

# 1 Doctrine of Necessity (In Islamic Jurisprudence)

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## 5 Abstract

6 Islamic law is derived through Islamic jurisprudence, which is basically and principally  
 7 pillared/sourced on Qur'an, the divine revelation (the words of the Almighty ALLAH) and  
 8 the Sunnah (Prophetic Traditions) the words and the practice of the Prophet (Peace Be Upon  
 9 Him) and it is called the basic source of law in Islamic Law. And thereafter the sources  
 10 seconding to the basic pillars are as Ijma (Consensus) and Qiyas (Qiyas, the application of  
 11 rule by analogy). There after the Ijti had (Juristic consensus of opinion of the imam's  
 12 mujtahid,) Istihsan (juristic preference), Maslahah Mursalah (Public Interest), Urf (Custom),  
 13 Istishab (presumption of existence or non-existence of facts Presumption of Continuity), Sadd  
 14 al-Dhara'i (Blocking the Means), Ijtihad (exercise of independent reasoning by Imam/  
 15 Mujtahid).

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16 *Index terms—*

## 18 1 Introduction

19 Islamic law is derived through Islamic jurisprudence, which is basically and principally pillared/sourced on Qur'an,  
 20 the divine revelation (the words of the Almighty ALLAH) and the Sunnah (Prophetic Traditions) the words and  
 21 the practice of the Prophet (Peace Be Upon Him) and it is called the basic source of law in Islamic Law. And  
 22 thereafter the sources seconding to the basic pillars are as Ijma (Consensus) and Qiyas (Qiyas, the application  
 23 of rule by analogy). There after the Ijti had (Juristic consensus of opinion of the imam's mujtahid,) Istihsan  
 24 (juristic preference), Maslahah Mursalah (Public Interest), Urf (Custom), Istishab (presumption of existence or  
 25 non-existence of facts Presumption of Continuity), Sadd al-Dhara'i (Blocking the Means), Ijtihad (exercise of  
 26 independent reasoning by Imam/ Mujtahid). 1

## 27 2 Chief Sources:

28 It is habit of the jurists to draw the juristic classification of the sources of the law in Islamic Jurisprudence saying  
 29 as A. The Quran. B. The Sunnah (authentic tradition of the Prophet Muhammed (Peace be upon him)). C. The  
 30 Ijma (consensus of opinion) D. The Qiayas (judgment upon juristic analogy) Supplementary Sources:

31 A. Istihsan (deviation, on a certain issue, from the rule of a precedent to another rule for a more relevant legal  
 32 reason that requires such deviation)

33 Author: Senior Associate Lawyer, The Legal Center Law Firm, Jabaryia, Kuwait. e-mail: Ja-  
 34 far.s@legalcenter.com.kw B. Istislah (unprecedented judgment motivated by public interest to which neither  
 35 the Quran nor the Sunnah explicitly refer) C. Uraf (the custom and the usage of a particular society, both in  
 36 speech and in action) 2

37 In Other words, two kinds may be articulated as GOD made laws and manmade laws as the first two sources  
 38 are the GOD made laws and the rest are the Manmade laws, though the in Islamic Law the understanding of the  
 39 manmade laws are based on GOD made laws but extracted by the jurists and he experts. The GOD made laws  
 40 are absolute and authoritative one and is the principally provide the bases for all kinds of legal understandings.  
 41 The GOD made laws are based on the revealed and derived there from and from the authoritative of the  
 42 Beloved Prophet (Peace Be Upon Him) being law giver and interpreter of the laws.

43 The man made laws are derived from the authority of the ruler (Khalafat) (keen in accordance to the  
 44 principal articulated in Qur'an and Sunnah). Here it is pertinent to mention that the authority of the

## 2 CHIEF SOURCES:

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45 Almighty ALLAH is ultimate sovereign and the authority of the Prophet (Peace Be Upon Him) is manifesto  
46 sovereign and the authority of the Ruler/Khalafat is vicegerency. 3 I-Obligation/Farad/Wajib means an  
47 action to be undertaken as compulsory Under the Islamic Jurisprudence, the Legal Order/ Hukam Sharii  
48 means the demand of the legislator for an action to be done or not to be done. It has been made with  
49 different kinds as II-Forbidden/prohibited/refrained means an action not to be undertaken as Compulsory III-  
50 Mustahab/Masnoon/Nafila means an action is appreciable, if it is being undertaken and not doing so is not to be  
51 blamed/punished. IV-Mubah/Permissible means an action by the choice to be undertaken V-Improper means an  
52 action is depreciable to be done. ?? The Legal value/order under the Islamic jurisprudence is divided in two kinds  
53 as The aim/purposes of the Islamic Law is under the principal of Maslaha (the welfare/public interest) 6 Imam  
54 Ghazali defined as, "Maslaha is general purposes in the Divine Law for the preservation of five (5) essentials of  
55 human beings as Din (religion) life, intellect, offspring and property. ?? Furtherance herein the Imam Ghazali  
56 said that Health is a necessary condition to the preservation of life. Indeed, it is an essential requirement for  
57 the establishment of God's law in human life, for it is only healthy human beings that can properly implement  
58 this law in human society, "A proper understanding and implementation of religion, from the standpoint of both  
59 knowledge and worship, can only be arrived at through physical health and life preservation". Hence, Islam places  
60 health as second in importance to faith. The Prophet says: "Second to faith, no one has ever been given a greater  
61 blessing than health". ?? In another hadith, the Prophet defines the relative importance of health and wealth:  
62 "Wealth is of no harm to a God-fearing person, but to the God-fearing, health is better than wealth". Another  
63 hadith gives us the proper perspective of the essential things in life: "Whoever of you gets up in the morning  
64 feeling physically healthy, enjoying security and having his food for the day is like one who has the world at his  
65 fingertips". By contrast, health places on us a great responsibility, for which we are accountable to God. The  
66 Prophet says: "The first thing every servant of God will have to account for on the Day of Judgement is that  
67 God will ask him: 'Have I not given you a healthy constitution?'" The Prophet is also quoted as saying: "No  
68 one will be allowed to move from his position on the Day of Judgement until he has been asked how he spent his  
69 life, how he used his knowledge, how he earned and spent his money, and in what pursuits he used his health".  
70 ?? The Classical jurists said that the Maslah is the important legal principal. 9 And some jurists declared it as  
71 independent source of law. 10 The Islamic Jurisprudence under the teaching of the Islam gave great importance to  
72 human health and life and its systems from different angles covers the health of the human life. 11 As the health  
73 and its guidance has been persuaded. ??? The Quranic concept is very much clear signifying the importance to  
74 the human health time and again. ??? The Islamic Law and Islamic Jurisprudence gave the great importance to  
75 the human health, its safety and security above of all obligations. ??? That's why the health principal articulated  
76 in Islamic System is more curable and healthy towards human health. ??? Herein under, I would to draw the  
77 kind attention towards the Doctrine of necessity under Islamic Jurisprudence as even obligatory demand from  
78 a follower is ordered to be suspended in serious need for the human health and Security till the normalization.  
79 Tantamount that wherever, whenever is need to suspend even the obligation for the safety of the human health  
80 & security, the obligation would be suspended

81 And it has been defined in four (4) different divisions as understood by the jurists including the jurist of  
82 the time known as Dr Tahir ul Qadri, the last extracted classification of the Legal Order/ Al-Hukam u Shari 5  
83 after meeting the evaluation from the day one to this date as designed by the jurists and Now the Legal value  
84 under the Islamic Jurisprudence after taking its gradual evaluation of understanding is in juxtaposition for due  
85 understanding is as and the human health & security would be preferred as a principal. Let's the legal refreezes to  
86 be considered within the prospective of the doctrine of the necessity in this regard under the Islamic Jurisprudence  
87 as in Qur'an at difference places, it has been declared that He has only forbidden you carrion, blood, the flesh of  
88 swine and (the animal) on which the name of other than Allah is invoked at the time of slaughter. But he who is  
89 faced with a survival condition (forced by necessity), neither defying (Allah's injunctions seeking taste of lust),  
90 nor transgressing (the limit of necessity), then Allah is surely Most Forgiving, Ever-Merciful. (Quraan an-Nahl,  
91 16 : 115) ??? He has made unlawful for you only the dead animals and blood and the flesh of swine and the  
92 animal over which, whilst sacrificing, the name of someone other than Allah has been invoked. But he who is  
93 forced by necessity and is neither disobedient nor transgressing will not incur any sin on himself (if he eats that  
94 much which is required to survive). Allah is, indeed, Most Forgiving, Ever-Merciful. (Qur'an al-Baqarah, 2 :  
95 173) ??? Whilst He has spelled out to you in detail (all) those things which He has forbidden to you except when  
96 (under the unavoidable circumstances) you are forced (to eat the bare necessity just as a life-saving measure.  
97 (Quraan al-An'am, 6 : 119) ??? Then if someone gets into a survival situation (and is forced by) ravenous  
98 hunger (and intense thirst i.e., driven by dire necessity, provided) he is not prone to sinning (i.e., eats what is  
99 forbidden without being wilfully inclined to sin), then Allah is indeed Most Forgiving, Ever-Merciful. ( Quraan  
100 al-M'idah, 5 : 3) ??? It has been made clear like crystal that the Human health and safety is needed by the  
101 law mandatorily and all the applicable laws may be suspended to save and safe the human health and security.  
102 ??? & 21 It is very much significant to keep always in consideration that the principally the obligations and the  
103 Forbidden under the Islamic Legal Order (Value) shall be suspended/repeal its compliance and practice in case of  
104 serious need and necessity. And the need and necessity has been defined by the jurists and it has been elaborated  
105 already above, wherein Imam Ghazali defined it very well and once again herein the Need/necessity mean, "To  
106 obtain the benefit and restrain the loss" and "An action, which deserve the human health and Security of life

107 while protecting the Aims of Islamic value/order". And the Aims have been identified therein as: -A-Din B-Life  
108 C-Sound mind D-Offspring E-Property

109 An action, which requires for the protection of the above five (5) shall be considered as Need/Necessity under  
110 the Legal value/order, which is appreciable in Islamic jurisprudence and Islamic Law and losing them is not  
111 depreciable in Islamic Jurisprudence and Islamic law, herein it is very much clear that what need means in  
112 Islamic value/order. AS it has been derived as a main Principal by the jurists under the Islamic Jurisprudence to  
113 be followed and complied fully in accordance is as said by Almighty ALLAH But he who is faced with a survival  
114 condition (forced by necessity), neither defying (Allah's injunctions seeking taste of lust), nor transgressing (the  
115 limit of necessity), then Allah is surely Most Forgiving, Ever-Merciful. ??2 And after the need is over in protecting  
116 the aims, the obligation and forbidden shall be complied and practiced as it was limited in its scope for suspension  
117 in case of need. Again it has been principled by the jurists as Under the versus of the holey Qiraan as mentioned  
118 above are permitting the deserving measure means serious & material pressure to do with two kinds, eternal fear  
119 and external threat. The principal in Islamic jurisprudence and Islamic Law is with the change of the time and  
120 space, the legal value/order shall be varied in principal. Which is flexibility in Islamic Jurisprudence towards the  
121 humanity and humanism and herein-from the Doctrine of Necessity is invoked and derived. as in case of absence  
122 of water the legal value/order of ablution or bath shall be repealed/suspended with Tayamam and during the  
123 journey there is favour/reduction in Salat (

124 ) and Fasting Haaj ( )  
125 ) and Zakaat ( ) shall not be applicable over incompetent.

126 Furtherance there from shall be considered under the same principal of Doctrine of Necessity as opening the  
127 secrets of the human body for a medical practitioner for due procurement to be undertaken, Defence shall be  
128 a right even at the cost to injure the attacker, postpartum in case of investigation, synthetically reproduction,  
129 Transplantation, birth control, test-tube baby and likewise others needs and sometimes. ??42526 272829 The  
130 crux of the abovementioned explanations means that in saving the life and security in coercive and forced time,  
131 the forbidden is permitted to utilize till the need is over, which is called the Doctrine of necessity in Islamic  
132 jurisprudence. The one who disbelieves after having believed, except someone who is coercively forced to do  
133 so, and at heart remains contented with belief (as before), but (of course) he who (adopts) disbelief (afresh)  
134 wholeheartedly with an open mind, on them is a wrath from Allah and for them is a fierce torment. (Quraan  
135 an-Nahl, 16: 106) ??0 No flexibility would be there as Almighty ALLAH gave through Qur'an to humanity in  
136 the name of the health and security of human life as the believe on the ultimate oneness on ALMIGHTY ALLAH  
137 is the core and main demand from the believer/follower and it may be suspended in dare need of the security of  
138 human life remaining intact by heart. . ? ??? ? ??? ? ??? ? ??? ? ??? ? ??? ? ??? ? ??? ? ??? ?  
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142 ? ??? ? ??? ? ??? ? ??? ? ??? ? ??? ? ??? ? ??? ? ??? ? ??? ? ??? ? ??? ? ??? ? ??? ?

143 The base of the mentioned explanatory principals is on the saying of the Beloved Prophet Muhammad (Peace  
144 Be Upon Him) "as Neither harm nor reciprocation, which has been narrated in the book of Iba-e-Majha 2 nd  
145 vellum page 784 Hadeeth No: -2341 35 and another place the beloved Prophet (Peace be Upon Him) responded  
146 as narrated therein book of Musnad of Imam Ahmad Hadeeth No:-22246 over the question facing the coercive  
147 and forced need option-less but to eat dead as, 36 that if don't turn up, and don't betake and don't observe  
148 anything more than you can do it mean just beating the coercive need is allowed not more than that in any  
149 manner whatsoever. Furtherance hereto it has been explained and said, "A need/necessity mean someone has  
150 been pushed coercively and forcibly option-less to do a dislike or selfinjuring and it may be by external effects  
151 or internal". ??7 And Abdul Majid Deryia Abadi said that, "need/necessity mean in a dare need/prudent, one  
152 may use the forbidden, while feeling failure to die or unable to take obligation and in that case denying to use  
153 of forbidden shall be considered as sin". 38 and same has been said while adding the words to use till the fear  
154 of dying is over 39 and added the same 40 and in it has been added in case of refusal to obey the principal  
155 of need/prudent/necessity shall be sinner (as the suicide is forbidden in Islam) and in case death shall be a  
156 forbidden death ??1 and It has been added that the limit of need/prudent/necessity shall not be crossed ??2 .  
157 The coercive and forced need/prudent/necessity has been divided in five kinds and defined when this principal  
158 shall be applicable ??3 . and Imam Ahmad Raza Khan said that in case of failure to undertake the compliance it  
159 and dies, shall be forbidden death 44 . The principal of forbidden or obligation shall be held in absence and shall  
160 be uplifted till the need/prudent/necessity is over or fear to death is over. Hereunder is the principal derived  
161 by the jurists are as ??5 . Meant that every forbidden is permissible to the need. The jurists permitted in  
162 this regard "to use the bone for transplantation for human health with the bones of the animals even" 46 and  
163 "sometimes under special and recommended circumstances even to use the alcohol, blood and urine" 47 and  
164 imam shabaani "permitted for medication horse meat and camel urine" 48 and Imama Abu hanifa said that 49  
165 "in case of safety from death in using the dead meat or alcohol, then it shall be permissible to that extend"  
166 and it has been extracted therefrom the principals as said by Imam Shaami 50 "if certainty to use the forbidden  
167 to cure, while unavailability of admissible" and the same is derived as, if someone is away from the availability  
168 of permissible drink/food and he has fear of death in case not drinking the forbidden, which is available, the  
169 forbidden/haraam shall be permitted to drink till saving the life" as 52

## 2 CHIEF SOURCES:

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170 The beloved Holy Prophet (Pace be Upon Him) answered when he was questioned about treatment as,  
171 "Certainty of presumption for procurement from haram/forbidden is permissible when others are not reachable"  
172 'Yes, O worshipers of Allah! Use remedies. For indeed Allah did not make a disease but He made a cure for it'-or  
173 -'a remedy, except for old age.' The jurists seriously consider the new developments in medications towards the  
174 procurement and safety of human health as enriched by the experts of the relevant subjects even through the  
inadmissible/forbidden/haram for the greater interest. <sup>1 2 3 4</sup>

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Figure 1: ( ?????? ?????? ?????? ???? ?????? ?????? 14 ) ( ??????? [ 115 ] ) ?????? ?????? ???  
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Figure 3: ?????? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ??????

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neither disobedient nor transgressing will not incur any sin on himself (if he eats that much which is required to survive). Allah is, indeed, Most Forgiving, Ever-Merciful, and it projects the human health, life and security is most honourable. That in coercive and forced need/necessity (coercive and forced one), the need/necessity shall prevail, it has been defined by the jurists under the Islamic jurisprudence as:

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?? forbidden 32 and another principal is ??? ???? ?? forbidden for coercive need facer 33 ?

Figure 5:

2 CHIEF SOURCES:

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176 Based on the doctrine of necessity under the Islamic Jurisprudence, the jurists permitted the forbidden in the  
177 greater interest of the human being honouring the alive as 54 if the pregnant died having the alive fetus, the  
178 minimum surgery shall be undertaken to have fetus out. And there are vide number of the examples and the  
179 precedents permitted the prohibited or forbidden or haram to use in saving the human life by the jurists under  
180 the Islamic Jurisprudence. ??5 Those are some examples reflecting that the Islamic jurisprudence projects the  
181 Legal value/order for the safety of human health and security of life above all the obligations. The legal system  
182 provided by the Islamic Law over the Doctrine of Necessity particularly and significantly is very much clear that  
183 how 1400 years before codified, which is still covering the shield and providing the safety, care, honor and dignity.  
184 Surprising that it has the flexibility in the name of the humanity under the Doctrine of Necessity in Islamic  
185 Jurisprudence. ??6 ?????? ?????? ?????? ??? ?????? ??? ??? ?????? ??? ?????? ?????? ?????? ??????  
186 ?????????? ?????? ?????? ?????????? (??? ?????????? ?????? ?????????? 1-14 ??? ?????????? ?????????? ?????? 3 ??????)  
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