

## CONSTITUTIONAL HISTORY OF PAKISTAN

### Pre-mid assignment (1)

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### Question

*The first Constituent Assembly was dissolved by the Governor General by a proclamation in 1954 which was subsequently challenged by Maulvi Tamizuddin Khan. Discuss the judgments of Chief Court Sindh and Federal court, primarily focusing on Justice Munir's Judgment and Justice A.R. Cornelius's dissent, and explaining why this judgement has caused harm to constitutional development of Pakistan.*

### Answer

On October 24, 1954, **Governor General** (Ghulam Muhammad) issued an order of exigency 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 reconstituted.<sup>1</sup>

**Maulvi Tamizuddin Khan**, who is the head and president of the dissolved constituent assembly, confronted and questioned the action of the Governor General by filing a petition under article 223 A of Indian Act, 1935<sup>2</sup> for a 'Writ of Mandamus' in the Chief Court Of Sindh to restrain the Federal Government from giving effect to the proclamation and a 'Writ of Quo Warranto' to have the appointment of some of the new Ministers declared as repugnant to the Act of 1935, as

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<sup>1</sup> Shah 1986: 11

<sup>2</sup> Jurisdiction of High Court

amended. The petitioner alleged that the Governor General's had no authority for issuing such a proclamation, under any law.

The writ petition was contested by the federal government and it was contended that the Government of India (Amendment) Act, 1954 which had given the superior courts power to issue such writs, was unenforceable for want of the approval of the Governor General. The Governor General claimed that the section 223 A is not a law, as a new clause in the Act requires the assent of Governor General.

During the preceding seven years, in federal legislature, it had the practice to present Bills enacted by the members of legislature, for the approval of the Governor General, but law made by the Constituent Assembly, when acting in that capacity, had been authenticated by its President and published in the Pakistan Gazette.<sup>3</sup>

- **Judgment of Chief Court Sindh**

A bench of the Sindh Chief Court, consisting of four judges, heard a petition and unanimously held that the words in section 6(3) of the Independence Act to the effect that "The Governor General is authorized to ratify any law of the legislature of the Dominion..." merely meant, as had previously been assumed, that if such assent was necessary, like in lawmaking of the Federal legislature, the Governor General's power to give it was not subject to constitutional laws passed by the assembly, because it was a sovereign body, with no prescribed duration, subject to no control from outside itself. The powers of the Governor General were restricted to the ministry and government officials of the Dominion and did not extend to participation in the making of the

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<sup>3</sup> Shah 1986: 12

Constitution, nor to a dissolution of the Assembly.<sup>4</sup> The Court declared this dissolution Ultra vires, and nullity in law.

- **The Appeal to the Federal Court**

On appeal of the Federal Court, the decision was reversed in a historic judgment delivered in March 1955.<sup>5</sup> The case was decided inclined to government and denied the petition of Maulvi Tamizuddin, challenging the proclamation of the Governor General. Four out of five judges held assent by the governor general to be essential for the validity of even constitutional legislation. The Federal Court decided the matter mainly on the question of the Governor General's assent to Section 223-A. This section is added to Government of India Act, 1935 by amendment. Moulvi Tamizuddin had passed the amendment, in his assembly, but not ratified by the Governor General.

- **Justice Munir's Judgement**

In the primary judgment, delivered by Chief Justice, **Muhammad Munir**, it was stressed that, as Pakistan was a member of the Commonwealth and its interim constitution was of the Commonwealth type, there must be an authority with power to assent to laws. When the constituent assembly was not exercising the restricted lawmaking authority of the federal legislature under the act of 1935, it was acting as the legislature of the Dominion as stated in Section 9(1) of the Independence act which enacted that "...the powers of the legislature of the Dominion shall, for the purpose of the provisions as to the constitution of the Dominion, operable in the first occurrence by the lawmaking assembly...". This, conforming to the learned Chief Justice meant that the Governor General, as spokesperson of the Crown, must under section 6(3) of the Act give

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4 Maulvi Tamizuddin Khan v. Federation (PLD 1955 Sindh 96)

5 Federation v. Tamizuddin Khan (PLD 1955 F.C. 240)

or withhold assent. Reliance was also stated in section 5 “...there shall be a Governor General who shall represent His divine right for the purpose of the government of the Dominion.” According to Chief Justice “government” necessarily included administration of Constitutional laws and must, therefore, embrace the making of such laws. As for the government that the various organs of government had throughout acted in the assumption that assent was unnecessary, this plea was met by observing that this argument could only be taken into consideration if there was any doubt as to the meaning of section 6(3), but as there was no such doubt, effect had to be given to its terms irrespective of the consequences.<sup>6</sup>

- **Justice A.R. Cornelius's dissent**

In a dissenting judgment, **Justice Cornelius** held that assent was not necessary for the validity of constitutional legislation and no such conclusion could be drawn from the mere fact that Pakistan was in the Commonwealth, especially as the circumstances in which and the conditions under which Pakistan became a Dominion were without precedent in Commonwealth history. The Constituent Assembly was not the lawmaking body of the state as such a body was still to be created by the Constituent Assembly. There was a clear distinction between government and constitution-making; American Constitutional amendments did not require the assent of the President. The federal executive had acted upon constitutional legislation to which no assent had been given, so as to change the position of innumerable individuals and to affect rights and create interests, which defied categorization.<sup>7</sup>

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<sup>6</sup> Khan 2012: 84

<sup>7</sup> Shah 1986: 14

- **Implications of Moulvi Tamizuddin Case**

Moulvi Tamizuddin case wrecked the fate of Pakistan as it is in a constant situation of chaos and political dilemma. I think that this judgment caused immeasurable damage to the constitutional development of Pakistan. It rocked the constitutional ship of the country at its start. This judgment irrevocable, weaken and harm the image and integrity of the judiciary of Pakistan in eye of its own citizens. This case also set forth the four martial laws in Pakistan. These coups harm the nation in every aspect. In an era of dictators, the fundamental rights of citizens of Pakistan had brutally infringed. I also considered the separation of West Pakistan as the consequence of this case. This case gave birth to the doctrine of necessity, thus triggers abrogation of laws, suspension of constitution, terrorism, sectarianism etc.

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## References

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