Nusrat Bhutto Case

On validity of Proclamation of Martial Law on 5 July

Reproduced By:
Sani Hussain Panhwar
Member Sindh Council, PPP

Validity of Proclamation of Martial Law on 5 July 1977

Begum Nusrat Bhutto
V.
The Chief of the Army Staff and Another

(PLD 1977 SC 657 = 1977 (3) PSCR 1)

A petition by Begum Nusrat Bhutto, under Article 184 (3) of the 1973 Constitution of the Islamic Republic of Pakistan, sought to challenge the detention of Mr. Zulfikar Ali Bhutto, former Prime Minister of Pakistan, and the other leaders of the Pakistan People's Party under Martial Law Order No. 12 of 1977 contending that the chief of the Army Staff had no authority under the 1973 Constitution to impose martial law in the country and to promulgate the Laws (Continuance in Force) Order, 1977; that his intervention amounted to an act of treason in terms of Article 6 of the Constitution; that as a consequence the proclamation of martial law dated 5 July 1977, the Laws (Continuance in Force) Order, 1977, as well as martial law order No. 12, under which the detenus had been arrested and detained were all without lawful authority.

This petition was heard by a bench of nine judges of the Supreme Court consisting of S. Anwar-ul-Haq, Chief Justice, Wahiduddin Ahmad, Muhammad Afzal Cheema, Muhammad Akram, Dorab Patel, Qaisar Khan, Muhammad Haleem, G. Safdar Shah and Nasim Hasan Shah, JJ.

The leading judgment was written by S. Anwar-ul-Haq, Chief Justice. His opinion was also concurred with by Nasim Hasan Shah, J., who through a separate judgment expressed thus:

"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 5 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 Mohammad 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 fl constitution for the country, which was

promulgated on 7 June 1962. This constitution remained in force till 25 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 Mohammad Yahya Khan, willingly obliged, again placed the country under martial law by the proclamation issued by him on 26 March 1969, abrogated Constitution of 1962 and dissolved the National and Provincial assemblies. A few days thereafter, on 31 March 1969, he promulgated the Provisional Constitution Order, with, 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 30 March 1970. These resulted in a landslide victory for Sheikh 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 Mohammad Yahya Khan and the massive intervention of India, followed by armed aggression, East Pakistan was dismembered from the mother country on 16 December 1971. Thereafter the elected representatives belonging to the western wing, along with two members from East Pakistan, met in Islamabad on 14 April 1972, as the National Assembly of Pakistan and proceeded to enact the interim constitution on 21 April 1972. Subsequently, this body framed the permanent Constitution of Pakistan, which came into force on 14 August 1973.

Some four years later country-wide elections were held on 7 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 under 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 be 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 5 July 1977.

The Chief of the Army Staff General Mohammad Zia-ul Haq proclaimed martial law. The constitution was ordered to remain in abeyance, the National Assembly, Senate and Provincial Assemblies were dissolved and the Prime Minister and other ministers ceased to hold offices. However, the President of Pakistan continued to hold 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 *State v. Dosso (PLD 1958 SC 533).*

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

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 Jilani v. Government of Punjab (PLD 1972 SC139). Herein also the proclamation of martial law by General Mohammed Yahya Khan and the Abrogation of the 1962 Constitution as to introduce military rule were concerned, and it was held that the assumption d 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 a revolution and its legal effect is not only the destruction of the existing constitution but also of the validity of the national legal order, irrespective of how and by whom such a change is brought about, was held not to be good law. General Yahya Khan was held to be an usurper and all the actions taken by him were found to be illegal and illegitimate. In order to avoid the disastrous consequences of declaring all acts done during his rule, whether legislative or otherwise, to be of no legal effect, it was, however, held that those which were in the wider public interest could be 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. For answering this question it is necessary to examine as to which of 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 Jilani'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 President Iskandar Mirza in October, 1958, shows that he decided that:

(a) The Constitution of 23 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 Mohammad 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 23 March 1956, after so many tribulations, is unworkable. It is full of dangerous compromises, that Pakistan will soon disintegrate internally if the inherent malaise is not removed. To rectify them, the country must first be taken to sanity by a peaceful revolution. 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 a 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 25 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., 26 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....*

(Emphasis added)

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 5 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 5 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 a 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 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 that I saw no prospects of a compromise between the People's Party and the PNA, because of their mutual distrust and lack of faith. It was feared that the failure of the PNA and PPP 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 organize 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....

(Emphasis added)

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 Jilani 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 authorising 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 jurusprudence — *Id Quod Alias Non Est Licitum, Necessitas Licituin 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. *see reference by H.E. the Governor General to the Federal Court — PLD 1955 F. C. 435).* 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 16 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 state and society from dissolution and that on the grounds 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 Stratton and Others (1779) 21 St. Tr. 1222*. 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 on the whole they do, they must appear clearly to do it with a view to 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 populi 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 (1964) 3 Cyprus Law Reports 195.* To appreciate the background of this decision, it may be mentioned that by December 1963 the structure of the constitution of Cyprus had broke down. The island was 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 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 1964 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 1960 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 trail 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 intercommunal 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 (Misc. 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.

Triantafyllides, 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 *supreina 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 ray 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 a 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 breakdown of the district courts, the government had to choose between two 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 prerequisites 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* (discussed in 1967 {83 LQR 64}). The divisional bench held that although the existing government of Mr. Smith and his colleagues was not the lawful government of 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,(1968-2 S.A. 284) 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 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 according of validity to some acts or measures done or enacted otherwise than by the machinery of that constitution.' He went on to add: 'Lewis, 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 he 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 and Naude (1900) 17, SC 340,* Solomon, J., said on page 355:

> Martial law is nothing more nor less than the law of self-defence or the law of necessity. It is put in force in times of public danger, when the *maxim salus republicae extrema 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 thereunder are strictly limited by the necessities of the situation.

And in *White and Tucker v. Rudolph. 1879 Kotze 115.,* Kotze, J., said on page 124:

> It must be admitted that the law distinctly recognizes the maxim *necessitas non habet legem, 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, prime 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, validity 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 favourably 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*, Madzimbanmto v. Lardner Burke 1968 3 All. E.R. 561.* 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 for 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 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 and Oala V. Attorney-General (Wes)t* decided on 24 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 so directed.

The appellants sought *certiorari* 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 field", 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 arose 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 (1966) E.A.D.R. 514,* which followed the decision of this court in *State v. Dosso (PLD 1958 SC 533)*. But the court, however, reiterated its view that the Federal Military Government was not a 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 whu are suspended. We have tried to show that the country 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'.

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 recognized 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. Bekker and 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 — PLD 1955 F.C. 435*). Thus, in certain exceptional circumstances it is possible, as a measure of state necessity, to impose even martial law.

The question whether the conditions prevailing in Pakistan necessitated the above step has to be answered by reference to the happenings from 7 March 1977, upto 5 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 7 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 in imposing martial law stands validated, on the principle of state necessity, as urged by the learned Attorney-General.

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 Jaw. Whereas for Kelsen the efficacy of a revolution creates a new reality of which the pure science of law must take ccount, 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 effivancy 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."

All the 9 judges were unanimous that the petition was liable to be dismissed: Ed.