its decision on the construction of a statute, the decision implies that there is a constitutional basis for the holding.[47] Given the rule of construction that courts should interpret statutes so that they are consistent with the constitution, the Court's language suggests that the "open-courts" doctrine is of constitutional dimension. In addition, the Court's extensive reference to the historical antecedents of the doctrine[48] reflects a strong judicial

45. Congress legislated for the territory of Hawaii by means of the Hawaiian Organic Act, Act of Apr. 30, 1900, ch. 339, § 67, 31 Stat. 153 (omitted as obsolete, 48 U.S.C. § 532). Section 67 of the Act gave the governor the authority to declare martial law. *See* 327 U.S. at 307-08.

46. We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law" it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase "martial law" as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals.

Id. at 324.

47. It follows that civilians in Hawaii are entitled to the Constitutional guarantee of a fair trial to the same extent as those who live in any other part of the country. . . . Extraordinary measures in Hawaii, however necessary, are not supportable on the mistaken premise that Hawaiian inhabitants are less entitled to Constitutional protection than others.

Id. at 318.

Justice Murphy, in concurrence, had no doubt that the military trial of civilians in Hawaii was in violation of the Constitution. *Id.* at 324-35.

48. People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule which according to the government Congress has authorized here. In this country that fear has become part of our cultural and political institutions. The story of that development is well known and we see no need to retell it all. But we might mention a few pertinent incidents. As early as the 17th Century our British ancestors took political action against aggressive military rule. When James I and Charles I authorized martial law for purposes of speedily punishing all types of crimes committed by civilians the protest led to the historic Petition of Right which in uncompromising terms objected to this arbitrary procedure and prayed that it be stopped and never repeated.

Id. at 319-20 (footnotes omitted).

As noted by the Court, the "open-courts" doctrine has some impressive historical and doctrinal antecedents. *See* C. FAIRMAN, *supra* note 9, at 9-18. "We conclude that to the [English] publicists of the sixteenth, seventeenth, and eighteen [sic] centuries 'martial law' meant a regime applicable to soldiers in time of war (i.e., when the courts were closed)." *Id.* at 18. Although the British court in the case of Wolfe Tone, 27 St. Tr. 613 (1798), adhered to the open-courts rule, subsequent decisions in the Empire seem to have abandoned the rule "where war actually exists or imminently threatened." C. FAIRMAN, *supra* note 9, at 156. *See* O. HOOD PHILLIPS, *supra* note 9, at 502-04. "If it is held that a state of war does or did exist, then the military tribunal—not being a Court but merely a body of military officers to advise the military commander—would not be bound by the

aversion to justice by tribunal. The elimination of open courts, like the elimination of legislative bodies, would jeopardize the country far more than any external threat.[49]

5. *Executive Usurpation of Legislative Power*

The aforementioned decisions have defined the limits of the necessity doctrine as a justification for the infringement of individual rights and liberties. The Court has tolerated certain reasonable measures in this area in response to emergency situations. Yet, when such emergency measures affect the separation of powers, the Court has refused to validate such actions.

Where the President tenders the necessity doctrine as justification for an unquestionable usurpation of congressional authority, the Court has refused to uphold such a course of action. For example, in *Youngstown Sheet and Tube Co. v. Sawyer,*[50] the Court condemned President Truman's seizure of the steel mills during a bitter labor dispute. In ruling against the President, the Court ignored his contention that the grave threat to the Korean War effort created by the threatened steelworker's strike justified his conduct.[51] The Court refused to consider whether the seizure was necessary to save the lives of American servicemen and to permit the country to honor its United Nations obligations. The power which the President sought to exercise was solely within the realm of the lawmaking authority of Congress. The Court noted that in 1947, during debates on the Taft-Hartley Act, Congress specifically rejected an amendment that would have authorized such a seizure in cases of emergency.[52]

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ordinary law or procedure." *Id.* at 503-04. Nevertheless, the courts do retain authority to determine the threshold issues of whether a state of war exists, *id.* at 503, and whether "the necessity for martial rule" is made out. C. FAIRMAN, *supra* note 9, at 156.

49. Martial rule in Hawaii has been criticized extensively as unnecessary. *See, e.g.,* Marx, *supra* note 9, at 50; Wiener, *supra* note 24, at 94-99; Frank, *Ex Parte Milligan v. The Five Companies; Martial Law in Hawaii,* 44 COLUM. L. REV. 639 (1944).

The Supreme Court's affirmation of the "open-courts" rule is of enormous significance to the necessity doctrine. It is an assertion of judicial authority; the court did, and presumably will continue to, invalidate any actions taken by a military tribunal against a civilian outside the theatre of war. Thus the rule strengthens the doctrine of necessity. Moreover, it reflects a distrust of emergency authority, particularly where it exercises its power to punish. While the executive and legislature may respond most effectively to a dire emergency, only courts can do justice. If the civil courts can function, there is no reason, save the arrogant hunger for power, for not permitting them to operate.

Finally, only civil courts can continually review the legality of emergency regulations and enforcement measures. The necessity for this form of review reflects the Court's recognition of the corrupting powers of unbridled authority. Thus, not only does the "open-courts" rule protect the individual from arbitrary justice, it protects the courts from having their power usurped.

50. 343 U.S. 579 (1952).

51. *Id.* at 582.

52. *Id.* at 586.

The justices writing for the majority were not oblivious to the possibility that the Court's denial to the President of this form of emergency power might have serious if not devastating consequences.[53] This risk, however, is inherent in a system of separation of powers. Justice Douglas argued that, in the long run, this risk is the price we must be willing to pay in order to preserve the far greater interest in liberty.[54]

Justice Jackson, in concurrence, took the opportunity to dismiss generally any claim the government might advance to broaden emergency powers; the potential for abuse of authority which would arise inevitably from the exercise of these powers would be too great. He drew support for his argument from the notable absence in the Constitution of any such powers.[55]

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53. As Justice Douglas noted:

> Legislative power, by contrast [to executive power], is slower to exercise. There might be delay while the ponderous machinery of committees, hearings, and debates is put into motion. That takes time; and while the Congress slowly moves into action, the emergency may take its toll in wages, consumer goods, war production, the standard of living of the people, and perhaps even lives.

Id. at 629 (Douglas, J., concurring).

54. We pay a price for our system of checks and balances, for the distribution of power among the three branches of government. It is a price that today may seem exhorbitant to many. Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnances in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade-unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure.

Id. at 633-34 (Douglas, J., concurring). Congress has a function to perform at all times; it, and not the President, determines the extent of executive discretion in times of emergency.

> The utmost that the Korean conflict may imply is that it may have been desirable to have given the President further authority, a freer hand in these matters. Absence of authority in the President to deal with a crisis does not imply want of power in the government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law.

Id. at 603-04 (Frankfurter, J., concurring).

This strong judicial aversion to executive usurpation of legislative authority during a national emergency was also expressed in the *Milligan* decision. Although the Court was divided over whether a civilian could ever be tried by a military tribunal when civil courts are functioning, *see supra* notes 42-44 and accompanying text, the justices unanimously agreed that—putting aside the issue of their legality—such military tribunals can only be established by Congress and not the President. Writing for the Court, Justice Field stated that "[the tribunals] cannot justify on the mandate of the President because he is controlled by law, and has his appropriate sphere of duty which is to execute, not to make, the laws. . . ." 71 U.S. at 121. *See* Chief Justice Chase's concurrence, 71 U.S. at 139-41.

55. Justice Jackson stated:

> The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how

6. Summary

American history has demonstrated that executives confronted with what they perceive as an emergency are all too willing to curtail individual rights and short-circuit the legislative process. Their motives are often less than admirable. Regardless of motives, however, such extraordinary measures demand, as a precondition, extraordinary circumstances. In a constitutional structure, the will of the executive cannot constitute a sufficient legal basis for abrogating the requirements of the constitution. If caprice were enough, then the constitution would be meaningless. Hence, the doctrine of necessity must be severely restricted.

Although the Supreme Court has upheld drastic measures curtailing individual rights during a national emergency—including confinement without trial on the basis of race—it has also prohibited military trials of civilians in any but the most extraordinary circumstances. Moreover, the Court has maintained that regardless of the threatened danger, the President cannot exercise the congressional prerogative. No emergency can justify abridgement of the fundamental rules of governance contained in the Constitution.

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they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.

Id. at 649-50 (Jackson, J., concurring).

Even assuming the appropriateness of emergency powers, Justice Jackson believed that they should never be authorized without at least some legislative control. The experience of post-Weimar Germany, where the President had sole discretion over the exercise of emergency powers, provided Justice Jackson with a telling example of the inherent failings of such a process. Under the authority of the German constitution, President Von Hindenburg, persuaded by Hitler, suspended all individual rights. In contrast, the French and British governments, which also operated under emergency powers during World War II, were far less oppressive. Justice Jackson attributes this difference to the legislative control in both England and France over emergency powers.

> This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience.

Id. at 651-52. Justice Jackson concluded:

> With all its defects, delays and inconveniences, men discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.
>
> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

Id. at 655.

III

THE NECESSITY DEFENSE IN THIRD WORLD COUNTRIES

The narrow American strictures placed upon the scope of the necessity defense have been largely disregarded by Third World countries confronted with unconstitutional political upheaval.[56] Necessity has been tendered successfully as a defense to the most egregious and blatantly illegal governmental conduct. Prior to the *Bhutto* decision, courts in Cyprus and Nigeria utilized this defense to approve the virtual evisceration of their written constitutions. In Rhodesia, the high court utilized a variation of the necessity defense, Grotius' doctrine of implied mandate,[57] to do equal damage to that country's constitutional structure.

A. CYPRUS

Attorney General of the Republic v. Mustafa Ibrahim and

56. One might question the relevance, apart from the comparative perspective, of American constitutional law to an analysis of decisions by the supreme courts of newly-independent, Third World, Commonwealth countries such as Pakistan or Cyprus. The relevance is apparent in the significant reliance by third-world judges upon opinions of the United States Supreme Court. There are several reasons for this curious judicial phenomenon. First, having emerged from the British Commonwealth, these countries had no extensively developed constitutional jurisprudence. Second, legal scholars in these countries view the United States as the oldest and most successful experiment in constitutional government. One author writes, "The major influence, indeed inspiration, in the present day practice of judicial review, in the Commonwealth countries, has been the Supreme Court of the United States." E. MCWHINNEY, JUDICIAL REVIEW 236 (4th ed. 1969). For example,

> the Supreme Court of India has been prepared to admit legal argument concerning American, Canadian, and Australian federal constitutional jurisprudence as an aid to the development of its own distinctive constitutional jurisprudence. And some of the most recently independent and self-governing countries of the Commonwealth have gone even further. The Law Reports of the ill-fated Federation of Nigeria, for example, reveal systematic citation by counsel in constitutional cases, and actual canvassing in their opinions by the Supreme Court judges deciding those cases, of constitutional precedents drawn from the United States, Canada, India, Ceylon, and Northern Ireland.

Id. (citations omitted).

In the *Bhutto* decision, the Pakistan Supreme Court referred to not less than five United States Supreme Court decisions, including *Milligan, Moyer, Sterling, Korematsu, and Hirabayashi. See* PLD 1977 S. Ct. (Pak.) at 733-40.

The central issue facing our Supreme Court in state necessity cases is universal to all countries that presume to be ruled by a constitution—to what extent can society tolerate emergency measures and still remain true to constitutional governance? This issue is a very difficult one, with both practical and jurisprudential implications. Mindful that they must rely upon persuasion rather than force, dedicated jurists must carefully fashion a doctrinal system which effectively protects, during emergencies, the constitution, the commonweal and courts. Given that the United States Supreme Court has had almost two-hundred years of historical and judicial experience to develop such a system, its opinions can no doubt be instructive.

57. *See infra* notes 136-42 and accompanying text.

Others[58] was an early and influential case utilizing the necessity defense to justify substantial alterations of the fledgling Cypriot Constitution. In the *Ibrahim* decision, the Supreme Court of Cyprus held that the necessity doctrine legitimized extensive revision of nonamendable provisions of the constitution. One of these revisions was the creation of the Supreme Court that heard the case.[59]

The Cypriot Constitution was an instrument designed both to recognize and to reconcile the Greek majority and Turkish minority on Cyprus. Great Britain, Turkey, and Greece oversaw the drafting of the constitution before the British granted the country independence.[60] The constitution was a rigid document that attempted to insure that both communities would participate fully in the political decision-making process of the island. The provisions that guaranteed this participation were unamendable.[61] These provisions included rigid ethnic requirements for all branches of the government, the civil service and the military.[62] There were also rigid ethnic requirements imposed within the judicial branch.[63]

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58. 1964 Cyprus Law Reports 195.

59. The case itself involved a criminal appeal by the government of a trial court decision to grant bail to three Turkish Cypriot defendants. In seeking reversal, the government contended that, given the current state of revolt in Cyprus, there was a particularly strong likelihood that these defendants would jump bail by escaping to the Turkish sector of the island. The defendants did not address the merits, but rather claimed, *inter alia,* that the court, created in violation of the Cypriot Constitution, had no jurisdiction to hear the appeal. *Id.* at 201-04. In its decision, the court found in favor of the government and reversed the order setting bail. *Id.* at 216. The issue of bail provided the setting for a far more important inquiry by the court: Was the government's massive restructuring of the judicial process, in direct contravention of the constitution, justified under the necessity doctrine?

60. S. KYRIAKIDES, *Cyprus,* in V CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 7 (A. Blaustein & G. Flanz ed. 1972); P. POLYVIOU, CYPRUS: THE TRAGEDY AND THE CHALLENGE (1975).

61. Cyprus Const. art. 182(1).

62. They included a requirement that the President be Greek, that the Vice-President be Turkish, and that each have a final veto over any legislation concerning foreign affairs, defense and security. *Id.* at art. 48(f) and 49(f). Moreover, the House of Representatives is to be comprised of both Turkish and Greek representatives—35 and 15, respectively—to be elected by their respective communities. *Id.* at art. 62(c). The passage of any legislation regarding the electoral law, municipalities, and the imposition of duties and taxes requires a majority vote from each set of representatives. In effect, then, each community has a legislative as well as an executive veto over all important laws.

Various governmental agencies are required by the constitution to maintain a constant ratio of Greek to Turkish participants. In the public service, a seventy-to-thirty ratio must be maintained, *Id.* at art. 123(1), while in the military, a sixty-to-forty ratio is required. *Id.* at art. 129(1). Moreover, the Council of Ministers (the Cabinet) must contain seven Greek ministers and three Turkish ministers. *Id.* at art. 46.

63. The highest court, the Supreme Constitutional Court, was to be composed of three members—a Turkish Cypriot, a Greek Cypriot and a non-Cypriot who was to be President. *Id.* at art. 133(1). There was also a High Court, primarily with appellate jurisdiction over civil and criminal matters. *Id.* at art. 155 and 156. This High Court was to be composed of two Greek Cypriots, a Turkish Cypriot, and a non-Cypriot judge who would act as President and have two votes. *Id.* at art. 153(1). The composition of the

The new constitutional government soon proved incapable of passing essential legislation.[64] President Makarios proposed amendments to the constitution that the Turkish community rejected.[65] After a period of rising tensions and extensive armed confrontations between the two communities,[66] the Turkish Cypriots stopped participating in the government.[67] The House of Representatives, which was now entirely Greek, passed substantial legislation including the creation of a new Supreme Court.[68]

In the lengthy *Ibrahim* opinion, the three Greek Cypriot members[69] of the Supreme Court relied heavily upon the doctrine of necessity to justify the establishment of their own court. All three members, in separate opinions, took notice of the emergency circumstances existing in Cyprus when the House of Representatives restructured the judiciary.[70] The court held that these conditions made it imperative that the legislature act to alleviate the problem. Even though the Cypriot Constitution explicitly prohibited the House of Representatives from altering the provisions regarding the

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lower courts, both civil and criminal, was to be determined by the ethnicity of the parties. Where the parties were either all Turkish or Greek, they were entitled to judges of the same background. *Id.* at art. 159(1) and (2). Where the parties included both Turks and Greeks, the court had to be composed of both kinds of judges. *Id.* at art. 159(3) and (4).

64. S. KYRIAKIDES, *supra* note 60, at 16-17.

65. P. POLYVIOU, *supra* note 60, at 37-38.

66. *Id.* at 40.

67. S. KYRIAKIDES, *supra* note 60, at 19.

68. *Id.* at 20. The law took jurisdiction from the Supreme Constitutional Court and High Court and transferred it to the newly created five-member Supreme Court.

69. The law provided that the Supreme Court was to be comprised of the five Cypriot judges presently sitting on the two high courts—three Greek Cypriots and two Turkish Cypriots. *Ibrahim,* 1964 Cyprus Law Reports, at 228. Apparently, the Turkish Cypriots did not participate in this opinion. The court, however, found that the participation of three of its members was sufficient under the new law:

> [We hold] that this Court, as at present constituted by three of the five Judges of the Supreme Court, duly nominated by the full court to exercise the court's appellate jurisdiction at the material time, has the competence and jurisdiction to deal with all questions raised in the appeal.

Id. at 206.

70. In the first few pages of the opinion, Judge Vassiliades took judicial notice of the following conditions existing during the summer of 1964:

(a) armed rebellion against the government,
(b) armed clashes between organized groups resisting the authority of the state,
(c) loss of life, damage to property, interruption of communications,
(d) control of certain state territory by insurgents,
(e) presence of United Nations troops,
(f) inability of the state government to establish authority and resume responsibilities,
(g) duration of above conditions for several months.

Id. at 201-02.

Moreover, both courts of appeal ceased entirely to function. In August 1963, the non-Cypriot President of the Supreme Constitutional Court resigned, and soon after, in June 1964, the non-Cypriot President of the High Court resigned. Replacements were not forthcoming. *Id.* at 207, 249-50.

judiciary,[71] the court held that the doctrine of necessity can "be read into [those] provisions. . . ."[72] The court found full justification for this constitutional alteration because there was a necessity for a different and functioning judiciary.[73]

The Cypriot court's decision to rest its holding upon the necessity doctrine had less to do with faithful adherence to a legal doctrine than with expediency. Given the ethnic composition of the court, the issue before it, and the current political crisis, the decision to approve this constitutional deviation was predictable.[74] The court's decision to uphold the constitutionality of the legislative provisions in question served not only to maintain the court's existence and authority, but also to remove the restraints upon amending the constitution, and to enable the Greek Cypriot community to function effectively, without Turkish Cypriot cooperation.

In *Ibrahim,* the court misapplied the necessity doctrine to the issues before it. The House of Representatives, in altering the judicial structure of the country, could not legitimately contend that it was acting out of state necessity. At the very least, the government must show that the country's legislative body passed the extra-constitutional measures. Since only the Greek members of the legislature passed the judicial reform bill, the government cannot make even this threshold claim. A measure passed by a Turkish or Greek majority acting alone does not constitute legislative action.[75]

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71. Cyprus Const. art. 182(1).

72. *Ibrahim,* 1964 Cyprus Law Reports, at 214.

73. *Id.* at 248, 265.

74. The rigid ethnic requirements were partially responsible for the government having to install neutral, non-Cypriot judges. Since those rigid requirements could not be altered by constitutional means, a necessity arose for extra-constitutional measures. Given that the constitution did not manifest the sovereign will of the Cypriot people, a necessary deviation was perfectly acceptable.

> The Cyprus House of Representatives has not ever adopted or ratified the Constitution of Cyprus. Thus, such Constitution, which was conceived, drafted and came into force whilst circumstances were such as not to render it the unquestionable outcome of the free choice of the Cyprus people or of its leadership, was never ratified by an unfettered expression of judgment on behalf of the people of Cyprus, after it had become independent.

Id. at 222 (Triantafyllides, J., concurring).

75. *See* Cyprus Const. art. 182(1). Such a revision requires more than a simple separate majority of all those Greeks and Turks present. This type of change requires separate majoritites of two-thirds of the *total* number of Greeks and Turks, respectively, in the House. *Id.* at art. 182(3).

Nowhere in any of the three opinions did the court even consider the absence of the Turkish members of the House of Representatives when the questioned legislation was adopted. Moreover, none of the judges provided any reasons, apart from the uncooperativeness of the Turkish Vice-President, for the failure to obtain two new non-Cypriot judges for the two high courts. A true necessity analysis mandates an inquiry into the nature of the Vice-President's recalcitrance, including a determination of whether any reasonable efforts were made to persuade him to participate. No such inquiry was made.

B. NIGERIA

In *Lakanmi v. Attorney-General,*[76] the Supreme Court of Nigeria utilized the necessity defense to retain its constitutional power of judicial review in the wake of military rule. The ostensible reason for martial law had been an attempt by some army majors to stage a *coup d'etat*. As the rebels were gaining ground, the acting President and council of ministers (the Prime Minister's whereabouts were then unknown) turned over the administration of the country to the General Officer Commanding the Nigerian Army, Major-General Aguiyi-Ironsi. In his first official act, Aguiyi-Ironsi suspended all provisions of the Nigerian constitution relating to the presidency, parliament, and the prime minister, as well as provisions concerning regional governors, premiers, executive councils and legislatures.[77]

At issue in this complicated case was the legality of certain decrees of the regime purporting to strip the courts of their jurisdiction to review orders issued by government tribunals, including those pending before the courts. The new government issued orders through a Tribunal of Inquiry, and the government forbade any judicial review of these orders.[78]

The supreme court found the decrees unconstitutional on two grounds. First, by precluding the courts from reviewing the legality of the tribunal's actions, the decrees infringed upon the separation of powers guaranteed by the constitution. Second, by specifically naming the individuals against whom the original orders were issued, the decrees constituted impermissible *ad hominem* laws in violation of the fundamental principle that only a court and not a legislature can make a finding of individual guilt.[79]

In view of the massive restructuring of the Nigerian government after the military takeover, the court felt compelled to retain the old constitution as the fundamental and operative document against which the court would measure any of the regime's decrees. The court used the doctrine of necessity to reach two seemingly inconsis-

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76. 1971 U. OF IFE (NIGERIA) L. REP. 201.

77. *Id.* at 214.

78. The restrictions on both review of these orders, and the inapplicability of the constitution were contained in § 2 of Decree No. 45.

> (1) For the avoidance of doubt, it is hereby declared that the validity of any order, notice or document made or given or purported to be made or given or of any other thing whatsoever done or purported to be done under the provisions of any enactment of law . . . shall not be inquired into in any court of law, and accordingly nothing in the provisions of Chapter III of the Constitution of the Federation [pertaining to individual rights] shall apply in relation to any matter arising from this Decree or from any enactment or other law repealed as aforesaid.

Id. at 206.

79. *Id.* at 222.

tent results; it validated the new regime while basing its decision on the constitution.[80] Since there was no necessity for limiting the court's authority, or passing *ad hominem* decrees, those deviations were illegal.[81]

The government had argued that the takeover constituted an effective revolution, so that the constitution no longer existed as the nation's fundamental governing instrument. The court, while not disputing the basic validity of the doctrine of revolutionary legality, concluded that the takeover was not a revolution, since the lawful administration handed over authority to govern, and General Aguiyi-Ironsi himself stated in his initial speech that the new government would suspend only certain provisions of the constitution.[82]

The regime reacted quickly to this decision. Two weeks later, on May 9, 1970, the government issued a decree nullifying the court's decision and declaring that the takeover was a revolution.[83] Apparently, the new regime did not relish the prospect of sharing its power with the judiciary. The aftermath of the *Lakanmi* decision demonstrates the futility of attempting to control an illegal regime by legitimizing it.

C. RHODESIA

The bloodless 1965 revolution led by Prime Minister Ian Smith, head of the Rhodesian Front Party, precipitated a constitutional crisis in Rhodesia. Since 1961, Rhodesia had been governed under the terms of a British constitution which gave the country extensive self-rule. Although technically a colony, Rhodesia enjoyed essentially dominion status. Smith's party objected to those provisions of the constitution which provided well-entrenched rights to the black majority. At that time, the white minority ruled Rhodesia; the constitution envisaged, and the British insisted, however, that eventually

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80. The court stated:

> The necessity must arise before a decree is passed ousting any portion of the Constitution. In effect, the Constitution still remains the law of the country and all laws are subject to the Constitution excepting so far as by necessity the Constitution is amended by a Decree. This does not mean that the Constitution of the country ceases to have effect as a superior norm. From the facts of taking over, as we have pointed out, the Federal Military Government is an interim government of necessity concerned in the political cauldron of its inception as a means of dealing effectively with the situation which has arisen, and its main object lives and property and to maintain law and order.

Id. at 217.

81. *Id.*

82. *Id.* at 214. For a description of the doctrine of revolutionary legality, see *infra* note 123.

83. B. NWABUEZE, *supra* note 1, at 207.

the black majority would rule.[84]

On November 11, 1965, while Rhodesia was under a constitutional state of emergency, Prime Minister Smith made the Uniform Declaration of Independence (known as the UDI) and proclaimed the establishment of a new constitution. Although the 1965 Constitution was similar to the 1961 Constitution, the new Constitution omitted provisions for majority rule, and thus insured that white minority rule would prevail.[85] The Governor General immediately dismissed Smith and his cabinet; and the British Parliament enacted the Southern Rhodesia (Constitution) Act of 1965, which removed all legislative power from the Rhodesian legislature and returned it to Great Britain.[86] The revolutionary government, however, was effectively in control of the government, including both the civil service and the military.[87]

The Rhodesian High Court, Appellate Division, first confronted the legality of the U.D.I. and the concomitant 1965 Constitution in the case of *Madzimbamuto v. Lardner-Burke*.[88] This case involved the allegedly illegal detention of two Rhodesian political activists, Daniel Madzimbamuto and Leo Baron. The government had lawfully detained the two, under the terms of the 1961 Constitution, during the declared state of emergency and just prior to the U.D.I. When the state of emergency lapsed after three months, the revolutionary Rhodesian Parliament extended the state of emergency, thereby authorizing the continued detention of Madzimbamuto and Baron.[89] These two detainees argued "that the 1965 Constitution was invalid, that the present Government was an illegal government, and in consequence all its acts, . . . were invalid. The detention orders under which Daniel Madzimbamuto and the second appellant were detained were thus illegal and the applicants were entitled to [be released]."[90]

In the long *Madzimbamuto* opinions,[91] a majority of the Rhodesian High Court ruled that Prime Minister Ian Smith's revolutionary government was the lawful government, but that the 1961 Constitu-

84. Dias, *Legal Politics: Norms Behind the Grundnorm,* 1968 CAMBRIDGE L.J. 232, 234.

85. *Id.*

86. *Id.* at 235.

87. Brookfield, *The Courts, Kelsen and the Rhodesian Revolution,* 19 U. TORONTO L.J. 326, 329 (1969).

88. 1968(2) S.A. 284.

89. Welsh, *The Constitutional Case in Southern Rhodesia,* 83 LAW Q. REV. 64, 66-67 (1967).

90. 1968(2) S.A. at 293.

91. There were two High Court opinions in *Madzimbamuto*. The first was by the General Division of the High Court, *see* Brookfield, *supra* note 87, at 326 n.3; *see generally* Welsh, *supra,* note 89; the second was by the Appellate Division of that court.

tion, which the Smith regime purported to replace, was still the fundamental norm of Rhodesian society.[92] In principle, the court accepted Kelsen's doctrine of revolutionary legality as a means to evaluate the legitimacy of a revolutionary regime.[93] The court believed, however, that the Smith government had not yet become "effective" within the meaning of Kelsen's doctrinal formulation.[94] Since Great Britain was then attempting to regain control of the country and imposing economic sanctions on Rhodesia,[95] the regime was not "firmly established."[96] Only when a regime is so established can it become the *de jure* government.[97] Therefore, the 1961 Constitution was still the fundamental norm, or *Grundnorm,* of Rhodesian society.[98]

This conclusion left the court in the delicate position of evaluating the actions of a usurping authority that was in *de facto* control of the government.[99] The court resolved this problem by determining that where an illegal regime is in *de facto* control of the government, the courts are bound to uphold some of its actions.[100] In advancing this principle of constitutional adjudication, the court relied heavily upon Grotius' theory of implied mandate.[101] Although the majority recognized that some measures of a usurper can be given legal effect, the justices differed in delineating the criteria for determining which

92. 1968(2) S.A. at 331, 351 (Beadle, C.J.).

93. Brookfield, *supra* note 87, at 330. For an explanation of Kelsen's doctrine of revolutionary legality, see *infra* note 123.

94. 1968(2) S.A. at 359-60 (Beadle, C.J.).

95. 1968(2) S.A. at 322.

96. *Id.* at 320.

97. According to the majority, a revolutionary government becomes fully legitimate only when it obtains *de jure* status. The Smith regime had not reached this point, having only acquired *de facto* status.

> It will be seen that the definition of *de facto* and *de jure* governments which I have adopted contains two parts. The first part requires that a regime should be "in effective control over the territory" and this requisite is common to both a *de facto* and a *de jure* government. The second part of the definition deals with the likelihood of the regime continuing in "effective control." If it "seems likely" so to continue, then it is a *de facto* government. When, however, it is "firmly established," it becomes a *de jure* government. The difference between the two types of government is the degree of certainty with which one can predict the likelihood of the regime continuing in "effective control." The difference between the two types of government may be narrowed down to the difference between "*seems*" likely and "*is*" likely because a Government which "is" likely to continue in effective control could be said to be "firmly established." The difference here then is the difference between "seems" and "is," a difference purely of the degree of certainty with which the future can be predicted.

Id.

98. *Id.* at 331, 351 (Beadle, C.J.). For a definition of *Grundnorm,* see *infra* note 123.

99. *Id.* at 336.

100. *Id.* at 336-52.

101. *Id.* at 348. *See also infra* notes 136-142 and accompanying text.

acts of a usurper are valid.[102] Applying the various formulations to the case before it, both the General and Appellate Divisions of the High Court upheld the emergency proclamations of the revolutionary government.[103]

The theory of implied mandate varies from the necessity defense in that it legitimizes illegal governing authority by a usurper rather than an executive or legislature. Nevertheless, the two theories are fundamentally similar in that they are grounded upon the principle that unconstitutional conduct can be justified in the interests of preserving the state. The only advantage of Grotius' theory is that it was designed for application in a revolutionary context. The doctrine of state necessity was not. The theory freely admits that the successful revolutionary government is, in fact, usurping lawful authority. Like necessity, however, it equally undermines constitutional rule.

IV
THE NECESSITY DOCTRINE IN PAKISTAN: *BHUTTO v. CHIEF OF ARMY STAFF*

A. CONSTITUTIONAL UPHEAVAL AND THE COURTS BEFORE BHUTTO

The decisions of the high courts of Cyprus, Nigeria, and, to a lesser extent, Rhodesia, provided the judges in *Bhutto* with signifi-

102. *Id.* at 351-52, 421-22; *see also* Brookfield, *supra* note 87, at 351.

103. 1968 (2) S.A. at 360. Thereupon, the defendants appealed the High Court decision to the Judicial Committee of the Privy Council in Great Britain. 3 All E.R. 561 (1968). In a 4-1 decision, the Council ruled that the Smith regime was unlawful and, therefore, any of its actions, including enactment of emergency regulations and detentions ordered thereunder, are invalid. 3 All E.R. at 562. Although the Council did not reject outright the principle of "implied mandate," it found it was inapplicable to the present circumstances since Parliament was legislating for Rhodesia:

> It may be that there is a general principle, depending on implied mandate from the lawful Sovereign, which recognizes the need to preserve law and order in territory controlled by a usurper. But it is unnecessary to decide that question because no such principle could override the legal right of the Parliament of the United Kingdom to make such laws as it may think proper for territory under the sovereignty of Her Majesty in the Parliament of the United Kingdom. Parliament did pass the Southern Rhodesia Act of 1965 and thereby authorize the Southern Rhodesia Constitution Order in Council of 1965. There is no legal vacuum in Southern Rhodesia. Apart from the provisions of this legislation and its effect on subsequent "enactments" the whole of the existing law remains in force.

3 All E.R. at 577.

The Appellate Division of the High Court, in a subsequent decision, *R. v. Ndhlovu,* 1968(4) S.A. 515, held that the decision of the Privy Council was not binding upon them. The court concluded that since the *Madzimbamuto* decision was rendered, the revolutionary regime had become entrenched to the point where it was now the *de jure* government. 1968 (4) S.A. at 537. Therefore, the 1965 Constitution is the only valid constitution for Rhodesia.

cant precendential authority to justify an expansive application of the necessity doctrine. More importantly, the *Bhutto* court could draw also upon Pakistan's own turbulent constitutional history to develop the proper judicial response to an illegal regime. On three separate ocassions, the Pakistani high court considered the legality of an unconstitutional regime. Each time the court chose a different legal principle to validate the regime or its actions. Only in its earliest decision, known as the *Governor-General's Case,* did the court rely solely on the necessity doctrine. In the two other decisions, *State v. Dosso* and *Asma Jillani v. Government of the Punjab,* the court relied upon the theories of Kelsen and Grotius, respectively, to resolve the enormously troubling issues before it.

1. The Governor-General's Case

In the 1955 decision, *Reference by His Excellency the Governor General (under section 213 of the Government of India Act, 1935),*[104] the Federal High Court held that under the doctrine of state necessity, the Governor-General of Pakistan could act in a legislative capacity even though he had no authority to do so under the provisions of the Government of India Act of 1935 and the Indian Independence Act of 1947.[105] The court held that because the Constituent Assembly had been lawfully dissolved by the Governor-General,[106] and much of its previous legislation had already been

104. PLD 1955 F.C. (Pak.) 435. [hereinafter cited and referred to as the *Governor-General's Case*]. Section 213 of the Government of India Act gave the court authority to issue advisory opinions.

105. At the time the *Governor-General's Case* had been decided, Pakistan still had not adopted its own constitution. The responsibility for adopting Pakistan's first constitution rested upon Pakistan's Constituent Assembly, under the provisions of the Indian Independence Act of 1947. This act was the British instrument which gave both India and Pakistan their independent and separate status. It also provided that until the Constituent Assembly provided otherwise, the Assembly would also act as the law-making (as opposed to constitution-making) body for the country. Meanwhile, until the constitution was formally adopted, Pakistan was to be governed, under the provisions of the earlier Government of India Act of 1935, by the constitution which was imposed upon India by the British Parliament when Pakistan was still part of that colony. A. GLEDHILL, PAKISTAN: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 64 (1957).

106. The Governor-General had dissolved the Constituent Assembly the year before, on October 24, 1954, seven years after it first began meeting. E. MCWHINNEY, *supra* note 56, at 142. Several events precipitated the Governor-General's actions. Foremost, Pakistan was still without its own constitution.

> For most of the seven years during which it actively met, it [the Constituent Assembly] was deadlocked by disagreement over what should be the key concepts of the new society and what expression, if any, the constitution should give to them. The deadlock essentially involved a conflict between Western secularism and Muslim fundamentalism—between those who would give Pakistan a liberal democratic constitution along Western secular lines and those who would maintain, instead, an essentially Islamic, theocratic organization for the government of the new state. The incorporation of the basic moral principles of Islam into the constitution in the form in which this incorporation was then projected,

deemed invalid,[107] the Governor-General enjoyed the authority to

involved, amongst other things, the proscribing of legislation repugnant to the Quran and the Sunnah, with a related problem whether the Supreme Court alone or a committee learned in Islamic law should decide such repugnancy.

Id. at 140-41. Moreover, just prior to dissolution, during 1953, Pakistan was in the midst of an acute economic, political, and religious crisis. Along with serious food shortages throughout the country, Pakistan's foreign exchange reserves had fallen to a low level due to a shrinkage in the world demand for its two principal imports, jute and cotton. PAKISTAN: FROM 1947 TO THE CREATION OF BANGLADESH 25 (1973) [hereinafter cited as PAKISTAN HISTORY].

On the religious front, there was severe rioting by orthodox Muslims in the major cities of Karachi and Lahore, after the government refused their demand to declare an unorthodox Muslim group, the Ahmadiya sect, a non-Moslem minority and dismiss its members from government posts. During this turmoil, the Governor-General dismissed the cabinet and formed a new one. *Id.* at 25-26.

The direct cause of the dissolution was, however, political in nature. In late 1954, the Assembly adopted several amendments to the Government of India Act of 1935, which stripped the Governor-General of substantially all of his powers.

> The Govenor-General was required to appoint as Prime Minister a member of the federal legislature who enjoyed the confidence of its majority, and to appoint the other ministers from the federal legislature on the prime minister's advice. The Governor-General was obliged to act on the advice of his ministers, who would vacate office on a vote of non-confidence in the federal legislature; only the Prime Minister could dismiss the other ministers.

A. GLEDHILL, *supra* note 105, at 73. In this way, the Governor-General could no longer dismiss the Cabinet as he had done the year before. As Gledhill puts it, the Assembly placed the Governor in an "intolerable situation," since

> there was no provision in the interim constitution [i.e., the amendments to the 1935 Act] for the dissolution of the federal legislature, and so no means whereby the Governor-General, when at issue with the Assembly, could appeal to the electorate. Had he accepted the position, he would have been indefinitely subservient to the will of a perpetual legislature, which was losing the confidence of the people.

Id. at 73. Therefore,

> [O]n October 24, 1954, the Governor-General issued a proclamation of emergency declaring that the constitutional machinery had broken down, and that the Assembly could no longer function. A new Assembly would be elected, and the ministry would be reconstituted.

Id.

In the *Governor-General's Case,* the Federal High Court recognized the Governor-General's right to dissolve the Constituent Assembly. This right was derived, according to the court, from section 5 of the Indian Independence Act, which states: "5. For each of the new Dominions, there shall be a Governor-General who shall be appointed by His Majesty and shall represent His Majesty for the purposes of the government of the Dominion." This inherent authority to dissolve the Constituent Assembly was properly exercised by the Governor-General for the following reasons:

a) After 7 years the Assembly had still not drafted a Constitution.

b) The Assembly had become unrepresentative of the People of Pakistan and ceased to be responsible to them.

c) The Assembly had for all practical purposes assumed the form of a perpetual legislature.

Governor General's Case, PLD 1955 F.C. (Pak.) at 486-88.

107. The effective invalidation of much of the Constituent Assembly's enactments was an unanticipated by-product of the suit filed by the President of the Assembly after the dissolution. In his petition to the Federal High Court, the President sought both a writ of mandamus restraining the federal government from acting upon the proclamation and a writ of *quo warranto* to declare illegal the appointment of some new ministers. A. GLEDHILL, *supra* note 105, at 73. The Federal High Court denied this relief on jurisdic-

enact any measures necessary for the proper functioning of the

tional grounds. *Federation of Pakistan v. Moulvi Tamizuddin Khan* PLD 1955 F.C. (Pak.) 240. The court held that the courts had no authority to issue such writs since the act purporting to give them such jurisdiction was invalid because it was not assented to by the Governor-General as provided by section 6(3) of the Indian Independence Act. Under the express provisions of that act, "The Governor-General of each of the new Dominions shall have full power to assent in His Majesty's name to any law of the Legislature of that Dominion." A. GLEDHILL, *supra* note 105, at 74. It was the practice in Pakistan, after achieving independence, for the Governor-General to pass only on legislation which the Assembly enacted while acting in its capacity as a federal legislature. When the Assembly was making constitutional law, i.e., amending the Government of India Act of 1935, it was assumed that it was acting as a sovereign body subject to no control. The Federal High Court ruled otherwise. *Id.* The effect of the *Tamizuddin* decision was that all legislation which had not been assented to by the Governor-General, i.e., all constitutional enactments, was invalid. Over forty items of legislation were involved, some of them central to the effective running of the Pakistani government. The decision, therefore, had the following implications:

> (1) All actions taken under orders made after 31 March 1948, under section 9 of the Indian Independence Act, 1947, as amended by the Indian Independence (Amendment) Act, 1948, were invalid. In particular, section 92A of the Government of India Act, 1935, and hundreds of Acts made by the Governors of East Bengal, the Punjab (which in law should be called 'West Punjab'), and Sind were not and never had been part of the law. Further, the criminal law and procedure of Pakistan had never been applied to those parts of Baluchistan which had not been part of British India.
>
> (2) The executive and judicial government of Karachi had apparently no legal foundation.
>
> (3) All laws passed after 1950 by the Constituent Assembly functioning as Federal Legislature under sub-section (2) of section 8 of the Independence Act, 1947, were probably invalid because the Assembly had purported to change its composition by laws which had not received the Governor-General's assent.
>
> (4) All laws passed by the Provincial Legislatures since the last general elections were presumably invalid because the Assembly had purported to amend the fifth and sixth schedules to the Government of India Act, 1935, under which the provincial Assemblies were elected and constituted.
>
> (5) All laws passed by the Provincial Legislature of East Bengal after 14 March 1953, were invalid because the Provincial Assembly had no legal existence after that day.
>
> (6) Other branches of the civil, criminal and revenue law were in large part invalid because they had been enacted by the Constituent Assembly either under sub-section (2) of that section in accordance with amendments to the Government of India Act, 1935, made under sub-section (1) of the section.

Governor General's Case, PLD 1955 F.C. (Pak.) at 476. The Governor-General responded to the decision by retroactively validating thirty-five of the constitutional laws passed by the Assembly. He purported to act upon the basis of section 42 of the Government of India Act, 1935. That section provided:

> 42. (I) The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of Pakistan or any part thereof, and any ordinance so made shall have the like force of law as an Act passed by the Federal Legislature, but the power of making ordinances under this section is subject to the like restrictions as the power of the Federal Legislature to make laws, and any ordinance made under this section may be controlled or superseded by any such Act.

I. JENNINGS, CONSTITUTIONAL PROBLEMS IN PAKISTAN 42 (Reprint 1972).

The federal High Court invalidated this emergency constitutional legislation in *Usif Patel v. The Crown,* PLD 1955 F.C. (Pak.) 387. Under section 42 of the Government of India Act, 1935, the court noted, the Governor-General's power to promulgate ordinances is only as extensive as the power of the Federal Legislature to make laws. *Id.* at

Pakistani Government. This authority, the court made clear, was only temporary and subject to the approval of the new Constituent Assembly, which the Governor-General had promised to appoint.

In upholding the Governor-General's emergency actions, the court was careful to distinguish the present factual circumstances from those which led it to invalidate the earlier emergency provisions in the *Usif Patel* case.[108] It then stated the precise question

394. Since a federal legislature has no authority to make constitutional law—only the Constituent Assembly acting in its constitution-making capacity is empowered to enact such measures—the Governor-General is likewise precluded from so legislating, whether an emergency exists or not.

> So that we may now be understood more clearly, let me repeat that the power of the Legislature of the Dominion for the purpose of making provision as to the constitution of the Dominion could under . . . the Indian Independence Act be exercised only by the Constituent Assembly and that that power could not be exercised by that Assembly when it functioned as the Federal Legislature within the limits imposed upon it by the Government of India Act, 1935. It is, therefore, not right to claim for the Federal Legislature the power of making provision as to the constitution of the Dominion . . . .

Id. at 396. Any other interpretation could have potentially disastrous consequences.

> If the constitutional position were otherwise, the Governor-General could by an Ordinance repeal the whole of the Indian Independence Act and the Government of India Act and assume to himself all powers of legislation. A more incongruous position in a democratic constitution is difficult to conceive, particularly when the Legislature itself, which can control the Governor-General's action, is alleged to have been dissolved.

Id.

The Governor-General responded to the *Usif Patel* decision by issuing a new proclamation. He again validated the same thirty-five acts, this time based upon his common law authority to preserve the state. I. JENNINGS, *supra* at 53. In relevant part, the proclamation stated,

> (I) The Governor-General assumes to himself until other provision is made by the Constituent Convention such powers as are necessary to validate and enforce laws needed to avoid a possible breakdown in the constitutional and administrative machinery of the country and to preserve the State and maintain the government of the country in its existing condition.
>
> (2) For the purposes aforesaid it is hereby declared that the laws mentioned in the Schedule to the Emergency Powers Ordinance, 1955, shall, subject to any report from the Federal Court of Pakistan, be regarded as having been valid and enforceable from the dates specified in that Schedule.

Id.

The Governor-General next sought an advisory opinion from the High Court to determine the legality of several of his most recent actions. The *Governor-General's Case* was the court's response.

108. *See supra* note 107. In the *Governor-General's Case,* as opposed to *Patel,* the Governor-General was (a) asserting less authority, (b) providing for a new representative legislative body, and (c) relying upon necessity and not any statutory authorization.

> There is, therefore, this fundamental difference between the situation as existing at the time of this Court's decision in *Usif Patel's case* and the situation that exists now, that whereas the Ordinance the validity of which was considered in *Usif Patel's case* made no reference to a new Constituent Assembly and claimed for the Governor-General the power not only of permanently validating invalid constitutional legislations, but also the right of framing a constitution for Pakistan, the validation by the present Proclamation of Emergency is only temporary and the power has been exercised with a view to preventing the State from dissolution and the constitutional and administrative machinery from

before it as follows:

> Thus the issue raised refers to the extraordinary powers of the Governor-General during the emergency period and not to powers which vest in the Governor-General during normal times when the vital organ of the Constitution, namely the legislature, is functioning, and the question that we have to consider is whether there is any provision in the Constitution governing such a situation or any other legal principle within, outside or above the Constitution Acts which entitles the Governor-General to act in case of necessity of such a nature.[109]

The court, in addressing this issue, referred to numerous sources to support its proposition that the doctrine of state necessity is a "part of the common law of all civilised States and which every written constitution of a civilised people takes for granted."[110] For example, quoting Oliver Cromwell with approval, the court noted that "[i]f nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make the law."[111] The court found that the Governor-General's actions prevented the breakdown of the political and constitutional institutions of Pakistan.[112]

In its opinion, the court seemed to draw narrow limits for the circumstances under which an individual could lawfully usurp legislative authority in direct violation of the constitution. First, the usurper must be the head of state. The court placed particular emphasis upon the fact that the Governor-General was the head of the Pakistani state. The power to act in emergencies is inherent in his responsibilities.[113] Second, during the emergency, the legislature must be incapable of legislating. This was certainly true in Pakistan, since no legislature even existed when the Governor-General issued his proclamation. The court compared the duties of an executive in this situation to that of an army commander administering martial law.[114] Third, an executive can only utilize the necessity to justify those acts which are immediately necessary to the preservation of the state.[115] Moreover, since the necessity is based upon the absence of a legislative body, the Governor-General is bound to call a new Con-

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> breaking down before the question of validation of these laws has been decided upon by the new Constituent Assembly.

Governor General's Case, PLD 1955 F.C. (Pak.) at 478.

109. *Id.*

110. *Id.*

111. *Id.* at 479. *But see supra* note 7 for contradictory remarks by Cromwell on the topic of necessity.

112. "[I]f the Governor-General had not validated the laws after assuming to himself the powers to validate them the constitutional and administrative machinery of the country would have broken down." *Governor General's Case,* PLD 1955 F.C. (Pak.) at 477.

113. *Id.* at 486.

114. *Id.* at 484.

115. *Id.* at 486.

stituent Assembly as soon as it is practicable.[116]

Justice Cornelius dissented on the necessity issue, asserting that the Governor-General's actions went too far beyond his authority under the existing constitutional framework.[117] Although the justice recognized that during an emergency state necessity may justify interference with the rights of citizens,[118] he stated that it cannot justify "interference with constitutional instruments."[119] Cornelius contended that the sources which the majority cited to uphold executive exercise of legislative powers were anachronisms which no longer should be accorded any precedential weight.[120]

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116. *Id.*

117. *Id.* at 510-11 (Cornelius, J., dissenting).

118. Cornelius provides the following examples of permissible state interference with individual rights during an emergency.

> The existence of an emergency, say a state of war or a large-scale disturbance, may justify the executive in making an order commandeering all private motor vehicles. Similar circumstances may justify entry by officers of the executive upon privately owned premises which are, in the eye of the ordinary law, inviolable.
>
> In a more stringent emergency, the services of members of the public may be requisitioned for the purposes of carrying out works or otherwise offering resistance to check a calamity or offering resistance to an enemy.

Id. at 511.

119. *Id.* Cornelius apparently took a restrictive approach toward the necessity doctrine; accordingly, it cannot be used to validate usurpation of constitutional authority.

120. Cornelius stated that

> These affairs belong to periods when, and to territories where, the power of the King was, in fact, supreme and undisputed. The records of these affairs are hardly the kind of scripture which one could reasonably expect to be quoted in a proceeding which is essentially one in the enforcement and maintenance of representative institutions. For they can bring but cold comfort to any protagonist of the autocratic principle against the now universal rule that the will of the people is sovereign.

Id. at 515-16. Professor McWhinney is extremely critical of the high court's decisions in *Tamizuddin Khan, Usif Patel,* and the *Governor-General's Case*. He makes a compelling argument that the court should have relied upon the "political question" doctrine to dispose of these cases. In that way, it could have easily avoided the need to adjudicate the issues presented to it.

> Such an approach applied by the Federal High Court at the outset of the constitutional crisis, in *Tamizuddin Khan's Case,* would have yielded the same end result but have saved the court from the extraordinary embarrassment (as it subsequently turned out) of its having, according to the particular doctrinal argument on which it in fact decided that case, necessarily invalidated at the same time most of the constitutional and administrative structure and machinery on which any government in Pakistan must rest. It would also have avoided the necessity for the frenetic legal researches that then ensued in an endeavour to discover a doctrinal justification for holding the scattered remnants of Pakistan political and governmental authority together, and the further necessity for the upholding of the unbridled assertion of prerogative power under the principle *salus populi suprema lex* that the Federal High Court majority felt themselves inevitably constrained to in the later special *Reference*.

E. MCWHINNEY, *supra* note 56, at 145. Showing foresight which he could not have then fully appreciated, McWhinney added that "[t]he rather extravagant sweep of the court's decision in the special *Reference*—both the actual holding and more especially the lan-

2. *State v. Dosso*

The Pakistani courts did not have to wait very long before they again found themselves in the midst of an acute constitutional crisis. Shortly after the *Governor-General's Case,* on June 21, 1955, a new Pakistan Constituent Assembly was elected. In February of the following year, the Assembly adopted the country's first constitution. Pakistan functioned under the provisions of this constitution until October 7, 1958, when, amidst intense political bickering in the Cabinet and fear of potentially extensive vote fraud, the President issued an emergency proclamation. In it, he

> abrogated the Constitution, dismissed the Central and Provincial Governments, dissolved the National and Provincial Assemblies, abolished all political parties, proclaimed martial law, and appointed General Ayub Khan [Commander in Chief of the Army] as Chief Martial Law Administrator.[121]

Later that same month, the Pakistan Supreme Court, in a case that was pending at the time of the President's proclamation,[122] ruled that the 1956 Constitution was no longer the governing instrument of the country and that the will of the President was now the fundamental norm (or *Grundnorm*) by which to measure the validity of any governmental act.[123] Apparently, the doctrine of state necessity

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guage of the majority opinion—may well embarrass the courts in Pakistan sorely in the future." *Id.* at 146.

McWhinney's criticisms notwithstanding, the court, in its several opinions, managed to accomplish several seemingly worthwhile goals:

(a) it officially eliminated a bickering, uncooperative, and ineffective legislative body;

(b) it placed doctrinal restrictions upon the Governor-General's emergency authority; and

(c) it helped to establish a new Constituent Assembly.

121. PAKISTAN HISTORY, *supra* note 106, at 72.

122. State v. Dosso, PLD 1958 S. Ct. (Pak.) 533.

123. The philosophy of the Austrian positivist Hans Kelsen formed the basis of the court's assertion that the validity of the new government must be measured by its effectiveness alone. An analytical positivist in the tradition of Englishman John Austin, Kelsen insisted that a theory of law must be free from ethics, politics, sociology, and history. Although he did not deny the value of these considerations, the theory of law must remain pure. R. DIAS, JURISPRUDENCE 488-89 (4th ed. 1976).

This pure theory views law as a hierarchy of norms. These norms are propositions, in hypothetical terms, in the form "if X happens, then Y should happen." As opposed to propositions of science, which describe what, in fact, occurs, these normative propositions of law describe what ought to occur, i.e., "are concerned with imputation of responsibility." *Id.* at 490.

The hierarchy of norms merely means that the validity of any "ought" proposition derives from another—more basic—proposition or norm which imparts validity to it. For example, "[t]he rule that some official should imprison a convicted thief derives its validity from the judicial order prescribing imprisonment for theft, and this in turn derives its validity from rules regulating the competence of the court and the rules of substantive law and procedure." *Id.* at 493. Moreover, in every legal order this hierarchy of norms is traceable to a basic or fundamental norm, or *Grundnorm* as Kelsen calls it. The validity of all norms rests upon the *Grundnorm,* whether it is a written constitution or the will of the dictator. *Id.* at 495. According to this theory, the *Grundnorm* is not

was inapposite under these circumstances.

Relying primarily upon the philosophy of Hans Kelsen, the court found that the two elements for the establishment of a new *Grundnorm* were satisfied in this case. First, given the virtual evisceration of Pakistan's fundamental institutions under the proclamation, the President's actions constituted an "abrupt political change not within the contemplation of the Constitution."[124] Second, the court found that the revolution was effective "in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime."[125]

The court then considered the contention of the appellants that their pre-revolution convictions by Councils of Elders and not a law court were a violation of the Fundamental Rights Provisions of the 1956 constitution. The court first found that the protections accorded citizens in Part II of the 1956 Constitution, which includes the provisions concerning individual rights, were not contained in any of the regime's enactments. Therefore, the court held that these

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the written constitution itself, but the presupposition that the constitution "ought to be obeyed." A *Grundnorm* is a basis for the legal order until it loses its effectiveness, i.e., individuals no longer adhere to it.

The implication of the theory of the *Grundnorm* upon the legality of a revolutionary regime becomes apparent when a revolution successfully ousts the prior government. Thus, when a revolutionary regime manages to elicit support from society at large, then a new *Grundnorm*—that the will of the general or generals ought to be obeyed—becomes the validating factor for all the laws in society.

Other courts also have adopted the view that a regime which has successfully replaced the earlier *Grundnorm* must now be given judicial recognition as the legitimate government. *See* Uganda v. Commissioner of Prisons, 1966 East Afr. L. Rep. 514, (Uganda); R. v. Ndhlovu, 1968(4) S.A. 515 (Rhodesia).

One can only speculate about the popularity in Pakistan, and elsewhere, of this theory of revolutionary legality. Since they had been part of the British Empire, and thus subjected to external and often unpopular rule, these countries may have been more willing than most to regard revolution as a legitimate political tool. Also, from an intellectual perspective, Kelsen's theories must have intrigued these largely British-trained jurists whose jurisprudential background no doubt included such leading positivists as Austin, Bentham, and H.L.A. Hart. A jurisprudence which severs law from morality would be favorably received by Commonwealth judges, for whom "law" had long meant oppressive British rule; the notion that law and morality were necessarily connected would be anathema from the perspective of the lawfully oppressed. The fact that apologists for the Empire often asserted moral claims to rule, e.g., "the white man's burden," could only fortify third-world antipathy toward natural law.

Professor Eekelaar provides other, equally plausible, reasons.

> There is a view, professing a pessimistic realism, which would attribute the results of these cases to personal or political motivation on the part of the judges. Sympathy with the revolutionaries, unwillingness to relinquish office, even an altruistic desire to prevent their replacement by lesser men may indeed all have played a part.

Eekelaar, *Principles of Revolutionary Legality,* in OXFORD ESSAYS IN JURISPRUDENCE 23 (A.W.B. Simpson ed., 2d ser. 1973).

124. *Id.* at 538.

125. *Id.* at 539.

provisions were no longer in effect.[126]

3. *Asma Jillani v. Gov't of the Punjab*

The Pakistan Supreme Court subsequently renounced Kelsen's doctrine of revolutionary legality in *Asma Jillani v. Government of the Punjab,*[127] a case where the Pakistani courts, for the third time in their short history, passed upon the legitimacy of an unconstitutional regime. This case involved the regime of General Yahya Khan, who was Commander-in-Chief of the Pakistan Army until President Ayub Khan[128] unlawfully transferred all governmental authority to him in March 1969.[129]

In this third attempt to develop a judicially sound and politically practical response to what has become an endemic phenomenon to emerging nations, the court held that an unconstitutional regime does not acquire legitimacy merely because it has become effective. The court recognized, however, that some enactments which such a regime proclaims, and some actions which it takes, are valid under a variant of the necessity doctrine labeled "condonation."[130]

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126. *Id.* at 541.

127. PLD 1972 S. Ct. (Pak.) 139.

128. PLD 1972 S. Ct. (Pak.) at 220. President Ayub Khan had himself come to power under rather inauspicious circumstances. The very day after the *Dosso* decision, then General Ayub Khan staged a *coup* and took over the presidency from President Mirza. Khan's 11-year reign in office was marked by turbulence and bloodshed.

After single-handedly ruling the country under a virtual military dictatorship, Khan announced, on March 1, 1962, the formation of a new Pakistani constitution. Although the constitution contained some fundamental rights, these provisions were more honored in the breach. A National Assembly was soon convened, and martial law lifted. President Khan was elected during widespread political rioting to a five-year term as President. PAKISTAN HISTORY, *supra* note 106, at 77-83.

His regime was finally brought down by unified political opposition. In January 1969, during a period of intense national rioting, leaders of eight opposition parties from both East and West Pakistan met and demanded the following: (1) full autonomy for East Pakistan, (2) an end to restrictions upon freedom of the press, and (3) lifting of all emergency regulations, imposed during the 1965 Indo-Pakistani War. The leaders also demanded the abolition of the indirect method for electing the President, the National Assembly, and Provisional Assemblies. Voting for these offices was done by the 80,000 members of the college of "Basic Democrats," who themselves were popularly elected. This method of election was considered undemocratic since electors could be easily bribed or intimidated. *Id.* at 97.

President Khan, faced with growing unrest, lifted the state of emergency, announced that he would not seek re-election, and agreed to both regional autonomy and direct elections. Rioting continued, however, with many people taking revenge upon the now powerless Basic Democrats. Many local governments collapsed, and justice was dispensed by unofficial "people's courts." *Id.* at 99.

On March 25, 1969, President Ayub Khan resigned the presidency and turned over all governmental authority to the Commander in Chief of the Army, General Yahya Khan.

129. PLD 1972, S. Ct. (Pak.) at 185.

130. The court stated:

The court gave several reasons why the use of Kelsen's theory by the *Dosso* court was improper. First, the *Dosso* court was extremely premature in ruling, only six days after the fact, that President Mirza's revolutionary government was "effective" for purposes of Kelsen's theory. Subsequent political developments revealed the shortcomings of such a hasty determination. The *Dosso* court appeared foolish, the court suggested in *Asma Jillani,* when the regime it labeled "effective" one day was overthrown the next.[131] Second, in applying Kelsen's theory, the *Dosso* court failed to recognize what in philosophy is known as the "is-ought" distinction. Kelsen's theory is a descriptive theory of law; it is not a normative principle of adjudication.[132] Only gross misunderstanding can lead a court to utilize Kelsen as the basis of a theory that "might makes right."[133]

Finally, the court rejected Kelsen's theory outright. Since international law forms the basis of Kelsen's effectiveness theory of validation for a revolutionary regime, this theory had no application to the concerns of a national court. Although other countries, under rules of international law, recognize that a successful *coup d'etat* renders a state or government legitimate, it does not follow that the courts of that state are necessarily bound to follow that determination.[134]

> Recourse therefore has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself but one has to disagree with the view that this is a doctrine for validating the illegal acts of usurpers. This doctrine can be invoked in aid only after the Court has come to the conclusion that the acts of the usurpers were illegal and illegitimate. It is only then that the question arises as to how many of his acts, legislative or otherwise, should be condoned or maintained, notwithstanding their illegality in the wider public interest. This principle would be called a principle of condonation and not legitimization.

Id. at 154.

131. *Id.* at 161.

132. As the court described Kelsen's theory:

> [Kelsen] was only trying to lay down a pure theory of law as a rule of normative science consisting of "an aggregate or system of norms." He was propounding a theory of law as a "mere jurists' proposition about law." He was not attempting to lay down any legal norm or legal norms which are "the daily concerns of Judges, legal practitioners or administrators."

Id. at 179.

133. It was, by no means, his purpose to lay down any rule of law to the effect that every person who was successful in grabbing power could claim to have become a law creating agency. His purpose was to recognize that such things as revolutions do also happen but even when they are successful they do not acquire any valid authority to rule or annul the previous "grund-norm" until they have themselves become a legal order by habitual obedience by the citizens of the country. It is not the success of the revolution, therefore, that gives it legal validity but the effectiveness it acquires by habitual submission to it from the citizens.

Id. at 180-81.

134. In rejecting the theory, the court concluded:

Without Kelsen, the *Asma Jillani* court was unable to uphold the clearly unconstitutional usurpation of power by General Yahya Khan. Nevertheless, the court felt compelled to rule that certain acts by an illegal regime must be given legal effect.[135] As precedent for this assertion, the court relied upon the notion of implied mandate first advanced by Hugo Grotius in his classic treatise *De Jure Belli ac Pacis Libri Tres*.[136] According to Grotius, courts must validate certain necessary acts of a usurper because the *lawful* sovereign would want these acts to be done in the interest of preserving the state.[137]

In setting out the limits of this implied mandate, the court relied upon the criteria established by dissenting Lord Pearce in *Madzimbamuto v. Lardner-Burke*.[138] The acts so validated must

> [1] be directed to and reasonably required for ordinary orderly running of the State; . . .
>
> [2] not impair the rights of citizens under the lawful Constitution; and . . .
>
> [3] not [be] intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign.[139]

Given these criteria, the court was willing to validate certain acts of

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> Kelsen's attempt to justify the principle of effectiveness from the standpoint of International Law cannot also be justified, for, it assumes "the primacy of International Law over National Law." In doing so he has, to my mind, overlooked that for the purposes of International Law the legal person is the State and not the community and that in International Law there is no "legal order" as such. The recognition of a State under International Law has nothing to do with the internal sovereignty of the State, and this kind of recognition of a State must not be confused with the recognition of the Head of a State or Government of a State.

Id. at 181.

135. *Id.* at 154.

136. *See generally* H. GROTIUS, THE LAW OF WAR AND PEACE, DE JURE BELLI AC PACIS LIBRI TRES (F. Kelsey trans. 1925).

137. Now while such a usurper is in possession, the acts of Government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that one to whom the sovereignty actually belongs, whether people, king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the Courts.

PLD 1972 S. Ct. (Pak.) at 205. Following Grotius, the court poses the following question:

> There is no doubt that a usurper may do things both good and bad, and he may have during the period of usurpation also made many Regulations or taken actions which would be valid if emanating from a lawful Government and which may well have, in the course of time, affected the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer of property and similar subjects. Are all these to be invalidated and the country landed once again into confusion?

Id.

The answer the chief Judge seeks is, of course, no.

138. 3 All ER 561 (1968).

139. PLD 1972 S. Ct. (Pak.) at 206.

the Yahya Khan regime.[140] The Chief Justice, in applying this variant of the necessity doctrine, was very careful to state that this principle of implied mandate does not, in any way, place a mantle of legitimacy upon the usurper or anything he does.[141] The principle is one of "condonation and not legitimation."[142]

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140. The court approved the following acts of the regime:

(1) all transactions which are past and closed, for, no useful purpose can be served by reopening them,

(2) all acts and legislative measures which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order,

(3) all acts which tend to advance or promote the good of the people,

(4) all acts required to be done for the ordinary orderly running of the State.

PLD 1972 S. Ct. (Pak.) at 206. The court continued:

> I would not, however, condone any act intended to entrench the usurper more firmly in his power or to directly help him to run the country contrary to its legitimate objectives. I would not also condone anything which seriously impairs the rights of the citizens except in so far as they may be designed to advance the social welfare and national solidarity.

Id.

141. With respect to the two challenged enactments, the court found that they both extended beyond the limits of necessity. At issue was the validity of Presidential Order No. 3 of 1969 and Martial Law Regulation No. 78. The latter gave martial law administrators *carte blanche* authority to regulate the movements of any individuals, by such means as expulsion, detention, and house arrest, while the former precluded the Pakistani courts from reviewing any actions taken by martial law authorities. PLD 1972 S. Ct. (Pak.) at 199, 197. The court found that there was no "state of grave disorder" in West Pakistan justifying the imposition of such repressive measures as those contained in Martial Law Regulation No. 78. *Id.* at 207. Moreover, to the extent that some preventive detention was needed, it could have been imposed under the provisions of the less onerous Security of Pakistan Act. *Id.* at 207-08.

With regard to Presidential Order No. 3, the court found that it "too was clearly unnecessary." "[T]here is nothing to indicate that the Courts were, in any way, subverting the authority of Government or doing anything which could by any stretch of imagination, be considered to be objectionable." *Id.* at 208.

142. *Id.* at 207. The *Asma Jillani* decision, bold as it was, had little practical effect since it was decided four months after President Yahya Khan resigned from office. His relatively short regime, from March 1969 to December 1971, was marked by both repression and extreme bloodshed.

Immediately upon assuming office, Yahya Khan issued a proclamation abrogating the constitution, dissolving the National and Provincial assemblies, and imposing martial law throughout the country. PLD 1972 S. Ct. (Pak.) at 220. Soon after, he issued a provisional constitution order

> which provided that notwithstanding its abrogation Pakistan should be governed as nearly as possible in accordance with the 1962 Constitution. The Order suspended the sections of the Constitution relating to fundamental rights, however; directed that no legal proceedings might be taken for the enforcement of those rights; and reaffirmed that the courts might not question any order issued or sentence passed by a military court under the martial law regulations.

PAKISTAN HISTORY, *supra* note 106, at 99.

In November 1969, Kahn announced planned elections for the National Assembly, whose function it would be to draft a new constitution. The elections, which provided universal suffrage for the first time in Pakistan's history, took place in December 1970, while the country was still under martial law. *Id.* at 104.

The first meeting of the National Assembly, scheduled for March 3, 1971, was postponed by the President due to rioting in East Pakistan over the autonomy issue. *Id.* at 108. This political unrest eventually led to civil war and war with India. Pakistan lost both wars. *Id.* at 111-23. On December 18, 1971, President Yahya Khan resigned amidst

4. Summary

In a span of less than twenty years, Pakistan's high courts considered the legitimacy of three unconstitutional regimes. Although in each case the courts chose a different legal principle on which to ground its decision, it more or less accommodated each of the regimes. If only one lesson was to emerge from this historical nightmare, it would be that accommodation does not seem to promote constitutional governance, or insure political stability. Indeed, the very fact that the Pakistani courts shifted constitutional theories so effortlessly in resolving the most crucial legal issues in any society could hardly inspire the confidence in the judiciary so necessary to engender respect for democratic institutions.

Nevertheless, the *Bhutto* court chose to follow its predecessors in accommodating General Zia's regime. In selecting the doctrine of necessity to validate this regime, the *Bhutto* court chose the least appropriate of the three legal principles which the earlier Pakistani decisions provided. Rather than select one of the two available doctrines for legitimizing the actions of an outside usurper, the court chose a doctrine which, until then, had been limited to emergency measures proclaimed by the *lawful* executive. One of the limits of the necessity doctrine drawn by the high court in the *Governor-General's Case* is that the individual usurping power must be the head of state. General Zia did not meet this prerequisite.

The court, however, for important reasons, could not legitimize Zia's regime with either Kelsen's doctrine of revolutionary legality or Grotius' implied mandate theory. The former was morally offen-

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violent demonstrations in West Pakistan against the military regime. *Id.* at 123. Two days later, Ali Bhutto, as leader of the Majority Party in the National Assembly, became President. *Id.*

In its opinion, the court very carefully noted that it was in no way challenging current President Ali Bhutto's claim to lawful rule of Pakistan.

> It remains now for me only to consider another argument advanced by the learned Attorney-General that the attack is directed really against the present regime and not against the regime of General Agha Muhammad Yahya Khan. The learned counsel, on the other side, have all protested that this is not so but in order to leave no room for doubt I wish to make it clear that this decision is confined to the question in issue before this Court, namely, the validity of the Presidential Order No. 3 of 1969 and Martial Law Regulation No. 78 of 1971 and has nothing whatsoever to do with the validity of the present regime.

PLD 1972 S. Ct. (Pak.) at 208.

The *Jillani* opinion was extremely politic, in that the court, by relying upon an implied mandate theory, had little to lose and everything to gain. From the court's perspective, it managed to (a) maintain its own power of judicial review, condemn an unpopular dictatorial regime, and promote constitutionalism and the rule of law, all without fear of retribution, (b) bury the offensive political theory of revolutionary legality adopted by an earlier Pakistani court, and (c) uphold necessary enactments and actions of the prior illegal regime in order to ease the transition to democracy with as little uncertainty and conflict as possible.

sive to the court, having already been soundly rejected in *Asma Jillani,* while the latter would have the court refer to a self-styled military savior as a usurper. Hence, only the doctrine of state necessity was available, despite its inapplicability to the circumstances of Zia's *coup*.

B. General Zia's *Coup d'Etat*

General Zia's *coup* occurred during widespread civil violence characteristic of the political life of some emerging nations.[143] The ostensible cause of this military takeover was the widespread civil violence following the March 1977 national elections. Prime Minister Zulfikar Ali Bhutto's party, the Pakistan People's Party (PPP), won a stunning victory at the polls. Amidst rumors of election fraud,[144] opposition to the election results developed primarily from the rival Pakistan National Alliance (PNA), a loose association of nine political parties, and the Pakistan National Federation of Trade Unions (PNFTU).[145]

On March 10, 1977, the PNA boycotted the provincial assembly elections and, the next day, called a nation-wide general strike. Work-stoppages occurred throughout Pakistan, particularly in large cities such as Karachi and Hyderbad. Workers engaged the police, soldiers enforced curfews in some areas, and many arrests and some deaths occurred.[146] On March 14, 1977, the PNA demanded that Bhutto and his election commission resign and that new elections take place under the auspices of the military and the judiciary.[147]

The widespread violence and bloodshed did not let up. The PNFTU led more general strikes on April 9, 14, and 19, 1977.[148] On

143. *See supra* note 1.

144. The Economist, July 9, 1977 at 79.

145. Far Eastern Economic Review, July 1, 1977 at 10.

146. *Id.*

147. *Id.* Major opposition to Bhutto's regime soon came from the Pakistan Labor Alliance (PLA), a technically illegal body supported by 26 of Pakistan's labor unions and federations. The PLA was founded as labor's response to the post-election violence. Their demands, or objectives, included the following:

(1) Prime Minister Bhutto's resignation and fresh elections.
(2) Lifting the State of Emergency and complete freedom of the press.
(3) Disbanding the para-military Federal Security Force.
(4) Establishment of Islamic laws.
(5) Increased industrial development.
(6) Reduction of essential commodities to 1970 prices.
(7) Compensation to those killed in rioting by government.
(8) Implementation of teachings of the *Koran* and United Nations Declaration of Human Rights.
(9) Trial of those responsible for killing innocent citizens during rioting.

Id. at 11.

148. According to an observer, the April 19 work stoppage in Karachi "was unparalleled" for "[n]ot a single vehicle, including bicycles, moved. The transport workers

April 21, the federal government declared martial law in three of Pakistan's major cities: Karachi, Hyderbad, and Lahore.[149] Under authority of Article 245 of the Pakistan Constitution, Bhutto proclaimed a state of emergency in those cities.[150] The proclamation suspended fundamental rights under the constitution, expanded the jurisdiction of military courts to include many criminal offenses, and made the verdicts of those courts non-appealable. Also, troops were called in to many other cities by local officials to quell local rioting and disturbances.[151]

The civil strife continued, even after the introduction of martial law. The government arrested the top leadership of the PNA as well as many of its members.[152] Several days later, on April 25, Bhutto negotiated with the jailed leadership to end the conflict.[153] These negotiations at first seemed promising, but the talks broke off on July 3, and the two sides seemed hopelessly deadlocked. Each party accused the other of recalcitrance.[154] Then, on July 5, 1977, the army arrested Bhutto, most of his cabinet, and several leaders of the PNA. In his national address on the night of the takeover, General Zia eschewed any interest in running the government, and promised to hold elections in October.[155]

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refused to run buses, taxis and rickshaws, or to allow private cars, motor-cycles, bicycles, donkey carts, or camel carts to use the roads. Karachi was paralyzed." *Id.* at 11.

149. FAR EASTERN ECONOMIC REVIEW, May 6, 1977 at 8.

150. *Id.* Pakistan Const. art. 245 provides: "The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so."

151. *Bhutto v. Chief of Army Staff,* PLD 1977 S. Ct. (Pak.) 657, 694.

152. *Id.*

153. FAR EASTERN ECONOMIC REVIEW, May 6, 1977 at 9.

154. Among their demands, the PNA insisted upon fresh elections, extension of the power of the Election Commission, and payment of compensation to persons injured during the rioting. Additionally, Bhutto's opponents insisted that the country's criminal laws should be changed to reflect Islamic values within six months. The new Islamic laws would include provisions for extremely harsh punishments for criminals. Bhutto agreed to make these changes and, confident that the conflict was over, then left for a tour of Middle East countries.

Upon his return several days later, Bhutto discovered that the subcommittee assigned to carry out the details of the settlement was deadlocked. However, negotiations soon resumed. During the final round of these negotiations, the parties agreed to give wider powers to the election commission, including the ability to order judicial and military assistance to insure more honest elections, and to punish individuals tampering with free elections. Many details were also agreed upon, including the times at which the commission would meet. The government also agreed to hold new elections on October 6 and 8, 1977, and to prosecute those officials suspected by the PNA of election fraud.

Nevertheless, five of the nine members of the PNA council were dissatisfied with the results of the negotiations. They insisted, *inter alia,* that certain alleged terrorists be released and that the election commission be given full control of the administration. FAR EASTERN ECONOMIC REVIEW, July 1, 1977 at 8-11; FAR EASTERN ECONOMIC REVIEW, July 15, 1977 at 10-12.

155. *Id.*, July 15, 1977, at 10.

Nevertheless, General Zia, acting as chief martial law administrator, made widespread and extensive changes in the Pakistani government. He dissolved both the national and provincial legislatures, stripped provincial governors of all authority, and gave all executive authority to provincial martial law administrators selected from among his generals.[156] In addition, General Zia placed severe restrictions upon the exercise of individual rights and the power of judicial review. Zia suspended all fundamental rights and stripped the courts of all authority to review the proclamation or any order made pursuant thereto.[157]

C. THE *BHUTTO* DECISION

Despite Zia's purported suspension of judicial review, the Pakistan Supreme Court did consider the legitimacy of the new government in *Bhutto v. Chief of Army Staff*.[158] On November 10, 1977, the court held, in a unanimous opinion, that the *coup d'etat* was a lawful military action and that General Zia was, and is, the properly installed chief executive of the Pakistani government. Ruling that the constitution was still in force, the court found that any of the recent deviations from the constitution, excluding the restrictions on judicial review, were fully justified under the common law doctrine of necessity.

Begum Nusrat Bhutto, the wife of the jailed prime minister, initiated this action with a petition that challenged the detention of her husband and ten other leaders of the PPP.[159] Relying upon the Fundamental Rights section of the 1973 Constitution,[160] Mrs. Bhutto argued that the Laws Order of July 5, 1977[161] violated the following

156. The Proclamation, in part, read as follows:

> Whereas, I, General Mohammad Zia-ul-Haq, Chief of the Army Staff, have proclaimed Martial Law throughout Pakistan and assumed the office of the Chief Martial Law Administrator, hereby order and proclaim as follows:—
>
> (A) The Constitution of Islamic Republic of Pakistan shall remain in abeyance;
>
> (B) The National Assembly, the Senate and the Provincial Assemblies shall stand dissolved;
>
> (C) The Prime Minister, the Federal Ministers, Ministers of State, Advisers to the Prime Minister, the Speaker and Deputy Speaker of the National Assembly and the Provincial Assemblies, the Chairman and Deputy Chairman of the Senate, the Provincial Governors, the Provincial Chief Ministers and the Provincial Ministers shall cease to hold office;
>
> (D) The President of Pakistan shall continue in Office; and
>
> (E) The whole of Pakistan will come under Martial Law.

PLD 1977 S. Ct. (Pak.) at 717-18.

157. *Id.* at 718-19. These restrictions were contained in the Laws (Continuance in Force) Order, 1977. *Id.*

158. PLD 1977 S. Ct. (Pak.) 657.

159. *Id.* at 669.

160. *Id.* at 721.

161. *See supra* note 157 and accompanying text.

constitutional rights: the right to security of person,[162] the right to procedural safeguards upon arrest,[163] the right to freedom of association,[164] and the right to equal protection of the laws.[165] She contended that the Law Order was unconstitutional to the extent it suspended these rights.

The government did not initially dispute the merits of the petition; rather, it asserted that the military order suspending Fundamental Rights[166] and prohibiting judicial review of any martial law order or regulation[167] was conclusive. The Supreme Court, instead of relying upon the military order to deny Mrs. Bhutto's petition, considered substantive arguments concerning the legitimacy of the military administration. The government, faced with the duty of justifying its creation and continued existence, first contended that the present administration was legitimate by virtue of its success and acceptance.[168]

Since the *coup d'etat* constituted a new legal order, the government argued that the court could not measure its actions against the terms of the 1973 Constitution.[169] Therefore, the government

162. Pakistan Const. art. 9 provides: "No person shall be deprived of life or liberty save in accordance to law."

163. *Id.* at art. 10. Article 10 provides, *inter alia,* that an arrested person must be brought before a magistrate within 24 hours of arrest.

164. *Id.* at art. 17(1) & (2). Article 17 guarantees each citizen the right to unionize, freely associate and form or join a political party.

165. *Id.* at art. 25(1). Article 25(1) states that "All citizens are equal before law and are entitled to equal protection of law."

166. The Laws (Continuance in Force) Order, 1977 § 2(3) provides that "[t]he Fundamental Rights conferred by Chapter I of Part II of the Constitution, and all proceedings pending in any Court, insofar as they are for the enforcement of any of those Rights, shall stand suspended."

167. The Laws (Continuance in Force) Order, 1977 § 4(1) & (2) provides:

(1) No court, tribunal or other authority shall call or permit to be called in question the Proclamation of the fifth day of July, 1977, or any Order or Ordinance made in pursuance thereof or any Martial Law Regulation or Martial Law Order.

(2) No judgment, decree, writ, order or process whatsoever shall be made or issued by a Court or tribunal against the Chief Martial Law Administrator or any Martial authority exercising powers or jurisdiction under the authority of the Chief Martial Law Administrator.

168. *Bhutto,* PLD 1977 S. Ct. (Pak.) at 671.

169. Relying upon the legal philosophy of Hans Kelsen, the government argued that the grundnorm of the old Legal Order, as provided by the 1973 Constitution, has given way to a new grundnorm provided by the Proclamation and the Laws (Continuance in Force) Order, and to that extent the jurisdiction of the superior courts has been altered. The government submitted that as the transition from the old Legal Order to the new Legal Order had not been brought about by any means recognised or contemplated by the 1973 Constitution, therefore, it constituted a meta-legal or extra-constitutional fact, attracting the doctrine of "revolutionary legality." In this context, according to Mr. Brohi, whenever a constitution and the national Legal Order under it are disrupted by an abrupt political change not within the contemplation of the constitution, such a change is called a revolution, which term also includes *coup d'etat*. In such a situation

argued, the court should limit its determination to whether the government constituted such a "legal order."[170] The government alternatively argued that the doctrine of necessity, "a part of the legal systems of several European countries, including Britain [and] also

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the Court has to determine certain facts which may be termed "constitutional facts," which relate to the existence of the Legal Order within the framework of which the Court itself exists and functions. It if finds that all the institutions of State power have, as a matter of fact, accepted the existence of the new Legal Order, which has thus become effective, then all questions of legality or illegality are to be determined within the framework of the new Legal Order.

Id. See supra note 123.

170. *Id.* It was somewhat paradoxical for Zia's regime to submit to the court's jurisdiction and to assert, at the same time, that a new legal order exists. If the regime truly constituted a new legal order, then any action taken by the court in contravention of the proclamation is void *ab initio*. Argument of an issue before the court by the regime was at best, a meaningless gesture; at worst, a concession to the court's continuing exercise of authority.

The regime, however, did not place itself in this predicament willingly. It was displeased with the Supreme Court's decision to hear Nusrat Bhutto's petition challenging the regime's authority to arrest her husband and others. The petition was submitted directly to the Supreme Court and invoked the court's original jurisdiction under § 184(3) of the Pakistani Constitution. Section 184(3) provides that "the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in [Article 199]."

Two days after the Supreme Court ordered a hearing on the petition, General Zia, apparently displeased, removed Chief Justice Yakut Ali Khan, and replaced him with the senior member of the court, Sheik Anwarul Haq. Zia gave as his reason the nation's deep distrust of the higher judiciary. N.Y. Times, Sept. 23, 1977, at A5, col. 5. The ouster was in direct contravention of § 209 of the constitution, which limited removal powers to the Supreme Judicial Council, composed of five judges and the President.

Unless Zia was prepared to oust the entire court, however, he had to submit to its jurisdiction. Ouster of the entire court undoubtedly would have been met with adverse public opinion, and would have belied Zia's claimed support of democratic processes. Thus, consistency had to give way to political expediency.

Moreover, there is arguably a principled, albeit limited, role for existing courts even from the perspective of those claiming that a new legal order exists. Since a new legal order comes into existence only if it has become effective, i.e., generally accepted, who is better equipped than the courts in their traditional role of factfinders to make this determination? This limited view of the role of the court was the essence of the government's argument. "If [the court] finds that all the institutions of State power have, as a matter of fact, accepted the existence of the new Legal Order, which has thus become effective then all questions of legality or illegality are to be determined within the framework of the new Legal Order." *Bhutto,* PLD 1977 S. Ct. (Pak.) at 671. In this fashion, the court gives legal content and validity to a political phenomenon, by (1) approving the doctrine of revolutionary legality, and (2) determining that the new government is a legitimate revolutionary regime. It is easy enough, of course, to label this entire process of legitimization as absurd, since validating a regime which denies (or even simply fails to provide) the court authority to review its legitimacy necessarily renders that validation meaningless. Nevertheless, such a validation gives the appearance of reasoned decision-making, and thus provides a new regime with added legitimacy. If done well, it connotes an orderly and lawful transfer of authority from the old regime to the new. Indeed, the Pakistani Supreme Court played this role in State v. Dosso, PLD 1958 S. Ct. (Pak.) 533, 539, where the court recognized the revolutionary legitimacy of President Mirza's martial law regime. *See supra* notes 121-26 and accompanying text. The Uganda Supreme Court similarly ruled in Uganda v. Commissioner of Prisons, 1966 E. Afr. L. Rep. 514.

recognized by the Holy Qur'an,"[171] validated the *coup d'etat*.[172]

The court, echoing its predecessor in *Asma Jillani*, rejected the first argument outright and found contemptible the notion that a *coup d'etat* is legitimized solely by virtue of its political success.[173] Instead, the court considered the "total milieu" in which the *coup* occurred to determine its legitimacy.[174] Labelling the *coup* a "constitutional deviation," the court outlined the recent political history in Pakistan prior to this "deviation."

The court recognized its own limitations in assigning responsibility for the civil strife leading to this "deviation." It was in no position to determine "the factual correctness or otherwise of the several allegations and counter allegations made by the parties against each other."[175] But the court did rely on "the broad trends and circumstances" which led to the *coup* in resolving the critical issues before it.[176] After reviewing these broad trends, the court concluded that Zia's actions were "an extra-constitutional step, but obviously dictated by the highest considerations of State necessity and welfare of the people."[177] The court supported this conclusion by quoting extensively from Zia's speech on the evening of the *coup*. The court was particularly impressed by the General's expressed commitment to democracy and elections.[178] Yet the court refused to consider Mrs. Bhutto's arguments that General Zia's actions were a direct cause of the final political breakdown prior to the *coup*.[179]

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171. *Bhutto,* PLD 1977 S. Ct. (Pak.) at 674.

172. *Id.*

173. *Id.* at 692.

> [B]y making effectiveness of the political change as the sole condition or criterion of its legality, [Kelsen's theory] excludes from consideration sociological factors of morality and justice which contribute to the acceptance or effectiveness of the new Legal Order. It must not be forgotten that the continued validity of the grundnorm has an ethical background, in so far as an element of morality is built in it as part of the criterion of its validity.

Id.

174. *Id.* at 692-93.

175. *Id.* at 693.

176. *Id.*

177. *Id.* at 703. Among the broad trends of which the court took judicial notice were the allegations of election fraud, the resultant loss of life and property, the inability of the civil armed forces to restore order, the failure of martial law, judicial findings of fraud, the breakdown of talks between the major parties, and disruption of "all normal economic, social and educational activities." *Id.* at 702.

178. *Id.* at 704.

179. Mrs. Bhutto contended that the peaceful resolution of the political turmoil was hampered by General Zia's insistence that the government should not accede to the PNA's demand that the army withdraw from the province of Baluchistan—to which Bhutto had earlier agreed—or release certain suspected terrorists. The court responded: "[I]t is not our function to examine individual incidents or allegations." *Id.*

Moreover, the petitioner also contended that an accord had, in fact, been reached, though not made formal, just prior to the *coup*. This the court also effectively ignored. "It can only be a matter of conjecture at this stage, whether an accord between the Gov-

Once the court found that the doctrine of state necessity justified the takeover, it went on to examine the legal consequences of the *coup*. The court had to determine what limitations there were upon the acts of the new government.[180] Since the court justified the *coup* as a necessary deviation from the constitution, it also had to define the existence and character of the *coup* in terms of that necessity. Referring to the well-known Cyprus decision, *Attorney-General of Republic v. Mustafa Ibrahim,*[181] the court specified certain limitations upon the necessity doctrine. For the doctrine to apply, there must be

(a) An imperative and inevitable necessity or exceptional circumstances;
(b) No other remedy to apply;
(c) The measure taken must be proportionate to the necessity;
(d) It must be of a temporary character limited to the duration of the exceptional circumstances.[182]

The court had already determined that the first requirement had been met by the new government. The court did not, however, even attempt to apply the latter considerations to the particular facts of the case.[183] The court only quoted extensively from General Zia's July 5th speech promising elections in October.[184]

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ernment and the Pakistan National Alliance would have finally emerged if the army had not intervened." *Id.* at 705.

180. The court rejected Mrs. Bhutto's argument that since Zia was a usurper, his regime must be governed by the limitations set out in *Asma Jillani,* PLD 1977 S. Ct. (Pak.) at 706. *See supra* notes 131-46 and accompanying text. The doctrine pertaining to usurpers, the court reasoned, only applies where there is no state necessity for the extra-constitutional assumption of power. Since state necessity justified Zia's military takeover, his conduct did not constitute usurpation. PLD 1977 S. Ct. (Pak.) at 708. This line of reasoning seemingly ignored the fact that the *Asma Jillani* court never considered state necessity as an option where an outsider took over the government.

Despite the *Bhutto* court's elaborate, if not persuasive, reasoning, political rather than legal considerations accounted for its refusal to label Zia a usurper. The court itself admitted this when it later stated:

> in the case of an authority, whose extra-Constitutional assumption of power is held valid by the Court on the doctrine of necessity, particularly when the authority concerned is still wielding State power, the concept of condonation will only have a negative effect and would not offer any solution for the continued administration of the country in accordance with the requirements of State necessity and welfare of the people.

Id. at 708.

181. *See supra* notes 58-75 and accompanying text.

182. *Bhutto,* PLD 1977 S. Ct. (Pak.) at 710.

183. Instead, the court merely concluded as follows:

> It seems to me, therefore, that on facts, of which we have taken judicial notice, namely, that the imposition of Martial Law was impelled by high considerations of State necessity and welfare of the people, the extra-constitutional step taken by the Chief of the Army Staff to overthrow the Government of Mr. Z.A. Bhutto as well as the Provincial Governments and to dissolve the Federal and the Provincial Legislatures stands validated in accordance with the doctrine of necessity.

Id. at 712.

184. *Id.* at 714-15.

The court concluded this portion of its opinion by asserting its power of judicial review under the provisions of the 1973 Constitution, even though the Laws (Continuance in Force) Order invalidated judicial review.[185] Since the law of necessity justifies only necessary deviations from the constitutional structure, the lack of necessity for limiting judicial review means that the courts still must retain their constitutional powers.[186] Moreover, Muslim law recognizes the doctrine of judicial review.[187]

The court only reached Mrs. Bhutto's contention that the suspension of fundamental rights was illegal in the last pages of its opinion. Mrs. Bhutto contended that the government could only abrogate fundamental rights under Article 232 of the constitution.[188] Since Zia had already revoked the emergency proclaimed under the article, there was no legal basis for the government's continued suspension of these rights. The court, however, ignored the formal revocation of the state of emergency and found that the martial law order suspending fundamental rights had the legal effect of a Proclamation of Emergency under Article 232. Since the Martial Law

185. The court stated:

> [T]he superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law Authorities, if challenged, in the light of the principles underlying the law of necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance.

Id. at 716.

186. *Id.* at 716-17.

187. *Id.* at 717.

188. Pakistan Const. art. 232, states:

> (1) If the President is satisfied that a grave emergency exists in which the security of Pakistan, or any part thereof, is threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control, he may issue a Proclamation of Emergency.

Pakistan Const. art. 233(1) & (2) provide that:

> (1) Nothing contained in Articles 15 [right to peaceful assembly], 17 [right to free association], 18 [right to enter upon lawful profession], 19 [right to free speech and press] and 24 [right to property] shall, while a Proclamation of Emergency is in force, restrict the power of the State as defined in Article 7 to make any law or to take any executive action which it would, but for the provisions in the said Articles, be competent to make or to take, but any law so made shall, to the extent of the incompetency cease to have effect, and shall be deemed to have been repealed, at the time when the Proclamation is revoked or has ceased to be in force.
>
> (2) While a Proclamation of Emergency is in force, the President may, by Order, declare that the right to move any court for the enforcement of such of the Fundamental Rights conferred by Chapter 1 of Part II as may be specified in the Order, and any proceeding in any court which is for the enforcement, or involves the determination of any question as to the infringement, of any of the Rights so specified, shall remain suspended for the period during which the Proclamation is in force, and any such Order may be made in respect of the whole or any part of Pakistan.

orders were valid, Mrs. Bhutto's petition failed to overturn the suspension of fundamental rights or gain her husband's release.[189]

D. INVENTION AS THE MOTHER OF NECESSITY

By hearing the *Bhutto* case, the court acted in direct contravention of the martial law order. This disobedience to General Zia's orders, with its possible consequences, demonstrated tremendous courage by the court. Ignoring the possibility that the regime might forcefully terminate the hearing and subject its members to sanctions, the court conducted an orderly, ten-week long hearing.

Since the court had several alternatives to hearing the petition,[190] why did it choose to risk its very existence as a court to rule on this matter? Even more puzzling is that the court's actual result, that the detention of Bhutto and ten others could continue, would have been the practical result had the court chosen the safer route of denying jurisdiction to hear the petition. In fact, the court's holding was an act far more supportive of the new regime than any of the

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189. *Bhutto,* PLD 1977 S. Ct. (Pak.) at 722.

> [T]he provisions contained in clause (3) of Article 2 of the Laws (Continuance in Force) Order, 1977, suspending the right to enforce Fundamental Rights are valid for the reason that the situation prevailing in the country was obviously of such a nature as to amount to an Emergency contemplated by clause (1) of Article 232 of the Constitution, and the right to enforce Fundamental Rights could, therefore, be legitimately suspended by an order of the kind which could have been made under clause (2) of Article 233 of the Constitution.

A Proclamation of Emergency, however, cannot remain in force forever under the constitution. Article 232(7) mandates that a proclamation shall expire within two months, unless it has been approved by a joint sitting of Parliament. Even then, the proclamation can only be extended six months at a time. If the National Assembly is dissolved at the time, section 8 provides that the proclamation can extend up to four months. The court neglected to state whether and how this provision applies to the new regime.

190. The following options were available to the court:

a. The court could have refused to exercise its original jurisdiction under § 184(3) of the constitution, and allow the lower courts to resolve the issue as is the ordinary course of such petitions. In this fashion, the court could have at least postponed any possible confrontation between it and the regime. Moreover, since Zia claimed that his military regime was only temporary, the time element might remove the possibility of confrontation between the judicial and military authority of the state. Of course, if the court had refused to hear the petition on these grounds, it would have placed itself in the absurd and indefensible position of ruling that Mrs. Bhutto's petition did not contain a "question of public importance." Such a position could have severely damaged any credibility the court might need to win support for its future ruling on the matter.

b. The court could have simply refused to hear the petition on grounds that the Laws Order denied them the jurisdiction to do so.

c. The court could have found that the regime's actions in arresting its political opponents comported fully with the Laws Order. Such a finding would have required the limited exercise of jurisdiction, if only to see that the regime acted in accordance with its own rules, but Zia probably would have found this to be the least objectionable approach.

Alternatives (b) and (c) would have been defensible in view of the oath that each judge had taken, swearing allegiance to the new regime.

court's other alternatives. An analysis of the *Bhutto* decision must explain why the court was willing to risk its existence for the opportunity to clothe the regime in a mantle of legitimacy.

The only explanation for this paradox is that the court saw no other way to preserve meaningfully the last remaining vestige of democratic rule in Pakistan—the court itself and the power of judicial review.[191] Had the court willingly accepted the regime's limits upon its powers of judicial review, the judges would appear to be silent partners to any and all forms of political terror promulgated by the regime. By exercising judicial review over the most important legal and political issue facing the new regime—its fundamental legitimacy—then deciding in the Regime's favor, the court retained its judicial authority in the most politic fashion available.[192]

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191. Stated in its simplest terms, judicial review means that a court has the power to refuse to give effect to legislation when that legislation is inconsistent with the court's interpretation of the constitution. Many modern states, particularly emerging nations, have adopted this originally American doctrine as the only effective means to ensure the protection of fundamental societal values embodied in their constitutions.

> Desirous of protecting the permanent will, rather than the temporary whims of the people, many modern states have reasserted higher law principles through written constitutions. Thus there has been a synthesis of three separate concepts: the supremacy of certain higher principles, the need to put even the higher law in written form, and the employment of the judiciary as a tool for enforcing the constitution against ordinary legislation.

M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 41 (1971). Another author writes,

> The popularity and also the widespread practical application of the institution of judicial review of the constitution, in the constitution-making of post-World War II Continental Europe and also of the "new," (ex-Colonial) countries, is a tribute to its public acceptance as a prime instrument of democratic constitutionalism at the present day.

E. MCWHINNEY, *supra* note 56, at 233. For an excellent argument on the need for judicial review in emerging countries, *see* B. NWABUEZE, *supra* note 1, at 14-21.

192. Essentially the court found that (a) the *coup* was legitimate and (b) the suspension of fundamental rights was equally legitimate. However, *it* and not the regime must make those determinations.

General Zia, confronted with this decision, would be hard-pressed to fault the court. If he were to take any action against the court for its insistence upon exercising judicial review, he would certainly appear as a power-hungry usurper bent on destroying every last vestige of constitutional government. Since the court ruled in his favor on the substantive issues, he could hardly argue that it was interfering with his efforts to restore order and, eventually, democracy. After all, the present members of the Supreme Court had taken oaths of allegiance to the new regime. PLD 1977 S. Ct. (Pak.) at 674. Moreover, any attempt to undermine the court would cause General Zia to lose a valuable ally.

On the other hand, a ruling against the government on this issue would not only have brought a nullification of the ruling, but might have prompted the Zia regime to declare itself, as did the Nigerian military after the *Lakanmi* decision, *see supra* notes 76-89 and accompanying text, a revolutionary government that had replaced the *entire* pre-existing legal order. Such an explicit declaration would have surely precluded the court from ever again grounding a decision upon the 1973 Constitution. In its grab for power, the court could not risk forcing Zia's hand.

To maintain judicial review, the court had to assume, to the extent possible, the continued validity of the 1973 Constitution. This document provided for both the existence and the authority of the Supreme Court. If the constitution were in abeyance, as General Zia contended, the court would have no constitutional underpinnings to justify its continued legal existence.[193] This would place the court's authority at the complete discretion of the regime.

This constitutional basis for judicial review was more appropriate for the court than such alternate grounds as natural law[194] or even Muslim law.[195] The people of Pakistan shared a deep commit-

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Nevertheless, the short term benefits to the court of allying itself with Zia's regime are significantly outweighed by the overall damage to Pakistani society through validation of such blatantly illegal conduct.

193. Without the constitution, the existence and authority of the Supreme Court would be entirely grounded upon § 2(2) of the Laws Order.

194. There are several historical antecedents upon which to establish a natural law basis for judicial review. *See* M. CAPPELLETTI, *supra* note 191, at 36-41. One of the most famous is Coke's opinion in Dr. Bonham's case, 77 Eng. Rep. 647, 652 (C.P. 1610), in which he "asserted judicial power to disregard an act of Parliament violating common right and reason." Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought,* 30 STAN. L. REV. 843, 854 (1978). Grey relies upon the natural law basis of judicial review to defend the "noninterpretivist" approach toward constitutional adjudication, i.e., that the "Supreme Court has the obligation to articulate the changing content of the nation's fundamental values and that it is charged with evolving and applying the society's fundamental principles." G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 24 (10th ed. 1980).

195. Although the court did rely upon Muslim law to bolster its claim to judicial review, it was clearly not the court's primary basis.

> The Courts of Justice are an embodiment and a symbol of the conscience of the Millat (Muslim community), and provide an effective safeguard for the rights of the subjects. On this principle *as well,* the power of judicial review for judging the validity of the actions of the Martial Law Authorities must continue to remain in the superior Courts.

PLD 1977 S. Ct. (Pak.) at 717 (emphasis added). Reliance upon religious doctrine in this manner demonstrates the strong religious content of Pakistani legal and political affairs. It appeared to be an attempt by the court to cover itself in religious legitimacy, and thereby appeal to Zia's claimed commitment to fundamental Muslim principles.

> The ideology of Pakistan embodying the doctrine that sovereignty belongs to Allah and is to be exercised on his behalf as a sacred trust by the chosen representatives of the people, strongly militates against placing the rule for the time being above the law, and not accountable to any one in the realm. Muslim rulers have always regarded themselves as being accountable to the Courts of the land for all their actions and have never claimed exemption even from personal appearance in the Court.

Id.

The court chose not to rely solely on Muslim law because it could not realistically abandon the constitution as the expression of fundamental principles in favor of the Quran and Sunnah. First, the judges were trained in secular law and therefore incapable of determining when the regime's conduct exceeded the permissible bounds of Muslim law. Second, Supreme Court judges, by virtue of their Western training and their position on the civil courts, reflect the political tradition which had historically rejected Muslim fundamentalism as the predominant norm of Pakistani political life. During deliberations of the first Constituent Assembly, Muslim religious leaders proposed "that a Commission of Holy Men learned in the Quran and Sunnah, should have power to pass on all laws enacted by the legislature and to determine their validity in accordance

ment to a constitutional form of government.[196] General Zia addressed this commitment by promising to hold elections and assuring the country that the constitution was only in abeyance.

By grounding its decision upon necessity, the court reversed General Zia's governing principle that he would determine how much of the Pakistani Constitution to retain in his regime. Implicit in the proclamation was the claim that his decisions and not constitutional doctrine would be the fundamental governing instrument for Pakistan. The *Bhutto* court ruled explicitly to the contrary; the constitution was still in effect, and the government could only abrogate it to the extent that necessity demanded. Based upon its constitutionally mandated authority, the court asserted its power to determine whether sufficient necessity existed for any deviation.

The necessity doctrine is not suitable to a *coup d'etat*. The operation of the doctrine presumes a political structure where the rule of law prevails. Since a *coup* in a constitutional political structure is a denial of the rule of law, reliance upon the necessity doctrine is a sham. The use of the doctrine attaches legal respectability to an unquestionably illegal regime and gives a new government the appearance of constitutional propriety. Power and law are at odds in a *coup,* but necessity forces them to converge.

The use of the necessity doctrine in such a setting is a judicial betrayal of constitutional government, reasoned decision-making, and justice. While the court might hope to serve in an oversight

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with their conformity or non-conformity to the Quran and Sunnah." E. MCWHINNEY, *supra* note 60, at 150. The fundamentalists lost out, and what emerged in that first constitution was an essentially unenforceable provision that "[n]o law shall be enacted which is repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah, hereinafter referred to as Injunctions of Islam, and existing law shall be brought into conformity with such Injunctions." Pak. Const. art. 198(1) *quoted in id.* at 149. Thus, McWhinney writes, any possibility that Pakistan would be governed under fundamental Muslim principles was finally laid to rest.

> Lacking any enforcement agency other than the predominantly lay-educated Supreme Court, these Muslim fundamentalist provisions seemed likely to reduce to pious injunctions of purely moral significance, for individual members of the government to interpret according to their consciences. And even here the very generality of the Quran and Sunnah, and their lack of specificity and concreteness of ruling as to contemporary problems of political life, should have ensured that they would be no real barrier to secularist ideas of predominantly Western-trained (especially in law) political leaders.

Id. at 150.

Lastly, and precisely because the Supreme Court judges are secular in training and perspective, any attempt by the court to render a decision based only upon substantive Muslim law could subject them to severe criticism from the country's holy community. Religious leaders would argue, and quite justifiably, that they, and not a secular court, are best able to interpret the Quran. More importantly, if the decision so criticized were to go against the regime, General Zia would have a pretext to abolish the court entirely.

196. *See generally* A. GLEDHILL, *supra* note 105; E. MCWHINNEY, *supra* note 56, at 140-55.

capacity by allying itself with the regime in this manner, this result is unlikely. Events in Pakistan subsequent to the decision demonstrate that a military dictatorship will use the legal process only to the extent that it helps to consolidate the regime's power.[197]

The necessity defense presumes that the state and not an outsider undertakes the extra-legal acts.[198] Generally, it is the executive, the legislature, or both that authorize the military or civilian authorities to act in derogation of the law. It is the governor's position, coupled with the necessity, which permits constitutional deviations.[199] In contrast, General Zia acted upon his own authority, in derogation of the law of Pakistan, and in violation of the orders of the civilian government of Prime Minister Bhutto.[200]

Moreover, Zia's emergency measures went far beyond even those permitted a lawful head of state. By altering or suspending key portions of the constitution without Parliamentary approval, his military regime was improperly usurping legislative power. Worse yet, he eliminated the legislature outright. It is one thing to enforce emergency legislation without prior legislative approval and quite another to eliminate the legislature as one of those emergency measures. The former compromises the constitution, the latter destroys it.

Zia's measures were far more harmful to the state than the polit-

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197. *See infra* note 203.

198. The necessity doctrine provides a justification for illegal *governmental* acts taken during an emergency. The doctrine would be undermined if it were also applied to illegal acts taken by persons *outside* the government on the grounds of state necessity.

199. In the Cyprus decision, Attorney-General v. Mustafa Ibrahim, 1964 Cyprus L.R. 195, a case relied upon by the *Bhutto* court, *see supra* notes 181-184 and accompanying text, all the precedents which the Cypriot Supreme Court invoked grounded a government's right to deviate from the law upon its general responsibility to preserve the state. "Judicial decisions in various countries have acknowledged that in abnormal conditions exceptional circumstances impose on those exercising the power of the State the duty to take exceptional measures for the salvation of the country." *Ibrahim,* 1964 Cyprus L.R. at 257-58. In particular, the court refers to the Greek law of necessity.

> [I]n exceptional circumstances the right must be acknowledged to the *Government* to regulate by legislation certain exceptional matters relating to the accomplishment of their mission, that is, the restoration of law and order and public security, "by deviating from the constitution" . . . "if it is indispensably and imperatively necessary and inevitable."

Id. at 261 (emphasis added). Professor Nwabueze makes a similar point when he writes, referring to the actions of the Smith regime in Rhodesia:

> While necessity is admittedly available to private persons in private law, it is difficult to see how it can enable a private individual to claim to exercise the legislative or executive powers of a state on the ground that that is necessary for the preservation of society.

B. NWABUEZE, *supra* note 1, at 212. *See supra* notes 84-103 and accompanying text.

200. According to the constitution, the armed forces have no independent role in the Pakistani government. Pakistan Const. art. 245 provides: "The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so." Its function thus is severely circumscribed.

ical turmoil that they were intended to cure.[201] If the purpose of the necessity doctrine in a democratic society is to permit temporary infringement of certain individual rights in order to preserve the society as a whole, expanding it to justify abrogation of the constitution, suspension of elections, and elimination of the executive and legislature transforms the doctrine into a cynical perversion.[202]

Not only did the court's ruling stretch the necessity doctrine beyond its historically limited application, but in merely deciding to consider the doctrine the court was operating under two incompatible assumptions. The first assumption is that the 1973 Constitution was the fundamental governing instrument of Pakistani society. Since the doctrine of necessity excuses otherwise illegal conduct, it is axiomatic that the violated laws remain valid. Otherwise, a judicial inquiry into the necessity for the violation becomes gratuitous and irrelevant.

The second assumption is that Zia's regime was entitled to appear before the court to claim state necessity. Only legitimate regimes, those that were properly installed as the government, are privileged to advance the argument that their actions were justified by such necessity. Therefore, in merely allowing Zia's regime this privilege, the court implicitly determined that the regime was legitimate. These assumptions are incompatible because the regime's entire governmental structure was established in direct violation of the constitution. By seizing power and holding the constitution in abeyance, Zia was effectively replacing the constitution with his own will. Judicial recognition of the regime as the country's government involves the implicit acceptance of this transformation.

Hence, any invocation of the necessity doctrine becomes meaningless. Since it had implicitly invalidated the 1973 Constitution, the higher law which Zia had violated, the court obviated any recourse to that doctrine. Only if the regime had violated its own laws, which in fact it did not, would the doctrine have any relevance at all.

Nevertheless, if the necessity argument allows the court some control over the regime, should it not invoke the doctrine despite these internal inconsistencies? For several reasons the answer remains no. The cost of interposing the necessity doctrine is far too

201. Since a fundamental principle of the necessity doctrine is that it will never justify the usurpation of one branch of a government by another, it is all the more inappropriate for the doctrine to permit the usurpation of both legislative and executive functions by an outsider.

202. Separation of powers is an important aspect of Pakistani constitutional jurisprudence. As the court stated in *Bhutto,* "[t]he 1973 [Pakistan] Constitution provides for a clear trichotomy of powers between the executive, legislative and judicial organs of the State." 1977 PLD S. Ct. (Pak.) at 716.

high a price, given the concomitant requirement of implicitly legitimizing the installation of the new regime. By treating the regime as the state for purposes of the defense, the court leaves the impression that order has been restored, that the rule of law has prevailed, and that the constitution retains vitality. In reality, the constitution has been effectively destroyed, and no rule of law prevails. The appearance of control over the regime only helps the government to consolidate its power.

There are also several practical limitations to a necessity analysis of a *coup d'etat*. First, a court would be hard-pressed to exercise independent and impartial review in the wake of such an upheaval, particularly, as in this case, where the court is acting in direct contravention of a military order. Although the *Bhutto* court stated that it felt no constraints from the regime, one must question the sincerity of this statement.[203] Any judgment would thus be colored by the implicit threat of harm to a decision adverse to the government.

Second, it is extremely doubtful whether any court has the capability to determine whether necessity is of such a grave nature as to justify the substantial abrogation of the constitution through a *coup*. While every inquiry into the necessity of an otherwise illegal governmental act involves some speculation, the court's task in the *Bhutto* case required substantially greater speculation than that needed in the ordinary case. In the classic necessity case, a court must weigh the harm caused by emergency measures against the harm of inaction in the face of an emergency. This is a difficult task. The *Bhutto* court, however, had to evaluate first, the condition of Pakistan had the lawfully constituted organs of government continued to exist, and second, the tangible and intangible consequences upon the country of replacing the legislative and executive branches with a military regime, while suspending fundamental rights. Such an

203. The court alluded to the aftermath of the *Lakanmi* decision, *see supra* notes 76-83 and accompanying text, when the military regime nullified the Nigerian Supreme Court's decision. The court then explicitly distinguished the Nigerian experience from anything it might expect if it ruled against the government.

> [T]he Supreme Court of Pakistan, as at present constituted, does not feel itself under any inhibition or restraint in taking a view in this case which appears to be dictated by the highest considerations of law, justice, equity and good conscience, and I also see no reason why the Martial Law Administration should not accept the decision of this Court in the same spirit. I, therefore, venture to say that reference to the aftermath of the judgment of the Nigerian Supreme Court is completely misconceived and irrelevant to the legal questions we are considering here.

PLD 1977 S. Ct. (Pak.) at 712. One wonders whether, in its insistence that such cynical considerations do not affect it, the court is not, in Shakespeare's terms, protesting too much.

inquiry is beyond the competence of any court.[204]

The court is also impermissibly expanding its traditionally limited authority by partaking in such an inquiry. By considering the propriety of eliminating other branches of government during an emergency, the court is violating the most rudimentary notions of separation of powers. When the court presumes to question the ability of the lawfully established legislature or executive to function effectively, it is usurping power. The court's function is to review the actions of the legislature and executive, not their efficacy. As the constitutionally empowered arbiter of the law, the court must remain steadfast in refusing to permit destruction of the fundamental power relations in society.

Finally, by permitting the regime to advance the necessity defense to justify usurpation of constitutional organs of government, the court is constructing a principled basis for its own demise. According to the court's own reasoning, the doctrine justifies the forcible elimination of any constitutionally established institutions that hamper the restoration of order. Presumably, this includes the court. The court never actually considered this possibility, since Zia's regime never attempted to remove the judiciary, preferring instead to limit its jurisdiction. However, by reclaiming its jurisdiction on grounds that the facts did not warrant such curtailment, the court implied that some circumstances might warrant curtailment, or more extreme measures.

This theoretical possibility raises some troubling prospects. First, such a possibility is entirely inconsistent with the function of the necessity doctrine which provides courts with a means to assess the legality of otherwise unlawful state conduct.[205] This can only be accomplished, it seems, if a functioning court exists. Second, any legal theory which permits such drastic measures consistent with the constitution would be a deadly tool in the hands of any future court sympathetic to military rule. It would allow such a court to validate effortlessly any of the regime's attempts to curtail judicial authority. Third, Zia's regime could itself effectively use this expansive doctrine to nullify any of the court's bothersome decisions or oust it

204. Moreover, the court's reliance upon the necessity defense mandates that it maintain continued scrutiny of the regime to determine whether particular governmental policies are, in fact, necessary in view of the circumstances. Given the myriad of activities any government undertakes, such scrutiny would be impracticable, if not impossible. While continued oversight imposes an awesome responsibility, selective oversight, which is what the court actually wanted, could provide the court with what it perceived as an invaluable opportunity to impose limits upon patently unacceptable conduct of the regime.

205. The court could possibly be put in the curious and awkward position of approving its own demise on grounds that its judgment can no longer be trusted.

entirely. While the regime could conceivably eliminate the court's power or existence without this theoretical basis, the necessity doctrine could surround such actions with an aura of legitimacy.[206]

V
CONCLUSION

The use of the necessity doctrine to legitimize a *coup d'etat* or other revolutionary alteration of the government is inappropriate. This application of the doctrine is incorrect for two reasons. First, the assumption that the court will be able to influence the regime by using the doctrine in this manner is not realistic. Second, the court's action validates the new regime and gives it the appearance of legitimacy.

The necessity defense simply cannot exist in a military dictatorship. The defense presumes an independent judiciary and an executive or legislature that is willing to abide by the court's decisions. Without such a political and legal environment, a resort to the

206. During the past few years, following the *coup* and the *Bhutto* decision, the political climate in Pakistan has worsened considerably. In January 1979 a Freedom House survey reported that in contrast to the general international trend, political rights and civil liberties had declined in Pakistan. N.Y. Times, Jan. 8, 1979, at A6, col. 3. Amnesty International charged that torture, imprisonment and human rights violations increased steadily in 1981. N.Y. Times, Jan. 13, 1982, at A5, col. 1. This accusation was echoed in a Reagan administration report on human rights charging Pakistan with torture of its citizens. N.Y. Times, Feb. 8, 1982, at A10, col. 5. All political activity is banned, *id.,* and the arrest and detention of the regime's critics continues. N.Y. Times, Feb. 28, 1982, at A5, col. 4.

In conjunction with the increased oppression of his political opponents, Zia has mounted a full-scale assault on the nation's judiciary. On March 24, 1981, he promolgated Provincial Constitutional Order No. 1 which, *inter alia,* validated all actions of the regime since the *coup,* prohibited any court from reviewing the legality of martial law orders or regulations, granted Zia the power to amend the constitution at will, and required each high court judge to take a new oath of office. Provisional Constitution Order 1981 (C.M.L.A. Order No. 1 of 1981) Art. 15, 16 & 17 in 12 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustern & G. Flanz, ed. 1972). On March 25, 1981, Zia dismissed nine senior judges for their refusal to take the new oath of office. Of the nine, three were supreme court justices and included Chief Justice Anwar ul-Haq, the author of the *Bhutto* opinion. The remaining six included two judges each from the Punjab, Sind, and Baluchistan high courts. N.Y. Times, March 26, 1981, at A12, col. 3. The remaining members of the court apparently agreed to these terms.

Most recently, on August 12, 1983, Zia promised that he would hold elections for the National Assembly and end martial law within 18 months. These planned elections will be conducted on a non-party basis, and candidates will not be permitted to conduct individual campaigns. The Washington Post, August 13, 1983, at A15, col. 1. This is the sixth time since seizing office that he has announced elections. N.Y. Times, August 18, 1983, at A26, col. 1 (editorial).

Human rights violations are still rampant. During September 1983, 700 protesters were arrested, 69 of them sentenced to be flogged, and two dozen killed. The State Department noted in a recent report that 11 persons died in custody during 1982 from abusive forms of interrogation. L.A. Times, September 30, 1983, § II, at 7, col. 5.

defense is a sham. If the regime would be unwilling to abide by a court's adverse ruling, any decision on behalf of the state is suspect.

The use of the necessity defense to justify a military regime not only gives legal substance to a tragic political reality, but it also creates a false impression that the proper incidents of the defense are present. The creation of such an impression is invaluable to a regime which has just violently overthrown the lawful, constitutionally mandated government.

In essence, the courts have removed from the regimes the responsibility for holding themselves accountable to the country for their drastic actions. The regimes do not need to explain why they took extra-constitutional steps; they can rely upon an opinion by a supposedly impartial tribunal.

The Pakistan Supreme Court did not act in the national interest in its use of the necessity doctrine in the *Bhutto* case. The court upheld, as constitutional, actions by the regime which undermined the *raison d'etre* of the Pakistani Constitution. The court's action legitimized the removal of a popularly elected government and the disenfranchisement of the population.

Had the court held that the conduct at issue was clearly an unjustifiable departure from the constitution, both country and judiciary would have benefited. At the very least, they would have been no worse off. While the court might have been removed after such a ruling, Zia would have had to assuage a country committed to democratic rule without the assistance of the court. Without the court and constitution behind him, Zia may have been compelled to make concessions to bolster his then fledgling regime. Instead, the regime became entrenched to the point where the judicial system is now firmly under Zia's control.

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