LAHORE LEADS UNIVERSITY

Asma Jilani vs Government of Punjab

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Asma Jilani vs Government of Punjab (PLD 1972 SC 139)

1. Introduction

The Asma Jilani case (PLD 1972 SC 139) is a cornerstone of constitutional jurisprudence in Pakistan. Decided by the Supreme Court of Pakistan in 1972, this case fundamentally reshaped the legal understanding of constitutional supremacy, judicial independence, and military intervention in civilian affairs.

It directly challenged the legality of General Yahya Khan's martial law regime (1969–1971), which had suspended the 1962 Constitution and dissolved civil institutions. The case was brought by Ms. Asma Jilani, the daughter of political detainee Malik Ghulam Jilani, against the Government of Punjab.

The Supreme Court's verdict in this case marked a historic shift from judicial acceptance of military coups (as seen in the State v. Dosso case) to a firm reassertion of constitutional supremacy and the rule of law.

2. Background of the Case

2.1 Political Context

- In 1969, widespread political unrest and civil agitation led to the resignation of President Ayub Khan.
- The military once again intervened; General Agha Muhammad Yahya Khan took control as Chief Martial Law Administrator (CMLA).
- He abrogated the 1962 Constitution, dissolved the national and provincial assemblies, and assumed all powers of the state.

2.2 The Detention Issue

- During Yahya Khan's rule, many political activists were detained under martial law regulations.

- One such detainee was Malik Ghulam Jilani, a political leader and outspoken critic of military rule.
- His daughter, Asma Jilani, filed a petition under Article 98 of the 1962 Constitution before the Lahore High Court, challenging her father's detention and questioning the legality of the martial law regime itself.

2.3 Transition to Civil Rule

- By 1971, following Pakistan's military defeat in East Pakistan and the creation of Bangladesh, Yahya Khan's regime collapsed.
- Zulfikar Ali Bhutto took charge as the President and Civilian Chief Martial Law Administrator.
- It was during this transition that the Supreme Court decided to hear the Asma Jilani petition along with another similar case filed by Zarina Gauhar.

3. Issues Before the Court

The Supreme Court considered several critical constitutional questions:

S. No.	Legal Issue	Core Question
1	**Legality of Martial Law**	Was General Yahya Khan's martial law valid under the Constitution?
2	**Doctrine of Necessity**	Could extra-constitutional usurpation of power be justified under the doctrine of necessity?
3	**Detention of Citizens**	Were detentions under Martial Law Regulations constitutionally valid?
4	**Status of a Usurper**	Can a military ruler claim legitimacy by successful control of the state?
5	**Judicial Role**	What is the role of the judiciary in protecting constitutional order during martial rule?

4. Judgment of the Supreme Court

4.1 Bench Composition

The case was heard by a Full Bench of the Supreme Court, led by Chief Justice Hamoodur Rahman, with Justices Yaqub Ali Khan, Anwarul Haq, and others concurring.

4.2 Main Findings

- General Yahya Khan declared a usurper: The Court unanimously held that Yahya Khan had no legal authority to abrogate the Constitution or impose martial law.
- Martial Law declared unconstitutional: The entire system of governance under Yahya Khan was declared illegal and void ab initio (from the beginning).
- Doctrine of Necessity rejected: The Court expressly refused to validate military rule on grounds of necessity, departing from earlier precedents.
- Dosso Case overruled: The 1958 State v. Dosso decision, which had legitimized General Ayub Khan's coup using Hans Kelsen's theory of revolutionary legality, was explicitly overruled.

4.3 Observations by Chief Justice Hamoodur Rahman

- The Chief Justice emphasized that no individual, including a general, can abrogate the Constitution, as it represents the will of the people.
- He observed that military rule destroys constitutional continuity and erodes the sovereignty of the people.
- The Court recognized that previous validation of coups under Kelsen's theory had been misapplied and contrary to Islamic and democratic principles.

5. Legal Principles Established

Principle	Explanation
Supremacy of the Constitution	The Constitution is the highest law; no authority can override or suspend it.
Rule of Law	Every individual and institution, including the military, is subject to the law.
Judicial Independence	Courts are bound to protect the Constitution and strike down unconstitutional acts.
End of Revolutionary Legitimacy	The success of a coup does not grant legal validity; power must flow from law, not force.
Accountability of Usurpers	Those who seize power unconstitutionally are liable as **usurpers**, not lawful rulers.

6. Departure from Previous Doctrine

6.1 The Dosso Precedent (1958)

- In *State v. Dosso (PLD 1958 SC 533)*, the Supreme Court had applied Hans Kelsen's theory of revolutionary legality.
- The Court had ruled that a successful revolution creates its own legality, thus validating General Ayub Khan's martial law.

6.2 Reversal in Asma Jilani

- The 1972 verdict completely reversed this doctrine.
- The Court ruled that legality cannot emerge from force or success but only from constitutional legitimacy.
- This shift restored the concept of constitutional continuity and civilian supremacy.

7. Significance of the Judgment

7.1 Constitutional Supremacy Reaffirmed

- The ruling re-established that the Constitution is the supreme law of the land.
- Military intervention cannot lawfully suspend or replace it.

7.2 Strengthening of Democracy

- The verdict laid the moral and legal foundation for the 1973 Constitution.
- It underscored people's sovereignty and parliamentary supremacy.

7.3 Empowerment of Judiciary

- The judiciary, for the first time, took a firm stand against military rule.
- This judgment inspired later judicial activism and reinforced the doctrine of judicial review.

7.4 Influence on Constitutional Development

- The principles set in this case influenced the drafting of the 1973 Constitution, which strengthened:
    - Fundamental rights,
    - Separation of powers,
    - Parliamentary democracy, and
    - Judicial independence.

7.5 Symbol of Resistance

- The judgment became a symbol of constitutional resistance against dictatorship.
- It inspired future challenges to military regimes, including the Lawyers' Movement (2007).

8. Critical Evaluation

8.1 Timing and Practical Impact

- The verdict was announced after Yahya Khan had already stepped down.
- Therefore, it did not reverse the political consequences of his rule.
- However, it restored constitutional principles for future governance.

8.2 Later Judicial Deviations

- Despite Asma Jilani, later courts revived the Doctrine of Necessity:
  - Begum Nusrat Bhutto Case (1977): Validated General Zia-ul-Haq's takeover.
  - Zafar Ali Shah Case (2000): Validated General Musharraf's coup.
- These deviations weakened the long-term authority of the Asma Jilani precedent.

8.3 Scholarly Opinions

- Justice (R) Dorab Patel termed Asma Jilani "a moral victory, though politically late."
- Legal scholars view it as the first assertion of constitutionalism after decades of judicial submissiveness.
- It shifted the judiciary's role from validation to guardianship of the Constitution.

8.4 Theoretical Implications

- The case undermined Kelsen's revolutionary theory, reasserting the positivist and constitutionalist approach.
- It aligned Pakistani jurisprudence with global democratic norms rejecting extra-constitutional regimes.

9. Legacy and Long-Term Impact

9.1 Influence on 1973 Constitution

- The framers of the 1973 Constitution drew directly from this judgment.
- Emphasized the rule of law, federalism, and judicial oversight.

9.2 Guiding Principle for Future Courts

- Continues to serve as a moral and legal precedent against unconstitutional rule.
- Quoted in numerous later judgments as a symbol of judicial courage.

9.3 Educational and Jurisprudential Importance

- It is now part of constitutional law curricula across Pakistan's universities.
- Serves as a case study in constitutional theory, judicial review, and state legitimacy.

10. Conclusion

The Asma Jilani vs Government of Punjab case represents a watershed moment in Pakistan's legal history. It was the judiciary's first open rejection of military usurpation and the final burial of the Dosso precedent. The Supreme Court's bold stance under Chief Justice Hamoodur Rahman redefined the relationship between the civilian government, military, and judiciary. It declared that no regime, however powerful, can claim legitimacy without constitutional sanction. Although the decision's practical effects were limited by timing, its symbolic and constitutional value remains immense. It reaffirmed that the Constitution, not the gun, is the ultimate source of power in a democratic state. The Asma Jilani judgment thus remains an eternal reminder of judicial duty, rule of law, and the supremacy of the Constitution of Pakistan.

Summary Table: Key Points

Aspect	Details
Case Title	*Asma Jilani vs Government of Punjab*
Citation	PLD 1972 SC 139
Court	Supreme Court of Pakistan
Chief Justice	Hamoodur Rahman
Respondent	Government of Punjab
Main Issue	Legality of Yahya Khan's martial law
Held	Martial law illegal; Yahya Khan a usurper
Doctrines Rejected	Revolutionary Legitimacy and Doctrine of Necessity
Overruled Case	*State v. Dosso* (1958)
Significance	Reaffirmed constitutional supremacy and rule of law