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PLD 1972 SC 139

ASMA JILANI

Vs

GOVERNMENT OF THE PUNJAB AND ANOTHER

CONSTITUTION OF PAKISTAN (1973), ARTICLE 2A, 4, 6, 44, 49, 199, 232.
CONSTITUTION OF PAKISTAN (1973), ARTICLE 6 & 199

Constitution—Annulment and abrogation of Constitution by a successful Military revolution—Principle laid down in Dosso's case [PLD 1958 SC 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 eithr on the principle of stare decisis or otherwise.

The precise question before the Supreme Court was whether the High Courts had jurisdiction under Article 98 of the Constitution of Pakistan (1962) to enquire into the validity of detention under the Martial Law Regulation No.78 of 1971 in view of the barcreated by the provisions of the Jurisdiction of Courts (Removal of Doubts) Order, 1969. The further question was whether the doctrine enunciated in the case of State v. Dosso PLD 1958 SC 533 was correct.

Held, that in laying down a novel juristic principle of such far reaching importance the Chief Justice in the case of State v. Dosso proceeded on the basis of certain assumptions, namely :-

(1) "That the basic doctrines of legal positism", which he was accepting, were such firmly and universally accepted doctrines that "the whole science of modern jurisprudence" rested upon them;

(2) that any "abrupt political change not within the contemplation of the Constitution" constitutes a revolution, no matter how temporary or transitory the change, if no one has taken any step to oppose it; and

(3) that the rule of international law with regard to the recognition of States can determine the validity also of the States' internal sovereignty.

These assumptions were not justified, 's theory was, by no means, a universally accepted theory nor was it a theory which could claim to have become a basic doctrine of the science of modern jurisprudence, nor did Kelsen ever attempt to formulate any theory which "favours totalitarianism". He was propounding a theory of law as a "mere jurists' proposition about law". He wasnot attempting to lay down any legal norm or legal norms which are "the daily concerns of Judges, legal practitioners or administrators".

Kelsen in his attempt to evolve a pure science of law as distinguished from a natural science attached the greatest importance to a keeping law and might apart. He did not lay down the proposition that the command of the person in authority is a source of law. 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 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. An individual does not become the Head of a State through the recognitiion of other States but through the municipal law of his own State.

The observations of the Chief Justice in Dosso's case are not correct that upon the principles of international law if the territory and the people remain substantially the same there is"no change in the corpus or international entity of the State and the revolutionary Government and the new State are, according to international law, the legitimate Government and the valid Constitution of the State". This proposition does not find
support from any principle or international law.

The principle enunciated in Dosso's case, therefore, is wholly unsustainable, and it cannot be treated as good law either on the principle of stare decisis or even otherwise.[p.183]

Now to judge the validity of the events that took place on and from the 24th of March, 1969. On the 24th of March, 1969, Field Marshal Muhammad Ayub Khan, the then President of Pakistan,wrote a letter to the Commander-in- Chief. This was followed by a Broadcast over the Radio network at 7-15 p.m. of the 25th of March 1969. There was nothing either in this letter or in this broadcast to show that he was appointing General Agha Muhammad Yahya Khan as his successor-in-office or was giving him any authority to abrogate the Constitution which he had himself given to the country in 1962. Both these merely called upon the Commander-in-Chief of the army to discharge his legal and constitutional responsibility not only to defend the country against external aggression but also to save it from internal disorder and chaos. He did not even proclaim Martial Law.

Nevertheless, the Commander-in-Chief on the very same day, namely, the 25th of March 1969, on his own proclaimed Martial Law throughout the length and breadth of Pakistan and assumed the powers of the Chief Martial Law Administrator. He also abrogated the Constitution, dissolved the National and Provincial Assemblies and declared that all persons holding office as President, members of the President's Council, Ministers, Governors of Provinces and members of their Council of Ministers shall cease to hold office with immediate effect. Existing lawes and Courts were, howevere, preserved with the proviso that no writ or other order shall be issued against the Chief Martial Law Administrator or any person exercising powers or jurisdiction under the authority of the Chief Martial Law Administrator. [p. 183]

It is clear that under the Constitution of 1962, Field Marshal Muhammad Ayub Khan had no power to hand over power to anybody. Under Article 12 of the Constitution he could resign his office by writing undr his hand addressed to the Speaker of the National Assembly and then under Article 16 as soon as the office of President fell vacant the Speaker of the National Assembly had to take over as the acting President of the Country and an elkection had to be held within a period of 90 days to fill the vacancy.
Under Article 30 the President could also proclaim an emergency if the security or economic life of Pakistan was threatened by internal disturbances beyond the power of a Provincial Government to

control and may be for the present purposes that he could also proclaim Martial Law if the situation was not controllable by the civil administration. It is difficult, however to appreciate under what authority a Military Commander could proclaim Martial Law. [p.185]

Where the civil Courts are sitting and civil authorities are functioning the establishment of Martial Law cannot be justified. The validity of Martial Law is, in this sense, always a judicial question, for, the Courts have always claimed and have in fact exercised the right to say whether the necessity for the imposition of Martial Law in this limited common law sense existed. [p.187]

From the examination of the various authorities on the subject one is driven to the conclusion that the Proclamation of Martial Law does not by itself involve the abrogation of the civil law and the fuctioning of the civil authorities and certainly does not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country.

Per Yaqoob Ali, J. – However, effective the Government of a usurper may be, it does not within the National Legal Order acequire ligitimacy unless the Courts recognize the Government as de jure. International law is not concerned with these considerations. If a rabel Government has succeeded in gaining effective control over people and territory the other States may
recognize it. But will the same rule apply to the municipal Courts. East Pakistan today provides a classic example of a successful revolution which destroyed the National Legal Order and became a new law-creating fact.

If a dispute arises involving the determination whether the new Government of East Pakistan is de jure, will be municipal Courts of West Pakistan confer recognition of it, because a victorious revolution is a legal method of changing the Constitution and the new order has become afficacious as the individuals whose behavious the new order regulates actually behave by and large in conformity with new order. The answer is
obnvious. While under International law, East Pakistan has become an independent State, the municipal Courts of Pakistan will not confer recognition on it or act upon the legal order set up by the rebel Government. Yahya Khan's Government, therefore, remained de facto and not de jure up to 20th December, 1971, when he stepped aside. [pp. 229-230]

Kelson invests revolutionary Government with legal authority on the basis of a pre upposed norm that the victorious revolution and successful coup d'etat are law creating facts. This is in the realm of a theory and not a part of the national legal order of any State. No municipal Court will, therefore, rely on it as a rule. What Kelsen has said about the legitimacy of norm and legal authority of a revolutionary Govern,ment must be read separately and not mixed up, in the remak, that "the efficacy of the entire legal order is necessary condition for the validity of every single norm of the order. A conditio sine qua non, but not a conditio per quam. The efficacy of the total legal order is a condition, but not the reason for the validity of its constituent norm. These norms are valid not because the total order is efficacious, but because they are created in a constitutional way". If this appraisal of Kelsen is correct, then the decision in the case State v. Dosso upholding the validity of the Laws (Continuance in Force) Order must be held to be erroneous. [p.241]

A person who destroys the national legal order in an illegitimate manner cannot be regarded as a valid source of law-making. May be, that on account of his holding the coercive apparatus of the State, the people and the Courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and Courts will not recognize its rule and act upon them as de jure.

As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper; he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would be adventurers. [p.243]

CONSTITUTION OF PAKISTAN (1973) ARTICLE 4.

Constitution of Pakistan (1962), Article 2(2)—Term "Law" Concepts of "law".

Per Yaqoob Ali, J. – "Law" was not defined in the Constitution. It is thereore, for the Courts to lay down what "law" is, and if any decree, or behest of Yahya Khan expressed as a Martial Law Order, Martial Law Regulation or Presidential Order or Ordiance, does not conform to the meaning of the term "law" in Article 2 of the Constitution of Pakistan (1962) these Regulations, Orders and Ordiances will be void and of no legal effect. [p.230]

Pakistan is an Islamic Republic. Its ideology is enshrined in the Objectives Resolution of the 7th April, 1949, which inter alia declares "wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah". We should, therefore, turn more appropriately to Islamic Jurisprudence for the definition of "Law". One method of defining "Law" is to know its source. In Shari'at laws have divine origin. They are contained in the Holy Quran, and Hadith, namely, precepts and actions of the Holy Prophet, peace be kupon him. The other sources are Ijma': Consensus and juristic deductions including Qiyas; Analogy, Istihsen or Juristic equity, Public Good, Istidlal : Reason and Ijtihad; Juristic Exposition. While Juristic Deductions are judge-made laws, Ijma' is based on the doctrine of Imam Shafi'i that"the voice of the people is the voice of God", and is the most fruitful source of law making in Shariat. In the present day context the Legislative Assemblies comprising of chosen representatives of the people perform this function. Thus, in Islamic Jurisprudence, the will of a sovereign, be he the monarch, the President or the Chief Martial Law Administrator is not the source of law. The people as delegatee of the sovereignty of the Almighty alone can make laws which are in conformity with the Holy Quran and Sunnah. [p.235]

CONSTITUTION OF PAKISTAN (1962)

The Courts in the country gave full effect to the Constitution of 1962 and adjucated upon the rights and duties of citizens in accordance with the terms thereof by recognizing this law constitutive medium as a competent authority to exercise that function as also enforced the laws created by that medium in a number of cases. Thus all the laws made and acts done by the various Governments, civil and military, became lawsful and valid by reason of the recognition given to them by the new Constitution and the Courts. They had not only de facto validity but also required de jure validity by reason of the unquestioned recognition extended to them by the Courts of highest jurisdiction in the country. The validity of the acts done thereunder are no longer, therefore, open to challenge. [.162]

PROCLAMATION OF MARTIAL LAW, 1969 –

Provisional Constitution Order 1969; Jurisdiction of Courts (Removal of Doubt) Order [President's Order 3 of 1969] and Martial Law Regulation 78 [C.M.L.As'] of 1971 – Military rule soiught 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.

From the examination of the various authorities on the subject one is driven to the conclusion that the Proclamation of Martial Law does not by itself involve the abrogation of the civil law and the functioning of the civil authoritis and certainly does not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country. It would be paradoxical indeed if such a result could flow from the invocation in the aid of the State or an agency set up and maintained by the State itself for its own protection from external invasion and internal disorder. If the argument is valid that the proclamation of the Martial Law by itself leads to the complete destruction of the legal order, then the armed forces do not assist the State in suppressing disorder but actually create further disorder, by disrupting the entire legal order of the State. It is therefore not correct to say that the proclamation of Martial Law by itself must necessarily give the Commander of the armed forces the power to abrogate the Constitution, which he is bound by his oath to defend. If this be so, the from where did General Agha Muhammad Yahya Khan acquire the right to assume control of the reins of Government? Field-Marshal Muhammad Ayub Khan did not appoint him as his successor by his letter of the 24th March 1969. He merely called upon him to perform his "constitutional and legal duty to restore order" in the country. If this was his authority, then the only authority he got was to restore order and nothing mor. Even the imposition of Martial Law by his proclamation is of doubtful validity, because the proclamation should have come from the civil authorities and it was only then that under the proclamation the Commander of the armed forces could have moved into action. There is no provision in any law which gives the Commander of the armed forces the right to proclaim Martial Law, although he has like all other loyal citizens of the country a bounden duty to assist the State, when called kupon to do so. If the magnitude of the insurrection is so great that the Courts and the civil administration are unable to function, the military may exercise all such powers that may be necessary to achieve their objective and in doing so may even set up Military Tribunals to promptly punish wrong-doers but this, whether done throughout the country or in a restricted area within the country, merely temporarily suspends the functioning of the civil Courts and the civil administration. As soon as the necessity for the exercise of the military power is over, the civil administration must, of necessity, be restored, and assume its normal role.

The Presidential Order No.3 of 1969 is a sub-constitutional legislation and it could not have curtailed the jurisdiction that was given to the High Courts and to the Supreme Court by the Constitution of 1962, for, that jurisdiction was preserved even by the Provisional Constitution Order. [p.198]

The Martial Law Regulation No. 78 gives very wide powers to the Chief Martial Law Administrator and a Zonal Martial Law Administrator and even a Deputy Martial Law Administrator to detain a person without trial for any length of time, without giving him any reasons for such detention or any opportunity even of making any representation against such a detention. These are indeed very extraordinary powers for taking away the most cherished right of a citizen in a most arbitrary manner. They provide no machinery for seeking any redress against any possible abuse or misuse of the power or for making any representation or even for an appeal from Ceaser to Ceaser.[p.201]

Both the Presidential Order No.3 of 1969 and the Martial Law Regulation No.78 of 1971 were made by an incompetent authority and, therefore, lacked the attribute of legitimacy which is one of the essential characteristics of a valid law. The Presidential Order No.3 of 1969 was also invalid on two additional grounds,namely, that it was a Presidential Order, which could not in terms of the Provisional Constitution Order itself amend the Constitution so as to take away the jurisdiction conferred upon the High Court under Article 98 of the Constitution of Pakistan 1962 and that it certainly could not, in any event, take away the judicial power of the Courts to hear and determine questions pertaining even to

their own jurisdiction and this power could not be vested in another authority as long a the Courts contained
to exist. [p.204]

Per Yakoob Ali, J. – As both President's Order No.3 of 1969 and Martial Law Regulation 78 were intended to deny to the Courts the performance of their judicial functions, an object opposed to the concept of law, neither would be recognised by Courts as law. [p.237]

Interpretation of statutes — Legislation — Illegal and illegitimate Legislastion — Doctrine of necessity — Illegal usurpation of power by a Military adventurer–All laws enacted during such regime illegal– Everthing 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 greaster chaos andthe citizens from further difficulties.

The grabbing of power and installing himself as the President and Chief Martial Law Administrator of Pakistan by General Agha Muhammad Yahya Khan by the Proclamation of 1969 having been declared by the Supreme Court to be entirely illegal. The question arose whether everthing (legislative mesures and other acts) done during his illegal regime, whether good or bad, can be treated in the same manner and branded as illegal and of no effect.

HELD: Grave responsibility, in such circumstances, rests upon Courts not to do anything which might make confusion worse confounded or create greater state of chaos if that can possibly be avoided consistently withtheir duty to decide in accordance with law. Acts done by those actually in control without lawful authority may be recognized as valid or acted upon by the Courts within certain limitations, on principles of necessity. 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. All these cannot be invalidated and the country landed once again into confusion?. Such a principle, has also been adopted in America in various cases which came up after the suppression of the rebellion of the Southern States and American Courts too adopted the policy that where the acts done by the usurper were "necessary to peace and good order among citizens and had affected property or contractual rights they should not be invalidated", not because they were legal but because they would cause inconvenience to innocent persons and lead to further difficulties. [pp. 204-205]

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. [p.206]

Applying this test the Court condoned (1) all transactions which are past and closed, for, no useful purpose can be srved by re-opening 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 and all such measures as would establish or lead to the

establishment of, the objectives mentioned in the Objectives Resolution of 1954. The Court would not, however, condone any act intended to entrench the usurper more firmly in his power or to directly help him to runthe country contrary to its legitimate objectives. The Court 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 natioinal solidarity. [p.207]

Per Yaqoob Ali, J. – The Laws saved by the doctrine of State necessity do not achieve validity. They remain illegal, but acts done and proceedings undertaken under invalid laws may be condoned on the conditions that the recognition given by the Court is proportionate kto the evile to be averted, it is transitory and temporary in character and does not imply abdication of judicial review. [p.239]

My own view is that a person who destroys the national legal order in an illegitimate mannner cannot be regarded as a valid source of law-making. May be, that on account of his holding the coercive apparatus of the State, the people and the Courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and Courts will not recognize its rule and act upon them as de jure. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper, the should be tried for high treason and suitably punished. This alone will serve as a deterrent to would be adventurers. [p. 243]WW

MAXIM; Salus populi est supremn lex (the safety of the people is the ksupreme law) [p.160]

MAXIM; Inter arms leges silent (in the midst of arms the laws are silent) [p.187]

STATE V. DOSSO – PLD 1958 SC 533; FEDERATION OF PAKISTAN V. MOULVI TAMIZUDDIN KHAN -PLD 1955 FC 240; YUSUF PATEL V. THE CROWN – PLD 1955 FC 387; PRESIDENTIAL REFERENCE NO.,1 OF 1955 PLD 1955 FC 435; FAZLUL QADIR CHOWDHURY & OTHERS V. MUHAMMAD ABDUL HAQUE -PLD 1963 SC 486; SYED ABUL A'ALA MAUDOODI & ANOTHER V. THE GOVERNMENT OF WEST PAKISTAN & ANOTHER – PLD 1964 SC 673; THE GOVERNMENT OF EAST PAKISTAN V. MRS. ROWSHAN BIJOY SHAUKAT ALI KHAN – PLD 1966 SC 286; MALIK GHULAM JILANI V. THE GOVERNMENT OF WEST PAKISTAN & ANOTHER – PLD 1967 SC 373; THE GOVERNMENT OF WEST PAKISTAN & ANOTHER V. BEGUM AGHA ABDUL KARIM SHORISH KASHMIRI – PLD 1969 SC 14; PROVINCE OF EAST PAKISTAN V. MUHAMMAD MEHDI ALI KHAN – PLD 1959 SC 387; IFTIKHARUDDIN & ANOTHER V. MUHAMMAD SARFARAZ & ANOTHER PLD 1961 SC 585; MUHAMMAD AFAZAL V. THE COMMISSIONER, LAHORE DIVISION -PLD 1963 SC 401; CH. TANBIR AHMAD SIDDIKY V. GOVERNMENT OF EAST PAKISTAN – PLD 1968 SC 185; (1966) 1 W.L.R. 1234; THE GOVERNORS OF THE CAMPBELL COLLEGE BELFAST V. COMMISSIONER OF VALUATION FOR NORTHERN IRELAND (1964) 2 AER 705; THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA V. REGINAM AND OTHERS – (1957)2 AER 45 (PC); WATERSIDE WORKER'S FEDERATION V. ALEXANDER 25 CLR 434; TILONKO V. ATTORNEY-GENERAL OF NATAL 1907 AC 93; REX V. ALLEN (1921) 2 IR 241; EX-PARTE; MARIAS 1902 AC 109; WOLFE TONE'S CASE (1798) 27 ST. TR. 614; EX-JPARTE; MILLIGAN 4 WALLACE 121; TEXAS V. E. CONSTANTIN 77 US SCR 375 (LAWYERS' EDITION); MIR HASSAN AND ANOTHER V. THE STATE – PLD 1969 LAH. 786; MUHAMMAD ISMAIL V. THE STATE – PLD 1969 SC 241; MIAN FAZAL AHMAD V. THE STATE – 1970 SC MR 650; MARRIOTT'S ENGLISH POLITICAL INSTITUTIONS – 1938 EDN. P. 293; MADZIMBAMUTO V. LARDNER-BURKE AND ANOTHER – (1968)3 AER 561; TEXAS V. WHITE – (1868)7 WALLACE 733; HORN V. LOCKHART (1873) 17 WALLACE 850; BALDY V. HUNTER (1897) 171 US 388; UGANDA V. COMMISSIOINER OF PRISONS – EX PARTE MATOVU 1966 EA LR 514

Entries (RSS) and Comments (RSS).