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Asma Jilani ---- Vs---- Govt. of the Punjab

Important Case decided By SC.

P L D 1972 Supreme Court 139

Present: Hamoodur Rahman, C. J., Muhammad Yaqub Ali, Sajjad Ahmad, Waheeduddin Ahmad and Salahuddin Ahmed, JJ

Criminal Appeal No. 19 of 1972

Miss ASMA JILANI-Appellant

Versus

THE GOVERNMENT OF THE PUNJAB AND ANOTHER----- Respondents

(On appeal from the judgment and order of Lahore High Court, Lahore, dated the 15th January 1972, in Writ Petition No. 1538 of 1971).

Criminal Appeal No. K-2 of 1972

Mst. ZARINA GAUHAR-Appellant

Versus

THE PROVINCE OF SIND AND 2 OTHERS-Respondents

(On appeal from the judgment and order of the High Court of Sind & Baluchistan, Karachi, dated the 18th February 1972, in Constitutional Petition No. 40 of 1972).

Criminal Appeals Nos. 19 and K-2 of 1972, decided on 20th April 1972.

(a) Constitution--------

-------Annulment and abrogation of Constitution by a successful Military revolution-Principle laid down in Dosso's case [P L D 1958 S C (Pak.) 533] 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, then such a change is a revolution and its legal effect is not only the destruction of the Constitution but also the validity of the national legal order, irrespective of how or by whom such a change is brought about"-Held, wholly unsustainable and cannot be treated as good law either on the principle of stare decisis or otherwise-Martial Law-Nature and scope of Proclamation of Martial Law does not by itself involve abrogation of civil law and functioning of civil authorities and certainly does not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country-Commander of Armed Forces ; bound by his oath to defend the Constitution-Doctrine of "legal positivism" propounded by Hans Kelsen--Examined-[State v. Dosso P L D 1958 S C (Pak.) 533 overruled].

The precise question before the Supreme Court was whether the High Courts had jurisdiction under Article 98 of the Constitu*tion of Pakistan (1962) to enquire into the validity of detention under the Martial Law Regulation No. 78 of 1971 in view of the bar created by the provisions of the Jurisdiction of Courts (Removal of Doubts) Order, 1969. The further question was whether the doctrine enunciated in the case of State v. Dosso P L D 1958 S C (Pak.) 533 was correct. The successive mano*euvrings for usurpation of power under the Pseudonym of Martial Law, it was urged, were neither justified nor valid nor had even reached the effectiveness to merit the legal recognition that was given to them in the case of State v. Dosso.

Held, 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 :-

(1) "That the basic doctrines of legal positivism", which he was accepting, were such firmly and

universally accepted doctrines that "the whole science of modern jurisprudence" rested upon them ;

(2) that any "abrupt political change not within the contem*plation of the Constitution" constitutes a revolution, no matter bow temporary or transitory the change, if no one has taken any step to oppose it ; and

(3) 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 attempt to formulate any theory which "favours totalitarianism". Kelsen was only trying to lay down a pure theory of law as a rule of normative science consisting of "an aggregate or system of norms". He was propounding a theory of law as a "mere jurists' proposition about law". He was not attempting to lay down any legal norm or legal norms which are "the 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 autho*rity is a source of law. Kelsen's attempt to justify the principle of effectiveness from the standpoint 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 purposes 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 recog*nition of a State under international law has nothing to do with the internal sovereignty of the State, and this kind of recogni*tion 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 observations of the Chief Justice in Dosso's case are not correct that upon the principles of international law if the territory and the people remain substantially the same there is "no change in the corpus or international entity of the State and the revolutionary Government and the new State are, accord*ing to international law, the legitimate Government and the valid Constitution of the State". This proposition does not find support from any principle or international law. Accord*ing to Oppenheim's view as propounded in his book on Inter*national Law if the revolutionary Government is ineffective and or has no "reasonable expectancy of permanence" and/or does not "enjoy the acquiescence of the population", then the international community may well refuse to recognise it, even though its territorial integrity remains unchanged and its people remain substantially the same. 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 grund-norm is necessary, Pakistan need not have to look to the Western legal theorists to discover it. Pakistan's own grund-norm is enshrined in its own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is an immut*able 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, !t is one of the fundamental principles enshrined in the Holy Quran:

Say, 'O Allah, Lord of sovereignty. Thou givest sovereignty to whomsoever Thou pleasest ; and Thou takest a Nay sovereignty from whomsoever Thou pleasest. Thou exaltest whomsoever Thou pleaaest and Thou abasest whomsoever Thou pleasest.-Holy Quran, Pt. 3, Chap. III, A1 'Imran, Ay. 27-The basic con*cept underlying this unalterable principle of sovereignty is that the entire body politic becomes a trustee for the discharge of sovereign functions. Since in a complex society every citizen

cannot personally participate in the performance of the trust, the body politic appoints State functionaries to discharge these functions on its behalf and for its benefit, and has the right to remove the - functionary so appointed by it if he goes against the law of the legal sovereign, or commits any other breach of trust or fails to dis*charge his obligations under a trust. The functional Head of the State is chosen by the community and has to be assisted by a Council, which must hold its meetings in public view and remain accountable to public. It is under this system that the Government becomes a Government of laws and not of men, for no one is above the law. It is this that led Von Hammer, a renowned orientalist, to remark that under the Islamic system "the law rules through the utterance of justice, and the power of the Governor carries out the utterance of it.

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.

Now to judge the validity of the events that took place on and from the 24th of March 1969. Oar the 24th of March 1969, Field-Marshal Muhammad Ayub Khan, the then President of Pakistan, wrote a letter to the Commander-in-Chief of the army expressing his profound regret for coming to the conclu*sion that "all civil administration and constitutional authority in the country has become ineffective" and admitting after reciting the unhappy state of events that had taken place in the country earlier, that "it is beyond the capacity of the civil Government to deal with the present complex 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 represent the only effective and legal instrument, to take over full control of the affairs of the country", and finally called upon the Commander-in-Chief to do the needful. This was follow*ed by a Broadcast over the Radio network at 7-15 p.m., of the 25th of March 1969. There was nothing either in this letter or in this broadcast 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. Both these merely called upon the Commander-in-Chief of the army to discharge his legal and constitutional responsibility not only to defend the country against external aggression but also to save it from internal disorder and chaos. He did not even proclaim Martial Law. Nevertheless, the Commander-in- Chief on the very same day. namely, the 25th of March 1969, on his own proclaimed Martial Law throughout the length and breadth of Pakistan and assumed the powers of the Chief Martial Law Administrator. He also abrogated the Constitu*tion, dissolved the National and Provincial Assemblies and declared that all persons holding office as President, members .of the President's Council, Ministers, Governors of Provinces and members of their Council of Ministers shall cease to hold office with immediate effect. Existing laws and Courts were, -however, preserved with the proviso that no writ or other order shall be issued against the Chief Martial Law Administrator or any person exercising powers or jurisdiction under the authority of the Chief Martial Law Administrator.

It is clear that under the Constitution of 1962, Field-Marshal Muhammad Ayub Khan had no power to hand over power to anybody. Under Article 12 of the 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. Under Article 30 the President could also proclaim an emergency if the security or economic life of Pakistan was threatened by internal disturbances beyond the power of a Provincial Government to control and may be for the present purposes that he could also proclaim Martial Law if the situation was not controllable by the civil administration. It is difficult, however, to appreciate under what authority a Military Comman*der could proclaim Martial Law.

Martial Law, in the present times in England, has acquired various senses. In its original sense ft is perhaps now only identi*fiable in the law relating to the enforcement of discipline in the forces at home and abroad. In this sense this branch of Martial Law is now better known as "military law" and is in time of peace enforced under various statutes, such as the Army Act, the Navy Act and the Air Force Act. It derives its autho*rity from these statutes passed by the civil law-making bodies. In International Law Martial Law means the powers of a military commander in war time in enemy territory as part of the jus belli. In this sense as the Duke of Wellington once said in the House of Lords it is "neither more nor less than the will of the General who commands the army".

We must distinguish clearly between Martial Law as a machinery for the enforcement of internal order

and Martial Law as a system of military rule of a conquered or invaded alien territory. Martial Law of the first category is normally brought in by a proclamation issued under the authority of the civil Government and it can displace the civil Government only where a situation has arisen in which it has become impossible for the civil Courts and other civil authorities to function. The Imposition of Martial Law does not of its own force require the closing of the civil Courts or the abrogation of the authority of the civil Government. The maxim inter armes teges silent applies in the municipal field only where a situation has arisen in which tit has become impossible for the Courts to function, for, on the other hand, it is an equally well-established principle that where the civil Courts are sitting and civil authorities are functioning the establishment of Martial Law cannot be justified. The validity of Martial Law is, in this sense, always a judicial ques*tion, for, the Courts have always claimed and have in fact exercised the right to say whether the necessity for the imposi*tion of Martial Law in this limited common law sense existed.

From the examination of the various authorities on the subject one is 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 would be paradoxical indeed if such a result could flow from the invocation in the aid of a State of an agency set up and maintained by the State itself for its own protection from external invasion and internal disorder. If the argument is valid that the proclamation of the Martial Law by itself leads to the complete destruction of the legal order, then the armed forces do not assist the State in suppressing disorder but actually create further disorder, by disrupting the entire legal order of the State. It is, therefore, not correct to say that the proclama*tion of Martial Law by itself must necessarily give the Com*mander of the armed forces the power to abrogate the Consti*tution, which he is bound by his oath to defend.

Per Yaqoob Ali, J.-However, effective the Government of a usurper may be, it does not within the National Legal Order acquire legitimacy unless the Courts recognize the Government as de jure. International law is not concerned with these considera*tions. If a rebel Government has succeeded in gaining effective control over people and territory the other States may recognize it. But will the same rule apply to the municipal Courts. East Pakistan today provides a classic example of a successful revolu*tion which destroyed the National Legal Order and became a new law-creating fact. East Pakistan has declared its self-independence and became a separate State under the name of Bangla Desh. Pakistan claims that East Pakistan is a part of Pakistan, but a. large number of States have already recognized it as an* independent State. New Courts and Government services have been constituted in Bangla Desh which do not operate under the Legal Order of Pakistan. On these facts if a dispute arises involving the determination whether the new Government of East Pakistan is de jure, will the municipal Courts of West Pakistan confer recognition on it, because a victorious revolution is a legal method of changing the Constitution and the new order has become efficacious as the individuals whose behaviour the new order regulates actually behave by and large in conformity with new order. The answer is obvious. While under International law, East Pakistan has become an independent State, the municipal Courts of Pakistan will not confer recogni*tion on it or act upon the legal order set up by the rebel Government. Yahya Khan's Government, therefore, remained de facto and not de jure up to 20th December 1971, when he stepped aside.

Kelsen invests revolutionary Government with legal authority on the basis of a pre-supposed norm that the victorious revolution and successful coup d'etat are law-creating facts. This is in the realm of a theory and not a part of the national legal order of any State. No municipal Court will, therefore, rely on it as a rule. It is a statement of law by Mr. Kelsen to which a large number of jurists have taken exception. What Kelsen has said about the legitimacy of norm and legal authority of a revolutionary Government must be read separately and not mixed up. While revolution may destroy the existing national legal order because after the change the reality of the State has, disappeared from behind that order, it does not follow that the legal order, which replaces it, is the expression of the superior will of one or more revolutionaries who staged victorious revolution or successful coup d'etat. This is explained by Kelsen himself in the remark, that "the efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order. A conditio sine qua non, but not a conditio per quam. The efficacy of the total legal order is a condition, but not the reason for the validity of its constituent norm. These norms are valid not because the total order is efficacious, but because they are created in a constitutional way." So, after a change is brought by a revolu*tion or coup d'etat, the State must have Constitution and subject itself to that order. Every single norm of the new legal order will be valid not because the order is efficacious, but because it is made in the manner provided by the constitution of the State. Kelsen, therefore, does not contemplate an all omnipotent President and Chief Martial Law Administrator sitting high above the society and handing its behests downwards. No single man can give a constitution to the society which. in one sense, is an agreement between the people to live together under an Order which will fulfil their expectations, reflect their, aspirations and

hold promise for the realisation of themselves. It must, therefore, embody the will of the people which is usually expressed through the medium of chosen representatives. It must be this type of constitution from which the norms of the new legal order will derive their validity. If this appraisal of Kelsen is correct, then the decision in the case State v. Dosso* upholding the validity of the Laws (Continuance in Force) Order must be held to be erroneous.

A person who destroys the national legal order in an illegitimate manner cannot be regarded as a valid source of law*making. May be, that on account of his holding the coercive apparatus of the State, the people and the Courts are silenced *temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and Courts will not recognize *its rule and act upon them as de jure. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper; he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would-*be adventurers.

(b) Constitution of Pakistan (1952)------

------ Art. 2(2)-Term "Law" *Concept of "Law".

Legal theorists have spent a great deal of time and energy in elucidating the concept of law. Some Continental jurists think of them as dictates of reason, others as commands, yet others would have us believe that whatever is habitually obeyed is law. Even the American jurists are not unanimous. Justice Cardoso makes an exception in the case of statutes, in so far as they are clear, and precedents which are clearly in point. Jerome Frank on the other hand thinks that Gray's view is not sufficiently radical. The task of a Judge in the circumstances, is not an easy one. But is it necessary for him to define law? Law itself is not a legal concept, for, what is law is really a theoretical question. Conclusions of law do not depend upon the definition of law nor are legal judgments based on definitions of law and, in fact, as Sir Ivor Jennings has said in his Article on the Institutional Theory published in Modern Theories of Law, Oxford University Press. 1933 (page 83) "the task which many writers on Jurisprudence attempt to fulfil in defining law is a futile one", for, according to him, "law has no definition except in a particular context." So far as a Judge is concerned, if a definition is necessary, all that he has to see is that the law which he is called upon to administer, is made by a person or authority legally competent to make laws and the law is capable of being enforced by the legal machinery.

Per Yaqoob Ali, J. "Law" was not defined in the Constitu*tion. It is, therefore, for the Courts to lay down what 'law' is, and if any decree, or behest of Yahya Khan expressed as a Martial Law Order, Martial Law Regulation or Presidential Order or Ordinance, does not conform to the meaning of the term 'Law' in Article 2 of the Constitution of Pakistan (1962) these Regulations, Orders and Ordinances will be void and of no legal effect.

In introduction to "Law in the Making" C. K. Allen mentions two antithetic conceptions of growth of law : (i) law Is which is imposed by a sovereign will ; and (ii) law which .develops within society of its own vitality. He criticises Austin who defined "law" as the will of the sovereign and points out that whatever be the constitutional instrument which secures observance and enforcement of law-and some sanction of this kind is certainly indispensable--there is no historical justification for the view that this power always and necessarily must be a determinate, "human superior" which at the same time createsall law. It is impossible in every form of society governed by law to disengage and personify a "sovereign" as thus understood, with the artificial precision which Hobbes and Austin assume.

Salmond describes "law" as body of principles recognised and applied by the State in the administration of justice as the rules recognised and acted upon by Courts of justice. All the theories of law are at one in viewing law as consistent of rules. Such rules are regarded by natural law as dictates of reason, to positivism as decrees of the sovereign and by realism as the practice of the Courts. The central notion of the natural law theory is that there exist objective moral principles which depend on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law in so far as it conforms to these principles. These principles

of justice and morality constitute the natural law which is valid of necessity, because the rules for human conduct are logically connected with truths concerning human nature. Diametrically opposed to the theory of natural law is the positivist or imperative theory of law. It seeks to define law not by reference to its condition. but according to the formal criteria which differentiate legal rule from other source such as those of morals, etiquette, and so on. It is a type of command, it is laid by a political sovereign and is enforceable by sanction. Realism, like positivism, looks on law as the expression of the will of the State as made through the medium of the Courts.

According to Holmes law is really what the Judge decides. This great American Judge sowed the seed of the American realism in a famous paper in which he put forward. a novel way of looking at law. If one wishes to know what law is, he said, one should view it through the eyes of a bad man, who is only concerned with what will happen to him if he does certain things. The prophecies of what the Courts will do to the bad man, in the opinion of Justice Holmes, is what he means by the law.

In "A Grammar of Politics" Laski adds: "To those for whom law is a simple command, legal by virtue of the source from which it comes, it is not likely that such complexities as these will be popular. We are urging that law is, in truth, not the will of the State, but that from which the will of the State derives whatever moral authority it may possess . . . . It assumes that the rationale of obedience is in all the intricate facts of social organisation and in no one group of facts. It denies at once the sovereignty of the State, and that more subtle doctrine by which the State is at once the master and the servant of law by willing to limit itself to certain tested rules of conduct. It insists that what is important in law is not the fact of command, but the end at which that command aims and the way it achieves the end.

Pakistan is an Islamic Republic. Its ideology is enshrined in the Objectives Resolution of the 7th April 1949, which inter alia declares "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 Quran and Sunnah". We should, therefore, turn more appropriately to Islamic Jurisprudence for the definition of "Law". One method of defining "Law" is to know its source. In Shari'at laws have divine origin. They are contained in the Holy Qaran, and Hadith, namely, precepts and actions of the Holy Prophet, peace be upon him. The other sources are Ijma' Consensus and juristic deductions including Qiyas : Analogy, Istihsen or Juristic Equity, Public Good, Istidlal : Reason and Ijtihad ; Juristic Exposition. While Juristic Deductions are judge-made laws, Ijma' is based on the doctrine of Imam Shafi'i that "the voice of the people is the voice of God", and is the most fruitful source of law-making in Shariat. In the present day context the Legislative Assemblies comprising of chosen representatives of the people perform this function. Thus, in Islamic Jurisprudence, the will of a sovereign, be he the monarch, the President or the Chief Martial Law Administrator is not the source of law. The people as delegatee of the sovere*ignty of the Almighty alone can make laws which are in conformity with the Holy Quran and Sunnah.

The preponderant view appears to be that law is not the will of a sovereign. Law is a body of principles-called rules or norms*-recognised and applied by the State in the administration of justice as rules recognised and acted upon by the Courts of justice. It must have the contents and form of law. It should contain one or more elements on which the different theories of law are based, and give expression to the will of the people whose conduct and behaviour the law is going to regulate. The will of the people is nowadays often expressed through the medium of Legislature comprising of the chosen representatives of the people. The will of a single man howsoever laudable or sordid is a behest or a command, but is certainly not law as understood in juristic sense.

(c) Constitution of Pakistan (1962)---

---Courts having given full effect to Constitution of 1962 and having adjudicated upon rights and duties of citizens in accordance with laws thereof, all laws made and acts done by Government thus acquired not only de facto validity but also de jure validity by reason of unquestioned recog*nition extended to them by Courts of highest jurisdiction in the country.

The Courts in the country gave full effect to the Constitution of 1962 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 as also enforced the laws created by that medium in a number of cases. Thus 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 jure validity by reason of the unquestioned recognition extended to them by the Courts of highest jurisdiction in the country. The validity of the acts done thereunder are no longer, therefore, open to challenge.

(d) Court duty of--------

----No duty cast on Courts to enter upon purely academic exercises or to pronounce upon hypothetical questions *Court's judicial function: to adjudicate upon real and present con*troversy formally raised before it by litigant-Court would not suo motu raise a question and decide it.

The Courts do not decide abstract hypothetical or contingent questions or give mere declarations in the air. There is no duty cast on the Courts to enter upon purely academic exercises or to pronounce upon hypothetical questions. The Court's judicial function is to adjudicate upon a real and present controversy which is formally raised before it by a litigant. If the litigant does not choose to raise a question, however, important it might be, it is not for the Court to raise it suo motu.

(e) Stare decisis-Doctrine of stare decisis-------

----Flexible in its application -Law cannot stand still nor can the Courts and Judges be mere slaves of precedents.

In spite of a Judge's fondness for the written word and his normal inclination to adhere to prior precedents one cannot fail to recognise that it is equally important to remember that there is need for flexibility in the application of this rule, for, law cannot stand still nor can the Judge, become mere slaves of precedents. The rule of stare decisis does not apply with the same strictness in criminal, fiscal and constitutional matters where the liberty of the subject is involved or some other grave injustice is likely to occur by strict adherence to the rule.

Per Yaqoob Ali, J.-Stare decisis is the rule of expediency and public policy and is not inflexible and will not be applies where injustice is done or injury caused. This rule will also not apply if the language is not ambiguous. It will apply where two interpreta*tions are open and Court having adopted one interpretation it may not depart from it, if it upsets contracts, titles and marriages, etc.

(f) Bias-------

---Bias in Judge-Mere association with drafting of a law-Does not necessarily disqualify a Judge from interpreting that law in the light of arguments advanced before him.

(g) Jurisdiction -----

------ Superior Courts are Judge of their own jurisdiction.

The Courts undoubtedly have the power to hear and determine any matter or controversy which is brought before them, even if it be to decide whether they have the jurisdiction to determine such a matter or not. The superior Courts are, as is now well settled, the Judges of their own jurisdiction. This is a right which has consistently been claimed by Supreme Court and other Courts of superior jurisdiction in all civilised countries.

(h) Proclamation of Martial Law, 1969-----

------ Provisional Constitu*tion Order 1969; Jurisdiction of Courts (Removal of Doubts) Order [President's order 3 of 1969] and Martial Law Regulation 78 [C. M.L.As.'] of 1971-Military rule sought to be imposed upon country by General Agha Muhammad Yahya Khan by Proclamation of Martial Law, 1969-Entirely illegal-Presidential Order 3 of 1969, being a sub-constitutional legislation, could not curtail jurisdiction conferred by Constitution of Pakistan (1962) upon Supreme Court and High Courts-Presidential Order 3 of 1969 ; an unconstitutional document Martial Law Regulation 78 ; not only invalid and illegitimate but also incapable of being sustain*ed even on ground of necessity.

From the examination of the various authorities on the subject one is 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 would be paradoxical indeed if such a result could flow from the invocation in the aid of a State or an agency set up and. maintained by the State itself for its own protection from external invasion and internal disorder. If the argument is valid that the proclamation of the Martial Law by itself leads to the complete destruction of the legal order, then the armed forces. do not assist the State in suppressing disorder but actually create further disorder, by disrupting the entire legal order of the State It is therefore not correct to say that the proclamation of Martial Law by itself must necessarily give the Commander of the armed forces the power to abrogate the Constitution, which he is bound by his oath to defend. If this be so, then from where did General Agha Muhammad Yahya Khan acquire the right to *assume control of the reins of Government? Field-Marshal Muhammad Ayub Khan did not appoint him as his successor by his letter of the 24th March 1969. He merely called upon him to perform his "constitutional and legal duty to restore order" in the country. If this was his authority, then the only authority he got was to restore order and nothing more. Even the imposition of Martial Law by his proclamation is of doubtful. validity, because the proclamation should have come from the civil authorities and it was only then that under the proclamation the Commander of the armed forces could have moved into action. There is no provision in any law which gives the Commander of the armed forces the right to proclaim Martini Law, although he has like all other loyal citizens of the country a bounden duty to assist the State, when called upon to do so. If the magnitude of the insurrection is so great that the Courts and the civil administration are unable to function, the military may exercise all such powers that may be necessary to achieve their objective and in doing so may even set up Military Tribunals to promptly punish wrong-doers but this, whether done throughout the country or in a restricted area within the country, merely temporarily suspends the functioning of the civil Courts and the civil administration. As soon as the necessity for the exercise of the military power is over, the civil administration must, of necessity, be restored, and assume its normal role. It is not without significance that after the so-called imposition of Martial Law in 1969 the Martial Law Authorities had no occasion to fire even a single shot and found the conditions so normal that the civil administration never ceased to function and all the Courts continued to sit for all purposes. In fact the situation was so normal that within a few days the reality had to be accepted and even the Constitution was brought back except in so far as it had been purported to be altered by the creation of the office of President and the assumption of that office by the Chief Martial Law Administrator. Protection was also purported to be given to the acts of all Martial Law Administrators and their subordinates acting under their orders to save them from the consequences of their otherwise illegal acts. If Martial Law was by itself a sufficient legal cover then why was this special protection necessary. This country was not a foreign country which had been invaded by any foreign army with General Agha Muhammad Yahya Khan at its head nor was it an alien territory which had been occupied by the said army. The question of imposition of "military rule" as an incident of jus belli of international law could not, in the circumstances, possibly have arisen. The only form of martial law, therefore, that could possibly have been imposed in this country, assuming that such a state of large scale disorder had come to prevail in the country as was suggested by Field-Marshal Muhammad Ayub Khan in his letter of the 24th of March 1969, was a martial law of the kind which could be imposed under the English common law and was imposed by the British from time to time in 1919 in Amritsar, Lahore and Gujranwala, in 1921 in the areas inhabited by the Moplas, in 1930 in Sholapur, in 1942 in areas occupied by Hurs in Sind and in 1953 in Lahore. Under these martial laws there was, of course, no question of abrogation of any Constitution or of the introduction of military rule in supersession of the civil administration normally functioning in other parts of the country. Looked at, therefore, either from the constitutional point of view or the

Martial Law point of view whatever was done in March 1969, either by Field-Marshal Muhammad Ayub Khan or General Agha Muhammad Yahya Khan was entirely without any legal foundation. It was not even a revolution or a military coup d'etat in any sense of those terms. The Military Commander did not takeover the reins of Government by force nor did he oust the constitutional President. The constitutional President out of his own free will and accord in response to the public's demand, stepped aside and called upon the Military Commander to restore law and order, as he was bound to do both under the law and under the Constitution. On the stepping aside of the constitutional President the constitutional machinery should have automatically come into effect and the Speaker should have taken over as Acting President until fresh elections were held for the choice of a successor. The political machinery would then have moved according to the Constitution and the National and Provincial Assemblies would have taken steps to resolve the political disputes, if any, if the Military Commander had not by an illegal order dissolved them. The Military Commander, however, did not allow the constitutional machinery to come into effect but usurped the functions of Government and started issuing all kinds of Martial Law Regulations, Presidential Orders and even. Ordinances.

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.

The Presidential Order No. 3 of 1969 is a sub-constitutional legislation and it could not have curtailed the jurisdiction that was given to the High Courts and to the Supreme Court by the Constitution of 1962, for, that jurisdiction was preserved even by the Provisional Constitution Order.

Looking at the matter, therefore, from any point of view, whether, from the strictly legal and constitutional side, or on the basis of the principle of implied authority or even in terms of the so-called legal order purported to be created by the Provisional Constitution Order of 1969 itself, the conclusion cannot be escaped that the Presidential Order No. 3 was an unconstitutional document, General Agha Muhammad Yahya Khan had no authority to pass such legislation taking away the powers of the Courts in his capacity as President under the Provisional Constitution Order. The Martial Law introduced by him was illegal and, therefore, even as Chief Martial Law Administrator he was not competent to validly pass such laws, and it certainly was in excess of the implied authority, if any, given to him by the letter of Field-Marshal Muhammad Ayub Khan dated the 24th of March 1969.

The Martial Law Regulation No. 78 gives very wile powers to the Chief Martial Law Administrator and a Zonal Martial Law Administrator and even a Deputy Martial Law Adminis*trator to detain a person without trial for any length of time, without giving him any reasons for such detention or any opportunity even of making any representation against such a detention. These are indeed very extraordinary powers for taking away the most cherished right of a citizen in a most arbitrary manner. They provide no machinery for seeking any redress against any possible abuse or misuse of power or for making any representation or even for an appeal from Ceaser to Ceaser.

Both the Presidential Order No. 3 of 1969 and the Martial Law Regulation No. 78 of 1971 were made by an incompetent authority and, therefore, lacked the attribute of legitimacy which is one of the essential characteristics of a valid law. The Presidential Order No. 3 of 1969 was also invalid on two additional grounds, namely, that it was a Presidential Order, which could not in terms of the Provisional Constitution Order itself amend the Constitution so as to take away the jurisdiction conferred upon the High Courts under Article 98 of the Con*stitution of Pakistan 1962 and that it certainly could not, in any event, take away the judicial power of the Courts to hear and determine questions pertaining even to their own jurisdiction and this power could not be vested in another authority as long as the Courts continued to exist.

Per Yaqoob Ali, J.-As both President's Order No. 3 of 1969 and Martial Law Regulation 78 were intended to deny to the Courts the performance of their judicial functions, an object opposed to the concept of law, neither would be recognised by Courts as law.

Martial Law is of three types: (i) the law regulating discipline and other matters determining the rule

of conduct applicable to the Armed forces. The present case is not concerned with it; (ii) law which is imposed on an alien territory under occupation by an armed force. The classic function of this type of martial law was given by the Duke of Willington when he stated in the House of Lords that "Martial Law is neither more nor less than the will of the General who commands the Army. In fact, Martial Law means no law at all." This case is also not concerned with this type of Martial law; and (iii) law which relates to and arises out of a situation in which the civil power is unable to maintain law and order and the Military power is used to meet force and re-create conditions of peace and tranquility in which the civil power can re-assert its authority. The Martial Law Regulations and Martial Law Orders passed under this type of Martial Law must be germane only to the restoration of peace and tranquillity and induced during the period of unrest. In practice, the Martial Law imposed by Yahya Khan belonged to the second category. A large number of Martial Law Regula*tions and Martial Law Orders passed by him between 25th. March 1969 and 20th March 1971, had no nexus with civil disturbances. In fact, peace and tranquility was restored in the country within a few days of his stepping in. Martial Law should, therefore, have come to an end, but the entire structure of Institutions of Pakistan including superior Courts were made to appear by Yahya Khan as merely the expression of his will which a victorious military commander imposes on an alien territory to regulate the conduct and behaviour of its subjugated populace. Neither Pakistan was a conquered territory, nor the Pakistan Army commanded by Yahya Khan was an alien force to justify the imposition of this type of Martial Law. The Martial Law imposed by Yahya Khan was, therefore, in itself illegal and all Martial Law Regulations and Martial Law Orders issued by him were on this simple ground void ab initio and of no legal effect.

(i) Interpretation of statutes-----

-----Legislation-Illegal and illegi*timate legislation-Doctrine of necessity-Illegal usurpation of power by a Military adventurer-All laws enacted during such regime illegal -Everything done during such intervening period both good and bad cannot, however, be treated in the same manner-Recourse could be had to the doctrine of necessity to condone the illegality and validate certain legislation in order to sane the country from greater chaos and the citizens from further difficulties.

The grabbing of power and installing himself as the President and Chief Martial Law Administrator of Pakistan by General Agha Muhammad Yahya Khan by the Proclamation of 1969 having been declared by the Supreme Court to be entirely illegal. The question arose whether everything (legislative measures and other acts) done during his illegal regime, whether good or bad, can be treated in the same manner and branded as illegal and of no effect.

Held : Grave responsibility, in such circumstances, rests upon Courts not to do anything which might make confusion worse confounded or create a greater state of chaos if that can possibly be avoided consistently with their duty to decide in accordance with law. Acts done by those actually in control without lawful authority may be recognized as valid or acted upon by the Courts within certain limitations, on principles of necessity. There is no doubt that a usurper may do things both good and bad, and he may have during the period of usurpation also made many Regulations or taken actions which would be valid if emanating from a lawful Government and which may well have, in the course of time, affected the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer of property and similar subjects. All these cannot be invalidated and toe country landed once again into confusion? Such a principle, has also been adopted in America in various cases which came up after the suppression of the rebellion of the Southern States and the American Courts too adopted the policy that where the acts done by the usurper were "necessary to peace and good order among citizens and had affected property or contractual rights they should not be invalidated", not because they were legal but because they would cause inconvenience to innocent persons and lead to further difficulties.

Recourse therefore has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself but one has to disagree with the view that this is a doctrine for validating the illegal acts of usurpers. This doctrine can be Invoked in aid only after the Court has come to the conclusion that the acts of the usurpers 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. This principle would be called a principle of condonation and not legitimization.

Applying this test the Court condoned (1) all transactions which are past and closed, for, no useful purpose can be served by re-opening them, (2) all acts and legislative measures which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order, (3) all acts which tend to advance or promote the good of the people, (4) all acts required to be done for the ordinary orderly running of the State and all such measures as would establish or lead to the establishment of, the objectives mentioned in the Objectives Resolution of 1954. The Court would not, however, condone any act intended to entrench the usurper more firmly in his power or to directly help him to run the country contrary to its legitimate objectives. The Court would not also condone anything which seriously impairs the rights of the citizens except in so far as they may be designed to advance the social welfare and national solidarity.

Per Yaqoob Ali, J.-The Laws saved by the doctrine of State necessity do not achieve validity. They remain illegal, but acts done and proceedings undertaken under invalid laws may be condoned on the conditions that the recognition given by the Court is proportionate to the evil. to be averted, it is transitory and temporary in character and does not imply abdication of judicial review.

(j) Maxim--------

Salus populi cot suprema lox (the safety of the people is the supreme law).

(k) Maxim----

-- Inter arms leges silent (in the midst of arms the laws are silent).

Salmond on Jurisprudence ; George Whitecross Paton's Textbook on Jurisprudence ; Sir Ivor Jennings' Article on Institutional Theory in "Modern Theories of Law", 1933, p. 63 ; Dias' book on Jurisprudence, 3rd Edn., p. 93 ; Professor Lauter pacht's Article on Kelsen's Pure Science of Law in "Modern Theories of Law", 1933 ; Halsbury's Laws of England, 3rd Edn., Vols. 7 & 22, pp 260, 802 ;Corpus Juris Secundum, Vol. 21, para. 193 ; The Daily Pakistan Times, 11th November 1968 ; Laski's State in Theory and Practice, p. 27; Garner's Treaties on Political Science and Government, p.155; G. C. Field's Lectures on Political Theory, pp. 74-75; Dean Roscoe Pound's magnum opus on Jurisprudence, Vol. 1i, Part 3, p. 305; Frigowg's Supreme Court in American History, pp. 76-82; Professor Julius Stone's Treaties on the Legal System and Lawyers' Reasoning, 1964 Edn., p. 121 ;Modern Law Review, Vol. 26, p. 35; Oppen*helm's International Law, Vol. I, p. 127 1 Holy Quran, Pt. 3, Ch. 3, A1 'Imran, Ay. 27 ; Article by Sir William Holdsworth in Law Quarterly Review, Vol. 18, p. 117 ; Hansard, Vol. CXV, Col. 880 ; A. V. Dicey's Law of the Constitution, p. 287 ; Black*stone's Commentaries, Vol. I, p. 381 ; Commentaries on the Con*stitution of the United States by Chester James : Grodus on De jure belli et pacis, Book 1, Chap. 4 ; Lakamani & Ola v. Attorney-*General (West), Nigeria ref. In S. A. de Smith on Constitutional and Administration Law; The Attorney-General of the Republic. v. Mustafa Ibrahim and others 1964 C L R 195; 18 Law. Ed. 281; 87 Law. Ed. 1; 90 Law. Ed. 688; "A Grammar of Politics" by Laski; Yick Wo v. Hopking ; Law In The Making by C. K Allen; Modern Theories of Law, pp. 107-108; Friends Not Masters by Muhammad Ayub Khan and Fundamental Law of Pakistan, p. 598 by Brohi.

State v. Dosso P L D 1958 S C (Pak.) 533 ; Federation of Pakistan v. Mould Tamizuddin Khan P L D 1955 F C 240; Yusuf Patel v. The Crown P L D 1955 F C 387; Presidential Reference No. 1 of 1955 P L D 1955 F C 435 ; Fazlul Qadir Chowdhury anti others v. Muhammad Abdul Hague P L D 1963 S C 486; Syed Abul A'ala Maudoodi and another v. The Government of West Pakistan and another P L D 1964 S C 673; The Government of East Pakistan v. Mrs. Rowshan Bijoy Shaukat Ali Khan P L D 1966 S C 286; Malik Ghulam Jilani v. The Government of West Pakistan and another P L D 1967 S C 373; The Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri P L D 1969 S C 14; Province of East Pakistan v. Muhammad Mehdi Ali Khan P L D 1959 S C (Pak.) 387; Iftlkharuddin and another v. Muhammad Sarfaraz and another P L D 1961 S C 585; Muhammad Afzal v. The Commissioner, Lahore Division P L D 1963 S C 401; Ch. Tanbir Ahmad Siddiky v. Government of East Pakistan P L D 1968 S C 185; (1966) 1 W L R 1234 ; The. Governors of the Campbell College Belfast

v. Commissioner of Valuation for Northern Ireland (1964) 2 A E R 705 ; The Attorney-General of the Commonwealth of Australia v. Reginam and others (1957) 2 A E R 45 (P C) ; Waterside Worker's Federation v. Alexander 25 C L R 434 ; Tilonka v. Attorney-General of Natal 1907 A C 93 ; Rex v. Allen (1921) 2 I R 241 ; Ex parte : Marias 1902 A C 109; Wolfe Tone's case (1798) 27 St. Tr. 614; Ex parte : Milligan 4 Wallace 121 ; Texas v. E. Constitution 77 U S S C R 375 (Lawyers' Edition); Mir Hassan and another v. The State P L D 1969 Lah. 786; Muhammad Ismail v. The State P L D 1969 S C 241; Mian Fazal Ahmad v. The State 1970 S C M R 650; Marriott's English Political Institutions, 1938 Edn., p. 293; Madzimbamuto v. Lard*ner-Burke and another (1968) 3 A E R 561 ; Texas v. White (1868) 7 Wallace 733; Horn v. Lockhart (1873) 17 Wallace 850; Baldy v. Hunter (1897) 171 U S 388; Uganda v. Commissioner of Prisons ; ex parte Matovu 1966 E A L R 514.

Criminal Appeal No. 19 of 1972

M. Anwar. S. M. Zafar and Ijaz Hussain Batalvi, Senior Advocates Supreme Court instructed by M. A. Rahman, Advo*cate-on-Record for Appellant.

M. B. Zaman, Advocate-General Punjab (M. Farani, A. G. Chowdhury and R. S. Sidhwa, Advocates Supreme Court with him) instructed by Ijaz Ali, Advocate-on-Record for Respondent No. 1.

Nemo for Respondent No. 2.

Under Order XLV, Supreme Court Rules:

Yahya Bakhtiar, Attorney-General for Pakistan (A. A..Zari, Advocate Supreme Court with him) instructed by Ifiikharuddin Ahmad, Advocate-on-Record.

A. H. Memon, Advocate-General Sind, Muhammad Ahmad Mirza, Advocate-General Baluchistan, Fakhre Alam, Advocate-*General Peshawar (present up to 22-3-1972).

A. K. Brohi (present up to 24-3:1972), instructed by Fazal *Hussain, Advocate-on-Record and Sharifuddin Peerzada, Senior Advocate Supreme Court Amicus curiae.

Criminal Appeal No. K-2 of 1972

Manzoor Qadir and Ijaz Hussain Batalvi, Senior Advocates Supreme Court (Mashir Ahmad Pesh Imam, Advocate Supreme Court with them) instructed by M. A. Rahman, Advocate-on-*Record for Appellant. Abdul Hafiz Memon. Advocate-General Sind instructed by Shafiq Ahmad, Advocate-on-Record (present only on 16-3-1972) for Respondent No. 1.

Nemo for Respondent No. 2.

Yahya Bakhtiar, Attorney-General for Pakistan instructed by Masud Akhtar, Advocate-on-Record for Respondent No. 3.

Dates of hearing: 16th, 17th, 18th and 20th to 25th March 1972.

JUDGMENT

HAMOODUR RAHMAN, C. J.-These two appeals, by special leave, have been heard together, as they involve common questions of law.

Criminal Appeal No. 19 of 1972 (Miss Asma Jilani v. Province of Punjab) arises nut of a judgment of a learned Single Judge of the Lahore High Court, dismissing a petition under Article 98 (2) (b) (i) of the Constitution of 1962 filed to question the validity of the detention of the father of the petitioner. Malik Ghulam Jilani, the detenu in this case, eras arrested at Karachi under an order dated the 22nd of December 1971, purported to have been issued in exercise of powers con*ferred by clause (b) of sub-rule (1) of rule 32 read with rule 213 of the Defence of Pakistan Rules, 1971. This was the order that was originally challenged in the High Court. The High Court admitted the petition for regular hearing and issued notice to the Government of the Punjab for the 31st of December 1971. A day earlier on the 30th of December this order was rescinded and substituted by another order of the same day purported to have been issued by the Martial Law Administrator, Zone 'C', in exercise of the powers said to have been conferred on him by Martial Law Regulation No. 78.

The petition already filed was allowed to be amended on the 31st of December 1'971, by addition of fresh grounds attack*ing the legality of the second order of detention. When the petition came up for hearing on the lath of January 1972, the Government raised a preliminary objection that the High Court could not assume jurisdiction in the matter, because of the bar contained in the jurisdiction of Courts (Removal of Doubts) Order, 1969, promulgated by the last Martial Law regime.

The High Court relying on an earlier decision of this Court in the case of State v. Dosso (P L D 1958 S C (Pak.) 533) held that the Order of 1969 was a valid and binding law and that, as such, it had no jurisdiction in the matter by reason of the provisions of clause 2 of the above*mentioned Order.

Leave was granted in this case to consider : (1) as to whether the doctrine enunciated in the case of State v. Dosso was correct, (2) even if correct, whether the doctrine applied to the facts and circumstances in which Field Marshal Ayub Khan transferred power to General Agha Muhammad Yahya Khan, and (3) if the source of power assumed by General Agha Muhammad Yahya Khan was illegal and unconstitutional then whether all legislative and executive acts done by him including the imposition of Martial Law and the promulgation of Martial Law Regulations and Orders were illegal.

Criminal Appeal No. K-2 of 1972 (Mrs. Zarina Gauhar v. Province of Sind and others) arises out of an order of a High Court dismissing an application under section 497 of the Code of Criminal Procedure read with Article 98 of the Constitution of 1962, challenging the arrest of Mr. Altaf Hussain Gauhar, Editor-in-Chief, Dawn, Karachi, during the night between the 4th and 5th of February 1972, from his house without any warrant and his subsequent detention under an order purported to have been issued by the Martial Law Administrator, Zone 'D' under Martial Law Regulation No. 78. In this case too a Division Bench of the High Court of Sind & Baluchistan sitting at Karachi dismissed the application on the 10th of February 1972, holding that the Court has no jurisdiction to grant relief against Martial Law Orders for substantially the same reasons as were given by the, Lahore High Court in the case of Malik Ghulam Jilani.

Leave was granted by a Bench of this Court sitting at Karachi on the 24th of February 1972, as the petition for leave to appeal raised the same questions of law which had been raised in the petition filed by the daughter of Malik Ghulam Jilani, and the appeal was ordered to be heard at Lahore by the Full Court Along with the appeal in the case of Malik Ghulam Jilani.

Although the main question for decision in these appeals is whether the High Courts had jurisdiction under Article 98 of, the constitution of 1962 to enquire into the validity of the detentions complained of in these cases 9n view of the 'oar created by the provisions of the Jurisdiction of Courts (Removal of Doubts) Order, 1969 (Presidential Order No. 3 of 1969), learned counsel appearing for the appellants have very adroitly analysed the political vicissitudes through which this unfortunate country has passed since 1954 in order to highlight their contention that the successive manoeuvrings for usurpation of power under the pseudonym of Martial Law were neither justified nor valid roe had ever reached the stage of effectiveness to merit the legal recognition that yeas given to them in the case of The Stare, v Dosso.

Mr. Manzoor Qadir appearing for the appellant in Criminal Appeal No. K-2 of 1972 has even gone to the extent of inviting us to lay down, if necessary, new norms and examine the foundations of the norms themselves in order to determine the nature, scope and content of the "law" in accordance with which we are bound by our oaths to administer justice and according to which a citizen is entitled to demand justice in term" of the solemn undertaking contained in clause (2) of Article 2 of the Constitution, which is as follows:-

(2) In particular--

(a) no action detrimental to the life, liberty, body, reputation or property of ant parson shall be taken except in accordance with law;

(b) no person shall be prevented from, or be hindered in, doing that which is not prohibited by law; and

(c) no person shall be compelled to do that which the law does not require him to do."

But when it was pointed out to him that the problem of defining the "law" has become so engulfed in philosophical perplexities that it was well-nigh impossible to lay down any precise definition of the terra, he contented himself by referring to the definitions givers by the jurists of the American realist school of thought who by and large subscribe to the view that law is that which the Courts recognise as law. He adopts the definition of professor J. C. Gray that "the law of the State or of any organised body of men is composed of the rules which the Courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties". He also Quotes from Salmond on Jurisprudence and George Whitecross Paton's text book on Jurisprudence to show that jurists of other countries too hold the same view.

This may be a perfectly good definition from the legal practitioners' point of view but legal theorists have spent a great deal of time and energy in elucidating the concept of law. Some Continental jurists think of them as dictates of reason, others as commands, yet others would have us believe that whatever is habitually obeyed is law. Even the American jurists are not unanimous. Justice Cardozo snakes an exception in the case of statutes, in so far as they are clear, and precedents which are clearly in point. Jerome Frank on the other hand thinks that Gray's view is not sufficiently radical. The task of a Judge in the circumstances, is not an easy one. But is it necessary for him td define law? Law itself is not a legal concept, for, what is law is really a theoretical question. Conclusions of law do not depend upon the definition of law nor are legal judgments based on definitions of law and, in fact, as Sir Iver Jennings has said in his Article on the Institutional Theory published in Modern Theories of Law, Oxford University Press, 1933 (page 83) "the task which many writes on Jurisprudence attempt to fulfil in defining law is a futile one'", for, according to him, "law has no definition except in a particular context"

So far as a Judge is concerned, if a definition is necessary, all that he has to see is that the law which

he is called upon to administer is made by a person or authority legally competent to make laws and the law is capable of being enforced by the legal machinery. This, in my view, brings in the notion both of legitimacy and efficacy.

It is interesting to note that Dias in his book on Jurispru*dence, Third Edition (page 93) describes legislation as "law made deliberately in a set form by an authority, which the Courts have accepted as competent to exercise that function." This brings in, of course, the concept of the legitimacy of laws but in addition to this Dias also thinks that there are other factors such as "adaptability, effectiveness, consonance with morality and the socio-political background", which might influence the Courts in giving recognition to laws, He, however thinks that "effec*tiveness" is not a condition of the "law-quality" of its enactments or even of itself, because. "the validity of laws and of the law* constitutive medium are separate questions." According to him, "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, and it is not the only one." The thesis of Dias is thus the same as that now adopted by the learned counsel; namely, that "the legality of the law-constitutive medium only comes about when the Courts accept, or are made to accept it."

From this it is argued that the power of pronouncing upon the validity of a law is an inherent power vested in the superior Courts as a necessary conmoitant of the judicial power itself and, therefore, any law, which purports to take away that power Itself and seeks to stultify the functioning of the Courts, cannot be recognised as a "law" in the strict juristic sense. It is further pointed out that this principle has also been consistently followed by the superior Courts in this country. Thus in the case of Federation of Pakistan v. Moulvi Tamizuddin Khan (P L D 1955 F C 240) the Federal Court, quite undeterred by the disastrous consequences that were likely to ensue, claimed that it had the right "to expound the law in complete in difference to any popular reaction", even if the result is disaster", and declared a constitutional amendment made by the sovereign Constituent Assembly of Pakistan invalid on the ground that it had not received the assent of the Governor-*General, although admittedly the consistent practice of the Constituent Assembly since its inception had been that constitu*tional provisions enacted by it were not put up for the assent of the Governor-General and no Governor-General had hithertofore objected to this practice. In consequence of this decision it was found that a large number of constitutional enactments of the Constituent Assembly, which had not received the assent of the Governor-General, were likely to become invalid. The Governor-General, therefore, sought to validate such acts by indicating his assent with retrospective effect by means of an Ordinance called the Emergency Powers Ordinance No. 9 of 1955. The Federal Court again in the case of Yusuf Patel v. The Crown (P L D 1955 F C 387) declared the Emergency Powers Ordinance itself to be invalid, as the Governor-General was not, under the Independence Act, an authority competent to legislate in the constitutional field which was the exclusive reserve of the Constituent Assembly.

The disaster, which was apprehended in the case of Moulvi Tamizuddin Khan, had occurred. The Governor-General had unconstitutionally dissolved the Constituent Assembly. Proceed*ings taken to question the validity of the Governor-General's action by invoking the jurisdiction of the High Court under section 223-A of the Government of India Act were held to be incompetent, because, that section itself had been incorporated in the Government of India Act by a resolution of the Constituent Assembly which had not, according to the practice up to that time prevailing, been formally put up for the assent of the Governor-General, though tacitly accepted and acted upon in a large number of cases. Thereafter when the Governor-General attempted to validate a vast body of such constitutional legisla*tions, which had been passed between 1947 and 1954, retrospectively by an Ordinance, the Ordinance itself was struck down. In desperation the Governor-General in his turn invoked the advisory jurisdiction of the Federal Court under section 213 of the Government of India Act vide Governor-General's Reference No. 1 of 1955 (P L D 1955 F C 435), and asked the Court to find a solution for the "constitutional" impasse created by the judgments of the Court itself. The Federal Court again* came to his rescue and although no "law" of any kind could be found to meet the situation, it invoked in aid "the supreme principle of necessity embodied in the maxim salus populi est suprema lex", and on the basis thereof evolved a new political formula for the setting up of a new Constituent Assembly, even though this very maxim when used in support of the con*tention of Moulvi Tamizuddin Khan that the invalidation of a large number of constitutional laws merely on the ground of want of formal assent of the Governor-General would cause "disaster" and create a "Constitutional impasse" had not found favour with the Court.

The object of the learned counsel in referring to these decisions is presumably to suggest that from this day onwards whatever constitutional developments took place were not strictly legal. The

1956-Constitution, under which the principle of parity was accepted and the country was divided into two Provinces of East and West Pakistan, was, it is alleged, a Constitution framed by an illegally constituted body which was, under the threat of refusal of assent, also coerced into electing General Iskander Mirza as the first President of Pakistan under the Constitution. The process of illegality thus set in motion led in its turn to the illegal usurpation of power by the President so elected under the said Constitution abrogating the Constitution and declaring Martial Law on the 7th of October 1958. This was followed three days later by the promulgation of the Laws (Continuance in Force) Order on the 10th of October 1958.

Within a few days thereafter a case which has now become a cause celebre under the title of the State v. Dosso, came up for hearing on the 13th of October 1958. The main question agitated there was as to whether the proceedings, which were for a writ of habeas corpus and/or certiorari had abated by reason of the provisions of the. Laws (Continuance in Force) Order, 1958. The Court on the very next day, i. e. the 14th of October 1958, announced its decision that they had abated but when giving its reasons for the decision on the 23rd of October 1958, went on also to accord legal recognition to the Martial Law itself by describing it as a successful revolution and, therefore, a fresh law creating organ. The very next day, however, the new law *creator himself, who had purported to give the Laws (Continuance in Force) Order, 1958 under his command and the authority of the Martial Law proclaimed by him, was deposed by the Chief Administrator of Martial Law created in exercise of the same power. The latter subsequently, without creating any new organic law, quietly assumed the office of President also and continued to function as such until 1960 when he managed to secure a so-called mandate by some sort of a referendum to frame a Constitution. This Constitution was framed by him and came into operation from the 7th of June 1962. The country by and large accepted this 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 until 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 citizen in accordance with the terms thereof by recognizing this Law constitutive medium as a competent authority to exercise that function as also enforced the laws created by that medium in a number of cases. (Vide Mr. Fazlul Qadir Chowuhury and others v. Mr. Muhammad Abdul Haque (P L D 1963 S C 486). Syed Abut A'ala Maudoodi and another v. The Government of West Pakistan and another (P L D 1964 S C 673), The Government of East Pakistan v. Mrs. Roshan Bijoy Shaukat Ali Khan (P L D 1966 S C 286), Malik Ghulam Jilani v. The Government of West Pakistan and another (P L D 1967 S C 373) and The Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri (P L D 1969 S C 14).

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 jure validity by reason of the unquestioned recognition extended to them by the Court of highest jurisdiction in the country. The validity of the acts done thereunder are 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.

The question, however, with which we are now concerned is whether we should extend similar recognition on the basis of the *principle enunciated in the case of State v. Dosso to what happened on and after the 25th of March 1969, and recognise as valid laws the Jurisdiction of Courts (Removal of Doubts) Order, 1969 (President's Order No. 3 of 1969), which purports to take*away even our power to consider this question, and the Martial Law Regulation No. 78 promulgated on the 17th of April 1971, under which the detenus before us are now being detained.

In the above-mentioned case, as already pointed out, the *question which fall to be determined was as to whether the writs issued by the High Court had abated by reason of the provisions of clause (7) of Article 2 of the Laws (Continuance in Force) Order promulgated on the 10th of October 1958, after the abroga*tion of the 1956-Constitution and the declaration of Martial Law by the then President, the late Mr. Iskander Mirza. From the report of the judgment in Dosso's case it does not appear that the question of the validity of the abrogation of the Consti*tution, or of the promulgation of Martial Law or of the Laws (Continuance in Force) Order, 1958, was directly put in issue. The learned

Attorney-General, who then appeared for one of the respondents therein, has categorically stated from the Bar that he was not even allowed to raise this question. This Court, nevertheless, entered upon an appraisal of the constitutional position and purporting to apply the doctrine of "legal positivism" propounded by Hans Kelsen, came to the conclusion that where "a Constitution and the national legal order under fit is disrupted by an abrupt political change not within the contemplation of the Constitution", then such a 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." Therefore any change, no matter how or by whom brought about, whether by violence or non-violent coup d'etat or even by a person already in a public position, is "in law a revolution if it annuls the Constitution and the annulment is effective". (The underlining is mine). Under this theory it was held that if persons assuming power under such a 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." Thus the validity of the laws made thereafter has to be judged by reference to the new dispensation and not the annulled Constitution. This theory was further sought to be fortified on the basis that even according to the international law "a victorious revolution or a successful coup d'etat is an inter*nationally recognised legal method of changing a Constitution."

Learned counsel appearing in support of the appellants as also the learned counsel who have assisted the Court as amicii curiae have challenged the correctness of this theory and have contended that no such wide proposition had been propounded by Hans Kelsen and even if it had been it would be the solitary view of Hans Kelsen which has not been subscribed to by any other legal theorist. Indeed, it has been pointed out that Professor Lauterpacht in his Article on Kelsen's Pure Science of Law published in the Modern Theories of Law, Oxford University Press, 1933, goes to the extent of describing Kelsen as "an iconoclast" amongst jurists. In any event, it is contended that the Court in Dosso's case went even beyond Kelsen himself and the theory propounded by this Court actually amounts to making a rule of international law a rule of decision in the field of municipal law. The learned Chief Justice who delivered the main judgment of the majority comprising the Court, it is urged, was fully aware that, even according to Kelsen, "the essential condition to determine whether a Constitution has been annulled is the efficacy of the change" but did not wait to see whether that efficacy had, in fact, been attained by the change to which he was giving legal recognition. The case, it is further pointed out, was heard and decided within six days of the promulgation of the Martial Law and within three days of the promulgation of the Laws (Continuance in Force) Order. It was too early yet to hazard even a guess as to its efficacy. Indeed had the learned Chief Justice waited a few more days he would have seen that the efficacy was non-existent. This was more than amply demonstrated by the removal of the so-called successful law-creator himself the very next day after the publication of the judgment of the Court. Where then, it is said, was "the essential condition" for the recognition of the change ?

On general principles too learned counsel have attempted to show that the theory of Hans Kelsen was itself not sound in several respects and the criticisms levelled against his doctrines were so forceful that he himself had been compelled later to modify his views.

The learned Attorney-General appearing for the State has made no serious attempt to support the reasonings in Dosso's case or to justify the theories of Hans Kelsen apart from referring to one or two passages from some other jurists who too had apparently advanced the view that the de facto sovereign may, in certain circumstances, also be treated as the de jure sovereign but what he has most strenuously contended is that the law laid down in Dosso's case has now become the law of the land. It has been re-armed in various subsequent decisions and thus acquired a position which cannot be now reversed after 13 years. The decision in Dosso's case is now, according to him, the legal order and that has to be followed. He has also invoked in aid the principle of stare decisis to support his contention that the law laid down in that case should not now be changed.

It is true that the decision in Dosso's case did come up for consideration subsequently in several other cases and the Court re-affirmed its decision. The first of these was the case of the Province of East Pakistan v. Muhammad Mehdi Ali Khan (P L D 1959 S C (Pak.) 387) and it may be worth while to quote what the learned Chief Justice himself stated with regard thereto :-

"I may now take up the question whether there are sufficient grounds for reviewing or revising the view taken by this Court in the case of Dosso. In approaching that question the first thing to be seen

is what that case actually decides. In the judgment that was under appeal in that case some provisions of the Frontier Crimes Regulation had been held to be void because of their being inconsistent with a funda*mental right and, before the appeal came up for hearing, the Laws (Continuance in Force) Order was promulgated by the President. The Court held that after the coming into force of that Order no law could be declared or held to be void merely because it came into conflict with a fundamental right and that all pending applications for writs in which a law by reason of Part II of the Constitution had to be found to be void in order to grant the relief prayed for by a party had abated by force of clause (7) of Article 2 of that Order. The Court arrived at this result by reading Article 2(4) with Article 4(1) of the Order and by holding that after the promulgation of that Order Part 11 of the late Constitution had ceased to be available to adjudge the invalidity of the laws that were in force immediately before the Proclamation. The matter had not then been so fully and ably argued as now, but despite the ingenious and at times far-fetched arguments addressed, I am convinced more than before that case was rightly decided."

It will be observed from the above that the question of the validity of the Laws (Continuance in Force) Order, 1958, itself was not directly under challenge in Dosso's case but what was being contended there was that, in spite of the said Order, "all pending applications for writs, in which a law by reason of Part 11 of the Constitution (1956) had to be found to be void in order to grant the relief prayed for by a party, had abated by force of clause (7) of Article 2 of that Order.

The Court, as has been pointed out by the learned Attorney-General himself who appeared on behalf of one of the respondents in that case, in fact, proceeded on the assumption that the Laws (Continuance in Force) Order was a valid law and heard no arguments challenging the validity of the said Order itself. The observations in that judgment, based upon the theory of Hans Kelsen were, therefore, more in the nature of obiter dicta.

Dosso's case next came up for consideration again in the case of Ifiikharuddin and another v. Muhammad Sarfaraz and another (P L D 1961 S C 585=(1962) 2 P S C R 197). There too the propriety of an Order passed under Martial Law Regulation No. 72 was called in question and the Government pleaded immunity to jurisdiction. Again, the vires of the Laws (Continuance in Force) Order was not put in issue but all that was contended was as to whether the word "governed" referred to in that Order included also the legislative functions of Government. The Court by a majority judgment differed from the majority in Dosso's case and held that it was unable to agree that the words "all laws" referred to In that Order did not include the Constitution or so much of it as had been re-introduced by the Laws (Continuance in Force) Order. The majority judgment with which I concurred, observed :-

"The correct position is that in Article 2 of the Laws (Continuance in Force) Order, the Constitution had already been adopted, though with some modifications, but with a different status, and by Article 4 a provision was being made of a different category with respect to all other sub-constitu*tional laws. Read in this way, there is no inconsistency whatsoever between the two Articles as was suggested in Dosso's case. As a matter of fact, it is only if we adopt the construction put upon Article 4 in Dosso's case that an inconsistency between Article 4 and Article 2 is created and it is an accepted principle that we should lean in favour of a construction that puts a consistent interpretation on the different parts of a statute."

S. A. Rahman, J. who wrote a separate judgment, although he concurred in the order proposed by the majority, too observed as follows:-

"In Dosso's case, the actual decision of this Court was that fundamental rights as embodied in Chapter II of the late Constitution, were no longer part of the law of the land, after the promulgation of the Laws (Continuance in Force) Order, 1958. That question does not fall for determination in the instant case, in the face of the pre-emptory provisions of the Martial Law Regulation No. 72 and the fact that the vires of the Ordinance No. XXIII of 1959 are not being assailed before us. The question is an important one and not free from difficulty. We did not bear the learned Attorney-General fully, on this aspect of the case and if Dosso's case requires re-consideration, in this respect, the question must be reserved for decision for a more appropriate occasion.

Some doubts had. therefore, begun to be cast by the Supreme Court, as then constituted, on the correctness of the decision in Dosso's cave even from 1961, but unfortunately this question was not brought before this Court in the same concrete form in which it has now come before us, by any one and since this Court like the Supreme Court of the United States of America strictly confines itself, as observed by Muhammad Munir. C. 1. himself in the case of the Province of East Pakistan . v. Mehdi All Khan, at page 407, "to pronounce for or against the litigated right or liability by determination of the law applicable to the facts though its decision may have repercussions on a statute or a part of it in respect of future cases," the occasion to reconsider the decision in Dosso's case never arose.

The Courts do not decide abstract hypothetical or contingent questions or give mere declarations in the air. "The determination of an abstract question of constitutional law divorced from the concrete facts of a case", as observed by the same learned Chief Justice, "floats in an atmosphere of unreality; it is a determination in vacuo and unless it amounts to a decision settling rights and obligations of the parties before the Court it is not an instance of the exercise of judicial power."

There is no duty cast on the Courts to enter upon purely academic exercises or to pronounce upon hypothetical questions. The Court's judicial function is to adjudicate upon a real and present controversy which is formally raised before it by a litigant. If the litigant does not choose to raise a question, however, important it might be, it is not. for the Court to raise it sue motu. The matter thus remained where it was to this day, as no one raised the question before the Court.

The learned Attorney-General has placed very strong reliance upon a decision of this Court in the case of Muhammad Afzal v. The Commissioner, Lahore Division (P L D 1961 S C 401). in which the main judgment was written by myself, to support his contention that I too had given my clear approval to the derision in Dosso's case. Again, the question that arose fur decision in that case was as to whether Martial Law Orders issued by a Zonal Martial Law Adminis*trator, which purported to make provisions inconsistent with the provisions of the Constitution of 1956 and other existing laws, were of any legal effect and could validly take away the rights of citizens acquired under the latter provisions. The main argument was built up again upon the language of Articles 2 and 4 of the Laws (Continuance in Force) Order without challenging the validity of the said Order itself and this Court held the impugned Martial Law Orders to be incompetent to the extent they were repugnant to the existing laws, even under the Scheme of the Laws (Continuance in Force) Order, 1958, and it is in that ,connection that I stated as follows:-

"If as observed in the majority judgment of this Court in the case of the State v. Dosso and another, a successful revolution is an internationally recognised legal method of changing a Constitution and that the revolution itself constitutes a new law creating organ whose will thenceforward becomes the law, then did not the Laws (Continuance in Force) Order, 1958, which was the expressed will of the Revolution of October 1958, become thenceforward the fundamental law of the country and an instrument of a constitutional nature for both the law-giver as well as those who were to be governed in accor*dance with its terms?"

It will be noticed that this passage begins with the important word "if" and by no means constitutes an unqualified acceptance of the principles enunciated in Dosso's case. Indeed it was not necessary for me in that case to pronounce upon the validity or ,the invalidity of the Laws (Continuance in Force) Order because all that I was attempting to do in that case was to take advantage of the principle enunciated in Dosso's case and put the Martial Law Administrator himself within the "straight jacket" of his own legal order which Dosso's case stated that he had created, and it was on that basis that I held that within the framework of that legal order itself "the law-giver" himself was bound, if it was a legal order and, therefore, he could not act outside that legal framework. It is not correct, therefore, to say that I too gave my apps oval to the majority decision in Dosso's case.

We come next to the case of Ch. Tanbir Ahmad Siddiky v. Government of East Pakistan (PLD 1968 S C 185), on which the learned Attorney-General has placed strong reliance, for showing that by now the rule in Dosso's case had become so firmly entrenched as to acquire the status of a stare decisis. He quotes the observations of Cornelius, C. J. which are as follows:

"The pronouncement of the Supreme Court that writs for enforcement of the Fundamental Rights under the 1956-Constitution were not competent by reason of the Laws Continuance in Force) Order, was an interpretation of that Order, which bad effect as a part of that Order. To put it differently, that legal pronouncement became a part of Martial Law and had the effect that throughout the period that Martial Law was in operation, a period of over 3½ years during which an enormous number of executive actions were performed on the basis of laws of origin prior to the Martial Law as well as of laws made during the period of Martial Law, all in the belief sustained by the view of the Supreme Court that such actions were immune to challenge on the basis of Fundamental Rights in the Constitution of 1956.

To hold to the contrary today, if that were possible, would have the effect of disturbing a great many things done during the period of Martial Law, affecting individuals and institutions and in certain cases the whole of a Province, which things were valid in the period they were done, and have formed the basis of further actions by the authorities as well as by the citizens concerned. The period of Martial Law was governed by its own source of law, namely,- the Revolution of the 7th October 1958, and the actions that were done and brought to completion in that period, in compliance with laws derived from the said source are all covered by the Martial Law of which the decision in the case of Dosso, as confirmed in the case of Mehdi Ali Khan, was an essential part. The principle of stare decisis can have no more direct application than to the judicial interpretation of a major instrument by which the governance of an entire country was controlled during a limited period, and within the terminal points of that period. On general grounds, therefore, it is not open to this Court to, review its decision in the case of Dosso."

In this case again the only question argued was that fundamental rights had become unenforceable by reason of the provisions of the Laws (Continuance in Force) Order, 1958. The validity of the Laws (Continuance in Force) Order itself was not challenged but only the correctness of the interpretation given to its terms in Dosso's case was sought to be re-agitated. It is only in this connection that the learned Chief Justice thought that the principles of stare decisis could be legitimately applied to the interpretation given by the Supreme Court to the provisions of the said Order.

What then is this principle of stare decisis and does it apply to this Court?-Learned counsel appearing for the appellants as well as the learned counsel appearing as amicii curiae have, of course, contended that the principle is not applicable to this Court which is not bound by its earlier decisions. Indeed, they contend that the Constitution of 1962 and even the earlier Constitution of 1956 had specifically provided in conformity with the universally accepted principle that the Court of ultimate jurisdiction must always have the power to review its own decisions (vide Article 62 of the 1962-Constitution). Even otherwise it is contended that the rule of stare decisis is merely a rule of expediency and not "a universal inexorable command". It has many exceptions to it, for, the doctrine cannot be allowed to become a "dead hand" nor should the law be submerged in "still waters in which there are only stagnation and depth." It is further pointed out that even the House of Lords of the United Kingdom has now recognised the wisdom underlying the freedom from the binding force of precedents In the case of Courts of ultimate jurisdiction. It no longer adheres to this rule and has altered its former practice under which it considered itself bound by its earlier decisions. [Vide (1966) 1 W L R 1234].

I am not unmindful of the importance of this doctrine but in spite of a Judge's fondness for the written word and his normal inclination to adhere to prior precedents I cannot fail to recognise that 9t is equally important to remember that there is need for flexibility in the application of this rule, for law cannot stand still nor can we become mere slaves of precedents.

As observed in Halsbury's Laws of England, Third Edition, Volume 22 at page 802, paragraph 1690, "the supreme appellate Court will, however, not shrink from overruling a decision, or series of decisions, which establish a doctrine plainly outside a statute and outside the common law, when no title and no contract will be shaken, no person can complain, and no general course of dealing be altered by the remedy of a mistake; and, where the course of practice is founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes, at any rate that tribunal, from correcting the error, although the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless the House of Lords can say

positively that it is wrong and productive of inconvenience."

To more or less the same effect is the principle enunciated in the Corpus Juris Secundum, Volume 21, paragraph 193, in these words :-

"The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each case by the discretion of the Court, and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong be the result . . . . . The doctrine of stare decisis cannot be invoked to sustain, as authority, a decision which is in conflict with the provisions of the state Constitution; or a decision which is in conflict with a previous statutory enactment to which the decision makes no reference, and. which is made without reviewing or construing the statute, and* in such a case the statute should be followed rather than the, decision . . . . . "

Again at paragraph 215 it is opined that-

"the doctrine of stare decisis cannot control questions involving the construction and interpretation of the organic law at least where no rule of property is involved, or at least *that the doctrine does not apply with the same force to *decisions on constitutional questions as to other decisions, and while previous decisions will not be entirely disregarded and, may, in case of doubt, control the views of the Court, they will be considered merely as authorities tending to aid in arriving at a proper conclusion, and not as a rule to be followed without inquiry."

It will thus be seen that the rule of stare decisis does not apply with the same strictness in criminal, fiscal and constitutional matters where the liberty of the subject is involved or some other grave injustice is likely to occur by strict adherence to the rule.

Following this principle the House of Lords of the United Kingdom in the case of the Governors of the Campbell College Belfast v. Commissioner of Valuation for Northern Ireland ((1964) 2 A E R 705) set aside a decision which had held the field in Northern Ireland for 50 years by ruling that "the doctrine of stare decisis had but little application " in a case of a fiscal nature, where the decision "was plainly wrong, and had not been supported before the House."

That was a case of an interpretation of a fiscal provision which bad been followed throughout those 50 years and on the "faith of which businessmen and women, settlors and donors, may have made their dispositions" but even so the noble Lords felt that there was an equally important principle which, should not be overlooked, namely, that "where taxes or rates had been illegally demanded and paid on a clearly wrong construction of a statute justice demands that the illegal impost, however innocently made, should be terminated unless there is some very good reason to the contrary."

Similarly in the case of the Attorney-General of the Common*wealth of Australia v. Reginam and others ((1957) 2 A E R 45 (P C)) the Privy Council reversed a decision given in 1918 by the High Court of Australia in the case of Waterside Workers Federation v. Alexander (25 C L R 434), although they were conscious of the fact that "no one can doubt that it is a formidable question, why for a quarter of a century no litigant has attacked the validity of this obviously illegitimate union?*--Why in Alexander's case itself was no challenge made?-How came it that in a series of cases, which were enumerated in the majority and the dissensient judgments, it was assumed without question that the provisions now impugned were valid?" Not*withstanding this, they felt that whatever the reason may be "the question of the applicability of the doctrine of stare decisis to matters of far-reaching constitutional importance" would require consideration of the High Court of Australia itself. Thus indi*cating that the High Court of Australia might in view of the patent illegality discovered by the Judicial Committee itself wish to reconsider its decision in Alexander's case.

Upon these principles it has become necessary for me now to consider whether the wide principle enunciated in Dosso's case is so "plainly wrong" that it can be said to be "totally unsustain*able", because, otherwise, in view of the high esteem I have and have always had for the profound legal learning and sound judgment of the learned author of the main opinion in Dosso's case I would not venture to depart from his views.

Learned counsel appearing for the appellants as well as the learned counsel appearing as amicii curiae have assailed this decision on a number of grounds. Mr. Manzoor Qadir has confined himself to saying that the legal theory of Hans Kelsen was misread and misapplied, because, the revolution contemplated by Kelsen was a revolution which completely disintegrated the old legal order and brought about a permanent ,transformation in the new body politic. Temporary or transitory changes were not even upon Kelsen's own principles, which clearly postulated the condition of efficacy of the change as a necessary test, qualified to be classed in the category of a revolution.

Mr. Anwar rejects the theory off-hand as being totally unacceptable. According to him, if any grund-norm was necessary for Pakistan it was to be found in the Objectives Resolution of 1954 which is a document which still holds the field and each of the successive regimes has attempted to justify its action on the ground that whatever was happening in the country when it took over was an attempt to subvert those very objectives and it had to step in merely to bring the country back on the rails by fulfilling those objectives.

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.

Mr. Sharifuddin Peerzada, on the other hand. attacks the decision on a number of grounds which may be summarised as follows ;

(1) The decision 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.

(2) The decision was vitiated by bias at least in the learned Chief Justice who, as he himself has subsequently disclosed, had a hand in the drafting of the Laws (Continuance in Force) Order (vide Article of the learned Chief Justice published in the Pakistan Times newspaper on the 11th of November 1968). It is contend*ed that he should not have sat on this Bench, as he had already committed himself to granting legal recognition to the Regime and its Laws (Continuance in Force) Order.

(3) Being a Municipal Court it should not have made a rule of international law regarding recognition of States the basis of its decision.

(4) The Court's interpretation of Kelsen's doctrine was absolutely incorrect.

(5) 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.

(6) The doctrine of necessity as a validating factor was not even noticed.

The learned Attorney-General, as earlier indicated, has made no serious attempt either to justify the correctness of this decision or to controvert that whatever was done by either late Iskander Mirza or Field Marshal Ayub Khan was proper and legal. Indeed, he has dubbed them both as "usurpers" and even gone to the extent of characterising Governor-General late Ghulam Mohammad as the first "Guy Fawkes of Pakistan" but his main contention has been that whatever the merits or demerits of their vagaries Dosso's case had given them legal recognition and that being now the law of the land propounded by the highest Judicial authority and consistently recognised thereafter must prevail, no matter whe*ther it "amounts to an invitation to revolution" or "serves as an encouragement to military adventurers" or "sounds the death-knell of the rule of law", as suggested by learned counsel on the other side.

The learned Attorney-General vigorously maintains that it makes no difference, for, it is now too firmly established to be altered or departed from whether it be on the principle of "stare decisis", as observed by Cornelius, C. J. in the case of Tanvir Ahmed, or upon general principles. Hans Kelsen, it is furthermore contend ed, is not the only legal theorist who thought that the de facto sovereign can also be regarded in the juridical concept as also the de jute sovereign in certain circumstances. He too supports the theory that an "abrupt disruption of a legal order" may well be characterised as a revolution, no matter what the motive or the means employed, peaceful or violent, if it in fact annuls the existing order and "the annulment is effective." He quotes a passage from Harold, J. Laski's book on the State in Theory and practice (page 27) to show that the latter too held the view that those "who control the use of the Armed Forces of the State are in fact the masters of its sovereignty."

Similarly he cites from Garner's Treaties on Political Science and Government (page 155) to maintain that the "sovereign who succeeds in maintaining his power usually becomes in the course of time the legal sovereign . . . . . somewhat as actual pos*session in private law ripens into legal ownership through prescription."

G. C. Field's Lectures on Political Theory (pages 74-75) are also referred to by the learned Attorney-General to point out that "legal sovereignty is not a separate thing which can be conferred or constituted in a different way from other kinds of sovereignty. Sovereignty, in any sense, is constituted by consent, the development of the habit of obedience, and by that alone."

He has also utilized some observations of Dean Roscoe Pound from his magnum opus on Jurisprudence (Vol. 11, Part 3, page 305), where it has been opined that "in case of an ultimately successful insurrection the Courts deriving from it would uphold acts of the insurgents from the beginning and Courts of other countries would do the same"

He has also recounted the story of the American General Cadwaladar, who had flouted Chief Justice Taney and refused to respond to the writ of habeas corpus issued by him. This action of the General was, it is said, supported even by President Lincoln on the ground that due to the state of insurrection then prevailing in the Southern States the President had lawfully authorized the General to suspend the writ of habeas corpus. The Chief Justice questioned the right of the President to do so. The President instead of replying to the Chief Justice referred the matter to the Congress which, after considerable deliberations. "begrudgingly", approved the President's proclamation, out of the high esteem it had for the President, and legalised his suspen*sion of the writ. But soon thereafter, realizing the danger of the abuse of that power, passed another law adding provisos to the power of the President to suspend the writ of habeas corpus even in times of war. Under these provisos even In times of war the army officers in charge of prisoners were required to supply a list of all non-military persons held in detention in military prison to a civilian Court and they could detain them only until the next civilian grand jury met in the local Court House of that area. If the grand jury did not indict such a detained person then the local Civil Judge could order the military authorities to bring the man before the Court for hearing and discharge. (Vide Fribourg's Supreme Court in American History, pages 76-82).

While I must compliment the learned Attorney-General for his great industry in discovering these extracts, T regret I cannot agree with him that they in any way, support the broad principle sought to be adumbrated by him. With due respect to the learned Attorney-General I must point out that the passages quoted by him do not, when read in their proper context convey the sense which he wishes to put upon them. The theory that Herold Laski was putting forward was merely this that every State and every Government must have, of necessity, the legal power to use the armed forces of the State whenever its authority is threatened. Where it cannot do so "it must either change the law or abdicate". The purpose here sought to be pointed out was that "the armed forces of the State are there to protect, so far as may be, its sovereignty from invasion" and "it is the possession of this legal right to resort to coercion which dis*tinguishes the Government of the State from the Government of all other associations". Professor Herold Laski was by no means advocating the theory that the Commander-in-Chief of the country who, in fact controls "the use of the armed forces", is in the ultimate resort the real master of the sovereignty of the State. On the other hand, Laski's thesis appears to me to be that the control of the armed forces of the State is an essential element of the sovereignty of the State and that the armed forces are under the command of the State. Once the State loses that command it becomes ineffective and must either then change the law or abdicate.

Similarly, the passage read from Garner's Political Science and Government occurs in a paragraph which bears the sub-heading of "de jure sovereignty". It begins with these very significant words, namely, that "de jure sovereignty on the other hand has its foundation in law, not in physical power alone and, the person or body of persons by whom it is exercised can always show s legal right to rule". It is in this context that he propounded the theory that even a sovereign in actual control must show a legal right to rule, i. e. his "physical power and mastery ought for rest upon legal rights" and not that legal rights depends upon physical power and mastery. The de facto sovereign, according to Garner, could become de jure only "by election or ratification'" by the people. The physical force that he possesses can never by itself give him the legal right to convert his de facto claim into a de jure claim. It ii not also unimportant that the paragraph in question from which the citation has been made by the learned Attorney-General closes with these meaning*ful words:-

"There is, as Bryce well observed, a natural and instinctive opposition to submission to power which rests only on force."

G. C. Field also was only propounding the proposition that ac*tual or de facto sovereignty becomes de jure by "consent and the development of the habit of obedience", and by that alone. "We begin", says Field, "to talk about legal sovereignty only when this habit has been definitely established."

Roscoe Pound, as is well known, thinks of the sovereign as "that particular organ or that complex or system of organs, which exercises its (State's) governmental functions" and with regard to civil war it is interesting to note that what he has to say is as follows:-

"A body of citizens may throw off their legal subjection for the time being and set up a new de facto internal sovereignty.. But if the insurgents are put down, the legal subjection is treated as uninterrupted. So one may be subject in law and yet not in fact. The law would hold him a subject, and yet he may have thrown off for a time his habitual obedience."

Internal sovereignty, according to him, therefore, is the aggregate of the powers of internal control possessed by the ruling organs of the society and under the American system he thinks that the sovereign is the ultimate repository of power", which can change the Constitution.

None of the learned authors cited, therefore, support the" proposition of the learned Attorney-General and it seems to ma that the farthest that these learned authors have gone is to expound that where a de facto sovereign has, in fact, got his position confirmed by an election or ratified by the people by habitual obedience over a sufficiently long period of time there alone he can claim to have acquired de

jure sovereignty as well.

Let me now take up for consideration the criticisms levelled against the principles propounded in the judgment of the then learned Chief Justice in Dosso's case at pages 538 to 540. For this purpose I shall assume (without admitting) that the impugned observations were not merely obiter dicta, even though after reading the whole judgment with great care I regret that I have not been able to discover therein any reference to any argument advanced on behalf of the respondents with regard to the vires of the Laws (Continuance in Force) Order, 1958, itself. All that I have been able to discover is that it was sought to be contended that even under its provisions the fundamental rights given by the Constitution of 1956 to the citizens of this country still survived, particularly since the said Order was not given retrospective operation. Great reliance was also placed on the provisions of Article 2 of the said Order which, it was contended, had saved the -fundamental rights by providing "that Pakistan shall be governed as nearly as may be fn accordance with the late Constitution". The learned Attorney-General who, as already stated, appeared for one of the respondents in the said case, has also corroborated the criticism and stated at the Bar of this Court that he was not allowed to argue this particular question. It also appears that there is no finding in this judgment as regards the effectiveness of the new regime. The criticism, therefore, that the Court started with certain assumptions does not appear to be wholly unjustified.

As I have indicated earlier, Martial Law was imposed and the Constitution was abrogated by the then, President who had himself been appointed under the Constitution of 195-6, on the 7th of October 1958, and it was be who by his Proclamation of' the 7th of October 1958, abrogated the Constitution, dismissed the Central and Provincial Governments, dissolved the National Parliament and Provincial Assemblies, abolished all political parties, provided that until alternative arrangements are made Pakistan will come under Martial Law and appointed the then Commander-in-Chief of the Army as the Chief Martial Law Administrator. This Proclamation was made in his capacity as President and Head of the State by invoking in aid his "foremost duty before God and the people of Pakistan to maintain the integrity of Pakistan". Under this Order, therefore, he continued as President and in that capacity on the 10th of October 1958, issued the Laws (Continuance in Force) Order, 1958. Article 2 of this Order reads as follows :-

"2(1) Notwithstanding the abrogation of the Constitution of the 23rd March 1956, hereinafter referred to as the late Constitution, by the Proclamation and subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law the Republic, to be known henceforward as *Pakistan, shall be governed as nearly as may be in accordance with the late Constitution.

(2) Subject as aforesaid all Courts in existence immediately before the Proclamation shall continue in being and, subject.. further to the provisions of this Order, in their powers and. jurisdictions.

(3) The law declared by the Supreme Court shall be binding* on all Courts in Pakistan.

(4) The Supreme Court and the High Courts shall have power to issue the writs of habeas corpus, mandamus, prohibi*tion, quo warrant.. and certiorari.

(5) No writ shall be issued against the Chief Administrator of Martial Law, or the Deputy Chief Administer-for of Martial Law, or any person exercising powers or jurisdiction under the authority of either.

(6) Where a writ has been sought against an authority which has been succeeded by an authority mentioned in the preceding clause, and the writ sought is a writ provided for in clause (4) of this Article, the Court notwithstanding that no writ may be issued against an authority so mentioned may send to that authority its opinion on a question of law raised.

(7) All orders and judgments made or given by the Supreme Court between the Proclamation and the promulgation of this Order are hereby declared valid and binding on all Courts and authorities in Pakistan, but saving those orders and judgments no writ or order for a writ issued or made after the Pro*clamation shall have effect unless it is provided for by this Order, and all applications and proceedings in respect of any writ which is not so provided for shall abate forthwith."

It will be observed that under these provisions there was no bar to the issuance of a writ of the kinds mentioned in clause (4) against any person exercising power or jurisdiction under the authority of the President, who was a distinct and separate superior functionary from the Chief Martial Law Administrator. The absolute bar was only to the issuance of writs against "the Chief Administrator of Martial Law or the Deputy Chief Administrator of Martial Law or any person exercising powers and jurisdiction under the authority of either". Under clause (7) the judgments of the Courts already given in writ matters were declared to be valid and binding on all Courts and authorities but with regard to future orders a bar was provided unless the writ was of a kind which had been provided for by the Order itself, and applications and proceedings in respect of any writ which was not so provided for in the Order, were to abate.

In Dosso's case the respondents had applied to the High Court for writs of habeas corpus and certiorari for quashing certain orders issued by the Deputy Commissioner referring certain cases pending against the respondents therein for trial before the Council-of-Elders (Special Jirga) and for their release from detention. The High Court had granted them those reliefs and appeals against the said orders filed in the Supreme Court by the State were pending decision. The writs, therefore, were of the nature which were permitted by clause (4) of Article 2 of the Laws (Continuance in Force) Order, 1958, and were certainly not directed against either the Chief Administrator of Martial Law or the Deputy Chief Administrator of Martial Law or any person exercising powers and jurisdiction under the authority of either. Nevertheless, the Court held that by reason of the provisions of clause (7) of Article 2 all those writs had abated.

If the question of the vires of the Laws (Continuance in .Fore) Order or the validity of the imposition of the Martial Law had not been raised, it was not necessary for the Court to give a certificate of validity in that behalf, but the Court thought fit to do so without even noticing that under the theory pronounced by Hans Kelsen himself efficacy was a pre-condition to the validity of the acts of a de facto sovereign. There is nothing in any law or either in Kelsen's book to show that this decision is of a purely subjective nature or that this too depends upon :he will of the de facto holder of power. In the circumstances .vas it not incumbent upon the Court to decide this question Objectively before pronouncing that the de facto holder of power had also become the de jure sovereign and a proper law-creating agency. Into this exercise the Court, unfortunately, did no enter. The criticism, therefore, that the Court started with the basic assumption that the President, who had usurped power and whose will, it was said, bad become a new law-creating medium, had acquired effective control by the habitual obedience rendered to his commands by the citizens of the country over a reasonable period of time.

The actual facts, on the other hand, disclose a different picture, for, they do show that the very next day after the publication of the judgment of the Court that individual him*self was placed under arrest and packed out of the country. Where then was the efficacy of his will to which the Court had already given legal recognition ?-He was replaced by a crea*ture of his own creation, namely, the Chief Administrator of Martial Law who, it has to be pointed out, created no other legal order himself. He did not abrogate the Laws (Continuance in Force) Order, 1958, but continued to function thereunder, although he subsequently assumed also the role of the President.

Even on the theory propounded by the learned Chief Justice himself was this subsequent change also a successful revolution? If so, by what test, because, on this occasion there was no annulment of any Constitution or of the grund-norm, of any kind.. which had been created by President Iskander Mirza?----*What was, we may well ask, the grund-norm after the deposition of lskandar Mirza himself ?-----

intricate and difficult questions may arise in considering the questions relating to the validity of the regime from the day Field Marshal Ayub Khan took over and until his de facto regime received de jure

recognition by his election as President under the Constitution of 1961, but it is unnecessary for our present purposes to enter into this challenging exercise----It will be sufficient for the present to point out that it does appear to us that the legal recognition given in Dosso's case to what was done by President Iskander Mirza was, to say the least, premature.

It is also true that the learned Chief Justice In an article published in the Pakistan Times on the 11th of November 1968, under the heading of "Days I remember" admitted that in spite of the Proclamation of Martial Law on the 7th of October 1958, he "did not stop the Supreme Court from functioning", because, he felt, "that the Supreme Court on being properly moved still had the right to say whether what had happened was legal or Illegal". (The underlining is mine). The next morning, however, the Zonal Martial Law Administrator of Lahore met him and told him that the Courts, including the Supreme Court, had lost their jurisdiction but a few hours later he received a summon from the President to proceed to Karachi where he was told that the intention of the regime was to keep the existing laws and the jurisdiction of the civil authorities alive. He was then shown a draft of the Laws (Continuance in Force) Order, 1958, whereby this intention was sought to be given effect. He suggested "certain modifications, particularly with refer*ence to the superior Court's powers to issue writs and valida*tion of the judgments which had been delivered after the Procla*mation". I take it that these were accepted, for, they do in fact find place in the formal order that was ultimately promulgated on the 10th of October 1958. According to his own version, even at this time a doubt arose as to whether there was a President of the country or not but he himself posed the question "whether the army had been inducted into power by the Presi*dent or whether it had acquired such power on its own"?---*This evidently then silenced the Chief Administrator of Martial Law, for, the army had, in fact, been called in by the President.

The learned Chief Justice was, therefore, clear about the legal status of the Chief Administrator of Martial Law and since his interpretation was accepted the Order of 1958 was issued In the name of the President.

Learned counsel have sought to argue from this that the esteemed Chief Justice was thereby personally committed to give judicial recognition to the aforesaid Order of 1958 and was, therefore, disqualified from sitting on the Bench which heard Dosso's case. I am not inclined to agree with this view, for, having regard to the long experience of the learned Chief Justice as a member of the various Benches of superior Courts in this country and his vast judicial experience I am certain that he was, notwithstanding his association in the drafting of the Order, quite capable of keeping an open mind and expressing his independent judgment. Mere association with the drafting of a law does not necessarily disqualify a judge from interpreting that law in the light of the arguments advanced before him.

Nevertheless, with utmost respect to the learned Chief Justice, I do feel that in laying down a novel juristic principle of such far-reaching importance he did proceed on the basis of certain assumptions, namely :----

(1) "that the basic doctrines of legal positivism". which he was accepting, were such firmly and universally accepted doctrines that "the whole science of modern jurisprudence" rested upon them ;

(2) that any "abrupt political change not within the contem*plation of the Constitution" constitutes a revolution, no matter how temporary or transitory the change, if no one has taken any step to oppose it ; and

(3) 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, in my humble opinion, not justified. As I have earlier indicated 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 attempt to formulate any theory which "favours totaliterianism".

Professor Julius Stone in his Treatise on the Legal System and Lawyers' Reasoning, 1964 Edition, page 121, observes as follows :-

"We would defend Kelsen, as vehemently as he himself, against the reproach that his theory favours totalitarianism. Yet we have to add that the above sins of pride in purity have contributed much to the confusion which has led leading minds, in perfect good faith, to make such a charge. But for the over-weening claim to monopolise both juristic and lawyers' concerns, it would be clear that analytical jurispru*dence, being only a limited phase of merely juristic concern, could not assume to decide or influence greatly the mortal struggle between totalitarianism and democracy. It is now clear to the world from such late publications as What is Justice ? (1957), as it may always have been to his intimates, that he is a convinced liberal democrat, and that 'purity' in this aspect of his thinking marches with commitment to freedom as a lawyer-citizen. We personally, therefore, deplore the charge, and its echo and re-echo. Professor Kelsen could help to quiet it by renouncing even -more clearly the impression he long gave that he regards the scope of the pure theory of law as exhausting the jurist's and the lawyer's concerns."

Kelsen has done so but unfortunately he still continues to be grievously misunderstood. He was only trying to lay down a pure theory of law as a rule of normative science consisting of "an aggregate or system of norms". He was propounding a theory of law as a "mere jurists' proposition about law". He was not attempting to lay down any legal norm or legal norms which are "the daily concerns of Judges, legal practitioners or administrators"', In his early works this distinction was not made clear but in 1960 he attempted in his book "Rechtslehre" to clarify the confusion by pointing out, as Julius Stone observes, "that the propositions of the pure theory of law are mere jurists' propositions about law and that they do not bind the Judge, in the way in which legal norms bind him". Hs also insisted throughout that the efficacy of the norm is an essential condition of its recognition in its nomodynamic aspect and this efficacy must be (a) "by and large" and (b) "in terms of conformity with principles of society to the norms, and the regular execution of sanctions for non*conformity." But he does not even now provide us with any guideline as to how his basic norm acquires validity. He frankly admits that this is a "meta-legal question and, there*fore, incapable of any clear scientific declaration." Julius Stone thinks that in attempting to try to demonstrate the legal validity of Kelsen's original "grand-norm" subsequently redesignated by Kelsen himself as the "apex-norm" would be "to try to hoist oneself by one's own boot-straps".

Professor Stone observes that in Kelsen's theory "the apex*norm is neither legally valid nor invalid ; it is a hypothesis. How is the worth of such a hypothesis to be assessed ? Will it depend, for instance, on the extent to which the norms of the legal system of the particular society can be derived from it ? Or will it depend on how far the apex-norm, or a system of norms dependent on it, meet some extraneous test, such as efficacy or observance of the system as a whole by the society?"

Kelsen's position even now, as I shall presently endeavour to show, is not very clear, and as some critics seem to think "a whole idea of this basic norm still remains shrouded in mystery". (Vide Modern Law Review, Vol. XXVI, p. 35).

He sometimes characterises it as a "hypothesia" or a "postu*late" and then again as something existing purely "in the juristic consciousness" and as nothing more than an "ultimate hypothesis of positivism". It is, therefore, only a "thought norm" which could hardly be recognised as a legal norm furnishing a criteria of legal validity in any legal system. To give it the status of a legal norm or of a legal rule was thus, in my opinion, unjustified.

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 k down the proposition that the command of the person in autho*rity is a source of law. He, as Professor Leuterpacht observe in the Modern Theories of Law at page 117, considered that the command was only "a condition which

the law posits .for the creation of duties of other persons just as the private agree*ment is a condition for the validation of a more general rule of law relating to the observance of contract . . . . . In both cases the expression of will-as commanded or as agreed upon*-constitutes a concretization of the general rule of law."

He rebelled against the earlier conception or theories which put the State above the law and the most conspicuous of his theories was the "doctrine of the identity of a State and law". He considered the State merely as "a normative ordering co*extensive with the normative ordering of the legal system". It was, by no means, his purpose to lay down any rule of law to the effect that every person who was successful in grabbing power could claim to have become also a law-creating agency. His purpose was to recognise that such things as revolutions do also happen but even when they are successful they do not acquire any valid authority to rule or annul the previous 'grand-norm' until they have themselves become a legal order by habitual obedience by the citizens of the country. It is not the success of the revolution, therefore, that gives it legal validity but the effectiveness it acquires by habitual submission to it from the citizens. The initial hypothesis, if a hypothesis is necessary, therefore, still remains, even under the theory of Kelsen, the ultimate will of the people as manifested by their habitual submission and not, as suggested in Dosso's case, the success of the revolution.

Kelsen's attempt to justify the' principle of effectiveness from the standpoint of International Law cannot also be justified, for, it assumes "the primacy of International Law over National Law." In doing so he has, to my mind, overlooked that for c the purposes of International Law the legal person is the State and not the community and that in International Lave 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 Inter*national 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 (Vide Oppenheim's International Law, Vol. I, page 127).

Thus where there is no break in the legal continuity of the State itself, no question of recognition of an internal Government of a State arises, although according to international practice whenever a new Head of a State assumes office the other States are as a matter of courtesy "notified and usually recognise the new Head by some formal act as a message of congratulation". (Oppenheim, Vol. I, page 126). In this view of the matter I cannot find any cogent reason for giving any primacy to Inter*national Law over national law. So far as the former is concerned, even Hans Kelsen himself was in difficulty in finding a grand-norm for it.

I am also unable to agree with the learned Chief Justice that upon the principles of International Law if the territory and the people remain substantially the same there is "no change in the corpus or international entity of the State and the revolutionary Government and the new State are, according to International Law, the legitimate Government and the valid Constitution of the State". With great respect I must point out that this proposition does not find support from any principle of Inter*national Law. According to Oppenheim's view as propounded in his book on International Law if the revolutionary Government is ineffective and or has no "reasonable expectancy of permanence" and/or does not "enjoy the acquiescence of the population", then the international community may well refuse to recognise it, even though its territorial integrity remains unchanged and its people remain substantially the same.

With the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice not only misapplied the doctrine of Hans Kelsen, but also fell into error in thinking that it was 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 grund-norm is necessary for us I do not have to look to the Western legal theorists to discover one. Our own grund-norm is enshrined in our own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable 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 Resolution has been described by Mr. Brohi as the "corner stone of Pakistan's legal edifice" and recognised even by the learned Attorney-General himself "as the bond which binds the nation" and as a document from which the Constitution of Pakistan "must draw its inspiration". 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, 9t cannot be, for, it is one of the fundamental principles enshrined in the Holy Qur'an;

Say, 'U Allah, Lord of sovereignty. Thou givest sovereignty to whomsoever Thou pleasest ; and Thou takest away sovereignty from whomsoever Thou pleasent. Thou exaltest whomsoever Thou pleasest and Thou abasest whomsoever Thou pleasest. (Pt. 3, Ch. 3, Al 'Imran, Ay, 27.)

The basic concept underlying this unalterable principle of sovereignty is that the entire body politic becomes a trustee for the discharge of sovereign functions. Since in a complex society every citizen cannot personally participate in the performance of the trust, the body politic appoints State functionaries to discharge these functions on its behalf and for its benefit, and bas the right to remove the functionary so appointed by it if he goes against the law of the legal sovereign, or commits any other breach of trust or fails to discharge his obligations under a trust. The functional Head of the State is chosen by the community and has to be assisted by a Council which must hold its meetings in public view and remain accountable to public. It is under this system that the Government becomes a Government of laws and not of men, for, no one is above the law. It is this that led Von Hammer, a renowned orientalist, to remark that under the Islamic system "the law rules through the utterance of justice, and the power of the Governor carries out the utterance of it."

This trust concept of Government filtered into Europe through Spain and even as early as 1685 John Locke rejected Hobbes' leviathan and propounded the theory that sovereignty vested in the people and they had the right not only to decide as to who should govern them but also to lay down the manner of Govern*ment which they thought to be best for the common good. Government was, therefore, according to Locke, essentially a moral trust which could be forfeited if the conditions of the trust were not fulfilled by the trustee or trustees, as the case may be.

The trustees under this concept of ours are referred to as "those who are in authority among you" (Pt. 4, Ch. 4, Ay, 60; Al-Nisa, p. 207) which again negates the possibility of absolute power being vested in a single hand, for, the reference as clearly to a plurality of persons and to an authority properly constituted by law.

Upon this analysis, I am, with the utmost respect for the then learned Chief Justice, unable to resist the conclusion that he erred both in interpreting Kelsen's theory and applying the same to the facts and circumstances of the case before him. The principle enunciated by him is, in my humble opinion, wholly unsustainable, and I am duty bound to say that it cannot bet treated as good law either on the principle of stare decisis or even otherwise.

This disposes of the arguments of the learned counsel on both sides relating to the principle enunciated in Dosso's case. 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 the 24th of March 1969, Field Marshal Muhammad Ayub Khan, the then President of Pakistan, wrote a letter to the Commander-in-Chief of the army expressing his profound regret for coming to the conclusion that "all civil administration and constitutional authority in the country has become ineffective" and admitting after reciting the unhappy state of events that had taken place in the country earlier, that "it is beyond the capacity of the civil Government to deal with the present complex 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 force of Pakistan, which today represent the only effective and legal instrument, to take over full control of the affairs of the country", and finally called upon the Commander-in-Chief to do the needful in the following words :-

"It is your legal and constitutional responsibility to defend* the country not only against external aggression but also to save it from internal disorder and chaos. The nation expects you to discharge this responsibility to preserve the security and integrity of the country and to restore normal, social, economic and administrative life."

This was followed by a Broadcast over the Radio network at 7-15 p. m., of the 25th of March 1969 which again after narrating the events which had led him to this conclusion, concluded with a parting request to his countrymen "to appreciate the delicate situation and assist your brethren in the defence forces in every conceivable manner to maintain law and order."

There was nothing either 'in this letter or in this broadcast to show that he was appointing General Agha Muhammad Yahya Khan as big successor-in-office or was giving him any authority to abrogate the Constitution which he had himself given to the country in 1962. Both these documents merely called upon the Commander-in-Chief of the army to discharge his legal and con*stitutional responsibility not only to defend the country against external aggression but also to save it from internal disorder and chaos. He did not even proclaim martial law. Nevertheless, the Commander-in-Chief on the very same day, namely, the 25th of March 1969, on his own proclaimed Martial Law throughout the length and breadth of. Pakistan and assume the powers of the Chief Martial Law Administrator. He also abrogated the Constitution, dissolved the National and Provincial Assemblies and declared that all persons holding office as President, members of the President's Council, Ministers, Governors of Provinces and members of their Council of Ministers shall cease to hold office with immediate effect. Existing laws and Courts were, however, preserved with the proviso that no writ or other order shall be issue against the Chief Martial Law Administrator or any person exercising powers or jurisdiction under the authority of the Chief Martial Law Administrator.

Although by the Proclamation of Martial Law the office of President had ceased to exist yet the General by another Proclamation of the 31st of March 1969, purported to assume the office of President of the Islamic Republic of Pakistan with retrospective effect from the 25th of March 1969. Thereafter, only on the 4th of April 1969 a Provisional Constitution Order was enacted whereby the Constitution of 1962, was by and large restored, and it was provided that the country was to be governed as nearly as may be in accordance with its terms subject to the Proclamation of Martial Law and subject to any Regulation or Order that may be made from time to time by the Chief Martial Law Administrator (Vide Article 3(1)).

The office of President was reintroduced by clause (2) of the same Article in the following terms :-

"The Chief Martial Law Administrator shall be the President of Pakistan hereinafter referred to as the President, and shall perform all functions assigned to the President of Pakistan by and under the said Constitution or by or under any law."

This clearly indicated that the President was a subordinate functionary created by the Chief Martial Law Administrator, although he was himself to hold the same office, because, the powers of the President were limited to performing the functions assigned to him under the abrogated Constitution or under any law. By the other clauses almost all the fundamental rights were taken away and the Courts were debarred from issuing any order against any Martial Law Authority. Power was given to the President by Article 4 to issue Ordinances but provisions in law providing for reference of a detention order to an advisory Board were declared to be of no effect by Article 7 (2), and by Article 8 the President was also given the power to make orders for making such provisions "including constitutional provisions", as he may deem fit for the administration of the affairs of the State.

The first question, therefore, that arises is as to whether General Agha Muhammad Yahya Khan acted legally in declaring Martial Law, abrogating the Constitution, making new constitu*tional provisions and assuming the office of President It is clear that under the Constitution of 1962 Field Marshal Muhammad Ayub Khan had no power to hand over power to anybody. 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. Under Article 30 the President could also proclaim an emergency if the security or economic life of Pakistan was threatened by internal disturbances beyond the power of a Provincial Government to control and I will assume for the present purposes that he could also proclaim Martial Law if the situation was not controllable by the Civil administration. It is difficult however, to appreciate under what authority a Military Commander could proclaim Martial Law. Even in 1958 the Martial Law was proclaimed by the President. In my view, the Military Commander had no power also to abrogate the Constitution, although the learned Attorney-General has contended that the Proclamation of Martial Law by its own intrinsic force gave him the right to do so. even apart from anything said in Dosso's case.

This argument necessitates an examination into the nature and scope of Martial Law itself. Does the imposition of Martial Law ipso facto annul and abrogate everything and give the Military Commander the power to do anything he likes ?--Is Martial Law synonymous with military rule within the territorial limits of a national entity ?- Is the imposition of. Martial Law necessarily a coup d'etat or a revolution disintegrating the legal order itself?-Does the imposition of Martial Law absolve the Military Commander from the oath or affirmation that he takes under the Army Act at the time of his appointment as an officer to "be faithful and bear true allegiance to the Constitution and the Islamic Republic of Pakistan ?"

Martial Law, as pointed out by Sir William Holds-worth in his Article published in the Law Quarterly Review, Vol. 18, page 117, in England originally meant the law administered by the Court of the Constable and Marshal who had "jurisdiction over heraldry over words spoken to the disparagement of men of honour, and over contracts relating to war made out of the realm." Later they also acquired jurisdiction over a case of death or murder com*mitted beyond the sea and over the offences and miscarriages of soldiers contrary to the laws and rules of the army. The Courts of Constable and Marshal, however, disappeared in course of time and the Marshal's jurisdiction, it appears, is now confined to merely some formal matters relating to pedigrees, escutcheons pennons and coat-armours.

Martial Law, in the present times in England, has acquired various senses. In its original sense it is perhaps now only identifiable in the law relating to the enforcement of discipline in the forces at home and abroad. In this sense this branch of Martial Law is now better known as "military law" and is in time of peace enforced under various statutes, such as the Army Act, the Navy Act and the Air Force Act. It derives its authority from these statutes passed by the civil law-making bodies.

In International law Martial Law means the powers of a military commander in war time in enemy territory as part of the jus belli. In this sense as the Duke of Wellington once said in the House of Lords it is "neither more nor less than the will of the General who commands the army." (Hansard, Vol. CXV, Col. 880).

Can Martial law in this form be exercised within the country ?

The position in England today, as mentioned in Halsbury's Laws of England, Vol. 7, Third Edition, page 260, is as follows;--

"The Crown may not issue commissions in time of peace to try civilians by martial law; but when a state of actual war, or of insurrection riot, or rebellion amounting to war, exists, the Crown and its officers may use the amount of force necessary fn the circumstances to restore order, and this use of force is sometimes termed martial law. When once this state of actual war exists the civil Courts have no authority to call in question the actions of the military authorities; but it is for the civil Courts to decide, if their jurisdiction is invoked. whether a state of war exists which justifies the application of martial law. The powers, such as they are, of the military authorities cease and those of the civil Courts are resumed ipso facto with the termination of the state of war; and, in the absence of an Act of Indemnity the civil Courts may inquire into the legality of anything done during the state of war; even if there is an Act of Indemnity couched in the usual terms, malicious acts will not be protected."

Under the Constitution of France, however, there is a proce*dure available for a "Declaration of a State of Siege", under which the authority vested in the civil power for the maintenance of order and police passes entirely to the army (autorite militaire), in consequence of tumult or insurrection in any part of the country.

On the proclamation of such a state of siege the constitutional guarantees become suspended and the Government of the affected area is temporarily placed under the control of the military.

"Martial Law" in this sense, namely, the suspension of the ordinary law and the temporary Government of a country or a part of it by the military is, according to A. V. Dicey (vide Law of the Constitution, page 287), "utterly unknown to the law of England", for, it has nothing equivalent to the French "declaration of State of siege".

This does not, however, exclude the possibility of the armed forces being employed, even under the Laws of England, for the suppression of riots, insurrection and rebellion, but in this sense, according to Dicey, Martial Law is just "a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot or generally of any violent resistance to the law." He considers this right to be "essential to the very existence of orderly Government" and, as being as such "most assuredly recognised in the most ample manner by the law of England." This right has, however, according to him, "no special connection with the existence of an armed force," but pertains to the right of the Crown to put down breaches of peace for which purpose he may call upon any subject, whether civilian or soldier, to assist "as a matter of legal duty".

So far as England is concerned, no occasion has arisen to enforce even this type of common law martial law in the country since the civil wars of the Seventeenth Century, but martial law has been enforced in this form during the past century in South Africa, Southern Ireland, Palestine and parts of British India. Nevertheless, even in such cases the degree of freedom given to the military to exercise force has varied with the circumstances of each case. The test of interference always has been the necessity of performing the duty of repelling force and restoring order. In exceptional circumstances, the military may in such eventualities also find it necessary to set up Military Tribunals to try civilians and offenders may even be condemned to death but in every case the action taken has to be judged by the test of necessity. The Tribunals so set up are neither judicial bodies nor Courts Martial under the Army, Navy or the Air Force Acts but are merely bodies set up to advise the Military Commander as to 'the action he should take.

The English Courts also maintain that it is not the proclam*ation of Martial Law which justifies the use of force but rather the events which have created a situation in which the use of force in this form has become justified. Blackstone in his Commentaries, Vol. I, page 381, describes this kind of Martial Law "only as temporary exerescences bred out of the distemper of the State".

From the above it is clear that we must distinguish clearly between Martial Law as a machinery for the enforcement of internal order and Martial Law as a system of military rule of a conquered or invaded alien territory. Martial Law of the first category is normally brought in by a proclamation issued under the authority of the civil Government and it can displace the civil Government only where a situation has arisen in which it has become impossible for the civil Courts and other civil authorities to function. The imposition of Martial Law does not of its own force require the closing of the civil Courts or the abrogation of the authority of the civil Government. The maxim inter armes leges silent applies in the municipal field only where a situation has arisen in which it has become impossible for the Courts to function, for, on the other hand, it is an equally well-established principle that where the civil Courts are sitting and civil authorities are functioning the establishment of Martial Law cannot be justified. The validity of Martial Law is, in this sense, always a judicial question, for, the Courts have always claimed and have in fact exercised the right to say whether the necessity for the imposition of Martial Law in this limited common law sense existed.

In this connection it may be worthwhile quoting a passage from the opinion of the Earl of Halsbury in the case of Tilonko v. Attorney-General of Natal (1907 A C 93) which came up as an application for special leave to appeal by Tilonko who had been indicted before a Court Martial, sitting under a declaration of Martial Law, for the crimes of sedition and public violence. He objected to the jurisdiction of the Military Court on the ground that he was not a military man and had not been taken in the field of battle, as he had never taken up arms against the Government. He also questioned the validity of the imposition of Martial Law on the ground that the state of the country was not such as to justify it. The Government on the other hand claimed that the Court could net go behind the Proclamation. But the Noble Earl observed :

"The notion that martial law exists by reason of the pro*clamation-an expression which the learned counsel has more than once used-is an entire delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the ques*tion whether there is war or not. If there is war, there is the right to repel force by force but it is found convenient and decorous, from time to time, to authorize what are called Courts to administer punishments, and to restrain by acts of repression the violence that is committed in time of war, instead of leav*ing such punishment and repression to the casual action of per*sons acting without sufficient consultation, or without sufficient order or regularity in the procedure in which things alleged to have been done are proved . . . . . But the question whether war existed or not may, of course, from time to time be a ques*tion of doubt, and if that had been the question in this case, it is possible that some of the observations of the learned counsel with regard to the period of trial, and the course that has been pursued, might have required consideration"

This establishes beyond doubt that the Courts in England have always claimed the right in case of doubt to decide as to whether a state of war or insurrection exists which can justify the imposition of Martial Law.

Similarly in the case of Rex v. Allen ((1921) 21 R 241) the question arose for consideration whether Allen, a civilian, arrested after the proclamation of Martial law in Ireland, within the proclaimed area, in possession of arms and ammunition, was rightly convicted by a Military Court. The Chief Justice specifically formulated and dealt with, amongst others, the two following questions ;

(1) Was there a state of war in the area included in the Lord Lieutenant's proclamation justifying the application of Martial Law ? and

(2) Could the military Court act having regard to the fact that the Courts of justice in the area were open?

On the first question the Court, after going into evidence, came to the conclusion that at the time of the proclamation a State of war did actually exist and continued to exist at the time of the arrest of John Allen. On the next question too, after an exhaustive review of all earlier decisions, it found that when the "regular Courts were open so that criminals might be delivered over to them to be dealt with according to the ordinary law there was not any right in the Crown to adopt any other course or proceeding" bat relying on an earlier decision of the Privy Council in the case of Ex parte: Marias (1902 A C 109) held that where a system of guerilla warfare had come to be adopted by the rebels it could not be said that the "Courts were able to sit for all purposes" and to discharge their ordinary functions without hindrance.

In saying so they by-passed an earlier decision of the same Court in Wolfe Tone's case ((1798) 27 St. Tr. 614) where, according to Dicey (p. 294), the Court granted a writ of habeas corpus to Wolfe Tone who had admittedly participated in the French invasion of Ireland and thus stopped his execution ordered by a military Court.

The American view, as given in the Corpus Juris, Secundum, Vol. 93 at page 117, is clearly to the same effect that "the validity of Martial Law is always a judicial decision."

The American Courts from the case of Ex parte : Milligan (4 Wallace 121) decided in 1866 have consistently maintained that "Martial rule can never exist where the Courts are open, and in the proper and unobstructed exercise of their jurisdiction." (Vide Commentaries on the Constitution of the United States by Chester James Antieau).

The case of R. S. Sterling, Governor of the State of Texas v. E. Constantin (77 U S S C R 375 (L. Edn.)) also makes interesting reading. In this case the District Court of the United States for the Eastern District of Texas had passed an interlocutory order prohibiting the Governor, the Adjutant-General and the Commanding Officer of the Military District from enforcing their military or executive orders regulating or restricting the pro*duction of petroleum under a proclamation of Martial Law. The Supreme Court went into the question in detail on evidence first to consider as to whether there was a state of war or not and as to whether the Military Courts could adjudicate upon the rights of civilians when the ordinary Courts were functioning, and came to the conclusion that there was "no room for doubt that there was no military necessity which, from any point of view, could be taken to justify the action of the Governor in attempting to limit complainants' oil production, otherwise lawful ..... There was no exigency which justified the Governor in attempting to enforce by executive or military order the restriction which the District Judge has restrained pending proper enquiry. If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the Federal Court in the exercise of its jurisdiction and not to attempt to override It; to aid in making its process effective and not to nullify it, to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared".

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 funda*mental law of the country. It would be paradoxical indeed if such a result could flow from the invocation in the aid of a State of any agency set up and maintained by the State itself for its own protection from external invasion and internal disorder. If the argument is valid that the proclamation of the Martial Law by itself leads to the complete destruction of the legal order, then the armed forces do not assist the state in suppressing disorder but actually create further disorder, by disrupting the entire legal order of the state. I cannot, therefore, agree with the learned Attorney-General that the proclamation of Martial Law by itself must necessarily give the Commander of the armed forces the power to abrogate the Constitution, which he is bound by his oath to defend.

If this be so, then from where did General Agha Muhammad Yahya Khan acquire the right to assume control of the reins of Government? Field Marshal Muhammad Ayub Khan did not appoint him as his successor by his letter of the 24th March 1969. He merely called upon him to perform his "constitutional and legal duty to restore order" in the country. If this was his authority, then the only authority he got was to restore order and nothing more.

Even the imposition of Martial Law by his proclamation is of doubtful validity, because the proclamation should have come from the civil authorities and it was only then that under the proclamation the Commander of the armed forces could have moved into action. I am not aware of any document or of any provision in any law which gives the Commander of the armed forces the right to proclaim Martial Law, although I am prepared to concede that he has like all other loyal citizens of the country a bounden duty to assist the State, when called upon to do so. If the magnitude of the insurrection is so great that the Courts and the civil administration are unable to function, the military may exercise all such powers that may be necessary to achieve their objective and in doing so may even set up Military Tribunals to promptly punish wrong-doers but this, whether done throughout the country or in a restricted area within the country, merely temporarily suspends the functioning of the civil Courts and .the civil administration. As soon as the necessity for the exercise of the military power is over, the civil administration must, of necessity, be restored, and assume its normal role.

It is not without significance that after the so-called imposition of Martial Law in 1969 the Martial Law

Authorities had no occasion to fire even a single shot and found the conditions so normal that the civil administration never ceased to function and all the Courts continued to sit for all purposes. In fact the situation was so normal that within a few days the reality had to be accepted and even the Constitution was brought back except in so far as it had been purported to be altered by the creation of the office of President and the assumption of that office by the Chief Martial Law Administrator. Protection was also purported to be given to the acts of all Martial Law Administrators and their subordinates acting under their orders to save them from the consequences of their other*wise illegal acts. If Martial Law was by itself a sufficient legal cover then why was this special protection necessary.

This country was not a foreign country which had been invaded by any foreign army with General Agha Muhammad Yahya Khan at its head nor was it an alien territory which had been occupied by the said army. The question of imposition of "military rule" as an incident of jus bells of international law could not, in the circumstances, possibly have arisen. The only form of Martial Law, therefore, that could possibly have been imposed in this country, assuming that such a state of large scale disorder had come to prevail in the country as was suggested by Field Marshal Muhammad Ayub Khan in his letter of the 24th of March 1969, was a Martial Law of the kind which could be (imposed under the English common law and was imposed by the British from time to time in 1919 in Amritsar, Lahore and Gujranwala, in 1921 in the areas inhabited by the Moplas, in 1930 in Sholapur, in 1942 In areas occupied by Hurs in Sind and in 1953 in Lahore. Under these Martial Laws there was, of course, no question of abrogation of any Constitution or of the introduction of military rule in supersession of the civil adminis*tration normally functioning in other parts of the country.

Looked at, therefore, either from the constitutional point of view or the Martial Law point of view whatever was done in March 1969, either by Field Marshal Muhammad Ayub Khan or General Agha Muhammad Yahya Khan was entirely without any legal foundation. It was not even a revolution or a military coup d'etat in any sense of those terms. The Military Commander did not take over the reins of Government by force nor did he oust the constitutional President. The constitutional President out of his own free will and accord in response to the public's demand, stepped aside and called upon the Military Commander to restore law and order, as he was bound to do both under the law and under the Constitution. On the stepping aside of the Constitutional Presi*dent the constitutional machinery should have automatically come into effect and the Speaker should have taken over as Acting Presi*dent until fresh elections were held for the choice of a successor. The political machinery would then have moved according to the Constitution and the National and Provincial Assemblies would have taken steps to resolve the political disputes, if any, if the Military Commander had not by an illegal order dissolved them. The Military Commander, however, did not allow the constitutional machinery to come into effect but usurped the functions of Government and started issuing all kinds of Martial Law Regulations, Presidential Orders and even Ordinances.

It was in this state of affairs that the nature and scope of the Martial Law imposed in 1969 first came up for consideration before the Lahore High Court in the case of Mir Hassan and another v. The State (P L D 1969 Lah. 786). The question that fell to be decided there was as to whether the transference of certain criminal cases; during the pendency of applications under section 561-A of the Code of Criminal Procedure in the High Court-; in exercise of powers assumed under Martial Law Regulation No. 42, promulgated during the pendency of the said cases, was valid or not and as to whether the High Court had jurisdiction to enquire into the question of the validity of such transfer. A Full Bench of the High Court, after an exhaustive review of the opinions of jurists and the relevant law on the subject, came to the conclusion that the Martial Law imposed in 1969 was of the kind described by English authors as the Martial Law which can be imposed in exercise of the common law right vested in a State to suppress disorder and insurrection, and it was not of the type of military rule which can be enforced in an alien country by an invading or occupying army. The learned Judge, who delivered the main judgment, after examining the provisions of the letter of Field Marshal Muhammad Ayub Khan, the proclamation issued by General Agha Muhammad Yahya Khan and the Provisional Constitution Order promulgated on the 4th of April 1969, came to the conclusion that the "Martial Law was not imposed by the Chief Martial Law Administrator after having wrested power from the constitutional Government by force". In the circumstances, upon the public declarations of Field Marshal Muhammad Ayub Khan and General Agha Muhammad Yahya Khan themselves there was nothing to suggest that "the existing machinery for dispensing justice was found wanting or that it was to be subject to curbs or that a state of affairs was to be brought about in which the will of the Martial Law Commander was to be imposed." I entirely approve of these observations, for they conform with my own conclusions which I have expressed earlier and, 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.

Incidentally It may also be pointed out here that this particular aspect of the question was not considered in Dosso's case and, as such, the principles therein laid down did not debar the High Court from going into this question. The High Court was fully entitled to consider whether what happened in 1969 was either a revolution or a coup d'etat within the meaning in which they were considered in Dosso's case.

The judgment of the High Court in the above-mentioned case was not challenged by the then regime by any appeal to this Court but it resorted to the device of nullifying its effect by promulgating a Presidential Order called the Jurisdiction of Courts (Removal of Doubts) Order, 1969. This was pub*lished in the Gazette, Extraordinary of Pakistan on the 30th of June 1969.

Since the validity of this Order has been called in question before us it is necessary that both this Order and the Provisional Constitution Order of the 4th April 1969, should be set out herein In extenso:-

I. PROVISIONAL CONSTITUTION ORDER, 1969

"In pursuance of the Proclamation of the 25th March 1969, and of all powers enabling him in that behalf, the Chief Martial Law Administrator is pleased to make and promulgate the following Order:-

1.- (1) This Order may be called the Provisional Constitution Order, 1969.

(2) It shall come into force at once and be deemed to have taken effect immediately upon the making of the Proclamation on the 25th day of March 1969, hereinafter referred to as the Proclamation.

(3) It extends to the whole of Pakistan.

2. Save as otherwise provided in this Order, the provisions of this Order shall be in addition to and not in derogation of the Proclamation and shall be read and construed accordingly.

3.-(1) Notwithstanding the abrogation of the Constitution of the Islamic Republic of Pakistan brought into force on the 8th day of June 1962, hereinafter referred to as the said Constitution, by the Proclamation and subject to any Regula*tion or Order made, from time to time, by the Chief Martial Law Administrator, the State of Pakistan, shall, except as otherwise provided in this Order, be governed as nearly as may be in accordance with the said Constitution.

(2) The Chief Martial Law Administrator shall be the President of Pakistan, hereinafter referred to as the President, and shall perform all functions assigned to the President of Pakistan by or under the said Constitution or by or under any law.

(3) Paragraphs 2, 4, 5, 6, 7, 8. 9, 13, 14, 15 and 17 of the Fundamental Rights set out in Chapter I of Part II of the said Constitution shall stand abrogated and all proceedings pending in any Court, in so far as they are for the enforcement of those Rights shall abate.

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

4.-(1) 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 said Constitution.

(2) The Provisions of clause (1) shall also apply to an Ordinance which was in force -immediately before the issue of the Proclamation.

5. No Court, tribunal or other authority shall call or permit to be called in question-

(a) the Proclamation;

(b) any Order made in pursuance of the Proclamation or any Martial Law Regulation or Martial Law Order; or

(c) any finding, sentence or order of a Special Military Court or a Summary Military Court.

6.-(1) No appeal shall lie to the Supreme Court from any judgment, final order or sentence of a High Court !n criminal proceedings except when the High Court-

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life; or

(b) has withdrawn for trial before itself any case from any Court subordinate to its authority, and has in such trial convicted the accused person and sentenced him as afore. said; or

(c) certifies that the case involves substantial question of law as to the interpretation of the said Constitution; or

(d) has imposed any punishment on any person for contempt of the High Court.

(2) Save as provided in clause (1), the Supreme Court, a High Court and all other Courts and tribunals shall have and exercise the same powers and jurisdiction as they had immediately before the issue of the Proclamation.

7.-(1) Nothing in this Order or in any law shall prejudice the operation of any Martial Law Regulation made by the Chief Martial Law Administrator or by any person having authority from him to make Martial Law Regulations and where any Ordinance made under Article 4 or any other law is repugnant to such Regulation, the Regulation shall prevail.

(2) Any provision 9n any law providing for the reference of a detention order to an Advisory Board shall be of no effect.

8. The President may, by Order, make such provisions, including constitutional provisions, as he may deem fit for the administration of the affairs of the State.

A. M. YAHYA KHAN,

General,

Chief Martial Law Administrator,

4th April 1969. Pakistan."

II. JURISDICTION OF COURTS (REMOVAL OF DOUBTS) ORDER, 1969 "No. F. 24 (1)/69-Pub.-The following order made by the President is hereby published for general information:-

THE JURISDICTION OF COURTS (REMOVAL OF DOUBTS) ORDER, 1969

President's Order No. 3 of 1969

Whereas doubts have arisen as to whether the Supreme Court pr g High Court has power to issue any writ, order, notice or' other process to or against a Special Military Court or a Summary Military Court, or in relation to any proceedings of, or any jurisdiction exercised by, any such Military Court, or any Martial Law Authority;

And whereas it is necessary to remove such doubts;

Now, therefore, in pursuance of the Proclamation of the 25th day of March 1969, and in exercise of all powers enabling him fn that behalf, the President and Chief Martial Law Administrator is pleased to make and promulgate the following Order:--

1.-(1) This Order may be called the Jurisdiction of Courts (Removal of Doubts) Order, 1969.

(2) It shall come into force at once and shall be deemed to have taken effect on the 25th day of March 1969.

2. This Order shall have effect notwithstanding anything contained in the Provisional Constitution Order, or any Martial Law Regulation, or any other law for the time being in force.

3.-(1) No Court, tribunal or other authority, including the Supreme Court and a High Court, shall----

(a) receive or entertain any complaint, petition, application or other representation whatsoever against, or in relation to the exercise of any power or jurisdiction by, any Special Military Court or Summary Military Court, or any Martial Law Authority or any person exercising powers or jurisdiction derived from Martial Law Authority;

(b) call or permit to be called in question in any manner whatsoever any finding, sentence, order, proceeding or other action of, by or before a Special Military Court or a Summary Military Court or any Martial Law Authority or any person exercising powers or jurisdiction derived from a Martial Law Authority;

(c) issue or make any writ, order, notice or other process whatsoever to or against, or in relation to the exercise of any power or jurisdiction by a Special Military Court or a Summary Military Court, or any Martial Law Authority or any person exercising powers or jurisdiction derived from a Martial Law Authority.

(2) Any decision given, judgment passed, writ, order, notice or process issued or made, or thing done in contravention of clause (1) shall be of no effect.

(3) If any question arises as to the correctness, legality or propriety of the exercise of any powers or jurisdiction by a Special Military Court or a Summary Military Court or a Martial Law Authority or any other person deriving powers from a Martial Law Authority, it shall be referred to the Chief Martial Law Administrator whose decision thereon shall be final.

Explanation.-"Martial Law Authority" means the Chief Martial Law Administrator and includes a Deputy Chief Martial Law Administrator, a Zonal Martial Law Adminis*trator, a Sub-Administrator of Martial Law or any person designated as such by any of them.

4. If any question arises as to the interpretation of any Martial Law Regulation or a Martial Law Order, it shall be referred to the Martial Law Authority issuing the same for decision and the decision of such Martial Law Authority shall be final and shall not be questioned in any Court, Tribunal or other authority, including the Supreme Court and a High Court.

A. M. YAHYA KHAN, H. PK.. H. J.,

General,

President and Chief Martial Law

Administrator."

It will be noticed that the latter Order is described in the Gazette as an Order made by the President, although its Preamble states that it is being made :-

"In exercise of all powers enabling him in that behalf, the President and Chief Martial Law Administrator is pleased to make and promulgate the following Order."

It is signed by General A. M. Yahya Khan, who is described both as President and Chief Martial Law Administrator.

The former Order has been issued as an Order only of the Chief Martial Law Administrator and is signed as such.

It has become necessary to point out these facts, because, the argument has been advanced that the second Order is only a Presidential Order made in exercise of the powers given to the President either under Article 3 or Article 8 of the Provisional Constitution Order and, therefore, an order of a Sub-constitu*tional nature which could not alter or amend the Constitution itself. This right having been specifically reserved for the Chief Martial Law Administrator by the express language of Article ? (1) of the Provisional Constitution Order. The Constitution could, therefore, it is argued be amended only by a "Regulation or Order made by the Chief Martial Law Administrator" and by no other means and by no one else, because, under the scheme of the Provisional Constitution Order itself the President was a subordinate authority created by the Martial Law and his functions were limited to the performance of "functions assigned to the President of Pakistan by or under the said Constitution or by or under any law". Article 8 of this Order was, it is said, not repugnant to the provisions of clause (1) of Article 3 and did not override the same, because, it could be given a harmonious interpretation by limiting the power of making orders by the President thereunder to orders of a constitutional nature necessary for the administration of the affairs of the State but only to the extent they did not conflict with the Constitution or those parts of it which bad been preserved by the Provisional Constitution Order or were not inconsistent with any Martial Law Regulation. The mere description given under the signature in the above-quoted Order No. 3 of 1969 or in the Preamble did not alter its true character or give to it the status of a Martial Law Regulation which alone could amend or alter the Constitution. It was and remained a Presidential Order and a sub-constitutional legislation.

It is further pointed out that in this respect the Provisional Constitution Order of 1969 also makes a radical departure from the Laws (Continuance in Force) Order of 1958. Under the latter the President as well as the Chief Administrator of Martial Law could both amend the Constitution but under the former only the Chief Martial Law Administrator could do so. The intention was, therefore, clear and under the principle of expressio unius est excluslo alterius there was no scope for holding that the Constitution could be amended by a Presidential Order.

The learned Attorney-General has attempted to draw our attention to a number of Orders issued in exercise of the powers given under section 8 of the Provisional Constitution Order to show that where an Order was made in exercise of this power it was expressly so mentioned but the mere recital of this fact in a particular Order does not necessarily mean that the non-recital of the said fact would give an order described and published in the Gazette as a Presidential Order a higher status. We have also discovered that no set practice was followed during this period for even Ordinances were made in the purported exercise of powers under the Proclamation and all other powers vested in that behalf in the President and the Chief Martial Law Administrator and were signed by the person concerned under the description of "President and Chief Martial Law Administrator". The official description of the legislative measure is, therefore, the only safe indication available of its true nature. I am, therefore, unable to agree with the learned Attorney-General that this Presidential Order could have amended the Constitution and taken away, as it has purported to do, the jurisdiction of the High Courts to even receive or entertain any complaint, petition, application or other representation whatsoever against, or in relation to the exercise of any power or jurisdiction by any Special Military Court or Summary Military Court or any Martial Law Authority or any person exercising power or jurisdiction derived from the Martial Law Authority under Article 98 of the Constitution of 1962, which had been preserved even by the Provisional Constitution Order of 1969.

This provision, as very appropriately pointed out by Mr. Brohi, strikes at the very root of the judicial power of the Court to hear and determine a matter, even though it may relate to its own jurisdiction. The Courts undoubtedly have the power to hear and determine any matter or controversy which is brought before them, even if it be to decide whether they have the jurisdiction to determine such a matter or not. The superior Courts are, as is now well settled, the Judges of their own jurisdic*tion. This is a right which has consistently been claimed by this and other Courts of superior jurisdiction in all civilised countries and it is on the basis of this very right that this Court itself went into the question of the validity of the Martial Law in Dosso's case. If Muhammad Munir, C. J. in 1958 could feel that the Courts "on being properly moved still had the right to say whether what had happened was legal or illegal" then what has happened since to take away that right. What was done in 1958 can still be done even though the result might well be different.

Learned Attorney-General does not seriously dispute the correctness of the contention that "judicial power" is different from "jurisdiction" and so far as judicial power is concerned it must exist in Courts as long as the Courts are there. In fact, he has been bold enough, and I admire him for his boldness,

in characterising these provisions of the Presidential Order No. 3 of 1969, which seek to take away the judicial power itself as "absurdities". He frankly concedes that the Courts have and must have the power to determine all questions of their own jurisdiction. It is a proposition so well-settled that no one can challenge it.

The learned Attorney-General has, however, sought to contend that where there is a written Constitution the Courts are themselves creatures of the Constitution and have only such jurisdictions as the Constitution chooses to confer upon them. I have no cavil with this proposition, as I have myself in several cases indicated, that the Constitution can confer or restrict the jurisdiction of even superior Courts but this is not the same thing as saying that it can also restrict or curtail the judicial power, because, that in effect would be denying to the Court the very function for which it exists, i.e. to decide a controversy even if it relates to its own jurisdiction.

In the view that I have taken of the Presidential Order No. 3 of 1969 that it is a sub-constitutional legislation I cannot but hold that it could not have curtailed the jurisdiction that was given to the High Courts and to this Court by the Constitution of 1962, for, that jurisdiction was preserved even by the Provisional Constitution Order,

Looking at the matter, therefore, from any point of view, whether, from the strictly legal and constitutional side, or on the basis of the principle of implied authority as suggested by Mr. A Manzoor Qadir, or even in terms of the so-called legal order purported to be created by the Provisional Constitution Order of 1969 itself, I cannot escape the conclusion that the Presidential Order No. 3 was an unconstitutional document. General Agha Mohammad Yahya Khan had according to me, no authority to pass such legislation taking away the powers of the Courts in his capacity as President under the Provisional Constitution Order. The Martial Law introduced by him was illegal and, therefore, even as Chief Martial Law Administrator he was not competent to validly pass such laws, and it certainly was in excess of the implied authority, if any, given to him by the letter of Field Marshal Muhammad Ayub Khan dated the 24th of March 1969.

The High Courts were, therefore, wrong in thinking that they had no jurisdiction to enquire into this matter.

I come now to the Martial Law Regulation No. 78 which was promulgated on the 17th of April 1971. This too has to be quoted in extenso. It reads as follows:-

"MARTIAL LAW REGULATION

BY

CHIEF MARTIAL LAW ADMINISTRATOR, PAKISTAN

Restriction of Movements of Suspected Persons, Restriction Orders and Detention Orders, Regulation.

REGULATION No. 78

1. The Chief Martial Law Administrator or a Martial Law Administrator or a Deputy Martial Law Administrator authorised by the Martial Law Administrator concerned in this behalf. If satisfied with respect to any particular person, that with a view to preventing him from acting in a seditious manner

or in a man*ner prejudicial to the security, the public safety or interest or the defence of Pakistan. maintenance of public order, Pakistan's relations with any other power the maintenance of peaceful conditions In any part of Pakistan the maintenance of essential supplies and services, it Is necessary so to do, may make an order ;-

(a) directing such person to remove himself from Pakistan in such manner, by such time and by such route as may be specified In the order, and prohibiting his return to Pakistan ;

(A) directing that he be detained ;

(c) directing that he shall not remain within any specified area In Pakistan except on the conditions and subject to the restrictions specified in the order or to be specified by an authority or a person specified in the order ;

(d)"requiring him to reside or remain in such place or within such area in Pakistan as may be specified In the order or to proceed to a place or area within such time as may be specified in the order ;

(e) requiring him to notify his movements or to report himself or both to notify his movements and report himself in such manner at such times and to such authority or person as may be specified In the order ;

(f) imposing upon him such restrictions as may be specified in the order in respect of employment or business, in respect of his association or communication with other persons, and in respect of his activities in relation to the dissemination of news or propagation of opinions ;

(g) prohibiting or restricting the possession or use by him of any such article or articles as may be specified is the order ---

(h) otherwise regulating his conduct in regard to any matter as may be specified in the order;

Provided that no order shall be made under clause (a) of this paragraph against any citizen of Pakistan and by any person other than the Chief Martial Law Administrator.

2. Any order made under paragraph I may require the person against whom it is made to enter into a bond, with or without sureties, for the due observance of the restrictions and conditions specified in the order.

3. If any person remains in any area or place or fails to leave any area or place fn contravention of an order made under paragraph 1 he may be removed from the area or place by any police officer or "other person acting on behalf of the Chief Martial Law Administrator or a Martial Law Administrator or a Deputy Martial Law Administrator authorised by the Martial Law Administrator concerned in this behalf.

4. A person who is ordered to be detained under this Regu*lation shall be detained in such place and under such conditions as to maintenance, discipline and punishment for breaches of discipline, as the Chief Martial Law Administrator or a Martial Law Administrator or a Deputy Martial Law Administrator

authorised by the Martial Law Administrator concerned in this behalf may from time to time determine.

5. The Chief Martial Law Administrator or a Martial Law Administrator or a Deputy Martial Law Administrator authorised by the Martial Law Administrator concerned in this behalf. if has reason to believe that a person in respect of whom an order under clause (b) of paragraph 1 has been made, has absconded or, is concealing himself so that the order cannot be executed, may-

(a) make a report in writing of the fact to a Magistrate of the first class having jurisdiction in the place where the said person was ordinarily residing and thereupon the provisions of sections 87, 88 and 89 of the Code of Criminal Procedure, 1898 (Act V of 1898) shall apply in respect of the said person and his property as if he were a person against whom a warrant had been issued by the Magistrate and was absconding; and

(b) by notified order direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction he shall, unless he proves that it was not possible for him to comply with the direction. and that he had, within the period specified in the order, informed the officer of the reason which had rendered compliance impossible and also of his whereabouts, be punishable with rigorous imprisonment for a term which may extend to seven years, or with fine, or with both.

6. (a) If any person contravenes any order made under this Regulation, he shall be punishable with rigorous imprison*ment for a term which may extend to five years, or with fine, or with both.

(b) Where by reason of a contravention of an order made under this Regulation, a bond executed under paragraph 2 has been forfeited, the Court having jurisdiction to try the person who had contravened the order may call upon any person bound by the bond to pay the penalty thereof or to show cause why it should not be paid, and if sufficient cause is not shown -and the penalty is not paid, the Court may proceed to recover the same in the same manner, as a Court proceeding on the for*feiture, of a bond under the Code of Criminal Procedure, 1898 (Act V of 1893).

A. M. YAHYA KHAN GENERAL,

Commander-in-Chief, Pakistan Army and

Chief Martial Law Administrator.

Rawalpindi, the 9th April 1971. "

This gives very wide powers to the Chief Martial Law Administrator and a Zonal Martial Law Administrator and even a Deputy Martial Law Administrator to detain a person without r trial for any length of time, without giving him any reasons for such detention or any opportunity even of making any re-presenta*tion against such a detention. These are indeed very extraordinary powers for taking away the most cherished right of a citizen in a most arbitrary manner. They provide no machinery for seeking any redress against any possible abuse or misuse of power or for making any representation or even for an appeal from Ceaser to Ceaser. Learned counsel for the appellants contend that since the Provisional Constitution Order preserves Article 2 of the Constitution of 1962 and the Fundamental Right No. 1 given thereunder has not been abrogated, this measure even if it can be regarded as a `law' is void.

Article 2, as earlier indicated, assures a citizen that "no action detrimental to the life, liberty, body. reputation or property of any person shall be taken except in accordance with law", and Fundamental Right No. 1 guarantees that "no person shall be deprived of life or liberty save in accordance with law."

What is `law' has already been dealt with earlier in this judgment-so now I have to decide whether Martial Law Regula*tion No. 78 is a valid law. since I have already held that neither President's Order No. 3 of 1969 has succeeded in taking away that jurisdiction nor can the promulgation of Martial Law by itself produce that effect.

It is interesting to note that the impugned Regulation itself does not contemplate the ouster of the jurisdiction of the ordinary Courts of the land, for, the intrinsic evidence of its own terms is to the contrary. Paragraph 6(b) thereof clearly contemplates that if any person contravenes any order made under this Regulation he shall be tried by a "Court having jurisdiction to try the person". This can only mean the ordinary criminal Courts, for, no other machinery is provided for punishment In the case of such contravention. Again clause (a) of paragraph 5 speaks of a "Magistrate of the First Class" and refers to certain provisions of the Code of Criminal Procedure. Does this not mean that where a Court has tried anyone for the contravention of any order made under the Regulation the ordinary incidents of appeal and revision will also be attracted as a normal consequence of such a trial? The question of exclusion of the jurisdiction of the Courts, therefore, does not arise in terms of this Regulation. If it arises at all it arises under the Presidential Order No. 3 of 1969 with which I have already dealt.

However, as this question has been raised, regarding the validity of Martial Law Regulation No. 78, I must point out that it follows from what I have said earlier that it was made by an authority whose legal competence we have not been able to recognise on the ground of want of legal authority and the unconstitutional manner of arrogation of power.

The learned Attorney-General, however, insists that even this regime had received the legal recognition of this Court and, therefore, it had also acquired de jure authority to make laws. Reference in this connection has been made to two decisions. The first was in the case of Muhammad Ismail v. The State (P L D 1969 S C 241) in which the judgment was delivered again by myself. The only question raised in this case was as to whether after the promulga*tion of Martial Law on the 25th of March 1969, and the enact*ment of the Provisional Constitution Order on the 4th of April 1969, this Court continued to retain the jurisdiction conferred upon it by the Constitution of 1962 to entertain petitions for special leave to appeal in criminal proceedings in view of the fact that the Provisional Constitution Order did not specifically provide for any appeal by special leave. No question was raised in this case as to the validity of the Martial Law or of the Provisional Constitution Order. The only question argued was whether on a proper construction of the language of this order an appeal for special leave in criminal proceedings was still within the competence of this Court. The Court held that upon a proper construction of the terms of the Order the Jurisdiction to enter*tain and hear appeals by special leave in criminal matters had not been taken away and that the jurisdiction given to it by Article 58 of the 1962-Constitution remained unaffected. There was no question, therefore, of any conscious application of the mind of the Court to the question of the validity of the regime or the legality of the Provisional Constitution Order nor was this Court called upon to give any decision thereon as the latter order had manifested no intention to alter that jurisdiction and there was no conflict between the two. It is not correct, therefore, to say that this decision in any way constitutes a conscious recognition in law of the new regime.

The next case referred to is that of Mian Fazal Ahmad v. The State (1970 S C M R 650). In this case, which was a petition for special leave from an order of the Lahore High Court dismissing an application under section 561-A of the Code of Criminal Proce*dure for quashment of certain criminal proceedings pending investigation by the police, the High Court had admitted the petition and directed the police not to put up any challan in any Court. The police did not do so but instead of submitting a challan before a criminal Court placed the matter before a Military Court and the. latter convicted the petitioner. Thereupon the petitioner moved the High Court, for taking action against the D S. P. in contempt for disobedience of its order. The High Court dismissed the application of the petitioner. and this Court by a very brief order dismissed the petition for special leave observing that "when the Military Court took cognizance of the offence and imposed a penalty on the petitioner the learned

Judge in the High Court was right in dismissing the petitioner's application under section 561-A of the Code of Criminal Procedure." No other reason was given for the order.

Again, this does not show that the legality of the order of transfer of the case to the Military Court was ever challenged. The High Court's order was upheld possibly on the ground that the proceedings which were sought to be quashed by the original petition having been terminated by the transfer of the case to the Military Court, there was no further need of its quashment, and no question of commitment of the D. S. P. in contempt arose, as he had not violated the order of the High Court. In these circum*stances, it can hardly be urged that this constitutes a conscious legal recognition of the military regime of 1969. Questions in dispute in these cases were entirely different and had nothing whatever to do with the question now before us. It s incorrect, therefore, to say that this Court had given any legal recognition to the regime of General Agha Muhammad Yahya Khan.

The question, therefore, is still at large and has for the first time now been raised before this Court in this specific form. The learned Attorney-General's contention that even the tacit appro*val given by this Court by not questioning suo motu the various Martial Law Regulations made by the regime concerned during this period of 2J years is itself sufficient to preclude this Court from going into this question now, is not, in my opinion, tenable. The Courts, as I have already indicated, are not called upon to suo motu raise a controversy and then decide it. They can only do so if a litigant raises the controversy in a concrete form, as it has now been done before us. `-The Court", says Mr. Eaton Drome, has authority to expound the Constitution only in cases presented to it for adjudication. Its Judges may see the President usurping powers that do not belong to him, Congress exercising functions it is forbidden to exercise, a State asserting rights denied to it. The Court has no authority to interfere until its office is invoked in a case submitted to it in the manner prescribed by law." (Vide Marriot's English Politi*cal Institutions, 1938 Edn., p. 293).

Incidentally it may also be mentioned here that a great deal. that has been said about the oath of Judges is also not germane to the question now before us, for, in the view I take of the duty of a Judge to decide a controversy that is brought before him it cannot be said that any Judge of this Court has violated his oath which he took under the Constitution of 1962. He was not called upon to take any other oath thereafter and is still no doubt bound by that oath and will stand by it. But it must not be overlooked that since his own powers are limited to deciding a controversy properly brought before him by a litigant or on his behalf, an equal duty lay on the gentlemen of the Bar as well to raise this question. This was never done and it may be pertinent to point out that even the learned gentlemen of the Bar, except the learned Attorney-General, who have now argued this case, actively, at some stage or the other, co-operated with the various Martial Law regimes either as High Commissioner, Minister, Attorney-General, or Advocate-General. So far as this Court is concerned it has always acted in accordance with its oath and will continue to do so whenever a controversy is brought before it, no matter what the consequences.

Reverting now to the question of the legality of the Presi*dential Order No. 3 of 1969 and the Martial Law Regulation No. 78 of 1971 it follows from the reasons given earlier that they were both made by an incompetent authority and, therefore, lacked the attribute of legitimacy which is one of the essential: characteristics of a valid law. The Presidential Order No. 3 of 1969 was also invalid on two additional grounds, namely, that it was a Presidential Order, which could not in terms of the Pro visional Constitution Order itself amend the Constitution so as to take away the jurisdiction conferred upon the High Court under Article 98 and that it certainly could not, in any event, take away the judicial power of the Courts to hear and determine questions pertaining even to their own jurisdiction and this power could not be vested in another authority as long as the Courts continued to exist.

This does not, however, dispose of the case, for we are again presented by the learned Attorney-General with the argument that a greater chaos might result by the acceptance of this principle of legitimacy. He has reminded the Court of the grave consequences that followed when in Moulvi Tamizuddin Khan's case a similar argument was spurned by the Federal Court and "disaster" brought in. I am not unmindful of the grave responsibility that rests upon Courts not to do anything which might make confusion worse confounded or create a greater state of chaos if that can possibly be avoided consistently with their duty to decide in accordance with law.

Some of the learned counsel appearing on the other side at first advocated that we should totally ignore this argument but Mr. Manzoor Qadir and Mr. Sharifuddin Pirzada frankly conceded that within certain limits validation can be given to certain acts of even a de facto usurper of power either on the ground of state necessity or implied authority. Mr. Anwar sought at one stage to disassociate himself with this view but when it was pointed out to him that the result would then be that even the Legal Framework Order (No. 2 of 1970) and the elections held there*under would also become invalid, he too hesitated and thought that that might be going too far. Mr. Brohi on the other hand, is prepared to concede only this much that an usurper may be given the limited power of acting within the framework of the Constitution, but nothing beyond that.

This is a difficult question to decide and although I have for my guidance the example of our own Federal Court, which in Governor-General's Reference No. 1 of 1955 invoked the maxim of salus populi suprema lax to create some kind of an order out of chaos, I would like to proceed with great caution, for, I find it difficult to legitimize what I am convinced is illegiti*mate. I shall, therefore, first examine some other decisions which have been cited at the Bar before I begin to formulate my own views in the matter.

I have been referred to the decision of the Privy Council in the case of Madzimbamuto v. Lardner-Burke and another ((1968) 3 A E R 561) where Lord Pearce in a very elaborate dissenting judgment accept*ed that acts done by those actually in control without lawfull authority may be recognized as valid or acted upon by the Courts within certain limitations, on principles either of necessity or implied mandate, particularly where the enquiry is being made ex post facto, because, common sense dictates that every thing done during the intervening period, whether good or bad, cannot be treated in the same manner. In support of this proposition the noble lord refers also to a passage from Grotius' book on De Jure Belli et Pacis (Book 1, Ch. 4) where the following princi*ple is enunciated :--

"Now while such a usurper is in possession, the acts of Government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that one to whom the sovereignty actually belongs, whether people, king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the Courts."

There is no doubt that a usurper may do things both good, and bad; and he may have during the period of usurpation also made many Regulations or taken actions which would be valid if emanating from a lawful Government and which may well have, In the course of time, affected the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer of property and similar subjects. Are all these to be invalidated and the country landed once again into confusion?

Such a principle, it appears, has also been adopted in America In various cases which came up after the suppression of the rebellion of the Southern States and the American Courts roc adopted the policy that where the acts done by the usurper were "necessary to peace and good order among citizens and bat affected property or contractual rights they should not be invalidated", not because they were legal but because they would cause inconvenience to innocent persons and lead to further difficulties. Vide Texas v. White ((1868) 7 Wallace 733), Horn v, Loekhurt ((1373) 17 Wallace 850) and Baldy v. Hunter ((1897) 171 U S 388).

Lord Pearce himself indicated 3 limitations for the validation! of such acts, namely :--

"(1) So far as they are directed to and reasonably required: for ordinary orderly running of the State ;

(2) so far as they do not impair the rights of citizens under the lawful Constitution ; and

(3) 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 judgments of the Court of Appeal in Rhodesia in the same case and of a: Court in Uganda in the case of Uganda v. Commissioner of Prisons, Ex Parte Matovu (1966 E A L R - 514) have also been cited before us but I do not propose to deal with them, as they seem mainly to draw their inspiration from Hans Kelsen and the decision in Dosso's case. There is, however, another case from Nigeria where the military take over was not accepted as legitimate but condoned as a "manifestation of necessity" and not as "revolutionary breach of legal continuity''. On this basis even the fundamental rights guaranteed by the pre-existing constitution were also maintained in the case of Lakamani and 0la v. Attorney General (West), Nigeria. (Unfortunately the full report of this decision is not available but it is referred to in S. A. de Smith's book on Constitutional and Administrative Law).

We have also in this connection been referred to a case from Cyprus sub-nomine. The Attorney-General of the Republic v. Mustafa Ibrahim and others (1964 C L R 196) where the Supreme Constitutional Court of Cyprus also applied the doctrine of necessity to validate a certain legislation which was otherwise to consistent with certain Articles of the Cyprus Constitution on the ground that they would be justified "if it can be shown that it was enacted only in order to avoid consequences which could not otherwise be avoided, and which if they had followed, would have inflicted upon the people of Cyprus, whoa the Executive and Legislative organs of the Republic are bound to protect, inevitable irreparable evil end furthermore if it can be shown that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by the enactment in question, was not disproportionate to the evil avoided" This the Court thought was its duty to do in view of its "all important and responsible function of transmit*ting legal theory into living law; applied to the acts bf daily life fur the preservation of social order"

I too am of the opinion that recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous 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 the illegal acts of usurpers In my humble opinion, this doctrine can be invoke in aid only after the Court has come to the conclusion that the acts of the usurpers were illegal and illegitimate. It is only then that the question arises as to how many of his acts, legislative or other*wise, should be condoned or maintained, notwithstanding their illegality in the wider public interest. I would call this a principle of condonation and not legitimization.

Applying this test I would condone (1) all transactions which are past and closed, for, no useful purpose can be served by re*opening the n, (2) all acts and legislative measures which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order, (3) all acts which tend to advance or promote the good of the people, (4) all acts required to be done for the ordinary orderly running of the State and all such measures as would establish or lead to the establishment of. in our case, the objectives mentioned In the Objectives Resolution of 1954. I would not, however, condone any act intended to Entrench the usurper more firmly in his power or to directly help him to run the country contrary to its legitimate objectives. I would not also condone anything which seriously impairs the rights of the citizens except in so far as they may be designed to advance the social welfare and national solidarity.

Applying these tests to the President's Order No. 3 of 1969 and Martial Law Regulation No. 78 of 1971 lam not in a position to say that they fall in either of the categories mentioned above, although the learned Attorney-General has very strenuously contended that when Martial Law Regulation No. 78 was enacted a state of rebellion was prevailing in East Pakistan. Even if that was so, the Regulation could well have been restricted to the territories in which such a state of grave disorder prevailed. There is no evidence before us that there wag arty danger of such large scale disorder in West Pakistan. Furthermore, even if reasonable powers of preventive detention were necessary in West Pakistan to meet the case of any individual the security of Pakistan Act was available and at the time the impugned order of detention was actually made even the Defence of Pakistan Rules were available. Both of these contain ample provisions for detaining a person without trial. I am not in a position, there. fore, to say that Martial Law Regulation No. 78 was necessary for the ordinary orderly running of the State or for promoting the good of the people of West Pakistan. This Regulation cannot thus in my opinion, be justified even on the ground of necessity.

It is interesting to note that one of the detenus before us; namely, Malik Ghulam Jilani, was originally arrested under rule 32 read with rule 213 of the Defence of Pakistan Rules "with a view to preventing him from acting in a manner prejudicial to security, public safety and interest and defence of Pakistan." It was only subsequently that the order of detention was substituted by an order under Martial Law Regulation No. 78, but this too added no new grounds and all that it stated was that "whereas dl is necessary to prevent Malik Ghularn Jilani son of late Khan Bahadur Nazar Muhammad Khan, resident of 131/L-1, Gulberg III, Lahore, from acting in a manner prejudicial to security, public safety and interest, and defence of Pakistan". It is obvious therefore, from these orders themselves that what could be done under Martial Law Regulation No. 78 could also be done under the Defence of Pakistan Rules. The only object of converting the order into an order under Martial Law Regulation No. 78 was to deprive the Courts of their jurisdiction to entertain any application against such detention under the terms of President's Order No. 3 of 1969.

The latter Order too was clearly unnecessary, for, there is nothing to indicate that the Courts were, in any way, subverting the authority of Government or doing anything which could, by any stretch of imagination, be considered to be objectionable.

In these circumstances, I have, for the reasons given above, come to the conclusion that both these orders were not only Illegitimate but were also incapable of being maintained on the ground of necessity. The result which follows from this conclusion is that both the detentions were, in my view, illegal and the High Court should have declared the impugned orders of detention to be void and of no legal effect.

It remains now for me only to consider another argument advanced by the le rued Attorney-General that the attack is directed really against the present regime and not against the regime of General Agha Muhammad Yahya Khan. The learned counsel, on the other side, have all protested that this is not so but in order to leave no room for doubt I wish to make it clear that this decision is confined to the question in issue before this Court, namely, the validity of the Presidential Order No. 3 of 1969 and Martial Law Regulation No. 78 of 1971 and has nothing whatsoever to do with the validity of the present regime. I am fully conscious of the fact that there were very important differen*ces which may well have a bearing on this question. The circum*stances may well have been totally dissimilar. Again since the preparation of this judgment further developments have taken place of which I am entitled to take notice. The National Assembly has met and ratified the assumption of power by the new President who is an elected representative of the people and the leader of the majority party in the National Assembly as now constituted. The Assembly has also, it is said, ratified an interim Constitution. Its terms are not known to the Court as yet but these developments may well hive radically altered the situation. However, since this question is not before this Court I refrain from expressing any definite opinion with regard thereto.

Before I conclude this judgment I feel it my duty also to place on record my appreciation of the very able assistance given to this Court by all the learned counsel concerned. In particular I wish to express my gratitude to both Mr. A. K. Brohi and Mr. Sharifuddin Pirzada for the enormous amount of research under*taken by them and the willing assistance rendered by them as amicus curiae in spite of their heavy engagements elsewhere.

In the result, therefore, I would allow both these appeals and declare both the impugned orders of detention to be void and without legal effect: The detenus should now be set at liberty forthwith unless they are being detained under any other order passed under any valid law.

MUHAMMAD YAQUB ALI, J.-These two appeals one filed by Miss Asma Jilani and the other by Mrs. Zarina Gauhar arise oat of habeas corpus 'petitions tiled by the first named in the; Punjab High Court

for the release of her father Malik Ghulam Jilani and by the second named in the Sind *Baluchistan High Court for the release of her husband Mr. Altaf Gauhar.

Malik Ghulam Jilani was taken into custody on the 20th December 1971, by the order of the Governor of the Punjab under rule 32, sub-rule (1), clause (b) read with rule 213 of the Defence of Pakistan Rules, 1971, on the ground that it was necessary to prevent him from acting in a manner prejudicial to security, public safety, interest and Defence of Pakistan. On the 23rd December 1971, Miss Asma Jilani, filed a habeas corpus petition under Article 98(2)(b)(i) of the Constitution of 1962 questioning the detention of her father on more than one ground. A learned Judge issued rule to the respondent for :the 31st December 1971 to show cause as to why the order of detention be not set aside. On the 30th December 1971, the Governor rescinded the order of detention and simultaneously, ,in his capacity as Martial Law Administrator, Zone 'C', passed .an order under Martial Law Regulation 78, directing that Malik Ghulam Mint be detained in his house situated in Gulberg III, Lahore, till further orders under such Police custody as the District Magistrate, Lahore, may deem necessary. He was -further restrained from making any speech, statement or utter*ance which may be seditious or prejudicial to the security, the public safety or interest, the defence of Pakistan, the maintenance of public order, Pakistan's relations with any other power, the maintenance of peaceful conditions in any part of Pakistan or the maintenance of essential supplies and services ; he shall not meet any person without the prior approval of the District Magistrate, Lahore, except the present inmates of the said house :and shall be responsible to bear his own expenses including that of medical aid.

On the 31st December 1971, Miss Asma Jilani obtained permission to file supplementary grounds in support of the habeas corpus petition and attacked the legality and propriety of the fresh order of detention. The case came up for hearing on 15th January 1972, before Shafiur Rahman, J.-whereupon the Advocate-General appearing for the respondent raised a prelimi*nary objection that the High Court could not assume jurisdic*tion because of the bar captained in the Jurisdiction of Courts Removal of Doubts) Order 3 of 1969.

In reply the counsel for the petitioner contended that Martial Law Regulation 78 under which Malik Ghulam Jilani was being detained was not a part of the law of the land having been pro*mulgated by a person who had usurped power by "waging war against Pakistan" and that he took power from Ayub Khan in violation of the provisions of the Constitution of 1962, to *protect and defend which Constitution both Ayub Khan and Yahya Khan had taken oaths. It was further maintained that the provisions of Martial Law Regulation 78 and the Jurisdic*tion of Courts (Removal of Doubts) Order 3 of 1969, were con*trolled by Article 2 of the 1962-Constitution which envisaged due process of law.

The petition was dismissed by the learned Judge on account* of the bar contained in the Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 excluding the jurisdiction of Courts. including the High Courts and the Supreme Court to call in question any order passed by a Martial Law authority.

Mr. Altaf Gauhar was taken into custody on the night bet*ween 4th and 5th February 1972, from his residence in Karachi., under the order passed by the Martial Law Administrator,, Zone `D', under Martial Law Regulation 78. It was provided in the order that Mr. Altaf Gauhar was to be detained for a period of six months and committed to the custody of the Superintendent, Central Prison, Karachi. This part of the order,, of detention was, however, not implemented, and he was detain*ed, in a private bungalow in Karachi, but no one knew his where*abouts. Later on, he was taken to a rest house in the Sihala Police Training School and lodged there.

On the following morning Mrs. Zarina Gauhar filed a habeas corpus petition in the High Court of Sind & Baluchistan under Article 98(2)(b)(i) of 1962-Constitution calling in question the detention of her husband as without lawful authority.

It was pleaded that the arrest of Mr. Altaf Gauhar in an unknown place was without lawful authority as no warrant of arrest was served upon him or shown to him. nor the authority under which he may have been detained in custody was dis*closed. It was further urged : (i) that even if it was hereafter urged that Mr. Altaf Gauhar was detained under Martial Law Regulation 78 the detention was illegal

and without lawful autho*rity inasmuch as the Martial Law Regulation 78 itself does not constitute the law of the land ; (ii) that Martial Law, even if It be the will of an individual, Martial Law Ruler, who seizes power, is not a heritable commodity and vanishes with the original proclaimer, ceasing to exercise power for any reason and that there was no separate and independent Proclamation of Martial Law or Emergency by the present Chief Martial Law Administrator ; and (iii) that the exercise, by a civilian, of Martial Law powers is fundamentally opposed to the concept of Martial Law which signifies Military rule.

On the 7th February 1972, the petition was admitted the *hearing by a Division Bench and a rule issued to the respon*dent for a date to be fixed in office. On the 11th of February: 1972, Mrs. Zarina Gauhar filed an application under section 497, Cr. P. C., read with Article 98(2)(b)(i) of 1962-Constitution for granting interim bail to Mr. Altaf Gauhar during the pen*dency of the hearing of the habeas corpus petition.

The petition for bail was heard on the 18th February 1972,. and dismissed by Dorab F. Patel and Imdad Ally H. Agha, JJ.,-

with the observation that the counsel for the petitioner had failed to pursuade them that the Court had jurisdiction to grant rule against Martial Law order. For the same reasons the habeas corpus too was dismissed.

In declining to interfere with the orders passed by Martial Law authorities, the High Courts of the Punjab and the Sind-Balu*chistan relied on the judgment of this Court in the State v. Dosso and others (P L D 1958 S C (Pak.) 533). The following observations of Muhammad Munir, C. J.-were relied upon as conclusive and the validity of the Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 and Martial Law Regulation 78 of 1971;

"Thus a victorious revolution or a successful coup d'etat 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 jurisdictions, and can function only to the extent and in the manner determined by the new Constitution."

In support of the petition for leave to appeal, it was inter alia contended that the dictum in Dosso's case require considera*tion and that even if the view expressed in it was accepted as correct no victorious revolution or successful coup d'etat had taken place on the 25th March 1969, when Field Marshal Muhammad Ayub Khan stepped aside from the office of the President and invited General Agha Muhammad Yahya Khan as Commander-in-Chief of the Pakistan Army to perform his constitutional and legal duty and defend the country from internal disorder and chaos which was beyond the capacity of the Civil Government. It was questioned how could the Comman*der-in-Chief in those circumstances be said to have staged a victorious revolution, or a successful coup d'etat. Appeal was made by the learned counsel also to the oath taken both by Field Marshal Muhammad Ayub Khan and General Agha Muhammad Yahya Khan to preserve, protect and defend the 1962-Constitution which inter alia provided that "If the President was unable to perform the functions of his office, the Speaker of the National Assembly shall act as President and shall perform the functions of the President". The assumption of the office of the President ; abrogation of the 1962-Constitution ; and the dissolution of the National and Provincial Assemblies by General Agha Muhammad Yahya Khan by the Proclamation issued by him on the 26th March 1969, were, on this premises, claimed to be unlawful acts which Courts of Justice will not recognize. All the Martial Law Regulations and Orders pro*mulgated by him as President and as Chief Martial Law Admi*nistrator which were not relatable to immediate restoration of law and order were on the same ground claimed to be uncon*stitutional, invalid and of no legal effect.

Leave to appeal was granted as questions of fundamental importance involving interpretation of the 1962-Constitution and correctness of the decision in the State v. Dosso were involved.

Before proceeding further we may notice briefly the consti*tutional developments which took place in Pakistan after it came into being on the 14th August 1947, consisting of two wings, namely, the Province of East Bengal in the East, and the Provinces of the Punjab, N.-W. F. P., Sind and Baluchistan in the West. The constitutional structure of the State was based on the Indian Independence Act, 1947 (10 and 11 Geo. 6, Ch. 30) and the Government of India Act, 1935 (26 Geo. 5, Ch. 2) as adopted by the Provisional Constitution Order, 1947. A constituent Assembly composed of Members from both Wings who had been elected earlier was to act both as the Constitution-making body and as Federal Legislature of Pakistan. These constitutional Instru*ments provided for a Federal Government and distribution of powers between the Executive. Legislative and Judicial organs of the State which is an essential element of a democratic State.

Pakistan was faced with innumerable difficulties from the very start. Firstly, there was an influx of nearly ten million people from the Indian dominion who had as a result of violent dis*turbances which accompanied Partition of the sub-continent were uprooted from their hearths and homes and entered Pakistan as destitute refugees. The rehabilitation and settlement of these refugees pre-empted most of the time of the Government for a number of years. Secondly, Quaid-i-Azam Muhammad Ali Jinnah, Founder of Pakistan, in whom people had implicit faith and who served as a symbol of the unity of the Nation died in September 1948. He was succeeded by Khawaja Nazimuddin, who was then the Chief Minister of the Province of East Bengal. On the 11th September 1951, Khan Liaqat Ali Khan, the first Prime Minister, on whom the political mental of Quaid-i-Azam had fallen and who commanded obedience of the people throughout the country was assassinated. A tussle for grabbing power among persons who held positions of advantage in the Govern*ment thereupon ensued and under its weight the foundation of the State started quivering. Eventually Mr. Ghulam Muhammad, an ex-Civil Servant, who was holding the portfolio of Finance became the Governor-General and Khawaja Nazimuddin as Leader of the majority party in the Constituent Assembly assumed the Office of the Prime Minister.

In April 1953, Mr. Ghulam Muhammad dismissed Khawaja Nazimuddin and his Cabinet although he commanded clear majority in the Constituent Assembly and made another civil servant Mr. Muhammad Ali Bogra, Pakistan's Ambassador to the United States of America, as the Prime Minister. Among others General Muhammad Ayub Khan, Commander-in-Chief of Pakistan Army, joined his Cabinet as Defence Minister. This was the first constitutional mishap of Pakistan as Governor-*General Mr. Ghulam Muhammad was only a constitutional head. He had to act on the advice given to him by the Prime Minister and under the Constitutional Instruments (Indian Inde*pendence Act, 1947, and the Government of India Act, 1935) he had no legal authority to dismiss the Prime Minister and assume to himself the role of a sovereign.

On the 7th March 1949, the Constituent Assembly passed the Objectives Resolution which embodies the "will" of the historically first Legislature of the country. The Resolution declar*ed as under ;

"In the name of Allah, the Beneficent, the Merciful;

Whereas sovereignty over the entire universe belongs to God Almighty alone and the authority which he has delegated to the State of Pakistan 'through its people for being exercised within the limits prescribed by him is a sacred trust;

This Constituent Assembly representing the people of Pakistan resolves to frame a constitution for the sovereign independent State of Pakistan;

Wherein the principles of democracy, freedom, equality, tole*rance and social justice as enunciated by Islam shall be fully observed ;

Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accord with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah;

Wherein adequate provision shall be made for the minorities freely to profess and practise their religions and develop their cultures;

Whereby the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;

Wherein adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;

Wherein the independence of the judiciary shall be fully secured;

Wherein the integrity of the territories of the Federation, its independence and all its rights including its sovereign rights on land, sea and air shall be safeguarded;

So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity."

Counsel for the appellants and the amicus curiae named the Reso*lution as Grund-norm of Pakistan. The Attorney-General appearing for Martial Law Administrator, Zone `D', described, it as an Instrument which embodied the ideology of Pakistan and which was the only bond of its unity.

By 1954, the draft of the Constitution based on the Objectives Resolution had been prepared with the assent of the leaders of the various parties in the Constituent Assembly when on the 24th October 1954, Mr. Ghulam Muhammad knowing full well that the draft Constitution was ready, by a Proclamation, dissolved the Constituent Assembly, and placed armed guards outside the Assembly Hall. This was the second great mishap of Pakistan.

The order of the Governor-General was challenged by Maulvi Tamizuddin Khan, President of the Constituent Assembly, in the Chief Court of Sind by a Writ Petition filed under section 223-A of the Government of India Act, 1935, which was added by the Government of India (Amendment) Act, 1954, passed by the Constituent Assembly, on 16th July 1954. It empowered the High Courts to issue Writs of mandamus, certiorari, quo warranto and habeas corpus. The order passed by Mr. Ghulam Muhammad was challenged as unauthorised by the Indian Independence Act or the Government of India Act, void and of no legal effect.

In defence of the Writ Petition, the Governor-General and the Members of the newly-constituted Cabinet, cited as respondents, Inter alia pleaded that the Chief Court of Sind had no jurisdiction to issue a Writ under the Government of India (Amendment) Act, 195-1, as it had not received the assent of the Governor-*General.

A Full Bench of the Chief Court overruled the objection raised by the respondents and held that the

order dissolving the Constituent Assembly was illegal and issued a Writ restraining the Governor-General; his newly appointed Cabinet Ministers; their agents and servants from implementing or otherwise giving effect to the Proclamation of 24th October 1954, and from inter*fering directly or indirectly with the functions of the Constituent Assembly.

The Governor-General and his Ministers thereupon filed an appeal in the Federal Court being Constitutional Appeal 1 of 1955 reiterating the objection that the Government of India (Amendment) Act, 1954, did not become a law as it had not received the assent of the Governor-General.

By a majority judgment delivered by Muhammad Munir, C. J. *the appeal was allowed and the writ petition was dismissed on the finding that the Constituent Assembly when it functioned under subsection (1) of section 8 of the Indian Independence Act acted as Legislature of the Dominion within the meaning of section 6 of the Act and that under subsection (3) of the later section, the assent of the Governor-General was necessary to all legis*lation and that since section 223-A of the Government of India Act under which the Chief Court of Sind issued the Writ had not received such assent, it was not yet law and, therefore, that Court had no jurisdiction to issue the Writs. Cornelius, J. (as he then was) differed with this view and recorded a dissenting judgment holding that neither the British sovereign nor the Governor-General as such was a part of the Constituent Assem*bly. The assent of the Governor-General was, therefore, not necessary to give validity to the laws passed by the Constituent Assembly. With great respect to the learned Chief Justice the interpretation placed by him on sections 6 and 8 of the Indian Independence Act, 1947, as a result of which the appeal was allowed, is ex facie erroneous though we do not propose to examine in detail the reason given in the judgment.

Apart from the political cataclysm which the Proclamation of the 24th October, by Mr. Ghulam Muhammad brought into being a large number of laws passed by the Constituent Assembly which had from the very beginning not been placed before the Governor-General for assent were declared by the Court in the case of Maulvi Tamizuddin Khan as invalid. To meet this disaster the Governor-General purporting to act under section 42 of the Government of India Act promulgated an Ordinance called the Emergency Powers Ordinance IX of 1955 by which he sought to validate and to give retrospective effect to thirty-five con*stituent Acts which had been passed by the Constituent Assembly under subsection (1) of section 8 of the Indian Independence Act, 1947 (10 and 11 Geo. 6, Ch. 30). He also added a proviso to section 176 of the Government of India Act, 1935, forbidding "the bringing of suits or other proceedings against the Govern*ment or any Minister or Officer of the Government in respect of or arising out of anything done or omitted to be done by the Governor-General or by the Government or by any person under or in consequence of the Governor-General's Proclamation under section 102 of the Government of India Act, 1935, which had been issued simultaneously with the Ordinance". On the 15th April 1955. the Governor-General summoned a Constituent Convention for the 10th May 1955, for the purpose of making provision as to the Constitution of Pakistan, and on the following day issued a Proclamation assuming to himself until other provision was made by the Constituent Convention such powers as were necessary to validate and enforce the laws that were needed to avoid a breakdown in the constitutional and adminis*trative machinery of the country or to preserve the State and maintain the Government of the country in its existing condition, and in exercise of those powers retrospectively validated and declared enforceable the laws mentioned in the Schedule to the Emergency Powers Ordinance, 1955.

The question of the validity of section 2 of the Emergency Powers Ordinance, 1955, came up before the Court in the case of one Asif Panel (P L D 1955 F C 387) within a few days of the decision in Maulvi Tamizuddin Khan's case. On the short ground that under section 42 of the Government of India Act, 1935, the Governor-*General had no power to make by Ordinance any provision as to .the Constitution of the country. The Emergency Powers Ordinance IX of 1955 was held to be invalid whereupon the Governor-General made a Special Reference to the Federal Court which was answered on the 16th May 1955. Dealing with the validity of this action the Court expressed the opinion that the Constituent Assembly and not the Constituent Convention as was proposed to be set up by the Governor-General would be competent to exercise all powers conferred by the Indian Inde*pendence Act, 1947, and secondly that in the situation presented In the Reference, the Governor-General had during the interim period the power under the common law, special or state necessity of retrospectively validating the laws listed in the Schedule to the Ordinance, 1955, and all those laws now decided upon by the Constituent Assembly or during the aforesaid period shall be valid and enforced in the same way on which day they purported to have come into force.

Cornelius, J.-as he then was differed with the opinion of the Court that the Governor-General could on the basis of the State necessity validate the laws which were declared invalid by the Federal Court and opined that there was no provision in the Constitution and no rule of law applicable to the situation, by which the .Governor-General can, in the light of the Court's decision in the case of Usif Patel by Proclamation or otherwise, validate laws enumerated in the Schedule to the Emergency Powers Ordinance, 1955, whether temporarily or permanently.

In accordance with the opinion given by the Federal Court, a new Constituent Assembly was elected and it eventually succeeded in framing a Constitution which came into force on the 23rd March 1956. The Constitution provided for a federal Government with equal representation of peoples of both the Wings in the National Assembly (Article 44). Fundamental rights and an independent judiciary to enforce those rights were guaranteed. Article 5 provided that all citizens are equal before law and are entitled to equal protection of law and that no person shall be deprived of life or liberty save in accordance with law. Provision was made for preventive detention for a period not exceeding three months unless the Board consisting of persons, appointed by the Chief Justice of Pakistan in the case of a person detained under a Central Act and a Board consisting of persona nominated by the Chief Justice of the High Court of the Province in the case of a person detained under a Provincial Act reported that there was a sufficient cause for such detention.

The Federal Government was to be headed by a President who under Article 35 (1) could be impeached on a charge of violating the Constitution or gross misconduct. He was to act as a constitutional head and under Article 37 was to act in accordance with the advice of the Cabinet or the appropriate Minister or Minister of State. To confer autonomy on the; Provinces, Article 107 provided that Provincial Legislature shall have an exclusive power to make laws with respect to any matter not enumerated in Federal, Provincial and Concurrent Lists.

A National Assembly was yet to be elected under the 1956* Constitution when Mr. Iskander Mirza who had become the first President by a Proclamation issued on the 7th October 1958, abrogated the Constitution; dissolved the National and. Provincial Assemblies and imposed Martial Law throughout the country : General Muhammad Ayub Khan, Commander-in-Chief of the Pakistan Army, mss appointed as the Chief Administrator of Martial Law. This was the third great mishap which hit Pakistan like a bolt from the blue.

On the 10th October 1958, Mr. Iskander Mirza issued the Laws (Continuance in Force) Order (1 of 1958) which inter alia provided;

"(1) Notwithstanding the abrogation of the Constitution of the 23rd March 1956, and subject to any order of the President or Regulation made by the Chief Administrator of Martial Law, the Republic, to be known henceforward as Pakistan, shall be governed as nearly as may be in accordance with the late Constitution."

On the 13th October 1958, Criminal Appeals State v. Dosso and three other connected matters came up for hearing before the Court. The respondents in these cases were convicted by Council-of-Elders under the Frontier Crimes, Regulation 3 of 1901. The High Court of West Pakistan (Quetta Seat) 'set aside their convictions on the finding that Frontier Crimes Regulation being repugnant to Article 5 of the Constitution, the convictions were bad in law. The question raised by the Court was whether under Article 7 of the Laws (Continuance in Force),Order, 1958, the writs issued by the High Court under Article 170 of the Constitution setting aside the convictions of the respondents had abated.

Delivering the majority judgment of the Court Munir, C. J. held that as Article 5 of the late Constitution itself had now disappeared from the new Legal Order, the Frontier Crimes Regulation (III of 1901) was by reason of Article IV of the Laws (Continuance in Fore) Order, 1958, still in force and all proceed*ings in cases in which the validity of that Regulation had been called in question having abated the convictions of the respondents recorded by the Council-of-Elders was good. The conclusion reached by the learned Chief Justice proceeded on the following reasons;

"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 legal 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. Subsequent alterations in the Constitution and the validity of all laws made thereunder 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 Consti*tution 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 Constitu*tion 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'etat 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 Constitu*tion as guilty of the crime of treason. But if the revolution is victorious in the sense that the parsons 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'etat 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 jurisdictions, and can function only to the extent and in the manner determined by the new Constitution. While on this subject, Hans Kelsen, a renowned modern jurist, say;--

"From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated. Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order remains valid also within the frame of the new order. But the phrase 'remains valid', does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force; it is replaced by a new constitution which is not the result of a constitutional alteration of the former. If laws which are introduced under the old constitution continue to be valid under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution . . . . . .

The laws which, in, the ordinary inaccurate parlance, continue to be valid are, from a juristic viewpoint, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity is the new, not the old, constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other. Thus It is never the constitution merely but always the entire legal order that is changed by a revolution.

"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 nullified in a manner. anticipated by the old order itself. Every jurist will presume that the old order-to which no political reality any longer corresponds-has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new con*stitution. It follows that, from this juristic point of view, the storms of the old order can no longer be recognised as valid norms. (General Theory of Law and State translated by Anders Wedberg, 20th Century Legal Philosophy Series, pp. 117-118).

Bearing in mind the principle just stated let us now approach the question involved in these cases. If what I have already stated is correct, then the revolution having been successful it satisfies the test of efficacy, and becomes a basic law-creating fact. On that assumption the Laws (Continuance in Force) Order, however transitory or imperfect it may be, is a new legal order and it is in accordance with that order that the validity of the laws and the correctness of judicial decisions has to be determined."

The rest of the judgment dealing with the interpretation of the Laws (Continuance in Force) Order and their effect on pending cases with which we are not concerned.

The judgment in State v. Dosso set the seal of legitimacy on the Government of Iskander Mirza though he himself was deposed from office by Muhammad Ayub Khan, a day after the judgment was delivered on the 23rd October 1958, and he assumed to himself the office of the President. The judgments In the cases Maulvi Tamizuddin Khan ; Governor-General Reference 1 of 1955 and The State v. Dosso had profound effect on the constitutional developments in Pakistan. As a commentator has remarked, a perfectly good country was made into a laughing stock. A country which came into being with a written Con*stitution providing for a parliamentary form of Government with distribution of State power between the Executive, Legislature, and the Judiciary was soon converted into an autocracy and eventually degenerated into military dictatorship. From now onwards people who were the recipients of delegated sovereignty from the Almighty, ceased to have any share in the exercise of the State powers. An all omnipotent sovereign now ruled over the people in similar manner as the alien commander of the army who has conquered a country and "will" alone regulates the conduct and behaviour of the subjugated populace. Martial Law remained in force till the 7th of June 1962, when in pursuance to a Mandate he had obtained by some kind of referendum Muhammad Ayub Khan gave a Constitution to the country. Under it he himself became the first President ; revoked the Proclamation of 7th October 1958 and lifted Martial Law. By and large the people accepted the Constitution and among others the Judges of the Supreme Court and High Courts took oath of office under this Constitution. All legislative and administrative acts of Martial Law authorities and the President between 7th October 1958, and 7th June 1962, were validated by this Constitution. Some were continued as Central Acts while others were repealed. Article 250 inter alia provided : Where a law is repealed ; the repeal shall not affect the previous operation of the law or anything duly done or suffered under the law, affect any right, privilege or liability, any penalty etc. Action taken under all Martial Law Orders, Martial Law Regulations, Presidential Orders and Ordinances issued between 7th October 1958 to 7th June 1962, were thereby validated.

In early 1965 Muhammad Ayub Khan was re-elected as President. The general impression in the country was that the election was rigged. Towards the end of 1958, an agitation started against his despotic rule and the undemocratic Constitu*tion which he had imposed on the country. the agitation gathered momentum every day and was accompanied by wide*spread disturbances throughout the country. In February 1969, Muhammad Ayub Khan called a round table conference of political leaders for resolving the political issues which had led to the disturbances. A solution was near insight, when all of a sudden Muhammad Ayub Khan decided to relinquish the office of the President and asked the Defence Forces to step in as it was "beyond the capacity of the Civil Government to deal with the present complex situation.

In the letter written to the Commander-in-Chief on the 24th March 1969, Muhammad Ayub Khan said;

"It is your legal and constitutional responsibility to defend the country not only against external aggression, but also to save it from internal disorder and chaos. The nation expects you to discharge this responsibility to preserve the security and integrity of the country and to restore normal social, economic and administrative life, let peace and happiness be brought back to this anguished land of 120 million people."

The Mandate given by the outgoing President to the Commander*-in-Chief was thus to fulfil his constitutional responsibilities; to restore law and order; and to carry out his legal duty in this behalf.

Muhammad Yahya Khan. Commander-in-Chief, who had taken an oath, that he will be faithful to the Constitution of 1962 and to Pakistan, however, in disregard of his constitutional and legal duty by a Proclamation issued on the 26th March 1969, abrogated the Constitution; dissolved the National and Provincial Assemblies and imposed Martial Law throughout the country. This was the fourth great constitutional mishap which befell Pakistan in less than 16 years.

On the 31st March 1969, Yahya Khan promulgated the Provisional Constitution Order which with some variations followed the scheme of the Laws (Continuance in Force) Order, 1958. It was provided that no judgment, decree, writ or process whatso*ever shall be made or issued by any Court or tribunal against the Chief Martial Law Administrator, Deputy Chief Martial Law Administrator or any Martial Law authority exercising power or jurisdiction under the authority of either (Article 3). Article 5 provided that;

"5. No Court, tribunal or other authority shall call or permit to be called in question:

(a) the Proclamation ;

(b) any order made in pursuance of the Proclamation or any Martial Law Regulation or Martial Law Order ; or

(c) any finding, sentence or order of a Special Military Court or a Summary Military Court.

Article 7 (2) laid down that : "Any provision in any law providing for the reference of a detention order to any Advisory Board shall be of no effect".

On 30th of June 1969, a Full Bench of the Punjab High Court in the case Mir Hassan and others v. The State (1) declared that Martial Law Regulation 42 by which the case pending against the petitioner under section 5 (2) of the Prevention of Corruption Act It of 1947 in the Court of a Special Judge was transferred to a Military Court was, in view of the Provisional Constitution Order and Martial Law Regulation 3, without jurisdiction and of no legal effect. It was observed by the learned Judges:

" Article 2 of Constitution (1962), declares that `every citizen of Pakistan is entitled to the protection of the law and to be treated in accordance with law and only in accordance with law . . . . .' The Article provides that no person shall be deprived of life, liberty, body, reputation or property without due process of law. It further declares that any public function*ary or person taking any action affecting the life, liberty, body, property or reputation of a person or affecting his profession, trade or business must rely on some law to justify his action. In other words, every public functionary or person must show legal authority for interference with the right of another person. Thus a direction or order by a public functionary would be invalid if it does not have the backing of a valid contemporaneous law. The Chief Martial Law Administrator by preserving Article 2 of the 1962-Constitution had made it clear once for ail that the intention of the Government was to act in accordance with law. Therefore, the

action of any authority including Martial Law authority howsoever high (1) P L D 1969 Lah. 786 he may be, if it had not the backing of a constitutional provision was not immune from being struck down by the Courts of the country."

To overcome the decision of the High Court the Chief Martial Law Administrator on the same day promulgated Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969. Articles 3 and 4 of the Order provided:

"3. (1) No Court, tribunal or other authority, including the Supreme Court and a High Court, shall --

(a) receive or entertain any complaint, petition, application or other representation whatsoever against, or in relation to the exercise of any power or jurisdiction by, any Special Military Court or Summary Military Court, or any Martial Law Authority or any person exercising powers or jurisdiction derived from Martial Law Authority;

(b) call or permit to be called in question in any manner whatsoever any finding, sentence, order, proceeding or other action of, by or before a Special Military Court or a Summary Military Court or any Martial Law Authority or any person exercising powers or jurisdiction derived from a Martial Law Authority ;

(c) issue or make any writ, order, notice or other process whatsoever to or against, or in relation to the exercise of any power or jurisdiction by, a Special Military Court or a Summary Military Court, or any Martial Law Authority or any person exercising powers or jurisdiction derived from a Martial Law Authority.

(2) Any decision given, judgment passed, writ, order, notice or process issued or made, or thing done in contravention of clause (i) shall be of no effect.

(3) If any question arises as to the correctness, legality or propriety of the exercise of any powers or jurisdiction by a Special Military Court or a Summary Military Court or a Martial Law Authority or any other person deriving powers from a Martial Law Authority, it shall be referred to the Chief Martial Law Administrator whose decision thereon shall be final.

(4) If any question arises as to the interpretation of any Martial Law Regulation or a Martial Law Order, it shall be referred to the Martial Law Authority issuing the same for decision and the decision of such Martial Law Authority shall be final and shall not be questioned in any Court, Tribunal or other authority, including the Supreme Court and a High Court."

The Order was given retrospective effect from 25th March 1969, and was to override anything contained in the Provisional Constitution Order, any Martial Law Regulation or any other law for the time being in force. If any question arose as to the interpretation of any Martial Law Regulation or any Martial.

Law Order. it was to be referred to the Martial Law authority issuing the same and the decision of the said authority will be final and cannot be questioned in any Court, tribunal or any other authority including the Supreme Court or a High Court.

On the 30th March 1970, Yahya Khan promulgated the Legal Framework Order and under its

provisions, elections were held in December 1970, to the National and Provincial Assemblies under the supervision of a Judge of this Court acting as the Chief Election Commissioner. After a good deal of political manoeuvring, the National Assembly was summoned by Muhammad Yahya Khan for the 3rd March 1971. However, shortly before that he postponed the session indefinitely. Awami League, the dominant political party of East Pakistan and who held a clear majority in the National Assembly reacted to this decision very sharply. To meet the situation Military action was taken on the 25th March 1971, which lasted for several months. These strong measures had, however, no effect on the events which were shaping fast in the Eastern Wing. It led to an armed surrection by Awami League and their supporters. On the 20th November 1971, Indian Armed Forces attacked East Pakistan and on 3rd December 1971, they attacked all along the West Pakistan border and the cease-fire line in Kashmir. On the 16th December Pakistan Army in East Pakistan surren*dered to the Indian Army and with the fall of Dacca on that day, the curtain fell on the illegal regime of Muhammad Yahya Khan for ever. He resigned his office on the 20th December 1971, and was placed under arrest.

The history of the constitutional mishaps which befell Pakistan between 1953 and 1969 bringing ruination, and untold miseries to its 120 million people, forms the overcast background against which the Court is required to answer the questions which fall for decision in the two appeals. Firstly, weather the proclamation of the 26th March 1969, abrogating the 1962 Constitution, became a law creating fact, and the Courts lost their exiting jurisdiction could function only to the extent and in the manner determined by the "Laws" promulgated by Muhammad Yahya Khan ; secondly, what is "Law" and what should be its form and content to obtain recognition from Courts of justice; thirdly, whether the Executive and Legislative organs of the State can deny to the Courts, the performance of their judicial functions; and, fourthly, what is the true import of Hans Kelsen's Theory on which the decision in The State v. Dosso is based and whether it would be acted upon by Municipal Courts.

The arguments raised by Mr. Manzur Qadir, counsel for Mrs. Zarina Gauhar, may be paced in three different sections : (i) that the abrogation of the Constitution of 1962 and imposition of Martial Law by General Muhammad Yahya Khan by Proclamation of March 1969, for purposes other than immediate restoration of law and order was unconstitutional and did not at any point of time acquired legal sanctity ; (ii) that enforceability of laws is dependent on their recognition by Courts and only "those laws" promulgated by Agha Muhammad Yahya Khan may be recogniz*ed by Courts as are covered by the doctrine of State necessity ; and (iii) that "laws" which purport to deprive Courts of their legal functions and are repugnant to the basic laws of Pakistan viz. Objectives Resolution of the 7th March 1949, are void and of no legal effect.

Mr. M. Anwar appearing for Miss Asma Jilani went a step further and pleaded that notwithstanding the consequences, all legislative measures adopted by Agha Muhammad Yahya Khan being tainted with illegitimacy should be discarded enmass.

The Attorney-General conceded that the decision in State v. Dosso did not lay down the law correctly and stated that it encourag*ed revolutions and was a standing invitation to future adventurers. He, however, maintained that as a large number of laws were promulgated and actions taken under them both during the regime of Muhammad Ayub Khan and Muhammad Yahya Khan, the Court may uphold those laws under the doctrine of stare decisis. He also conceded that clause (a) of Article 3 of the Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 in so far as it purported to deprive the citizens from approaching Courts of law by providing that no Court will "receive" any complaint, petition, application or other representation whatsoever was a bad law as it purported to deprive the Courts of their judicial functions which include the jurisdiction to determine whether their jurisdiction to entertain a cause is excluded bylaw. He further agreed that "law" is that which is recognized by Courts and relied on the order passed by this Court in Mian Fazal Ahmad v. The State (1970 S C M R 650) in which a Bench of this Court declined to give leave to appeal from the order of the High Court of Punjab, whereby a petition filed by the petitioner under section 561-A, Cr. P. C. in that case to call in question the registration of a case against him under the Sea Customs Act was dismissed on the ground that in the meantime a Military Court had tried and convicted him.

It was argued that this Court having already recognized President's Order 3 of 1969 as a law, should not go behind that decision. As regards the legality of the Proclamation of the 26th March 1969, issued by Muhammad Yahya Khan; the Attorney-*General relied on the theory that habitual obedience by people makes the de facto rule of a usurper de jure. Finally, the Attorney-General posed the question that if the "Laws" pro*mulgated by Muhammad Yahya Khan were illegitimate, as con*tended

by the counsel for the appellants, what will happen to the elections to the National Assembly and the Provincial Assemblies which were held under the Legal Framework Order promulgated by Yahya Khan on 30th March 1970.

The Advocates-General for the Provinces of Punjab, Sind, N. W. F. P. and Baluchistan did not address the Court.

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 ties 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. If so, then what was the legal status of Courts which accept that their authority stems from one man of unbridled will? He refer*red in this respect to the oath of office taken by the Judges under the 1962-Constitution and maintained that Judges have since then not taken any oath per contra or by means of any legal or formal document accepted or declared their allegiance to any other source of legal authority. He also attacked the decision in Dosso's case and analysed Kelsen's theory on which that decision is based. It was argued that Kelsen's theory that a victorious revolution and successful coup d'etat 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 accord*ing to Mr. Brohi was the central fallacy in the judgment given by Muhammad Munir, C. J. He referred to a remark by Kelsen in "What is justice" (page 268) "the propositions of jurisprudence are not themselves norms. They establish neither duties nor rights. Norms by which individuals are obligated and empowered issue only from the law-creating authority. The jurist, as the theoretical exponent of the law, presents these norms in pro*positions that have a purely descriptive sense, statements which only describe the "ought" of the legal norm. It is of the greatest importance to distinguish clearly between legal norms which com*prise the object of jurisprudence and the statements of jurispru*dence describing that object. These statements were called "rule of law" in contradistinction to the "legal norms" issued by the legal authority.

Mr. Brohi next referred to the decision in the case of Madzimbamuto v. Lardner Burke ((1968) 3 All E R 561) in which Kelsen's theory of effectiveness was applied. This case is mentioned by some authors as the grund-norm case. He pointed out that the decision fn this case was the maximum success which Kelsen could have conceivably envisaged.

Mr. Brohi further explained the nature of Martial Law (i) as a law regulating discipline and other matters determining the rules of conduct applicable to the Armed Forces; (ii) law which is imposed on an alien territory under occupation by an Armed Force of which the classic definition was given by the Duke of Willington when he stated in a debate in the House of Lords in 1851 as follows;

"Martial Law is neither more nor less than the will of the General who commands the Army. In fact, Martial Law means no law at all."

and (iii) law which relates to and arises out of a situation in which the Civil power is unable to maintain law and order and thus of necessity the Military power has to resort to the use of force In order to re-create conditions of tranquillity in which the civil power can re-assert its authority. Reference was made to decided cases that the Courts of law have the authority to deter*mine the Jurisdiction for the imposition of this type of Martial Law and also to make pronouncements regarding its valid con*tinuance on its objective analysis of factual situation, i.e., whether the Civil power is really unable to assert itself in the maintenance of law and order and the continued presence of the military power is essential (R. V. Strickland) (i). In this connection Mr. Brohi referred to the Proclamation of Martial Law, and the radio broad. c Sat of Muhammad Ayub Khan in which he said ;

"The whole nation demands that General Yahya Khan, the Commander-in-Chief of Pakistan Army, should fulfil his con*stitutional responsibilities"...That "the security of the country demands that no

impediment be placed in the way of the defence forces and they should be enabled to carry out freely their legal duties,"

and the letter he wrote to Muhammad Yahya Khan on 24th March 1969 to which reference has already been made earlier. He also referred to the first speech of Muhammad Yahya Khan in which he said : "My sole aim in imposing martial law is to protect life, liberty and property of the people and put the Admini*stration back on the rails" and again "it is my firm belief that a sound, clean and honest administration is a pre-requisite 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 and find a solution of all other political, economic and social problems that have been agitating the minds of the people". This document in the opinion of Mr. Brohi leaves no doubt that the Martial Law which was imposed on the 26th March 1969, fell in the third category.

The various actions taken by Yahya Khan under the umbrella of Martial Law, however, proved that in practice the Martial Law imposed by him fell in the second category. That is, law which is imposed by invading army on a conquered territory, because it is only then as stated by the Duke of wil*lington that the will of the army commander is law. 1f this be so, then the entire structure of all institutions in Pakistan including the superior Courts are merely an expression or aspect of one man's will, which a victorious military commander imposes no an alien territory and subjugated populace.

Continuing Mr. Brohi pointed out that the characteristic of all forms of civilised 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. Dealing with the transfer of power by Muhammad Ayub Khan to Muhammad Yahya Khan he said that with the abrogation of 1963 Constitution not only the legal limitations on the exercise of power, but also the legal basis and source of power disappear*ed. Power conferred by the 1962-Constitution on the President vested in Muhammad Ayub Khan only by virtue of the Constitu*tion. He had no other source of power outside it. His capacity to exercise transfer of power was thus contingent on the continuance of the 1962-Constitution. The transfer of power to the Commander-in-Chief by Muhammad Ayub Khan was to perform his constitu*tional obligations to restore law and order. He had no capacity to transfer total power of the State to Muhammad Yahya Khan. His act in transferring power to Yahya Khan was, therefore, a nullity. In any case the transfer was to be a limited power, ad hoc and temporary under which Yahya Khan could not have con*ceivably enjoyed unlimited power.

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 recepient as a trustee or a delegatee. On this hypothesis he argued that the will of one man was repugnant to the grund-norm 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 in 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.

Mr. Sharifuddin Pirzada (amicus curiae) supported the views expressed by Mr. A. K. Brohi that the abrogation of the 1962*Constitution by Yahya Khan was illegal and in excess and abuse of the mandate given to him by Ayub Khan. Yahya Khan acted against his oath of office that he will be faithful to the Constitution and owe allegiance to Government of Pakistan.

The decision in State v. Dosso was challenged by him on the grounds :--

(i) that it was given in complete violation of rule of natural justice. Mr. Yahya Bakhtiar, the present Attorney-General, who was then counsel for Toti was not then allowed to challenge the vires of the Laws (Continuance in Force) Order (1 of 1958) ;

(ii) Munir, C. J. disclosed after retirement that the decision was not based on judicial considerations ;

(iii) the decision was even fn disregard of oath of office of the Judges. He referred in this connection to the decision of the Court in Fazlul Quader Chowdhury v. Mr. Mohammad Abdul Haq ;

(iv) the decision purported to legalise the so-called revolution without any conditions which authorised absolutism and sanctioned that might is right ;

(v) interpretation of Kelsenian theory of grund-norm in the judgment is absolutely incorrect. He pointed out that Kelsen has revised his own theory of grund-norm which is now called apex norm.

(vi) that "effectiveness" was not the only criterion of legitimacy ; and

(vii) that the doctrine of state necessity was overlooked by the Court.

As regards illegal usurpation of power by Yahya Khan, Mr. pirzada referred to cases from Uganda, Nigeria, Rhodesia and Cyprus. Two other points were made by Mr. Pirzada (i) that the doctrine of stare decisis has no application to the present case; and (ii) that Kelsen's theory on which the decision in Dosso's case is based is adversely criticised by some well-known jurists. He also traced the history of Martial Law promulgated in the sub-Continent between 1804 to 1953. He relied among others on the following decided cases : (1) 18 Lawyers Edition 281 1 (2) 87 Lawyers Edition 1 ; and (3) 90 Lawyers Edition 688.

We will first deal with the validity of the Proclamation issued on the 26th March 1969, abrogating the Constitution of 1962 and imposing Martial Law throughout the country. The legal mandate was to restore law and order, but in practice Yahya Khan used it for the purpose of setting up his personal rule. His will was to be the supreme law and all national institutions including Courts of justice were to function to the extent and in the manner permitted by him. He, accordingly, issued a large number of Martial Law Orders and Martial Law Regulations and Presidential Orders and Ordinances which were not at all germane to his "Constitution" and "Legal" duties. Though Dacca fell on the 16th December 1971, and East Pakistan declared itself an independent State under the name Bangla Desh, Yahya Khan had the draft of a Constitution prepared which was to be promulgated on the 20th December 1971, by a pro*clamation.

Article 16 of the draft Constitution which was printed by the Government of Pakistan, Ministry of Law and Parliamentary Affairs (Law Division) provided :-

"16. Notwithstanding anything contained in this Con*stitution : -

(a) the first President of Pakistan under this Constitution shall be General Agha Muhammad Yahya Khan, H.Pk., H.J.;

(b) General Agha Muhammad Yahya Khan, H.Pk., H. J., may continue to hold also the post of Commander-in-Chief of the Pakistan Army for a period not exceeding five years commencing on the date of coming into force of this Constitution ; and

Article 260 which should be read in continuation of Article 16 provided further that the Commander-in-Chief of the Pakistan Army may declare Martial Law and shall be revoked only by the Commander-in-Chief. After Martial Law is imposed

"(4) It shall be within the power of the Commander-in-Chief of the Pakistan Army who shall be the Chief Martial Law Administrator to suspend for the duration of the Martial Law, or any shorter period as may be specified, the operation of specified provisions of this Constitution, but the said Principal Authority shall not have power to abrogate this Constitution."

These two provisions of the Constitution which Yahya Khan proposed to impose on the country provide historical evidence of his mala fide intention not to transfer power to the people although he made them believe all along that he was holding the office of President temporarily to arrange smooth transfer of power to the people.

In view of the facts narrated above, it cannot be maintained that the people had by and large, knowingly accepted the Government of Yahya Khan and his Order as legal and by habit given obedience to his Government. He had staged no victorious revolution or a successful coup d'etat. The Kelsenian theory of the change of the basic norm did not, therefore, apply to the facts in which Yahya Khan had come to assume the State powers. He obligated the people to obey his behests, but in law they incurred no obligation to obey him.

Another view is that the Judges of Municipal Courts who have takes oath of office to preserve, protect and defend the Constitution will not break the oath and declare that because of the superior will of the usurper they have been relieved from their legal obligations. If the Judges find the executive organ of the State unwilling to enforce their decrees and orders, the only course open to them is to vacate their office. Those who are desirous of serving the usurper may take office under the Legal Order imposed by him, but this depends upon the discretion and personal decision of the Judges and has no legal effect. If they adopt the second course they will be acknowledging that "might" is "right" and become collaborators with the usurper. The same result is achieved if they foreswear their oath and accept as valid the destruction of the national order and confer recognition on the legislative, administrative, and executive acts of the usurper. In Fazlul Quader Chowdhry v. Mr. Muhammad Abdul Haque (PLD 1963 S C 486) this Court observed :* -----

"The reasons why the Judges of the Supreme Court and the High Courts have to take a similar oath can in my opinion be found within the simple provisions of Article 58. It is there provided for all persons in Pakistan that in my case where it becomes necessary for them to assert in their interest, any provisions of the Constitution, they shall have access to the High Courts and through the High Courts to the Supreme Court as of right, and these two Courts are bound by their oath and duty to act so as to keep the provisions of the Constitution fully alive and operative, to preserve it in all respects safe from all defeat or harm, and to stand firm in defence of its provisions against attack of any kind. The duty of interpreting the Constitution is, in fact a duty of enforcing the provisions of the Constitution in any particular case brought before the Courts in the form of litigation."

It should be remembered in this connection that, however, effective the Government of a usurper may be, it does not within the National Legal Order acquire legitimacy unless the Courts recognize the Government as de jure.

International law is not concerned with these considerations*. If a rebel Government has succeeded in gaining effective control over people and territory the other States may recognize it. But will the same rule apply to-the Municipal Courts. East Pakistan today provides a classic example of a successful revolution which destroyed the National Legal Order and became a new law* creating fact. East Pakistan has declared its self independence and became a separate State under the name of Bangla Dash. Pakistan claims that East Pakistan is a part of Pakistan, but a large number of States have

already recognized it as an independent State. New Courts and Government services have been constituted in Bangla Desh which do not operate under the Legal Order of Pakistan. On these facts if a dispute arises involving the determination whether the new Government of East Pakistan is de jure, will the Municipal Courts of West Pakistan confer recognition on it, because a victorious revolution is a legal method of changing the Constitution and the new order has become efficacious as the individuals whose behaviour the new order regulates actually behave by and large in conformity with new order. The answer is obvious. While under International law, East Pakistan has become an independent State, the Municipal Courts of Pakistan will not confer recognition on it or act upon the legal order set up by the rebel Government. The Kelsen theory on which the Attorney-General relied for the proposition that the Government of Yahya Khan was de jute and the "laws" promulgated by him are valid is, therefore, wholly inapplicable to Municipal Courts.

Yahya Khan's Government, therefore, remained de facto and not de jute up to 20th December 19.71, when he stepped aside.

To determine whether the Martial Law Orders, Martial Law Regulations, Presidential Orders and Ordinances issued by him may be recognised by Courts, we must first turn to the defini*tion of "law" as Article 2 of the Constitution of 1962, which remained operative either by its own vitality or by virtue of the Provisional Constitution Order dated 30th March 1969, provided in unequivocal terms ;

"2.-(1) To enjoy the protection of law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

(2) In particular-

(a) no action detrimental to the life, liberty, body, reputa*tion or property of any person shall be taken except !n accordance with law ;

(6) no person shall be prevented from, or be hindered in, doing that which is not prohibited by law-; and

(c) no person shall be compelled to do 'that which the law does not require him to do."

"Law" was not defined in the Constitution. It is, therefore, for the Courts to lay down what 'law' is, and if any decree, or behest of Yahya Khan expressed as a Martial Law Order, G Martial Law Regulation or Presidential Order, or Ordinance, does not conform to the meaning of the term 'law' in Article 2 these Regulations, Orders and Ordinances will be void and of no legal effect.

In Introduction to "Law In the Making" C. K. Allen men*tions two antithetic conceptions of growth of law t (i) law is which is Imposed by a sovereign will ; and (ii) law which deve*lops within society of its own vitality. He criticises Austin who defined "law" as the will of the sovereign and points out that whatever be the constitutional Instrument which secures observance and enforcement of law -and some sanction of this kind is certainly indispensable-there is no historical justification for the view that this power always and necessary be determinate, "human superior" which at the same time creates all law. It is Impossible in every form of society governed by law to disengage and personify a "sovereign" as thus under*stood, with the artificial precision which Hobbs and Austin assume.

Salmond describes "law" as body of principles recognized and applied by the State in the administration of justice as the rules recognised and acted by Courts of justice. All the theories of law

are at one in viewing law as consistent of rules. Such rules are regarded by natural law as dictates of reason, by positivism as decrees of the sovereign and by realism as the practice of the Courts. The central notion of the natural law theory is that there exist objective moral principles which depend on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law in so far as it conforms to these principles These principles of justice and morality constitute the natural law which is valid of necessity, because the rules for human conduct are logically connected with truths concerning human nature. Diametrically opposed to the theory of natural law is the positivist, or imperative theory of law, it seeks to define law not by reference to its condition, but according to the formal criteria which differentiate legal rule from other source such as those of morals, etiquette. and so on. It is a type of command, it is laid by a political sovereign and is enforceable by sanction. Realism, like positivism, looks on law as the expres*sion of the will of the State as made through the medium of the Courts.

According to Holmes law is really what the Judge decides. This great American Judge sowed the seed of the American realism in a famous paper in which he put forward a novel way of looking at law. If one wishes to know what law is, he said, one should view it through the eyes of a bad man, who is only concerned with what will happen to him if he does certain things. The prophecies of what the Courts will do to the bad man, in the opinion of justice Holmes, is what he means by the law.

Paton defines "law" as the rules recognised and acted by Courts of justice. Dugit's definition is as follows;--

"Men live together in groups and societies ; they are dependent upon, solidarist with, one another. They have common needs which they cats satisfy only by a common life and, at the same time, they have different needs the satisfaction of which they assure by the exchange of reciprocal services. The progress of humanity is assured by the continuous growth, in both directions, of individual activity. Man, so placed in society, has the obligation to realize this progress, because in so doing he realizes himself. From the imminent force of things, therefore, there arises a rule of conduct which we may postulate as a rule of law."

Roscoe Pound states that more than one reason led American realists which define law in terms of judicial process. One is the central position of the Court in the Anglo-American legal system and the concrete character of a legal precept in that system as a product of the Courts rather than of the univer*sities. Again, economic determinism and psychological realism lead to scrutiny of the work of individual Judges, and skeptical relativism leads to discounting of norms and rules and autho*ritative guides to determination. Certainly the judicial process (to which today we must add the administrative process) is something of which a theory of the subject-matter of jurisprudence must take account.

Kelsen has developed the theory of "Pure Law" His method and approach to law are essentially those marked out by Kant. He does not regard law as the sum total of legal rules. Neither does he regard it as a command or psychological process or even a social reality. In his view, it is the produce of a mental operation. The norm which lies at the basis of his system although not arbitrary is purely relativist and hypothetical. He claims that his initial hypothesis transforms the "might" into "law". His theory on "Pure Law" elimi*nates the elements of ethics, politics, psychology, sociology and history.

Dias says that many writers while admiring Kelsen's struc*ture, point out, that he provides no guidance whatever to a person in the actual application of the law. Thus, he shows how, in the process of concretising the general norms it may be necessary to make a choice either in decision or interpreta*tion. The Judge or the official concerned is already aware of that necessity. His need is for some guidance as to how he should make his choice. The answer is not to be found in Kelsen's teachings, but in value considerations of one sort or another which Kelsen sedulously eschews. In "What is Justice" Kelsen at page 268 himself says;

"If jurisprudence is to present law as a system of valid norms, the propositions by which it describes its object must be "ought" propositions, statements in which an "ought", not an "is", is expressed. But the propositions of jurisprudence are not themselves norms. They establish neither duties nor rights.

Norms by which individuals are obligated and empowered issue only from the law-creating authority. The jurist, as the theoretical exponent of the law. presents these norms in propositions that have a purely descriptive sense, statements which only describe the "ought" of the legal norm. It is of the greatest importance to distinguish clearly between legal norms which comprise the object of juris*prudence and the statements of jurisprudence describing that object. These statements may be called "rules of law" in contradistinction to the "legal norms" issued by the legal authority."

Dias proceeds that "a legal order is not merely the sum total of laws, but includes doctrines, principles, and standards, all of which are accepted as "legal" and which operate by influenc*ing the application of rules. Their validity is not traceable to the grund-norm of the order. Are these, then, to be lumped with values and banished from a theory of law, even though they are admitted to be "legal"? If so, it is a grave weakness in any such theory."

Scandanavian school is opposed both to Salmond and Kelsen. It believes that there is no such things as rules, but that conformity with a rule consists really in habitual behaviour accompanied by a feeling of being bound to act in this habitual way.

Professor Goodhart differs with Kelsen in refusing to regard basic rules (norms) as hypothesis. According to him a norm is nonetheless a rule-a customary rule -acceptance and obser*vance of which finds expression in social practice and the general attitude of society.

Discussing the classic approach of the pure jurist to the problem of law as that of Kelsen, Laski in "The State in Theory and Practice" points out : "The human mind, it may be said, revolts from a jurisprudence as bare and as formal as this. It remembers the long medieval effort to identify law with the will of God, the stoic notion of law as the voice of universal reason, the famous phrase of Utpian which makes of law the science of distinguishing between right and wrong in human conduct. It rejects the idea of law as that behind which there is found the sovereign power of the state . . . . . Law, to be law, it is widely felt, must correspond with something more valid than the will of an authority which grounds its claim to respect upon nothing more than the coercive power at its dis*posal". Laski proceeds to say : "We must not make it mean more than it announces itself as meaning. It is, so to speak, an abstract conceptualism in which, for certain clearly defined purposes, law is divorced from justice and made simply a final term in a hierarchy of wills behind which it is impos*sible to go. The jurist here is engaged on a purely formalistic analysis. He excludes from his field of discourse all considera*tions of what is ethically right or socially expedient and considers only as law that which emanates from a will whose source may be traced to the sovereign."

In "A Grammar of Politics" Laski adds : "To those for whom law is a simple command, legal by virtue of the source from which it comes, it is not likely that such complexities as these will be popular. We are urging that law is, In truth, not the will of the State, but that from which the will of the State derives whatever moral authority it may possess . . . It assumes that the rationale of obedience. is in all the intricate facts of social organisation and in no one group of facts. It denies at once the sovereignty of the State, and that more subtle doctrine by which the State is at once the master and the servant of law by willing to limit itself to certain tested rules of conduct. It insists that what is impor*tant in law is not the fact of command, but the end at which that command aims and the way it achieves the end. It sees society, not as a pyramid in which the State sits crowned upon the summit, but as a system of co-operating interests through which, and in which, the individual finds his scheme of values. It argues that each individual scheme so found gives to the law whatever of moral rightness it contains. "And" Any other view is seeking to Invest coercive authority with ethical content on grounds which analysis shows to be simply the fact of the power to coerce. That power may how its way to success, but 9t does not, by the fact of the victory, become a moral agent. We argue, rather, that our rules of conduct are justified only as what they are in working induces our allegiance to them".

The brief survey of the definition of "Law" will not be com*plete without quoting the observations of Mr. Justice Matthews in the case Yick Wo. v. Hogking;

"When we consider the nature and the theory of our institu*tions of Government, the principles upon which they are sup*posed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbit*rary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law but in our system, while sovereign powers are delegated to the agencies of Government, sovereignty itself remain with the people, by whom and for whom all Government exists and acts. And the law is the definition and limitation of power. It is indeed, quite true, that there must always be lodged some where, and in some person or body, the authority of final decision ; and, in many cases of mere administration the responsibility is purely political, no appeal lying expert to the ultimate tribunal of the public judgment, exercised either is the pressure of opinion or by means of the suffrage. But the fundamental to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are monuments showing the victorious progress of the race in securing the men the blessings of civilization under the reign of just and equal, laws, so that, in the famous language of the Massachusetts Bill of Rights, the Government of the Commonwealth "may be a Government of laws and not of men". For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of salary itself."

Pakistan is an Islamic Republic. Its ideology is enshrined in the Objectives Resolution of the 7th April 1949, which inter alia declares 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 Quran and Sunnah. We should, therefore, turn more appropriately to Islamic Jurisprudence for the definition of "law". One method of defining "law„ is to know its source. In Shari'at law have divine origin. They are contained in the Holy Quran, and Hadith. namely, precepts and actions of the Holy Prophet (peace be upon him). The other sources are Ijma` : Consensus and juristic deductions including Qiyas ; Analogy, Istihsan or Juristic Equity, Public Good, Istidlal ; Reason and Ijtihad ; Juristic Exposition. While Juristic Deductions are judge-made laws, Ijma' is based on the docrtine of Imam Shafi'i that "the voice of the people is the voice of God", and is the most fruitful source of law-making in Shariat. In the present day context the Legislative Assemblies comprising of chosen repre*sentatives of the people perform this function. Thus, In Islamic Jurisprudence, the will of a sovereign, be he the monarch, the President or the Chief Martial Law Administrator is not the source of law. The people as delegatee of the Sovereignty of the Almighty alone can make laws which are in conformity with the Holy Quran and Sunnah. A remark may be added that often the head of the State or a Province of the State is included in the composition of Legislature and if the Assembly is not sitting he may enact Ordinances which are temporary and expire when the Assembly meets.

I have burdened this order with different theories of law not only for the purpose of finding out the essential qualities of law, but also because during the last thirteen years or more we have so much gone astray from the rule of law that not only the common man, but the lawyers and Judges alike need to refresh their minds about the true import and form of law.

The preponderant view appears to be that law is not the will of a sovereign. Law is a body of principles called-rules or norms* recognised and applied by the State in the administration justice as rules recognised and acted upon by the courts of justice. It must have the content and the form of law. It should contain one or more elements on which the different theories of law are based, and give expression to the will of the people whose conduct and behaviour the law is going to regulate. The will of the people is nowadays often expressed through the medium of Legislature comprising of the chosen representatives of the people. The will of a single man howsoever laudable or sordid is a behest or a command, but is certainly not law as understood in juristic sense.

Let us now examine the provisions of Presidential Order 3 of 1969 and Martial Law Regulation 78 of 1971 to determine whether they are at all laws in juristic sense. '

As mentioned earlier, a Full Bench of the High Court of West Pakistan (Lahore Seat) had in the case of Mir Hassan hold that the order transferring his case under the Prevention of Corruption Act II of 1947 from the Court of the Special Judge to a Military Court was illegal. It was reasoned by the learned Judges:-

" .Article 2 of the 1962-Constitution was kept intact. It declares that `every citizen of Pakistan is entitled to the protection of the law and to be treated in accordance with law and only in accordance with law . . .' The Article provides that no person shall be deprived of life, liberty, body, reputation or property without due process of law. It further declares that any public functionary or person taking any action affecting the life, liberty, body, property or reputation of a person or affecting his profession, trade or business must rely on some law to justify his action. In other words, every public functionary or- person must show legal authority for interference with the right of another person. Thus a direction or order by a public functionary would be invalid if it does not have the backing of a valid contemporaneous law. The Chief Martial Law Administrator by preserving Article 2 of the 1962* Constitution had made it clear once for all that the intention of the Government was to act in accordance with law. Therefore, the action of any authority including Martial Law Authority howsoever high he may be, if it had not the backing of a constitutional provision was not immune from being struck down by the Courts of the country."

The judgment was announced in this case on the 30th June 1969. On the same day President's Order 3 of 1969 was issued. The purport of this order was to deny to the Courts the perfor*mance of their judicial functions. It did not contain a body of principles which may be recognized and acted upon by the Courts. It reflected only the will of the Chief Martial Law Administrator who ordained that no action taken by him or by any Martial Law Authority howsoever, unjust such action may be, shall be open to judicial review. In view of its offensive provisions, the Attorney-General conceded that Article 3 in so far as it laid down that "No Court, tribunal or other authority, including the Supreme Court and a High Court, shall-(a) receive' any complaint, peti*tion, etc., was not a law, because it is essentially within the Jurisdiction of Courts to determine whether their jurisdiction to try a dispute is barred by law. The same reasons applied to Art. 4 which denied to Courts the function of interpretation of laws.

Martial Law Regulation 78 of 1971 inter alia provides:

"1. The Chief Martial Law Administrator or a Martial Law Administrator or a Deputy Martial Law Administrator authorised by the Martial Law Administrator concerned in this behalf, if satisfied with respect to any particular person, that with a view to preventing him from acting in a seditious manner or in a manner prejudicial to the security, the public safety or interest or the defence of Pakistan, the maintenance of public order, Pakistan's relations with any other power, the maintenance of peaceful conditions in any part of Pakistan, the maintenance of essential supplies and services, it is necessary so to do, may make an order ;

(a) . …….

(b) directing that he be detained ;

There were already two laws in the field on the same subject, Safety Act of Pakistan and the Defence of Pakistan Rules, 1965. These Rules were framed under the Defence of Pakistan Ordinance during the 1965 war with India, and re-enacted during the 1971 war. The provisions of these two laws are similar to the provisions of Martial Law Regulation 78. What was then the necessity for promulgat*ing Martial Law Regulation 78. The reason is not far to seek. An order passed under the Public Safety Act or the Defence of Pakistan Rules could be challenged in the High Court under Article 98 of the Constitution. It was so held by this Court in the case of Malik Ghulam Jilani and Shorish Kashmiri. An order passed under Martial Law Regulation 78 by a Martial Law authority could not, however, be challenged by virtue of Presidential Order 3 of 1969. The object with which this Regula*tion was issued was therefore to interfere with the judicial functions of Courts.

As both President's Order No. 3 of 1969 and Martial Law Regulation 78 were intended to deny to the Courts the performance of their judicial functions, an object opposed to the concept of law. Neither would be recognised by Courts as law.

We may now turn to the methodology of law-making during the Martial Law which was imposed by Yahya Khan on the 26th March 1969. Pakistan came into being with a written Constitu*tion-Government of India Act, 1935 (26 Geo. 5, Ch. 2) and the India Independence Act, 1947 (10 & 11 Geo. 6, Ch. 30). These constitutional instruments were, in time, replaced by the Constitu*tion of 1956 which in turn was substituted by the Constitu*tion of 1962. It is still in force either by its own vitality or under the Provisional Constitution Order, 1969. The written Constitution of a State is, according to Kelsen, its basic norm. It regulates all other legal' norms. Pakistan has unfortunately suffered long spells of Martial Law, but its basic structure was democratic from its inception. There was distribution of powers between the executive, legislature and judiciary. During Martial Law the legislative powers of the State were usurped by the Executive and attempt made to deny to Courts the exercise of judicial functions. The usurpation of legislative powers of the stage by the Chief Martial Law Administrator was therefore against the basic norm. The new Legal Order consisting of Martial Law Orders, Martial Law Regulations, Presidential Orders and Presidential Ordinances was, therefore, unconstitutional and void ab initio. This Order would have become legal only if the Government of Yahya Khan was recognized by Courts as de jure and the Order he gave to the country was held valid. This question has already been answered in the negative.

In this connection, we may examine also the nature of Martial Law imposed by Yahya Khan on the 26th March 1969, for lest it is said that the Martial Law Regulations, and Martial Law Orders were not laws in juristic sense, but they derived their validity from the Proclamation of the 26th March 1962' Martial Law is of three types : (i) the law regulating discipline and other matters determining the rule of conduct applicable to the Armed forces. We are not concerned with it ; (ii) law which is imposed on an alien territory under occupation by an armed force. The classic function of this type of Martial Law was given by the Duke of Willington when he stated in the House of Lords that ' "Martial Law is neither more nor less than the will of the General who commands the Army. In fact Martial Law means no law at all." We are also not concerned with this type of Martial Law ; and (iii) law which relates to and arises out of a situation in which the Civil power is unable to maintain law and order and the Military power is used to meet force and recreate conditions of peace and tranquillity in which the Civil power can re-assert its authority. The Martial Law Regulations and Martial Law Orders passed under this type of Martial Law must be germane only to the restoration of peace and tranquillity and induced during the period of unrest.

In practice, the Martial Law imposed by Yahya Khan belonged to the second category. A large number of Martial Law Regulations and Martial Law Orders passed by him between 25th March 1969, and 20th March 1971, had no nexus with civil disturbances. In fact, peace and tranquillity was restored in the country within a few days of his stepping in. Martial Law should, therefore, have come to an end but the entire structure of institutions of Pakistan in*cluding superior Courts were made to appear by Yahya Khan as merely the expression of his will which a victorious military commander imposes on an alien territory to regulate the conduct and behaviour of its subjugated populace. Neither Pakistan was a conquered territory, nor the Pakistan Army commanded by Yahya Khan was an alien force to justify the imposition of this type of Martial Law.

The Martial Law imposed by Yahya Khan was, therefore, in Itself illegal and all Martial Law Regulations and Martial Law Orders issued by him were on this simple ground void ab initio and of no legal effect.

Let us next examine the validity of the Presidential Orders and Ordinances issued by Yahya Khan between 26th March 1969, and 20th December 1971. He assumed the office of President on 31-3-1969 with effect from the 25th March 1969. Under Article 16 of the 1962-Constitution if at any time the President was unable to perform the functions of his office, the Speaker of the National Assembly was to act as President. Muhammad Ayub Khan could not, therefore, transfer the office of the President to Yahya Khan. Indeed, he did not even purport to do so. He simply asked him to perform his constitutional and legal responsibilities. Yahya Khan, therefore, assumed the office in violation of Article 16 of the Constitution to which he had taken oath of allegiance as Commander-in-Chief. It could not, therefore, be postulated that Yahya Khan had become the lawful President of Pakistan and was competent to promulgate Orders and Ordinances in exercise of the legislative functions conferred by the Constitution on the President. All Presidential Orders and Ordinances which were issued by him were, therefore, equally void and of no legal effect.

The next question which arises for determination is whether these illegal legislative acts are protected

by the doctrine of State necessity. The Laws saved by this rule do not achieve validity. They remain illegal, but acts done and proceedings undertaken under invalid laws may be condoned on the conditions t that the recognition given by the Court is proportionate to the evil to be averted, it is transitory and temporary in character* does not imply abdication of judicial review. In the Southern Rhodesian case Madzimbamuto v. Lardner Burke only those legislative acts of the de facto Government of Smith were recognised which were necessary for the ordinary, orderly running of the Courts and which did not defeat their rights of the citizens and in its operation did not directly or indirectly entrench the usurpation (Field send, A. J. A.) Acts which are beneficial to the Society and provide their welfare, such as, appointment of Judges and other public functionaries by Yahya Khan will also be covered by the doctrine.

It has been noticed that both President's Order 3 of 1969 and Martial Law Regulation 78 of 1971 were intended only to deny to the Courts the performance of their judicial functions. No chaos or anarchy would have taken place in the Society if these 'laws' were not promulgated. Both Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 and Martial Law Regula*tion 78 are, therefore, not protected by the doctrine of State necessity.

We will now examine the case State v. Dosso on which the Attorney-General mainly relied in his submissions. As mentioned earlier the decision in this case is based on the Kelsenian theory of the change of basic norms as a result of victorious revolution and successful coup d'etat as law-creating facts according to International Law. It was contended by the counsel for the appellants and the amicus curiae that (i) Kelsen's theory was not a rule of law which would have primacy or the legal norms of the State; (ii) that as a theory it was criticised by some eminent jurists; and (iii) in any case It was not correctly applied In the case of State v. Dosso.

To appreciate the contentions we must first understand Kelsen's theory of "Pure Law" He differs with the theory of Imperative Law t Will of a Sovereign ; and Theory of Natural Law; Dictates of Reason; as well as with the Theory of Realism; Practice of the Courts. Kelsen does not regard the law conceived as the sum total of legal rules or as a will. Neither does he regard it as a command or psychological process or even a social reality. In his view law is the product of a mental operation.

It is a phenomenon in the category of essence (das Sollen) as distinguished from the category of existence (das Sein); which is an abstract way of saying that the science of law is a branch of normative sciences as distinguished from natural sciences 1 which is still another abstract way of saying that the legal rule is concerned with what the positive law says shall be, and not with the question why positive law is obeyed or what the positive law ought to be." (Modern Theory of Law, pp. 107-108). According to Kelsen law consists of norms which are free from elements of ethics, morals, psychology, history, sociology, etc. They are divided into basic norms and general norms. The document which embodies the first constitution is a real constitution, a binding norm, only on the condition that the basic norm is presupposed to be valid. Only upon this presupposition are the declarations of those to whom the constitu*tion confers law-creating power binding norms. A norm the validity of which cannot be derived from its superior norm is called a "basic" norm. All norms whose validity may be traced back to one of the same basic norm, form a system of norms, or an order. This basic norm constitutes, as a common source, the bond between all the different norms of which an order consists. The ultimate hypothesis of positivism is the norm authorising the historically first legislator. The whole function of this basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act. The basic norm is not created in a legal procedure by a law-creating organ. It is not as a positive legal norm is valid.

Under the heading the "Principles of Legitimacy" Kelsen points out that legal norms may be limited in time. The end as well as the beginning of this validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way which the legal order itself determines. This is the principle of legitimacy. He then describes an illegitimate way of change of legal norms. "It fails to hold in the case of a revolution, this word understood in the most general sense, so that it also covers the so-called coup d'etat. A revolution, in this wide sense, occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, i.e., in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals, who so far have been legitimate organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people or through

actions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which former had not itself anticipated. Kelsen then refers to the change of the basic norm by revolution. If the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. If the order remains inefficacious, then their undertaking is interpreted as illegal act, as the crime of treason. The change of basic norm thus depends on the principle of effectiveness which is based on the presupposition, but the norms of the old order are regarded as devoid of validity, because the old constitution and legal norms based on this constitution, the old legal order as a whole, has lost its efficacy; because the actual behaviour of men does so longer conform to this old legal order. Every single nrom loses its validity when the total legal order to which it belongs loses its efficacy as a whole. The efficacy of the entire legal order is a necessary condition for the validity of every single nrom of the order. A conditio sine qua non, but not a conditio per quam. The efficacy of the total legal order is a condition, but not the reason for the validity of its constituent norm. These norms are valid not because the total order is efficacious, bat because they are created in a constitutional way.

The legality of the revolutionary Government is thus based upon a presupposed basic norm which is mentioned by Kelsen in the Chapter "The Unity of National and International Law" under the heading "Revolution and Coup d'etat and Law, Creating Facts. According to International Law" Kelsen says : that victorious revolution and successful coup d'etat are law. creating facts. To assume that the continuity of national law, nor what amounts to the same the identity of the state, is not affected by revolution or coup d'etat, as long as the territory and the population remain by and large the same, is possible only if a norm of international law is presupposed recognising victorious revolution and successful coup d'etat as legal methods of changing the constitution". Kelsen is a great exponent of International Law while many jurists think that there is no such thing as International Law and that its principles are applicable only to the extent that the national legal order of a State adopts them. Kelsen postulates that the basic norms of all the States are in themselves norms of the International law. He says, "only because modern jurists-consciously or unconsciously-presupposed International law as a legal order determining the existence of the State in every respect, according to the principle of effectiveness, do they believe in the continuity of national law and the legal identity of the State in spite of a violent change of the constitution. In regulating, by its principle of effectiveness, the creation of the constitution of the State, International law also determines the reason of the validity of all national legal orders." So it becomes clear that Kelsen invests revolutionary Government wit legal authority on the basis of a presupposed norm that the victorious revolution and successful coup d'etate are law-creating v facts. This is in the realm of a theory and not a part of the national legal order of any State. No municipal Court will, therefore, rely on it as a rule. It is a statement of law by Mr. Kelsen to which a large number of jurists have taken exception.

What Kelsen has said about the legitimacy of norm and legal authority of a revolutionary Government must be read separately and not mixed up. While revolution may destroy the existing national legal odor base after the change the reality of the State has disappeared from behind that order, It does not follow that the legal order, which replaces it, is the expression of the superior will of one or more revolutionaries who staged victorious revolution or successful coup d'etat. This is explained by Kelsen himself in the remark, quoted above, that "the efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order. A conditio sine qua non but not a conditio per quam. The efficacy of the total legal order is a condition, but not the reason for the validity of its constituent norm. These norms are valid not because the total order is efficacious, but because they are created in a constitutional way." So, after a change is brought by a revolu*tion or coup d'etat, the State must have constitution and subject itself to that order. Every single norm of the new legal order will be valid not because the order is efficacious, but because it is made in the manner provided by the constitution of the State. Kelsen, therefore, does not contemplate an all omnipotent President and Chief Martial Law Administrator sitting high above the society and handing its behests downwards. No single man can give a constitution to the society which, in one sense, is an agreement between the people to live together under an Order which will fulfil their expectations, reflect their aspirations and hold promise for the realisation of their selves. It must, therefore, embody the will of the people which is usually expressed. through the medium of chosen representatives. It must be this type of constitution from which the norms of the new legal order will derive their validity.

If my appraisal of Kelsen is correct, then the decision in the case State v. Dosso upholding the validity of the Laws (Continuance in Force) Order must be held to be erroneous. The Court ought to have acted in the same manner as it partially did In the Governor-General's Reference No. 1 of 1955 and directed the President to call the National Parliament and adopt a new Constitution. Unless this direction was complied with, no new legal order would have come into being for neither Iskander Mirza nor Muhammad Ayub Khan could become a valid source of law-making. How could the Court

accept one or the other as a law-making fact. No valid law can come into being from the foul breath or smeared pen of a person guilty of treason against the national order. This reasoning applies with greater force to the abrogation of the Constitution of 1962 by Yahya Khan on the 26th March 1969. The legal order imposed by him in the form of Martial Law Regulations and Orders and President's Orders and Ordinances were, therefore, tainted with illegality and would not be recognized by Courts.

Dias criticises the theory of Kelsen on which the decision in State v. Dossois based. Kelsen as a legal philosopher excluded from his theory of Pure Law of psychological, historical, sociological and ethical considerations. He Is not mindful as to how many revolu*tions take place in a country or into how many bits it falls apart as a result of his theory of victorious revolution and successful coup d'etar as law-making facts. Society, however, will not countenance such a phenomenon with equanimity. My own view is that person who destroys the national legal order in an illegitimate manner cannot be regarded as a valid source of law-making May be, that on account of his holding the coercive apparatus of the State, the people and the Courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and Courts will not recognize its rule and act upon them as de jure. As soon as the first oppor*tunity arises, when the coercive apparatus falls from the hands of the usurper, he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would be adventurers.

Before concluding the examination of Kelsen's theory of effectiveness, it may be mentioned that basides State v. Dosso, it was applied in three other cases. The first case is from South Rhodesia Madzimbamuto v. Lardner-Burke. In 1965, Smith Government overthrew the 1961-Constitution given to South Rhodesia, by the British Government and attempted to enforce its own laws. On several occasions Courts of law in South Rhodesia declined to recognize the "new laws". One of them being the detention law under which Lardner-Burke was detained. Dealing with its validity Beadle, C. J., the Chief Justice of the High Court held 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", and, that "the present Government, having effectively usurped the Governmental powers granted Rhodesia under the 1901-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 territary, its administrative and legislative acts must conform to the 1961-Constitution. Qunet, J.P. Macdonald, J. A., and Jarvis, A. J., generally agreed in the opinion given by Beadle, C. J. Fieldsond, A. J. A., expressed the view that "a Court created in terms of a written constitution has no jurisdiction to recognise, either as a de jure or de facto Government and Government other than that constitutionally appointed under that constitution". He went on to consider the doctrine of necessity and concluded: "Necessity, however, provides a basis for the acceptance as valid by this Court of certain acts of the present authorities, provided that the Court is satisfied that-(a) any administrative or legislative act is directed to and reasonably required for the ordinary orderly running of the country ; (b) the just rights of citizens under the 1961-Constitution are not defeated; and (c) there is no consideration of public policy which precludes the Court from upholding the act, for instance if it were intended to or did in fact in its operation directly further or entrench the usurpation. . ." The decision was set aside by the Privy Council. Lord Reid delivering the majority judgment rejected the Kelsen's theory of effectiveness and held;---

"With regard to the question whether the usurping Government cap now be regarded as a lawful Government much was said about de facto and de jure Governments Those are conceptions of international law and in their Lordships' view they are quite inappropriate in dealing with the legal position of usurper within the territory of which he has acquired control. As was explained in Carl-Zeiss-Stiftung v. Raynor & Keelor Ltd. (No. 2) (1966) 2 All E R 536 ; (1967) 1 A C 853 when a question arises as to the status of a now regime in a foreign country the Court must ascertain the view of Her Majesty's Government and act on It as correct. In practice the Government have regard to certain rules, but those are not rules of law. And it happens not infrequently that the govern*ment recognise a usurper as the de facto Government of a territory while continuing to recognise 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."

It was mentioned by Mr. Brohi that the view expressed by the Judges of the High Court of Rhodasia was the maximum success for the theory of effectiveness which Kelsen could have conceivably envisaged.

There are three other cases: one from Uganda; the other from Nigeria; and the third from Cyprus, on the same subject, but it is unnecessary to recount their facts. In Uganda v. Commis*sioner of Prisons (1966 B A I R 514), Sir Udo Udoma, C. J., following the State v. Dosso relied on the Kelsen's principles in arriving at the conclu*sion that the 1966-Constitution is a legally valid Constitution and the supreme law of Uganda and that the 1962-Constitution having been abolished by a victorious revolution, fn law, does no longer exist, nor does it now form part of the laws of Uganda, it having been deprived of its de facto and de jure validity.

We have not seen the case from Nigeria & Cyprus, but were informed that the line of reasoning runs through them. All these decisions are open to the common objections, firstly that Kelsen's theory of Pure Law was not a norm of the national order and a Court of justice could not have relied on it in preference to the municipal laws. This is brought out by Kelsen himself in "What is Justice", page 286, wherein he says : "It is of the greatest importance to distinguish clearly between legal norms which comprise the object of jurisprudence and the statements to jurisprudence describing that object These statements may be called "rules of law" in contradistinction to the "legal norms" issued by the legal authority."

Secondly, Kelsen's theory of Pure Law stands in opposition to other theories of law, such as, Natural Law which is based on Reason and Realism which is based upon the practice of Courts. What is said by Kelsen is, not the last word He has his critics. With respect to the great Jurist, I question his statement that "It is equally irrelevant whether the replace*ment is effected through a movement emanating from the mass of people or through actions from those in governing positions. From a juristic point of view, the decisive criterion of a revolu*tion is that the order in force is overthrown and replaced by a new order". In one case the body politic has risen against an unrepresentative Government which has imposed a tyrinical Order on the people. They overthrew that Order and gave themselves a Constitution which will fulfil their aspirations holds promise of happiness and self-realization, and induces-*allegiance. In the other case one or more persons "stage a victorious revolution" or "a successful coup d'etate", stifle the aspirations of the people, deprive them of their basic rights and cajole them into obedience. Kelsen as a legal philosopher should have preferred the former as legal rather than recognize the rule of might as de jure. I differ, therefore, with the theory of Kelsen on which the decision in the State v. Dosso is based.

As regards the application of the Kelsenian theory as mentioned already Mr. Iskander Mirza, and Mr. Ayub Khan had joined hands on the night between 7th and 8th October 1958, to overthrow the national legal order unmindful of the fact that by abrogating the 1956-Constitution they were not only committing acts of treason, but were also destroying for ever the agreement reached after laborious efforts between the citizens of East Pakistan and citizens of West Pakistan to live together as one Nation. The cessation of East Pakistan thirteen years later is, in my view, directly attributable to this tragic incident. On the 10th October 1958, Mr. Iskander Mirza promulgated the Laws (Continuance in Force) Order 1 of 1958. Mr. Yahya Bakh*tiar the present Attorney-General who was counsel for Toti one of the respondents in the appeals disposed of alongwith the case of Dosso stated from the bar that on his way to Lahore for appearing before the Supreme Court, he read the text of the order in a daily newspaper. He found Mr. Fayyaz Ali, the then Attorney*-General, present in Court to move a Reference by the President in the advisory jurisdiction of the Court presumably relating to the validity of the Laws (Continuance in Force) Order. After a hurried consultation in the Chamber of the Chief Justice Mr. Fayyaz Ali did not move the Reference and the Court raised this issue without giving him an opportunity to argue against it. Judgment in the case was announced on 27th October 1958. The State appeals were allowed on the finding that by virtue of the provisions of Article 7 of the Laws (Continuance in Force) Order the writs issued by the High Court setting aside the conviction of Dosso and others had abated. On the following day Mr. Iskander Mirza was deposed and Muhammad Ayub Khan assumed to him the office of President.

In was questioned how did the Court come to hold on the 13th October 1958, that the new Government was able to maintain its Constitution in an efficacious manner and that the old order as a whole had lost its efficacy "because the actual behaviour of men does no longer conform to this old legal order." Indeed, it was the recognition by the Court which made the now Government de jure and its Constitution efficacious.

Mr. Sharifuddin Pirzada drew our attention in this connection to the following extract from the Book

"Friends Not Masters" by Muhammad Ayub Khan :-

"Meanwhile, the army's legal experts came up with the opinion that since the Constitution had been abrogated and Martial Law declared, and a Chief Martial Law Administrator appointed, the office of President was redundant. That according to their light, was the legal position. I said 'Now, don't you chaps start creating more problems for me. Why do you bother me? It will serve no useful purpose."

"Chief Justice Munir was there, I think, when this point came up for discussion. He had been advising Iskander Mirza about certain matters before the revolution. I called him and thought that I would see Iskander Mirza too. I asked Colonel Qazi to state his point of view. His position was that the President, no longer had any place in the new arrangement, Munir disagreed. I told Qazi, 'I agree with Munir. This is final. Accept this as a decision: I then asked him to leave."

In a rejoinder published in the Pakistan Times, dated 11th November 1968, under the title "The Days I Remember" by Muhammad Munir, C. J. (Retired) after recounting his past association with Iskander Mirza proceeded to state:-

"Some months before the 1956-Constitution was to come into force he (Iskander Mirza) casually mentioned to me that things were going bad to worse and that he intended to assume supreme power by dismissing the Ministers and dissolving the Assembly. He did not tell me that he intended to introduce Martial Law though he often used to say that the politicians were not to forget the army. He had not invited my opinion on the subject, but I pointed out to him that at that time he had little ground for taking the steps he was contemplating and that he should have the elections held under the new Constitution.

MARTIAL LAW

This happened perhaps in April and except at a lunch at Nathiagali I had no occasion to meet him until the Constitu*tion having been abrogated and Martial Law declared in October 1958, I was summoned to Karachi. The President's proclamation abrogating the Constitution and introducing Martial Law was announced on the night of 7th October 1958. We in Lahore heard of it on the morning of 8th October add I of once realised the legal implications of what had happened if its legality was not questioned and professional politicians acquiesced in it. Though all laws, Courts and other civil authorities had lost their previous jurisdiction I did not stop the Supreme Court from functioning because I felt that the Supreme Court on being properly moved still had the right to say whether what had happened was legal or illegal.

On the morning of 9th October, General Mohammad Azam Khan, who was the Zonal Martial Law Administrator of Lahore, came to me and asked me whether I was aware of the legal implications of what had happened. He told me that Courts, including the Supreme Court had lost their jurisdiction and could function only to the extent the President or Chief Martial Law Administrator determined. He expressed his willingness to get for me such powers as I needed to run the judiciary. I told him that I had not made up my mind to stay or to go and that I wanted time to think over the matter. A few hours later I received through the army a message from the President calling me to Karachi. Accordingly I took the first available plane and flew to Karachi. General Burki who had a subtle smile on his face also travelled by the same plane.

At Karachi I was told that subject to any order by the President or Regulation by the Chief Martial Law Administrator it was intended to keep the existing laws and the jurisdiction of the civil authorities alive, and that I was to scrutinise the draft instrument which the Law Secretary had been required to prepare with that object. I was happy that some sort of civil Government and part of the Constitution were being restored. Therefore I saw the draft prepared by Sir Edward Snelson, and In a meeting which was attended by the President and Chief Martial Law Administrator who was accompanied by a young army officer, the Law Secretary and myself, I suggested certain modifications, particularly with

reference to the superior Courts powers to issue writs and validation of judgments which had been delivered after the proclamation. The instrument was entitled the Laws Continuance in Force Order and purported to be promulgated in the name of the President."

It was urged by Mr. Sharifuddin Pirzada that the Chief Justice having associated himself with the drafting of The Laws (Continuance in Force) Order on the 9th October 1958, was in principle precluded from sitting in judgment on its validity. I can only venture to observe that no one was more deeply initiated in judicial propriety than the learned Chief Justice.

However, there is another aspect. Article 163 of the 1956* Constitution provided that the law declared by the Supreme Court shall be binding on all Courts in Pakistan and that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court. By laying down the law that victorious revolution and successful coup d'etat are internationally recognised legal methods of changing a constitution and that the revolution itself become" a law-creation fact, and that Court can function only to the extent and in the manner declared by the new constitution, this Court closed the minds of all the Courts subordinate to it and bound down the hands of all executive authorities to accept the new Government as de jure. The Attorney. General did not hesitate in acknowledging that the decision in this case encourages revolutions and that it held out promise to future adventurers that if their acts of treason are crowned with success, Courts will act as their hirelings. No Judge who is true to the oath of his office can countenance such a course of action. Thus, with greatest respect to the learned Judges who are parties to the decision in the State v. Dosso we feel constrained to overrule it and hold that the statement of law contained in it is not correct.

It now remains to deal with the doctrine of stare decisis on which the Attorney-General relied for recognition of the Martial Law Regulations, Martial Law Orders, and Presidential Orders and Ordinance issued by Yahya Khan between the 25th March 1969 and the 20th December 1971. Besides State v. Dosso he relied on The Province of East Pakistan v. Mehdi Ali Khan and others (P L D 1959 S C (Pak.) 387), Tanvir Ahmad Siddiqi v. Province of West Pakistan (P L D 1968 S C 185) and Fazal Ahmad v. The State (1970 S C M R 650). The learned Judges in The Province of East Pakistan v. Mehdi Ali Khan were parties to the case State v. Dosso. In Tanvir Ahmad Siddiqi v. The Province of East Pakistan the validity of the Laws (Continuance in Force) Order, 1958, was not challenged. In Fazal Ahmad v. The State by a short order leave to appeal was refused by a Bench of this Court with the remarks: "when the Military Court took cognizance of the offence and imposed penalty upon the petitioner, the learned Judge of the High Court was right in dismissing the petitioner's application under section 561-A of the Code of. Criminal Procedure" A case under section 167 of the Sea Customs Act was registered against Fazal Ahmad by the Deputy Superintendent of Police, Lahore Cantt ; he thereupon moved the High Court for quashing the proceedings whereupon a learned Judge gave an interim direction to the Deputy Superintendent of Police to appear before him and produce file of the case and not to put up a challan against the petitioner in any Court. The Deputy Superintendent of Police, however, put up the challan before a Military Court whereupon Fazal Ahmad moved the High Court for initiating contempt proceedings against the Deputy Superintendent of Police. In the meantime, the Military Court convicted the petitioner and the High Court took no further action in the case on these facts leave to appeal was refused by a bench of this Court. The question whether the Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 was ultra vires of the Provisional Cons*titutional Order was not even raised in the petition for leave to appeal. There is no mention in it of any provision of that order which purported to exclude jurisdiction of the Courts to call in question the orders passed by the Martial Law authorities.

Stare desists is the rule of expediency and public policy and is not inflexible and will not be applied where injustice is done or injury caused. This rule will also not apply if the language is not ambiguous. It will apply where two interpretations are open and Court having adopted one interpretation it may not depart from it, if it upsets contracts, titles and marriages, etc we were referred to the case of Governors of the Campbell College Belfast v. Commissioner of Valuation for Northern Ireland ((1964) 2 All E R 705). it was held in this case that notwithstanding the long-standing practice of confining exemption for educational charities to those of an eleemosynary nature the Court was not required to refrain from giving effect to the true construction of section 2 of the Act of 1854-either by the doctrine of contemporanea expositio or by the doctrine of stare decisis for considering the practical defect, the importance of correcting the law with regard to rating outweighed in the present case any embarrassment that might be caused by allowing in the appeal.

Reference was also made to a decision from a foreign jurisdiction that so far as constitutional interpretation is concerned there is very little scope of the application of stare decisis. In the case Federation of Pakistan v. Maul vi Tamizuddin Khan it was contended on behalf of the respondent that because for several years no assent to an Act of the Constituent Assembly, while sitting as a constitution-making body under subsection (1) of section 8 of the Indian Independence Act was ever obtained and that some important Acts passed by the Assembly were treated as law by everyone concerned, though they had not received the assent of the Governor-General under subsection (3) of section 6 must be so interpreted as not to be applicable to the legislations passed by the Constituent Assembly under subsection (1) of section 8. In refuting the submission Munir, C. J. referred to cases cited in Crawford's "Statutory Construction" and Coolay's "Constitutional Limitation" and observed ;

"In all the cases where observations of this kind have been made, the true intention of the particular provisions in the con*stitution was ambiguous or doubtful, and I know of no instance where the words of the constitution being clear and consistent with a reasonable interpretation, any Court ever went to the extent of. misconstruing its true purpose merely because somebody else had taken a mistaken view of it. There is no question of estoppel in such cases, the correct description of the reasoning employed being argument ab inconvenienti. This mode of construction of written constitutions is, therefore, subject to an overriding consideration which has thus been stated by Coollay himself at pages 149-150."

This view is supported by Mr. Brohi, in his Book, "Fundamental Law of Pakistan", page 598 : It is said: "In the matter of constitutional adjudications the rule of stare decisis has, if at all, limited application".

Whatever be the scope of stare decisis and its limited application to the interpretation of constitutional instruments, Kelsen's theory on which Munir, C. J., relied was neither a norm of the National Legal Order, nor a statutory provision. Its application in upholding the "victorious revolution" by Iskander Mirza did not, therefore, attract the doctrine of stare dectsis. Moreover, it cannot be said that a right was created in Yahya Khan to rebel against the National Legal Order on the basis of the decision in the State v. Dosso.

The Attorney-General next contended that if all the laws given by Yahya Khan were declared to be invalid, the same would apply to the Legal Framework Order under which the elections to the National Assembly and Provincial Assemblies were held in December 1970. This contention was effectively answered by Mr. Manzur Qadir who stated that the concept of validity is derived from the will of body-politic. If the body* politic gives an express answer that answer is valid and It does not matter who puts the question. He also pointed out a distinction between the status of a person who acquires power and the limits in which he exercises his power. The legality of the elections to the National and the Provincial Assemblies under the Legal Framework Order cannot, therefore, be doubted on the ground that Yahya Khan had no legal authority to promulgate this Order.

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. Manzur Qadir acknowledged the legitimacy of the Government headed by Mr. Zufiqar Ali 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 did not affect the legality of the Elections held under it to the National Assembly and Provincial Assemblies. This coincided with the position taken up by the Attorney. General that Mr. Zulfiqar Ali Bhutto was not the recipient of power from Yahya Khan and that he held the office of the 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. Zulfiqar Ali Bhutto. An Interim Constitu*tion has also been passed and Mr. Zulfiqar Ali Bhutto is to be inaugurated as President under this Constitution on the 21st April 1972. The legitimacy of the present Government is thus beyond the shadow of doubt.

The text of the Interim Constitution adopted by the National Assembly on the 17th April 1972, has been published in the newspapers. Article 280 provides;-

"280.-(1) Except as provided by this Article, all existing laws shall, subject to this Constitution, continue in force, so far as applicable and with the necessary adaptations, until altered, repealed or amended by the appropriate Legislature.

(2) The Proclamation made on the twenty-fifth day of March 1969, is revoked with effect as from the commencing day, and the Orders specified in the Sixth Schedule and any Orders amending those Orders are repealed with effect as from that day, but this clause shall not affect any existing laws made under those Orders.

(3) All Martial Law Regulations and Martial Law Orders, except the Martial Law Regulations and the Martial Law Orders specified in the Seventh Schedule, are repealed with effect as from the commencing day, and on that day each Martial Law Regulation and the Martial Law Orders so specified shall be deemed to have become an Act of the appropriate Legislature and shall, with the necessary adapta*tions, have effect as such.

Article 281 further provides

"281.-(1) All Proclamations, President's Orders, Martial Law Regulation, Martial Law Orders, and all other laws made as from the twenty-fifth day of March 1969, are hereby declared, notwithstanding any judgment of any Court to have been validly made by competent authority, and shall not be called in ques*tion in any Court.

(2) All orders made, proceedings taken and acts done by any authority, or by any person, which were made, taken or done, or purported to have been made, taken or done, on or after the twenty-fifth day of March 1969, in exercise of the powers derived from any President's Orders, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws, or in execution of any orders made or sentences passed by any authority in the exercise or purported exercise of powers as aforesaid, shall be deemed to be and always to have been validly made, taken or done.

(3) No suit or other legal proceedings shall lie in any Court against any authority or any person for or on account of or in respect of any order made, proceedings taken or act done, whether in the exercise or purported exercise of powers referred to in clause (2), or in execution of or in compliance with orders made or sentences passed in exercise or purported exercise of such powers.

The intended effect of these constitutional provisions is that among other Martial Law Regulations and Orders, Martial Law Regulation 78 and Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 will be deemed to have been validly made, but this is so not because Yahya Khan was competent in law to promulgate theca laws. They are valid, because the new Constitution of the State adopts them as constituents of the National Legal Order as from the commencing day, i.e. 21st April 1972, with retrospective effect from the 25th March 1969. In the words of Kelsen: If laws which were introduced under the old Consti*tution continue to be valid under the new Constitution this is possible only because validity has expressly or tacitly been vested in them by the new Constitution. The phenomenon is a case of reception. The laws which, in the ordinary inaccurate parlance, continue to be valid are, from a Juristic viewpoint, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different.

Article 9 of the Interim Constitution secures Fundamental Rights including the right that no law providing for preventive detention shall authorise the detention of a person for a period exceeding three months unless the appropriate Advisory Board has reviewed his case and reports before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention: "Provided that such law shall also provide that the case of the person detained shall be brought before the appropriate Advisory Board for the first review within one month of the order of

detention". Advisory Board means a Judge of the Supreme Court and Senior Officer in the service of Pakistan in relation to a person detained under a Federal law and a Judge of the High Court and a Senior Officer of the service of Pakistan in the case of a person detained under a Provincial Law. Martial Law Regulation 78 contains no such safeguards. Article 7(1)(2) declares:

"7.- (1) Any law, or any custom or usage having the force of law, in so far as it is a inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any Law which takes away or abridges the rights so conferred and any law made in contraven*tion of this clause shall, to the extent of such contravention, be void."

The First Schedule to the Constitution specifies Presidential Orders, Martial Law Regulations, and Acts passed by the National and Provincial Assemblies which are exempted from the operation of Article 7(1) and (2). Martial Law Regulation 78 and President's `Order 3 of 1969 are not included in the Schedule.

As seen Article 280 itself provides: all existing laws shall subject to this Constitution continue in force. Martial Law Regulation 78 has been repealed, but if it was continued being repugnant to Fundamental Rights contained in Article 9 it would have been void under Article 7(1). It follows that if the orders of detention passed under Martial Law Regulation 78 are by virtue of Articles 280 and 281 deemed to have been validly made, they would become unlawful from the commencing day, i.e. 21st April 1972. This result would have been avoided only if Martial Law Regulation 78 was continued as an Act of the appropriate Legislature and included in the 1st Schedule to the Constitution. The orders under which Malik Ghulam Jilani and Mr. Altaf Gauhar are being detained will, therefore, be liable to be set aside on the ground that continuation of their detention is in violation of Fundamental Rights.

On the findings recorded above, I will allow both the appeals and direct that the detenus be released forthwith unless required to be detained under any other lawful order.

SAJJAD AHMAD, J.-These two detention cases of Malik Ghulam Jilani and Mr. Altaf Gauhar, under Martial Law Regu*lation No. 78 promulgated by General Agha Muhammad Yahya Khan in the purported exercise of his powers as the Chief Martial Law Administrator, have spurted delicate constitutional and legal questions seemingly tied up with political concomitants. However, in the resolution of causes coming for determination before a Judge, his mind is sealed off against any extraneous influence. True to his sacred oath, he has to decide them to the best of his ability in accordance with law, doing justice to all manner of people, without fear or favour, malice or ill-will. The importance of the issues involved, which have engrossed my mind ever since the commencement of these proceedings in this Court, under the constant stress of my judicial oath, have impelled me to add my voice by this separate note to the weighty pronouncements made in the very elaborate and erudite judgments of my Lord, the Chief Justice and my brother M. Yaqub Ali, J. with whose conclusions I respectfully agree.

In fact, these judgments of my Lords and I say so unfeignedly, in their exhaustive discussion of all the salient points arising in these cases, leaves little or nothing to be added. It must also be gratefully acknowledged that all the related questions were argued before us in very great depth, with diligent research and marked ability by the learned counsel for the appellants, the learned Attorney-General, and Mr. Brohi and Mr. Sharifuddin Pirzada, who had appeared as amicii curiae at our request. In historical retrospect, they have called to mind the anguished memory of the constitutional tragedies that have afflicted this Muslim homeland of our dreams, playing havoc with the body politic. Twice the Constitution was abrogated, the abrogation being preceded and followed by reckless material greed, scramble for power and free run for political ambition and adventurism. On each occasion, the abrogation of the Constitution, first in 1958 and again in 1969, was accompanied by the simultaneous clamping of Martial Law on the entire country, associated with its accursed terror and its potential mischief of coercive action in the destruc*tion of democratic values and civilised pattern of life in the

country. Contrary to its conventional and limited purpose in the domestic sphere to suppress turmoil and civil strife by the Civil Administration with the aid of the army, the Martial Law in Pakistan has come to mean the complete subjugation of all juris*dictions to the arbitrary will of one individual, who, by his for*tuitous position as the head of the army for the time being becomes the self-appointed repository of all the State powers as the Chief Martial Law Administrator, wielding unbridled authori*ty in the land. In this sense, Martial Law operates as if it were a part of jus belli imposed by the invading army on a foreign land brought into subjugation by conquest. Such a Martial Law, as once described by Lord Wellingdon in the House of Commons, is "nothing more nor less than the will of the general commanding the army. It is in fact no law at all." It cannot be gainsaid that after the bitter and ugly experiences of the two Martial Laws suffered by the nation within the span of the last 14 years, the very name of Martial Law has become an anathema and it is intolerably repugnant to the common people regardless of its necessity or potentiality for doing any public good, which cannot otherwise be done.

The story is long and painful, but for purposes of these appeals, it is not necessary to go beyond 25-3-69, when with the exit of F.M. Muhammad Ayub Khan, the then President of Pakistan, General Agha Muhammad Yahya Khan, the then Com*mander-in-Chief of the Pakistan Army, was ushered on the political scene. In his letter of March 24, 1969, the Field-Marshal, depict*ing the political and economic chaos that had overtaken the country, invited him to discharge his legal and constitutional responsibilities to defend the country not only against external aggression but also to save it from internal disorder and chaos.

Simultaneously, General Yahya Khan issued a Martial Law Proclamation on March 25, 1969, assuming to himself the powers of the Chief Martial Law Administrator and the Commander of the Armed Forces. On 31st March 1969, he also appointed himself as the President and assumed that office with effect from the 25th of March 1969. This was followed by the promulgation of the Provisional Constitution Order on the 4th of April 1969, by which it was ordained that notwithstanding the abrogation of the Constitution of 1962, the State of Pakistan shall be governed as nearly as may be, in accordance with the said Constitution, subject to any regulations or orders made from time to time by the Chief Martial Law Administrator. It hardly needs any argument to show that General Yahya Khan at the receiving end overstepped the mandate of the Field Marshal, as contained in the letter men*tioned above, even if it were assumed to have any legal validity. But this mandate was wholly misconceived. Under Article 12 of the Constitution, which was then in force, if F. M. Muhammad Ayub Khan found himself unable to cope with the crisis created in the country, he should have resigned his office under Article 12 of the Constitution then in force, and the Speaker of the Legislative Assembly could then have stepped in his place under Article 16 thereof till the election of the new incumbent for that office within 90 days of that event. Alternatively, a state of emergency could have been declared under Article 30 of the Constitution and the military could have been summoned in aid of the Civil adminis*tration to quell the disturbances and to restore law and order. However, General Yahya Khan, instead of doing his constitutional duty, did not lose a minute to jettison the Constitution to the winds, which he had undertaken by his oath as an army officer to defend and protect. Further he arrogated to himself the supreme powers of the Chief Martial Law Administrator. This assumption of power by General Yahya Khan was utterly an illegitimate and unconstitutional act of usurpation, which can, on no legal or valid basis, be accorded a de jure status by the Law Courts.

This position was not seriously contested by the learned Attorney-General, who has, however, argued that the very fact that General Yahya Khan took reins of power by overthrowing the old order in a manner not contemplated by the existing Con*stitution, amounted to a coup d'etat or a revolution on his part, which is an internationally recognised mode of changing the Con*stitution, thereby setting up a new law creating organ. He argued that the new order thus created by a successful revolution, which held effective away for 2 ½ years commanding submission and obedience from all quarters, including the judiciary, gave birth to a new law creating authority de facto as well as de jure, and that all legislative and administrative measures which flowed from this authority, were valid and immune from any challenge in the Courts, where such a challenge is forbidden by the supra-constitu*tional powers of the new authority. In support of his argument, the learned Attorney-General heavily relied on a decision of this Court in the famous case of State v. Dosso, wherein, Chief Justice Muhammad Munir, as he then was, by invoking Kelsen's theory of legal positivism, held that "where the Constitution and national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution, then such a 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. Therefore, any change, no matter how or by whom brought about, whether by violence or non-violence or by persons held in a public position, is in law a revolution, if it annuls the constitution and the annulment is effective. The legality of a successful revolution is judged not by reference to the annulled constitution but by reference to its own success and the validity of the laws thereafter has to

be examined by reference to the new legal order and not the annulled constitution". The learned Attorney*-General, who, ironically, was a counsel against the State In Dosso's case, admitted, with refreshing frankness, that that case was decided without affording him a chance to contend against the conclusions of the Court reached therein. He submitted that he wished that all the criticism now hurled on the decision in Dosso's case had been made at that time or on some other occasion soon thereafter to defeat it and that It was not challenged even in the causes that did arise in the superior Courts thereafter, with the result that it is now woven into the fabric of our laws and that it is too late in the day now after it has been allowed to hold the field for 13 years in public and political life, to reverse it, this would only result in judicial chaos. He argued very forcefully that this Court has undoubtedly got the powers to review that judgment, but that it should not review it, particularly at this stage when the usurper has been supplanted and a duly elected and an accredited democratic leader is in charge of the affairs of the country as the President and the Chief Martial Law Administrator. To this last argument, the short argument given by the learned counsel of the appellants was that the legality and legitimacy of the present regime is not in issue in these proceedings, although they stated that it was a painful anomaly that the present head of the State, who undoubtedly represents the body politic in his own right as the chosen leader of the largest political party in this wing of the country, should have, under the stress of circumstances, derived his authority not from the body politic, which he represents, but from the erstwhile Chief Martial Lam Administrator, who has stated an exit. It is indeed most gratifying that this anomaly alluded to by the learned counsel has now come to an end.

The pivotal question that arises for determination in these appeals is whether Martial Law Regulation No. 78 under which the two detenus have been held, is valid law, and whether, as held by the learned Single Judge of the Lahore High Court, in dismissing the writ petition on behalf of the detenu Malik Ghulam Jilani, the Jurisdiction of Courts (Removal of Doubts) Order of 1969 (President's Order No. 3 of 1969) bars the jurisdiction of the Courts, including the Supreme Court and the High Courts, as it purports to do by its section 3, to examine the legality of the detenus detention under Martial Law Regulation No. 78 mentioned above. Section 3 aforesaid is couched in sweeping terms of complete ouster of jurisdiction, by stating that "No Court, Tribunal or other authority, including the Supreme Court and a High Court, shall---

(a) receive or entertain any complaint, or other representa*tion whatsoever against in relation to the exercise of any power of jurisdiction by any Special Military Court or Summary Military Court or any Martial Law Authority or any person exercising powers or jurisdiction derived from Martial Law authority ;

(b) call or permit to be called in question in any manner whatsoever any finding, sentence, order, proceedings or other action of or before a Special Military Court or any Martial Law authority or any person exercising power or jurisdiction derived from a Martial Law authority;

(c) issue or make any writ, order, notice or other process whatsoever to or against or in relation to the exercise of any power or jurisdiction by a special Military Court or a Summary Military Court of any Martial Law authority or any person exercising powers. or jurisdiction derived from a Martial Law authority.

(2) Any decision given by his writ, order, notice or process issued or made or thing done in contravention of clause (1), shall be of no effect.

(3) If any question arises as to the correctness, legality or propriety of the exercise of any powers or jurisdiction by a special Military Court or a Summary Military Court or a Martial Law authority or any other person deriving power from a Martial Law authority, it shall be referred to the Chief Martial Law Adminis*trator, whose decision thereon shall be final.

Explanation.-Martial Law authority means the Chief Martial Law Administrator and includes a Deputy Chief Martial Law Administrator, a Zonal Martial Law Administrator, a Sub. Administrator of Martial Law, or any person designated as such by any one of them.

(4) If any question arises as to the Interpretation of any Martial Law Regulation or a Martial Law Order, it shall be referred to the Martial Law authority issuing the same for decision, and the decision of such Martial Law authority shall be final and shall not be questioned is any Court, Tribunal or other authority, including the Supreme Court, and a High Court. This order is issued by General Agha Muhammad Yahya Khan, both as President and Chief Martial Law Administrator."

It was contended by the learned counsel for the appellants that this is a sub-constitutional legislation, being in the nature of a President's order and not one, which was Issued by the Chief Martial Law Administrator in his supra constitutional powers. From its tenor and the context in which it was issued, I am inclined to think that this order was promulgated by the Chief Martial Law Administrator in his dual capacity as the President and .the Chief Martial Law Administrator, and that it was essentially and primarily a Martial Law order made by the Chief Martial Law Administrator, to undo the judgment of the Lahore High Court rendered in the case of Mir Hassan and others v. The State (P L D 1969 Lah. 786), the same day or a day earlier, wherein Martial Law Regulation No. 42 promulgated during the pendency of the case before the High Court, was scrutinised, and it was held that it did not affect the powers of the High Court under section 561-A, Cr. P. C., which was (invoked to quash the proceedings in that case. This judgment further sought to confine the Martial Law to certain limitations in relation to the power of the High Court to dispense justice. Obviously, Order No. 3 was brought in to set this judgment at naught and to place it beyond the reach of the civil Courts. Nonethe*less I am absolutely clear in my mind that Order No. 3 of 1969, is wholly indefensible both on account of the illegitimacy of its sources as well as the utter futility of its objective to defeat the judicial power legally and constitutionally vested in the judicature of the country.

In my humble view, and I say so with all respect, the decision in Dosso's case relied on by the learned Attorney-General which was based primarily on the Kelsonian theory mentioned above, did not lay down the correct law, and cannot, therefore, prop up the illegal usurpation of power by General Yahya Khan and his legislative or administrative actions. The theory propounded by Kelsen in its abstract form is at best a theory which, instead of receiving a ready acceptance by the jurists, has met with a large measure of opposition and rejection. The strongest objection, which is urged against it is that the basic norm of effectiveness and success of the new order brought in by a revolution or a coup d'etat can have no relevance in the sphere of domestic jurisdiction of the Municipal Courts of law, although it is so recognised to the international law. Theories of law cannot take the place of law and are not immutable. They cannot be made generally applicable to all societies at all times. In Pakistan, in particular, we do not have to depend on Kelsen or other jurists or legal philosophers for constitutional inspiration. Our grund-norms are derived from our Islamic faith, which is not merely a religion but is a way of life. These grund-norms are unchangeable and are insepar*able from our polity. These are epitomised in the Objectives Resolution passed by Constituent Assembly of Pakistan on 7-3-1949, and were incorporated in the first Constitution of the Islamic Republic of Pakistan of 1956 and repeated again in the Constitution of 1962. Its basic postulates are that sovere*ignty belongs to Allah Almighty, which is delegated to the people of Pakistan who have to exercise the stare powers and authority through their chosen representative on the principle of democracy, freedom, quality, tolerance, and social justice as enunciated by Islam, wherein the fundamental human rights are to be respected and the independence of the judiciary is to be fully secured. Can it be argue that any adventurer, who ray usurp control of the State power in Pakistan, can violate all these norms and create a new norm of his own in derogation of the same? The State of Pakistan was created in perpetuity based on Islamic ideology and has to be run and governed on all the basic norms of that ideology, unless the body politic of Pakistan as a whole, God forbid, is re-constituted on an un-Islamic pattern, which will, of course, mean total destruction of its original concept. The Objectives Resolution is not just a conventional preface. It embodies the spirit and the fundamental norms of the constitutional concept of Pakistan.

It was forcefully argued by Mr. Brohi that in deciding Dosso's case, their Lordships of the Supreme Court had assumed that the powers of the Court flowed from the Laws (Continuance in Force) Order, ignoring that the independent judicature in Pakistan, with the Supreme Court at its apex, is an indispensable link in the structure of Pakistan as a political entity. Here the Courts do not drive their powers from any individual, who may happen to have the control of the executive power for the time being. This judicial power as a trust from the Almighty Allah, is lodged in the society as a whole, which, in turn, is irrevocably committed to the Courts as trustees of the society. The decision in Dosso's case appears to be controlled by the Laws (Continuance in Force) Order of 1958, which the Court was itself called upon to legitimize as a new law-creating organ. The Court did not go into the question of the constitu*tional validity of that Order in all its details.

It was also argued by the learned counsel for the appellants that whether a revolution or a coup d'etat has been successfully achieved or not, is a justiciable issue, which is for the Courts to decide on evidence and relevant material, but the learned Judges, in deciding Dosso's case, proceeded to accept the mere proclama*tion by the usurper as proof of the accomplishment and success of the revolution. It was further submitted that Kelsen's theory that a successful revolution furnishings its own gaund-norm, is devoid of all ethical and moral fibre. Fieldson, A. J. A., in this judgment in the famous constitutional case of Rhodesia entitled Madzimbamuto v. Lardner Burke (1968 All E R 561), observed as follows:-

"Nothing can encourage instability more, than for any Saila revolutionary movement to know that if it succeeds in snatching power, it will be entitled to complete support of the pre-existing judiciary in the judicial capacity.

The weighty arguments against the correctness of the decision in Dosso's case have not been adequately countered by the learned Attorney-General. The mainstay of that decision, as already stated above, is the doubtful Kelsonian theory of legal positivism, which receives an indifferent support from some passages cited by the learned Attorney-General from Herald, J. Laski's book on "State, in Theory and Practice', from Garner's "Treatise on Political Science and Government", and G. C. Field's "Lectures on Political Theory". In fact, reading them in their true context, the' passages cited by the learned Attorney-General from the books mentioned above, do not support the theory in the terms as advanced by him. In this view of the matter, I feel constrained to state, with all, respect, that Dosso's case does not lay down the correct law.

The contention of the learned Attorney-General that the decision in Dosso's case having held the field for a number of years, must not now be reversed on the principle of stare decisis, as it would lead to chaos, does not rest on a sound footing. This rule of stare decisis is one of expediency and can have no claim to inflexibility or compulsive obedience. In case of constitutional decisions, this doctrine is to be strictly considered, so that the organic law of the land is not allowed to run in muddy channels. The error in a constitutional decision, which is manifestly apparent and which causes injury to the body politic, must unhesitatingly be set right.

On the point of acquiescence and obedience of all concerned to the acts of usurpation by General Yahya Khan and the submissive acceptance of the acts of his regime as constituting an estoppel, it would be useful to refer to Coolay's observation in his book entitled "Constitutional Limitation" at page 104:-

"Acquiescence for no length of time can legalise a clear usurpation of power where the people have plainly expressed their will in the constitution and upon the judicial tribunals to enforce it. A power is frequently yielded to, merely because it is claimed and it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the constitution was designed to guard against appearing or without any one being sufficiently interested in the subject to raise the question, but these circumstances cannot be altered to sanction the infraction of the constitution."

The learned Attorney-General very forcefully argued that the reversal of Dosso’s decision at this stage, which may lead to the striking down of the laws and acts of the Yahya regime on the principle of legitimacy, will create a legal chaos. The Courts will not certainly be a party to creating a chaos in the body politic, and equally well they abhor any vacuum in the law. It is precisely to save this situation that the Courts are inclined to accord validation within recognised limits on the principle of efficacy, to the acts of a de facto usurper of power by invoking the doctrine of necessity or implied mandate from the lawful authority. Mr. Manzur Qadir very correctly pointed out that the doctrine of necessity has now come to be recognised as a law of Pakistan. The Federal Court of Pakistan in Governor-General's Reference No. 1 of 1955, invoked this doctrine by resort to the famous maxim of salus populi est suprema lex. This doctrine was succinetly explained by Fieldson, A. J. A. in the Rhodesian case, referred to above, in the following words, which may be usefully quoted;--

"The necessity relied on in the present case is the need to avoid the vacuum, which would result from a refusal to give 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 2 years. If such acts were to be without validity, there will 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, and numerous matters which require attention in the complex and modern State. Without constant attention to such matters, the whole machinery of the adminis*tration would break down to be replaced by chaos, and the welfare of the inhabitants of all races would be grievously affected."

Lord Pearson, in his dissenting judgment fn the same case in the Privy Council, agreed with the views of Fieldson, A. J. A., and held that "on the doctrine of necessity, acts done by usurpers in effective control of authority may be recognised as valid and may be acted upon in the Courts but within set limitations". These limits were stated by him to be:-

(1) That the acts be directed and reasonably required for the orderly running of the State.

(2) That they do not impair the rights of the citizens under the lawful constitution.

(3) That they do not entrench the usurper in his power.

I feel persuaded to agree with these limitations as laid down by Lord Pearson. By and large, they provide a correct guideline for the Courts to examine the validity of the legislative or administrative acts of the usurper when they are brought in for their scrutiny. I would, however, like to add that the authentic verdict of the body politic cannot be turned down even if it happens to have been obtained by an unauthorised person.

It remains to consider whether the two impugned measures its these appeals, namely, President's Order No. 3 of 1969, and Martial Law Regulation No. 78 of 1971, which have proceeded from an illegitimate source, can be upheld on the doctrine of necessity or implied mandate. My answer definitely is No. It is the exclusive privilege of the Courts to identify laws from what are not laws or bad laws. A law is not law merely because it bears that label. It becomes law only if it satisfies the basic norms of the legal system of the country and receives the stamp of validity from the Law Courts. On this test alone, Order No. 3 of 1969 must be struck down, as it seeks to destroy the judicial power which vests inherently and constitutionally in the judicature of the country, which with the executive and the Legislature, form the three important limbs of the State. The totality of judicial powers resides in the judicature of Pakistan, whose powers for dispensation of justice as the trustee of the society, are indestructible, and cannot be taken away by the arbitrary will of an individual. To the judiciary is committed the duty of being the watch-dog of the actions and virtues of the other co-ordinate limbs of the State. This Court has plenary judicial power, and the contents of that power cannot be shared with any other 'limb of the Government, executive or Legislature. While the jurisdiction of superior Courts may be regulated by the Constitution, any effort to destroy the judicial power is a senseless exercise. It was once very, appropriately remarked by Justice Hughee that "there is no doubt that the Judges are under the constitution but the constitution is what the Judges say it is". The absurdity of Order No. 3 of 1969 is heightened by its presumptuous effort to lay down that no Court, including the Supreme Court and the High Court, shall even receive or entertain any complaint, petition or applica*tion or other representation whatsoever against or in relation to the exercise of any power or jurisdiction by any special Military Court or Summary Military Court or any Martial Law authority or any person exercising the authority or jurisdiction from Martial Law authority. It can never be disputed that the Courts alone have the power to determine all questions of their own jurisdiction, including the negative that they do not have the jurisdiction.

In view of what has been said above, I would unhesita*tingly strike down Order No. 3 of 1969 as a bad and untenable measure. In regard to Martial Law Regulation No. 78 of 1971, I have simply to

point out that it can have no validity in the eyes of law, firstly, because its authorship is unconstitutional being of a person who was a usurper and who had illegally arrogated to himself the powers of the Chief Martial Law Administrator to issue this regulation. It can also not be upheld on the doctrine of necessity or implied mandate, as there was, in fact, no need for it whatsoever, and it was enacted to give a free band to the usurper to gag any one who raised a voice against him, and to annihilate any opposition or supposed opposition to the firm entrenchment of his authority as a usurper, The object of preventive detention, for which this regulation was made, is already available in the existing law, namely, "The security of Pakistan Act, 1952 " and "The Defence of Pakistan Rules, 1965". It is obvious that this Regulation was enacted merely to make arbitrary power more arbitrary.

I think I must now summarise my conclusion in these appeals as follows;--

(1) The decision of this Court in Dosso's case does not lay down good law, and must be overruled.

(2) The Martial Law as proclaimed by General Agha Mohammad Yahya Khan was illegal. The assumption of power by General Agha Mohammad Yahya Khan as the President and the Chief Martial Law Administrator was wholly unconstitutional, and cannot be recognised as valid.

(3) General Agha Mohammad Yahya Khan was no doubt in effective control of governmental power for the period that he remained in the saddle, and only those of his legislative and administrative acts can be recognised by the Courts, which may be found to be absolutely necessary on the doctrine of necessity within the limitations of that doctrine to be adjudged by the Courts.

(4) President's Order No. 3 of 1969 and Martial Law Regulation No. 78 of 1971, not being valid laws, cannot be recognised as such by the Court, and have to be struck down.

In the result, I would accept these two appeals, and direct that the detenus be set at liberty forthwith, unless they arc detained under any other valid law of the land.

WAHEEDUDDIN AHMAD, J.-I have had the advantage of reading the judgment of my Lord the Chief Justice. I fully agree with its reasoning and conclusions and have nothing to add.

SALAHUDDIN AHMED, J.-I have had the benefit of perus*ing 'the erudite judgment of my Lord the Chief Justice, and I fully agree with him. I should however, like to add a few observations of my own.

Both the detention orders have been passed under Martial Law Regulation No. 78, promulgated on 17-4-1971, by General Agha Muhammad Yahya Khan, and the main question for consideration before this Court is whether the detention of the two detenus under Martial Law Regulation No. 78 is legal. All other questions revolve round this.

Before, however, the Court can determine this question, it is confronted with the preliminary question, as to whether the Court can receive or entertain any complaint, petition, application, etc., against or relating to an order passed by a Martial Law Authority call or permit to be called in question etc., any order of such authority in view of the bar placed on the Courts under section 3 of the President's Order No. 3 of 1969. Two sub-questions flow from this preliminary question, and they are;

(i) Is President's Order No. 3 of 1969 binding in law ?

(ii) If so, does it still permit the Court to enquire into the validity of Martial Law Regulation No. 78 ?

It has been the Constitutional practice in the Indo-Pakistan sub-continent that whenever an existing Order ceased to be operative, either legally or illegally, the existing laws have been continued to remain valid by the new dispensation. Beginning from the Government of India Act (Consolidated in 1924) down to the Laws (Continuance in Force) Order, 1958, and the Proclamation of Martial Law by General Agha Muhammad Yahya Khan, the validity of existing laws were continued by this process. The details are as follows:----

Section 30 of the Government of India Act, 1919 (Con*solidated in 1924); section 292 of the Government of India Act, 1935; section 18 of the Indian Independence Act, 1947; Articles 221 and 224 of the Constitution of Islamic Republic of Pakistan, 1956; Paragraph 4 of the Laws (Continuance in Force) Order, 1958; Article 225 of the Constitution of Pakistan, 1962; and paragraph 5 of the Proclamation of Martial Law dated the 25th March 1969. Similar is the provision in Article 372 of the Indian Constitution.

On the 20th of December 1971, Chief Martial Law Adminis*trator and ex-President of Pakistan General Agha Muhammad Yahya Khan stepped down from his offices, and consequently all the existing laws lapsed, and unless they were saved by a competent authority under the subsequent dispensation, they ceased to have any sanction behind them. The 1962-Constitution having already been abrogated by him, the only sanction behind the various `Laws' that he purported to make was his individual 'will' and with his disappearance from the scene. all the existing `Laws' including President's Order No. 3 of 1969 and Martial Law Regulation No. 78 lapsed. There is nothing to show, and the learned Attorney-General has been unable to place before us anything from the now dispensation to show, that the existing laws were saved. He has, however, relied upon the proclama*tion of General Agha Muhammad Yahya Khan dated the 20th December 1971, whereby he transferred power to President Zulfikar Ali Bhutto for the purpose of showing that the existing laws were continued in force. In this Proclamation it has been stated that the Proclamation of the 25th March 1969 shall have effect subject to the Proclamation of the 20th December 1971, and inasmuch as the Proclamation of the 25th March 1969 had saved the existing laws, the Proclamation of the 20th Decem*ber 1971, it has been contended, also operated to save the existing laws. It is to be noticed that the Proclamation of the 20th December 1971, itself was by General Agha Muhammad Yahya Khan and it derived its force and validity from his individual 'will'. As soon as, however, this 'will' ceased to exist on account of his exit, the very life line of the Proclamation of 20th Decem*ber 1971, was cut off, I have, therefore, no hesitation in saying that neither President's Order No. 3 of 1969 nor Martial Law Regulation No. 78 is a valid existing law.

The next question is : whether President's Order No. 3 and Martial Law Regulation No. 78 can be saved on the doctrine of necessity. The doctrine of necessity is concomitant of the doctrine of legitimacy, and might have relevance in the regime of General Agha Muhammad Yahya Khan. As the legality of the present regime is not directly in issue before this Court, it is not called upon to consider it. The learned Attorney-General has submitted that the recipient of power in the present regime has legitimate credentials from the body politic itself and therefore, no limits can be placed on its power. As for the former, it is not before us as a specific issue; as for the latter it is not true. The corner stone of the State of Pakistan is that the sovereignty rests with Allah and Pakistan is his delegatee in the matter of the Governance of the State. It is natural, therefore, that the delegatee or for the matter of that any ruler, single or collective, in Pakistan can never have unlimited power. If the present regime has legitimate credentials, as claimed by the learned Attorney-*General the application of the doctrine of necessity does not arise. It must rely on its own source of law. If it has not the validity of President's Order No. 3 and Martial Law Regulation No. 78 shall have to be tested in the light of the

following tests which Fieldsand, J. laid down in the Rhodesian case and which were approved in the Privy Council by Lord Pearce (1968) 3 A E R 561. If the taking over by the usurper is complete and effective and this 9s to be determined on evidence by the Court, the Court may as a matter of necessity treat a 'Law' as valid but only such parts as:

(a) are directed to and reasonably required for orderly running of the State;

(b) Such as do not impair the rights of the citizens under the previous lawful Constitution;

(c) Such as do not run counter to the previous lawful Consti*tution, and are not intended to strengthen the usurper.

President's Order No. 3 is bad for another reason; It is Inconsistent with the Rule of Law which is the basis of every civilised society. The order is inconsistent with the Rule of Law because it reflected the individual dominant `will' of one person, namely, General Agha Muhammad Yahya Khan and was based on no rule of conduct and also because it sought to make an Act or Order of any Martial Law Authority immune from attack in any Court of law.

Martial Law Regulation No. 78 is also repugnant to Islamic Law. The latter recognises detention as justified in two circum*stances only, (i) by sentence of Court; and (ii) for the purpose of investigation. Vide p. 35 of Miras-e-Quaid-e-Azam by Dr. Javaid Iqbal.

President's Order No. 3 of 1969 has also been assailed on another ground. It has been contended that President's Order No. 3 contains supra-Constitutional Provisions namely, those barring the jurisdiction of the Court In regard to Act or Order of a Martial Law Authority and that any dispute in regard to the interpretation or application of a Martial Law Authority can only be referred to the Chief Martial Law Administrator for final interpretation. These supra-Constitutional provisions under the Provisional Constitution Order, 1969 could only be made by the Chief Martial Law Administrator and not the President who made President's Order No. 3. Tao two offices are separate and the former is superior to the latter as the office of the President was created by the Chief Martial Law Administrator under section 3(2) of the Provisional Constitution Order. This again is a question which the Court has to determine for it is the only limb of the State that can determine it. The learned Attorney-General has unsuccessfully tried to repel this and argued that the aforesaid two provisions are Constitutional matters and these could under section 8 of the Provisional Constitution Order be made by the President. Inter alia, section 2 of the Order which says that "this Order shall have effect notwithstanding anything contained in the Provisional Constitution Order . . . . .", and sections 3(3) and 4 of the Order that give Martial Law Autho*rity the sole jurisdiction to determine the correctness, legality or propriety of the exercise of any powers or jurisdiction by among others, a Martial Law Authority or to interpret any Martial Law Regulation or Martial Law Order, clearly show that President's Order No. 3, do contain supra-Constitutional provi*sions. Alternatively the learned Attorney-General has contended, that President's Order No. 3 of 1969 has been promulgated by the Chief Martial Law Authority and not by the President.

It has been submitted that the criteria for determining this question are three-fold. Firstly, the title or name of the Order ; secondly, description of the order and its authorship as given in the official Gazette, and thirdly, in the recital of the power in the Order. In regard to the first test, prima facie, it is a President's Order being President's Order No. 3 of 1969. The second test also shows that the order has been described as President's Order in the Gazette of Pakistan, Extraordinary, dated June 30, 1969. The Notification published in the Gazette contains the following;----

"The following Order made by the President is hereby published for general information:-"

As regards the third test, it has been stated in the preamble of the President's Order No. 3, that the Order is being made "by the President and Chief Martial Law Administrator." The learned Attorney-General has contended that the were addition of the description "Chief Martial Law Administrator" does not make it the Order of the Chief Martial Law Administrator. I think the said Notification clinches the issue for it leaves no room for doubt about the authorship of the Order. I, therefore, hold that President's Order No. 3 of 1969 is ultra vires on this ground.

In this context it has been brought to the notice of the Court that by the insertion of the condition "for the administra*tion of the affairs of the State" in section 8 of the Provisional Constitution Order of 1969 President's Order No. 3, has been made justiciable and the Court accordingly can determine whether the provision contained in the President's Older No. 3, has in fact been made for the administration of the affairs of the State. I agree with this contention.

The position as it obtains vis-a-vis the President's Order No. 3, and Martial Law Regulation No. 78 is that there is a regime whose legality or legitimacy has not yet been questioned in any Court of law. This regime has chosen to act under a law that has ceased to exist with the disappearance of the maker of the law. What then is the consequence of such Act? In my opinion if the particular law has not been adopted or continued in a competent manner by the new dispensation, the Act is a nullity.

I see no force In the contention advanced by the learned Attorney-General that President's Order No. 3, has been re*cognised as good law in Fazal Ahmed v. The Sate (P L D 1970 Lah. 741) and in Fazal Ahmed v. The State (1970 S C M R 650). In the first place both these cases were decided at a time when the old order was in existence. In the second place in none of these cases any specific issue was raised in regard to the validity of President's Order No. 3.

Assuming, however, the President's Order No. 3, and Martial Law Regulation No. 78 are still good laws, the question is whether this Court has the power to determine the legality of the detention of the petitioner's husband in view of the bar contained In President's Order No. 3 of 1969.

In my opinion this Court has the power to decide the issue as It is the sole Judge of its own jurisdiction including the negative, to hold that it has no jurisdiction. This proposition arises from the fact that being the highest Court of the land, the law declared by it is binding on all Courts and all Executive and Judicial Authorities throughout Pakistan, shall act in aid of the Supreme Court (viz. Article 64 of the 1962-Constitution). No doubt the 1962-Constitution contains certain provisions ousting the jurisdiction of the Supreme Court, the ouster, however, does not take away the jurisdiction of the Court in regard to this particular point in issue. Reference has been made to the 1962 *Constitution, because that is the only legal instrument under which the institution of the Supreme Court was established. A pertinent question, however, arises as to whether after the abrogation of the 1962-Constitution by General Agha Muhammad Yahya Khan by his proclamation of the 25th March. 1969, this Court can still derive inspiration and authority from the said y Constitution. The one short answer to this is that as soon as `' General Agha Muhammad Yahya Khan made his exit from the scene, the Constitution, which had been dormant in the meantime, revived.

As regards the Judicial power of this Court it may be stated that the 1962-Constitution was based on a Presidential structure and it was accordingly erected on the theory of the separation of powers between the three limbs of the Government, namely, the Legislature, the Executive and the Judiciary The entire judicial power, including the concept of jurisdiction, was lodged with the judiciary. The Supreme Court is the creation of 1962-Constitu*tion and its existence was continued under paragraph 5 of the Proclamation of Martial Law dated the 25th March 1969. As the proclamation of the 25th March 1969 and the Provisional Constitution Order, 1969, have ceased to exist due to the disappearance of General Agha Muhammad Yahya Khan from the scene, the 1962-Constitution has come back with full force and is operative until it is validly replaced by the elected representative of the people. In Pakistan the legal sovereignty rests with Allah. Therefore, the judicial power has been conferred on the judiciary as agent of the Sovereign Authority, namely, Allah. In my opinion, therefore, this Court has the requisite power and jurisdiction to determine the questions that have been raised before it. The existence of the jurisdiction of this Court receives further support from the fact that the respondents have appeared before this Court and have submitted to the jurisdiction of this Court. After all, in a civilised society who else can determine a dispute between the State or its

ruler and its citizens.

According to the common factor in the oaths of the Judges we have undertaken to discharge our duties and perform our functions in accordance with the laws of Pakistan which we have sworn to preserve, protect and defend. The oaths also have bound us to do justice according to law. This takes us to the question as to what is law'. 'Law' has not been defined in the 1962.-Constitution or in the Provisional Constitution Order of 1969. It is, therefore, the function of this Court to define 'law'. It has been rightly emphasized by Mr. Manzur Qadir that law its basic to orderly society and Courts are basic to law. It can hardly be disputed that apart from the law as we find in the Constitution and the various Statutes, there are a number of laws and legal principles which have been evolved by Courts in course of their decisions. For example in Pakistan the rule of audi alteram partem is a part of the law of Pakistan and it has to be read in a Statute which does not expressly oust the application of the principle of natural justice. Besides, in any case where vires or validity of a law is in question, it is the Court that has a final say in the matter. It has been truly said that 'law' is that which the Court recognises as such.

It has, therefore, been rightly contended that now that the validity of President's Order No. 3 or Martial Law Regulation No. 78 has been raised as a direct issue before this Court, it is the Court's decision that will finally put a seal on its validity or otherwise.

The learned Attorney-General has very frankly conceded that it is this Court that can put the final seal on the validity or otherwise of a law. He has also frankly conceded that it is difficult for him to support the provision of section 3(1)(a) of the President's Order No. 3 of 1969 which prohibits the Court from receiving or entertaining any complaint etc. The Court's power to discover law applicable to a situation has been accepted in the Governor-General's Reference No. 1 of 1955 (P L D 1955 F C 435). In the case under report the Governor-General having found himself in a difficult situation and having been unable to find any legal basis to meet the situation had to approach the then Federal Court for a solution of the problem and the Court answered the reference and indicated the manner in which the problem could be legally solved.

From the foregoing it is evident that, in the first place, President's Order No. 3 of 1969 and Martial Law Regulation No. Its do not exist so far as this Court is concerned, and therefore, they are not valid laws. In the second place even if it be assumed that they do exist, they can not deprive the Court of its inherent jurisdiction to consider the validity or otherwise of those laws or any action taken thereunder. The following illustration will highlight this position. Suppo*sing by an order passed under Martial Law Regulation No. 78, 'X' has been ordered to be detained. While executing this order, however, instead of 'X', 'Y' is arrested and detained. It is absurd to say that the Court is deprived of its jurisdiction to consider the validity of the order vis-a-vis the person detained merely because the order is by a Martial Law Authority. In the case of detenu Mr. Altaf Gauhar there is a similar question involved, for, while the Martial Law Administrator Zone 'D' passed the order directing that the detenu be kept confined by the Superintendent, Central Prison, Karachi, and granted Class 'B' during detention, the detenu admittedly was not committed to the requisite custody. Can it be said with any amount of reasonableness that the Court has no power even to see whether the action taken is in accordance with the order passed by the Martial Law Administrator? It is now an admitted fact that the detenu Altaf Gauhar was actually detained in places different from the one mentioned in the impugned order of detention, without any order by the Martial Law Administrator concerned. Even on this very limited ground I feel no hesitation in saying that this Court has the jurisdiction to pronounce the detention of Mr. Altaf Gauhar as illegal.

It has been contended by the learned Attorney-General that President's Order No. 3 has provided for a remedy in a matter like this. I am unable to agree with him. Having regard to the provisions made in section 3 of the President's Order No. 3 of 1969, any question regarding the correctness, legality or propriety of exercise of any powers or jurisdiction of a Martial Law Authority could only be referred to the Chief Martial Law Administrator for decision by a Martial Law Authority itself, for the Court's jurisdiction even to receive or entertain any com*plaint in that respect has been sought to be ousted. The position, therefore, is that any order passed by a Martial Law Authority, if it is labelled as such, it must be accepted as a good order whether it is in fact male or could be made under any Martial Law Order or Regulation, or not. Such an unlimited and un*defined power, which is at the same time arbitrary and not governed by any rule of law, can never be accepted as good by any Court of law. Such an unlimited power is not only foreign to Islamic Law but is also not recognised in any modern

society.

Dosso's case-P L D 1968 S C 533

There have been murmurs both inside and outside Pakistan as to the correctness of the decision in Dosso's case. It has now been mooted before this Court and the Court has been asked to review its own decision. There is no doubt about the competence of this Court to review its own decision. Article 62 of the 1962.* Constitution, which established the Supreme Court, has provided as follows:

"The Supreme Court shall have power, subject to the provisions of any Act of the Central Legislature and of any Rules made by the Supreme Court, to review any judgment pronounced or any order made by it."

This case gives me the impression that law has been sacrificed on the alter of expediency. The entire legal system of Pakistan has been derailed as a result of this decision, and the system requires to be put back on the rail, if Pakistan Is to pursue its chartered course as laid down In the Objective Resolution passed by the People of Pakistan. Stare decfsis should have no appli*cation to Dosso's case. Schwartz in his book 'The Supreme Court' has observed as follows on stare decisis;

" . . In a judicial tribunal, stare decisis is not so much a virtue as a necessity . . . . . adherence to precedent is basis as a abstract desideratum of the law. But it must not take precedence over the need for the law to be right, particularly on Constitutional issues. Inherent in every system of law is the antinomy between certainty and change." (pp. 345-346).

I, therefore, fully agree that Dasso's case must be reviewed on the grounds mentioned by my Lord the Chief Justice.

Dosso's case came up for decision during the regime of General Muhammad Ayub Khan and it was decided therein that a successful revolution was entitled to the allegiance of the Courts of law. The decision is based on what the learned Judges thought was Kelsen's Theory of Jurisprudence. This theory was interpreted to provide the legal justification for the acceptance by the domestic Court of the success of an internal revolution within the State. It was not borne in mind, as it should have been, that Kelsen's was a 'pure theory of law' as distinguished from the 'law' itself. It is the overlooking of this obvious position that has caused the basic fallacies in the judgment. Kelsen himself was aware of the fact that this theory did not form part of any legal system. Furthermore the Court had assumed that there was a revolution and the revolution had succeeded. Both these questions were questions of fact and required to be decided upon evidence, and upon issues raised before the Court. There is nothing to show, that there was any rebellion or insurrection. The Proclamation of the 7th October 1958, by President Iskandar Mirza made no mention of any rebellion or insurrection.

It is thus evident that the very foundations upon which the decision rested did not exist. I, therefore, think that this Court should make it clear that the validity or otherwise of an existing order can only be determined with reference to the laws of Pakistan and not to any theory of international jurisprudence. It is also necessary to state firmly that the question of existence of a revolution or its success are questions of fact which can only be decided upon evidence, and not assumed. This will remove once for all the temptations that have been placed in the way of an adventurer seizing power illegally and destroying an existing legal order.

Prejudice is an opinion without judgment. Voltaire my hero

QUOTE

The Following User Says Thank You to sajidnuml For This Useful Post:

zarmina siraj (Monday, May 30, 2011)

Friday, February 04, 2011 **#2**

Khurshid.A.Mahsud
39th CTP (DMG)

Join Date: Oct 2007
Location: Islamabad
Posts: 310
Thanks: 259
Thanked 389 Times in 233 Posts

Quote:

> Originally Posted by **sajidnuml**
>
> *It is thus evident that the very foundations upon which the decision rested did not exist. I, therefore, think that this Court should make it clear that the validity or otherwise of an existing order can only be determined with reference to the laws of Pakistan and not to any theory of international jurisprudence. It is also necessary to state firmly that the question of existence of a revolution or its success are questions of fact which can only be decided upon evidence, and not assumed. This will remove once for all the temptations that have been placed in the way of an adventurer seizing power illegally and destroying an existing legal order.*

The judges were so wrong on this point. Musharraf ruled us for full 9 years despite of this verdict. This reminds me of Learned Hand : " Liberty lies in the hearts of men and women.When it dies there, no court, no law , no constitution can save it."

Last edited by Silent.Volcano; Friday, February 04, 2011 at 02:55 AM.

QUOTE

Friday, February 04, 2011 **#3**

sajidnuml
41st CTP (PAAS)

Join Date: Jun 2010
Location: Nawabshah
Posts: 392
Thanks: 212
Thanked 324 Times in 189 Posts

Quote:

> Originally Posted by **Khurshid.A.Mahsud**

> *The judges were so wrong on this point. Musharraf ruled us for full 9 years despite of this verdict. This reminds me of Learned Hand : " Liberty lies in the hearts of men and women.When it dies there, no court, no law , no constitution can save it."*

yes, Khursheed You are right no law or Constitution can free men or women unless they wish so.

but with obedience to law comes liberty i have read somewhere. but laws can be bad stifling the liberty of masses says Aristotle. where should we go. the people here are demanding revolution following your quoted words.

I am confused reading conflicting quotes, ideas

_____
Prejudice is an opinion without judgment. Voltaire my hero

Last edited by Silent.Volcano; Friday, February 04, 2011 at 02:55 AM.

QUOTE

Friday, February 04, 2011 **#4**

Khurshid.A.Mahsud
39th CTP (DMG)

Join Date: Oct 2007
Location: Islamabad
Posts: 310
Thanks: 259
Thanked 389 Times in 233 Posts

Quote:

> Originally Posted by **sajidnuml**
> *yes, Khursheed You are right no law or Constitution can free men or women unless they wish so.*
>
> *but with obedience to law comes liberty i have read somewhere. but laws can be bad stifling the liberty of masses says Aristotle. where should we go. the people here are demanding revolution following your quoted words.*
>
> *I am confused reading conflicting quotes, ideas*

Good Laws and liberty complement each other. With regard to peoples demanding revolution in Pakistan, i would just say that they would get disappointed. Revolution occurs in closed and rigid system unlike ours where everyone is talking of revolution on Tv, in newspapers, in public places etc. It may sound strange but this very fact reaffirms my belief that revolution may never visit Pakistan: when you have so much free space available to express your dissatisfaction against the system you dont need revolution.. Ours is a very flexible system. It is certainly not like Egypt's rigid dictatorship.

QUOTE

The Following 2 Users Say Thank You to Khurshid.A.Mahsud For This Useful Post:

7asif (Thursday, December 22, 2016), sajidnuml (Friday, February 04, 2011)

Friday, February 04, 2011 **#5**

rqabutt
Junior Member

Join Date: Jul 2010
Posts: 15
Thanks: 1
Thanked 0 Times in 0 Posts

pls tel me asma jilani's case in some words.I dnt have much time to read the whole, Benazir,Dosso n Asma Case,these r very long here but i have very short time

QUOTE

Saturday, November 11, 2017 **#6**

Mishaaal
Junior Member

Join Date: Oct 2017
Posts: 14
Thanks: 0
Thanked 0 Times in 0 Posts

?????

Is this an official document ???

QUOTE

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