

## Scenario 2

### **Judiciary in 1954-73:**

#### ***Draconian use of 'Doctrine of Necessity:***

On 25<sup>th</sup> July 2003, two civil judges and a magistrate were killed by prisoners of the Sialkot District Jail while they were on an official visit to the jail premises accompanying a heavy contingent of the local police.

Why did they have to kill the judges?

Dr Farrukh Saleem, an Islamabad based analyst, rightly pointed out that '*.... It is important for the judiciary to peer into history for answers.*'

Here are some dates and events describing the judicial history of Pakistan; one can find out if the events are inter-connected and if some stuff is also available in between the lines.

**On 21st September 1954**, the Constituent Assembly amended the Government of India Act. The amendments precluded the Governor General from acting except on the advice of his ministers. All ministers were to be members of the Assembly at the time of their selection and continue to hold office only so long as they retained the confidence of the legislature.

Justice Munir, in Molvi Tamizuddin Khan's case, declared that the Assembly was not a sovereign body. He gave ruling that the Constitutional Assembly had '*lived in a fool's paradise if it was ever seized with the notion that it was the sovereign body of the state.*' The historians keep the opinion that when Justice Munir denied the existence of the Assembly's sovereignty, he, in fact, had destroyed Pakistan's constitutional basis. He did further harm when he did not indicate where sovereignty resided.

Through Special Reference No.1 of 1955, the then Governor General Ghulam Mohammad asked the Federal Court for an advisory ruling regarding his powers. Justice Munir, relying on Bracton's maxim 'that which is otherwise not lawful is made lawful by necessity', and on the Roman law maxim urged by Jennings, 'the well-being of the people is the supreme law' declared that:

*'Subject to the condition of absoluteness, extremeness, and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under stress of necessity, the necessity being referable to an intention to preserve the Constitution, the state, or the society, and to prevent it from dissolution, and affirms..... that necessity knows no law... ..necessity makes lawful which otherwise is not lawful. (Ref: PLD 1955 FC240)*

Thus, because the Constituent Assembly was denied a judicial remedy, the Governor General's position seized the ultimate power of the state. It also followed from the court's decision on sovereignty that the Assembly could be dissolved by the Governor General for political purposes.

**21<sup>st</sup> March 1955:** Chief Justice Muhammad Munir of the Federal Court (the present Supreme Court) legalized the dissolution of the 1st Constituent Assembly. Justice A.R. Cornelius (a non-Muslim) of the Federal Court dissented. Cornelius opined that the Constituent Assembly was 'sovereign', the governor-general's dissolution was illegal and that 'Pakistan owed no duty to the Crown.'

**31<sup>st</sup> March 1955:** Despite objections from powerful political elements, the Governor General of Pakistan intended to have the constituent convention pass the constitution, as already drafted by the then central cabinet 'Constitution through Ordinance'.

**16<sup>th</sup> May 1955:** On 24<sup>th</sup> October 1954 the Governor-General of Pakistan, Ghulam Mohammad (GM), dissolved the Constituent Assembly and appointed a new Council of Ministers on the grounds that the said Assembly no longer represented the people of Pakistan. The fact was that the draft of the constitution was ready to be announced on 25<sup>th</sup> December 1954, but the governor general dismissed that assembly on 24<sup>th</sup> October 1954, to avoid the curtailment of his powers of dismissing the government of the elected prime-minister. Mr GM had more objections to the constitution which the Assembly was about to adopt.

The President of the Constituent Assembly, Maulvi Tamizuddin, appealed to the Chief Court of Sind at Karachi to restrain the new Council of Ministers from implementing the dissolution and to determine the validity of the appointment of the new Council under Section 223-A of the constitution. [*In those days, Pakistan comprised of two parts, West Pakistan & East Pakistan (Bagladesh after 1971) and Karachi was the capital of Pakistan. M Tamizuddin was from East Pakistan*] (**PLD 1955 Sindh 96**)

In response, members of the new Council of Ministers appealed to the court saying that it had no jurisdiction to deal with the dissolution of the Assembly and appointments of the ministers. They argued that Section 223-A of the constitution had never been validly enacted into the Constitution because it was never approved by the Governor-General, and therefore anything submitted under it was invalid. The Sindh Chief Court ruled in favour of Maulvi Tamizuddin and held that the Governor General's approval was not needed when the Constituent Assembly was acting only as a Constituent Assembly and not as the Federal Legislature. The Federation of Pakistan and the new Council of Ministers then appealed to the Supreme Court, the appeal was heard in March 1955. (Reference: *Federation of Pakistan v Maulvi Tamizuddin Khan*)

In the appeal hearing under Chief Justice Muhammad Munir, the court decided that the Constituent Assembly functioned as the 'Legislature of the Domain' and that the Governor-General's assent was necessary for all legislation to become law. Therefore, the Sindh Chief Court had no jurisdiction to overturn the Governor General's dissolution and Mr Ghulam Mohammad's step was held as valid.

However, the ground of which the court found in favour of the Federation of Pakistan called into question the validity of all legislation passed by the Assembly, not to mention the unconstitutionality of the Assembly itself since 1950. To solve this problem, the Governor-General had to invoke Emergency Powers to retrospectively validate the Acts of the Constituent Assembly. An appeal was filed against the Governor-General for invoking emergency powers and the then Chief Justice of Pakistan had to determine the constitutionality of invoking the Emergency Powers.

The Court held that in this case the Governor-General could not invoke emergency powers because in doing so he validated certain laws that had been invalid because he had not assented to them previously. Justice Munir also ruled that constitutional legislation could not be validated by the Governor General but had to be approved by the Legislature. Lack of the Constituent Assembly did not transfer the Legislature's powers to the Governor-General.

The Federal Court of Pakistan gave ruling that:

- The Governor General in certain circumstances had the power to dissolve the Constituent Assembly.
- The Governor-General had during the interim period the power 'under the common law of civil or state necessity' of retrospectively validating the laws listed in the Schedule to the Emergency Powers ordinance.
- The new Assembly (formed under the Constituent Convention Order 1955) would be valid and able to exercise all powers under the Indian Independence Act 1947.

In his verdict, CJP Ch Munir declared it was necessary to go beyond the constitution to what he claimed was the Common Law, to general legal maxims, and to English historical precedent. He relied on Bracton's maxim, '**that which is otherwise not lawful is made lawful by necessity**', and the Roman law maxim urged by Jennings, '**the well-being of the people is the supreme law.**'

Justice Sajjad Ali Shah in his essay titled 'Blessings of Judicial Activism' published in DAWN on 26<sup>th</sup> September 2006 has explained the above facts with references given below:

*[In consequence of judgment of the Federal Court, 35 constitutional acts and many decisions under writ jurisdiction became invalid for want of assent of the Governor General. There was total confusion and chaos: the Governor-General issued an ordinance with retrospective effect to rectify the mistake. The Federal Court held in **Usif Patel's case** (PLD 1955 FC 387) that the Governor-General was not empowered to issue an ordinance for constitutional matters in the absence of the constituent assembly whatsoever.*

*The Governor-General then made special reference to the Federal Court for guidance (PLD 1955 FC 435). The Federal Court allowed retrospective validation of invalid acts to be approved by a new constituent assembly directed to be elected. This judgment gave rise to the doctrine of state necessity, which is also called the law of necessity, later used by the courts to justify martial laws and the dismissal of constitutions.]*

**23<sup>rd</sup> March 1956:** First Constitution of Pakistan declared. Major General Iskandar Mirza changed his portfolio from Governor General to the President of Pakistan.

**28<sup>th</sup> October 1958:** Chief Justice Muhammad Munir called Iskander Mirza's dissolution of the 2nd Constituent Assembly & abrogation of 1956's Constitution, a 'legalized illegality' meaning thereby that a victorious revolution and a successful coup d'etat is an internally recognized legal method of changing a constitutional government.

When Iskandar Mirza dissolved the parliament in 1958 and announced martial law, Justice Munir and the Supreme Court were readily available to place a judicial stamp of approval on what had taken place. Justice Munir had given the verdict that:

*'It sometimes happens, however, that the Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing constitution but also the validity of the national legal order ... ..For the purpose of the doctrine here explained, a change is, in law, a revolution if it annuls the constitution and the annulment is effective...Thus the essential condition to determine whether a constitution has been annulled is the efficacy of the change...Thus a victorious revolution, or a successful coup d'etat is an internally recognized legal method of changing a constitution.*

*...If what I have already stated is correct, then the revolution having been successful, it satisfies the test of efficacy and becomes a basic law-creating factor'.*

The above extract has been taken from the decision announced by the Chief Justice of the Federal Court in the case titled **State v. Dosso (PLD 1958 SC 533)**. The constitutional petition was filed in the backdrop of proclamation of martial law issued by President Iskandar Mirza in the first week of October 1958, wherein:

- The Constitution of 23 March 1956 was abrogated.
- The Central and Provincial governments were dismissed.
- The Parliament and Provincial Assemblies were dissolved.
- All political parties were abolished.

- Until alternative arrangements were made, Pakistan remained under martial law's flag.

Gen Ayub Khan, Commander-in-Chief of Pakistan Army was accordingly appointed as the Chief Martial Law Administrator and all the armed forces of Pakistan placed under his command. Explaining the reasons for these steps the President, *inter alia*, had observed:

*'The constitution which was brought into being on 23 March 1956, after so many tribulations, is unworkable. It is full of dangerous compromises, that Pakistan will soon disintegrate internally if the inherent malaise is not removed. To rectify them, the country must first be taken to sanity by a peaceful revolution.'*

The learned Chief Justice went on to observe that if a revolution succeeds, it is a **legalised illegality**. The revolution itself becomes a law creating fact because thereafter its own legality is judged not by reference to the annulled constitution but by reference to its own success. For this view, reliance was placed on the writings of Hans Kelsen contained in his book General Theory of Law and State. The court held that the 1958 revolution satisfied the test of efficacy and had thus become a basic law creating fact. It was accordingly found that the Laws (Continuance in Force) Order 1958, however transitory or imperfect it might be, was a new legal order and had destroyed the old legal order, with the result that the validity of the laws and correctness of judicial decisions were to be determined with reference to that order and not the earlier legal order.

In nut shell Justice Munir's decision in Dosso case set the constitutional stage for Ayub Khan, the then Commander in Chief of the Pakistan Army, to take over the government from Iskandar Mirza. It would be remembered in the history that Gen Ayub Khan's take over (on 27<sup>th</sup> October 1958) took place just next day the Court's decision was announced.

*[Upon retirement, Justice Munir had accepted a government job in Tokyo and then formally accepted a cabinet position under Gen Ayub Khan's government. The Governor General Iskandar Mirza was sent into exile, to UK.]*

**14<sup>th</sup> April 1972:** Interim Constitution of Pakistan was passed by the National Assembly and Martial Law was lifted.

*[It may be remembered that the army had gone angry with Mr Bhutto till then because, when he became Martial Law Administrator, then President and then the Prime Minister, he had sent 22 serving Generals home. It was natural that 22 top families, their next generation in army, their relatives and associates all went upset and the PPP continuously suffered a lot since then.]*

**7<sup>th</sup> & 20<sup>th</sup> April 1972:** The Supreme Court of Pakistan declared Yahya Khan's martial law to be illegal. The decision was announced four months after the departure of that army ruler.

Gen Yahya Khan was also a Commander in Chief of the Pakistan Army who imposed Martial Law in March 1969, after receiving a written letter from Gen Ayub Khan, the then President of Pakistan 'to do your duty to run the country'. He performed his duty by promulgating another martial law next day.

Gen Ayub Khan himself had violated his own constitution by handing over power to the Commander-in-Chief of the army, Gen Yahya Khan, instead of the National Assembly Speaker as was provided for the transfer of power in the constitution. Gen Yahya Khan abrogated the 1962 constitution of Ayub Khan and introduced the "Legal Framework Order" containing the rules relating to the holding of general elections and framing of the future constitution for Pakistani people.

Gen Yahya's rule ended on 20<sup>th</sup> December 1971 with the fall of Dacca.

In this case, commonly known as ***Asma Jilani Case (PLD 1972 SC 139)***, on behalf of the military government, the law of necessity was pleaded but the Supreme Court rejected the plea and held that the commander of the armed forces was bound by oath to defend the

constitution and had no power to dismiss the same as the constitution was the fundamental law of the country. This judgment was very bold with full manifestation of judicial activism as the doctrine of necessity was rejected; the doors of army rule were shut.

This was the judgment after which, when writing the new Constitution of 1973 an Article 6 was inserted in it to prevent the army from dismissing the Constitution and imposing martial law (but subsequent history of 1977 and 1999 proved that all this went in vain).

In ***Asma Jilani vs The Government of Punjab and others***, on 7<sup>th</sup> April 1972, the Supreme Court of Pakistan declared that Gen Yahya Khan had usurped power that his action was not justified by the revolutionary legality doctrine and consequently his martial law was illegal. The court, after its detailed reasoning, came to the conclusion that:

*'With the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice Mohammad Munir not only misapplied the doctrine of Hans Kelsen, but also fell into error that it was a generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go far as Kelsen had gone...I am unable to resist the conclusion that Mohammad Munir erred both in interpreting Kelsen's theory and applying the same to the facts and circumstances of the case before him. The principle enunciated by him is wholly unsustainable.'* (Ref: PLD 1972 SC 139)

Justice Yaqub Ali Khan concluded that the judgment in Tamizuddin Khan's case of 1955 and Dosso's case of 1958 had made *'a perfectly good country into a laughing stock, and converted the country into autocracy and eventually ...into military dictatorship'*. He pointedly criticized the abrogation of the 1956 constitution, observing that *'Iskandar Mirza and Ayub Khan committed treason, and destroyed the basis of representation between the two wings.'*

The decision was though bold but it cannot be forgotten that the Court declared Yahya Khan a usurper only after he had ceased to hold office while the other usurpers were dead.

Similarly once more, the SC tried to put up a brave face in the Haji Saifullah case by declaring Gen. Zia's dissolution of the National Assembly invalid; but, again, this was done only after the dictator's death [*making his son, Ejaz ul Haq, publicly boast in a moment of truth that had his father been alive the judgment could not have been delivered*]. (Ref: ***South Asia Tribune; 7-13 September 2003, Issue 58***)

It may not be out of place to mention that constitutional package for 1973's constitution was drafted in the light of this judgment of the Supreme Court of Pakistan, which had opined in Asma Jilani case: *'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 the adventurers.'*

**Asma Jilani case** indeed was the basis for the framers of the 1973 Constitution drafting not only the Article 6 dealing with high treason but also making a specific exception to the constitutional principle of non-retro-spectives of offences and punishments in the case of such high treason and desecration of the constitution. Acutely aware of the potential for mischief of Pakistan Army and its corrupt political partisans, such as those who eventually would endorse the 8th and 17th Amendments, the framers went on to include the Article 12(2) stating that any such offence would not fall under the Protection against Retroactive Punishment or indemnity granted by the parliament via Article 270. Article 12(2) states:

*'Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty third day of March one thousand nine hundred and fifty six, an offence.'*

The academics noted that the ruling in Dosso's case, famous Justice Mohammad Munir's judgment (*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, such a change is called a revolution and its legal effect is not only the destruction of the existing constitution but also of the validity of the national legal order, irrespective of how and by whom such a change is brought about*) was held not to be good law. ***Gen Yahya Khan was held to be***

***an usurper and all the actions taken by him were found to be illegal and illegitimate.*** In order to avoid the disastrous consequences of declaring all acts done during his rule, whether legislative or otherwise, to be of no legal effect; it was, however, held that those which were in the wider public interest could be skipped on the principle of condonation, notwithstanding their illegality or varied interpretations whatsoever.

**10<sup>th</sup> April 1973:** Pakistan got another constitution, still in vogue, if and when our civil & military dictators allow showing its twisted and distorted face; widely used as reference in media papers and courts but never respected by spirit.