



Constitutional History of Pakistan

Asma Jilani's Case

**Kelson's Theory of
Ground Norm or Objective
Resolution**

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[ASMA JILANI V. THE GOVERNMENT OF PUNJAB, PLD 1972 SC 139](#)



An introduction to the background of the case

Asma Jilani case is the one of those important cases of the history which proved landmark in the constitutional history of Pakistan such as *State Vs. Dosso* (1958), *Begum Nusrat Bhutto Vs. Chief of Army Staff* (1977), *Syed Zafar Ali Shah Vs. Gen. Musharraf* (1999). In the case of Asma Jilani, a detailed history of the Martial law is mentioned. In the four out of these five cases, the Court placed reliance upon abstract legal doctrines such as Hans Kelsen's theory of "*Grundnorm*" popularly called the "Doctrine of Necessity" to carry out the political acts.

Important Facts of the Case

The important facts of the case were describing that the imposition of Martial Law by General Yahya Khan and assumption of the office of Chief Martial Law Administrator by him was challenged in *Asma Jilani's case* (PLD 1972 SC 139)

The two appeals , one filed by Miss Asma Jilani in the Punjab High Court for the release of her father Malik Ghulam Jilani , and by Mrs Zarina Gohar in the Sindh High Court for the release of her husband Althaf Gohar, under Article 98 of the Constitution of Pakistan 1962. The detention of Malik Ghulam Jilani and Althaf Gohar had been made under the Martial Law Regulation No.78 of 1971. So the detention of these persons was challenged in Lahore and Karachi High Court respectively.

The High Courts dismissed the Petitions holding that the High Court was debarred from entertaining Habeas Corpus Petition under the of Courts (Removal and Doubts) Order 1969". However the High Courts gave the Petitioners Certificate to appeal in the Supreme Court

The High Court held that it had no jurisdiction because clause 2 of the Jurisdiction of Courts (Removal of Doubts) Order No.3 of 1969 barred the courts from questioning the validity of any act done under the Martial Law Regulation No.78 of 1978.

Asma Jilani appealed to Supreme Court which held that this country was not a foreign

country which had been invaded by any army with General Agha Mohammad Yahya Khan as its Head, nor was it an alien territory which had been occupied by the said Army. Martial Law could not have arisen in the circumstances. Pakistan had its own legal doctrine-The Qur'an, and the Objectives Resolution. Therefore Martial law was never superior to the Constitution.

Yahya Khan was neither a victor nor Pakistan was an occupied territory and thus declared him a "Usurper". All his actions were also declared illegal.

Light upon the Major Issues

There were many issues raised from Asma Jilani's side after the petition was dismissed which were;

Whether the doctrine of necessity as accepted in *Dosso's* case was correct and whether it was "Good law", whether the doctrine applied to the facts and circumstances in which Field Marshal Ayub Khan transferred power to General Agha Muhammad Yahya Khan, and if the source of power assumed by General Agha Muhammad Yahya Khan was illegal and unconstitutional then how we can say that all legislative and executive acts done by him including the imposition of Martial Law and the promulgation of Martial Law Regulations and Orders were not illegal.

Question of annulment and abrogation of Constitution by a successful Military Revolution as laid down in *State Vs Dosso* was considered.

Limits to the Doctrine of Necessity The doctrine of necessity cannot be used to scrap a constitution or to repeal a part. In those instances it has been invoked successfully the doctrine of necessity has been used only to uphold the rule of law rather and not to abrogate the existing constitution. Most of all, there is no justification to apply the doctrine to deviate from a constitution such as ours that is founded on the will of the people.

Brief summary of key points raised in the discussion

- **Detention of Mr Ghulam Jilani and Altaf Gohar**

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- **Marshal law imposed by Yahiya Khan**



General Yahya Khan did not realize the need for an early political settlement with the leaders of East Pakistan

In the case of Miss Asma Jilani the Martial law imposed by Yahya Khan was discussed because her father's detention was happened due to Martial law. The Martial Law is actually the law which relates to and arises out of a situation in which the civil power is unable to maintain law and order and the Military power is used to meet force and re-create conditions of peace in which the civil power can re-assert its authority.

- **The Constitution and Martial law**

The constitution was another significant part of the discussion. Not only with the reference to the present case but it has been discussed also with the reference to Dosso's case as;

Constitution-----Annulment and abrogation of Constitution by a successful Military revolution-Principle laid down in Dosso's case [P L D 1958 S C (Pak.) 533] that "where a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution, then such a change is a revolution and its legal effect is not only the destruction of the Constitution but also the validity of the national legal order, irrespective of how or by whom such a change is brought about"-Held wholly unsustainable and cannot be treated as good law either on the principle of stare decisis or otherwise-Martial Law-Nature and scope of Proclamation of Martial Law does not by itself involve abrogation of civil law and functioning of civil authorities and certainly does not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country-Commander of Armed Forces ; bound by his oath to defend the Constitution- Doctrine of "legal positivism" propounded by Hans Kelsen--Examined-[State v. Dosso P L D 1958 S C (Pak.) 533 overruled].

Proclamation of Martial Law, 1969----- Provisional Constitution Order 1969; Jurisdiction of Courts (Removal of Doubts) Order [President's order 3 of 1969] and Martial Law Regulation 78 [C. M.L.As.] of 1971-Military rule sought to be imposed upon country by General Agha Muhammad Yahya Khan by Proclamation of Martial Law, 1969-Entirely illegal-Presidential Order 3 of 1969, being a sub-constitutional legislation, could not curtail jurisdiction conferred by Constitution of Pakistan (1962) upon Supreme Court and High Courts-Presidential Order 3 of 1969

; an unconstitutional document Martial Law Regulation 78 ; not only invalid and illegitimate but also incapable of being sustained even on ground of necessity

- **Question of legality**

Interpretation of statutes - -----Legislation - Illegal and illegitimate legislation - Doctrine of necessity - Illegal usurpation of power by a Military adventurer - All laws enacted during such regime illegal - Everything done during such intervening period both good and bad cannot, however, be treated in the same manner - Recourse could be had to the doctrine of necessity to condone the illegality and validate certain legislation in order to save the country from greater chaos and the citizens from further difficulties.



- **Kelsen's Theory**

Kelsen Theory of grund-norm was also under the discussion because previous decisions like in Dosso's case were based upon this theory. Hans Kelsen (1881-1973) developed an interesting modern version of positivism around this implicit criticism of Austin. He is still committed to the separation of law and morals, but tries to avoid Austin's mistake of reducing obligations to non-moral habits, probabilities, harms and expressions. The key features of the theory are:

Kelsen recognized that law must also have a *normative* base. Logically, he concludes, there must be a basic norm on which law rests. However, it does not need to rest on a *moral* norm. There has to be such a norm or justification would never come to an end. Still, the normative grounding is different from the norms of morality - Kelsen preserves the separation. This yields a more subtle and defensible version of positive law.

He calls that basic norm "the logical constitution." It is the basic evaluative premise from which the legitimacy or validity of all the laws derive. An example of a basic law would be: "One ought to obey all those acts of Legco which are signed by the chief executive and acceptable to the NPC." Laws can be created, but the basic norm specifies how they can be created and changed. Only those created in accordance with the basic norm will be valid laws. The notion of a *valid* (binding) law must be kept distinct from the notion of a *good* (just) law. Criticism of law is indeed a moral matter but a bad law may still be a valid law and create a legal (but not moral) obligation.

The principle of *legitimacy*, Kelsen asserts, is limited by the principle of *effectiveness*. Some "fact of the matter" determines what the legitimate government of a society is and what are its laws. Validity is a matter of effectiveness only for the basic norm, however. If no one pays obeys the subsequent laws, then the regime is plagued by lawlessness. But as long as the people accept

that these are laws (which they are disobeying, the basic law is still effective. However, that situation is clearly a borderline one. Normally, people will be guided by their recognition of an obligation to obey at least some of what they regard as valid laws. So even the widespread disobedience to other "valid" laws; is consistent with the claim that they are valid. The basic norm is still effective if the custom is "objectively interpreted" as validating or legitimizing law-making actions.



- **Objective Resolution**

The Objective Resolution pertaining Allah almighty's sovereignty was an important defense taken by Asma Jilani to make her arguments strong against the Martial Law as;

In any event, if a grund-norm is necessary, Pakistan need not have to look to the Western legal theorists to discover it. Pakistan's own grund-norm is enshrined in its own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949. This has not been abrogated by any one so far, nor has this been departed or deviated from by any regime, military or civil. Indeed, it cannot be, for it! Is one of the fundamental principles enshrined in the Holy Quran:

Say, 'O Allah, Lord of sovereignty. Thou givest sovereignty to whomsoever Thou pleasest ; and Thou takest a Nay sovereignty from whomsoever Thou pleasest. Thou exaltest whomsoever Thou pleaaest and Thou abasest whomsoever Thou pleasest.-Holy Quran, Pt. 3, Chap. III, Al 'Imran

The basic concept underlying this unalterable principle of sovereignty is that the entire body politic becomes a trustee for the discharge of sovereign functions. Since in a complex society every citizen cannot personally participate in the performance of the trust, the body politic appoints State functionaries to discharge these functions on its behalf and for its benefit, and has the right to remove the - functionary so appointed by it if he goes against the law of the legal sovereign, or commits any other breach of trust or fails to discharge his obligations under a trust. The functional

Head of the State is chosen by the community and has to be assisted by a Council, which must hold its meetings in public view and remain accountable to public. It is under this system that the Government becomes a Government of laws and not of men, for no one is above the law

- **Doctrine of Condo nation**

Another concept discussed was the doctrine of condonation which says;

Acts done by those actually in control without may be recognized as valid or acted upon by the Courts with certain limitations, on principles of necessity. The Court thus condoned:-

- All acts and legislative measures in accordance with the arrogated Constitution.
- All acts which tend to advance or promote the good of the people.
- All acts required to be done for the ordinary orderly running of the State.

The Decision of the Court and Rationale behind the decision.

Criminal Appeal No. 19 of 1972 (Miss Asma Jilani v. Province of Punjab) arises out of a judgment of a learned Single Judge of the Lahore High Court, dismissing a petition under Article 98 (2) (b) (i) of the Constitution of 1962 filed to question the validity of the detention of the father of the petitioner. Malik Ghulam Jilani, the detenu in this case, was arrested at Karachi under an order dated the 22nd of December 1971, purported to have been issued in exercise of powers conferred by clause (b) of sub-rule (1) of rule 32 read with rule 213 of the Defense of Pakistan Rules, 1971.

Criminal Appeal No. K-2 of 1972 (Mrs. Zarina Gauhar v. Province of Sind and others) arises out of an order of a High Court dismissing an application under section 497 of the Code of Criminal Procedure read with Article 98 of the Constitution of 1962, challenging the arrest of Mr. Altaf Hussain Gauhar, Editor-in-Chief, Dawn, Karachi, during the night between the 4th and 5th of February 1972, from his house without any warrant and his subsequent detention under an order purported to have been issued by the Martial Law Administrator.

Hans Kelsen's Theory of Grundnorm, his Doctrine of Control Efficacy and the Pakistani Supreme Court's decision in State vs. Dosso. These three things and their eventual negation led to the historical decision of PLD 1972 SC 139 that sit today in the judicial records of Pakistan.

The decision in the *Asma Jilani* case was never implemented by the parliament and in less than five years of that judgment, the SCP reversed its stand and revived the Doctrine of Necessity and its stance in the *Dosso* case.

In *Asma Jilani* the Court did not believe that Kelsen's theory is not authentic itself so how can it set out to lay down a legal norm. Nor did it find that Kelsen's was a generally accepted doctrine. It was not a rule of law and it was no more than an enunciation of legal theory.

The Court held that the *doctrine of legal positivism* founded on Hans Kelsen's theory and

recognized in *Dosso's case* was inapplicable, General Yahya Khan was termed as a usurper and all actions taken by him except those in the welfare of the people were declared to be illegal.

When Asma Jilani's judgment was released, Yahya Khan was not in power, but now it was Bhutto's Martial Law and Bhutto was the chief Martial law Administrator and the president. He was ordered by the court to remove the Martial law.



The Court held that none of the previous case law on the issue was relevant to the case at hand, distinguishing it as a case of temporary assumption of power (a phenomenon of constitutional deviation) rather than a revolution. Consequently, the Court validated the act of overthrowing an elected Government and assuming power by force on the basis of doctrine of necessity.

The reverse decision of court in *Asma Jilani* case was based on the Doctrine of stare decisis -----Flexible in its application Law cannot stand still nor can the Courts and Judges be mere slaves of precedents.

Impacts of the Decision

Although, the decision of the court was not completely in the favour of Miss Asma Jilani but it had broader impacts as it proved a strong force to weaken the concept of dictatorship in an Islamic state and it opened a new window for the fresh air of democracy in Pakistan. The outcomes of the decision were as follows; it was only in *Miss Asma Jilani vs. Govt. of the Punjab* (PLD 1972 SC 139) that the Supreme Court (while pronouncing judgment against the Martial Law of 1969) not only overruled *State vs. Dosso* but also disregarded the law of necessity by discrediting imposition of Martial Law in practically any situation. The decisions of the Supreme Court in the cases of *Special Reference* and *Dosso* were brutish examples of creating a royal figure in a republic through illogicality. The *Asma Jilani* case, however, was a breath of fresh air, overruling the basic dictatorial principle of putting power over law.

Asma Jilani's case paved the way for the restoration of democracy. This case was followed by the interim Constitution of 1972 and then by the permanent constitution of 1973. Due to the judicial pronouncement in the case of Asma Jilani, Bhutto was compelled to remove the Martial law. PLD 1972 SC 139 *Asma jilani* case proved that western thoughts cannot be imposed on non-

western and Muslim country because Pakistan is an Islamic state where sovereignty is of Allah almighty.

Analysis

The constitutional change must be reinforced by a process that make best use of harmony and secures the approval of the majority and the minority elements within the country. The process is as important as the outcome. The dangers inherent in adopting either of these theories to legitimize changes to the basic structure of a legal system would be evident to any observer of Pakistan's constitutional history.

The trend was set in motion by the Supreme Court in the 1958 case of *The State v Dosso*. The Court in *Dosso* came to the military's rescue by giving its seal of approval to General Mirza's action to dissolve parliament contrary to the constitution. The Court relied on Kelsen in support of its decision. In fact the Court's judgment paved the way for others. Ayub Khan did not transfer power to the National Assembly in accordance with the 1962 Constitution but handed over power to Yahya Khan, who promptly abrogated the constitution and imposed Martial law. His action was challenged in *Asma Jilani v The State of West Punjab*. In that case; the Supreme Court overruled *Dosso* as wholly unsustainable. In *Asma Jilani* the Court latched on to the doctrine of necessity to legitimize Yahya Khan's actions.

The arose either from the constitutional point of view or the Martial Law point of view whatever was done in March 1969, either by Field Marshal Muhammad Ayub Khan or General Agha Muhammad Yahya Khan was entirely without any legal foundation. In fact it was not even a revolution or a military coup d'etat in any sense of those terms. The Military Commander did not take over the reins of Government by force nor did he oust the constitutional President.

Justice Hamoodar Rahman applied the doctrine to circumstances where, in his view, ignoring it would have resulted in disastrous consequences to the body politic and upset the social order itself; but he also said that the doctrine cannot validate the illegal act of usurpers.

Kelsen's theory regards might as right. A theory that rewards force at the expense of principle cannot be a right foundation for a constitution that claims to encapsulate the sovereign will of the people. In *Asma Jilani* the Court did not believe that Kelsen set out to lay down a legal norm. Nor did it find that Kelsen's was a generally accepted doctrine. It was not a rule of law and it was no more than an expression of legal theory.

These cases, with the exception of the decision in the *Asma Jilani* case, show a Court that has been the weakest of the four organs of the State, the fourth and strongest organ being the army. Even in the present Rashid Rizvi case, as in the *Asma Jilani* case, the Court has placed reliance upon the Hugo Grotius principle of "State Necessity" and the "Implied Mandate", to selectively

disregard and legitimize certain unconstitutional actions.

The court's decision taken on the account of Stare decisis principle which says that; Judges are not bound by previous decisions they have power to take new decisions in the light of the circumstances and situation encounter by them.

"the doctrine of stare decisis cannot control questions involving the construction and interpretation of the organic law at least where no rule of property is involved, or at least that the doctrine does not apply with the same force to decisions on constitutional questions as to other decisions, and while previous decisions will not be entirely disregarded and, may, in case of doubt, control the views of the Court, they will be considered merely as authorities tending to aid in arriving at a proper conclusion, and not as a rule to be followed without inquiry."

The western theories cannot provide a base for every legal system they can be alter with the passage of time. These theories are not applicable in every society in nor are these in accordance to every religion and custom of the society. In Pakistan we should be inspired from these changeable abstract thinking rather than we should depend upon Islamic concepts given to us from our sovereign Allah our grund-norms are derived from our Islamic faith, which is not merely a religion but is a way of life.

The State of Pakistan was built on the base Islamic ideology and has to be run and governed on all the basic norms of that ideology, unless the body politic of Pakistan as a whole, God forbid, is re-constituted on an un-Islamic pattern, which will, of course, mean total destruction of its original concept. The Objectives Resolution is not just a conventional preface. It embodies the spirit and the fundamental norms of the constitutional concept of Pakistan.

Conclusion

ASMA JILANI'S case proved a landmark in the history of Pakistani judiciary. It has proved that, our basic norm is objective resolution not the western theories which have overlapping concepts even they are not generally acceptable we need not to rely upon the ambiguous concepts of these manmade laws rather than we should take our decisions in the light of those concepts which tells us that sovereignty is only of God. Although Miss Jilani was not succeeded but her efforts were not in vain they opened a new gate for the freedom of self-expression as well they were responsible for the freedom of democracy.

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