

Zain Sheikh & Associates, Advocates & Corporate Consultants

PLD 1958 SC 533

STATE

Vs

DOSSO AND ANOTHER

Constitution—Destruction of, by successful revolutionary change in Government—Effect on prevalent laws—Validity depends upon will of new law-creating organ—Constitution of Pakistan— Abrogation of, by President—Laws Continuance in Force, Order (Post-Proclamation) (I of 1958), Article II, cls. 1, 4 & 7, Article IV cl. I—Effect—Frontier Crimes Regulation (III of 1901), continues in force—Pending proceedings, on writ applications based on infraction of a Fundamental right granted by abrogated Constitution, abate—Constitution of Pakistan (1956), Articles 4, 5, 170.

Held, (per Muhammad Munir, C.J.,) that since Article 5 of the late Constitution itself had now disappeared from the new legal order the Frontier Crime Regulation (III of 1901) by reason of Article IV of the Laws Continuance in Force Order, 1958, was still in force and all proceedings in cases in which the validity of that Regulation had been called in question having abated, the convictions recorded and the references made to the Council of Elders were good. [p.542]

A victorious revolution or a successful coup d' E'tat is an internationally recognised legal method of changing a Constitution.

After a change of that character has taken place, the national legal order must for its validity depend upon the new law-creating organ. Even Courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new Constitution.[p.539]

If the territory and the people remain substantially the same, there is, under the modern juristic doctrine, no change in the corpus or international entity of the State and the revolutionary government and the new Constitution are, according to International Law, the legitimate government and the valid Constitution of the State. [p.539]

[Hans Kelsen: "General Theory of Law & State" translated by Anders Wedberg; 20th Century Legal Philosophy Series pp.117-118]

Where revolution is successful it satisfies the test of efficacy and becomes a basic law-creating fact. On that assumption the Laws Continuance in Force Order, however transitory or imperfect, was a new legal order and it was in accordance with that Order that the validity of the laws and the correctness of judicial decisions had to be determined.[p.540]

Jibendra Kishore Acharyya Chowdhury and 58 others v. The Province of East Pakistan & Secretary, Finance and Revenue (Revenue Department, Government of East Pakistan PLD 1957 SC.(Pak) 9 ref.

The Order applied to the situation that came into existence under the President's Proclamation of October 7. The Laws that were in force after that date were enumerated in Article IV, but from the list of such laws the Constitution of 23rd March 1956 had been expressly excluded. This meant that when

under clause (4) of Article II of the Order the Supreme Court or the High Court was moved for a writ, the ground for the writ, could only be the infraction of any of the laws mentioned in Article IV, or any right recognised by that order and not the violation of a right created by the late Constitution. The so-called fundamental rights which were described in Part II of the late Constitution were therefore no longer a part of the national legal order and neither the Supreme Court nor the High Court had under the new Order the authority to issue any writ on the ground of the violation of any of the fundamental rights..... Under the new legal Order any law could at any time be changed by the President and therefore there was no such thing as a fundamental right, there being no restriction on the President's law-making power. Under Article 4 of the late Constitution there was a restriction on the power of the legislature to make laws involving breaches of fundamental rights and invalidity attached to all existing laws, customs and usages having the force of law if they were inconsistent with any of the fundamental rights. This test to determine the validity of the laws and the fetters on the power of the legislature to make laws had both disappeared under the new Order. Unless therefore the President expressly enacted the provisions relating to fundamental rights, they were not a part of the law of the land and no writs could issue on their basis. [p. 541]E.

It was true that Article II provided that Pakistan shall be governed as nearly as may be in accordance with the late Constitution but this provision did not have the effect of restoring fundamental rights because the reference to Government in this Article was to the structure and outline of Government and not to the laws of the late Constitution which had been expressly abrogated by Article IV. Article II and Article IV could therefore stand together and there was no conflict between them. But even if some inconsistency be supposed to exist between the two, the provisions of Article IV which were more specific and later must override those of Article II.[pp. 541, 547, 553, 569]F,L,O to P; AA,BB,CC.

Position in regard to future applications for writs, therefore is that they lie only on the ground that any one or more of the laws, Constitution in Force Order has been contravened. [p.541]G.

As regards pending applications for writs or writs already issued but which are either sub judice before the Supreme Court or require enforcement, the relevant provision is clause (7) of Article II. This provision means that, excepting the writs issued by the Supreme Court after the Proclamation and before the promulgation of the Order, no writ or order for a writ issued or made after the proclamation shall have any legal effect unless the writ was issued on the ground that any other or more of the laws mentioned in Article IV or any other right kept alive by the new Order had been contravened. And if there be a pending application or proceeding in respect of a writ which is not covered by clause (4) of Article II, or any other provision of the new Order, that is to say the application or proceeding relates to a writ sought on the ground that a fundamental right has been contravened, then the application or the proceeding shall abate forthwith. This means that not only the application for the writ would abate but also the proceedings which require the enforcement of that writ. The abatement must therefore be held to govern all those writs which were the subject-matter of appeal before the Supreme Court either on certificate or by special leave. [p. 542]H.

No judgment, order or writ of a High Court can be considered to be final when either that Court has certified the case to be a fit one for appeal and proceedings for appeal have been taken or when the Supreme Court itself has granted special leave to appeal from that judgment, order or writ. [p.542,547]I&M.

Cornelius, J., was unable to hold beyond doubt that the concluding words of subsection (7) of S. 2 of the Laws (Continuance in Force) Order, 1958 had the effect of bringing to an abrupt end in the circumstances of the two cases, the proceedings in the High Court which were under examination before the Supreme Court in Appeals No. 1 of 1957 and 60 of 1958. [pp.555,561]R to TT.

Per Corneliu, J., – “ I am unable to hold beyond doubt that the concluding words of subsection (7) of section 2 of the Order of the 10th October 1958, have the effect of bringing to an abrupt end the proceedings in the petitions before the High Courts commenced by the convicted persons in the two cases here under consideration. I do not therefore consider that it is open to me to reverse the judgment of the High Court on the point of repugnancy to Article 5 of the Constitution of 1956 is not tenable”. [p. 561]TT.

His Lordship held that that view was not tenable. [p.566]V,W.

[Full discussion of above question][pp.555,566,567]R to X;Z.

(h) Constitution of Pakistan (1956) Art. 178 – High Court not competent to declare invalid a conviction had in a “special area” though the convicted person was later confined in a place within jurisdiction of the High Court – Prisoners Act (III of 1900), Ss. 15 & 16. [p.567]Z.

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