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SUBJECT: CONSTITUTIONAL DEVELOPMENT

TOPIC: ASMA JILANI VS GOVERNMENT OF PUNJAB, CASE LAW

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# Asma Jilani v. Government of Punjab

## 1. Introduction:

- **Case:** *Miss Asma Jilani v. Government of the Punjab* (PLD 1972 SC 139).
- **Court:** Supreme Court of Pakistan.
- **Year:** 1972

## 2. Historical & political background (context that matters)

- In **March–December 1971** Pakistan was under the effective control of **General Agha Muhammad Yahya Khan**, who had assumed power as Chief Martial Law Administrator after President Yahya Khan's takeover in 1969; martial law regulations continued to be used to detain political opponents. The country had just gone through the crisis of 1971 (Eastern Pakistan) and intense political instability.
- Under the emergency/martial-law framework, authorities had issued **Martial Law Regulation No. 78** (and related measures) that authorized detention of persons without the ordinary protections available under the constitution or ordinary criminal law. Many political figures and opponents were detained under those regulations.

## 3. Parties, petitions and procedural posture

- **Petitioner:** Miss Asma Jilani, acting on behalf of her detained father Malik Ghulam Jilani (and associated petitions challenging detention).
- **Respondent(s):** Government of the Punjab (and the Federation/State authorities responsible for the detention).
- **Relief sought:** Writs of habeas corpus / declarations that detention under martial law regulations was invalid and that courts retained jurisdiction to decide the matter. The petitions were moved up to the Supreme Court after earlier proceedings in High Courts.

## 4. Core legal questions before the Court

The Supreme Court framed and answered several interlinked questions:

I. **Was the imposition of martial law by General Yahya Khan constitutionally valid, or was it an illegal usurpation of power?**

II. **Could the doctrine of necessity (or prior precedent like *State v. Dosso* (1958)) be used to validate or legalize the takeover and its actions?**

III. **Were the detentions made under Martial Law Regulation No. 78 lawful, and did the superior courts retain jurisdiction to adjudicate habeas corpus petitions during martial law?**

## 5. Arguments — petitioners and respondents (summarized)

- **Petitioners:** Argued that the Constitution remained the supreme law; martial law regulators were not a lawful source of detention power because the takeover lacked legal foundation; courts must enforce constitutional guarantees (habeas corpus). They insisted a usurpation could not be validated by later acts alone.
- **Respondents / State:** Argued that effective control by the new regime and the political realities meant that the acts of the regime were to be treated as law (invoking doctrines used in prior rulings), and that courts should decline to interfere on the ground of necessity and public order. They relied implicitly on the reasoning of earlier cases that gave legal effect to extra-constitutional change.

## 6. The Court's analysis — step by step (what the justices examined)

The Supreme Court's reasoning is lengthy and careful; here I break it down into the major analytical steps:

### (a) Jurisdiction and justiciability

The Court first considered whether the constitutional courts could exercise jurisdiction over detentions during the emergency. It concluded that constitutional remedies could not be shut

out simply by proclamation; the courts retained competence to examine legality where a fundamental right (personal liberty) was in issue.

**(b) Examination of factual control vs. legal legitimacy**

The Court distinguished **"effective control"** (i.e., who physically runs the state) from **legitimacy** (legal validation under the constitutional scheme). Mere exercise of power does not, without more, make a usurpation lawful. The judges emphasized that the Constitution was supreme and could not be abrogated by force.

**(c) Review of doctrine of necessity and precedent (especially *Dosso*)**

The Court carefully reviewed **State v. Dosso (1958)** — the case that earlier had allowed a takeover to be validated on positivist grounds (Hans Kelsen's theory). The 1972 Court explicitly **disapproved and overruled** that approach as applied in Dosso, rejecting the idea that an extra-constitutional seizure of power could automatically become lawful merely because the new rulers had effective control. The judges held that legal validity cannot be produced by mere force or assertion of necessity where it conflicts with constitutional supremacy.

**(d) Characterization of Yahya Khan's takeover**

After weighing facts and law, the Court characterized General Yahya Khan as a **"usurper"** — someone who had assumed power outside the constitutional framework — and therefore his proclamation and associated martial law measures had **no constitutional effect**. This was a bold legal finding: it labelled the regime not lawful authority but a usurpation.

## 7. The Court's final ruling (clear, decisive points)

- The Supreme Court held that the **detentions under Martial Law Regulation No. 78** were **not legally valid** and that the detained persons were entitled to release or to have the legality of their detention determined according to constitutional standards.
- The Court **declared Yahya Khan's martial law illegal and unconstitutional**, and explicitly **overruled State v. Dosso (1958)** to the extent that Dosso had legitimized military usurpations through legal positivist reasoning.
- The Court reaffirmed the **supremacy of the Constitution**, and stressed that judges must not allow extra-constitutional acts to be treated as lawful merely because they are done by those who temporarily have physical control.

## 8. Legal principles and doctrines established or re-affirmed

From the judgment the following legal principles were either established or strongly emphasized:

- **Supremacy of Constitution:** The constitution is the basic norm; acts inconsistent with it are void.
- **Rejection of automatic legitimation by 'necessity':** The traditional invocation of the doctrine of necessity to validate coups was rejected as an open-ended license. Judges cannot bless usurpations purely on the ground of political expediency.
- **Usurper principle clarified:** A person who seizes power extra-constitutionally is a usurper and does not thereby acquire lawful authority merely through control.
- **Judicial review survives crises:** High courts and the Supreme Court retain a role to review violations of fundamental rights even in extraordinary circumstances unless there is a lawful constitutional suspension.

## 9. Immediate consequences (legal, political, institutional)

- **Short term:** The judgment undermined the legal foundations claimed by the military authorities of that period. It assisted in the process by which civilian rule and constitutional arrangements were restored and provided judicial backing for releasing unlawfully detained persons.
- **Institutional:** The decision marked a dramatic reassertion of judicial independence in Pakistan's post-1971 environment. It constrained doctrinal reliance on positivist jurisprudence used earlier to validate extra-constitutional regimes.

## 10. Longer-term significance and academic commentary

- **Landmark status:** *Asma Jilani* is treated as a landmark constitutional case in Pakistan because it withdrew judicial support for earlier precedents that had effectively legalized coups. The case is seen as a legal turning point and is commonly taught in constitutional law courses.
- **Limitations & critiques:** Some scholars note that while the judgment is morally and legally bold, its practical deterrent value against future coups has been uneven — later decades saw further interventions by military regimes and complex judicial reactions.

The political reality often tests legal pronouncements; nonetheless, the case remains an authoritative declaration of legal principle.

## ❖ Conclusion:

The **Asma Jilani case (1972)** stands as a *milestone in Pakistan's constitutional history*. Through this judgment, the Supreme Court of Pakistan courageously re-established the **supremacy of the Constitution**, declaring that no authority—military or civil—has the right to suspend or destroy it. The Court firmly held that **General Yahya Khan was a usurper** and that his Martial Law was **illegal and unconstitutional**.

By **overruling the earlier decision in State v. Dosso (1958)**, the Court buried the flawed idea that mere possession of power could create legality. It also rejected the misuse of the **doctrine of necessity**, emphasizing that no emergency or political chaos can justify violating constitutional order.

The judgment symbolized a new era of **judicial independence** and moral strength, reminding future rulers that **legitimacy flows from the Constitution, not from the barrel of a gun**. It reinforced the principle that **law and justice must always prevail over force**, and that **the Constitution is the ultimate guardian of the people's rights and freedoms**.