Judgment on the Constitutional Petition Challenging the Validity of Martial Law

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Sani Hussain Panhwar
Member Sindh Council, PPP

Judgment on the

Constitutional Petition

Challenging the Validity of

Martial Law

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P L D 1977 Supreme Court (SC 657)

Present: Anwarul Haq, C. J., Waheeduddin Ahmad, Muhammad Afzal Cheema, Muhammad Akram, Dorab Patel, Qaisar Khan, Muhammad Haleem, G. Safdar Shah and Nasim Hasan Shah, JJ

BEGUM NUSRAT BHUTTO—Petitioner

Versus

CHIEF OF ARMY STAFF AND FEDERATION PAKISTAN—Respondents

Constitutional Petition No. 1 of 1977, decided on 10th November 1977.

Per S. Anwarul Haq, C. J. [Waheeduddin Ahmed, Muhammad Afzal Cheema, Muhammad Akram, Dorab Patel, Muhammad Haleem, G. Safdar Shah and Nasim Hasan Shah, JJ. agreeing].

(a) Constitution of Pakistan (1973)

Art. *184 (3)* – Maintainability of petition—Petition directed against Chief of Army Staff whereas impugned orders of detention passed by Chief Martial Law Administrator—Chief of Army Staff also being Chief Martial Law Administrator, objection regarding non-maintainability of petition on ground of not having been directed against Chief Martial Law Administrator, *held,* only technical since it could be easily rectified by adding words "Chief Martial Law Adruinistrator" to description of respondent. - [Writ]. [p. *674]A*

(b) Constitution of Pakistan (1973)-

- Art. *184(3)* read with Art. *199* – Aggrieved person—Petitioner moving petition in her capacity of wife of one of detenus and as Acting Chairman of Party to which all detenus belonged—Petitioner though not alleging any contravention of her own Fundamental Rights yet *in* circumstances, *held,* an aggrieved person within meaning of Art. *199.* – [Aggrieved person]. [p. *675]B*

Manzoor Elahi v. State P L 1) *1975 S* C *66 ref.*

(c) Precedents-

-- Interpretation of—Apprehension that decision of Supreme Court in *Asma Jillani's case (P L D 1972 S C 139)* in effect rendered illegal all successive Governments of Pakistan and Constitutions framed during relevant period,

held, not well-founded.—[Interpretation of precedents]. [p. *684]C*

State v. Dosso P L D *1958 S* C (Pak.) *533 ; Quin v. Leathem 1901* A C *495; Prager v. Blatspiel, Stamp & He co. k Ltd. (1924)* 1 K B *566: Read v. J. Lyons & Co. Ltd. 1947* A C *156; Candler v. Crane Christnrass & Cr. (1951)* 1 All E R *426; State v. Zia-ur-Rehman P* L D 1973 S C *49* and *Miss Asma Jillani v. The Government of The Punjab and another PL D 1972 S C 139 ref.*

(d) Precedents-

-- Interpretation of—Judgments delivered in Southern Rhodesian case of *Madzimbarnuto [(1968) 3* All E R *561]—Held,* cannot be regarded as judicial authority for proposition that effectualness of new regime provides its own legality—Doctrine subjected to weighty criticism on ground of seeking to exclude all considerations of morality and justice from concept of law and legality.—[Interpretation of precedents--Doctrine of necessity [p. *688]D*

Madzimbamuto v. Lardner-Burke and another (1968) 3 All E R *561,* Splitting the Grundnorm *1967* Modern Law Review , Vol. 30; The Judicial Process : UDI and the Southern Rhodesian Judiciary by *Claire Pally;* Legal Politics: Norms Behind the Grundno.m by *R. W. M. Dias* 1968 Cambridge Law 'Journal, Vol. 26 *ref.*

***(e)* Jurisprudence--**

- *Kelsen's* pure Theory of Law—Not universally accepted—Nor indeed a theory having become basic doctrine of science of modern jurisprudence—Theory not found consistent for full application in all revolutionary situations coming before Courts for adjudication as to validity of new Legal Orders resulting from such revolutions.—[Theory of law]. [p. 692JE

Principles of Revolutionary Legality—Oxford Essays on Jurisprudence, 2nd Series, 1973; The Problem of Power in Legal Politics: Norm Behind the Grundnorm by *R. W. M. Dias,* Ch. IV; *Adams* v. *Adams* (1970) 3 All E R 572; The Pure Theory in Legal Politics: Norms Behind the Grundmom by *R. W. M. Dias,* Ch.) + VI and The 1965 Standford Law Review, Vol. 17 by *Professor Julius Stone ref.*

***(f)* Jurisprudence--**

-- Kelsen's Theory—Open to serious criticism on ground of excluding from consideration sociological factors of morality and justice—Legal consequences of an abrupt political change by imposition of martial law—To be judged not by application of an abstract theory of law in vacuum but by consideration of total *milieu* preceding change, i.e., objective political situation prevailing at time, its historical imperatives and compulsions, motivations of persons bringing in change and extent of preservation or suppression of old Legal Order.-[Theory of law].

Kelzen's theory is open to serious criticism on the ground that by making effectiveness of the political change as the sole condition or criterion of its legality, it excludes from consideration sociological factors of morality and justice which contribute to the acceptance or effectiveness of the new Legal Order. It must not be forgotten that the continued validity of the grundnorm has an ethical background, in so far as an element of morality is built in it as part of the criterion of its validity.

These considerations assume special importance in an ideological State like Pakistan, which was brought into being as a result of the demand of the Muslims of the Indo-Pakistan sub-continent for the establishment of a homeland in which they could order their lives in accordance with the teachings of the Holy Qur'an and Sunnah. When the demand was accepted, it was given effect to by means of a Constitution passed by the British Parliament, which held sovereignty over India in 1947. In other words, the birth of Pakistan is grounded both in ideology and legality. Accordingly, a theory about Law which seeks to exclude these considerations, cannot be made the binding rule of decision in the Courts of this country.

It follows, therefore, that the legal consequences of an abrupt political change, of the kind with which the Court is dealing in this case, must be judged not by the application of an abstract theory of law in vacuum, but by a consideration of the total *milieu* in which the change is brought about, namely, the objective political situation prevailing at the time, its historical imperatives and compulsions; the motivation of those responsible for the change, and the extent to which the old Legal Order is sought to be preserved or suppressed. Only on a comprehensive view of all these factors can proper conclusions be reached as to the true character of the new Legal Order. [p. 692]F.

(g) **Jurisprudence-**

Kelsen's Theory—Theory of revolutionary legality—Can have no application or relevance where breach of legal continuity admitted or declared to be of a purely temporary nature and for a limited specified purpose—Such phenomenon—One of constitutional deviation rather than of revolution—Application of *Kelsen's* theory to such transient and limited change in legal or constitutional continuity of a country, *held,* inappropriate.—[Theory of law]. [p. 693]G

Per *Waheeduddin Ahmad, J. (agreeing).—*

The principles laid down in *Asma Jillani's case* are not applicable *to* the facts of the present case. In the circumstances of the present case the principles enunciated in the *Reference by His Excellency The Governor-General* P L D 1955 F C 435 will have to be invoked for solving the present constitutional deadlock. [p. 723]BB

Per *Dorab Patel, J. (agreeing).*

The principles laid down by the Federal Court in the *Reference by HIS Excellency The Governor-General* P L D 1955 F C 435 will have to be followed in resolving the impasse created by the constitutional break-down. [p. 740] J J.

Per *Muhammad Akram, J. (agreeing).—*

Legality depends on the jurisdiction in which the matter is considered, quite apart from effectiveness. The effectiveness of the legislative authority is not a condition of the validity either of "laws" or even of itself. It is a factor which in time induces the Courts to accept such authority. [p. *731]GG*

Ours is an ideological State of the Islamic Republic of Pakistan. Its ideology is firmly rooted in the Objectives Resolution with emphasis on Islamic Laws and concept of morality. In our way of life we do not and cannot divorce Morality from law. Therefore the Pure Theory of law is not suited to the genesis of this State. *It* his no place in our body politics and is unacceptable to the judges charged with the administration of justice in this country. [p. 733] HH

Kelsen's General Theory of Law and State, pp. 118-119 ; *State* v. *Dosso* P L D 1958 S C (Pak.) 533; *Miss Asma Jillani* v. *Government of the Punjab and another* P L D 1972 S C 139; *Adams* v. *Adams* (1970) 3 All E R 572 and *Lloyd's* Introduction to Jurisprudence, Third Edn., p. 269 *ref.*

Per *Nasim Hasan Shah, J. (agreeing).*

In the facts and circumstances of our situation the doctrines propounded by *Kelsen* do not appear to be strictly applicable as the change-over which occurred on the 5th July 1977 cannot qualify as a "revolution" in Kelsenian terms. Although the Armed Forces are undoubtedly in effective control of the administration, it is neither their intention nor indeed have they established a new Legal Order in supersession of the existing Legal Order. The Constitution of 1973 remains the Supreme law of the land, subject to the condition that certain parts thereof have been held in abeyance. The President of Pakistan and the superior judiciary continue to function under the Constitution, subject to any limitations placed on their jurisdiction. The change is only in the nature of a constitutional deviation rather than the destruction of one Legal Order and its replacement by another. Even otherwise, the doctrines a *Kelsen* cannot be accepted in their entirety by Courts of law. Whereas for *Kelsen* the efficacy of a revolution creates a new reality of which the pure science of law must take account, for the Courts involved in practical decisions the efficacy of a revolution creates a new legal situation which they must take note of and proceed to decide the matter as raised before them by the contesting parties. In doing so they will have to take into account not only the efficacy of the change, but other values, such as the desirability of maintenance of peace, order, justice or good government, to fill the vacuum in law and to avoid

chaos, presumption in favour of the old regime because of its original legal status or against it because of its record of unconstitutional actions and conduct. In short, the responsibility of the judge is not to the "objective reality" that exists for the academic observer but to the peace, order, justice, morality and good government. In fact, for judges involved in practical decisions acceptance of the changed Legal Order is not so much on account of its efficacy as such, but rather on necessity in the sense of "ID QUOD ALIAS NON EST LICITUM, NECESSITAS LICITUM FACIT" (that which otherwise is not lawful necessity makes lawful). {p. 763]TT

(h)* Proclamation of Martial Law [dated *5-7-1977]—Qaiser Khan, (agreeing)

Justification of—State necessity and welfare of people—Widespread allegations of massive interference with sanctity of ballot by Government officials in favour of candidates of ruling party; national wave of resentment giving birth to country-wide protest agitation; disturbances getting out of control of civil Armed Forces and resulting in heavy loss of life and property; calling out of troops by Federal Government, consequent imposition of Local Martial Law in several important cities; requisitioning of military assistance by local authorities in smaller towns and cities not having desired result; rigging and official interference with elections in favour of ruling party candidates established by judicial decisions in some cases displaying general pattern of official interference; public statements of Election Commissioner concerned ratifying widespread allegations of Opposition regarding official interference with elections and endorsing demand for fresh elections; Prime Minister in circumstances offering himself to Referendum but such offer not having any impact at all and demand for his resignation and for fresh elections continuing unabated plan resultantly dropped; despite Prime Minister's dialogue with Opposition leaders and temporary suspension of movement officials charged with maintenance of law and order continuing to be apprehensive of terrible explosion beyond control of civilian authorities in event of failure of talks; talks between Prime Minister and Opposition leaders on basis of his offer for holding fresh elections dragging on for various reasons and ultimately Opposition party insisting on nine or ten points having yet to be resolved and Prime Minister also saying that his side would similarly forward another ten points if Opposition failed to ratify accord allegedly reached earlier; Punjab Government, during crucial days of deadlock, sanctioning distribution of fire-arms licences on a vast scale to its party members and provocative statements deliberately made by Prime Minister's Special Assistant; normal economic, social and educational activities seriously disrupted as a result of agitation and incalculable damage caused to nation and country—Prime Minister's constitutional and moral authority to rule country standing seriously eroded in consequence and his Government finding it difficult to maintain law and order, to run orderly ordinary administration, to keep open educational institutions, and to insure normal economic activity—Situation deteriorating to such extent that either Prime Minister or Service Chiefs themselves feeling necessity of a declaration of loyalty to Government so as to boost up Prime Minister's authority

to help restore law and order and a return to normal conditions but even such declaration not having any visible impact on momentum of agitation—Constitutional authority of Prime Minister and other Federal Ministers as also of Provincial Governments repudiated "on a large scale throughout country—Representative character of National and Provincial Assemblies not accepted by people at large—Serious political crisis in country leading to break down of constitutional machinery concerning executive and legislative organs of State—Situation arising such for which no solution provided for in Constitution—Armed Forces of country in such eventuality intervening to save country from further chaos and bloodshed, to safeguard integrity and sovereignty of country and to separate warring factions—Step though extra-Constitutional yet obviously dictated by highest considerations of State necessity and welfare of people and for this reason spontaneously welcomed by almost all sections of population —Explanation given by Chief Martial Law Administrator for Army's intervention -- A true reflection of situation—Sincere and unambiguous declaration of Chief Martial Law Administrator, to wit, he took over administration only for a short time to arrange for fresh elections fairly at shortest possible time and intended to hand over government to chosen representatives of people persuading people and Judges of Superior Courts to willingly accept such interim arrangements—New arrangement, dictated by considerations of State necessity and welfare of people; *held,* acquired its effectiveness owing to its moral content and promise of restoration of democratic institutions and justified in circumstances. [Doctrine of necessity]. [pp. 693, 699, 701, 704, 705] H *et seq. I et sea, J, K & L*

P L D 1977 Jour. 164; P L D 1977 Jour. 1; P L D 1977 Jour. 190; P L D 1977 Jour. 198; Statements made by the Chief Election Commissioner on the 17th of March 1977, 23rd of May 1977, and the 5th of June 1977; Minutes of certain Meetings of the Law and Order Committee, headed by *Mr. Yahya Bakhtiar;* Speech made by *Genera! Muhammad Ziaul Hay* on 5th of July 1977 *ref.*

Miss Asma Jillani v. *Government of The Puajab and another* P L D 1972 S C 139 and *State* v. Dosso P L D 1958 S C (Pak.) 533 *distinguished.* Per *Nasim Hasan Shah, J. (agreeing).*

The question whether the conditions obtaining in Pakistan necessitated the imposition of Martial Law has to be answered by reference to the happenings from 7th March, 1977 up to 5th July 1977, which reveal that the constitutional and moral authority of the National Assembly which had come into being as a result of the elections held on 7th March 1977, as well as the Federal and Provincial Governments formed thereafter had been continuously and forcefully repudiated throughout the country over a prolonged period of nearly four months with the result that the national life stood disrupted. A situation had arisen for which the Constitution provided no solution. The atmosphere was

surcharged with the possibility of further violence, confusion and chaos. As the Constitution itself could not measure up to the situation, the doctrine of State Necessity became applicable for where the safety of the State and the welfare of the people are in imminent danger, necessity justifies a departure from the ordinary principles of law. In these circumstances the step taken by the Armed Forces of imposing Martial Law stands validated, on the principle of State Necessity. [p. 762]SS

Per *Qaiser Khan, J.*

A Constitution or the basic norm could be annulled, abrogated, destroyed or suspended in two ways, one by a Constitutional act, that is to say, by the method provided for in the Constitution for changing or replacing it and the other by an un-Constitutional act, say revolution or *coup de'etat,* which is known as extra-Constitutional act. In the instant case the Constitution of 1973 was put in abeyance, that is to say, suppressed for the time being by the Chief of the Army Staff by an extra-Constitutional act of issuing a Proclamation declaring himself as the Chief Martial Law Administrator. For the running of the Country the Chief Martial Law Administrator who had assumed all powers under the Proclamation issued the Laws (Continuance in Force) Order the same day.

Now the validity or invalidity of this action could not be tested on the basis of the Constitution of 1973 as it was no longer there having been suppressed and there was no other superior norm on the basis of which it could be tested. Such an action, according to some jurists, is called meta-legal. For judging such a situation there are two authorities of the Supreme Court in the field, that *of Dosso P* L D 1958 S C (Pak.) 180 and *Asma Jillani,* P L D 1972 S C 139. *Dosso's case* by which the new order could be legitimized cannot be applied as it has been overruled by the *Asma Jillani's case. Asma Jillani's case* does not apply in the present case as the facts and circumstances of this take-over are quite different from the facts and circumstances of the then take-over. In the present case under the circumstances prevailing in the Country of which the Court can take judicial notice the present takeover was quite justified for saving the State from total destruction and the Chief of the Army Staff under the circumstances could not be dubbed as a usurper. [p. 740]KK

***(i) Laws* (Continuance in Force) Order, 1977 [C . M. L. A's Order 1 of 1977]-**

Doctrine of necessity—Contention that question of application of doctrine of necessity does not arise in present case since with suppression or destruction of old Order even such doctrine or concept disappeared and could no longer be regarded as part of judicial system obtaining in Pakistan—*Held:* Question of considering application of doctrine of necessity did arise in case in hand since Court not persuaded of military intervention providing its own legality simply for reason of its being accepted by people and becoming

effective in such sense—Old Constitution even if assumed to be completely destroyed or suppressed judicial concepts and notions of morality and justice, nevertheless not destroyed simply for reason of new Legal Order not mentioning anything about them—Laws (Continuance in Force) Order, 1977 on other hand clearly mentions governance of country, as nearly as may be, in accordance with. Constitution (1973) and to continue all laws for time being in force, indicating thereby an intention not to destroy legal continuity of country as distinguished strictly from constitutional continuity.—[Doctrine of necessity]. [p. 706]M

(j) Jurispurdence-

Usurpation of power—Power assumed in extra-Constitutional manner by authority not mentioned in Constitution—Does not always amount to usurpation of power—Question to be determined in light of circumstances of particular case before Court.—[Usurpation of power]. *[p. 7u8] N*

(k) Jurisprudence

Assumption of power once held valid, legality of actions taken by such authority to be judged in light of principles pertaining to law of necessity Concept of condonation as expostulated in Asma *Jillani's case* P L D 1972 S C 139.—[Doctrine of necessity].

The concept of condonation, as expostulated in *Asma Jillani's* case, has relevance not only to the acts of a usurper, but also to a situation which arises when power has fallen from the hands of the usurper, and the Court is confronted with protecting the rights and obligations which may have accrued under the acts of the usurper, during the time he was in power. However, in the case of an authority, whose extra-Constitutional assumption of power is held valid by the Court on the doctrine of necessity, particularly when the authority concerned is still wielding State power, the concept of condonation will only have a negative effect and would not offer any solution for the continued administration of the country in accordance with the requirements of State necessity and welfare of the people. It follows, therefore, that once the assumption of power is held to be valid, then the legality of the actions taken by such an authority would have to be judged in the light of the principles pertaining to the law of necessity. [p. 708]O

(l) Islamic jurisprudence-

Doctrine of necessity—Maxim: *Salis populi supremo lex* (Necessity makes prohibited things permissible)— Doctrine accepted not only in Islamic Jurisprudence but in other systems as well.-- [Doctrine of necessity—Maxim]. [pp. 708, 710, 711, *7l2]P, Q, R & S*

Sura Al-Baqar and Sura Al-Nahal; Islamic Jurisprudence and Rule of Necessity and Need by *Dr. Muslehuddin,* 1975 Edition, pp. 60-63 ; Islamic

Surveys by *Coulson, p.* 144; Muslim Conduct of State by *Hamidullah, p.* 33; Majelle, Arts. 17, 21, 22, 26; *Rex v. Stretton* (1779) Vol. 21; *Howeh's* State Trials; *Attorney General of Duchy of Lancaster v. Duke of Devenshire* (1884) 14 Q B D 273; *The Attorney-General of Republic v. Mustafa Ibrahim* 1964 C L R 195; *E. 0. Lakanmi and another v. Attorney General, West Nigeria* P L D 1955 F C 435; *Usif Patel v.* Crown P L D 1955 F C 387 and The Search for a Grundnorm in Nigeria—*The Lacknmi's case by Ablola Oji ref.*

Per *Muhammad Afzal Cheema, J.* (*agreeing)*

Islam being the ideological foundation of the State of Pakistan any man-made legal theory divorced from morality and coming into conflict with the Divine Law of Islam would be wholly irrelevant for our purposes to the extent of its repugnancy to the latter. Unlike a pure theory of law, Islamic principles are subjectively centered round morality and are aimed at the establishment of an orderly and peaceful moral society by taking an equally pragmatic view in the matter of their application and placing the security, safety and welfare of the people above everything else. The doctrine of necessity or is an inevitable outcome of this realistic approach and has been recognized by Islam both in the individual as well as the collective field. *[p. 724]CC*

The *raison d'etre* of the doctrine of individual necessity applies with full force to the doctrine of State necessity which is nearly an extension of the former and is invoked in graver situations of National importance and comprehension. *[p. 726]DD*

It is thus abundantly clear that submission to the authority of the ruler and obedience to his commands does not extend to illegal and un-Islamic directives or orders. [p. *727]EE*

The Court could not fail to take judicial notice of the crisis which developed by way of protest against the alleged rigging of the General Elections when the entire nation rose against the previous Government, There was complete break-down of law and order, several precious lives were lost and the administration of the major cities had to be handed over by him to the Armed Forces which too were unable to cope with the situation and restore normalcy. The allegations of huge purchases of arms and their large-scale distribution amongst the members of the then ruling party in the country with a view to prepare them for civil war do not appear to have been specifically denied in the rejoinders filed by the petitioner or by the then Prime Minister himself. It would not, therefore, be too much to hold that the country was on the verge of a conflagration. The Constitution did not contemplate such situation nor did it offer a solution of the crisis. It was in this background that the Chief of the Army Staff moved in for a temporary period and with the limited object of restoring normalcy and holding free and fair elections as repeatedly declared by him. The

doctrine of necessity is, therefore, attracted with full force in these circumstances. [p. *727]FF*

Per *Muhammad Akram, J. (agreeing)*

The principle of necessity, rendering lawful what would otherwise be unlawful, is not unknown to English Law ; there is a defence of necessity (albeit of uncertain scope) in criminal law, and in constitutional law the application of martial law is but an extended application of this concept. [p. 739]l

S. A. De Smith on Constitutional and Administrative Law, Chap. XXII ; *D. F. Marais* v. *The General Officer Commanding the Lines of Communication and the Attorney-General of the Colony* 1902 A C 109; *Frederick Pollock's* Article in Law Quarterly Review, pp. 152-158 ; The National Security, Interest and Civil Liberties, (1971-72 Edn.) 85 Har. Law Review 1133/1326 ; *Ex parte Milligan* (1866) 71 U S 2 ; *Moyer* v. *Peabody* (1909) 212 U S 78 ; *Sterling v. Constantin* (1932) 287 U S 378 ; *Korematsu* v. *United States* (1944) 323 U S 214 (223-24) and *Hirabayashi* v. *United States* (1943) 320 U S 81 (95) *ref.*

Per *Nasim Hasan Shah, J. (agreeing).*

The doctrine of "necessity", namely rendering lawful that which otherwise is unlawful, is well-established in jurisprudence ID QUOD ALIAS NON EST LICITUM, NECESSITAS LICITUM FACIT",—(that which otherwise is not lawful necessity makes lawful). In constitutional law the application of Martial Law is but an extended application of this concept of State necessity. The doctrine of necessity was applied by the Federal Court of Pakistan only recently as a legal justification for ostensibly unconstitutional actions to fill a vacuum arising out of a Court order. [p. 754]NN

Situations are conceivable where the normal law of the land may have to give way before necessity, particularly in a situation where the welfare of the State and its subjects are at stake, and in proper case it would be the Court's duty to recognize such a situation and to act upon the principle *"salus populi suprema lex"* despite the express provisions of the Constitution. [p. *755]OO*

The doctrine of necessity is also recognized in Islamic Law. Even in the Holy Qur'an the application of this doctrine is made permissible. *[p. 762]PP*

However, before this doctrine can be invoked the following conditions must pre-exist: (*a)* that which is forbidden by Allah can be taken only where one is driven to it by necessity; (b) that there is neither craving nor the intention to transgress the limits set by Him; and (c) that only that bare minimum is taken as is necessary to save life. Thus the principle of necessity as also the conditions in which it can be resorted to are clearly set forth in Islam. [p. *762]QQ*

Necessity can be accepted as a justification for an extra-legal act, in certain conditions. This position is also recognised in Islam. In the precedent cases, it has also been observed that "Martial Law is nothing more nor less than the law of self-defence or the law of necessity and that in constitutional law the application of Martial Law is but an extended application of the concept of State necessity." Thus, in certain exceptional circumstances it is possible, as a measure of State necessity, to impose even martial law. [p. *7621RR*

Reference by H. E. The Governor-General to the Federal Court P L D *1955* F C *435; The Attorney-General of the Republic v. Mustafa Ibrahim and others (1964) 3* Cyprus L R *195 ; Madzinibamuto v. Lardner-Burke (1968) 3* All E R *561 ; R. v. Bakker & Naude* (1900) *17 S C 340 ; White & Tucker v. Rudolph 1879* Kotze *115; Lakanmi & Dula v. Attorney-General (West), Nigeria and Uganda v. Commissioner of Prisons (1966)* E A L R 514 *ref.*

(m)* Proclamation of Martial Law [dated *5-7-19771-

Doctrine of necessity—Act otherwise illegal becomes legal if done *bona fide* under stress of necessity referable to intention to preserve Constitution, State, or Society, and to prevent it from dissolution Extra-Constitutional step taken by Chief Martial Law Administrator to overthrow Federal and Provincial Governments and to dissolve Legislatures, *held,* stands validated in accordance with doctrine of necessity, action having been taken on high considerations of State necessity and welfare of people.—[Dotrine of necessity]. [p. *712]T*

Reference by H. E. Governor-General to the Federal Court P L D 1955 F C 435 and *Miss Asma Jillani v. The Government of the Punjab P* L D 1972 S C 139 *ref.*

(n)* Proclamation of Martial Law [dated *5-7-19771-

Read with Laws (Continuance in Force) Order, *1977* [C. M. L. A.'s 1 of *19771*—True legal position emerging out of law and facts of case, explained.

Held: (i) 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; *(ii)* That the President of Pakistan and the Superior Courts continue to function under the Constitution. The mere fact that the Judges of the superior Courts have taken a new oath after the proclamation of Martial Law, does not in any manner derogate from he position, as the Courts had been originally established under the 1973 Constitution, and have continued in their functions in spite of the Proclamation of Martial Law; *(iii)* That the Chief Martial Law Administrator, having validly assumed power by means of an extra-Constitutional step, in the interest of the State necessity and for the welfare of the people, is entitled to perform all such acts and promulgate

all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity, namely :—*(a)* All acts *or* legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it **;** *(b)* All acts which tend to advance or promote the good of the people ; *(c)* All acts required to be done for the ordinary orderly running of the State ; and *(d)* All such measures as would establish or lead to the establishment of the declared objectives of the Proclamation of Martial Law, namely, restoration of law and order, and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution ; (iv) That these acts, or any of them, may be performed or carried out by means of Presidential Orders, Ordinances, Martial Law Regulations, or Orders, as the occasion may require; and *(v)* That the superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law Authorities, if challenged, in the light of the principles underlying the law of necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance. [p.715]U

***(o)* Proclamation of Martial Law [dated 5-7-1977]-**

Read with Laws (Continuance in Force) Order, 1977 [C.M.L.A.'s 1 of 1977] and Constitution of Pakistan (1973), Arts. 199 & 184(3)—Power of judicial review of superior Courts—Nell, not taken away by Proclamation of Martial Law (dated 5-7-1977).—[Judicial review].

Certain writers and contemporary jurists support the proposition that the Courts established under the pre-existing Legal Order continue to have the power and jurisdiction to adjudicate upon the validity and effectiveness of the new Legal Order. As the new Legal Order is only for a temporary period, and for a specified and limited purpose, and does not seek to destroy the old Legal Order but merely to hold certain parts thereof in abeyance or to subject it to certain limitations on the ground of State necessity or on the principle of *salus populi supremo lox,* the superior Courts continue to remain the judges of the validity of the actions of the new regime in the if ht of the doctrine of necessity, for the new regime than represents not a new Legal Order, but only a phase of constitutional deviation dictated by necessity.

There is yet another and a stronger reason for holding that the power of judicial review continues. The 1973 Constitution provides for a clear tracheotomy of powers between the executive, legislative aid judicial organs of the State. However, owing to reasons of necessity, the executive and the legislative power now stands combined in one authority, for the reason that these two

organs of the State had lost their constitutional and moral authority in the circumstances arising since the 7th of March 1977, but no such considerations arose in regard to the judicial organ of the State. Accordingly, on no principle of necessity could powers of judicial review vested in the superior Courts under the 1973 Constitution, be taken away.

Next, even if for any reason the principle or power of judicial review embodied in the relevant provisions of the 1973 Constitution be held not to be available under the new dispensation, the fact remains that the ideology of Pakistan embodying the doctrine that sovereignty belongs to Allah and is to be exercised on His behalf as a sacred trust by the chosen representatives of the people, strongly militates against placing the ruler for the time being above the law, and not accountable to any one in the realm. Muslim rulers have always regarded themselves as being accountable to the Courts of the land for all their actions and have never claimed exemption even from personal appearance in the Courts. The Courts of justice are an embodiment and a symbol of the conscience of the Millat (Muslim community), and provide an effective safeguard for the rights of the subjects. On this principle as well, the power of judicial review for judging the validity of the actions of the Martial Law Authorities must continue to remain in the superior Courts. [p. 719] V

A perusal of the provisions of the Laws (Continuance in Force) Order also shows that they are primarily designed to give effect to the purposes of the proclamation. As however this Order is an offspring of necessity, the superior Courts continue to have the power of judicial review, notwithstanding anything to the contrary contained in this Order, to test the validity of its provisions and any action taken there under, in the light of the principles regulating the application of the law and doctrine of necessity. [p. 719] Y

(p) Laws (Continuance in Force) Order, 1977 [C. M. L. A.'s 1 of 19771—

Read with Constitution of Pakistan (1973), Arts. 184(3) & 199—Judicial review, power of—Laws of land—Kept alive under C.M.L.A.'s Order 1 of 1977—Full provision made for their adjudication by ordinary Courts—Matters failing within authority of civil Courts to decide—*Held,* must continue to fall outside purview of Martial Law Authorities—Remedy to citizens against any such encroachment—Can be had by way of judicial review in superior Courts.—[Judicial review] [p. 717] W

(q) Proclamation of Martial Law [dated 5-7-1977]-

And Laws (Continuance in Force) Order, 1977—Not supra-Constitutional instruments but of extra-Constitutional nature so as to conform to description of action by virtue of which Chief Martial Law Administrator assumed administration of country. [p. 717]X

(r) Laws (Continuance in Force) Order, 1977 (C. M. L. A.'s 1 of 1977)-

Art. 2(3) read with Constitution of Pakistan (1973), Art. 232 (1), Fundamental Rights, suspension of—Chief Martial Law Administrator, *held,* justified in suspending right to enforce Fundamental Rights and Art. 2 (3) of C.M.L.A.'s Order 1 of 1977 not open to challenge. —[Fundamental rights].

The conditions culminating in the Proclamation of Martial Law were so grave that the very existence of the country was threatened, that chaos and bloodshed was apprehended and there was complete erosion of the constitutional authority of the Federal Government, leave alone that of the various Provincial Governments. The situation had indeed deteriorated to such an extent that it justified an extra-Constitutional step, resulting in the suspension of certain parts of the Constitution itself by the Armed Forces. Such being the case, the situation was obviously at least of the kind contemplated by clause (1) of Article 232 of the Constitution. In the circumstances, the Chief Martial Law Administrator was justified in providing in clause (3) of Article 2 of the Laws (Continuance in Force) Order that the right to enforce Fundamental Rights shall be suspended. It was clearly an Order which could have been made under the 1973 Constitution. No exception can, therefore, be taken to the validity of this provision. [p. 721]Z

Per *Ghulam Safdar Shah, J. (agreeing).*

In view of the suspension of Fundamental Rights by subsection (3) of section 2 of the Laws (Continuance in Force) Order, 1977, the Supreme Court has no jurisdiction to grant to petitioners any relief. *[p. 748JMM*

(s) Proclamation of Martial Law [dated 5-7-1977]-

Implementation of solemn pledge given by Chief Martial Law Administrator to hold free and fair elections and restore democratic rule—Court observations.

While the Court does not consider it appropriate to issue any directions as to a definite time-table for the holding of elections, the Court would like to state in clear terms that it has found it possible to validate the extra-Constitutional action of the Chief Martial Law Administrator not only for the reason that he stepped in to save the country at a time of grave national crisis and constitutional break-down, but also because of the solemn pledge given by him that the period of constitutional deviation shall be of as short a duration as possible, and that during this period all his energies shall be directed towards creating condition, conducive to the holding of free and fair elections, leading to the restoration of democratic rule in accordance with the dictates of the Constitution. The Court, therefore, expects the Chief Martial Law Administrator to redeem th[i]s pledge, which must be construed in the

nature of a mandate from the people of Pakistan, who have, by and large, willingly accepted his administration as the interim Government of Pakistan. *[p. 723]AA*

Per Qaiser Khan, J.

(t) Proclamation of Martial Law [dated 5-7-1977]-

Read with Laws (Continuance in Force) Order, 1977 (C. M. L. A.'s 1 of 1977), Arts. 2, Proviso & 4 and Constitution of Pakistan (1973), Art. 184(3)—Jurisdiction—Maintainability of petition under Art. 184(3), Constitution of Pakistan (1973)—C. M. L. A.'s Order 1 of 1977—New Legal Order for time being—Supreme Court deriving its jurisdiction from new Legal Order, orders of detention, *held,* cannot be challenged and petition liable to dismissal.—[Jurisdiction].

Since the Courts including the Supreme Court were revived by the Laws (Continuance in Force) Order and continued to work under its authority, they therefore derived their jurisdiction aLo from the said Order. For example, if after the issuance of the Proclamation the Chief Martial Law Administrator had not issued the Laws (Continuance in Force' Order and had started ruling by decrees through his officers then where would have been this Court and what jurisdiction it would have had.

Otherwise too allegiance is always due to the *de facto* Government for it is this Government which can provide protection to the citizens and allegiance to the State imposes as one of its most important duty obedience to the laws of the sovereign power for the time being within the State. The municipal Courts have always to enforce the laws of the *de facto* Government and it is such a Government which can enact law, can appoint Judges and can enforce the execution of law. *[p. 742]LL*

So long as there was a provision in the new Legal Order for dealing with a case or situation the doctrine of necessity could not be resorted to. Any action of the Martial Law authorities which is taken in consequence of any Martial Law Regulation or Martial Law Order could not, therefore, be challenged or questioned on the doctrine of necessity.

All the actions of the *de facto* Government can be tested only when the said Government comes to an end and the old Legal Order is revived. In that case the action of the Martial Law authorities would be tested on the basis of the old Legal Order. [p. *746]LL(A)*

The Courts cannot give any direction that the Chief Martial Law Administrator is to do such and such thing or not to do such and such thing and within such and such time simply because he had made certain statements and

pro rises. This is outside the scope of the jurisdiction of the Court. The upshot of the above discussion is :—(l) That the Laws (Continuance in Force) Order which is enctual for the time being is the new Legal Order for the time being. (2) That the new Legal Order has suppressed the old Legal Order (Constitution) for the time being. (3) That the Supreme Court derives its jurisdiction from the new Legal Order and that the orders of detentions in question cannot be challenged in the Supreme Court in view of the proviso to Article 2 and Article 4 of the Order. [p. 747]LL(B)

State v. *Zia-ur-Rehman* P L D 1973 S C 49; Stanford Law Review, Vol. 17 Professor Stone and the Pure Theory of Law, p. 1139; *Madzimbamuto Lardner-Burke* (1968) 3 All E R 561; *Salmond* on Jurisprudence, 11th Edn., p. 25 and *Muhammad Umar Khan* v. *Crown* P L D 1953 Lai- . 528 *ref.*

Mir Hassan v. *State* P L D 1969 Lab. 786 and *Dosso* v. *State* P L D 1958 S C (Pak.) 531 *distinguished.*

Yahya Bakhtiar, Senior Advocate and *Ghulam Ali Memon,* Advocate-on-Record for Petitioner.

Nemo for Respondent No. 1.

A. K. Brohi, Senior Advocate, *Riaz Ahmad,* Assistant Advocate-General Punjab and *Fazal-i-Hussain,* Advocate-on-Record for Respondent No. 2.

Sharifuddin Pirzada, Attorney-General for Pakistan, *Dilawar Mahmood,* Deputy Attorney-General and *M. Afzal Lone,* Advocate as Law Officers of the Court.

Dates of hearing : 20th, 25th, 26th September; 1st, 10th to 12th, 18th to 20th, 22nd to 26th, 29th to 31st October and 1st November 1977.

JUDGMENT

S. ANWARUL HAQ, Chief Justice (CJ)—This petition by Begum Nusrat Bhutto, under Article 184 (3) of the 1973 Constitution of the Islamic Republic of Pakistan, seeks to challenge the detention of Mr. Zulfikar Ali Bhutto, former Prime Minister of Pakistan, and ten other leaders of the Pakistan People's Party under Martial Law Order No. 12 of 1977. It raises several difficult questions of far-reaching constitutional importance. Besides addressing elaborate arguments as to the validity and legal effect of the imposition of Martial Law by the Chief of the Army Staff, the parties, as well as *two* of the detenus, namely, Mr. Zulfikar Ali Bhutto and Mr. Abdul Hafeez Pirzada, have filed lengthy written statements on the factual aspects of the case, setting out their respective versions of the events culminating in the Proclamation of Martial Law on the 5th of July, 1977 these two detenus have also personally appeared before the Court and made detailed oral submissions in support of their position. A third detenu, *viz* Mr. Mumtaz Ali Bhutto, has also filed a written statement. The other eight detenus have neither filed written statements nor asked to be heard personally.

The petition states that Mr. Zulfikar 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 has 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.

Relying mainly on the judgment of this Court in *Miss Asma Jiilani vs. The Government of the Punjab and another (1)* Mr. Yahya Bakhtiar, learned counsel for the petitioner, contends that the Chief of Staff of the Pakistan Army had no authority under the 1973 Constitution to impose Martial Law on the country; that this intervention by the respondent amounts to an act of treason in terms of Article 6 of the Constitution; that as a consequence the Proclamation of Martial Law dated the 5th of July 1977, the Laws (Continuance in Force) Order, 1977, as well as Martial Law Order No. 12, under which the detenus have been arrested and detained, are all without lawful authority; that even if all or any of these acts or actions may be justified on the doctrine of necessity, yet arrest and

detention of the top leadership of the Pakistan People's Party is highly discriminatory and *mala fide,* intended solely for the purpose of keeping the Pakistan People's Party out of the forthcoming elections; and that the respondent cannot place himself beyond the reach of the Courts by relying on an order promulgated by himself, as the 1973 Constitution continues to be the supreme legal instrument of the country, especially as the respondent himself has declared that this Constitution was not being abrogated but only certain parts thereof were being held in abeyance for the time being so as to create a peaceful atmosphere for the holding of elections and restoration of democratic institutions.

Mr. Yahya Bakhtiar submits that, in the circumstances, the orders of detention have resulted in a flagrant violation of the detenus Fundamental Rights, as contained in Chapter I, Part II of the Constitution, particularly Articles 9, 10, 17 and 25 thereof, which relate to the security of person, safeguards as to arrest and detention, freedom of association and equality of all citizens before law. He further submits that as the detenus are being held in various prisons all over Pakistan, therefore, it is not possible for them to move the various provincial High Courts for relief. He contends that this is eminently a case requiring redress by the Supreme Court under clause (3) of Article 184 of the Constitution, which specifically empowers this. Court to make an order for the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II, if the Court considers that a question of public importance with reference thereto is involved.

Mr. A. K. Brohi, learned counsel appearing for the Federation of Pakistan, which was also made a party at his request, has taken two preliminary objections as to the maintainability of this petition:

(a) That it is directed against the Chief of the Army Staff, whereas the orders of detention had been passed by the Chief Martial Law Administrator; and

(b) That the petitioner is not an aggrieved person in terms of Article 184 (3) of the Constitution read with Article 199 thereof, as she does not allege any violation of her own Fundamental Rights, but only those of the detenus.

He also maintains that this Court has no jurisdiction to grant any relief in this matter owing to the prohibition contained in Articles 4 and 5 of the Laws (Continuance in Force) Order, 1977, which clearly contemplate that no Court, including the High Court and the Supreme Court, can question the validity of any Martial Law Order or Regulation, or any order made there under by a Martial Law Authority. He submits that under clause (3) of Article 2 of the aforesaid Laws (Continuance in Force) Order the right to enforce Fundamental

Rights stands suspended, and for this reason as well the petition is not maintainable.

As to the legal character of the new regime, and the validity of the Laws (Continuance in Force) Order, 1977, and the various Martial Law Regulations and Orders issued by the Chief Martial Law Administrator and the President under its authority, Mr. Brohi submits that up to the 5th of July 1977, Pakistan was being governed under the 1973 Constitution, but on that day a new Legal Order came into force by virtue of the Proclamation issued by the Chief Martial Law Administrator, and this Legal Order has displaced—albeit temporarily—the old Legal Order. The validity or legality of any action which takes place after the 5th of July 1977 can only be tested against the guidelines provided by the new Legal Order. According to him, the grundnorm of the old Legal Order, as provided by the 1973 Constitution, has given way to a new grundnorm provided by the Proclamation and the Laws (Continuance in Force) Order, and to that extent the jurisdiction of the superior Courts has been altered. He submits that as the transition from the old Legal Order to the new Legal Order has not been brought about by any means recognised or contemplated by the 1973 Constitution, therefore, it constitutes a meta-legal or extra-Constitutional fact, attracting the doctrine of "revolutionary legality". In this context, according to Mr. Brohi, whenever a Constitution and the national Legal Order under it are disrupted by an abrupt political change not within the contemplation of the Constitution, such a change is called a revolution, which term also includes *coupe d'etate.* In such a situation the Court has to determine certain facts which may be termed "constitutional facts", which relate to the existence of the Legal Order within the framework of which--the Court itself exists and functions. If it finds that all the institutions of State power have, as a matter of fact, accepted the existence of the new Legal Order, which has thus become effective, then all questions of legality or illegality are to be determined within the framework of the new Legal Order. Mr. Brohi submits that, on this view of the matter, a viable alternative can be found between the two extreme positions adopted by this Court in *Dosso's case (I)* and *Asma Jillani's case*—one holding that every revolution, once successful is legal, and the other holding that a revolution as such is illegal. According to him, the Supreme Court in *Dosso's case* could have decided the controversy by simply holding that, as a matter of constitutional fact, a new Legal Order had come into being in the country, and the question in issue in that case could only he decided by reference to this new Legal Order which had attained effectualness. He contends that the view taken by the Supreme Court in *Asnia Jillaiti's case* leaves several questions unanswered, by rejecting Kelscn's pure theory of law, because it does not provide any guidelines as to what law the Courts ought to apply in case a revolution has become effective by suppressing or destroying the old Legal Order. As a result, Mr. Brohi submits that this Court should, therefore, lean in favour of holding that a new Legal Order has effectively emerged in

Pakistan by means of a meta-legal or extra-Constitutional change, and for the time being this is the legal framework according to which all questions coining before the Court must be decided. In his view it is not necessary for the Court, nor is it a concomitant of judicial power to either side with the revolution or to act as a counter revolutionary, by giving its seal of approval to a military intervention or to condemn it by describing it as illegal. Judicial restraint requires that the Court should only take judicial notice of events which have transpired in the country, and decide as a constitutional fact, whether the new Legal Order has become effective or not.

As to the necessity for the imposition of Martial Law on the 5th of July 1977, Mr. Brohi has stated that the events leading thereto fall into two phases:

(i) The first phase relates to the unconstitutional and illegal governance of this country by the detenus and their associates and terminates on the eve of the imposition of Martial Law; and
(ii) The second phase relates to the preparations which were being made by detenus and their associates for the fomenting of civil war within the country and their intention to frustrate and prevent the holding of free and fair elections and thereby consolidate their illegal tenure of office.

He submits that the Court may take judicial notice of the picture emerging from the mosaic of these events, which are cited merely to illustrate the overall pattern of events, and not to embark upon a detailed factual inquiry which would be outside the scope of these proceedings. According to the learned counsel, the specific illegalities committed by or at the instance of the former Government will form the subject-matter of independent legal proceedings in which the persons concerned will be afforded a reasonable opportunity for their defence in accordance with law.

Mr. Brohi goes on to state that massive rigging took place during the elections held on the 7th of March 1977 in accordance with the directions issued at the highest Government level, and that the then Chief Election Commissioner, in an interview given to the daily *Millar,* Karachi, pointedly commented on the widespread irregularities committed in relation to these elections, and recorded his opinion that results in more than 50% of the seats were affected thereby. He had further expressed the view that appropriate course would be to hold fresh elections. Mr. Broth contends that the evidence now available leads to the inescapable conclusion that there was a master-plan for the rigging of the elections which had been conceived, directed and implemented by the then Prime Minister, Mr. Z. A. Bhutto. The learned counsel submits that as a result of this massive rigging of the elections in violation of the mandate of the Constitution for holding free and fair elections, Mr. Bhutto's Government lost whatever constitutional validity it had earlier possessed, and there were

widespread disturbances throughout the country, amounting to a repudiation of Mr. Bhutto's authority to rule the country. Mr. Bhutto prolonged the dialogue between himself and the leaders of the Pakistan National Alliance in a *mala fide* manner, so that the nation reached a critical juncture and the spectre of civil war loomed ahead. It became clear beyond doubt that no possibility of a free and fair election being held existed as long as the levers of power remained in Mr. Bhutto's hands. He asserts that there was a general recognition of this fact which also led to widespread public demands that the Army should accept responsibility for the holding of elections. According to the learned counsel, in the circumstances, it became imperative for the Army to act, and the imposition of Martial Law on the 5th of July 1977 was greeted with a sigh of relief throughout the country. He states that in the three mouths since the imposition of Martial Law peace and quiet has been restored; the national economy which had reached the stage of collapse is slowly being brought back to normalcy; Government institutions which were on the verge of disintegration are being restored to health; and the country's foreign policy is being conducted in the national interest and not for the aggrandizement of Mr. Bhutto or the projection of his personal image. Mr. Brohi adds that the Chief Martial Law Administrator has already declared his intention to hold elections as soon as possible, and the postponement of the October elections has been ordered in response to the public demand for enforcing accountability in relation to the top leadership of the Pakistan People's Party. In this view of the learned counsel, it can thus be seen that Martial Law was imposed not in order to displace a constitutional authority, but in order to provide a bridge to enable the country to return to the path of constitutional rule.

Mr. Sharifuddin Pirzada, the learned Attorney-General, appearing as the Law Officer of the Court, has supported Mr. Brohi's submission that the change which took place in Pakistan on the 5th of July 1977 did not amount to usurpation of State power by the Chief of the Army Staff, but was in fact intended to oust the usurper who had illegally assumed power as a result of massive rigging of the elections of the 7th of March 1977. It was also intended to displace the illegally constituted legislative assemblies both at the Centre and in the Provinces, as majority of the members had succeeded in the elections by corrupt and criminal practices. Mr. Pirzada accordingly contends that the present situation is not governed by the dicta of this Court in the two well-known cases of *Dosso* and *Asma Jillani* for the reason that the circumstances here are radically different, in that in those cases the change brought about by the military intervention was of a permanent nature, whereas the avowed purpose of the present Chief Martial Law Administrator is to remain in power only for a limited and temporary period so as to hold free and fair elections for the restoration of democratic institutions.

Mr. Sharifuddin Pirzada next submits that although he would generally support Mr. Brohi's submissions as to the legal character of an effective revolution,

yet he does not wish to adopt a position contrary to the one he took up while appearing as *amicus curiae* in *Asma Jillani's case,* regarding the validity and applicability of Kelsen's pure theory of law relating to the meta-legal character of the change and the birth of a new grundnorm. He submits that there are several renowned jurists who do not fully subscribe to Kelsen's views and consider that effectualness alone, to the exclusion of all considerations of morality and justice cannot be made a condition of the validity of the new Legal Order. The learned counsel, however, submits that the circumstances culminating in the imposition of Martial Law on the 5th of July 1977 fully attract the doctrine of State necessity and of *salus populi est suprema lex,* with the result that the action taken by the Chief Martial Law Administrator must be regarded as valid, and the Laws (Continuance in Force) Order, 1977, must be treated as being a supra-constitutional instrument, now regulating the governance of the country. The learned Attorney-General contends that the doctrine of necessity is not only a part of the legal systems of several European countries, including Britain, but is also recognised by the Holy Qur'an. He contends that consequently all actions taken by the Chief Martial Law Administrator to meet the exigencies of the situation and to prepare the country for future elections with a view to the restoration of democratic institutions must be accepted by the Courts as valid, and there can be no question of condonation, which concept can apply only in the case of the acts of a usurper. On this view of the matter, Mr. Sharifuddin Pirzada submits that the Court cannot grant any relief to the detenus, under Article 184 (3) of the Constitution, as the Fundamental Rights stand suspended by virtue of clause (3) of Article 2 of the Laws (Continuance in Force) Order, 1977.

Mr. Brohi as well as Mr. Sharifuddin Pirzada were also asked to address the Court on the possible effect and implications of the new oath of office administered to the Judges of the Supreme Court and the High Courts after the imposition of Martial Law. They both stated that, in their 'View, the new oath has not in any manner restricted the independence of the superior judiciary, nor affected their obligation to perform their judicial functions according to law; it only indicates that the superior judiciary, like the rest of the country, has accepted the fact, which is even otherwise also evident, that on the 5th of July 1977, a radical transformation took place in the pre-existing Legal Order. Both the learned counsel are agreed, and Mr. Yahya Bakhtiar, learned counsel for the petitioner, joins them, that the taking of the fresh oath by the Judges of this Court does not in any way preclude them from examining the question of the validity of the new Legal Order and decide the same in accordance with their conscience and the law.

I shall first take up the preliminary objections raised by Mr. A. K. Brohi, and supported by Mr. Sharifuddin Pirzada, regarding the maintainability of the present petition.

The first objection is that the petition is directed against the Chief of the Army Staff whereas the orders of detention had been passed by the Chief Martial Law Administrator. It is clear that the objection is only in the nature of a technicality, as the Chief of the Army Staff is also the Chief Martial Law Administrator, and the objection could, therefore, be easily rectified by adding the words Chief Martial Law Administrator to the description of the respondent as stated in the petition.

The second objection is that the petitioner, namely Begum Nusrat Bhutto is not an aggrieved person in terms of Article 184 (3) of the Constitution read with Article 199 thereof, as she does not allege any violation of her own Fundamental Rights, but only those of the detenus. Clause (3) of Article 184 of the Constitution gives a concurrent power to the Supreme Court to make an order for the enforcement of Fundamental Rights in the same terms as could be made by a High Court under the provisions of Article 199. Clause (i) (c) of Article 199 does indeed contemplate that an application for the enforcement of Fundamental Rights has to be made by an aggrieved person. Now, it is true that in the case before us the petitioner is not alleging any contravention of her own Fundamental Rights, but she has moved the present petition in two capacities, namely, as wife of one of the detenus and as Acting Chairman of the Pakistan People's Party, to which all the detenus belong. In the circumstances, it is difficult to agree with Mr. Brohi that Begum Nusrat Bhutto is not as aggrieved person within the meaning of Article 199. In more or loss similar circumstances in *Manzoor Elahi v. State (1)* this Court entertained a petition under Article 184 (3) of the Constitution although it was not moved by the detenu himself but by his brother. I consider, therefore, that both the preliminary objections raised as to the maintainability of the petition have no merit.

The main question which arises for determination in this case is regarding the legal character of the new regime which has come into existence in Pakistan as a result of the Proclamation of Martial Law on the 5th of July 1977.

In the comparatively short period of thirty years since attaining Independence Pakistan has passed through six periods of Martial Law:-

(i) Martial Law imposed under tote orders of the Federal Government in 1953 in Lahore in order to suppress anti-Ahmedia agitation and the disturbances arising there from;
(ii) The 1958 Martial Law imposed by President Iskander Mirza and Field Marshal Muhammad Ayub Khan;
(iii) The 1969 Martial Law imposed by General Agha Muhammad Yahya Khan to depose Field Marshal Muhammad Ayub Khan;
(iv) Continuation of the 1969 Martial Law by Mr. Z. A. Bhutto on assuming power on the 20th of December 1971 and becoming the first civilian Chief

Martial Law Administrator in our history;

(v) Local Martial Law imposed in April 1977 in several cities of Pakistan by Mr. Bhutto's Federal Government under Article 245 of the 1973 Constitution; and

(vi) Martial Law imposed on the 5th of July 1977 by the Chief of the Army Staff, General Muhammad Ziaul Haq.

As many of the actions taken by the Martial Law Authorities during the first five periods were challenged before the Courts, the question of the legality and the extent of the powers enjoyed by these Authorities have been repeatedly examined by the Court in this country. One may in this behalf refer to *Muhammad Umar Khan v. Crown (2), Dosso v. State (3), Muhammad Ayub Khoro v. Pakistan (4), Gulab Din v. Major A. T. Shaukat (5), Mir Hassan* v. *State (6)* and *.Asma Jillani's case,* already referred to. It does not, however, appear to me to be necessary to examine this particular aspect at this stage for the reason that on Mr. Brohi's argument the legality of the actions taken by the new regime is not dependent on any power derived from Martial Law as such, but rests on considerations arising out of the alleged break-down of the pre-existing Legal Order. According to him, it is immaterial whether the new regime is called a Martial Law regime, or by any other name However, it will be necessary to advert to this question when considering the learned Attorney-General's contentions.

As already stated, Mr. Brohi has placed reliance on the concept of revolutionary legality, as expounded by Professor Hans Kelsen. This concept was adopted by this Court in *Dosso's case,* already referred to, but rejected in the case of *Asma* It, therefore, becomes necessary to examine these two cases in the light of the submissions now made by Mr. Brohi in this behalf.

The facts in *Dosso's case* were that by a Proclamation made on the 7th of October 1958, the President dismissed the Central Cabinet and the Provincial Cabinets and dissolved the National Assembly and both the Provincial Assemblies of East Pakistan and West Pakistan. Simultaneously, Martial Law was declared throughout the country and General Muhammad Ayub Khan, Commander-in-Chief of the Pakistan Army was appointed as the Chief Martial Law Administrator. Three days later, the President promulgated the Laws (Continuance in Force) Order, 1958, the general effect of which was the validation of laws, other than the late Constitution, that were in force before the proclamation, and restoration of the jurisdiction of all Courts including the Supreme Court and the High Courts. The order contained the further direction that the Government of the country, thereafter to be known as Pakistan and not the Islamic Republic of Pakistan, shall be governed as nearly as may be in accordance with the late Constitution. The question raised before the Court was whether certain prerogative writs issued by the High Courts had abated by reason of the provisions of clause (7) of Article 2 of the aforesaid Order.

Delivering the judgment of the Court, Muhammad Munir, C. J. observed that "as we will have to interpret some of the provisions of this Order, it is necessary to appraise the existing constitutional position in the light of the juristic principles which determine the validity or otherwise of law-creating organs in modern States, which being members of the comity of nations are governed by International Law. In judging the validity of laws at a given time one of the basic doctrines of positivism on which the whole science of modern jurisprudence rests, requires a jurist to presuppose the validity of historically the first Constitution whether it was given by an internal usurper, an external invader or a national hero or by a popular or other assembly of persons. A subsequent alteration in the Constitution and the validity of all laws made there under is determined by the first Constitution. Where a Constitution presents such continuity, a law once made continues in force until it is repealed, altered or amended in accordance with the Constitution. It sometimes happens, however, that a 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. A revolution is generally associated with public tumult, mutiny, violence and bloodshed but from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. The change may be attended by violence or it may be perfectly peaceful. It may take the form of a *coup d'état* by a political adventurer or it may be effected by persons already in public positions. Equally irrelevant in law is the motive for a revolution, inasmuch as a destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends. For the purposes of the doctrine here explained a change is, in law, a revolution if it annuls the Constitution and the annulment is effective. If the attempt to break the Constitution fails those who sponsor or organise it are judged by the existing Constitution as guilty of the crime of treason. But if the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then 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. On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled Constitution. Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change. In the circumstances supposed no new State is brought into existence though Aristotle thought otherwise. 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. Thus a victorious revolution or a successful *coup d'état* is an internationally recognised legal method of changing a

Constitution".

"After a change of the character I have mentioned has taken place, the national Legal Order must for its validity depend upon the new law-creating organ. Even Courts lose their existing jurisdiction, and can function only to the extent and in the manner determined by the new constitution."

In support of these conclusions, the learned Chief Justice cited a passage from Hans Kelsen's "General Theory of Law and State", *inter alia,* to the effect that:

> "This shows that all norms of the old Order have been deprived of their validity by revolution and not according to the principle of legitimacy. And they have been so deprived not only *de facto* but also *de jure.* No jurist would maintain that even after a successful revolution the old Constitution and the laws based thereupon remain in force, on the ground that they have not been annulled in a manner anticipated by the old Order itself."

Mr. Brohi, as already stated, has precisely taken this stand before us, except that instead of describing the revolution as successful he would use the word effectual or effective, and would not also go to the extent of conferring permanent legitimacy on the new Legal Order, leaving this question to be determined by the future course of events including an Act of indemnity, if any, by a future Parliament.

The view taken by the Supreme Court in *Dosso's case* continued to hold the field for almost fourteen years until it was brought under challenge in *Asma Jillani's case* in connection with an order of detention made under a Martial Law Order issued by General Agha Muhammad Yahya Khan and inherited by Mr. Z. A. Bhutto on his assumption of power as Chief Martial Law Administrator on the 20th of December 1971. It is interesting to observe that in *Asma Jillani's case* Mr. Yahya Bakhtiar, the learned counsel appearing for Begum Nusrat Bhutto, defended the decision in *Dosso's* case on various grounds including that of *stare decisis,* whereas the present Attorney-General, Mr. Sharifuddin Pirzada and Mr. A. K. Brohi, learned counsel for the respondent, criticized this decision while appearing as *amicii curiae.* Although a counsel is not bound by the position he may have taken on a previous occasion, it would be instructive to note the point of view then advocated by Mr. Brohi as regards the correctness of the decision in *Dosso's case.* On page 171 of the Report, Hamoodur Rahman, C. J. has observed:

> "Mr. Brohi is of the view that the fallacy underlying the decision in *Dosso's case* lies in the fact that it has accepted a purely legal theory of law as a question of law itself, although it was nothing more than "a question about law" and no legal judgment could possibly be based on such a purely hypothetical proposition. He is further of the view that the Court in making the impugned observations proceeded clearly upon the assumption that (a)

the revolution, if any, had succeeded and *(b)* that its own authority was derived from the Laws (Continuance in Force) Order. Both these assumptions were wrong. The question as to whether the revolution, if any, had in fact succeeded in creating an effective legal order was a question of fact and had to be decided as such objectively. It was not even gone into. The decision was, therefore, purely an *ad hoc* decision, which cannot be treated as binding."

Muhammad Yaqub Ali, J. summed up Mr. Brohi's position (on pp. 224-225 of the Report), in the following words:

"Mr. A. K. Brohi *(amicus curiae)* first argued the question that Courts of Law are, as a matter of legal obligation, bound by the dictates of the 1962 Constitution and have not been absolved of that legal obligation by taking cognizance of the new authority destructive of the established legal order. He also questioned the nature of the new Legal Order based on the system officially described as Martial Law. In his opinion this system was not regulated by any set of legal principles known to jurisprudence and was merely contingent on the will and whim of one man. He also attacked the decision in *Dosso's case* and analyzed Kelsen's theory on which that decision is based. It was argued that Kelsen's theory that a victorious revolution and successful *coup d'état* are law-creating facts is a mere theory of law as distinguished from law itself. The function of a theory of law is to explain or to describe the nature of law or the nature of a legal system. It is, however, itself not a part of legal system or the law which it seeks to describe. This according to Mr. Brohi was the central fallacy in the judgment given by Muhammad Munir, C. J."

"Mr. Brohi next referred to the decision in the case of *Madzimbamuto v. Lardner-Burke* [(1968) 3 All E R 5611 in which Kelsen's theory of effectiveness was applied. This case is mentioned by some authors as the grundnorm case. He pointed out that the decision in this case was the maximum success which Kelsen could have conceivably envisaged…..

"Continuing, Mr. Brohi pointed out that the characteristic of all forms of civilized Government is that the structural distribution of power is regulated by law in a manner that every functionary, no matter so highly placed, is the servant of the law, should a system of Government exist in which power is regulated and derived not from law, but from force such a system cannot claim to be a legal system of Government whatever else it may be .....

"Lastly, Mr. Brohi argued that in Pakistan the real sovereign is God Almighty and the State of Pakistan has a limited power of which it is a recipient as a trustee or a delegatee. On this hypothesis he argued that the will of one man

was repugnant to the grundnorm of Pakistan, *viz.* the Objectives Resolution and in Pakistan no single man could be the sole repository of State power. He referred to a passage from his book: "The Fundamental Laws of Pakistan" that according to the Western jurisprudence legal sovereign are the people who give the first Constitution; that in Pakistan the first sovereign is God Almighty and the power received from Him as a delegatee or a trustee is to be exercised by chosen representatives of the people and not by the will of one man."

The stand taken by Mr. Sharifuddin Pirzada while appearing as *amicus curiae* in *Asma Jillani's case* may also be briefly mentioned. Besides contending that the decision in *Dosso's case* was given in haste and against the principles of natural justice, because no opportunity at all was given to learned counsel appearing for the respondents to argue the contrary, he submitted that being a Municipal Court, the Supreme Court should not have made a rule of International Law regarding recognition of States the basis of its decision; that the Court's interpretation of Kelsen's doctrine was incorrect; that in any event the theory of Kelsen is not a universally accepted theory and should not have been applied to the circumstances then prevailing in Pakistan; and that the doctrine of necessity as a validating factor was not even noticed. According to Muhammad Yaqub Ali, J., Mr. Sharifuddin Pirzada added that the decision in *Dosso's case* purported to legalize the so-called revolution without any conditions which authorised absolutism and sanctioned that might is right; and that effectiveness was not the only criterion of legitimacy.

It appears that the learned Judges hearing *Asma Jillani's case* were greatly impressed by the submissions made by Messrs A. K. Brohi and Sharifuddin Pirzada, with the result that they unanimously came to the conclusion that *Dosso's case* had not been correctly decided. They accordingly proceeded to overrule the same. In doing so, Hamoodur Rehman, C. J. observed 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, (i) that the basic doctrines of legal positivists which he was accepting were such firmly and universally accepted doctrines that the whole science of modern jurisprudence rested upon them; (ii) that any abrupt political change not within the contemplation of the Constitution constitutes a revolution, no matter how to temporary or transitory the change if, no one has taken any step to oppose it; and (iii) 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. Kelsen'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 admit to formulate any theory which favors totalitarianism ……. Kelsen was

only trying to lay down as a rule of normative science consisting of an aggregate or system of norms. He was propounding a theory of law as mere jurist's proposition about law. He was not attempting to lay down any legal norm or norms which are 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 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 stand-point 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 purpose 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 recognition of other States but through the municipal law of his own State. The question of recognition of a Government from the point of view of International Law becomes important only when a change in the form of Government also involves a break in the legal continuity of the State or where the question arises as to whether the new Government has a reasonable expectancy of permanence so as to be able to claim to represent the State...

"The criticism, therefore, is true that the Chief Justice of the Supreme Court not only misapplied the doctrine of Hans Kelsen but also fell into error in thinking that it was a generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone....."

"In any event, if a grundnorm is necessary, Pakistan need not have to look to the Western legal theorists to discover it. Pakistan's own grundnorm is enshrined in its own doctrine that the legal sovereignty over the entire Universe belongs to Almighty Allah alone and the authority exercise-able by the people within the limits prescribed by Him is a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949. This has not been abrogated by any one so far, nor has this been departed or deviated from by any regime, military or civil. Indeed it cannot be, for it is one of the Fundamental Principles enshrined in the Holy Qur'an.... It is under this system that the Government becomes a Government of laws and not of men, for no one is above the 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."

In view of the position taken up by Mr. Brohi in *Asma Jillani's case,* and the success he had in persuading the Court to agree with him, Mr. Brohi has indeed faced an uphill task before us to question the correctness of this judgment, in so far as it rejects the application of Kelsen's pure theory of law as providing validity to the new Legal Order emerging as a result of a coup *d'état.* He submits that the learned Judges were in error in analyzing the decision in *Dosso's cage* as if they were sitting in appeal; that they also erred in going behind the facts proved or assumed to have been proved in that case, namely, that the revolution had become successful; and that in any case they were not clear in their mind as to whether Muhammad Munir, C. J. had misunderstood Kelsen's theory or misapplied it when deciding *Dosso's case.* He has referred us to *Quin* v. *Leathem (1), Prager* v. *Blatspiel, Stamp & Heacock Ltd. (2), Read* v. *J. Lyons & Co. Ltd.* (3) and *Candler* v. *Crane Christmass & Co. (4),* in support of the proposition that a judicial precedent is not to be criticized or taken to pieces in the manner in which *Dosso's case* was treated by this Court.

In the first-mentioned case, it was observed by Lord Halsbury that "while considering a precedent, we must look at the hypothesis of fact upon which the case was decided by the majority of those who took part in the decision." In the second case, it was observed that "the object of the common law is to solve difficulties and adjust relations in social and commercial life. It must meet, so far as it can, sets of fact abnormal as well as usual. It must grow with the development of the nation. It must face and deal with changing normal circumstances. Unless it can do that, it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law." In the next case, the observation relied upon by Mr. Brohi is to the effect that "your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalize the law of England. That attractive if perilous field may also be left to other hands to cultivate." In the last case referred to by Mr. Brohi, it was said by Lord Denning L. J. that "this argument about the novelty of the action does not appeal to me. It has been put forward in all the great cases which have been mile-stone of progress in law and it has nearly always been rejected..... It was fortunate for the common law that the progressive view prevailed."

I have no cavil with the propositions and observations referred to by Mr. Brohi, but I do not see how they affect the correctness of the view taken in *Asma Jillani's case.* Even if the Court erred in observing that the assumption regarding the success of the revolution was not justified I or the reason that a few days after the pronouncement of the Court President Iskander Mirza was himself deposed by Field Marshal Muhammad Ayub Khan, and the Court should have assumed

the facts as stated by Muhammad Munir, C. J. the view taken by the Court as to the applicability of Kelsen's theory is not affected by this error. The Court has given sound reasons for rejecting it, particularly the fact that it was at best a theory about law, which had not been universally accepted by other renowned jurists. Unless, therefore, compelling reasons are shown for departing from the view taken by this Court in *Asma Jillani's case,* I would like to adhere to the same for the reasons so ably stated in the judgments of Hamoodur Rehman, C. J. and Muhammad Yaqub Ali, J. (as he then was).

Mr. Brohi submits that the logical consequence of this Court's decision in *Asma Jillani's case* would be to render illegal, with retroactive effect, all actions taken during the time of Field Marshal Mohammad Ayub Khan, including the Constitution of 1962 which he gave to the nation as the will of one man; that the regime of his successor, General Agha Mohammad Yahya Khan having been specifically declared to be illegal by the Supreme Court, the usurper could not legitimately hand over power to Mr. Z. A. Bhutto on the 20th of December 1971, nor could the latter derive validity for his Government by getting the Interim Constitution or 1972 and the permanent Constitution of 1973 passed by a truncated National Assembly, which was not attended by nearly 160 members belonging to East Pakistan which had by that time seceded from Pakistan under the name of Bangla Desh. It appears to Mr. Brohi that these consequences were overlooked by the learned Judges who decided *Asma Jillani's case* and rejected Kelsen's theory regarding the legality of a successful revolution. Mr. Brohi next submits that in any case, in the subsequent case of *State v. Zia-ur-Rehman* (1) the Supreme Court itself backed away from the grundnorm provided by the Objectives Resolution, on which it had tried to base itself in *Asma Jillani's case* in the absence of any other concept of legitimacy.

The answer to some of these criticisms is to be found in the several judgments delivered in *Asma Jillani's case.* On p. 161 of the Report, it is observed by Hamoodur Rehman, C. J. that "the country by and large accepted the 1962 Constitution and even the Judges took oath under the fresh Constitution. Two Presidential elections were held under this Constitution, the erstwhile Commander-in-Chief was elected on both occasions. National and Provincial Assemblies were set up and the country continued to be governed in accordance with its terms till the 25th of March 1969..... "

"The Courts in the country also gave full effect to this Constitution and adjudicated 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 and also enforce the laws created by that medium in a number of cases ....."

"Thus even according to the arguments advanced by the learned counsel

appearing for the appellants all the laws made and acts done by the various Governments, civil and military, became lawful 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 acquired *de jute* validity by reason of the unquestioned recognition extended to them by the Courts of highest jurisdiction in the country. The validity of tie acts done there under is no longer, therefore, open to challenge, even under the concept of law propounded by the realist school of jurists and adopted by the learned counsel for the appellants."

On the same subject, Mohammad Yaqub Ali, J. went a step further and remarked as under:-

"The Attorney-General lastly urged that by challenging the validity of Martial Law imposed by Yahya Khan who was no longer in power the intention in fact was to dispute the legality of the present Government. In reply, Mr. Manzoor Qadir acknowledged the legitimacy of the Government headed by Mr. Z. A. Bhutto as Chairman of the majority party in the National Assembly, and said it was based on the will of the chosen representatives of the people. This was the reason behind the plea raised by him that the invalidity in the Legal Framework Order (issued by General Yahya Khan) did not affect the legality of the Elections held under it to the National Assembly and the Provincial Assemblies. This coincided with the position taken up by the Attorney-General that Mr. Z. A. Bhutto was not the recipient of power from Yahya Khan and that he held the office of President as leader of the majority party in the National Assembly. We also take judicial notice of the fact that after arguments were concluded in these appeals, the National Assembly met and unanimously expressed confidence in the Government of Mr. Z. A. Bhutto. An Interim Constitution has also been passed and Mr. Z. A. Bhutto is to be inaugurated as President under this Constitution on the 21st of April 1972. l he legitimacy of the present Government is thus beyond the shadow of doubt."

In the judgment of Salahuddin Ahmed, J. it was observed that the Supreme Court had derived its power from the 1962 Constitution, because that was the only legal instrument under which the institution of Supreme Court was established. The learned Judge went on to state that as soon as General Agha Mohammad Yahya Khan made his exit from the scene the 1962 Constitution which had been dormant in the meantime revived.

It will thus appear that all the members of the Court which decided *Asma Jillani's case,* were agreed that even though the 1962 Constitution was given by one man, namely, Field Marshal Mohammad Ayub Khan, it had acquired validity by its general acceptance by the people of Pakistan and recognition by the superior Courts, and it was on the basis of this assumption that they declared General Agha Mohammad Yahya Khan to be a usurper, inasmuch as he had

abrogated, without lawful authority, the preexisting 1962 Constitution of the Islamic Republic of Pakistan. The observations made by Mohammad Yaqub Ali, J. regarding the legitimacy of the successor Government of Mr. Z. A. Bhutto were not endorsed by the other Judges of the Court, but this question was directly answered in the affirmative in the subsequent case of *Zia-ur-Rehman,* when it was observed that :-

> "After the abrogation of the Constitution of 1962 and the establishment of military rule, the Legal Framework Order was clearly an endeavor to restore the principles of democracy wherein the State was to exercise its powers through the chosen representatives of the people and frame a Constitution for the State of Pakistan, 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 Qur'an and Sunnah as envisaged by the Objectives Resolution itself. This was clearly, therefore, a step towards achieving the goals set out in the Objectives Resolution and for making provisions for the orderly and ordinary running of the Government of the country through the chosen representatives of the people. If there was any act of the usurper which could be condoned on the basis of the doctrine of necessity, then this was pre-eminently such an act. This was the first time that the representatives of the people had been chosen in the country by free and fair elections on the basis of adult franchise. The credentials of the people so elected were not, therefore, open to challenge on any principle of democracy, and since they had been elected under the Legal Framework Order, they had also been given a mandate by the people to make provision for the Constitution of Pakistan."

> "The question then arises as to whether the fact that 160 male and seven female members from East Pakistan) could not or did not participate in the proceedings of the National Assembly would make a difference either to the effective working of the Assembly or to the validity of the Constitution unanimously adopted by it. If the majority of the members had been forcibly prevented or otherwise wrongfully excluded from participating in its proceedings, there may have been some scope for contending that the Constitution produced was not a valid document. In the absence, however of any evidence to show that any one was so prevented, excluded or prohibited from attending the meeting of the National Assembly convened for the purpose of framing the Constitution, it cannot be said that the meeting of the National Assembly, which mustered the necessary quorum required by Article 17 of the Legal Framework Order and adopted a Constitution, was lacking in competence or was not a legally constituted body or that its acts were open to challenge on the ground that the majority of the members of the House were not present .... It cannot be invalidated merely on the ground that a large number of members were not present or did not participate."

Nothing was said at the Bar by Mr. Brohi to persuade the Court to take a view different from the one reproduced above in regard to the validity of the Constitutions of 1962, 1972 and of 1973. Accordingly, it seems to me that the apprehension expressed by the learned counsel that the decision of this Court in *Asma Jillani's case* had the effect of rendering illegal all the C successive governments of Pakistan, and the Constitutions framed during their times is not well-founded, and in any case stands effectively repelled by the decisions just mentioned. As a result, it follows that the controversy in the present case must proceed on the assumption that the 1973 Constitution had been validly flamed and was in force when the Chief of the Army Staff proclaimed Martial Law on the 5th of July 1977.

Similarly, Mr. Brohi's criticism that, in *Ziaur Rehmmn's case,* the Supreme Court has itself backed away from the grundnorm provided by the Objectives Resolution on which it had tried to base itself in *Asnta Jillani's case,* is not justified. While explaining his observations on this subject in *As,na Jillanti's* case, Hamoodur Rehman, C. J. stated that it was not correct to say that in that case the Court had declared that the Objectives Resolution adopted by the first Constituent Assembly of Pakistan on the 7th of March 1949 was the grundnorm for Pakistan, and therefore, impliedly held that it stood above even the Interim Constitution or any Constitution that might be framed in the future. After citing the relevant passages from the various judgments delivered in *Asma Jillani's case,* his Lordship concluded that "it will be observed that this does not say that the Objectives Resolution is the grundnom, but that the grundnorm is the theory of legal sovereignty accepted by the people of Pakistan and the consequences that flow from it. I did not describe the Objectives Resolution as the corner-stone of Pakistan's legal edifice, but merely pointed out that one of the learned counsel appearing in the case had described it as such....." His Lordship then proceeded to clarify that "The Supreme Court has never claimed to be above the Constitution nor to have the right to strike down any provision of the Constitution." I think these observations by Hamoodur Rehman, C. J. effectively answer the point sought to be made by Mr. Brohi.

The question, however, is whether these opinions about the status of the Objectives Resolution or the legal doctrine of sovereignty obtaining in Islam, serving as grundnorm for Pakistan, even if somewhat contradictory in character as considered by Mr. Brohi, affect the correctness of the view taken by the Court in *Asma Jillani's case* regarding the concept of revolutionary legality. It appears to me that while a mention of the concept of grundnorm becomes unavoidable when discussing Hans Kelsen's pure theory of law, yet the opinion of the Court as to its soundness and application to the circumstances presented by the seizure of power by General Agha Mohammad Yahya. Khan in March 1969 is not based on these considerations; rather it proceeds on a detailed consideration

of the opinions of Western jurists regarding the concept of law, which reject the idea of effectiveness or effectualness as being the only criterion for its validity. Such being the case, no modification of the view taken in *Asma Jillani's case* is called for simply on the ground that in *Zia-ur-Rehman's case* the Objectives Resolution of 1949 was not treated as the grundnorm for Pakistan, although it appeared to have been so treated in *Asma Jillani's case.*

Mr. Brohi submits that the position taken up by him regarding the legality of an effectual new regime established as a result of suppression or destruction of the old Legal Order finds full support from the several judgments delivered by the High Court in the famous case from Southern Rhodesia, the Privy Council judgment in which is reported as *Aladzimbarnuto* v. *LardnerBurke and another (1).* Learned counsel wishes to adopt the reasoning of Macdonald, J. of the Appellate Division of the High Court of Rhodesia as embodying his submissions in this behalf.

I find that this case was fully noticed in the judgment of Muhammad Yaqub Ali, J. in the case of *Asma Jillani,* and the learned Judge expressed his agreement with the submission made by Mr. Brohi on that occasion that "the view expressed by the Judges of the High Court of Rhodesia was the maximum success for the theory of effectiveness which Kelsen could have conceivably envisaged." This remark appears to imply that the judgment did not really go far enough to support Kelsen's theory in its entirety. In the circumstances, it would not have been necessary to go over the same ground again, except for the fact that Mr. Brohi relies very heavily on the propositions stated by Macdonald, J.

The facts of that case need not be stated at any length except to say that in 1965 the Government of Ian Smith overthrew the 1961 Constitution given to Southern Rhodesia by the British Parliament, and made a Unilateral Declaration of Independence to the effect that Southern Rhodesia was no longer a Crown colony but an independent sovereign State. The Parliament of the United Kingdom did not recognize this Unilateral Declaration of Independence, but continued to assert that it had responsibility and jurisdiction for the colony. The Governor, appointed by Her Majesty the Queen, dismissed Mr. Smith and other Government Ministers and called on all citizens to refrain from acts which would further the objectives of the illegal authorities, but added that it was a duty of all citizens to maintain law and order and to carry out their normal tasks. This applied equally to the Judiciary, the Armed Forces, the Police and the public service. The dismissal of the Prime Minister and other ministers was ignored and a new Constitution was adopted, and thereafter the usurping Government proceeded on the basis that the 1965 Constitution had superseded the 1961 Constitution. Madzimbamuto, the appellant before the Privy Council,

questioned the legality of her husband's detention under an Emergency Regulation continued in force by the Rhodesian authorities after the Unilateral Declaration of Independence.

The case first came up before a Division Bench comprising Lewis, J. and Goldin, J., who held that the 1965 Constitution was not the lawful Constitution and that Mr. Smith's Government was not a lawful Government; but they held that necessity required that effect should be given to the emergency power Regulations and, therefore, the detention of the appellant's husband was lawful. The five Judges of the Appellate Division delivered separate judgments. Beadle, C. J. took the view that "The status of the present Government today is that of a fully *de facto* Government in the sense that it is in fact in effective control of the territory and this control seems likely to continue. At this stage, however, it cannot be said that it is yet so firmly established as to justify a finding that its status is that of a *de jure* Government." He further held that "the present Government, having effectively usurped the Governmental powers granted to Rhodesia under the 1961 Constitution, can now lawfully do anything, which its predecessors could lawfully have done, but until its new Constitution is firmly established and thus becomes the *de jure* Constitution of the country, its administrative and legislative acts must conform to the 1961 Constitution. Jarvis, A. J. A. was in general agreement with Beadle, C. J., whereas Fieldsend, A. J. A. expressed his conviction that a Court created in terms of a written Constitution had no jurisdiction to recognize either as *a de jure* or *de facto* Government, any Government other than that constitutionally appointed under that Constitution. However, he went on to consider the doctrine of necessity for validating certain acts of the present authorities. Macdonald, A. J. A. and Quenet, J. took the view that "allegiance to the State imposes as one of its most important duties obedience to the laws of the sovereign power for the time being within the State", and "so far as a municipal Court is concerned *a de facto* Government is a *de jure* Government in the sense that it is the only lawmaking and law-enforcing Government functioning for the time being within the State."

Mr. Brohi submits that in coming to this conclusion this learned Judge was influenced, among others, by the opinion expressed by Sir Ivor Jennings in his book "The Law and the Constitution" to the effect that "All revolutions are legal when they have succeeded and it is the success denoted by acquiescence which makes their Constitutions law." Mr. Brohi also draws our attention to the fact that Macdonald, A. J. A., has, in the body of his judgment, exhaustively traced the history of constitutional development in England for coming to the conclusion that under the English law duty of allegiance lies to *a de facto* sovereign. The learned counsel particularly wishes to rely on the conclusions reached by this learned Judge to the effect that "the lesson to be gleaned from the history of the English law is that Judges should not allow themselves to be

embroiled in political controversy and in particular should not take part in revolutionary or counter revolutionary activity ..... The more unsettled the time and the greater the tendency towards the disintegration of established institutions, the more important it is that the Court should proceed with the vital, albeit, unspectacular task of maintaining law and order and by so doing act as a stabilising force within the community. This objective can only be achieved if the acts of a Government for the time being within the State are given the force of law".

On appeal to the Privy Council, Lord Reid, delivering the majority judgment, rejected Kelsen's theory of effectiveness and held "with regard to the question whether the usurping Government can now be regarded as a lawful Government, much was said about *de facto* and *de jure* Government. Those are concepts of International Law and, in their Lordships' view, they are quite inappropriate in dealing with the legal position of a usurper within the territory of which he has acquired control It happens not infrequently that the Government recognizes a usurper as the *de facto* Government of a territory while continuing to recognize the ousted sovereign as the *de jure* Government. But the position is quite different where a Court sitting in a particular territory has to determine the status of a new regime which has usurped power and acquired control of that territory."

> Lord Pearce, in a dissenting judgment, observed that "the *de facto* status of sovereignty could not be conceded to a rebel Government as against the true sovereign in the latter's own Courts, but the principle of implied mandate (i.e. that acts done by those actually in control without lawful validity) might be recognised as valid or acted on provided that they were directed to and reasonably required for ordinary, orderly running of the State, that they did not impair the rights of the citizens under the lawful Constitution, and that they were not intended to (and did not in fact) directly help the usurpation and did not run contrary to the policy of the lawful sovereign."

Considering the divergence of opinion expressed by the learned Judges who have dealt with this case at various stages, it cannot be said that it provides any effective judicial precedent, capable of application in subsequent cases. The decision in this case has, however, been commented upon by several learned authors, and it may be useful to briefly refer to them at this stage.

In an Article entitled "Splitting the Grundnorm", printed in 1967 Modern Law Review, Vol. 30, J. M. Eekelaar has analyzed the various judgments at some length, and reached the conclusion that they have the effect of splitting the grundnorm between the *de jure* Constitution of 1961 and the *de facto* authority of Ian Smith who gave the 1965 Constitution. He observes that the Smith regime would find little comfort in the judgment as it does not recognize its legality but

merely treats it as a *de facto* authority in Southern Rhodesia.

In another Article appearing in the same volume of Modern Law Review under the heading "The Judicial Process: UDI and the Southern Rhodesian Judiciary", by Claire Palley, the social backgrounds of the Judges concerned have been mentioned as influencing the view they took in this case, and it is stated that the Judges were reluctant to pronounce on the validity of Smith regime, although they were willing to validate actions of the regime on the doctrine of necessity." As a result, "although they virtually rejected the Kelsen's doctrine and the 1965 Constitution, and distinguished between *de jure* authority and legality which they would not enforce, and effective authority and law and order which they would enforce, it is clear that in Rhodesia the regimes edicts are laws enforced in the Austinian sense by the Courts"

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Commenting on this case under the heading "Legal Politics: Norms Behind the Grundnorm" in 1968 Cambridge Law Journal (Vol. 26), R. W. M. Dias observes that "the above review of the case shows that as to the lawfulness of the Smith regime, the weight of judicial opinion was overwhelmingly against it, notwithstanding its effectiveness." He is also critical of the judgment delivered by Macdonald, J. observing that: "In the first place, he begs the essential question which is not whether there is a duty to obey the laws of the Government for the time being but whether its decrees are laws. Secondly, to make effectiveness the only criterion of its legality is to abandon judicial independence……Fourthly, what an incentive to rebellion this judgment provides." The learned author goes on to state "What then are the implications of the grundnorm case. The most obvious one is that it has revealed shortcomings in what Kelsen has taught. He said in one place that the grundnorm imparts legality as long as the total Legal Order is effective. The grundnorm case shows that although the Smith regime was totally effective, it was not lawful. But at the same time that only some of its decrees were to be treated as laws. On the other band, the old order was totally ineffective, yet it possessed an important controlling influence." He remarks further "when there is as yet no accepted grundnorm, as in the midst of a revolution, the Courts may nonetheless accept as laws propositions identified with reference to whatever criterion they choose; which is precisely what happened in the grundnorm case. This, as pointed out earlier, is how laws and lawfulness of their origin come to be distinguishable".

This Article contains very useful observations as to the content of law, which have direct relevance for us in the present context. Dias observes that "Rules and legal phenomenon do not exist only for the instant; they endure, be it for short or indefinite periods. The concept of enduring laws is more in accord with experience than that of instantaneous laws, just as enduring human beings are more real than instantaneous ones. The concept of any phenomenon as a continuing thing must necessarily include the factors essential to continuity as an

integral part of it. These would include the factors but for which it would not have come into being and continued to be, as well as those involved in its function and functioning..... The grundnorm is an enduring phenomenon, and it is insufficiently appreciated that not only effectiveness but also conformity to morality and justice is among the very springs of its being and continued life".

The above reviews of the judgments delivered in the Southern Rhodesian case are, I think, sufficient to show that this case cannot be regarded as a judicial authority for the proposition canvassed by Mr. Brohi, namely, that effectualness of the new regime provides its own legality. On the contrary, weighty criticism has been leveled against the doctrine on the ground that it seeks to exclude all considerations of morality and justice from the concept of law and legality.

In the two leading judgments delivered in *Asma Jillani's case* by Hamoodur Rehman, C. J. and Muhammad Yaqub Ali, J. (as he then was) copious references have been made to the opinions of renowned writers who do not endorse Kelsen's view regarding revolutionary legality. It was pointed out that writers like Garner, G. C. Field, Professor Harold Laski and Dean Roscoe Pound had not supported the proposition that *a de facto* sovereign should become *de jure* by exacting obedience by force or coercion; on the other hand, they had expounded the doctrine that *de facto* sovereignty becomes *de jure* by consent and the development of the habit of obedience, and that a *de facto* sovereign gets his position confirmed by an election or ratification by the people by habitual obedience over a sufficiently long period of time, and then alone be can claim to have acquired *de lure* sovereignty as well.

A brief reference has already been made to the views of more modern writers like Eekelaar and Dias. A few further references will not be out of place. In an Article entitled "Principles of Revolutionary Legality" included in the Oxford Essays on Jurisprudence, 2nd Series, 1973, the first-mentioned author has attempted to enumerate the principles that may be relevant to a decision whether revolutionary activity should be given legal justification, so as to salvage this area of investigation from total extinction by the operation of positivist dogmatism. In his view the principles pertaining to revolutionary situations are:—

(i) The principle of effectiveness;
(ii) The principle of legitimate disobedience to authority exercised for improper purpose;
(iii) The principle of necessity;
(iv) The principles that violation of a right demands a remedy and that no one should profit from his own wrongful act. As a revolution will invariably have involved the violation of some of the rights protected by the previous Constitution, a combination of these

principles suggests that, even if the new order is considered legitimate, some recompense should be offered to those whose rights were infringed;

(v) The principle that a Court will not permit itself to be used as an instrument of injustice;

(vi) The principle that it is in the public interest that those in *de facto* impregnable control should be accorded legal recognition. It gives effect to the acceptable policy value that it is in the interest of the community that order be preserved. But one might be reluctant to hold that it is the only relevant principle and that there cannot be others which would militate against automatically accepting revolutionaries as legitimate regardless of any other circumstance;

(vii) The principle that Government should be by the consent of the governed, whether voters or not. There is nothing new in this principle. Authority can be found in political writings at least front the middle ages to the present day.

It appears to the learned author that "the most important advantage to be gained by the recognition of princ[i]ples of this kind is that revolutionary situations would no longer be seen in absolute terms: that either the usurpers must always and inevitably remain illegitimate, or that they must always and inevitably be held legitimate once they have succeeded, irrespective of the reasons why they took power, how they have behaved while in power and how long they have held power. The answer to the problem of legitimacy may be a qualified one, involving the judicious balancing of a wide variety of factors".

The views of Dias on the Rhodesian case, and incidentally on Kelsen's theory, as appearing in an Article written by him, have already been mentioned. Reference may also be made to some observations appearing in his book on Jurisprudence. In Chapter IV under the heading "The Problem of Power", Dias writes that "the effectiveness of a legislative medium, it should be emphasized, is not a condition of its own law quality or of its enactments, but only a factor which influences Courts to accept and continue accepting it. A situation may be supposed in the midst of a revolution where the old order has gone and no new order has effectively replaced it. In such a lacuna the Courts can continue to apply as laws the enactments of the old order even though it is no longer effective . . . ."

"Not only is the legality of a revolutionary regime independent of effectiveness, but it also has jurisdictional and temporal dimensions. Thus, although the Rhodesian regime was eventually accepted as legal by the Rhodesian Courts, British Courts have still not done so. In *Adams Vs. Adams* (A. G.

intervening) [(1970) 3 All E R 572], a British Court refused to recognize a divorce decree pronounced by a Rhodesian Judge who had not taken the oath under the 1961 Constitution. This shows that legality depends on the jurisdiction in which the matter is considered, quite apart from effectiveness. The temporal dimension is brought out by a decision of the Pakistan Supreme Court, *Jillani v. Government of Punjab,* which rejected effectiveness altogether as the criterion of legality. In an earlier case *The State v. Dosso*, the Supreme Court had held that a revolutionary regime, which was effectively in power was legal and had thereby destroyed the previous Constitution no matter how or by wont that change had been brought out. In Jillani's case, the Supreme Court rejected this as a wholly unsustainable proposition and overruled Dosso. The point, however, is that this decision was given after that revolutionary regime had been itself overthrown so that the declaration that it was illegal *ab initio* was retrospective." He goes on to state that "In the result it would seem that the effectiveness of the legislative authority is not a condition of the validity either of laws or even of itself. It is a factor which in time induces the Court to accept such authority…… That consonance with morality and the social political background also play a part in bringing about the acceptance of a law constitutive medium .....There is thus an arguable case for saying that Courts should take account of the morality for which a law constitutive medium stands in deciding whether to accept it or not...."

In Chapter XVI of the same book under the heading "The Pure Theory", Dias examines Kelsen's theory at some length, and, after discussing the concept of the grundnorm, he observes that some writers have pointed out, with a hint of criticism, that in whatever way effectiveness of grundnorm is measured, Kelsen's theory has ceased to be pure on this point, for effectiveness should seem to depend on those very sociological factors which he so vehemently excluded from his theory of law ..... The force of this point may be seen when one asks why a particular grundnorm was accepted, especially if it followed on a revolution, might it not be that the new criterion of validity was able to command a minimum of effectiveness because it was thought to guarantee that measure of justice and morality which the previous criterion did not... On this line of argument the grundnorm is effective, and continues to be effective, in so far as any clement of morality is built in as part of the criterion of validity. If so, the continued validity of every proposition of law derived from the validating source has an ethical background and the separation of law from morality would cease to exist....All this amounts to formidable argument leveled not merely at Kelsen, but at positivism in general. It is sufficient here to observe that, if sound, it would strike at the foundation of his separation of is and ought."

A brief reference may also be made to the views expressed by De Smith in his book "Constitutional and Administrative Law". In Chapter III, under the heading "Ultimate Authority in Constitutional Law", he discusses the problems posed

by situations involving a breach of legal continuity, be it peaceful of accompanied by coercion and violence. Such a situation may have to be treated as superseding the Constitutional and Legal Order and replacing it by a new one. He states that "Legal theorists have no option but to accommodate their concepts to the facts of political life. Successful revolution sooner or later begets its own legality. If, as Hans Kelsen has postulated, the basic norm or ultimate principle underlying a constitutional order is that the Constitution ought to be obeyed then the disappearance of that order followed by acquiescence on the part of officials, Judges and the general public in laws, rules and orders issued by the new holders of power, will displace the old basic norm or ultimate principle and give rise to a new one. Thus might becomes right in the eye of the law."

"This is a persuasive rationalization of the legal consequence of a successful revolution like the rebellion of the American Colonists or the English revolution of 1688. It does not, however, answer all questions. It offers a description, not a prescription. It does not dictate what attitude Judges and officials ought to - adopt when the purported breach of legal continuity takes place…."

"Sooner or later a breach of legal continuity will be treated as laying down legitimate foundations for a new constitutional order, provided that the revolution is successful, there is, however, no neat rule of thumb available to Judges during or immediately after the revolution for the purpose of determining whether the old order survives wholly, in part or not at all."

"One other comment must be made. In some situations where un-constitutional action has been taken by persons wielding effective political power, it is open to a Judge to steer a middle course. He may find it possible to hold that the framework of the pre-existing order still survives, but that deviations from its norms can be justified on grounds of necessity. The principle of necessity, rendering lawful what would otherwise be unlawful, is not unknown to English Law; there is a defence of necessity, (albeit of uncertain scope) in criminal law and in constitutional law the application of Martial Law is but an extended application of this concept. But the necessity must be proportionate to the evil to be averted and acceptance of the principle does not normally imply total abdication from judicial review, or acquiescence in supersession of the Legal Order; it is essentially a transient violation. State necessity has been judicially accepted in recent years as a legal justification for ostensibly unconstitutional action to fill a vacuum arising within the constitutional order in Pakistan, Cyprus, Rhodesia and Nigeria. To this extent it has been recognised as an implied exception to the letter of the Constitution. And perhaps it can be stretched far enough to bridge the gap between the old Legal Order and its successor."

Lastly, it would be instructive to refer to certain statements made by Professor Kelsen himself while replying to certain criticisms made against his pure theory

of law by Professor Julius Stone of the University of Sydney, Australia. Writing in the 1965 Stanford Law Review (Vol. 17), Kelsen first quotes a passage from Professor Stone to the effect that "The fact that Kelsen's theory at its formulative stage did not clearly distinguish the legal norms from the propositions about law . . . sheds revealing light on one of the most dogmatic of Kelsen's early positions. This is that a Judge (and indeed any lawyer) must, in order properly to perform his function, operate in accordance with the pure theory of law….. As soon, however, as they (the proposition about law) are distinguished, as Kelsen now admits they must be, then it clear that the propositions of the pure theory of law are mere jurists' propositions about law, and they do not bind the Judge, in the way in which legal norms bind him." He then proceeds to reply to this criticism by saying that 'Never, not even ill the earliest formulation of the pure theory of law did I express the foolish opinion that the propositions of pure' theory of law bind the Judge in the way in which legal norms bind him. In so far as the Judge in performing his function of applying' and creating law adopts a theory of law his position is the same as that of any other lawyer. And as far as the lawyers are concerned, I tried, of course, to convince them that my theory is correct, as every body who presents a theory tries to convince others of its correctness. But this does not mean that I considered the propositions of the pure theory of law as legally binding....."

From what has been said in the preceding paragraphs, it becomes abundantly clear that Kelsen's pure theory of law has not been universally accepted; nor is it indeed a theory which could claim to have become a basic doctrine of the science of modern jurisprudence. It has also not found consistent or full application in all revolutionary situations which have come before the Courts for adjudication as to the validity of the new Legal Orders resulting from such revolutions. Indeed, Professor Kelsen has himself stated that never did he express the foolish opinion that the propositions of his pure theory of law bind the Judge in the way in which legal norms bind him. Hamoodur Rebman, C. J. has rightly observed in *Asma Jillani's case* that Kelsen was propounding a theory of law as a mere jurists' proposition about law but was not attempting to lay down any legal norm or norms which are the daily concern of Judges, legal practitioners or administrators; and that Kelsen did not attempt to formulate a theory which favoured totalitarianism as he attached the greatest importance to keeping law and might apart.

Kelsen's theory is also open to serious criticism on the ground that, by making effectiveness of the political change as the sole condition or criterion of its legality, it excludes from consideration sociological factors of morality and justice which contribute to the acceptance or effectiveness of the new Legal Order. It must not be forgotten that the continued validity of the grundnorm has an ethical background, in so far as an. element of morality is built in it as part of the criterion of its validity.

These considerations assume special importance in an ideological State like Pakistan, which was brought into being as a result of the demand of the Muslims of the Indo-Pakistan sub-continent for the establishment of a homeland in which they could order their lives in accordance with the teachings of the Holy Qur'an and Sunnah. When the demand was accepted, it was given effect to by means of a Constitution passed by the British Parliament, which held sovereignty over India in 1947. In other words, the birth of Pakistan is grounded both in ideology and legality. Accordingly, a theory about law which seeks to exclude these considerations cannot be made the binding rule of decision in the Courts of this country.

It follows, therefore, that the legal consequences of an abrupt political change, of the kind with which we are dealing in this case, must be judged not by the application of an abstract theory of law in vacuum, but by a consideration of the total *milieu* in which the change is brought about, namely, the objective political situation prevailing at the time, its historical imperatives and compulsions; the motivation of those responsible for the change, and the extent to which the old Legal Order is sought to be preserved or suppressed. Only on a comprehensive view of all these factors can proper conclusions be reached as to the true character of the new Legal Order.

One last comment may also be offered in this behalf, namely, that the theory of revolutionary legality, as propounded by Mr. A. K. Brohi, can have no application or relevance to a situation where the breach of legal continuity is admitted, or declared, to be of a purely temporary nature and for a specified limited purpose. Such a phenomenon can more appropriately be described as one of constitutional deviation rather than of revolution. It will indeed be highly inappropriate to seek to apply Kelsen's theory to such a transient and limited change in the legal or constitutional continuity of a country, thus giving rise to unwarranted consequences of a far-reaching character not intended by those responsible for the temporary change.

On this view of the matter, I consider that no justification has been made out for resurrecting *Dosso's case in* supersession of the view adopted by this Court in *Avila Jillani's case* regarding the application of Kelsen's theory of revolutionary legality in the circumstances obtaining in Pakistan. In other words, I would still prefer the view advocated by Mr. Brohi in that case to the stand taken by him before us, which seeks to rob the present political change of all its moral content, and also leaves its legal character uncertain and undecided.

The stage has now been reached for a somewhat detailed examination of the circumstances culminating in the imposition of Martial Law on the 5th of July 1977. A brief mention thereof has already been made in the earlier part of this

judgment while summarizing the contentions raised by Messrs A. K. Brohi and Sharifuddin Pirzada. It may be stated that many of the averments made in this behalf in the written statement filed by Mr. A. K. Brohi have been strenuously controverted by the detenus who have filed written rejoinders and also appeared in person before the Court. Mr. A. K. Brohi has filed a rejoinder in reply to these statements of the detenus, and Mr. Zulfikar Ali Bhutto has filed a further written statement in response thereto. An affidavit of General (Rtd.) Tikka Khan, a former Chief of Staff of the Pakistan Army and Minister of State in Mr. Bhutto's Government has also been placed on the record in refutation of certain actions attributed to him in the respondent's written statement. While taking note of all these statements and counter statements, I think that in the present proceedings the Court is not called upon to record a judicial finding as to the factual correctness or otherwise of the several allegations and counter allegations made by the parties against each other. The Court is primarily concerned with ascertaining the broad trends and circumstances which culminated in the overthrow of the Government of Mr. Z. A. Bhutto. For this purpose, we must take judicial notice of various events which happened in the country during the period commencing from the 7th of March 1977 on which date the general Elections to the National Assembly of Pakistan were held, resulting in an overwhelming majority for the Pakistan People's Party led by Mr. Z. A. Bhutto. Ample material appears to be available on the record of this Court to enable us to arrive at the necessary conclusions.

The National Assembly of Pakistan, consisting of members elected from the four Provinces of West Pakistan in 1971, was dissolved in January this year by the President of Pakistan acting on the advice of the then Prime Minister Mr. Z. A. Bhutto; similar action was taken by the Governors of the four Provinces in respect of the Provincial Assemblies in the Punjab, Sind, N.W.F.P. and Baluchistan. Fresh elections were ordered to be held to all these legislative bodies within 90 days of the date of dissolution as required by clause (2) of Article- 224 of the 1973 Constitution. An intensive political campaign was launched by the Pakistan People's Party and the Pakistan National Alliance, a combination of Nine Opposition parties headed by Maulana Mufti Mahmood. Must political observers, including the top leadership of the Pakistan People's Party, expressed the view that the elections were going to be hotly contested between the two major parties, although Mr. Z. A. Bhutto and other leaders of his party expressed the confidence that they would get comfortable majority at the Centre and in all the four Provinces so as to be able to form the Federal and the Provincial Governments. However, when the results of the polling to the National Assembly seats were announced by the evening of time 7th of March 1977, the People's Party was found to have obtained 155 seats out of the total of 200 seats of the National Assembly, including a large number of those seats, particularly in the Punjab, where its success was, to say the least, very doubtful.

The Pakistan National Alliance refused to accept the results and alleged massive rigging of the elections by Government officials under the directions of Mr. Z. A. Bhutto. They also decided to boycott the polling to the Provincial Assemblies which was to be held three days later. The Pakistan National Alliance called for a country-wide protest movement against the rigging of elections in contravention of the constitutional mandate. The agitation gained rapid momentum and spread to all parts of the country. The main demands of the opposition were resignation of the Prime Minister, resignation of the then Chief Election Commissioner, and fresh elections to the National and Provincial Assemblies. As the demands were not conceded, the agitation continued and soon assumed a violent form resulting in widespread disturbances, which continued to grow in magnitude. It soon became apparent that they were beyond the control of the civil armed forces, with the result that the Army had to be calked out in many places. On the 21st of April 1977, the Federal Government of Mr. Z. A. Bhutto issued a direction under Article 245 of the Constitution calling upon the Armed Forces to act in aid of civil power in Karachi, Lahore and Hyderabad towns. Troops were also called out in aid of civil power by the local executive authorities in many other towns under the provisions of the Code of Criminal Procedure.

The agitation, however, continued unabated, resulting in extensive damage to public and private property and heavy loss of life, details of which will be given presently. Protest marches continued in defiance of the orders made by the local Martial Law Administrators, and many instances of ridiculing army personnel were reported from various towns. The top leadership of the Pakistan National Alliance, and a large number of their followers were arrested throughout the county, and their trial by military Courts was also authorised. As these repressive measures did not appear to produce the desired results, Mr. Z. A. Bhutto announced in May 1977 that as he could not sacrifice the National Assembly on the demand of the Opposition. he would offer himself for a Referendum as to whether he should continue as the Prime Minister of the country or not, and for this purpose Seventh Amendment to the Constitution was passed by the National Assembly on the 12th of May 1977. However, the Opposition rejected this device and the agitation continued.

In these circumstances Mr. Bhutto agreed in principle to hold fresh elections to the National Assembly, and offered to enter into a dialogue with the leaders of the Pakistan National Alliance. The talks commenced on the 3rd of June 1977 on which date a joint appeal was made by Mr. Z. A. Bhutto and the leaders of the Opposition for calling off the strike during the continuance of the talks. As a result of this joint appeal, the protest movement was temporarily called off. The direction issued by the Federal Government under Article 245 of the Constitution was also withdrawn, and the troops were gradually pulled out from the riot torn areas.

The talks continued until about the 15th or 16th of June 1977, when it was announced that an accord had been reached between the parties, and that the same would now be reduced into writing. The Prime Minister then left for a short tour of some friendly countries, but during his absence the task of drafting the accord could not make much progress. Fresh efforts were made to break the dead-lock, and a night long session between the two negotiating teams was held on the 2nd of July 1977, resulting in an announcement on the morning of the 3rd of July 1977 that full accord had been reached and the formal agreement would soon be signed by both the parties after it had been formally ratified by the General Council of the Pakistan National Alliance. Unfortunately, differences again arose, and at a press conference convened by the Prime Minister late on the 4th of July 1977 it was announced that fresh talks will be held between Mr. Abdul Hafeez Pirzada of the Pakistan People's Party and Professor Ghafoor Ahmed of the Pakistan National Alliance to iron out these differences. The Prime Minister, however, announced that his party would also raise ten or twelve other issues as was being done by the Pakistan National Alliance, it appears that the take-over by the military authorities was carried out in the early hours of the 5th of July 1977 soon after this announcement by the Prime Minister.

The allegation that there was massive rigging of the elections under the directions of Mr. Z A. Bhutto has been strenuously denied by Mr. Z. A. Bhutto himself and by Mr. Yahya Bakhtiar on behalf of the Pakistan People's Party. However, the important point for our present purpose is not whether in fact there was massive rigging of the elections or not, but that the people all over Pakistan protested that there had been massive rigging by the Government functionaries. In addition, we have before us material in the form of certain actions taken in this behalf by the Government and the Chief Election Commissioner. In the first place, there is the fact that the results of the elections were not announced by the Chief Election Commissioner until the 21st of March 1977, which was the last date permitted for this purpose by clause (2) of Article 224 of the Constitution and he did so only when he had been given summary powers by the Federal Government, by means of Amending Ordinance XV of 1977, to examine the validity of individual elections and to set them aside by reason of any illegality or corrupt practice which may have vitiated the result. He took up twenty-six cases for investigation under these summary powers and set aside the results of six constituencies, unseating important members belonging to the Pakistan People's Party. Show-cause notices had been issued by the Chief Election Commissioner to at least two other important members of the party, namely, the former Attorney-General, Mr. Yahya Bakhtiar, and the Federal Law Minister, Malik Mohammad Akhtar, when the summary powers previously conferred on the Chief Election Commissioner were suddenly withdrawn by the President on the 12th of May 1977 under clause (2)(b)of Article 89 of the Constitution, Mr. Yahya Bakhtiar submits that he was not afraid of facing scrutiny by the Chief Election Commissioner, and that the withdrawal of the summary powers had nothing to

do with the pendency of his case. That may or may not be so, as the relevant fact for our present purpose is that the powers in question were suddenly withdrawn, thus giving the impression that the withdrawal was intended to protect certain important members of the Pakistan People's Party from being unseated. In the present proceedings we have merely taken judicial notice the events which generated discontent against Mr. Z. A. Bhutto's Government, and are not called upon to record a judicial finding as to whether the dissatisfaction was in fact justified or not. A further fact to be noticed in this behalf is that the Chief Election Commissioner had called for the files of eighty-five other constituencies when these powers were withdrawn.

Four orders passed by the Election Commission in the exercise of the summary powers mentioned above have been placed on the record. They make very instructive reading. It may be stated that at the relevant time the Election Commission was headed by a retired Judge of the Supreme Court of Pakistan, Mr. Justice Sajjad Ahmed Jan as the Chief Election Commissioner, and had two members drawn from the serving Judges of the High Courts, namely, Mr. Justice Sa'ad Saood Jan of the Lahore High Court and Mr. Justice Abdul Hafeez Memon from the Sind High Court.

The first case deals with the election of a former Federal Minister, Mr. Hafeezullah Cheema, to the National Assembly from Constituency No. NA-57, Sargodha-5. On page 176 of the reported judgment (P L D 1977 Jour 164) the Election commission has recorded the following conclusions:

> "We do not thick it necessary to make any comments on the patent facts disclosed from our scrutiny of the record and the evidence mentioned above, as they speak for themselves. The only possible conclusion which can be drawn from them is that the polls were rigged in the polling stations mentioned above and the election was thus reduced to a farce. The several telegraphic complaints sent by Mr. Zafarullah Khan on the day of the poll have been proved to he substantially correct. The events clearly reveal a pre-planned design to subvert the electoral process and to secure a victory for Mr. Hafeezullah Cheema at all costs by resort to the foulest possible means. As stated above, no polling took place at some of the polling stations and yet the results were manipulated for these polling stations giving to Mr. Cheema a land-slide victory, it is painful to observe that Mr. Cheema in his position as the Federal Minister of the Central Government should have resorted to such foul methods, throwing to the winds all norms of decency and democratic behavior in his blind desire to win the seat for himself anyhow, totally unmindful of the consequences. He and his henchmen indulged in violence and intimidation with reckless bravado to achieve their nefarious designs."

In the second case, reported as P L D 1977 Jour. 183 relating to the election of Mr. Amir Abdullah Khan, a nominee of the Pakistan People's Party from National Assembly Constituency No. NA-61, Mianwali-II, the Election Commission has observed, on page 187 of the Report, that:-

> "The events as disclosed by the evidence mentioned above, speak for themselves. The election in this constituency was a mockery and a sham. The sanctity of the ballot paper was destroyed by the foulest methods, regardless of consequences. In the circumstances, we have no hesitation in declaring, as already stated in our short order dated the 20th of April, 1977, that the polls in this constituency are vitiated by grave illegalities and are, therefore, null and void and that fresh election will be held in this constituency as required by section 108 of the Representation of the People Act, 1976."

In the third case, reported as P L D 1977 Jour. 190 relating to the election of Mr. Ghulam Nabi Chaudhry, a nominee of the Pakistan People's Party from Constituency No. NA-76, Lyallpur-IX, the Election Commission observed on p. 197 of the Report:

> "The resume of the evidence led in the case and the description of some of the incidents that took place during the polls in this Constituency leave no room for doubt that the polls are tainted by grave illegalities and violations of law. The respondent resorted to violence and even abducted a Presiding Officer and subverted the electoral processes to make sure about his victory at all costs."

In the last case brought to our notice, reported as P L D 1977 Jour. 198, relating to the election of Sardar Ahmed Ali, a nominee of the People's Party, from National Assembly Constituency No. NA-89, Kasur-I, the Election Commission came to the conclusion on p. 202 of the Report that:

> "The whole evidence as discussed above leaves no room for doubt that a fraud has been played on the electorate by resort to despicable acts like stealing the ballot boxes and the ballot papers, shoving in bogus votes in the ballot boxes and later bringing them into the polling stations for being included in the count. The only result that follows is that this poll which was farcical, has to be declared as null and void."

It is true that the specific judgments referred to by the learned Attorney-General relate only to four cases, but the conclusions recorded by the Election Commission in each of them are significant, as revealing a certain pattern of interference by the Government functionaries with the sanctity of the ballot. Enormity of this interference appears to be further highlighted by at least three public statements made by the Chief Election Commissioner on the 17th of March

1977, 23rd of May 1977, and the 5th of June 1977 respectively.

The first statement appeared in the daily newspaper 'Nawa-i-Waqt' (Annexure F. 12 on p. 150 of the respondent's rejoinder filed on 26-10-77) reporting the proceedings of a Press Conference held by the Chief Election Commissioner in his office, in which, after reciting the various irregularities noticed by him, he expressed the view that there were allegations of rigging against almost all the ministers of the Government, and that, if possible, fresh elections should be held to all the 200 seats of the National Assembly, and even the elections to the Provincial Assemblies should be reviewed, so as to inspire confidence in the purity of the electoral process.

The second statement referred to by Mr. Sharifuddin Pirzada was reported in a weekly Urdu magazine 'Chatan', published in Lahore (Annexure F. 13 on p. 152 of the aforesaid rejoinder), bearing the date-line 23rd of May 1977. It refers to an interview given by the Chief Election Commissioner to the Voice of America reiterating his view that there had been massive rigging in the elections to the National Assembly held on the 7th of March 1977, and that he had advised Prime Minister Bhutto to hold fresh elections. According to the correspondent of the Voice of America stationed in Islamabad, the Chief Election Commissioner had re-armed his earlier statement that the results of at least 100 constituencies of the National Assembly were not above suspicion.

The third statement dated the 5th of June 1977 appeared in a newspaper called the daily 'Millat' published in Karachi, in the Gujerati language. An English translation of this news item is to be found in Annexure R/1 to the first written statement filed in this Court by Mr. A. K. Brohi on behalf of the Federation of Pakistan. It bears the caption "Sajjad shocked by election rigging. Suggests new election instead of inquiry." The body of the news item states that:

> "In view of the grave irregularities that have come to the knowledge of the Election Commission during the inquiry held into election to 24 seats, the Commission has decided to hold inquiry into another 80 seats.
>
> Records of the elections of these 80 seats have been sealed under the orders of the Commission. The Chief Election Commissioner, Mr. Justice Sajjad Ahmed Jan is shocked to learn of the grave irregularities committed in regard to more than 50% of the seats during elections. In view of these irregularities on such a large scale Mr. Justice Sajjad Ahmed Jan feels that it will be better to hold elections afresh."

Mr. Brohi has also drawn our attention to para, 48 of his written statement to the effect that the then Punjab Government had sanctioned, on 15-5-77, the distribution of fire-arms licenses on a vast scale to its party members. This

allegation has not been denied by Mr. Bhutto and Mr. Abdul Hafeez Pirzada, either orally or in their rejoinder statements.

Mr. A. K. Brohi has also brought on the record certain other material suggestive of the fact that such large scale rigging had in fact been planned and directed at the highest level, namely, that of the Prime Minister himself, but I consider that it is not necessary to go into those details, the relevant fact in the present proceedings being that there were widespread allegations of massive rigging in the elections in favour of candidates of the Pakistan People's Party, and that these allegations find *prima facie* support from the orders and statements made by the then Chief Election Commissioner and the members of the Election Commission as mentioned above. These circumstances explain the genesis of the protest movement launched by the Opposition against Mr. Z. A. Bhutto and his Government.

As to the magnitude of the movement, certain salient facts have already been stated, namely, that Mr. Bhutto was obliged to call in the Armed Forces in aid of the civil power in a large number of cities and towns of Pakistan owing to the fact that the civil authorities were unable to cope with the disturbances.

As regards the casualties suffered and the damage caused to public and private property, Mr. Sharifuddin Pirzada, the learned Attorney-General, has invited us to take judicial notice of the submissions made before the Supreme Court by the former Attorney-General, *Mr.* Yahya Bakhtiar, who now appears for the petitioner Begum Nusrat Bhutto, on the 6th of June 1977. While arguing an appeal on behalf of the Federal Government against the decision of the Lahore High Court declaring as unlawful the imposition of local Martial Law by the Armed Forces of Pakistan in pursuance of a direction issued by the Federal Government under Article 245 of the Constitution, Mr. Yahya Bakhtiar gave certain facts and figures in justification of the action taken by the Federal Government. He stated that during the 2½ months of agitation 4653 processions were taken out by the public, including 248 processions by women, 92 by the members of the legal profession, 18 by Ulema or religious scholars, 248 by students and 57 by boys and children. According to Mr. Yahya Bakhtiar, these figures related to the period from March 14 to May 17, 1977.

Mr. Yahya Bakhtiar further informed the Court on that occasion that 241 civilians, belonging to both the political parties, were killed, and 1195 were injured, whereas nine members of the security forces were killed and 531 of them were injured. There were 162 acts of sabotage and arson, besides large scale destruction of property as follows:—

- Installations 18
- Shops 74

- Banks 58
- Vehicles on the road 1622 *(They did not include the vehicles burnt in the Republic Motors, Karachi)*
- Hotels 7
- Cinemas 11
- Offices (public & private) 56
- Railways, whether bogies were burnt or otherwise damaged 27

These losses and casualties, which according to Mr. Yahya Bakhtiar were unprecedented, appear to me to lend full support to the submission made by Mr. Sharifuddin Pirzada that the protest movement launched by the Opposition against the alleged massive rigging of the elections organised by Mr. Z A. Bhutto's Government had assumed very serious proportions indeed, comparable almost to the well-known agitation movements launched in the undivided India, like the Khilafat Movement, the Quit India Movement of 1942, etc.

Certain other aspects of the prevailing political and law and order situation may also be noticed. It has already been stated that as a result of the joint appeal made by the Prime Minister, Mr. Z. A. Bhutto and the top leadership of the Pakistan National Alliance on the 3rd of June 1977, the agitation was called off for the time being and the troops were withdrawn from their duties in aid of civil power. Mr. Yahya Bakhtiar submits that, in these circumstances, it would be wrong to say that the law and order situation in the country continued to be serious, or that there was any real danger of widespread disturbances or civil war as alleged by the respondent.

In controverting these submissions, Mr. Sharifuddin Pirzada has drawn our attention to the minutes of certain meetings of the Law and Order Committee, headed by Mr. Yahya Bakhtiar himself, in his capacity as the then Attorney-General The membership of this Committee included several Secretaries to the Federal Government, Heads of Civil Armed Forces, Heads of Intelligence Services, Chief of General Staff of the Pakistan Army, Chief Secretaries of all the four Provincial Governments and their Inspectors-General of Police. It was thus a very high-powered Committee.

Mr. Sharifuddin Pirzada first refers to the minutes of the meeting of this Committee held on the 11th of June 1977 (Annexure F. 33 of respondent's rejoinder), under the chairmanship of Mr. Yahya Bakhtiar. As the agitation had been temporarily called off on the 3rd of June 1977 on the commencement of the dialogue between the Government and the Pakistan National Alliance, the Committee noted that the general law and order situation in the country was reported to be satisfactory, but there was information that certain sections were intending to continue demonstrations of "belicosity" through processions in

Lahore, Karachi and Hyderabad in case the talks fail. Paragraph 4 of the minutes of this meeting states that "in reviewing the situation in the respective Provinces, Chief Secretaries and Inspectors-General of Police stated that, although law and order situation was near normal everywhere, all provinces were tense and could break out into serious trouble, worse in intensity than hithertofore, should the Government .....P.N.A. talks fail. The agitation this time may take the form of sabotage, arson and assassinations in addition to large scale demonstrations in the streets."

"It was generally agreed that the prospect, of maintaining law and order in the eventuality of a break-down of talks sere bleak."

In the minutes of the meeting of the Committee held on the 27th of June 1977 (Annexure F. 54 on p. 244), it is stated that:

"The political situation in the country was discussed in totality. Main features of the discussions are briefly stated as under:—

(i) ....
(ii) Exposition of political situation in the country by various officers attending the meeting revealed that the P. N. A. was gradually building up a tempo of agitation in anticipation of a break-down of talks.
(iii) Although different leaders of P. N. A. blew hot and cold, there remained cohesion and unity in their ranks, which quality was lacking in the P. P. P.
(iv) In Punjab the various forces of law and order including the Police might, at best, be able to buy time for the Government for a month or so but they would not be able to beat back a full-blooded agitation by **P.** N. A.
(v) The P. N. A. agitation would, this time, also take the form of sabotage and attempts on the lives of certain political leaders and Government officials.……
(ix) In Sindh the P.P.P. was in disarray. Clashes in Karachi and Hyderabad were inevitable whether there is a Government-P.N.A. accord or not."

Again the minutes of the meeting of the committee held on the 2nd of July 1977 (Annexure F. 55 on p. 248) recite that:--

"In giving a run-down of the law and order situation in the coun,ry, the D. I. B. expressed apprehension of large scale clashes between supporters of P.P.P. and P. N. A. during the forthcoming electioneering campaign. Mr. G. M. Khar's return to the P.P.P. fold and his open challenge to the P.N.A. is a grave provocation to the blooded veterans of the recent country-wide agitation. The path of clashes is, therefore, fraught with dangers, the least of these being demoralization of rank and file of the P.P.P. should there be a

single reverse on the street. In fact the latest trends of P. N. A. workers show that the desperate ones among them may no longer be amenable to party discipline.

Rumors are being spread that Mr. Khar went to Peshawar to acquire arms in large quantity for P.P.P. workers."

It needs to be mentioned that Mr. G. M. Khar, referred to in the minutes, noticed in the preceding paragraph, was at one time a very prominent member of the Pakistan People's Party, and mentioned as a possible successor by Mr. Z. A. Bhutto. He was appointed Governor of the Punjab and later Chief Minister of the Punjab, before falling out with Mr. Bhutto. After various vicissitudes in his fortune, he returned to the fold of the Pakistan People's Party, and was appointed by Mr. Bhutto as a Special Assistant to the Prime Minister as late as the 16th of June 1977. Immediately on appointment in this capacity, he started making belligerent speeches against the Opposition, which were given great prominence by Radio, Television and the official press. The reference in the minutes of the meeting of the Law and Order Committee is to these speeches made by Mr. G. M. Khar from the safety of the Prime Minister's Secretariat.

On the basis of the material thus brought to the notice of the Court by Messrs A. K. Brohi and Sharifuddin Pirzada, consisting mostly of official reports and decisions as well as contemporary reports in the official newspapers, I think the Court is entitled to take judicial notice of the following facts:—

(1) That from the evening of the 7th of March 1977 there were widespread allegations of massive official interference with the sanctity of the ballot in favour of candidates of the Pakistan People's Party;

(2) That these allegations, amounting almost to widespread belief among the people, generated a national wave of resentment and gave birth to a protest agitation which soon spread from Karachi to Khyber and assumed very serious proportions;

(3) That the disturbances resulting from this movement became beyond the control of the civil armed forces;

(4) That the disturbances resulted in heavy loss of life and property throughout the country;

(5) That even the calling out of the troops under Article 245 of the Constitution by the Federal Government and the consequent imposition of local Martial Law in several important cities of Pakistan, and the calling out of troops by the local authorities under tile provisions of the Code of Criminal Procedure

in smaller cities and towns did not have the desired effect, and the agitation continued unabated;

(6) That the allegations of rigging and official interference with elections in favour of candidates of the ruling party were found to be established by judicial decisions in at least four cases, which displayed a general pattern of official interference;

(7) That public statements made by the then Chief Election Commissioner confirmed the widespread allegations made by the Opposition regarding official interference with the elections, and endorsed the demand for fresh elections;

(8) That, in the circumstances, Mr. Z. A. Bhutto felt compelled to offer himself to a referendum under the Seventh Amendment to the Constitution, but the offer did not have any impact at all on the course of the agitation, and the demand for his resignation and for fresh elections continued unabated with the result that the Referendum Plan had to be dropped;

(9) That in spite of Mr. Bhutto's dialogue with the leaders of the Pakistan National Alliance and the temporary suspension of the Movement, against the Government, officials charged with maintaining law and order continued to be apprehensive tat in the event of the failure of the talks there would be a terrible explosion beyond the control of the civilian authorities;

(10) That although the talks between Mr. Bhutto and the Pakistan National Alliance leadership had commenced on the 3rd of June 1977, on the basis of his offer for holding fresh elections to the National and Provincial Assemblies, yet they had dragged on for various reasons, and as late as the 4th of July 1977, the Pakistan National Alliance leadership was insisting that nine or ten points remained to be resolved and Mr. Bhutto was also saying that his side would similarly put forward another ten points if the General Council of P.N.A. would not ratify the accord as already reached on the morning of the 3rd of July 1977.

(11) That during the crucial days of the dead-lock between Mr. Z. A. Bhutto and the Pakistan National Alliance leadership the Punjab Government sanctioned the distribution of fire-arms licenses on a vast scale, to its party members, and provocative statements were deliberately made by the Prime Minister's Special Assistant, Mr. G. M. Khar, who had patched up his differences with the Prime Minister and secured this appointment as late as the 16th of June, 1977; and

(12) That as a result of the agitation all normal economic, social and educational

activities in the country stood seriously disrupted, with incalculable damage to the nation and the country.

In the light of these facts, it becomes clear, therefore, that from the 7th of March 1977 onward, Mr. Z. A. Bhutto's constitutional and moral' authority to rule the country as Prime Minister stood seriously eroded. His Government was finding it more and more difficult to maintain law and order, to run the orderly ordinary administration of the country, to keep open educational institutions and to ensure normal economic activity. These conclusions find support from the declaration of loyalty to Mr. Z. A. Bhutto's Government made by the Chairman of the Joint Chiefs of Staff and the Chiefs of Staff of the Pakistan Army, Pakistan Navy and Pakistan Air Force on the 28th of April 1977. There has been some controversy between the parties as to whether Mr. Bhutto had requested the Service Chiefs for such a declaration, or it was voluntarily made by them on their own initiative, but the fact remains that the situation had deteriorated to such an extent that either Mr. Bhutto or the Service Chiefs themselves felt that a declaration of loyalty to Mr. Bhutto's Government was needed at that critical juncture so as to boost up his authority and to help in the restoration of law and order and a return to normal conditions. It is again a fact that even this declaration did not have any visible impact on the momentum of the agitation launched by the Opposition which continued unabated.

The Constitutional authority of not only the Prime Minister but also of the other Federal Ministers, as well as of the Provincial Governments was being repudiated on a large scale throughout the country. The representative character of the National and the Provincial Assemblies was also not being accepted by the people at large. There was thus a serious political crisis in the country leading to a break-down of the constitutional machinery in so far as the executive and the legislative organs of the State were concerned. A situation had, therefore, arisen for which the Constitution provided no solution. It was in these circumstances that the Armed Forces of Pakistan, headed by the Chief of Staff of the Pakistan Army, General Mohammad Ziaul Haq intervened to save the country from further chaos and bloodshed, to safeguard its integrity and sovereignty, and to separate the warring factions which had brought the country to the brink of disaster. It was undoubtedly an extra-constitutional step, but obviously dictated by the highest considerations of State necessity and welfare of the people. It was precisely for this reason that the declaration of Martial Law on the morning of the 5th of July 1977 was spontaneously welcomed by almost all sections of the population which heaved a sigh of relief after having suffered extreme hardships during the unprecedented disturbances spread over a period of nearly four months.

This seems to me to be the proper place for mentioning some of the salient points of the speech made by General Mohammad Ziaul Haq on the evening of

the 5th of July 1977 to explain the reasons for the action he had taken to overthrow the Government of Mr. Z. A. Bhutto and to dissolve the Federal and Provincial Legislatures. Addressing his countrymen, the General said:-

"The Army take-over is never a pleasant act because the Armed Forces of Pakistan genuinely want that the administration of the country should remain in the hands of the representatives of the people who are its real masters. Ti e people exercise this right through their elected representatives who are chosen in every democratic country through periodic elections.

The elections were held in our beloved homeland on March 7 last. The election results, however, were rejected by one of the contending parties, namely, the Pakistan National Alliance. They alleged that the elections had been rigged on a large scale and demanded fresh elections. To press their demand for re-elections, they launched a movement which assumed such dimensions that people even started saying that democracy was not workable in Pakistan. But, I genuinely feel that the survival of this country lies in democracy and democracy alone. It is mainly due to this belief that the Armed Forces resisted the temptation to take over during the recent provocative circumstances in spite of diverse massive political pressures. The Armed Forces have always desired and tried for the political solution to political problems. That is why the Armed Forces stressed on the then Government that they should reach a compromise with their political rivals without any loss of time. The Government needed time to hold these talks. The Armed Forces bought them this valuable period of time by maintaining law and order in the country. The Armed Forces were subjected to criticism from certain quarters for their role in aid of the civil administration, but we tolerated this criticism and ridicules in the hope that it was a passing phase. We hoped that when this climate of agitational frenzy comes to an end, the nation would be able to appreciate the correct and constitutional role of the Armed Forces and all fears would be allayed.

I have just given you a very broad-outline picture of the situation obtaining in the country. It must be quite clear to you now that when the political leaders failed to steer the country out of a crisis, it is an inexcusable sin for the Armed Forces to sit as silent spectators. It is primarily, for this reason that the Army, perforce had to intervene to save the country.

I would like to point out here that I saw no prospects of a compromise between the People's Patty and the P. N. A. because of their mutual distrust and lack of faith. It was feared that the failure of the P. N. A. and P.P.P. to reach a compromise would throw the country into chaos and the country would thus be plunged into a more serious crisis. This risk could not be taken in view of the larger interests of the country. The Army had, therefore,

to act as a result of which the Government of Mr. Bhutto has ceased, to exist; martial law has been imposed throughout the country; the National and Provincial Assemblies have been dissolved and the Provincial Governors and Ministers have been removed."

It will be seen that the explanation given by General Mohammad Ziaul Haq for the Army's intervention is a true reflection of the situation which had been developing over the past four months as a result of the Pakistan National Alliance agitation and repudiation of Mr. Bhutto's constitutional and moral authority as Prime Minister of Pakistan. 'The statement correctly brings out the necessity for the imposition of Martial Law. It is also clear that this sincere and unambiguous declaration of his objectives by the Chief Martial Law Administrator was a major factor in persuading the people of Pakistan to willingly accept the new dispensation as an interim arrangement to bridge the gap between the break-down of the previous administration and the induction of the new elected Government under the terms of the 1973 Constitution. The new arrangement, therefore, acquired its effectiveness owing to its moral content and promise of restoration of democratic institutions. I may add here that the willingness of the Judges of the superior Courts to take the new oath after the proclamation of Martial Law was also founded upon the same considerations.

It is strenuously contended by Mr. Yahya Bakhtiar that the accord between the Government and the Pakistan National Alliance was delayed by certain actions and attitudes of the Chief of the Army Staff as he insisted that the demands of the Pakistan National Alliance regarding the release of the accused persons facing trial before the Hyderabad Special Court (namely, Messrs Wali Khan and others) and regarding the withdrawal of the Army from Baluchistan should not be accepted by the Government at any cost. In support of this submission he refers us to certain averments made by Mr. Z. A. Bhutto in his written statement and rejoinder. Mr. Yahya Bakhtiar also submits that in spite of these hurdles created by the respondent, accord had in fact been reached on the morning of the 3rd of July 1977, and a formal accord would have been signed if the Army had not intervened on the night between the 4th and the 5th of July 1977.

I have already stated that in the present proceedings it is not our function to examine individual incidents or allegations, and for this very reason I have not taken into account the large number of allegations appearing in the written statement filed by Mr. A. K. Brohi regarding the abuse of power by Mr. Z. A. Bhutto or misuse of official authority and funds, as they are not directly germane to the circumstances culminating in the imposition of Martial Law. From the objective narration of events as they were happening from the 7th of March 1977 onwards, one is left in no doubt that the constitutional and moral authority of the National Assembly which had c ‘me into being as a result of the elections held on the 7th of March 1977, as well as of the Federal and Provincial Governments

formed thereafter as a result of mandates given to them by the National and the Provincial Assemblies had been continuously and forcefully repudiated throughout the country over a prolonged period of nearly four months, thus resulting in serious disruption in all spheres of national life. It can only be a matter of conjecture at this stage, whether an accord between the Government and the Pakistan National Alliance would have finally emerged if the Army had not intervened. From the material placed on the record, in the shape of deliberations of official committees, it has become abundantly clear that the situation was surcharged with possibilities of further violence, confusion and chaos.

Having found that the extra-Constitutional step taken by the Armed Forces of Pakistan was justified by requirements of State necessity and welfare of the people it is now necessary to examine its legal consequences.

The learned Attorney-General contends that the doctrine of necessity is fully applicable to the facts obtaining in the present case, and would validate that which was not sanctioned by the Constitution, as the country and the people could not be sacrificed at the alter of the letter of the Constitution, when its spirit had already been killed owing to the massive rigging of the elections indulged in by Mr. Z. A. Bhutto and the Government functionaries acting under his order ; that the doctrine of necessity is fully recognised by the Holy Qu'ran as well as by the juridical systems of Western countries; that it has also been accepted in several precedent cases by the Supreme Court of Pakistan; and that the authorities inducted into power on account of State necessity and the principle of *salus populi suprema lex* are fully entitled to administer the country and exercise supra-Constitutional powers for this purpose.

Mr. A. K. Brohi, appearing for the Federation of Pakistan has, however, adopted a somewhat different position, by contending that the question of the application of the doctrine of necessity does not at all arise in this case, as with the suppression or destruction of the old Legal Order, even this doctrine or concept has disappeared, and can no longer be regarded as part of the juridical system now obtaining in Pakistan. He submits that the doctrine of necessity can apply only if breaches take place within a given legal system like a man who has suffered a fracture is put in plaster or is given other clinical treatment to repair the damage, but no such repair is possible if he has already met his death. According to him all the cases cited at the Bar in support of the application of this doctrine presented a situation in which the Legal Order was intact but had suffered partial damage, a situation which was distinguishable from the present case where whole of the country was placed under Martial Law and the Constitution had been suspended with a view to restoring it to life after the holding of elections. Finally, Mr. Brohi contends that even if the doctrine were to apply, only the initial act of taking-over by the Army could be tested, but all subsequent actions could

not be judged in the light of this doctrine, as the Judges would have no objective tests to apply, and that in any case the Courts were now governed by the limitations placed upon them by the Laws (Continuance in Force) Order, 1977.

Mr. Yahya Bakhtiar, learned counsel appearing for the petitioner, submits that even if the Court were to come to the conclusion that the intervention by the Armed Forces had become necessary in the situation then prevailing the action would still remain in the nature of usurpation of power as held by the Supreme Court in *Asma Jillani's case;* and in such a situation only certain acts of the usurper could be condoned which fell directly within the ambit of the 1973 Constitution. He further submits that the Chief Martial Law Administrator being a usurper must be directed by the Court to hold elections as early as possible according to his original intention, and should not be permitted to prolong his rule indefinitely on the ground that he wants to enforce the principle of accountability against political leaders. Mr. Yahya Bakhtiar submits that even now it should be possible for the respondent to hold general elections before the end of the current year.

It seems to me that the view expressed by Mr. A. K. Brohi is not at all tenable. The question of considering the application of the doctrine of necessity has obviously arisen in this case as the Court is not persuaded that the military intervention provides its own legality simply for the reason that it has been accepted by the people of Pakistan, and has become effective in that sense. Even otherwise, if it is assumed that the old Constitution has been completely suppressed or destroyed, it does not follow that all the juridical concepts and notions of morality and justice have also been destroyed, simply for the reason that the new Legal Order does not mention anything about them. On the contrary, I find that the Laws (Continuance in Force) Order makes it clear that, subject to certain limitations, Pakistan is to be governed as nearly as may be in accordance with the 1973 Constitution and all laws for the time being in force shall continue. These provisions clearly indicate that there is no intention to destroy the legal continuity of the country, as distinguished strictly from the Constitutional continuity.

At this stage, it will be convenient to examine Mr. Yahya Bakhtiar's contention that the dictum in *Asma Jillani's case* as to usurpation of power fully applies even if the imposition of Martial Law is assumed to be justified by State necessity, and therefore, the utmost that the Court can do is to condone certain actions of the Martial Law Authorities, and no question of validation arises.

Having dealt with the untenability of Kelsen's theory and the decision of the Supreme Court in *Dosso's case,* Hamoodur Rahman, C. J. has observed on page 183 of the Report, that "unfettered by this decision I propose now to judge the validity of the events that took place on and from the 24th of March 1969", on which date Field Marshal Muhammad Ayub Khan, the then President of Pakistan,

wrote a letter to the Commander-in-Chief of Pakistan Army expressing his profound regret for coming to the conclusion that "All civil administration and constitutional authority in the country has become ineffective," and that "it is beyond the capacity of the Civil Government to deal with the present political situation, and the defence forces must step in". In these circumstances, he thought that there was no option left for him but "To step aside and leave it to the defence forces of Pakistan, which today present the only effective and legal instrument to take over full control of the affairs of the country." He accordingly called upon the Commander-in-Chief to perform his legal and constitutional responsibility to defend the country not only against external aggression but also to save it from internal disorder and chaos.

The learned Chief Justice has commented on this letter in the following words:

> "There was nothing either in this letter or in his broadcast (by Field Marshal Muhammad Ayub Khan 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."

His Lordship has further remarked that "It is clear that under the Constitution of 1962, Field Marshal Muhammad Ayub Khan had no power to band over power to any body. Under Article 12 of that Constitution he could resign his office by writing under 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 election had to be held within a period of 90 days to fill the vacancy." After examining the nature of Martial Law, the learned Chief Justice further observed that:

> "From this examination of the authorities I am 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 authorities and certainly does not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country.... ,
>
> It was not even a revolution or a military *coup d'état* in any sense of those terms..... Therefore, there can be no question that the military rule sought to be imposed upon the country by General Agha Muhammad Yahya Khan was entirely illegal."

Having thus held that the seizure of power by General Agha Muhammad Yahya Khan was illegal and amounted to an act of usurpation, the learned Chief Justice observed that:

"Recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disasterous consequences to the body politic and upset the social order itself, but I respectfully beg to disagree with the view that this is a doctrine for validating illegal acts of the usurper. In my humble opinion, this doctrine could be invoked in aid only if the Court has come to the conclusion that the acts of the usurper 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. I would call this a principle of condonation and not legitimization."

The other learned Judges agreed with this line of reasoning, and have apparently endorsed the four principles enunciated by the learned Chief Justice on page 207 of the Report for condoning certain categories of acts of the usurper.

Now, it will be seen that in *Asma Jillani's case* the Court has taken the view that the abrogation of the Constitution and assumption of all 4overnmental power by the, Army Commander-in-Chief was illegal because it was not justified by the circumstances in which he was called upon by the then President, Field Marshal Muhammad Ayub Khan to perform his legal and constitutional duty of restoring law and order. The Court took note of the fact that the Constitution itself contained a provision for the Speaker of the National Assembly to assume the office of Acting President, in case the sitting President wanted to resign or step aside, but this constitutional provision was frustrated by General Yahya Khan when he proclaimed himself to be the President of the country as well as the Chief Martial Law Administrator and abrogated the 1962 Constitution without there being any justification for the same. It is clear, therefore, that the conclusion that the act of General Muhammad Yahya Khan amounted to a usurpation of power flows directly from the circumstances obtaining in that case, and is not to be regarded as a general proposition of law to the effect that whenever power is assumed in an extra-Constitutional manner by an authority not mentioned in the Constitution, then it must amount to usurpation in all events. It would obviously be a question for determination in the circumstances of the particular case before the Court as to whether the assumption of power amounts to usurpation or not.

It is also clear from the various judgments delivered in *Asma Jillani's case* that the question of condonation arose only on the view that the Army Commander-in Chief was a usurper. The learned Attorney General is, therefore, right in saying that in a case where extra-constitutional intervention is justified by necessity, then different considerations arise from those which would be relevant for judging the acts of a usurper.

It has also to be noticed that the concept of condonation, as expostulated in

Asma Jillani's case, has relevance not only to the acts of a usurper, but also to a situation which arises when power has fallen from the hands of the usurper, and the Court is confronted with protecting the rights and obligations which may have accrued under the acts of the usurper, during the time he was in power. However, in the case of an authority, whose extra-Constitutional assumption of power is held valid by the Court on the doctrine of necessity, particularly when the authority concerned is still wielding State power, the concept of condonation will only have a negative effect and would not offer any solution for the continued administration of the country in - accordance with the requirements of State necessity and welfare of the people. It follows, therefore, that once the assumption of power is held to be valid, then the legality of the actions taken by such an authority would have to be judged in she light of the principles pertaining to the law of necessity.

As already stated, the learned Attorney General submits that the doctrine of necessity is recognised by Islam. He has in this connection, in the first place, drawn our attention to the injunctions contained in *Sura Baqar* and *Sura Al Nahal*, which are in almost identical terms and permit, if one is forced by necessity. without willful disobedience, nor transgressing due limits, that which is forbidden, namely, dead meat and blood and the flesh of swine and any food over which the name of other than Allah has been invoked. He also refers to certain observations appearing in Islamic Jurisprudence and Rule of Necessity and need by Dr. Muslehuddin, 1975 Edition, (pp. 60-63), Islamic Surveys by Coulson (p. 144), and the Muslim Conduct of State by Hamidullah (p. 33). These writings lend support to the maxim that "Necessity makes prohibited things permissible."

Mr. Sharifuddin Pirzada has next drawn our attention to certain Articles in the Majelle in support of his proposition. Article 17 enjoins that "Hardship causes the giving of facility; that is to say, difficulty becomes a cause of facility, and in times of embarrassment it becomes necessary that latitude should be shown." Article 21 says that "Necessities make forbidden things canonically harmless". Article 22 lays down those necessities are estimated according to their quantity, and Article 26 embodies the *maxim salus populi suprema lex* by saying that "To repel a public damage a private damage is preferred." He submits that although these maxims are directly relevant to cases of private necessity but the principle can certainly be extended to State necessity.

In support of his contention that the doctrine or law of necessity is recognised in most Western systems of Jurisprudence, and has also been followed in Pakistan, the learned Attorney-General has referred us to *Rex v. Strettois* (1779) reported in Vol. 21, Howell's State Trials; *Attorney-General of Duchy of Lancaster v. Duke of Devenshire* (1); the well-known case from Cyprus, *The Attorney-General of Republic v. Mustafa Ibrahim* (2); the well-known case from Nigeria reported as *E.O.*

Lakanmi and another v. Attorney-General, West Nigeria, Reference by H. E. The Governor-General (3) and of course observations appearing in the case of *Asma Jillani.*

He also relies upon the dissenting judgment delivered by Lord Pearce in the Rhodesian case, already referred to earlier in another context, namely, *Madzinibamuti v. Lardner-Burke (4).*

I find that in the Federal Court case, relied upon by the learned Attorney-General, namely, *Reference by H. E. Governor-General,* the implications of the law of necessity were discussed at some length by Muhammad Munir, C. J., and accordingly it will be useful to refer to it in the first instance.

After referring to several authorities including some of those now mentioned by Mr. Sharifuddin Pirzada, his Lordship stated, particularly relying on the address of Lord Mansfield in the proceedings against George Stretton and others that "the principle clearly emerging from this address of Lord Mansfield is 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 the 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 Chitty's statement that necessity knows no law, and the maxim cited by Bracton that necessity makes lawful which otherwise is not lawful." Having stated this principle, the learned Chief Justice, with whom the majority of the Judges agreed, proceeded to answer the questions referred to the Court by the Governor-General, and suggested certain arrangements for the betting up of a Constituent Convention, which he preferred to call Consistent Assembly, and for which there was otherwise no provision in the Government of India Act, which then served as the Constitution for Pakistan. The opinion recorded by the Federal Court in this case provides a striking example of the invocation of the law of necessity to validate certain extra-Constitutional measures dictated by the considerations of the welfare of the people and the avoidance of a legal vacuum owing to an earlier judgment of the Federal Court in *Usif Patel* v. *Crown* (1). The measures in question were validated and not sought to be condoned.

In the case from the Cyprus jurisdiction a more or less similar situation had arisen owing to the difficulty of the Turkish members of the Cyprus Parliament participating for the passing of a law regarding the functioning of the Supreme Court itself. In a very elaborate judgment, after surveying the concept of the doctrine *or* law of necessity as obtaining in different countries the Court came to the conclusion that the Cyprus Constitution should be deemed to include the doctrine of necessity in exceptional circumstances which is an implied exception to particular provisions of the Constitution, and this in order to ensure the very existence of the State. It was further stated that the following pre-requisites must

be satisfied before this doctrine can become applicable:-

(a) An imperative and inevitable necessity or exceptional circumstances;
(b) No other remedy to apply;
(c) The measure taken must be proportionate to the necessity; and
(d) It must be of a temporary character limited to the duration of the exceptional circumstances.

It was added that "A law thus enacted is subject to the control of this Court to decide whether the aforesaid pre-requisites are satisfied, that is, whether there exists such a necessity and whether the measures taken were necessary to meet it".

It seems to me that this summing up of the law of necessity by one of the learned Judges of the Cyprus Supreme Court embodies the true essence of the doctrine, and provides useful practical guidelines for its application.

Reference may now be made to the case of *E.O. Lakatani* in which the question of the validity of a Decree issued by the Federal Military Government of Nigeria came up for examination. Nigeria was being governed by the Republican Constitution of 1963, when a section of the Army rebelled in different parts of the country on the 15th of January, 1966. Two regional premiers were put to death and the Prime Minister of the Federation and one of his Ministers were captured and taken to an unknown destination; also some senior members of the Army were killed. The Council of Ministers met without the Prime Minister and decided to hand over the administration of the country to the Armed Forces before the situation got worsened. The Acting President of Nigeria himself announced the handing over of the administration of the country to the Armed Forces. This announcement was followed by a speech by the General Officer Commanding the Nigerian Army in which he declared that he had accepted the invitation of the Acting President to form the interim military Government, and had suspended certain parts of the Constitution relating to the office of President, the establishment of Parliament and of the office of the Prime Minister, and certain offices relating to the Regions.

The Supreme Court of Nigeria took the view that these events did not amount to a revolution, and that the situation was distinguishable from that obtaining in *Dosso's case* in Pakistan, where the President had issued a proclamation anulling the existing Constitution. It stated that the Federal Military Government of Nigeria was not a revolutionary Government, as it had made it clear before assuming power that the Constitution of the country will remain in force excepting certain sections which were being suspended. They went on to say that "We have tried to ensure that the country is governed by the Constitution and Decrees which, from time to time, are enacted when the

necessity arises and are then supreme when they are in conflict with the Constitution. It is clear that the Federal Military Government decided to govern the country by means of a Constitution and Decrees. The necessity must arise before a Decree is passed ousting any portion of the Constitution. In effect, the Constitution still remains the law of the country and all laws are subject to the Constitution excepting as far as by necessity the Constitution is amended by a Decree. This does not mean that the Constitution of the country ceases to have effect as a superior norm. From the facts of the taking-over, as we have pointed out that the Federal Military Government is an interim Government of necessity concerned in the political cauldron of its inception as a means of dealing with the situation which has arisen and its main object is to protect lives and property and to maintain law and order."

The learned Judges of the Supreme Court went on to observe that "by recognizing the fact that there is a doctrine of necessity, we do not alter the law but apply it to facts as they do exist." They then proceeded to examine the validity of the impugned Decree by posing the question whether it went beyond the requirements or demands of the necessity of the case. They came to the conclusion that the Decree in question was nothing short of a legislative judgment, an exercise of judicial power and, therefore, *ultra vires* and invalid under the Constitution which envisaged a clear separation of judicial and legislative functions of the State.

This judgment supports the learned Attorney-General on the point that necessity validates actions which would otherwise not be lawful; but it also spells out the principle that all actions taken in pursuance of necessity could be tested on that ground by way of judicial review. The learned Attorney-General submits that the second part of the judgment was not accepted by the Federal Military Government of Nigeria, which proceeded to pass certain other Decrees to nullify the effect of the verdict of the Supreme Court. In support of this submission, he drew our attention to an article entitled "The Search for a Grundnorm in Nigeria—*The Lakanmi's case*", written by a Nigerian Jurist, named Abiola Oji. The author of the Article is critical of the judgment of the Supreme Court as he would have preferred the Court to apply Kelsen's theory regarding the legality of a successful revolution. On the question of judicial review a very pertinent observation appearing in this Article is that the Supreme Court had placed itself in the wrong by striking down a Decree which was intended to forfeit stolen public money. That may have been the reason for the reaction of the Military Government to the decision of the Court, but this reaction does not necessarily mean that the Court was in error on the plane of legal and judicial principles.

I would also like to observe that, as I am not fully conversant with the political situation and the legal traditions of Nigeria, it is not possible for me nor

is it desirable to offer any comments on the propriety of the action taken by the Federal Military Government of Nigeria in the wake of the judgment of the Supreme Court in the case we are discussing. I can, however, say about our own situation, namely, that the Supreme Court of Pakistan, as at present constituted, does not feel itself under any inhibition or restraint in taking a view in this case which appears to be dictated by the highest considerations of law, justice, equity and good conscience, and I also see no reason why the Martial Law Administration should not accept the decision of this Court in the same spirit. I, therefore, venture to say that reference to the aftermath of the judgment of the Nigerian Supreme Court is completely misconceived and irrelevant to the legal questions we are considering here.

Reverting now to the observations made by the Court in *Asma Jillani's case* on the doctrine of necessity, I find that Hamoodur Rahman, C. J. has referred with approval to the decision in the Cyprus case as well as to the formulation of the doctrine by Lord Pearce, who delivered the dissenting judgment in the Privy Council in the Rhodesian case, already referred to. In that judgment, Lord Pearce had indicated three limitations for the validation of acts of the Smith Government, namely, *(i)* So far as they are directed to and reasonably required for ordinary orderly running of the State; *(ii)* So far as they do not impair the rights of citizens under the lawful Constitution; and *(iii)* So far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful sovereign. The learned Chief Justice adopted these principles but preferred to treat them as basis of condonation and not legitimization, as he was dealing, *ex post facto* with the acts of the usurper.

A review of the concept of the law of necessity, as recognized in various jurisdictions, clearly confirms the statement made in this behalf by Muhammad Munir, C. J. in *Reference by H. E. Governor-General* (1) to the effect that an act which would otherwise be illegal becomes legal if it is done *bona file* under the 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. The principle has been reiterated by the Supreme Court in *Asma Jillani's case* with the difference that where the Court is dealing with the acts of a usurper, such acts may be condoned and not validated by the application of the law of necessity. It seems to me, therefore, that on facts, of which we have taken judicial notice, namely, that the imposition of Martial Law was impelled by high considerations of State necessity and welfare of the people, the extra-constitutional step taken by the Chief of the Army Staff to overthrow the Government of Mr. Z. A. Bhutto as well as the Provincial Governments and to dissolve the Federal and the Provincial Legislatures stands validated in accordance with the doctrine of necessity.

The question now arises as to what is the extent and scope of the powers

which the Chief Martial Law Administrator may exercise during the temporary period for which he has taken control of the administration in Pakistan. It is contended by the learned Attorney-General that once the take-over is validated on the principle of necessity, then the Chief Martial Law Administrator would have the right to govern the country in any manner he thinks best, and the Courts in Pakistan will be bound by the provisions of the Laws (Continuance in Force) Order, 1977, which must henceforth be treated as a supra-Constitutional instrument, binding all authorities in Pakistan. He seeks to reinforce this submission by referring to the implications of Martial Law as described in Corpus Juris Secundum Vol. 93, and "Salmond on Jurisprudence", p. 190, 11th Edition.

According to the definition given on p. 115 of the Corpus Juris Secundum, Martial Law, or more appropriately martial rule, is the temporary government by military force and authority of territory in which, by reason of the existence of war or public commotion, the civil government is inadequate to the preservation of order and the enforcement of law. The definition continues to add that "In strictness it is not law at all, but rather a cessation of all municipal law as an incident of *jus belli* and because of paramount necessity, it depends, for its existence, operation and extent, on the imminence of public peril and the obligation to provide for the general safety. It is essentially a law or rule of force, a purely military measure, and in final analysis is only the will of the Officer Commanding the Military Force. As the offspring of necessity, it transcends and displaces the ordinary laws of the land, and it applies alike to military and non-military persons and is exercisable alike over friends and enemies, citizens and aliens." The authors also state that "The validity of Martial Law is always a judicial question" and the establishment of Martial Law does not itself oust or suspend civil authority or jurisdiction, but is rather a recognition that the civil authority had been suspended or has broken down as a result of the conditions inducing the proclamation of martial rule.

According to Salmond, there are three kinds of martial law, namely, (i) the law for the discipline and the government of the Army itself; or (ii) the law by which the Army in time of war governs foreign territory in its military occupation outside the realm; or (iii) the law by which in time of war the Army governs the realm, which is in derogation of civil law, so far as required by military necessity and the public safety. In the present context, we are concerned with the third and last kind of Martial Law. After discussing various legal opinions as to the legality of such a Martial Law, the author says that "It is sufficient to say that the better opinion would seem to be that even within the realm itself the existence of the state of war and of national danger justifies in law the temporary establishment of a system of military government and military justice in derogation of the ordinary law of the land, in so far as this is reasonably deemed necessary for the public safety.... with the acts of military

authorities done in pursuance of such a system the civil Courts of law will not concern themselves in time of war. In short, the legal basis of Martial Law in this third sense is simply the common law doctrine of necessity."

In an earlier, part of this judgment, I have stated that it was not necessary to discuss at any length the various kinds of Martial Law, for the reason that the legal character of the change which has taken place in Pakistan was not dependent upon the name given to the new regime, as the authorities overthrowing Mr. Z.A. Bhutto could have governed by decree or by Martial Law Regulations etc. once they had seized power by an extra-Constitutional step. In spite of the reference made by the learned Attorney-General to the textbooks mentioned above, I am of the view that the definitions given here are irrelevant. We are not dealing with a situation contemplated in the statements relied upon by the learned Attorney-General; rather with a situation of a more fundamental character, Where the constitutional machinery has broken down or its authority has been eroded by factors of a political nature. The disturbances which ensued as a consequence were not the direct cause; they were only the result of a fundamental malady which was of a constitutional nature. It is also to be noticed that the Proclamation of Martial Law and the speech made by the Chief Martial Law Administrator on the evening of the 5th of July 1977 clearly speak of the civilian President continuing in office under the Constitution, and they also contemplate that the civil Courts including the High Courts and the Supreme Court shall, continue to function as before, subject to certain limitations spelt t ut in the Laws (Continuance in Force) Order, to which I shall advert later. I mention these facts to show that it would be inappropriate to judge the present situation by reference to classical statements as to the state of war contemplated by textbook writers in relation to martial law.

In order to determine the true nature of the change, we must examine, as already stated, all the surrounding circumstances including the motivation of those who have brought about the change and the objectives declared by them as justifying the change. 1 would like to clarify here that the use of what may be described as "the declaration of intent" is not to be construed in the limited sense in which the preamble to a statute or even the Constitution may be looked at for ascertaining its true meaning. We are still in the realm of ascertaining the true legal character of the abrupt political change which has been brought about by means of an extra-Constitutional measure, and for this reason the declaration of intent is relevant for this higher purpose, and is not to be confused with the limited use which may be made of a preamble to a formal statute.

I have already referred in another context, to the speech made by the Chief Martial Law Administrator on the evening of the 5th of July 1977 to explain the reasons for his take-over of the administration. He stated *inter alio* that:

"But the Constitution has not been abrogated. Only the operation of certain parts of the Constitution has been held in abeyance. Mr. Fazal Elahi Chaudhry has very kindly consented to continue to discharge his duties as President of Pakistan as heretofore under the same Constitution. I am grateful to him for this. To assist him in the discharge of his national duties, a four-member Military Council has been formed. The Council consists of the Chairman, Joint Chiefs of Staff, and Chiefs of Staff of the Army, Navy and the Air Force.

I will discharge the duties of the Chief of Army Staff and Chief Martial Law Administrator. Martial Law Orders and instructions as and when required will be issued under nay orders."

He further stated on this occasion that:

"I want to make it absolutely, clear that neither I have any political ambitions nor does the Army want to be detracted from its profession of soldiering. I was obliged to step in to till in the vacuum created by the political leaders. I have accepted this challenge as a true soldier of Islam. My sole aim is to organise free and fair elections which would be held in October this year. Soon after the polls power will be transferred to the elected representatives of the people. I give a solemn assurance that I will not deviate from this schedule. During the next three months my total attention will be concentrated on the holding of elections and I would not like to dissipate my powers and energies as Chief Martial Law Administrator on anything else."

As to the place of Judiciary, he stated that;

"It will not be out of place to mention here that 1 hold the Judiciary of the country in high esteem. I will do my best to refrain from doing anything which is likely to restrict the power of the Judiciary. However, under unavoidable circumstances, if and when Martial Law Orders and Martial Law Regulations are issued, they would not be challenged in any Court of law."

It will be seen that the declared objectives of the imposition of Martial Law are to create conditions suitable for the holding of free and fair elections in terms of the 1973 Constitution, which was not being abrogated, and only certain parts of which were being held in abeyance, namely, the parts dealing with the Federal and the Provincial executives and Legislatures. The President of Pakistan was to continue to discharge his duties as heretofore under the same Constitution. Soon after the polls the power is to be transferred to the elected representatives of the people. It is true that owing to the necessity of completing the process of

accountability of hollers of public offices, the holding of elections had to be postponed for the time being but the declared intention of the Chief Martial Law Administrator still remains the same, namely, that he has stepped in for a temporary period and for the limited purpose of arranging free and fair elections so as to enable the country to return to a democratic way of life.

In the presence of these unambiguous declarations, it would be highly unfair and uncharitable to attribute any other intention to the Chief Martial Law Administrator, and to insinuate that he has not assumed power for the purposes stated by him, or that he does not intend to restore democratic institutions in terms of the 1973 Constitution. Such being the case, in my opinion, the remarks made by De Smith in his book "Constitutional and Administrative Law, to which reference has already been made earlier, apply with full force to the situation prevailing at present in Pakistan, namely:

> "In some situations where unconstitutional action has been taken by person wielding effective political power, it is open to a judge to steer a middle course. He may find it possible to ask that the framework of the pre-existing order survives but the deviation from these norms can be justified on the grounds of necessity. Th. principle of necessity, rendering lawful what would otherwise be unlawful is not unknown to English law; there is a defence of necessity, albeit of uncertain scope, in criminal law and in constitutional law, the application of martial law is but an extended application of this concept. But the necessity must be proportionate to the evil to be averted, and acceptance of the principle does not normally imply total abdication from judicial review or acquiescence in the supersession of the Legal Order; it is essentially a transient phenomenon."

As a result, the true legal position which, therefore, emerges is:-

(i) 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;

(ii) That the President of Pakistan and the superior Courts continue to function under the Constitution. The mere fact that the Judges of the superior Courts have taken a new oath after the Proclamation of Martial Law, 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 Martial Law;

(iii) That the Chief Martial Law Administrator, having validly assumed power by means of an extra-Constitutional step, in the interest of the State and for the welfare of the people, is entitled to perform all

such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity, namely:

(a) All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it;

(b) All acts which tend to advance or promote the good of the people;

(c) All acts required to be done for the ordinary orderly running of the State; and

(d) All such measures as would establish or lad to the establishment of the declared objectives of the proclamation of Martial Law, namely, restoration of law and order, and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution;

(iv) That these acts, or any of them, may be *per*formed or carried out by means of Presidential Orders, Ordinances, Martial Law Regulations, or Orders, as the occasion may require; and

(v) That the superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law Authorities, if challenged, in the light of the principles underlying the law of necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance.

This last point needs a little explanation. In the body of this judgment opinions of certain textbook writers and contemporary jurists have been quoted in support of the proposition that the Courts established under the pre-existing Legal Order continue to have the power and jurisdiction to adjudicate upon the validity and effectiveness of the new Legal Order. As I have held that the new Legal Order is only for a temporary period, and for a specified and limited purpose, and does not seek to destroy the old Legal Order but merely to hold certain parts thereof in abeyance or to subject it to certain limitations on the ground of State necessity or on the principle of *salus populi suprema lex,* the superior Courts continue to remain the Judges of the validity of the actions of the new regime in the light of the doctrine of necessity, for the new regime then represents not a new Legal Order, but only a phase of constitutional deviation dictated by necessity.

There is yet another, and a stronger reason for holding that the power of

judicial review continues. The 1973 Constitution provides for a clear trichotomy of powers between the executive, legislative and judicial organs of the State. However, owing to reasons of necessity, the executive and the legislative power now stands combined in one authority, for the reason that these two organs of the State had lost their constitutional and moral authority in the circumstances arising since the 7th of March 1977, but no such considerations arose in regard to the judicial organ of the State. Accordingly, on no principle of necessity could powers of judicial review vested in the superior Courts under the 1973 Constitution, be taken away.

Next, even if for any reason the principle or power of judicial review embodied in the relevant provisions of the 1973 Constitution be held not to be available under the new dispensation, the fact remains that the ideology of Pakistan embodying the doctrine that sovereignty belongs to Allah and is to be exercised on his behalf as a sacred trust by the chosen representatives of the people, strongly militates against placing the ruler for the time being above the law, and not accountable to any one in the realm. Muslim rulers have always regarded themselves as being accountable to the Courts of the land for all their actions and have never claimed exemption even from personal appearance in the Courts. The Courts of Justice are an embodiment and a symbol of the conscience of the Millat (Muslim community), and provide an effective safeguard for the rights of the subjects. On this principle as well, the power of judicial review for judging the validity of the actions of the Martial Law Authorities must continue to remain in the superior Courts.

Lastly, the Court is bound to take note of the fact that already several instances have been brought to its notice where the ordinary civil rights of the people are being interfered with by the subordinate Martial Law Authorities even though the laws of the land, which have been kept alive under the Laws (Continuance in Force) Order, 1977, make full provision for their adjudication. In some cases, interference has occurred even when the contending parties had already been litigating in the civil Courts regarding the same disputes. The necessity which justified the Proclamation of Martial Law did not arise owing to the failure of the Courts to adjudicate on these matters. Such matters must, therefore, continue to fall outside the purview of the Martial Law Authorities, and the only remedy to the citizens against any such encroachment can be by way of judicial review in the superior Courts.

I now proceed to examine the provisions of the Proclamation as well as of the Laws (Continuance in Force) Order, 1977, in the light of the principles just stated. There has been considerable argument at the Bar as to the correct description of these legal instruments. Mr. Sharifuddin Pirzada would like to describe them as supra-Constitutional instruments, for, in his opinion, they override the 1973 Constitution and are binding on every one by virtue of their own force. As I am

not persuaded to accept this last contention for the reason already stated, namely, that the power of the Court to test the validity of all actions of the Chief Martial Law Administrator on the touchstone of necessity remains, I would accordingly describe these instruments as being of an extra-Constitutional nature so as to conform to the description of the action by virtue of which the Chief Martial Law Administrator has assumed the administration of Pakistan.

For facility of reference, the Proclamation and the Laws (Continuance in Force) Order, 1977, as originally promulgated may be reproduced here:—

"PROCLAMATION

Whereas, I, General Mohammad Zia-ul-Haq, Chief of the Army Staff, have proclaimed Martial Law throughout Pakistan and assumed the office of the Chief Martial Law Administrator, hereby order and proclaim as follows:

(A) The Constitution of the Islamic Republic of Pakistan shall remain in abeyance;
(B) The National Assembly, the Senate and the Provincial Assemblies shall stand dissolved;
(C) The Prime Minister, the Federal Ministers, Ministers of State, Advisers to the Prime Minister, the Speaker and Deputy Speaker of the National Assembly and the Provincial Assemblies, the Chairman and Deputy Chairman of the Senate, the Provincial Governors, the Provincial Chief Ministers and the Provincial Ministers shall cease to hold office;
(D) The President of Pakistan shall continue in Office; and
(E) The whole of Pakistan will come under Martial Law.

THE LAWS (CONTINUANCE IN FORCE) ORDER, 1977
C. M. L. A. ORDER NO 1 OF 1977

In pursuance of the Proclamation of the fifth day of July 1977 and in exercise of all powers enabling him in that behalf, the Chief Martial Law Administrator is pleased to make and promulgate the following Order:

1.—(i) This Order may be called the Laws (Continuance in Force) Order, 1977.
(ii) it extends to the whole of Pakistan.
(iii) It shall come into force at once.

2.--(i) Notwithstanding the abeyance of the provisions of the Constitution of the Islamic Republic of Pakistan hereinafter referred to as the Constitution, Pakistan shall, subject to this Order and any order made by the President and any regulation made by the Chief Martial Law Administrator, be governed as nearly

as may be in accordance with the Constitution

(ii) Subject as aforesaid, all Courts in existence immediately before the commencement of this Order shall continue to function and to exercise their respective power and jurisdictions:

Provided that the Supreme Court or a High Court shall not have the power to make any order of the nature mentioned in Article 199 of the Constitution against the Chief Martial Law Administrator or a Martial Law Administrator or any person exercising powers or jurisdiction under the authority of either.

3.— The Fundamental Rights conferred by Chapter 1 of Part 11 of the Constitution, and all proceedings pending in any Court, in so far as they are for the enforcement of any of those rights shall stand suspended.

3.— (i) The President shall act on and in accordance with the advice of the Chief Martial Law Administrator.

(ii) The Governor of a Province shall act on, and in accordance with, the advice of the Martial Law Administrator appointed by the Chief Martial Law Administrator for the Province.

4.- (i) No Court, tribunal or other authority shall call or permit to be called in question the proclamation of the fifth day of July, 1977, or any Order or Ordinance made in pursuance thereof or any Martial Law Regulation or Martial Law Order.

(ii) No judgment, decree, stay order or process whatsoever shall be made or issued by a Court or tribunal against the Chief Martial Law Administrator or any Martial Law Authority exercising powers or jurisdiction under the authority of the Chief Martial Law Administrator.

5.— (i) Notwithstanding the abeyance of the provisions of the Constitution, but subject to any order of the President or regulation made by the Chief Martial Law Administrator, all laws, other than the Constitution, and all Ordinances, Orders-in-Council, Orders made by the President, Rules, by-laws, regulations, notifications and other legal instruments in Pakistan or any part thereof, or having extra-territorial validity shall, so far as may be and with such adaptation as the President may see fit to make, continue in force until altered, amended or repealed by competent authority

(ii) In clause (1) "in force", in relation to any law, means having effect as law whether or not the law has been brought into operation.

6.— Subject to clause (2) of Article 3, the powers of a Governor shall be those which he would have had the Federal Government directed him to assume on its behalf all the functions of the Government of the province under the provisions of Article 232 of the Constitution.

7.— (i) An Ordinance promulgated by the President or by the Governor of a province shall not be subject to the limitation as to its duration prescribed in the Constitution.

(ii) The provisions of clause (1) shall also apply to an Ordinance which was in force immediately before the commencement of this Order.

8.— All persons who, immediately before the commencement of this Order, were in the service of Pakistan as defined in Article 260 of the Constitution and those persons who immediately before such commencement were in office as Judge of the Supreme Court or a High Court or Auditor-General, shall continue in the said service on the same terms and conditions and shall enjoy the same privileges, if any.

9.— Any provision in any law, providing for the reference of a detention order to a Review Board shall be of no effect.

10.— The Proclamation of Emergency referred to in Article 280 of the Constitution, as in force immediately before the commencement of this Order, shall continue in force."

It will be seen that the Proclamation embodies and describes in legal form, the extra-constitutional action which the Chief of the Army Staff has taken on the ground of necessity. The proclamation must, therefore, be held valid for the same reason; in fact, the entire controversy dealt with in the preceding pages has concerned this Proclamation and nothing else.

A perusal of the provisions of the Laws (Continuance in Force) Order also shows that they are primarily designed to give effect to the purposes of the Proclamation. As however this Order is an offspring of necessity, the superior Courts continue to have the power of judicial review, notwithstanding anything to the contrary contained in this Order, to test the validity of its provisions and any action taken there under, in the light of the principles regulating the application of the law and doctrine of necessity, as already set out earlier.

I now turn to the examination of the last question arising in this case, namely, whether the Fundamental Rights can still be enforced in spite of the prohibition contained in clause (3) of Article 2 of the Laws (Continuance in Force) Order, viz., that "The Fundamental Rights conferred by Chapter I of Part II of the Constitution, and all proceedings pending in any Court, in so far as they are for the enforcement of any of those rights shall stand suspended." The contention of Mr. Yahya Bakhtiar is that the right to enforce the Fundamental Rights could be suspended only during the continuance of an Emergency under Article 232 of the Constitution, and that too in terms of an Order made by the President under clause (2) of Article 233 thereof, but the Emergency already proclaimed in

Pakistan has since been revoked by the respondent with effect from the 15th of September 1977, with the result that the Fundamental Rights stand revived. Messrs A. K. Brohi and Sharifuddin Pirzada, however, contend that in spite of the revocation of Emergency, the Fundamental Rights remain suspended under Article 2(3) of the Laws (Continuance in Force) Order, 1977, which is independent of the Emergency contemplated in Article 232 of the Constitution.

It may be stated that the Emergency proclaimed by General Agha Mohammad Yahya Khan, as President of Pakistan, on the 23rd of November 1971, was continued in force under Article 2-0 of the 1973 Constitution. It was varied by a Proclamation on the 21st of April 1977 so as to include internal Emergency under Article 236 of the Constitution, and it was revoked altogether on the 15th of September 1977. An order was made on the 15th of August 1973 by the President under Article 233(2) of the Constitution suspending the right to enforce certain specified Fundamental Rights, but this Order was rescinded on the 14th of August 1974.

The right to enforce Fundamental Rights was again suspended under Article 245 of the Constitution with effect from the 21st of April 1977, in respect of areas where the Armed Forces had been called out in aid of civil power under the directions of the Federal Government. The present position, however, is that the Emergency having been revoked altogether with effect from the 15th of September 1977, there is no operative order in the field in terms of the Constitution, suspending the right to enforce Fundamental Rights.

The question, therefore, is whether the provision embodied in this behalf in clause (3) of Article 2 of the Laws (Continuance in Force) Order is valid in the light of the principles governing the application of the law of necessity. One of the conditions stated in this behalf is that the Chief Martial Law Administrator is entitled to perform all acts and take such legislative measures which are in accordance with, or could have been made under the 1973 Constitution. Now, the Constitution does permit the suspension of the right to enforce Fundamental Rights in case of an Emergency of the nature contemplated in Article 232 thereof. Clause (I) of this Article says that "If the President is satisfied that a grave Emergency exists in which the security of Pakistan or any part thereof is threatened by war or external aggression or by internal disturbances beyond the power of a Provincial Government to control, he may issue a Proclamation of Emergency." If, therefore, it is found that the situation of the kind contemplated by this provision of the Constitution exists in Pakistan, then the Chief Martial Law Administrator would be entitled to make an order of the kind which could be made under clause (2) of Article 233 of the Constitution suspending the right to enforce Fundamental Rights.

It has already been seen that the conditions culminating in the Proclamation of

Martial Law on the 5th of July 1977, were so grave that the very existence of the country was threatened, that chaos and bloodshed, was apprehended and there was complete erosion of the constitutional authority of the Federal Government, leave alone that of the various Provincial Governments. The situation had indeed deteriorated to such an extent that it justified an extra-Constitutional step, resulting in the suspension of certain parts of the Constitution itself by the Armed Forces. Such being the case, the situation was obviously at least of the kind contemplated by clause (I) of Article 232 of the Constitution. In the circumstances, the Chief Martial Law Administrator was justified in providing in clause (3) of Article 2 of the Laws (Continuance in Force) Order that the right to enforce Fundamental Rights shall be suspended. It was clearly an order which could have been made under the l93 Constitution. No exception can, therefore, be taken to the validity of this provision.

As the present petition under clause (3) of Article 184 of the Constitution is intended for the enforcement of certain Fundamental Rights of the detenus, it is not maintainable for the reason that the Fundamental Rights stand validly suspended since the 5th of July 1977, under clause (3) of Article 2 of the Laws (Continuance in Force) Order, 1977. On this view of the matter, it is not necessary for this Court to examine the contention that the Martial Law Order No. 12 under which detentions have been ordered is not valid, or that the detentions are *mala fide*.

The final position as emerging from this somewhat lengthy discussion of the various questions arising in this case may briefly be summed up as follows:-

(i) That the legal character and validity of any abrupt political change, brought about in a manner not contemplated by the pre-existing Constitution or Legal Order, cannot be judged by the sole criterion of its success or effectiveness, as contemplated by Kelsen's pure theory of law. Not only has this theory not been universally accepted, or applied, it is also open to serious criticism on the ground that, by making effectiveness of the political change as the sole condition or criterion of its legality, it excludes from consideration sociological factors or morality and justice which contribute to the acceptance or effectiveness of the new Legal Order. The legal consequences of such a change must, therefore, be determined by a consideration of the total *milieu* in which the change is brought about, including the motivation of those responsible for the change, and the extent to which the old Legal Order is sought to be preserved or suppressed.

(ii) That in any case the theory of revolutionary legality can have no application or relevance to a situation where the breach of legal continuity is of a purely temporary nature and for a specified limited purpose. Such a phenomenon can more appropriately be described as one of constitutional deviation rather than

of revolution

(iii) That examined in this light, the Proclamation of Martial Law on the 5th of July 1977, appears to be an extra-Constitutional step necessitated by the complete break-down and erosion of the constitutional and moral authority of the Government of Mr. Z. A. Bhutto, as a result of the unprecedented protest movement launched by the Pakistan National Alliance against the alleged massive rigging of elections to the National Assembly, held on the 7th of March 1977. It was a situation for which the Constitution provided no solution, and the Armed Forces had, therefore, to intervene to save the country from further chaos and bloodshed, to safeguard its integrity and sovereignty, and to separate the warring factions which had brought the country to the brink or disaster ;

(iv) That the imposition of Martial Law, therefore, stands validated on the doctrine of necessity, and the Chief Martial Law Administrator is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity;

(v) That it has also become clear from a review of the events resulting in the culmination of Martial Law, and the declaration of intent made by the Chief Martial Law Administrator, that the 1973 Constitution still remains the supreme law, subject to the condition that certain parts thereof have been held in abeyance on account of State necessity; and the President of Pakistan as well as the superior Courts continue to function under this Constitution. In other words, this is not a case where the old Legal Order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a temporary period and for a specified and limited objective, namely, the restoration of law and order and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of the restoration of democratic institutions under the 1973 Constitution;

(vi) That, accordingly, the superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law Authorities if challenged in the light of the principles underlying the law of necessity as set out in this judgment. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance; and

(vii) That the provisions contained in clause (3) of Article 2 of the Laws (Continuance in Force) Order, 1977, suspending the right to enforce Fundamental Rights are valid for the reason that the situation prevailing in the country was

obviously of such a nature as to amount to an Emergency contemplated by clause (1) of Article 232 of the Constitution, and the right to enforce Fundamental Rights could, therefore, be legitimately suspended by an order of the kind which could have been made under clause (2) of Article 233 of the Constitution.

As a result, the present petition fails and is hereby dismissed. However, it will be for the detenus, if so advised, to move the High Courts concerned under Article 199 of the Constitution.

Before parting with this judgment, it is necessary to refer to certain misgivings and apprehensions expressed by Mr. Yahya Bakhtiar, learned counsel for the petitioner, to the effect that the postponement of the elections scheduled to be held on the 18th of October 1977, has cast a shadow on the declared objectives of the Chief Martial Law Administrator. After seeking instructions from his client, Mr. A. K. Brohi has informed the Court that the Chief Martial Law Administrator intends to hold elections as soon as the process of the accountability of the holders of public offices is completed, and the time factor depends upon the speed with which these cases are disposed of by the civil Courts concerned. The learned Attorney-General has stated at the Bar that, in his opinion, a period of about six months is needed for this purpose, and thereafter it will be possible to hold the elections within two months.

While the Court does not consider it appropriate to issue any directions, as suggested by Mr. Yahya Bakhtiar, as to a definite time-table for the holding of elections, the Court would like to state in clear terms that it has found it possible to validate the extra-Constitutional action of the Chief Martial Law Administrator not only for the reason that he stepped in to save the country at a time of grave national crisis and constitutional break-down, but also because of the so1emu pledge given by him that the period of constitutional deviation shall be of as short a duration as possible, and that during this period all his energies shall be directed towards creating conditions conducive to the holding of free and fair elections, leading to the restoration of democratic rule in accordance with the dictates of the Constitution. The Court, therefore, expects the Chief Martial Law Administrator to redeem this pledge, which must be construed in the nature of a mandate from the people of Pakistan, who have, by and large, willingly accepted his administration as the interim Government of Pakistan.

In the end, we would like to express our deep appreciation for the valuable assistance rendered by the learned Attorney-General for Pakistan, Mr. Sharifuddin Pirzada, and the learned counsel for the parties, namely, Mr. Yahya Bakhtiar for the petitioner and Mr. A. K. Brohi for the respondent, in the decision of this case, which has raised difficult and complicated questions of constitutional law.

WAHEDUDDAN ANMAD, J.—I have had the advantage of reading the judgment of my Lord the Chief Justice. I am in respectful agreement with the reasoning and conclusions reached by him. I cannot add anything further usefully to the contribution already made by him.

I was a party to the judgment of this Court in *Asma Jillani's case* and I am of the considered view that the principles laid down in the above case are not applicable to the facts of the present case. In the circumstances of the present case the principles enunciated in the *Reference by His Excellency The Governor-General* will have to be invoked for solving the present constitutional dead-lock.

MUHAMMAD AFZAL CHEEMA, J.— I have had the privilege of going through the elaborate judgment proposed to be delivered by my Lord the Chief Justice and am in respectful agreement with the views expressed and the conclusions reached therein. However, I feel tempted to make a few observations in order to highlight one or two aspects of my Lord's judgment.

It needs hardly to be mentioned that this case besides involving determination of extremely complicated constitutional issues having far-reaching implications and a direct and immediate impact on the entire nation which is anxiously awaiting its decision, also calls for the resolution of the conflict of views expressed by this Court in *Dosso's case* and *Asma Jillani's case* or reaffirmation of one of them. Both the judgments having been widely published and internationally commented upon.

Mr. Brohi's arguments were mainly directed towards the defence of the Kelsonian theory and if accepted would have in substance led to the restoration of this Court's dictum in *Dosso's case.* It may be observed with respect that Islam being the ideological foundation of the State of Pakistan any man-made legal theory divorced from morality and coming into conflict with the Divine Law of Islam would be wholly irrelevant for our purposes to the extent of its repugnancy to the latter. Unlike a pure theory of law, Islamic principles are subjectively centred round morality and are aimed at the establishment of an orderly and peaceful moral society by taking an equally, pragmatic view in the matter of their application and placing the security safety and welfare of the people about everything else. The doctrine of necessity is an inevitable outcome of this realistic approach and has been recognized by Islam both in the individual as well as the collective field.

The object of legal principles is to ensure proper regulation of human conduct and behavior to the benefit of the individual and the society. Islam has permitted and condoned a departure from their strict observance and application in cases of extreme necessity and compulsion. The principle of public welfare *(Salus populi est supremo lex)* follows as a necessary corollary from this. There are several

instances when in a peculiar situation strict compliance with the Qur'anic injunction was found to result in greater hardship and mischief and likely to create more complications the remedy proving worse than the disease, the Holy Prophet or the Caliphs did not insist on its enforcement and temporarily suspended it on ground of expediency. The doctrine of necessity is not, therefore, a juristic concept of the West but is of Islamic origin Navin, been based on and deduced from the following Verses of the Holy Qur'an :—

(1) Al-Baqar II-173
He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name bath been invoked besides that of God. But if one is forced by necessity, without lawful disobedience, nor transgressing due limits, then he is guiltless, for God is oft-forgiving Most Merciful.

(2) Al-Maida V=4
Forbidden to you (for food) are dead meat, blood, the flesh of swine, and that on which hath been invoked the name of other than God . . . .but if any one is forced by hunger, with no inclination to transgression, God is indeed oft-forgiving, Most Merciful.

(3) Al-Inam VI=119
He has explained to you in detail what is forbidden to you except under compulsion of necessity.

(4) Al-Nahal = 115
He has only forbidden you dead meat and blood and the flesh of swine ..... but if one is forced by necessity nor transgressing due limits, then God is oft-giving, Most Merciful.

The Muslim exegesists and jurists have also deduced the above principle from Verse No. 106 of Sura XVI: 'Any one who after accepting faith in God utters unbelief except under compulsion remaining firm in faith .....

It would be abundantly clear from this that in order to save his skin, a Muslim has been permitted even to go to the extent of a verbal denial of his belief and making a sacrilegious utterance.

These Verses found further support from the following traditions of the Holy Prophet (peace be upon him)

This in substance means that the principal objective of avoiding harm or damage should always be kept hi view and never lost sight of.

In these two traditions of which one is reported from *Ummi Kalsoom* and the

other from *Asma Binte Yazid*, the Holy Prophet condoned misstatements of fact made *bonafide* during *(i)* war, *(ii)* for effecting compromise amongst the people in general, and *(iii)* for bringing about reconciliation between husband and wife in particular.

It would not be out of place to refer in context to two important historical incidents. One is that the Holy Prophet prohibited the cutting of hands for an established theft during battle and the other is that of suspension of the imposition of this *Hadd* by Caliph Omar during the year of famine.

From the above verses, traditions and incidents the Muslim exegeaists and doctors formulated the following juristic principles

- Necessities make permissible acts otherwise, prohibited.
- Harm or damage has to be done away with,
- Specific harm or damage can be tolerated in order to obviate general harm or damage.
- While confronted with two-evils one should choose the lesser evil.
- The obviation of a greater harm may be sought through a lesser harm.
- Removal of evils is more important than achievement of good and shall take precedence over it as the Sharia pays more heed to the observance of prohibitions than compliance with affirmative commandments.

According to Imam Al-Ghazali the doctrine of necessity could be legitimately invoked for the preservation of *(i)* religion *(ii)* life (iii) reason, *(iv)* progeny and *(v)* property.

The *raison d'être* of the doctrine of individual necessity applies with full force to the doctrine of State necessity which is nearly an extension of the former and is invoked in graver situations of National importance and comprehension.

In Verse 59 of *Sura Al-Sana*, the Muslims have been enjoined to submit to Allah, His messenger and those in authority from amongst them.

The obedience of the latter is not, however, absolute and unqualified but is subject to the condition that the commands of the ruler should be in conformity with and not in violation of the Islamic injunctions so much so that even the allegiance to the Holy Prophet has been made contingent on this very condition as would be clear from Verse 12 of Sura Al-Mutahana.

They shall not disobey thee in any just matter.

This is further clear from the following two traditions of the Holy Prophet (peace be upon him):

(1) Whoever disobeys Allah shall not be obeyed.
(2) There is no obedience of the creature in disobedience of the Creator.

On assumption of the Office of Amir-ul-Momineen, Abu Bakar, the First Caliph addressed the audience in the following words: -

Obey me so long as I obey God and His messenger and if I disobey them don't obey me.

It is thus abundantly clear that submission to the authority of the ruler and obedience to his commands does not extend to illegal and un-Islamic directives or orders. During the Umayyad and the Abbasid Caliphates when the Muslims had to deal with unjust and tyrannical rulers, the Muslim doctors were often confronted with the problem as to whether the community should unquestionably submit to the authority of these rulers, or whether in view of the above injunctions and traditions the people were under an obligation to rise and revolt against them. It would not be out of place to refer in this context to two technical expressions used by the Muslim jurists. One is Iman Mutalib a ruler who captures political power and takes effective control of the administration of the country. In fact Dar-ul-Mahtar refers to three modes of appointment of the Imam: *(i)* By the allegiance of the leading personalities; *(ii)* By nomination of the predecessor; and (iii) By capturing political power by force *i. e.* Imam Mughalib. According to the Hanfis such a ruler could be accepted on the doctrine of necessity. The other expression is *Khurooj* to rise in revolt against the ruler of the time who is unjust, tyrannical and habitually disobeys the Islamic injunctions. It would be interesting to note that Imam Abu Hanifa had used the technical expressions of Imam Bil-Haq and Imam Bil-Fehl which are respectively synonymous with *de jure* and *de facto,* the two oft-repeated terms with which we are so familiar. In fact one is deeply impressed by the most reasonable and realistic attitude of the Muslim jurists in regard to this very sensitive and complicated issue. While on the one hand great emphasis is laid on the maximum tolerance of an unjust ruler in the wider interests of public order, prevention of chaos, and bloodshed, such considerations become irrelevant when he openly transgresses the limits of Allah, and is unjust and tyrannical. Taking a balanced view Imam Abu Hanifa adopted a middle of the road course and did not subscribe to the extremist stand taken by the Moatazzilites and the Khawarij on one hand and the reactionary Murhiba on the other. He held that *Khurroj* against an unjust ruler was not lawful so long as there was no interference with the orderly running of the Government, people were free to offer prayers, perform pilgrimage and the Courts of law continued to function properly. His own conduct in supporting the *Khurroj* of Zain Bin Ali grandson of Imam Hussain and

brother of Imam Baqar in the first instance and subsequently of Muhammad Bin Abdullah in 145 Hijra against the Abbasid Caliph Al-Mansoor is also very significant. This balanced attitude of Imam Abu Hanifa was based on a rational interpretation of the two apparently divergent traditions of the Holy Prophet. In one of these emphases was laid on the imperativeness of the obedience of Iman Mutalib a *de facto* ruler and it was observed that people were under an obligation to obey him even if he were an ugly Abyssinian with chopped off nose provided he captured power with a *bona fide* intention of delivering the Nation from the clutches of an unjust tyrant and himself observed the limitats of Allah. In the other the Muslims have been enjoined to rise in revolt against an unjust ruler and if killed in action have been described as martyrs (Shaheed).

Coming now to the circumstances of the instant case, my Lord the Chief Justice has fuilly explained the factual position as it obtained before the Army took over on 5-7-1977. The Court could not fail to take judicial notice of the crisis which developed by way of protest against the alleged rigging of the General Elections when the entire nation rose against the Government of Mr. Bhutto. There was complete break-down of law and order, several precious lives were lost and the administration of the major cities had to be handed over by him to the Armed Forces which too were unable to cope with the situation and restore normalcy. The allegations of huge purchases of arms and their large-scale distribution amongst the members of the PPP in the country with a view to prepare them for civil war do not appear to have been specifically denied in the rejoinders filed by the petitioner or by Mr. Bhutto himself. It would not therefore, be too much to hold that the country was on the verge of a conflagration. The Constitution did not contemplate such a situation nor did it offer a resolution of the crisis. It was in this background that respondent No. 1 moved in, for a temporary period and with the limited object of restoring normalcy and holding free and fair Elections as repeatedly declared by him. The doctrine of necessity is, therefore, attracted with full force in these circumstances as explained by my Lord the Chief Justice. I fully endorse his Lordship's exposition of the constitutional position in regard to the scope of the validity of the actions of the new Regime and the conditions and limitations attached thereto.

MUHAMMAD AKRAM, J.- I have the advantage of having gone through the leading judgment proposed by my Lord, the Chief Justice for announcement. I have no hesitation in fully agreeing with his masterly analysis of the facts, exposition of the legal tangles and conclusions so lucidly recorded by him in this case involving very difficult and complicated questions of great constitutional importance. I would, however, respectfully like to dilate upon some of the legal aspects of Hans Kelsen's Pure Theory of Law (positivism), the implications of the Martial Law currently in-force in the country and the doctrine of necessity, invoked before us, merely to supplement what has already fallen from his pen.

Mr. A. K. Brohi, appearing for the Federation of Pakistan, with his great erudition and philosophy that he brought to bear into this case, has done his best to analyze and explain this theory and its implications at length before us. I therefore, in fairness to him it is necessary in the first instance to enter upon a detailed analysis of this theory as advocated before us.

The positivist movement started with the beginning of the nineteenth century. I represented a reaction against the *a priori* method of thinking that characterized the preceding age. Prevailing theories of Natural Law shared the common feature of turning away from the realities of actual law in order to discover in nature or reason principles of universal validity. Actual laws were then explained or condemned according to these canons. But the positivists believed that law as it is actually laid down (positivism) has to be kept separate from the law that ought to be. They made the distinction between "what the law is" from "what the law ought to be".

Bentham (1748 1832) and Austin (1790-1859) were the protagonists of the British theory of positivism with their firm belief in the separation of law and morals. Thus according to them laws even if morally outrageous, were still laws. After them Professor H. L. A. Hart is regarded as the leading contemporary representative of British positivism. He defends the Positivist School of Jurisprudence from many of the criticisms which have been levied against its insistence on distinguishing the law that "is" from the Jaw that "ought" to be.

But the pure theory of law propounded by Professor Hans Kelsen (1881-1973) marks the refined development to date of analytical positivism. He argued that a theory of Law must deal with law as actually laid down, not as it ought to be and it must be shorn of and free from all variable factors such as ethics, politics, sociology, history etc. It must, in other words, be "pure" (rein). Knowledge of law, according to Kelsen, meant knowledge of "norms"; and a norm is a proposition in hypothetical form. Jurisprudence consists of the examination of the nature and organization of normative propositions. It includes all norms created in the process of applying some general norm to a specific action. According to Kelsen, a dynamic system is one in which fresh norms are constantly being created on the authority of an original, or basic norm, a "Grundnorm". Around these points, Kelsen unfolded his picture of law. It appears to him as a hierarchy of norms with the "Grundnorm" forming the apex of the pyramid. If a new fact or event is observed which fails to conform to a scientific "law", then that "law" has to be modified to include it. It is a cardinal feature of Kelsen's theory that laws consist of "ought" propositions. The prescription of sanction imparts law-quality to a norm, or putting it in another way, "Law is the primary norm, which stipulates the sanction."

According to Kelsen, in every legal order, no matter with what proposition of law one begins, a hierarchy of "oughts" is traceable back to some initial, fundamental "ought" on which the validity of all the others ultimately rests. This is the Grundnorm, the basic or fundamental or apex norm. The Grundnorm need not be the same in every legal order, but a Grundnorm of some kind there will always be, whether, *e.g.* a written Constitution or will of a dictator. The Grundnorm is not the Constitution, it is simply the presupposition demanded by theory, that this Constitution ought to be obeyed. Therefore, the Grundnorm is always adapted to the prevailing state of affairs. The Grundnorm only imparts validity to the Constitution and all other norms derived from it. In Great Britain, for instance, the entire legal order is traceable to the propositions that the enactments of the Crown in Parliament and judicial precedents ought to be treated as "law". According to Kelsen every rule of law derives its validity from some other rule standing behind it. But the Grundnorm has no rule behind it. Its validity has therefore to be assumed for the purpo[s]e of theory. A rule is valid, not because it is, or is likely to be, obeyed by those to whom it is addressed, but by virtue of another rule imparting validity to it. The validity of each individual rule does depend on the effectiveness of the legal order as *a* whole, of in case it is "by and large" effective.

It is of the utmost importance that the Grundnorm should secure for itself a minimum of effectiveness, i. e., a certain number of persons who are willing to abide by it and it should command *a* minimum of effectiveness. If a Grundnorm ceases to drive a minimum of support, it ceases to be the basis of the legal order, and any other proposition which does obtain support will replace it. Such a change in the state of affairs is said to amount to a "revolution" in law.

From the above premises, Hans Kelsen in his General Theory of Law and State (pages 118-119), proceeds on to the discussion of the subject of "Change of the Basic Norm" or the Grundnorm. In this connection he observed: -

> "It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. if they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order, it is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, a norm

> endowing the revolutionary government with legal authority, if the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm."

It is this passage in Kelsen which forms the basis of the decision by the Supreme Court of Pakistan in the *State v. Dosso* and which is the corner stone of the entire argument elaborately advanced before us by Mr. A. K. Brohi for the respondent in support of the Proclamation of Martial Law and the regime with its new Legal Order that has allegedly become effective and has supplanted the old Legal Order.

Dias in his Jurisprudence (Fourth Edition), has adversely criticized Kelseu's theory. He observed that the Grundnorm is a key concept in his theory but that it raises many difficulties. Some writers have pointed out, with a hint of criticism, that in whatever way effectiveness of the Grundnorm is measured Kelsen's theory has ceased to be "pure" at this point. For effectiveness would seem to depend on those very sociological factors which he so vehemently excluded from his theory of law if, then, the Grundnorm upon which the validity of all other norm depends is tainted with impurity, it is arguable that the others are similarly tainted. Another line of attack on the claim to purity is that Kelsen's whole scheme is an *a priori* one dependent on empirical observations for confirmation. He offered it as a "theory of Interpretation", which implies that it is not a description but a model and thus evaluative in function. This criticism touches, not the theory, but his claim to its purity. According to him the effectiveness of the legal order as a whole is prerequisite to the validity of each single rule in it. If as seems clear, some inquiry into political and sociological factors has to precede, or at least is implicit in, the adaptation of a particular Gruodnorm as the criterion of validity and if the validity of every part of the system is dependent upon the continued effectiveness of the whole, then on his own showing the study of jurisprudence should include the study of the social environment. Dias has further pointed out that Kelsen's picture is that of a legal order viewed only in the present time-frame, which explains his exclusion of moral, sociological and other considerations from the question of the validity of any rule.

Dias has emphasised that the effectiveness of a legislative medium is not a condition of its own "law quality" but only a factor which influences Courts to accept and continue accepting it. He further observed that a situation may be supposed in the midst of a revolution when the old order has gone and no new order has effectively replaced it. In such a lacuna the Court can continue to apply as "laws" the enactments of the old order even though it is no longer effective. The label "laws" attaches to whatever the Courts are prepared to accept as such.

Even if the old order is ineffective and there is a new, effective order, the Courts may still treat the old order as "legal" and the new as "illegal" or simply "*de factor*". Not only is the legality of a revolutionary regime independent of effectiveness, but it also has jurisdictional (spatial) and temporal dimensions. Thus, although the Rhodesian regime was eventually accepted as legal by the Rhodesian Courts, British Courts have still not done so. In *Adams v. Adams (A. G. intervening),* a British Court refused to recognize a divorce decree pronounced by a Rhodesian Judge who had not taken the oath under the 1961 Constitution. This shows that legality depends on the jurisdiction in which the matter is considered, quite apart from effectiveness. The temporal dimension is brought out by a decision of the Pakistan Supreme Court in *Jilani v. Government of Punjab,* which rejected effectiveness altogether as the criterion of legality.

In conclusion, according to Dias the effectiveness of the legislative authority is not a condition of the validity either of "laws" or even of itself. It is a factor which in time induces the Courts to accept such authority. Nor is it the only such factor. Others are farce propaganda and packing the Bench with Judges who will comply, all of which only reinforce the contention that the legality of the law-constitutive medium only comes about when the Courts accept, or are made to accept it.

These are some of the formidable arguments leveled by Dias, not merely at Kelsen, bat at positivism in general. Kelsen gave no criterion by which the minimum of effectiveness is to be measured. All he maintained was that the Grundnorm imparts validity as long as the "total legal order" remains effective, or, as he later put it, "by and large" effective. As to this it may be asked, in the first place, for how long effectiveness must be maintained for the requirement to be satisfied. Kelsen drew no distinction between effectiveness, which makes people obliged to obey, and effectiveness which makes them feel under an obligation to do so.

Dias maintains that Grundnorm is a very weak point in Kelsen's theory. It does not apply in revolutionary situations, in which case it ceases to be a "general theory"; or, if general it ceases to be true. In settled conditions it teaches nothing new; in revolutionary conditions, where guidance is needed, it is useless, for the choice of a Grundnorm is not dictated inflexibly by effectiveness but is a political decision, as Kelsen himself admitted.

Lord Lloyd in his Introduction to Jurisprudence (Third Edition), Dn page 269, in all fairness, while criticising Hans Kelsen's theory, has at the same time paid compliments to him and said that there is perhaps, no single writer in this century who has made a more illuminating analysis of the legal process than him, by his lucid exposition. But according to Lord Lloyd the Basic norm is a very troublesome feature of Kelsen's system. We are not clear what sort of norm this really is not, nor what it does, nor indeed, where and how to find it. In his latest

formulation he tells us that it is not "positive", but is presupposed in juristic thinking and is "metalegal" only. Professor Goodhart was doubtful of the value of an analysis which did not explain the existence of the basic norm on which the whole system was founded. According to Lord Lloyd it may be argued that Kelsen's theory, being description of legal science, can only indicate the role of the jurist and can in no way assist the Judge. This would suggest that those Judges who relied upon Kelsen's theory to solve past-revolution legal problems were laboring under the self-deception that he would assist them. The analysis of Kelsen's theory has raised some of the difficulties inherent in his basic nom. His theory is only useful to the legal scientist and not the Judge and only in a residual case, and, further, that the kingpin of the whole structure rests upon the shaky foundation of a loose concept of "effectiveness".

Gustov Radbrach was a German thinker who had lived through the Nazi regime and reflected upon its evil manifestations in the legal system. He was a protagonist of the positivist doctrine until the Nazi tyranny, but he was converted by his experience of the environments round him. In 1944 a woman, wishing to be rid of her husband, denounced him to the authorities for insulting remarks he had made about Hitler while home on leave from the German army. Toe wife was under no legal duty to report his acts, though what he had said was apparently in violation of statutes making it illegal to make statements detrimental to the Government of the Third Reich or to impair by any means the military defence of the German people. The husband was arrested and sentenced to death, apparently pursuant to these statutes, though he was riot executed but was sent to the front. In 1949 the wife was prosecuted in a West German Court for an offence described as illegally depriving a person of his freedom (rechtswidrige Freiheitsbe-raubung). This was punishable as a crime under the German Criminal Code of 1871 which had remained in force continuously since its enactment. The wife pleaded that her husband's imprisonment was pursuant to the Nazi statutes and hence that she had committed no crime. The Court of appeal to which the case ultimately came held that the wife was guilty of procuring the deprivation of her husband's liberty by denouncing him to the German Courts, even though he had been sentenced by a Court for having violated a statute, since, to quote the words of the Court, the statute "was contrary to the sound conscience and sense of justice of all human beings." This reasoning was followed in many cases which have been hailed as a triumph of the doctrines of natural law and as signaling the overthrow of positivism. The bitter experiences in these cases have thus made a great dent into the Pure Theory of Law (See 71 Harward Law Review 591 at pages 618-619).

Similarly a number of authors in their articles in some of the leading law journals (1970) 28 Cambridge Law Journal 75 by Dias ; (1968) 26 Cambridge Law Journal 223 by Dias; 1971 Cambridge Law Journal 103 by Harris; 1963 Modern Law Review 34 by Julius Stone; and 1967 Modern Law Review 157 by Erle have

exposed the weaknesses in this theory.

In addition to these in *Miss Asma Jillani* v. *The Government of the Punjab* this Court has held that Kelsen'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. He was propounding a theory of law as a "mere jurists' proposition about law". He did not lay down any legal norm or legal norms which are "the daily concerns of Judges, legal practitioners or administrators".

Moreover, as observed by my Lord, the Chief Justice, ours is an ideological State of the Islamic Republic of Pakistan. Its ideology is firmly rooted in the Objectives Resolution with emphasis on Islamic laws and concept of morality. In our way of life we do not and cannot divorce morality from law. Therefore the Pure Theory of Law is not suited to the genesis of this State. It has no place in our body politics and is unacceptable to the Judges charged with the administration of justice in this country.

In the light of the above discussion, before us Mr. A. K. Brohi, learned counsel for the respondent, undertook in vain to salvage *Dosso's case* after it had been effectively overruled in *Miss Asma Jillani's case* by rejecting Kelsen's Pure Theory of Law.

MARTIAL LAW AND NECESSITY

S. A. De Smith in his invaluable treatise on the "Constitutional and Administrative Law" (Chapter 22) has observed that when an unlawful assembly is proceeding to the execution of its purpose, it constitutes a riot. If it goes on to execute that purpose in a violent manner which alarms a person of reasonable courage in the neighbourhood, it constitutes a riot. Akin to riot is the common-law offence of causing an affray by fighting or threats of force giving rise to alarm in the neighbourhood. Troops may be called in to disperse rioters in the last resort; they should normally act only under the direction of the competent civil authorities, and the degree of force they use must be proportionate to the evil to be averted.

In dealing with the problems of "National Emergencies" (Chapter 23) the learned author further observed that the military officer on the spot may have to make a snap decision whether to use force, and if so, how much, to quell a riot. Judges and writers have insisted many times over that soldiers are entitled, indeed obliged at common law, to use all necessary force, including deadly violence in the last resort, to disperse rioters who are doing serious and extensive damages to property. But when riot passes into rebellion or guerilla warfare, emphases shift and other principles intrude. The civil power primarily

responsible for containing and suppressing an uprising must be the Government in office. The military authorities will be obliged to act in its support.

If the situation moves a stage farther and the civil authorities become incapable of governing because of large-scale insurrection, powers to do whatever may be needed to restore peace, may be handed over to (or assumed by) the military authorities. This is a new situation, different both in degree and kind. A state of Martial Law will then exist and the powers of the General Officer Commanding the Forces will, so it is usually thought, become non-justifiable, and for the time being, absolute, subject only to consultation with the civil power. According to the learned author martial law has been aptly described as "a peculiar system of legal relations" which arises in time of civil war or insurrection, or, it may be added, invasion. It is a state of affairs, not a settled body of rules, though rules and orders will be promulgated and enforced by the military authorities as they see fit.

Again Martial Law can be used to describe an entirely different kind of situation—one where military officers overthrow the legitimate government, establish a new regime and proclaim a state of Martial Law. The phenomenon is all too familiar in many countries. It has not arisen in Britain in modern times and the constitutional law books of that country are therefore, silent on its legal consequences. Briefly, one can say that the Judges and officials are not obliged to recognize the validity of such a proclamation, any more than they are obliged accept any other revolutionary *coup d'état,* but that if they defy the mailed fist, they cannot expect to retain office for long. If they do recognize the suppression of the old order as valid, successful revolution has begotten its own legality.

In this connection the learned author has further observed that a state of Martial Law may be introduced by or without a proclamation. A proclamation purporting to introduce a state of Martial Law is of no legal effect in itself; Martial Law is justified only by paramount necessity. If the ordinary Courts are still sitting, it seems that they have jurisdiction to determine whether "a state of war" (not necessarily war in the international sense, but a state of affairs requiring military 'pacification' by the imposition of Martial Law) exists in an area where they normally have jurisdiction. In determining this question they will give heavy weight to the opinion of the local military commander, but his opinion is not binding on them. If they decide that a 'state of war' does exist, then (according to the present weight of legal opinion) they should decline to review the legality of anything done by the military authorities in the purported discharge of military responsibilities till, in their independent judgment, the 'state of war' has terminated.

In the case of *D. F. Marais* v. *The General Officer Commanding the Lines of Communication and the Attorney-General of the Colony* in South Africa an application was made on behalf of Marais, a civilian subject of the Crown, for his immediate release from military custody, on the ground that his arrest and imprisonment were in violation of the fundamental liberties to which subjects of His Majesty were entitled. But his application was dismissed by the Supreme Court of the Cape of Good Hope, *inter alia,* relying on an affidavit of the gaoler concerned to the effect that he was detained by an order or the military authorities for contravening certain Martial Law Regulations though owing to military exigencies he was not prepared at the time to disclose the charges against him. The Privy Council refused the petition for special leave to appeal from the order of the Supreme Court with the observations that: -

> "The truth is that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities.
>
> Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established.
>
> It may often be a question whether a mere riot, or disturbance neither so serious nor so extensive as really to amount to a war at all has not been treated with an excessive severity, and whether the intervention of the military force was necessary; but once let the fact of actual war be established, and there is an universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of military authorities."

Coke, Rolle and Hale were of the opinion that time of peace is when the civil Courts are open, and that when they are closed it is time of war. The decision in *Marais's case,* however, shows that this test is not conclusive and that existence of a state of war in a given district is compatible with the continued functioning for some purposes of the civil Courts within the district. This decision gave rise to four articles on martial law in (1902) 18 Law Quarterly Review 117, 113, 143 & 152. H. Erie Richards in his article on pages 133/142 has mentioned that this decision has met with some criticism even from those whose legal vision is not coloured by their political sympathies. In the context of the above findings the learned author remarked that "it must be left to Courts to determine whether any particular act be or be not in excess of necessity of the occasion in question in each case." He further observed that in times of emergency, falling short of war, the Court may decide "whether there was sufficient necessity to justify any suppression of the ordinary law and indeed there would be no security for the subject at any time if it was left to the uncontrolled discretion of the military to take such action at their pleasure. But when once war is declared and is raging in the country, that

question is no longer open to doubts that it is then necessary to interfere with the ordinary law to some extent....."

The learned author, in offering his further comments on the judgment in *Marais's case* observed that it has been contended that the existence of war in the view of the law does not depend on the actual fact of whether war is raging in the country or not, but is to be determined by the fact of whether the Courts continue to sit; an artificial rule which does not commend itself, apart from authority, to reason. The necessity for taking action which infringes on rights of property or liberty cannot depend on the fact that the Courts continue or do not continue to sit; it depends on the necessity created by the presence of an enemy in the country. The military indeed can at their will prevent or allow the continuance of the sittings of the Courts. The real test is the necessity of the occasion in each case. In summing up the learned author remarked that: "War is self-evident, and the fact that the Courts may continue to sit cannot prevent the existence of war."

According to another article on "*the case of Marais"* contributed by Cyril Dodd (pages 143-151) martial law arises from the State necessity, and is justified at the common law by necessity, and by necessity alone—a necessity which the Courts may at any time inquire into, so far at any rate as they reasonably can without injury to the State arising from the disclosure of matters contrary to the public interest and endangering the public safety. The learned author observed that in *Marais's case* when the petition came before the Privy Council the chief argument, indeed the only argument really relied on, was that there was a fixed principle that, if the ordinary Courts were open, civilians must be dealt with by them if charged with offences, and not by military persons or tribunals; that a place where the Courts open must be regarded as a place in which there is peace, and that when the Courts are open it is 'time of peace' for all legal purposes and in all Courts of law. This contention, in his opinion was undoubtedly supported by a considerable show of authority, and would appear in more ancient times to have been generally held as a true statement of the law. But this supposition was based on fiction rather than on reality. In the opinion of the learned author it was not to be expected that a Committee of the Privy Council should feel bound by any such general rule to the extent of being compelled to hold, contrary to actual fact, that war did not exist, simply because where the war in fact existed the Courts were sitting. It distinctly puts an end to the ancient rule, that because for some purposes the Courts are open at a place, that place must be held to be one where peace exists, no matter what the actual fact may be. According to the learned author in the case of *Marais* even the limited proposition that the authorities are not responsible to the Courts sitting, during the war, would appear too wide. It would seem to depend upon the question of whether the Courts are able to sit for all purposes, and are allowed by the military power to do so, and upon whether the matter is one they can, without danger to public safety and the proper prosecution of the war, investigate and deal with.

Likewise Frederick Pollock in his article (pages 152-158) of the Law Quarterly Review has commented on the Privy Council judgment in *Marals's case* and in his opinion the only point decided then was that the absence of visible disorders and the continued sitting of Courts are not conclusive evidence of state of peace. In the fourth article (pages 117-132) W. S. Holdsworth, on the authority of Cockburn, C. J. observed that martial law of the kind, as a distinct code of rules, does not exist. It is merely the application of the common law principle "that life may be protected and crime prevented by the immediate application of any amount of force which, under the circumstances may be necessary." It allows an amount of force exactly proportionate to the necessities of the case. This is the view most strongly supported, especially by the more recent authorities.

The American views on the subject are contained in a copy of a letter of Pennsylvania Assembly to Governor Robert Marris, November 11, 1755 under the heading "The National Security Interest and Civil Liberties" published in (1971-72) 85 Harward Law Review, 1133/1326. In this a separate section is devoted to the subject of "The Exercise of Emergency Powers" to cope with disorders of sufficient magnitude and intensity assuming national importance and threatening the functioning of the Government. In such cases safeguards of judicial review are necessary as a check against any abuse of power. But in this connection the standard laid down by the Supreme Court of America for reviewing the use of emergency measures has varied widely. In *Ex Parte Milligan,* which involved emergency measures taken by President Lincoln during the Civil War, the Court verged on taking the extreme view that Government action in emergencies is subject to the same constitutional limitations as are actions taken in normal times. But in contrast to this, the Supreme Court appears to have gone to the other extreme in *Moyer* v. *Peabody,* a 1909 case reviewing actions taken by *a* State Governor pursuant to a proclamation of martial law during a violent labour dispute. The Court seemed to view the choice of what particular measures to take during an emergency as an exercise of political power with which the Courts should not interfere as long, at least, as the choice was made in good faith. Moreover, the Court held "that the Governor's declaration that a state of insurrection existed is conclusive of the fact." Thus, Moyer came to stand for the proposition that the executive has nearly complete discretion in its exercise of emergency powers, both with respect to declaring the emergency and to choosing the means of meeting it.

This stance, however, granted an excessive degree of latitude to the executive and was ultimately replaced in the case of *Sterling* v. *Constantin* by a standard of review that scrutinized the Government response to find a "direct relation" between the "measure taken and the goal of restoring order." In *Sterling* the Governor of Texas had declared martial law in order to have the militia impose a production limit which a Federal Court had enjoined the State's regulatory

commission from imposing. The emergency claim was based upon an alleged but unsubstantiated fear that the local populace would rise up in order to stop the plunder of the vicinity's oil resources. In the face of this claim the Court refused to follow *Moyer,* first distinguishing between the conclusiveness of the executive's declaration of emergency and its choice of measures, and then subjecting the latter to a "direct relation test." Similarly, in *Korenalsu v. United Stales* and *Hirabayashi v. United States* the most recent cases in which the Supreme Court decided the constitutionality of emergency measures taken by the Federal Government during wartime, the Court undertook an independent, albeit restrained, inquiry as to whether there was a reasonable basis in fact for the conclusion that the measures were "necessary" to meet the particular dangers posed by the emergency situation. However, on facts in these two cases the Court concluded that the Government's fear of espionage and sabotage by persons of Japanese ancestry was reasonable and therefore, upheld the curfew directed against them and an executive order passed against them excluding them from the West Coast.

In the above-mentioned letter it is observed that to prevent the abuse of emergency powers, Courts must review both whether an emergency existed, and, more important whether the measures taken were necessary to restore order. "The best standard to adopt would be a strict standard of necessity, which would require that there not be available to the Government alternative means of coping with the emergency that were as effective as the measures employed but less restrictive of individual liberties". The less-restrictive alternative analysis is in a sense inherent in any judicial review of Government actions on the basis of their reasonableness, since the reasonableness of a measure necessarily depends on the alternatives available. However, the proposed application of less restrictive alternative analysis is broader, for it implies that whenever a less restrictive alternative of equal effectiveness can be shown, the measure taken will be invalidated. (See pages 1294-1297 of the Report).

In this connection (on pages 1321-22) it is observed that emergency situations, whether characterized primarily by mass public disturbances or by guerilla-like violence, can differ greatly as to their magnitude. At the most severe extreme, the Government might be faced with a rebellion so widespread and intense that it was unable to carry out its normal functions through civilian institutions. It might then be necessary to govern by martial law. Although there has been much confusion as to the meaning of this term, it is clear that martial law is not "law" at all in the sense of a body of rules, but rather refers to the way in which governmental power may be exercised. Commentators generally define martial law as the use of military forces to carry on the functions of civil Government, carefully distinguishing it from the mere use of the military as an aid to the civilian Government. Although Courts still occasionally use language suggesting that a declaration of martial law results in the complete abandonment of

constitutional safeguards against actions taken by the military, the "direction relation" test of *Sterling v. Constantin* was formulated with reference to and applied to overturn emergency measures taken by the military pursuant to an executive declaration of martial law. There is no reason to believe, therefore, that judicial review of Government actions in an emergency should depend in any way on whether there had been a declaration of martial law or on whether the emergency measures were carried out by military or civilian authorities. In either case the standard should be the necessity of the measure to restore order.

The learned author of "the Copstitutional and Administrative laws" has also discussed the subject of the "Ultimate Authority in Constitutional law" (Chapter 3) in its historical background. This presents a very useful, absorbing and greatly informative study of the problems engaging our attention. I cannot resist in quoting here from him *in extenso.* He observes that a written constitution is regarded as the primary source of legal authority within a State. But then what is it that confers this legitimating quality on the constitution? He asks and in his opinion this question produces some convoluted answers. In the large majority of independent States, in Australia there has been, at one time or another, a breach of legal continuity, and a constitution has been adopted or changed in a manner unauthorized by the pre-existing legal order. This is already true of a high proportion of the African States which have become independent during the last decade or so. Since independence they have had revolutions and *coups d'état;* often the constitutional instrument has itself been abrogated and replaced, or suspended and modified, in a manner precluded by the independence constitution. And a few countries have deliberately chosen to adopt a new constitution peacefully but in a manner unauthorized by the preexisting constitution. This is an assertion of legal nationalism, of what is called 'constitutional autochthony', designed to demonstrate that the authority of the constitution is rooted in native soil, not derived from an imperial predecessor. Such a course has been followed in Eire (the Republic of Ireland), India and Sri Lanka (Ceylon). A constitution is adopted by a Constituent Assembly in the name of people, or presented to the people for their approval; it will not receive the royal assent like normal constitutional amendments.

Take again the constitution of the United States of America. Since its adoption in 1787 it has remained intact, apart from amendments duly made in terms of the Constitution. But was the Constitution valid in the first place, and if so why? In 1776 the Thirteen Colonies had unlawfully declared their independence of Britain, and had repudiated the sovereignty of the United Kingdom Parliament. 'We, the People of the United States', proceed to 'ordain and establish a constitution'. In fact it was formulated at a convention consisting of delegates from the several States and then ratified by the Congress. The name of the 'sovereign' People was invoked to confer upon the constitution moral authority and binding force.

The learned author says that the vague concept that ultimate 'sovereignty' resides in the 'people' is widely acceptable because of its political overtones. Even where a constitution has been overturned from above or below by manifestly illegitimate means, it is commonplace for the *de facto* holders of power to assert that they derive their mandate from the people, because it is awkward to be stigmatized as an undemocratic usurper. And by producing a constitution approved by or on behalf of the people, the accolade of legitimacy is achieved.

It is one thing to say that Government should rest on the consent of the governed; it is another thing to proclaim that a Constitution has acquired the force of supreme law merely because it has obtained the approval of an irregularly convened Constituent Assembly or of a majority of the electorate or both. Yet to assert that all constitutions (or constitutional amendments) procured in a manner inconsistent with the pre-existing legal order are legally invalid will land one in a morass of absurd and insoluble difficulties. If the Constitution of the United States is a nullity, then presumably only the United Kingdom can validate (with retroactive effect) the millions of governmental measures and judicial decisions taken in that country since Independence. This is plainly ridiculous, for nobody doubts that the United States became an independent State in international law before the end of the eighteenth century. In any case, whence did the United Kingdom Parliament derive its omnicompetence? In July 1688 James II dissolved his Parliament. In December he fled the country, having dropped the Great Seal of the Realm in the Thames a few days earlier. William of Orange, having reached London, met groups of peers, former members of Parliament and other notables; they advised him that elections should be held in the boroughs and counties. The Convention of Lords and Commons met in January 1689, and next month offered the Crown to William and Mary jointly, subject to conditions set out in a Declaration of Rights. The offer having been accepted, the Convention passed an Act asserting that it was Parliament, and then enacted the Bill of Rights, incorporating the Declaration of Rights. Clearly the Convention 'Parliament' has been irregularly summoned; its affirmation of its own legal authority carried the matter no farther; there had been no King from December 1688 (assuming that James II was deemed to have abdicated or to have forfeited the Crown) till February 1689; William III had no hereditary legal title to the throne and therefore had no authority to assent to bills. Has every purported Act of Parliament since 1688 been a nullity? Is a Stuart still the rightful King?

Once questions such as these are asked, one must acknowledge that in certain circumstances a breach of legal continuity, be it peaceful or accompanied by coercion and violence, may have to be treated as superseding the constitutional and legal order and replacing it by a new one. Legal theorists have no option but to accommodate their concepts to the facts of political life.

These are some of the perplexing questions that have baffled the legal

theorists. One of then: Hans Kelsen advanced his Pure Theory of Law which as already been rejected by us as unacceptable to the norms of our own country. But I find that the principles of State necessity and the maxim *"Salus popish supreinu lex"* is fully attracted to the peculiar facts and circumstances of this case as a validating factor.

According to S. A. de Smith the principle of necessity, rendering lawful what would otherwise be unlawful, is not unknown to English law ; there is a defence of necessity (albeit of uncertain scope) in criminal law, and in constitutional law the application of martial law is but an extended application of this concept. But the necessity must be proportionate to the evil to be averted, and accepᵗance of the principle does not normally imply total abdication from judicial review or acquiescence in the supersession of the legal order; it is essentially a transient phenomenon. State necessity has been judicially accepted in recent years as a legal justification for ostensibly unconstitutional action to fill a vacuum arising within the constitutional order in Pakistan, Cyprus, Rhodesia and Nigeria. To this extent it has been recognised as an implied exception to the letter of the constitution. And perhaps it can be stretched far enough to bridge the gap between the old legal order and its successor."

In these circumstances and for these additional and supplementary reasons I have agreed with my Lord, the Chief Justice on the facts and law, as well as the conclusions formulated by him.

DORAB PALEL, J.—I have had the advantage of reading the judgment proposed to be delivered by my Lord the Chief Justice. I respectfully agree with it and would further observe that in my humble opinion the principles laid down by the Federal Court in the *Reference by His Excellency The Governor-General,* will have to be followed in resolving the impasse creat4 by the constitutional break-down.

QAISAR KHAN, J.—After going through the very elaborate, illuminating and scholarly judgment of my Lord the Chief Justice proposed to be delivered in this case, it is with the greatest respect that I have to state that though I agree with my Lord the Chief Justice that the petition be dismissed but I have arrived at the conclusion on quite different grounds and I shall, therefore, record my own judgment. The facts and circumstances leading to the filing of this petition under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 need not be reiterated as these have already been given in great detail in the proposed judgment of my Lord the Chief Justice.

In my opinion the main point for determination in this case is as to whether this Court has the jurisdiction to entertain and adjudicate upon the petition in view of the Proclamation of the 5th of July 1977 and the Laws (Continuance in

Force) Order, 1977 of the same date.

After hearing very learned and lengthy arguments of the learned counsel for the parties and the learned Attorney-General I have come to the conclusion that this Court has no jurisdiction in the matter. My reasons for coming to this conclusion are few and simple.

The Constitution of the Islamic Republic of Pakistan was the basic norm of the Country which is also described as the grundnorm, the apex norm or the total Legal Order. This Court was the creation of the said Constitution and jurisdiction had also been conferred on it by the said Constitution. The validity or invalidity of any and every action was tested by the Courts with reference to the Constitution. It may, however, be mentioned here that the provisions of the said Constitution themselves could not be questioned by the Courts. The Courts could not say that such and such a provision of the Constitution was good and such and such bad or that such and such a provision should have been there and such and such should not have been there.

At some stage in the arguments it was suggested that the Resolution of March 1949 was the grundnorm in Pakistan and action should be tested keeping that as a touchstone. There is, however, no force in this contention as no body in Islam is above law but under our Constitution of 1973 the President and the Governors had been placed above law and they were not answerable to any Court of law nor could they be tried in any Court. The offence of murder is compoundable according to the Holy Qur'an but we in Courts could not accept compromise in murder cases. The resolution was the wish and ultimate aim for the realization of the Islamic order but it was not the grundnorm in Pakistan. It was also held so by this Court in the ca*se of Zia-ur-Rahman*.

It is common knowledge and does not require any jurist to be quoted in its support that a Constitution or the basic norm could be annulled, abrogated, destroyed or suspended in two ways, one by a Constitutional act, that is to say, by the method provided for in the Constitution for changing or replacing it and the other by an un-Constitutional act, say revolution or *coup d'état,* which is known as extra-Constitutional act. In the instant case the Constitution of 1973 was put in abeyance, that is to say, suppressed for the time being by the Chief of the Army Staff by an extra-Constitutional act of issuing a Proclamation on the 5th of July 1977 declaring himself as the Chief Martial Law Administrator. For the running of the Country the Chief Martial Law Administrator who had assumed all powers under the Proclamation issued the Laws (Continuance in Force) Order the same day *i.e.,* 5th of July 1977.

Now the validity or invalidity of this action could not be tested on the basis of the Constitution of 1973 as it was no longer there having been suppressed and

there was no other superior norm on the basis of which it could be tested. Such an action, according to some jurists as Mr. Brohi puts it, is called meta-legal. For judging such a situation we have two authorities of this Court in the field, that of *Dosso* and *Asma Pliant. Dosso's case* by which the new order could be legitimized cannot be applied as it has been overruled by the *Asma's case. Asma Jillani's case* does not apply in the present case as the facts and circumstances of this take-over are quite different from the facts and circumstances of the then take-over in the present case under the circumstances prevailing in the country of which we can take judicial notice the present take-over was quite justified for saving the State from total destruction and the Chief of the Army Staff under the circumstances could not be dubbed as a usurper.

Now what is to be done in such a case. Here I agree with Mr. Brohi that in such a situation the Court has to determine certain facts which are even more basic than jurisdictional facts. These are facts which may be termed as Constitutional facts. These facts relate to the existence of the Legal Order within the framework by which the Court itself exists and functions. Jurisdictional facts only relate to the jurisdiction of the Court but Constitutional facts relate to the legal structure within which that jurisdiction is located. The inquiry as to Constitutional facts is factual and not a legal inquiry. The Court has to find as a matter of fact as to what Legal Order is in operation in the country.

There are several indicia which furnish clues to the existence of any particular Legal Order. The most important of these relate to the aegises under which the three principal organs of the State function. These organs are the Legislature, the executive and the judiciary. Let us examine the position of each in relation to the present situation.

The National Assembly constituted under the 1973 Constitution is evidently no longer in existence. It does not even purport to exist. There is no legislative body in existence in Pakistan today which can claim that it is a Legislature within the meaning of that term used in the 1973 Constitution. The executive, *i.e.,* the Government servants have accepted the new Legal Order and are working under it. Similarly the People's Party's Government has ceased to exist as a matter of fact. The members who constituted that Government did not even profess to be exercising power and authority in Pakistan today. On the other hand almost all of them including the former Prime Minister have taken an oath in connection with election under the new Legal Order thereby admitting its factual existence. The same is the position of the judiciary. Judges had taken oath under the Constitution of 1973 and there was no provision in the said Constitution for a second oath to be taken by Judges. However, under the Presidents Post Proclamation Older 9 of 1977 we were directed to take a new oath or to quit. As a result of the said directive we took the new oath in which there was no mention of the Constitution of 1973.

This oath was prescribed by a Presidential Order not in the exercise of powers under the Constitution of 1973 but in exercise of powers under the Proclamation and the Laws (Continuance in Force) Order of the 5th of July 1977. Incidentally it may be mentioned here that according to Article 2, sub-Article (3) of this Order the President acts only on the advice of the Chief Martial Law Administrator. Now by taking this oath we have conceded the *de facto* existence of the new Legal Order. Furthermore, amendment was also brought about in the suppressed Constitution which we accepted as valid. The existence of the new Legal Order as a fact has therefore been accepted by all and since it is admittedly effectual beyond doubt for the time being it *is* therefore to be accepted as the *de facto* new Legal Order for the time being. So far as I have been able to understand effectualness is the only touch stone on the basis of which recognition to a *de facto* Government could be accorded by municipal Courts and support for this can be had from STANFORD LAW REVIEW, VOL. 17 PROFESSOR STONE AND THE PURE THEORY OF LAW (Page 1139). Since the Order is of a supra-Constitutional nature all questions are now to be answered with reference to it.

The assertion that the Courts were functioning under the old Constitution winch has been revived by the Laws (Continuance in Force) Order is fallacious. When by the Proclamation the Constitution was put in abeyance the Courts automatically ceased to exist. They started functioning again only by the force of the Laws (Continuance in Force) Order and not by virtue of the old Constitution. The Laws (Continuance in Force) Order nowhere lays down that the Constitution has been revived. As a matter of fact section 5 of it which is reproduced below clearly lays down that it is still in abeyance:

> "Notwithstanding the abeyance of the provisions of the Constitution subject to any order of the President or Regulation made by the Chief Martial Law Administrator all laws *other than the Constitution* and all Ordinances, Orders-in-Council, Orders made by the President, Rules, Bye-Laws, Regulations, Notifications and other legal instruments in force in Pakistan or any part thereof or having extra-territorial validity shall so far as may be and with such adaptation as the President may see lit may continue in force until altered, amended or repealed by competent authority."

The reference in the Order to the provision of the Constitution of 1973 was only an easy and expeditious way of devising a new Legal Older. Since the Courts including this Court were revived by the Laws (Continuance in Force) Order and continued to work under its authority, they therefore derived their jurisdiction also from the said Order. For example, if after the issuance of the Proclamation the Chief Martial Law Administrator had not issued the Laws (Continuance in Force) Order and had started ruling by decrees through his officers; then where would have been this Court and what jurisdiction it would have had.

Otherwise too allegiance is always due to the *de facto* Government for it is this Government which can provide protection to the citizens and allegiance to the State imposes as one of its most important duty obedience to the laws of the sovereign power for the time being within the State. The municipal Courts have always to enforce the laws of the *de facto* Government as it is such a Government which can enact law, can appoint Judges and can enforce the execution of law.

In this connection the following passages from the *Rhodesian case* which was quoted at the Bar and which are based on the views of the various authorities are worth perusal: -

"A municipal Court recognizes the legality of the only law-making and law-enforcing Government functioning "for the time being" within the State. It cannot do more and, in particular, it is not possible for a municipal Court to ascribe to Governments under which it functions different degrees of legality. From the point of view of a municipal Court a Government either is or is not lawful. I am satisfied that the present Government is the only existing law-making and law-enforcing Government within the State of Rhodesia and if I am to carry on my functions as a Judge I must enforce laws passed in accordance with the 1965 Constitution. To do so is in accordance with, and not in breach of, my allegiance to the State of Rhodesia. It is important, in this connection, to remember that in law it is the State and not a Government within a State which has the quality of "perpetual continuance". Allegiance is owed to the State as a legal entity with perpetual existence. Obedience to the laws of the Government "for the time being," and service under the Government "for the time being," are requirements of the allegiance owed to the State and it is only in a loose and inexact sense that it is possible to speak of allegiance being owed to a particular Government." (Page 160).

"Judicial power presupposes an established Government capable of enacting laws and enforcing their execution, and of appointing Judges to expound and administer them. The acceptance of the judicial office is recognition of the authority of the Government from which it is derived. And if the authority of that Government is *annulled and overthrown, the power of its Courts and other officers is annulled with it.* And if a State Court should enter upon the inquiry proposed in this case, and should come to the conclusion that the Government under which it acted had been put aside and displaced by an opposing Government *it would cease to be a Court, and be incapable of pronouncing a judicial decision upon the question it undertook to try.* If it decides at all as a Court, it necessarily affirms the existence and authority of the Government under which it is exercising judicial power." (Page 156).

"The English law on this aspect is summed up pithily by Hobbes in his

statement (adopted by Austin and cited above) that, "the legislator is he not by whose authority the law was first made but by whose authority it continues to be law". And this is the effect of the definition of "sovereign" in the Interpretation Act, 1889. There is no difference in law between a written constitution and an unwritten constitution and under English constitutional law respect is paid not to a constitution as such but to the Government which by its authority gives the constitution the force *of* law." (Page 155).

"The lesson to be gleaned from the history of English law is that the Judges should not allow themselves to become embroiled in political controversy and, in particular, should not take part in revolutionary or counterrevolutionary activity. If a Judge believes that a situation has arisen which in all conscience compels him to exercise the "sacred right" of revolution or counter-revolution he should *leave the Bench* and not seek to use his position on it to further his revolutionary or counter-revolutionary designs. The more unsettled the times and the greater the tendency towards the disintegration of established institutions, the more important it is that the Court should proceed with the vital, albeit unspectacular, task of maintaining law and order and by so doing act as a stabilizing force within the community. This objective can only be achieved if the acts of a Government *"for the time being"* within the State are given the force of law. Under English law Judges, in common with all other citizens, owe allegiance to the State and this allegiance involves obedience to and service under the Government *'for the time being"* within the State." (Page 154).

"The early history of England and the English law relating to the allegiance due to a *de facto* sovereign explain in large measure the view strongly adhered to by all English Judges that the judiciary should not meddle in politics." (Page 151).

"This allegiance to Rhodesia imposes a duty of obedience to the laws which continue in force under the authority of the *de facto* Government, as well as in laws passed by it; provided, of course, these are passed in accordance with the *de facto* constitution." (Page 149).

"It is not essential, however, to resolve the dispute between Hale and Black-stone on the one hand, and Hawkins and Foster on the other for the purpose of deciding the fundamental constitutional issue in this case which is whether the laws of a Government *'for the time being",* that is, of a *de facto* Government, must be obeyed. On this aspect there is no disagreement at all between English jurists " (Page 144).

"A sharp distinction is drawn in law between persons who set up a *de facto* Government by revolution and persons who, taking no part in the revolution, obey the laws of the *de facto* Government iii pursuance of the duty of allegiance owed to the State. If obedience to the laws of a *de facto* Government were not

enjoined by the law, anarchy would be likely to ensue. In a choice between anarchy and order the law wisely makes a realistic and sensible choice of order." (Page 129).

"There are a number of reasons for the unanimous acceptance by English jurists of a duty to obey the laws of a sovereign power established within the State by revolution:

(i) First and foremost among these is the fundamental concept that allegiance is due in return for actual protection. The corollary of this is that allegiance is not due to a sovereign power which, while claiming the theoretical right to protect, fails to afford protection.

(ii) Secondly, and most importantly, there is the need in the interests of the State and its people to ensure the continuity of the law and avoid the anarchy which would result from a legal vacuum.

(iii) A third reason, refreshingly free from cant and hypocrisy, is the appreciation by jurists that because Governments without exception have an extra-legal origin, Courts exercising jurisdiction within a State must, if they are to function at all, obey the laws of the Government *"for the time being"*. If a Court of law anywhere in the world were to insist that only the laws of a Government with a legal origin may be obeyed and enforced, it would not be able to function because there is no such Government. The feature which distinguishes one Government from another is not that some have an extra-legal and others a legal origin but simply the variation in the length of time separating all existing Governments from their extra-legal origin. Although Government *"for the time being"* within a State shares with all other Governments the taint of extra-legal origin it has the obvious merit of being the only effective law-making and law-enforcing body within the State. To refuse to obey the laws of such a Government is to take not a legal but a revolutionary or a counter-revolutionary stand." (Page 121).

"A municipal Court is concerned not with the question of whether the State has been or should be accepted into the international community, but simply with the existence or non-existence of a law-making and law-enforcing Government within the territory in which it exercises jurisdiction." (Page 110).

"My approach to the position of the Judges and of the High Court and, indeed, to these cases as a whole, is a "positivist" approach; because I think that in the situation which exists in Rhodesia today what "is" or what "is not" the law can only be decided on the basis of accepting things as they actually "are" and not simply as they "ought to be". (Page 47).

"It seems to me that at any one time in any one place there can only be one correct law. That law cannot vary with the political views of the individual Judge

who "declares" it. This, of course, is by no means the same thing as saying that the Judge, having declared the law as he finds it to he, or even before so declaring, must necessarily remain in office and apply that law. Here his personal views may play a part, because in certain circumstances the Judge may decide that rather than continue as a Judge and apply such law he will go. So long, however, as he continues to sit as a Judge he must declare the law as it "is", and not as it "was", or as what he thinks it "ought" to be." (Page 48).

"If the entire Constitution under which a Court is created disappears or is completely suspended, *the Court created under it must also disappear or be suspended along with the Constitution.* A revolutionary Government cannot be held to be a *de facto* Government (in the sense in which I have used the words) unless the old Constitution is at least entirely suspended. This I consider to be the case in Rhodesia today, because as a matter of political reality no writ of any Government purporting to govern under the 1961 Constitution runs in Rhodesia. What, then, is the position of this Court at the present time? Strange as the conception might be, it cannot be said that the Court owes its present existence to or derives its present authority from the old 1961 Constitution. *It owes its existence to and derives its authority today from the fact that the present de facto Government which is in full control of the Government of the country,* knowing that the Court as such has not "joined the revolution", has nonetheless permitted it to continue and exercise its functions as a Court, and has authorized its public officials to enforce the Court's judgments and orders. The orders of the High Court today are not enforced by any remnant of a Government governing under the 1961 Constitution. They are enforced by the officials of the present *de facto* Government." (Page 52).

"In these circumstances it seems to me that the Court can only be regarded as deriving its authority from the fact that the present *de facto* Government allows it to function and allows its officials to enforce its orders." (Page 55).

From the above with which I fully agree it is abundantly clear that this Court derives its jurisdiction from the Laws (Continuance in Force) Order and that it has to accept and enforce laws of the *de facto* Government for the time being. Courts have always to see that conflict between the Court and the State is avoided even if the Government be a *de facto* one. If we hold that on the basis of legality the new Legal Order was no order then this Court would be signing its own death warrant for then there would be no Government at all. For argument sake if the Judges (10 not rely on the new norms then what norms are available for them to proceed with. In a revolutionary situation like the present one they have either to quit or to accept the new norms.

The mere fact that according to the new Legal Order the jurisdiction of this Court has been curtailed somewhat is no ground for questioning the validity of

the order. Even under the Constitution of 1973 the jurisdiction of the superior Courts could be curtailed and had in fact been curtailed a number of times by a number of amendments in the Constitution. Could not an amendment be validly made in the Constitution of 1973 for deleting clause (3) of Article 184 altogether. Could then it be asserted that our judicial power which could not be taken away had been taken away. Judicial power is quite different from jurisdiction. The judicial power always rests in Courts and that has not been taken away by the new Legal Order. It has however now to be exercised within the framework of the new Legal Order.

So far as the doctrine of necessity is concerned it is not an independent legal system. It is always an integral part of the framework of a total Legal Order. When there is no provision in the total Legal Order for dealing with a particular situation then the doctrine of necessity is resorted to. The situation in Pakistan on the 4th of July 1977, was such that there was total breakdown of law and order and a situation had arisen for which the Constitution of 1973 had no provision to deal with. The Chief of the Army Staff, therefore, resorted to the doctrine of necessity and issued the Proclamation of the 5th of July suspending the Constitution and proclaiming himself as Chief Martial Law Administrator. Now when by the Proclamation the Constitution was suspended the doctrine of necessity automatically got suspended with it and was not thereafter available for controlling the Martial Law or the actions to be taken under it. On the issuance of the Laws (Continuance in Force) Order a new Legal Order came into being and the doctrine of necessity again automatically reappeared with it, but within the framework of the new Legal Order. In future if no provision can be found for dealing with a situation that might arise under the new Legal Order then the doctrine of necessity, can again be resorted to. But so long as there was a provision in the new Legal Order for dealing with a case or situation the doctrine of necessity could not be resorted to. Any action of the Martial law authorities which is taken in consequence of any Martial Law Regulation or Martial Law Order could not, therefore, be challenged or questioned on the doctrine of necessity.

All the actions of the *de facto* Government can be tested only when the said Government conies to an end and the old Legal Order is revived. In that case the action of the Martial Law authorities would be tested on the basis of the old Legal Order. In this connection reference can be made to *Salmond on* Jurisprudence, 11th Edition, page 25, relevant para, from which is reproduced below :-

> "The formal establishment of such a system of military Government and justice in time of internal war or rebellion is commonly known as the proclamation of martial law. With the acts of the military authorities done in pursuance of such a system the civil Courts of law will not concern

themselves in time of war."

Reference may also be made to the authority reported in P L D 1953 Lah. 528. The following passage from this authority is worth perusal :-

> "But so long as Martial Law lasts such orders cannot form justiciable issues before the civil Courts, not because the civil Courts have no jurisdiction but because their jurisdiction can at any time be ended by show or use of force by the military. Once, however, Martial Law is lifted, the threat to the existence of the Civil Courts disappears and they can then not only function in a normal way but also call in question the acts of the military whose only defence can either be the right of private defence or the right disperse unlawful assembly or some indemnity legislation."

This observation was made despite the fact that in the case in question no new Legal Order had at all been established. The above would therefore show that during the continuance of Martial Law the action of the Martial Law authorities could not be questioned in civil Courts.

The argument that a decision holding the action of the Martial Law authority immune from judicial scrutiny by Courts would encourage revolutions and *coups d'état* has no substance in it as revolutions and *coups d'état* cannot be prevented by judgments. Despite the judgment of this Court in *Asma Jillani's case* a *coup d'état* did take place, for whatever reason, it is immaterial. We daily see the revolutions and *coups d'état* do take place despite provisions regarding treason in Constitutions of the countries. The persons who want to stage a revolution or *coups d'état* do not have any regard for the judgments or the Constitutional provisions. They go forward despite these and rule if they succeed or are executed if they fail. Only recently we have noticed such instances in our neighbouring countries.

The assertion that the Chief Martial Law Administrator had given statements and made pledges that he would do this and in such and such time does not detract from the existence of the Martial Law or the powers which are exercised under it. The Courts have nothing to do with these statements as such like statements and pledges are not enforceable under any law in any Court. Even in legal Governments the Prime Ministers who are generally the Chief Executives make wild promises either at the time of elections or even thereafter but no Court can come forward and direct them to fulfill their promise. This is a matter between them and the people. If they fulfill their promises people will be pleased with them but if they do not then it is for the people to resort to any action they might like to, but the Courts have nothing to do with that. The Courts cannot give any direction that the Chief Martial Law Administrator is to do such and such thing or not to do such and such thing and within such and such time simply

because he had made certain statements and promises. This is outside the scope of the jurisdiction of the Court.

The upshot of the above discussion is :-

(1) That the Laws (Continuance in Force) Order which is effectual for the time being is the new Legal Order for the time being.
(2) That the new Legal Order has suppressed the old Legal Order (Constitution) for the time being.
(3) That this Court derives its jurisdiction from the new Legal Order and that the orders of detentions in question cannot be challenged in this Court in view of the proviso to Article 2 and Article 4 of the Order. The petition is therefore dismissed.

MUHAMMAD HALIIM, J.—I have had the advantage of reading the judgment proposed to be delivered by my Lord the Chief Justice and concur with it in full and have nothing further to add.

G. SAFDAR SHAH, J.—During the course of rather extended, albeit, able arguments addressed to us by Mr. Sharifuddin Pirzada, learned Attorney-General for Pakistan, Mr. A. K. Brohi, learned counsel for the Federation of Pakistan and Mr. Yahya Bakhtiar, learned counsel for the petitioners, I was tempted to write a separate judgment. But after going through the judgment of my Lord the Chief Justice I abandoned the idea as I thought it would simply duplicate the process. The lucid and able exposition by my Lord the Chief Justice of the various complicated and difficult Constitutional issues in this case is indeed worthy of admiration, particularly when his Lordship was able to finalize his judgment within a very short time.

Respectfully, therefore, concurring in the judgment of my Lord the Chief Justice, and being of the sane opinion that in view of the suspension of Fundamental Rights by subsection (3) of section 2 of the Laws (Continuance in Force) Order, 1977, this Court has no jurisdiction to grant to petitioners any relief. This petition is therefore dismissed.

DR. NASIM HASAN SHAH, J— I have had the advantage of perusing the judgment proposed to be delivered by my Lord the Chief Justice and am in respectful agreement with it. As I consider that some aspects of the questions which fall for decision may usefully be highlighted further, I venture to add a few words of my own.

The facts which form the background have been lucidly set out in the judgment of my Lord the Chief Justice and need not be repeated. As I appreciate the problems that arise in this case, they are, firstly, to ascertain the precise nature

of the change that took place by the issuance of the Proclamation of Martial Law on 5th July 1977, and the promulgation on the same day of the Laws (Continuance in Force) Order, 1977; secondly, to determine the legal effect of these steps and, thirdly, in case these acts are not lawful, whether they can be validated on any juristic principle.

The consideration of our political history shows that the Armed Forces have, during the past two decades, stepped in to govern the country on three different occasions. In October 1958, when the 1956 Constitution was in force, the President of the Republic, General Iskandar Mirza, in collaboration with the Army, took over the country, abrogated the Constitution and placed the country under Martial Law, appointing General Muhammad Ayub Khan to govern the country through a legal instrument, called the Laws (Continuance in Force) Order, 1958. The latter, who shortly thereafter had also assumed the office of President, framed a Constitution for the country, which was promulgated on 7th June 1962. This Constitution remained in force till 25th March 1969, when President Ayub Khan, being unable to control the agitation mounted against his rule, invited the Commander-in-Chief of the Army to step in to save the country from internal disorder and chaos. The Commander-in-Chief, General Muhammad Yahya Khan, willingly obliged, again placed the country under Martial Law by the Proclamation issued by him on 26th March 1969, abrogated the Constitution of 1962 and dissolved the National and Provincial Assemblies. A few days thereafter, on 31st March 1969, he promulgated the Provisional Constitution Order, which, with some variations, followed the scheme of the Laws (Continuance in Force) Order, 1958. This was the second intervention.

The events that took place thereafter are recent history. General Elections, on the basis of One-man One-vote were held throughout the country in December 1970, in pursuance of the Legal Framework Order, promulgated earlier on 30th March 1970. These resulted in a land-slide victory for Sh. Mujib-ur-Rehman's Awami League in East Pakistan and an impressive victory for Mr. Z. A. Bhutto's People's Party in West Pakistan. Owing to the secessionist movement started by the Awami League, the follies of General Muhammad Yahya Khan and the massive intervention of India, followed by armed aggression, East Pakistan was dismembered from the mother country on 16th December 1971. Thereafter the elected representatives belonging to Western Wing, along with two members from East Pakistan, met in Islamabad on April 14, 1972, as the National Assembly of Pakistan and proceeded to enact the Interim Constitution on April 21, 1972. Subsequently, this body framed the Permanent Constitution of Pakistan, which came into force on 14th August 1973. Some four years later country-wide elections were held on 7th March 1977, under its provisions. However, as soon as the Election Results were announced, practically the whole country rose in protest against them, being convinced that they were manipulated and the outcome of massive rigging. The main demands made in the general agitation

that followed were that the Prime Minister should resign and that fair and free elections he held afresh. The ruling People's Party and the Opposition Parties, represented by an alliance, called the Pakistan National Alliance, held lengthy Conferences to resolve this grave problem, but without success. This led to the third Military intervention, in the early hours of 5th July 1977.

The Chief of the Army Staff General Muhammad Zia-ul-Haq proclaimed Martial Law, the Constitution was ordered to remain in abeyance, the National Assembly, Senate and Provincial Assemblies were dissolved, the Prime Minister and other Ministers ceased to hold offices. However, the President of Pakistan was continued in the office. On the same day the Laws (Continuance in Force) Order, 1977 was promulgated providing for the governance of the country in accordance with the provisions of the 1973 Constitution as nearly as may be, notwithstanding its abeyance, subject to certain stipulations.

So far as the two earlier interventions of October 1958, and March 1969, are concerned, this Court has had the occasion to examine the question of their legal effect. The legal effect of the intervention of 1958 came up for consideration in the case *Stale* v. *Dosso.* Muhammad Munir, C. J., who wrote the leading judgment, observed therein that "it sometimes happens, however that a 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." The learned Chief Justice went on to observe "the essential condition to determine whether a Constitution has been annulled is the efficacy of the change." in other words; if a revolution succeeds it is a legalized 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 on the "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 Order.

However, when the validity of the second intervention of 1969 came up for examination, a totally different view was taken of its legal effect. This is evident from the judgment of this Court in the case entitled *Asma Jillani* V. *Government of Punjab.* Herein also the Proclamation of Martial Law by General Muhammad Yahya Khan and the abrogation of 1962 Constitution so as to introduce military rule, were considered and it was held that the assumption of power by General

Muhammad Yahya Khan and installation of himself as the President and Chief Martial Law Administrator by the Proclamation of 1969 was entirely illegal. The ruling in *Dosso's case* 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 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. General Yahya Khan as held to be a usurper and all the actions taken by him 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 condoned on the principle of condonation, notwithstanding their illegality.

This brings us to the consideration of the legal effect of the third and present intervention. The contention on behalf of the petitioner, of course, is that the acts of General Muhammad Zia-ul-Haq in placing the country under Martial Law, suspending the Constitution and ordering the governance of the country in accordance with the provisions of the Laws I (Continuance in Force) Order, 1977, are, as held by this Court in *Asma Jilani's case,* illegal. Hence the Proclamation of Martial Law and the Laws (Continuance in Force) Order are liable to be declared as without lawful authority.

This contention is refuted by Mr. A. K. Brohi, appearing on behalf of the Federation of Pakistan, who submits that the view of the consequences of the military take-over by this Court in *Asma Jillani's case* was not correct. On the other hand, the conclusions arrived at by this Court in the earlier case *of.Dosso* were correct, because even an extra-legal act not within the contemplation of the Constitution which *effectively* destroys or supersedes the old (national Legal Order is a law-creating fact and the validity of the said action to be judged not by reference to the old Legal Order, but by reference to the new Legal Order.

The question, therefore, is as to which of the two views is correct? However, to ascertain whether the rule to be applied in the present case should be the one laid down in *Dosso's case* or the one laid down in *Asma Jillani's;* it must first be examined if the nature of the military interventions that took place in October 1958 and March 1969 are similar in character to the intervention now in question.

The Proclamation of Martial Law issued by the President Iskandar Mirza in October 1958, shows that he decided that: -

(a) The Constitution of the 23rd March 1956 will be abrogated.
(b) The Central and Provincial Governments will be dismissed with immediate effect.

(c) The National Parliament and Provincial Assemblies will be dissolved.
(d) All political parties will be abolished.
(e) Until alternative arrangements are made, Pakistan will come under Martial Law.

General Muhammad 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,* observed :-

> "The Constitution which was brought into being on 23rd 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. Then, it is my intention to collect a number of patriotic persons to examine our problems in the political field and devise a Constitution more suitable to the genius of the Muslim people. When it is ready, and at the appropriate time, it will be submitted to the referendum of the people."

The Proclamation read with the above declaration of intent shows that the intention was to destroy the old national Legal Order. Accordingly the Constitution was abrogated and it was clarified that it was proposed to replace it by a new one. Although the Laws (Continuance in Force) Order, 1958 provided for the governance of the country as nearly as may be, in accordance with the Constitution of 1956, yet this was only for the interregnum. The said Constitution described as the *late* Constitution in the Laws (Continuance in Force) Order and, of course, was subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law. Hence it could truly be said that the intervention of 1958 was intended to and did in effect supersede the old national Order, substituting it by a new national Legal Order.

The position of the 1969 intervention was similar to the 1958 intervention. By the Proclamation of Martial Law of 25th March, 1969, the whole of Pakistan was placed under Martial Law and the Constitution of the Islamic Republic of Pakistan, 1962, was abrogated. In the broadcast made by General Yahya Khan, Commander-in-Chief of the Pakistan Army, on the following day, ***i.e.*** 26th March, 1969, it was unambiguously stated that the Constitution of 1962 was to be replaced by a new Constitution as is evident from the following extract from his speech:

> "……. It is my firm belief that a sound, clean and honest administration

is a prerequisite for sane and constructive political life and for the smooth transfer of power to the representatives of the people elected freely and impartially on the basis of adult franchise. *It will be the task of these elected representatives to give the country a workable constitution.....*"

Thus in both the above-noted instances the purpose of the intervention was not only to suppress the existing Constitutions, but to replace them by new Constitutions. The old Legal Order was to be replaced by a new Legal Order.

The present situation, however, is radically different. Although by the Proclamation of 5th July, 1977 the whole of Pakistan has come under Martial Law, the Constitution has not been abrogated but merely kept in abeyance. The President of Pakistan elected under the 1973 Constitution is to continue in office. Furthermore, there is no intention to substitute the present Legal Order by a new Legal Order, for this Legal Order is to be revived after fresh elections have been held. These too will be held under the provisions of the 1973 Constitution. The real character of the present intervention has been explained by the Chief Martial Law Administrator himself in his speech made on 5th July, 1977, the relevant portion whereof may usefully be reproduced below:

"…….. But the Constitution has not been abrogated. Only the operation of certain parts of the Constitution has been held in abeyance. Mr. Fazal Elahi Chaudhary has very kindly consented to continue to discharge his duties as President of Pakistan as heretofore *under the same* Constitution. I am grateful to him for this. To assist him in the discharge of his national duties, a four-member Military Council has been formed. The Council consists of the Chairman, Joint Chiefs of Staff, and Chiefs of Staff of the Army, Navy and Air Force.

I will discharge the duties of the Chief of Army Staff and Chief Martial Law Administrator. Martial Law Orders and Instructions, as and when required, will be issued under my orders."

The reasons necessitating the intervention were explained in the following words :

"The elections were held in our beloved homeland on March 7 last. The election results, however, were rejected by one of the contending parties, namely the Pakistan National Alliance. They alleged that the elections had been rigged on a large scale and demanded fresh elections. To press their demand for re-elections, they launched a movement which assumed such dimensions that people even started saying that democracy was not workable in Pakistan. But, I genuinely feel that the survival of this country lies in democracy alone. It is mainly due to this

belief that the Armed Forces resisted the temptation to take over during the recent provocative circumstances in spite of diverse massive political pressures. The Armed Forces have always desired and tried for the political solution to political problems. That is why the Armed Forces stressed on the then Government that they should reach a compromise with their political rivals without any loss of time..... It must be quite clear to you now that when the political leaders failed to steer the country of a crisis, it is an inexcusable sin for the Armed Forces to sit as silent spectators. It is primarily, for this reason that the Army, perforce had to intervene to save the country.

I would like to point out that I saw no prospects of a compromise between the People's Party and the P.N.A., because of their Mutual distrust and lack of faith. It was feared that the failure of the P.N.A. and P.P.P. to reach a compromise would throw the country into chaos and the country would thus be plunged into a more serious crisis. This risk could not be taken in view of the larger interests of the country. The Army had, therefore, to act as a result of which the Government of Mr. Bhutto has ceased to exist; martial law has been imposed throughout the country, the National and Provincial Assemblies have been dissolved and the Provincial Governors and Ministers have been removed."

However, a categorical assurance that there was no intention to establish a new Legal Order, but merely to help the country to get back on the rails of constitutionalism was thereafter given, in the following words :

"..... I was obliged to step in to fill in the vacuum created by the Political leaders. I have accepted this challenge as a true soldier of Islam. *My sole aim is to organise free and fair elections which would be held in October this year.* Soon after the polls, power will be transferred to the elected representatives of the people….."

The intervention thus appears to be for a temporary period and for limited purpose of arranging fair and free elections so as to enable the country to return to the democratic way of life. Thus on the present occasion the Proclamation of Martial Law does not appear to be of the same type as the Proclamations of Martial Laws of 1958 and 1969, whereby not only the existing Constitutions were abrogated but that this was done with the intention of replacing them with new Constitutions. The purpose there was to destroy the existing Legal Orders and replace them with new Legal Orders. In the present case the situation is quite different. In view of the break-down of the normal constitutional machinery and to fill the vacuum, the Armed Forces were obliged to take an extra-constitutional step. Martial Law was imposed, in the picturesque words used in the written statement filed by Mr.

Brohi, not "in order to disable the constitutional authority, but in order to provide a bridge to enable the country to return to the path of constitutional rule." In the felicitous phrase of my Lord the Chief Justice, the act was more in the nature of a "constitutional deviation" rather than an overthrow of the Constitution. The Constitution of 1973 is not buried but merely suspended. It, however, continues to be the governing instrument subject to the provisions of the Laws (Continuance in Force) Order, 1977. In these circumstances neither the *ratio decidendi* of *Dosso* v. *State* nor that of *Asma Jillani* v. *The Punjab Government is* strictly applicable to the present case.

The question next arises whether the above intervention was a step which could lawfully be taken. So far as this point is concerned, it is an admitted position that there: is no provision in the Constitution authorizing the Army Commander, even in the event of the break-down of the constitutional machinery to intervene in the manner that he did. But Mr. Sharif-ud-Din Pirzada, Attorney-General of Pakistan, submitted before us that since the country cannot be allowed to perish for the sake of the Constitution, the intervention was justified on the doctrine of State necessity, while Mr. Brohi contended that as the old Legal Order had been effectively replaced by a new Legal Order, henceforth all questions of legality were answerable with reference to it, in other words all such questions were to be determined not on the basis of the previous Legal Order but with reference to the Laws (Continuance in Force) Order, 1977.

The doctrine of "necessity", namely rendering lawful that which otherwise is unlawful, is well-established *in* jurisprudence (ID QUOD ALIAS NON EST LICITUM, NECESSITAS LICITUM FACIT"—that which otherwise is not lawful necessity males lawful). In constitutional law the application of Martial Law is but an extended application of this concept of State necessity. The doctrine of necessity was applied by the Federal Court of Pakistan only recently as a legal justification for ostensibly unconstitutional actions to fill a vacuum arising out of a Court order. See *Reference by H. E. The Governor-General to the Federal Court.* It will be recalled that the reference was necessitated, *inter alia,* to overcome, the difficulty caused by the circumstance that forty,-four, Acts passed by the Constituent Assembly of Pakistan had not received the assent of the Governor-General, as required by law. The Constituent Assembly had been dissolved by the Governor-General in October, 1954, and had not been reconstituted. By a Proclamation made on l6th April 1955, the Governor-General declared certain essential laws to be enforceable until their validity was decided upon by the new Constituent Assembly. It was held that he had acted in order to avert an impending disaster and to prevent the Sate and society from dissolution and that on the ground of necessity his Proclamation should be treated as having been given the force of law to the measures specified. The principal authority relied upon

was the address to the Jury by Lord Mansfield in the case of *R. V. Siriton and others.* The Governor of Madras acted illegally and unconstitutionally in refusing to count the votes of some of the members of his Council. The Councilors accordingly imprisoned him for eight months and carried on the Government themselves. Upon being indicted in England they set up the defence of necessity. Lord Mansfield directed the jury that the defence was one of 'civil' or 'State necessity'. He remarked:

> "In India you may suppose a possible case, but in that case, it must be imminent, extreme necessity; there must be no other remedy to apply to for redress and in the whole they do, they must appear clearly to do it with a view of preserving the society and themselves …… What immense mischief would have arisen to have waited for the interposition of the Council at Bengal."

The principle clearly emerging from this address is 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 the 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 Chitty's statement that necessity knows no law and the maxim cited by Bracton that necessity makes lawful which otherwise is not lawful.

Situations are conceivable where the normal law of the land may have to give way before necessity, particularly in a situation where the welfare of the State and its subjects are at stake, and in proper case it would be the Court's duty to recognize such a situation and to act upon the principle *"salus pupuli suprema lex"* despite the express provisions of the Constitution. An instance of this is furnished by the case *The Attorney-General of the Republic* v. *Mustafa Ibrahim and others.* To appreciate the background of this decision, it may be mentioned that by December 1963 the structure of the Constitution of Cyprus had broken down. The island divided up into armed camps. The Vice-President and the Turkish Cypriot members of the Council of Ministers ceased participating in the machinery of government; the Turkish Cypriot representatives no longer sat in the House of the Representatives; but the Constitution required the concurrence of Greek and Turkish Cypriots for many important purposes. The administration of justice was thrown into chaos. For some months Turkish Judges did not attend their Courts. The mixed Courts which had to be convened to dispose of cases where the parties belonged to different communities could not be constituted. The Supreme Constitutional Court had not met since August 1963, when its neutral President had resigned; and by July 1954 over 400 cases were awaiting trial by the Court. In June 1964 the neutral President of the High Court resigned.

In July 1964 the House of Representatives, sitting without its Turkish

Cypriot members, passed a law to establish a Supreme Court which was to exercise the functions previously vested in the Supreme Constitutional Court and the High Court. This law was inconsistent with a number of important articles of the 1950 Constitution; it had not been passed in the manner prescribed by the Constitution; indeed, it included provisions which conflicted with certain articles declared by the Constitution to be unalterable.

In August 1964 four persons charged with serious offences and committed for trial at assizes were granted bail by a District Judge. The Attorney-General appealed to the Supreme Court against this order for bail; three Judges nominated by the Court in accordance with the 1964 law heard the appeal. For the respondent it was argued that the 1964 law was a nullity as it was unconstitutional, so that the Court had no valid existence. The Court unanimously rejected this plea and held that it was validly constituted and had jurisdiction to entertain the appeal. The Constitution of 1960, it was observed, had not ceased to have legal force, but it had to be read subject to the doctrine of necessity. Measures not sanctioned by the letter of the Constitution could properly be taken if they were necessary to avert a grave public evil and were proportionate to the evil to be averted. In Cyprus the presuppositions of inter-communal co-operation, on which the Constitution had been based, had foundered, and the Constitution had become unworkable. The steps taken to rectify the situation were reasonably required in the circumstances. In support of this conclusion some pertinent observations were made by the three Judges constituting the Bench. Vassiliades, J., observed :—

> "This Court now, in its all important and responsible function of transforming legal theory into living law, applied to the facts of daily life for the preservation of social order, is faced with the question whether the legal doctrine of necessity ..... should or should not, be read into the provisions of the written Constitution of the Republic of Cyprus. Our unanimous view is in the affirmative.
>
> The enactment of the Administration of Justice (Miscellaneous Provisions) Law, 1964, which would otherwise appear to be inconsistent with Articles 133.1 and 153.1 of the Constitution, can be justified, if it can be shown that it was enacted only to avoid consequences which could not otherwise be avoided and which, if they had followed, would have inflicted upon the people of Cyprus, when the Executive and Legislative Organs of the Republic are bound to protect, inevitable irreparable evil; and furthermore if it can be shown that no more was done than was reasonably necessary for the purpose, and that the evil inflicted by the enactment in question was not disproportionate to the evil avoided—Law was justified notwithstanding the provisions of Articles 133.1 and 153.1 of the Constitution."

Triantafollides, J., after reproducing the facts of the Constitutional impasse observed:

> "Organs of Government set up under a Constitution are vested expressly with the competence granted to them by such constitution, but they have always an implied duty to govern too. It would be absurd to accept that if, for one reason or other, an emergency arises, which cannot be met within the express letter of the constitution, then such organs need not take the necessary measures in the matter, and that they would be entitled to abdicate their responsibilities and watch helplessly the disintegration of the country or an essential function of the State, such as the administration of justice. Notwithstanding a constitutional deadlock, the State continues to exist and together with it continues to exist the need for proper government. The Government and the Legislature are empowered and bound to see that legislative measures are taken in ensuring proper administration where what has been provided for under the Constitution, for the purpose, has ceased to function .....

He went on to observe :-

> Having considered the jurisprudence and authoritative writings of other countries to which this Court has been referred, as well as some others, I am of the opinion that the doctrine of necessity in public law is in reality the acceptance of necessity as a source of authority for acting in a manner not regulated by law but required, in prevailing circumstances, by supreme public interest, for the salvation of the State and its people. In such cases *'salus populi'* becomes *'suprema lex'."*

Another pertinent observation may also be reproduced:

> "Even though the Constitution is deemed to be a supreme law limiting the sovereignty of the Legislature, nevertheless, where the Constitution itself cannot measure up to a situation which has arisen, especially where such situation is contrary to *its* fundamental theme, or where an organ set up under the Constitution cannot function and where, furthermore, in view of the nature of the Constitution it is not possible for the sovereign will of the people to manifest itself, through an amendment of the Constitution, in redressing the position, then, in my opinion according to the doctrine of necessity the legislative power, under Article 61 remains unhindered by Article 179, and not only it can, but it must, be exercised for the benefit of the people."

He then went on to make the observation relied upon by Mr. Sharifuddin Pirzada that a State and people should not be allowed to perish for the sake of Constitution. On the contrary, the Constitution should exist for the preservation

of the State and welfare of the people. However, he qualified his observations by laying down that where the doctrine of necessity has been invoked it is for the judiciary to determine if the necessity in question actually exists and also if the measures taken were warranted thereby.

Josephides, J., also held that he interpreted the Constitution to include the doctrine of necessity in exceptional circumstances, as an implied exception to particular provisions of the Constitution in order to ensure the very existence of the State. Commenting on the situation that had arisen he remarked :

> "Faced with the non-functioning of the two superior Courts of the land and the partial break-down of the District Court, the Government had to choose between the alternatives, *viz.* either to comply with the strict letter of the Constitution (the relevant articles being unalterable under any Condition), that is, cross its arms and do nothing but witness the complete paralysis of the judicial power, which is one of the three pillars of the State; or to deviate from the letter of the constitution, which had been rendered inoperative by the force of events (which situation could not be foreseen by the framers of the Constitution). . . . ."

However, he laid down the following pre-requisites to be satisfied before this doctrine could become applicable :-

(a) an imperative and inevitable necessity or exceptional circumstances;
(b) no other remedy to apply;
(c) the measure taken must be proportionate to the necessity; and
(d) it must be of a temporary character limited to the duration of the exceptional circumstances.

The doctrine of necessity was also invoked by two Judges of the Divisional Bench of the High Court of Southern Rhodesia (Lewis and Goldin, JJ.) in the famous case *Madzimbamuto* v. *V. Lardner-Burke.* The Divisional Bench held that although the existing Government of *Mr.* Smith and his colleagues was not the lawful Government of the Southern Rhodesia (having unilaterally declared independence —UDI— and broken away from the British Crown and framed its own Constitution in 1965, in supersession of the Constitution enacted by the British Parliament in 1961) the Government could nevertheless continue to retain without trial two persons in terms of a Southern Rhodesia's statute which conferred the power to detain persons without trial only upon the lawful Government of Southern Rhodesia. This finding was grounded on the following hypothesis:

> "The Government is, however, the only effective Government of the country, and therefore on the basis of necessity and in order to avoid

> chaos and a vacuum in the law, this Court should give effect to such measures of the effective Government, both legislative and administrative, as could lawfully have been taken by the lawful Government under the 1961 Constitution for the preservation of peace and good Government and the maintenance of law and order."

The appeal from this judgment was heard by a Bench of five Judges of the Appellate Division of the Rhodesian High Court, of whom only one, Fieldsend A. J. A. agreed with the first Court with respect to the doctrine of necessity. According to him in considering each in individual case that comes before it the Court must not lose sight of the political situation and the political realities. The question is whether these political realities create such a situation that, judged by the yardstick of 1961 Constitution the Court should decide that situation sanctions for the accord of validity to some acts of measures done or enacted otherwise than by the machinery of that Constitution." He went on to add: "Levis, J., in the Court fully relied on the maxim *"salus populi supreina lex",* which is in effect the doctrine of State necessity to justify a departure from the express terms of the 1961 Constitution. In his alternative argument in this Court Mr. Rathouse said that lie preferred not to put his case squarely upon this basis, but to rely rather upon what he termed "natural necessity' to determine whether or not there is any room for the introduction of a doctrine of necessity to mitigate the strict application of the Constitution it is necessary first to ascertain the principles underlying the commonly accepted meaning of the doctrine. This can best be done by reference to certain of the cases from which these emerge." He then referred to several cases, of which the following two are of particular interest and are accordingly being reproduced hereunder. In *R. v. Bekker & Naude* (A Solomon, J., said at page 355 :-

> "Martial Law is nothing more nor less than the law of self-defence or the low of necessity. It is put in force in times of public danger, when the *maxim salus toioubIicae exlrenmu lex* applies, and when in consequence it becomes necessary for the military authorities to assume control and to take the law into their own hands for the very purpose of preserving that Constitution which is the foundation of all the rights and liberties of its subjects. When such a state of things arises in any district, the ordinary rights and liberties of the inhabitants are subordinated to the paramount interest of the safety of the State . . . . Both the justification for proclaiming martial law and the actual exercise of authority there under are strictly limited by the necessities of the situation:'

and in *White & Tucker* v. *Rudolph,* Kotze, J. said at page 124:

> 'It must be admitted that the law distinctly recognizes the maxim *necesitas non habe: legein, quod cogit defendit.* The meaning of this is not, as some

> writers lay down, that necessity overrides all law, and is superior to it; but that the law justifies in certain cases, as where the safety of the State is in imminent danger, a departure from the ordinary principles protecting the subject in his right of private property. This right of private property is sacred and inviolable: any interference with it is, *prima facie,* wrongful and unlawful, and it is incumbent upon the respondent in the present instance to justify what he has done by showing that it was dictated by necessity that will justify a departure from the ordinary principles of law. It must be necessity extreme and imminent."

His conclusion was expressed as follows :-

> "From a consideration of all these sources and their similarities to and differences from the cases now under consideration, it seems that the only proper conclusion is that natural justice, in the form of a controlled common sense, dictates that, for the welfare of the mass of people innocently caught up in these events, validly must be accorded to some acts of the usurping authorities, provided that no consideration of public policy to the contrary has to prevail. It is unnecessary, and indeed undesirable, to attempt to define precisely, the limits within which this validity will be accorded. The basis being broadly necessity, the decision is one which must be arrived at in the light of the circumstances of each case."

The above view was favorably commented upon in the dissenting judgment of Lord Pearce in the Privy Council, although the majority rejected the principle of necessity as applied by the Rhodesian Judges *(Madzimbamuio* v. *Lardner-Burke.* Lord Pearce stressed that the British Parliament and Government had really made no effort whatever to govern Rhodesia after UDI and the argument that it was only Parliament and Parliament alone to determine whether maintenance of law and order would justify giving effect to laws made by the usurping Government to such extent as may be necessary for that purpose was altogether elusive and unreal if read as a response to the question whether and under what circumstances the necessity of avoiding chaos can be regarded (as it was conceded by the appellants that it can be regarded) as a source of law.

His Lordship quoted with approval the following extract from the judgment of Fieldsend, J. :—

> "The necessity relied on in the present case is the need to fill the vacuum which would result from a refusal to give the validity to the acts and legislation of the present authorities in continuing to provide for the every day requirements of the inhabitants of Rhodesia over a period of two years. If such acts were to be without validity there would be no

effective means of providing money for the hospitals, the police, or the Courts, of making essential by-laws for new townships or of safeguarding the country and its people in any emergency which might occur, to mention but a few of the numerous matters which require regular attention in the complex modern state. Without constant attention to such matters the whole machinery of the administration would break down to be replaced by chaos, and the welfare of the inhabitants of all races would be grievously affected."

Lord Pearce went on to observe:

> "The lawful Government has not attempted or purported to make any provision for such matters or for any lawful needs of the country, because it cannot. It has of necessity left all those things to the illegal Government and its Ministers to provide. It has appointed no lawful Ministers. If one disregards all illegal provisions for the needs of the country, there is a vacuum and chaos.
>
> In my view the principle of necessity or implied mandate applies to the present circumstances in Rhodesia. I cannot accept the argument that there was no necessity since the illegal regime can always solve the problem by capitulating. So too a foreign army of invasion can always return home. The principle of necessity or implied mandate is for the preservation of the citizen, for keeping law and order, *rebus sic stantibus,* regardless of whose fault it is that the crisis has been created or persists. Subject therefore to the facts fulfilling the three necessary questions, the principle of necessity or implied mandate applies in this case. This according to Lord Mansfield with whom I agree, is a question of fact.
>
> Does the ordinary orderly running of the country reasonably require it? Fieldsend, J., held that it did. The other Judges accepted different principles, and therefore their overall conclusion is not of much assistance on this point. But Fieldsend, J., approached the case from what in my view is the right angle, and I would therefore accept his finding....."

Another instance wherein the principle of necessity was found to be applicable is furnished by the decision of the Supreme Court of Nigeria in the *case Lakanmi & OaIa v. Attorney-General (West)* decided on 24th April, 1970. After the rebellion in different parts of Nigeria, in January 1966, the Acting President handed over the country to the Armed Forces. The General Officer commanding the Nigerian Army accepted the invitation to form an interim Military Government. He suspended some parts of the Constitution and started to administer the country. The State Government of Western Nigeria started to

investigate the activities of public officers including E. O. Lakanmi and some members of his family. The Chairman of the Tribunal of Inquiry into the assets of such public officers made an order under Edict No. 5 of 1967 restraining the appellants (Lakanmi etc.) from disposing of their real property until the Military Government of the State directed.

The appellants sought *cerliurari* to quash the order on the grounds that Edict No. 5 was void, since it purported to operate in the same field as the Federal Military Government's Decree No. 51 of 1966 which had earlier "covered the filed", and that certain of its provisions were inconsistent with the Decree. The High Court of Ibadan rejected these arguments and the appellants appealed; while the appeal was pending, the Federal Military Government passed three further Decrees in the same field, Nos. 37, 43 and 45 of 1968. The respondents took a preliminary objection that the High Court of Appeal had no jurisdiction, since the order complained of had been validated by Decree No. 45 of 1968. The Court of Appeal agreed. On a further appeal to the Supreme Court, the question rose of the validity of Decree No. 45.

The appellants argued that the Federal Military Government was not a revolutionary Government but a constitutional interim Government whose object was to uphold the 1963 Constitution except where the necessity to depart from it arose. The separation of powers was accordingly preserved after 1966 and the Government's power to make laws by Decrees was not therefore unfettered. Decree No. 45 could therefore be regarded as a legislative act which constituted an executive interference in the sphere of the judiciary, and was to that extent invalid.

The respondents argued that the Federal Military Government was a revolutionary Government which had unfettered power to rule by Decree. Nothing in the Constitution could make a Decree void, and validation laws should be regarded as a normal exercise of legislative functions.

The Supreme Court held that Edict No. 5 was *ultra vires* as Decree No. 51 covered the field. As to the validity of Decree No. 45, they accepted the appellants argument and decided that the Federal Military Government was indeed a constitutional rather than a revolutionary Government, and that the 1963 Constitution remained law, except as derogated from under the doctrine of necessity. They refused to accept the view that the Federal Military Government derived its authority from the 1966 revolution and not from the 1963 Constitution. Separation of powers remained a part of the Constitution which had not been superseded under the doctrine of necessity; and as Decree No. 45 was not itself justified by the doctrine, it was invalid.

In taking the above decision the Supreme Court of Nigeria made several

interesting observations and some of these may be reproduced hereunder with advantage :-

> "It is to be noted from the Government Notice (No. 148) set out above that the invitation to the Armed Forces, which was duly accepted, was to form an *interim Military Government,* and it was made clear that only certain sections of the Constitution would be suspended. It was evident that the Government thus formed is an interim Government which would uphold the Constitution of Nigeria and would only suspend certain sections as the necessity arises."

Thereafter the Court discussed the case of *Uganda* v. *Commissioner of Prisons* which followed the decision of this Court in *State* v. *Dosso.* But the Court, however, reiterated its view that the Federal Military Government was not revolutionary Government and went on to observe :

> "……. It made it clear before assuming power that the Constitution of the country still remains in force, excepting certain sections which are suspended. We have tried to show that the country is governed by the Constitution and Decrees which, from time to time, are enacted when the necessity arises and are then supreme when they are in conflict with the Constitution. It is clear that the Federal Military Government decided to govern the country by means of the Constitution and Decrees. The necessity must arise before a decree is passed ousting any portion of the Constitution. In effect, the Constitution still remains the law of the country and all laws are subject to the Constitution excepting so far as by necessity the Constitution is amended by a Decree. This does not mean that the Constitution of the country ceases to have effect as a superior norm. From the facts of the taking-over, as we have pointed out, the Federal Military Government is an interim Government of necessity concerned in the political cauldron of its inception as a means of dealing effectively with the situation which has arisen and its main object is to protect lives and property and to maintain law and order. . ."

It was also observed that "by recognizing the fact that there is a doctrine of necessity, we do not alter the law but apply it to facts as they do exist."

The doctrine of necessity is also recognised in Islamic Law. Even in the Holy Qur'an the application of this doctrine is made permissible. Verse 173 of Chapter Il (Suia-al-Baqr) as translated by Maimaduke Pickthal refers to it thus

> *"173. He hath forbidden you only carrion, and blood, and swine flesh, and that which hath been immolated to (the name of) any other than Allah. But he who is driven by necessity, neither craving nor transgressing, it*

is no sin for him. Lo ! Allah is Forgiving, Merciful."

However, before this doctrine can be invoked the following conditions must pre-exist *(a)* that which is forbidden by Allah can be taken only where one is driven to it by necessity *(b)* that there is neither craving nor the intention to transgress the limits set by him; *(c)* that only that bare minimum is taken as is necessary to save life. Thus the principle of necessity as also the conditions in which it can be resorted to are clearly set forth in Islam.

This somewhat lengthy review of the case-law of this country, the judgments of the superior Courts of Cyprus, Rhodesia, Nigeria and even the Privy Council show that necessity can be accepted as a justification for an extra-legal act, in certain conditions. This position is also recognised in Islam. In the precedent cases, cited above it has also been observed that "Martial Law is nothing more nor less than the law of self-defence or the law of necessity (In *R.* v. *Bekkar & Naude)",* and that in constitutional law the application of Martial Law is but an extended application of the concept of State necessity *(See Reference by H. E. The Governor-General to the Federal Court of Pakistan).* Thus, in certain exceptional circumstances it is possible, as a measure of State necessity, to impose even Martial Law.

The question whether the conditions obtaining in Pakistan necessitated the above step has to be answered by reference to the happenings from 7th of March, 1977, up to 5th July, 1977, which reveal that the constitutional and moral authority of the National Assembly which had come into being as a result of the elections held on 7th March, 1977, as well as the Federal and Provincial Governments formed thereafter had been continuously and forcefully repudiated throughout the country over a prolonged period of nearly four months, with the result that the national life stood disrupted. A situation had arisen for which the Constitution provided no solution. The atmosphere was surcharged with the possibility of further violence, confusion and chaos. As the Constitution itself could not measure up to the situation the doctrine of State Necessity became applicable, for where the safety of the State and the welfare of the people are, in imminent danger necessity justifies a departure from the ordinary principles of law. In these circumstances the step taken by the Armed Forces of imposing Martial Law stands validated, on the principle of State Necessity, as urged by the learned Attorney-General. But by the same token this deviation must be of a temporary character, limited to the duration of the exceptional circumstances. Moreover the actions taken during this period will, for the reasons set forth so admirably by my Lord the Chief Justice, be open to judicial review.

I may now briefly comment upon the stand taken up by Mr. Brohi on this point. According to him the legal effect of the intervention was to be adjudged with reference to the new Legal Order, namely, the Laws (Continuance in Force)

Order, 1977, and not the old Legal Order, namely, the Constitution of 1973, because, the aforesaid Order had been effectively replaced by the new Legal Order, the efficacy of the change being the basis of its validity. In this connection Mr. Brohi relied upon the doctrine of Kelsen enunciated in his works on the Pure Theory of Law and the General Theory of Law and State. The views of Kelsen advocated by him in these works were explained to us by Mr. Brohi in some detail. However, in the facts and circumstances of our situation the doctrines propounded by Kelsen do not appear to be strictly applicable as the change-over which occurred on the 5th July 1977 cannot qualify as a "revolution" in Kelsenian terms. Although the Armed Forces are undoubtedly in effective control of the administration, it is neither their intention nor indeed have they established a new Legal Order in supersession of the existing Legal Order. The Constitution of 1973 remains the supreme law of the land, subject to the condition that certain parts thereof have been held in abeyance. The President of Pakistan and the superior judiciary continue to function under the Constitution, subject to any limitations placed on their jurisdiction. The change is only in the nature of a constitutional deviation rather than the destruction of one Legal Order and its replacement by another. Even otherwise, the doctrines of Kelsen cannot be accepted in their entirety by Courts of Law. Whereas for Kelsen the efficacy of a revolution creates a new reality of which the pure science of law must take account for the Courts involved in practical decisions the efficacy of a revolution creates a new legal situation which they must take note of and proceed to decide the matter as raised before them by the contesting parties. In doing so they will have to take into account not only the efficacy of the change, but other values, such as the desirability of maintenance of peace, order, justice or good Government, to fill the vacuum in law and to avoid chaos, presumption in favour of the old regime because of its original legal status or against it because of its record of unconstitutional actions and conduct. In short, the responsibility of the Judge is not to the "objective reality" that exists for the academic observer but to the peace, order, justice, morality and good government. In fact, for Judges involved in practical decisions acceptance of the changed Legal Order is not so much on account of its efficacy as such but rather on necessity in the sense of "ID QUOD ALIAS NON EST LICITUM, NECESSITAS LICITUM FACIT" (that which otherwise is not lawful necessity makes lawful).

As for the other points arising in the case and dealt with by my Lord the Chief Justice in his judgment, I am in complete agreement therewith and have nothing to add.

ORDER OF THE COURT

According to the unanimous view of the Court, this petition is dismissed as not being maintainable.

Petition dismissed.

Syed Anwarul Haq.