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Topic: **Asma jilani vs Goveronment of Punjab (PLD 1972 sc 139)**

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

Background and Facts of the Case:

The *Asma Jilani v. Federation of Pakistan* case is one of the most important constitutional judgments in the legal history of Pakistan. It was decided by the Supreme Court of Pakistan in 1972, shortly after the fall of General Yahya Khan's military regime and the separation of East Pakistan (Bangladesh). The case dealt with fundamental questions of constitutional law: **the validity of martial law**, **the legitimacy of a military ruler**, and **the status of fundamental rights under an extra-constitutional regime**.

Historical and Political Context:

In March 1969, President Field Marshal Ayub Khan resigned and handed over power to the Commander-in-Chief of the Army, General Yahya Khan. Yahya Khan then imposed martial law throughout Pakistan, abrogated the Constitution of 1962, and assumed absolute authority as the "Chief Martial Law Administrator" and later "President of Pakistan." His regime governed without a constitution, relying on martial law regulations.

During Yahya Khan's rule, several political leaders—including Malik Ghulam Jilani, a senior politician—were detained under martial law orders. His daughter, **Asma Jilani**, filed a petition under Article 98 of the 1962 Constitution (restored after martial law was lifted in 1971) seeking her father's release and challenging the legal validity of Yahya Khan's regime. A similar petition, **Zahur Elahi v. Federation of Pakistan**, was also filed and heard simultaneously.

Core Legal Questions:

The Supreme Court had to consider:

Was General Yahya Khan a lawful ruler of Pakistan?

Was the martial law imposed by him constitutional or valid under any legal doctrine?

Were detentions and actions taken under martial law regulations enforceable?

Could the judiciary review the legality of a regime that had already ceased to exist?

The case thus became a direct test of military authority, constitutional supremacy, and the limits of judicial validation.

Supreme Court's Reasoning and Legal Principles

1. Doctrine of Necessity Revisited:

Before this case, the Supreme Court of Pakistan in *State v. Dosso* (1958) had validated the martial law declared by General Ayub Khan using the **Kelsenian theory of revolutionary legality**, arguing that a successful revolution becomes a new legal order. This doctrine gave legitimacy to unconstitutional takeovers if they were effective.

However, in *Asma Jilani*, the Supreme Court strongly **rejected and overruled the Dosso judgment**. The Court declared that the doctrine of necessity had been misused and misapplied. It held that:

- A successful coup does **not** automatically create a valid legal order.
- The effectiveness of a military regime cannot be used to justify its legality.
- The Constitution is supreme, and no authority—military or civilian—can override it by force.
- This was a monumental shift in constitutional jurisprudence.

2. Yahya Khan Declared an "Usurper":

The Supreme Court held that General Yahya Khan:

- had **no constitutional authority** to take over the government,
- was **not a lawful President**, and
- was an **usurper**, meaning someone who seizes power unlawfully.
- By calling him an usurper, the Court effectively ruled that his martial law was unconstitutional from the very beginning.

3. Martial Law Regulations Declared Void:

Because Yahya Khan's rule was illegal, the martial law regulations issued by him had **no legal force**. As a result:

- Detentions made under such regulations were unlawful.
- Any deprivation of liberty was unconstitutional.
- The Court ordered the immediate release of those detained under invalid martial law orders.

4. Restoration of Fundamental Rights:

The judgment emphasized the protection of fundamental rights and the judiciary's duty to safeguard them. The Court reinforced that:

- No authority may suspend fundamental rights except in accordance with the Constitution.
- The judiciary has the power to review any order that violates personal liberty.

5. Limits on Military Power:

The case firmly established that:

- The military cannot take over the state on its own initiative.
- Any extra-constitutional rule is invalid, regardless of political circumstances.
- The Constitution remains the permanent source of all governmental authority.

Significance, Consequences, and Legacy

1. Restoration of Constitutional Supremacy:

The *Asma Jilani* judgment is widely considered a turning point in Pakistan's constitutional history. The Supreme Court clearly re-asserted that **the Constitution is the supreme law**, and no deviation from it can be justified by necessity, revolution, or military success.

This fundamentally strengthened:

the rule of law,

the separation of powers,

judicial independence.

2. Overruling the Dosso Case:

By overturning the Dosso precedent, the Court prevented the future automatic legitimization of coups. This was a major victory for civilian rule and democratic governance, even though later courts would still struggle with issues of martial law.

3. Protection of Civil Liberties:

The decision reaffirmed that:

- Fundamental rights cannot be suspended by unlawful orders,
- Citizens retain constitutional protections even under political turmoil, and
- Courts must intervene when state power is abused.

4. Impact on Future Constitutional Cases:

Although the *Asma Jilani* judgment was briefly overshadowed by the 1977 martial law of General Zia-ul-Haq (which was validated under a modified version of necessity), it still serves as

a moral and legal benchmark. Later courts and scholars frequently cite it as a defining statement against unconstitutional rule.

5. Legacy in Pakistan's Political and Legal Thought:

The judgment remains one of the strongest judicial statements in Pakistan's history against military rule. It is taught in every law school as a landmark case emphasizing:

- constitutional supremacy,
- illegitimacy of military takeovers,
- judicial courage, and
- the protection of civil liberties.

The decision also shaped debates on:

- the limits of judicial validation of political acts,
- the role of courts during constitutional crises,
- and the proper scope of the doctrine of necessity.

Conclusion:

Asma Jilani v. Federation of Pakistan is a foundational case that redefined constitutional law in Pakistan. By declaring Yahya Khan an usurper, rejecting the doctrine of revolutionary legality, and restoring the supremacy of the Constitution, the Supreme Court delivered one of its most courageous and principled judgments. It remains a guiding light for democratic governance, the rule of law, and judicial independence.