

Doctrine of Necessity-Application in Pakistan- Cases of Immense Importance- A Critical Review

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Abstract

The titled cases i.e. Maulvi Tamizuddin Khan's Case, Usif Patel's Case, Dosso's Case, Asma Jilani's, Begum Nusrat Bhutto's, Miss Benazir Bhutto and Syed Zafar Ali Shah are taken from the various regimes of martial law, are the Circumstantial Evidences and repercussion on the legislature, Judiciary and Executive. The author has tried to critically review and analyse these cases and its impact on the whole system. These cases have provided the way out or way in for imposing martial law in the country time and again. It is also evident from these cases that due to reasons the court of law also supported such actions, which eventually adversely affected the spirit of the constitution of Pakistan. These actions by various individuals never allowed flourishing of political institutions, on the other hand all institution under the establishment were also working on sort of ad hoc basis. No consistency in any process of development and growth is being witnessed in Pakistan.

Keywords: *Law of Necessity, Necessity and Prerogative*

1. Introduction

While talking of imposition of Martial Law in Pakistan and ten cases are considerable. In order to properly appreciate the critical development and evolution of the doctrine it is necessary to acquaint ourselves with the facts and the law laid down in the above cases which are placed here in details in the next part of the article.

2. Discussions with reference to context

Federation of Pakistan and Others Vs. Maulvi Tamizuddin Khan (PLD 1955 FC 240)

On 24th October 1954, the Governor-General dissolved the Constituent Assembly of Pakistan and a reconstituted Council of Ministers was setup. *PLD 1955 Sind 96. P. 101*). The President of the Constituent Assembly, Maulvi Tamizuddin Khan, Contested the Power of the Governor-General to dissolve the Assembly and thereupon filed a writ petition, under Sec. 223-A of the Government of India Act, 1935, in the Chief Court of Sindh-Praying that a writ in the nature of mandamus be issued against the Federation of Pakistan and the members of the reconstituted Council of Ministers, restraining them from implementing the afore said Proclamation and to Prohibit them from interfering with the exercise of his i.e. (Maulvi Tamizuddin Khan's) functions as President of the Constituent Assembly, and to issue a second writ of Quo Warranto with the view to determining the validity of the appointment of the members of the reconstituted Council of Ministers. *(Ibid.) (PLD 1955 FC 240)*

It was also observed that legislation in the exercise of a high Prerogative Power and even where it is delegated by Statute or Charter to a legislature; in theory, it is always subject to assent, whether the assent be given by the King or by a person nominated by the King. In the British system, there is not a single

instance to the contrary that necessity was enjoined in the case of Pakistan, so long as it continued to be Dominion, though it was open to that Dominion, if the Governor-General gave assent to a bill of secession to repudiate its Dominion status. (*Ibid.* P. 289) (PLD 1955 FC 240)

Usif Patel and others Vs. The Crown

Usif Patel and two others, appellants in the case, were declared Goondas by the District Magistrate Larkana under the Sindh Control of Goonda Act (Governor's Act XXVIII of 1952) and were directed to furnish security and for their failure to furnish the same, confined to prison. Against their detention in prison, the appellants filed a habeas corpus petitions under Sec. 491 of the Criminal Procedure Code, 1898, that their detention was illegal and prayed that they be set at liberty. The Chief Court dismissed the said petitions holding that their detentions were legal. (PLD 1955 FC 387)

The State Vs. Dosso & Others (PLD 1958 SC (PAK.) 533)

On the 7th October 1958, President Iskander Mirza annulled the constitution of 1956, dismissed the Central and Provincial Legislatures, imposed Martial Law and took over the entire administrative and legislative machinery. Immediately thereafter Laws (Continuance in Force) Order 1958 was promulgated as a result of which laws, other than the Constitution of 1956, which were in force before the assumption of authority by Martial Law Administration, were validated and the jurisdiction of the Courts was restored. (PLD 1958 SC (PAK) 533)

The Supreme Court, headed by Chief Justice Mohammad Munir, held that since Article 5 of the late Constitution (relating to Fundamental Rights) had disappeared from the new legal Order, the Frontier Crimes Regulation 1901 by reason of Act IV of Laws (Continuance in Force) Order 1958 was still in force and all proceedings in cases in which validity of that Regulation had been called in question having abated, the convictions recorded and references made to the Council of Elders were good. (*Ibid.* P. 542.) (PLD 1958 SC (PAK) 533)

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. (*Ibid.* P. 540) (PLD 1958 SC (PAK) 533)

The appeals were accordingly disposed of.

Miss Asma Jilani Vs. The Government of the Punjab and Another (PLD 1972 SC 139)

On 22-12-1971, Malik Ghulam Jilani was arrested at Karachi under an order 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 Defence of Pakistan Rules, 1971. This order was challenged in the Lahore High Court through a writ petition which was admitted to regular hearing and a notice was issued to the Government of Punjab for 31.12.1971. A day earlier on 30th of December the said order was rescinded and substituted by another order of the same day purported to have been issued by the Martial Law Administrator Zone C in exercise of the powers said to have been conferred on him Martial Law Regulation no. 78. Miss Asma Jilani the daughter of the detente challenged the validity of the order of her father's detention. The petition was vehemently resisted by the Government and a preliminary objection was raised that the High Court had no jurisdiction in the matter because of the bar contained in the jurisdiction of Courts (Removal of Doubts) Order 1969 promulgated by the last Martial Law regime. (PLD 1972 SC 139. P. 157.)

Hamood ur Rehman, C.J. laid down:

"With the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice not only misapplied the doctrine of Hans Kelsen, but also fell into error in thinking that it was generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone." (*Ibid.* P. 181.) (PLD 1972 SC 139)

Begum Nusrat Bhutto Vs. Chief of Army Staff and Federation of Pakistan (PLD 1977 SC 657)

General Mohammad Zia-ul-Haq declared Martial Law throughout the country, and took over as the Chief Martial Law Administrator (CMLA). The 1973 Constitution was suspended (not abrogated). Federal and Provincial Cabinets, National and Provincial Assemblies were dissolved. The Prime Minister, Cabinet Members and the leading opposition leaders were arrested and placed under "Protective custody". The President was allowed to continue as the titular head of state and the Chief Justices of Provincial High Courts were appointed acting Governors of their respective provinces. (Hassan Askari Rizvi. *The Military & Politics in Pakistan 1947-86*, Lahore, Progressive Publishers, 1987, P. 225.) (PLD 1977 SC 657. P. 670)

The petition stated that Mr. Zulfiqar Ali Bhutto and the ten other leaders of the Pakistan People's Party were arrested in the early hours of the 17th of September, 1977 and detained in various prisons in the four Provinces of Pakistan. It is stated that on the evening of the 17th of September, 1977, the Chief of the Army Staff made a public statement, in which he leveled highly unfair and incorrect allegations against the Pakistan People's Party Government and the detenus by way of explaining away their arrest and detention. He also indicated his intention of placing the detenus before Military Courts or Tribunals for trial so as to enforce the principle of public accountability. The petition avers that this action had been taken against the detenus in a mala fide manner, with the ulterior purpose of preventing the Pakistan People's Party from effectively participating in the forthcoming elections which were scheduled to be held during the month of October, 1977. (PLD 1977 SC 657. P. 670.) (PLD 1977 SC 657. P. 670)

Miss Benazir Bhutto Vs. Federation of Pakistan and others (PLD 1988 Supreme Court 416)

Arts, 8, 184(3) & 199(1)(c) --- Vires of an Act can be challenged if its provisions are ex facie discriminatory in which case actual proof of discriminatory treatment is not required to be shown --- Where the Act is not ex facie discriminatory but is capable of being administered discriminately then the party challenging it has to show that it has actually been administered in a partial, unjust and oppressive manner. (PLD 1988 Supreme Court 416)

Syed Zafar Ali Shah and others Vs. General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869)

Necessity and Prerogative

"A further element of confusion arose in public law. At first sight the doctrine of necessity is somewhat difficult to separate from the prerogative. The difference is that the defence of necessity is open to everybody, while the prerogative relates only to the King " "On the other hand there were some politically necessary things that only the King could do; these belonged to his prerogative. Thus, he could (and can) erect sea walls and embankments against sea or tide, and enter the land of a subject to do So. It was said that before Magna Carta, c.21, he could take wood for the repair of his castles. He requisitioned ships, subject to the payment of compensation, and by the prerogative of purveyance similarly requisitioned provisions for his household and armed. (PLD 2000 SC 869)

Corruption

"If the spirit of liberty is so strong, why do free nations and enterprises fall, and dictators arise from their ruin? Machiavelli lays the blame on corrupt leaders, and then the corruption of the people themselves. "To usurp supreme and absolute authority ... in a free state, and subject it to tyranny, the people must have already become corrupt by gradual steps from generation to generation." Once that has happened, the enterprise is probably doomed. Free societies depend upon the virtue of the people; there is a symbiotic relationship between the good laws and institutions upon which the enterprise rests, and the virtuous behavior of the citizens. Just as "good laws are necessary to maintain good customs, so good customs are necessary for good laws to be observed." (PLD 2000 SC 869)

Man on Horseback

"The Military in a country only intervenes in political crisis according to the occasion and its disposition. Its disposition is inhibited by many factors, the foremost factor being the explicit and well accepted principle that the supremacy of the civil aspect of the government should be always observed. In fact many times that the Army had interfered in civil affairs they had found that they were inadequately equipped for running a civil Government and this experience has been accepted over a long period as the reason for not taking over the civil Government by the Military."

Submissions of the Advocates General of the Provinces

The learned Advocate-General Punjab adopted the arguments addressed by the learned Attorney-General and further submitted that appropriate changes in the Constitution/laws should be brought about so as to avoid frequent recurrence of Military intervention and that the present Government should be facilitated to achieve its declared objectives. (PLD 2000 SC 869)

Submissions of Mr. Kadir Bakhsh Bhutto, Vice Chairman, Pakistan Bar Council

Mr. Kadir Bakhsh Bhutto, Vice-Chairman, Pakistan Bar Council submitted that this Court has got the power of judicial review and the new oath cannot debar it from exercising that power. He further submitted that this Court should give a direction to the Government to hold elections at the earliest.

Submissions of Mr. Abdul Haleem Pirzada, President, Supreme Court Bar Association

Mr. Abdul Haleem Pirzada, President, Supreme Court Bar Association submitted that this country is facing this dilemma for the fourth time. Judiciary has always been put to test in these cases, the reason being that this is the only institution which has not been affected by all adventures. The Federation has been justifying the action from the facts that on that particular date, i.e. 12th of October, 1999 the Chief of Army Staff was coming back from Sri Lanka; his plane was directed to land either in India or get crashed. It was contended that the above assertion is incorrect. He argued that the impugned action was resorted to only when the Chief of the Army Staff was removed but this is not a valid ground for the take-over.

Dr. Farooq Hasan, Bar-At-Law Lahore High Court Bar Association

Dr. Farooq Hassan, learned Senior ASC outlined his submissions by stating that the case of both the parties could be summarized as below:-

Petitioner had contended that (a) 12th October, 1999; Army takeover had destroyed the democratic system in the country, and (b) that the Proclamation of Emergency and the Provisional Constitutional Order of 14-10-1999 were ultra vires of the Constitution.

Independence of Judiciary and Power of Judicial Review

Before we embark upon the task of dealing with the merits of the case in the light of the arguments advanced on behalf of the parties, it would be appropriate to dilate on the question of jurisdiction of this Court especially in view of the fact that the Judges of the Superior Courts have taken new oath of their offices under the Order No. 1 of 2000 promulgated by the Chief Executive under the PCO 1 of 1999. The basic question, which needs to be resolved is whether the restriction imposed by the PCO 1 of 1999 on the jurisdiction of this Court does in any way restrict the power' of judicial review of this Court whereunder it has an inherent power to interpret any provision of the Constitution or any other legislative instrument or law, even if that particular provision' is a provision which seeks to oust the jurisdiction of this Court. (PLD 2000 SC 869)

We accordingly hold as under:-

1. On 12th October, 1999 a situation arose for which the Constitution provided no solution and the intervention by the Armed Forces through an extra constitutional measure became inevitable,

which is hereby validated on the basis of the doctrine of State necessity and the principle of *salus populi suprema lex* as embodied in Begum Nusrat Bhutto's case. The doctrine of State necessity is recognised not only in Islam and other religions of the world but also accepted by the eminent international jurists including Hugo Grotius, Chitty and De Smith and some Superior Courts from foreign jurisdiction to fill a political vacuum and bridge the gap.

2. Sufficient corroborative and confirmatory material has been produced by the Federal Government in support of the intervention by the Armed Forces through extra-constitutional measure. The material consisting of newspaper clippings, writings, etc. in support of the impugned intervention is relevant and has been taken into consideration as admissible material on the basis of which a person of ordinary prudence would conclude that the matters and events narrated therein did occur. The findings recorded herein are confined to the controversies involved in these cases alone.
3. All past and closed transactions, as well as such executive actions as were required for the orderly running of the State and all acts, which tended to advance or promote the good of the people, are also validated.
4. That the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of State necessity;
5. That the Superior Courts continue to function under the Constitution. The mere fact that the Judges of the Superior Courts have taken a new oath under the Oath of Office (Judges) Order No. 1 of 2000, does not in any manner derogate from this position, as the Courts had been originally established under the 1973 Constitution, and have continued in their functions in spite of the Proclamation of Emergency and PCO No. 1 of 1999
6. That the previous Proclamation of Emergency of 28th May, 1998 was issued under Article 232(1) of the Constitution whereas the present Emergency of 14th October, 1999 was proclaimed by way of an extra-Constitutional step as a follow up of the Army take-over which also stands validated notwithstanding the continuance of the previous Emergency which still holds the field.
7. That the validity of the National Accountability Bureau Ordinance, 1999 will be examined separately in appropriate proceedings at appropriate stage.
8. That the cases of learned former Chief Justice and Judges of the Supreme Court, who had not taken oath under the Oath of Office (Judges) Order, 2000 (Order 1 of 2000), and those Judges of the Lahore High Court, High Court of Sindh and Peshawar High Court, who were not given oath, cannot be re-opened being hit by the doctrine of past and closed transaction.
9. That the Government shall accelerate the process of accountability in a coherent and transparent manner justly, fairly, equitably and in accordance with law.
10. That the Judges of the Superior Courts are also subject to accountability in accordance with the methodology laid down in Article 209 of the Constitution.
11. General Pervez Musharraf, Chief of the Army Staff and Chairman Joint Chiefs of Staff Committee is a holder of Constitutional post. His purported arbitrary removal in violation of the principle of *audi alteram partem* was *ab initio* void and of no legal effect.
12. That this order will not affect the trials conducted and convictions recorded including proceedings for accountability pursuant to various orders made and Orders/laws promulgated by the Chief Executive or any person exercising powers or jurisdiction under his authority and the pending trials/proceedings may continue subject to this order.
13. This is not a case where old legal order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a transitional period so as to enable the Chief Executive to achieve his declared objectives.

14. That the current electoral rolls are out-dated. Fresh elections cannot be held without updating the electoral rolls. the learned Attorney-General states that as per report of the Chief Election Commissioner this process will take two years. Obviously, after preparation of the electoral rolls some time is required for delimitation of constituencies and disposal of objections, etc.
15. That we take judicial notice of the fact that ex-Senator Mr. Sartaj Aziz moved a Constitution Petition No. 15 of 1996, seeking a mandamus to the concerned authorities for preparation of fresh electoral rolls as, according to Mr. Khalid Anwar, through whom, the above petition was filed, the position to the contrary was tantamount to perpetuating disenfranchisement of millions of people of Pakistan in violation of Articles 17 and 19 of the Constitution. Even MQM also resorted to a similar Constitution Petition bearing No. 53 of 1996 seeking the same relief. However, for reasons best known to the petitioners in both the petitions, the same were not pursued any further.
16. That having regard to all the relevant factors involved in the case including the one detailed in paragraphs 14 and 15 above three years period is allowed to the Chief Executive with effect from the date of the Army take-over i.e. 12th October, 1999 for achieving his declared objectives.
17. That the Chief Executive shall appoint a date, not later than 90-days before the expiry of the aforesaid period of three years, for holding of a general election to the National Assembly and the Provincial Assemblies and the Senate of Pakistan.
18. That this Court has jurisdiction to review/re-examine the continuation of the Proclamation of Emergency, dated 12th October, 1999 at any stage if the circumstances so warrant as held by this Court in the case of Sardar Farooq Ahmed Khan Leghari v. Federation of Pakistan PLD 1999 SC 57. (PLD 2000 SC 869)

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