

# The Role of Jurisprudence in Adjudication

Dr Muhammad Munir  
Associate Professor & Chairman, Dept.  
of Law, IIUI

<http://ssrn.com/author=1633078>

# Outline

- What is the Role of Jurisprudence in the legal system in general and adjudication in particular?
- What is the grudge-Nazi informer case?
- *Riggs v Palmer, Re Sigsworth* case
- **Kelson in Pakistani courts ???**
- *Dosso v. State,*
- *Asma Jilani v. The Government of Punjab*

# Facts of the grudge-Nazi informer case: **German Jurisprudence**

- Judgment of 27 July 1945, Oberlandesgericht Bamberg, 5 Juristen-Zeitung
- During the II WW a German soldier insulted Hitler while on vacation at home
- He was reported to the secret police;
- prosecuted and given death penalty but was not executed and sent to the front to die
- He survived the War and his ex-wife was prosecuted for depriving him of his liberty

# Facts of Grudge-Nazi informer case

- Her **defence** was that she had not violated any law as insulting Hitler under the Nazis was a criminal offence
- That Germans had a duty to obey the law
- **Prosecution**: the Nazi's law was not a valid law as it was against **morality** and **natural** law
- Citizens had no duty to obey Nazi's law
- The trial court accepted the prosecution's arguments and convicted the women

# The grudge-Nazi informer case

- The arguments of the defence were based on **positivism** and the those of prosecution were based on **natural law**
- These arguments were not based on the constitution, statutory law, precedent or custom
- These were purely jurisprudential arguments
-

# The place of juris...

- Thus, rules have their limitations,
- Where rules do not help, juris does
- Where rules stop, juris starts
- Thus, juris is used to resolve the most complicated cases in the legal system

# The place of juris...: The US jurisprudence

- *Riggs v Palmer* (1889):
- Francis Palmer made a will that would give most of his estate to his grandson Elmer Palmer, and the rest to his daughters Mrs. Riggs and Mrs. Preston.
- At the age of sixteen, Elmer poisoned Francis to death. Even though he was sent to jail for second degree murder, Elmer received his portion of the estate and Mrs. Riggs and Mrs. Preston sued to recover his share.

# The role of juris ....

- The trial court upheld the will as valid and denied the claims of Mrs. Riggs and Mrs. Preston.
- **Issue:** May the person who has murdered the testator nevertheless inherit according to the provision in the will?
- the Court decided that since no one shall benefit from his own wrongdoing, the murderer will not inherit under the will
- Thus, the decision was based on legal principle

# The role of juris ....: Pakistani jurisprudence

- In *The Chief Settlement Commissioner v. Raja Mohammad Fazil Khan* (PLD 1975 SC 331)
- the defendant had obtained land entitlement certificate from the Settlement Commissioner by fraud.
- When the alleged fraud was detected the defendant argued that his certificate cannot be cancelled by the Commissioner because it has no jurisdiction.
- His view was endorsed by the High Court

# The role of juris in Pakistani

- On appeal the Supreme Court of Pakistan ventured to decide whether a tribunal of special or limited jurisdiction, as distinguished from an ordinary Court of general jurisdiction, had the power to recall, rescind or treat as a nullity, an order obtained from it or any authority by practising fraud.

# Pakistani jurisprudence

- It ruled that “the preponderance of judicial authority is in favour of conceding such a power to every authority, tribunal or Court on the general principle that **fraud vitiates the most solemn proceedings, and no party should be allowed to take advantage of his fraud.**”

# Pakistani jurisprudence

- Other Pakistani cases in which decisions were based on legal principles are:
- *Grindlay's Bank Ltd. v. Murree Brewery Co. Ltd.* P L D 1954 Lah. 745.
- The wording used here are: “no party should be allowed to take advantage of his fraud”.
- It was applied in *Board of Inter & Secondary Education v. Salma Afroze*, P L D 1992 SC 263, at p. 274 D

# Introduction to Kelson: The Grund Norm

- The validity of a legal system
- An inferior norm is validated/authorised by a superior norm which in turn is validated by another superior norm
- The norm that validates all other norms of the legal system is the Grund Norm which is not validated by any norm.

# Introduction to Kelson: The Grund Norm (Basic Rule)

- A bylaw is validated by a Parent Act (statute)
- The statute is validated by the Constitution
- The constitution is validated by the first revolutionary document
- The document is the **Grund Norm** in the legal system
- It validates all other norms of the legal system

# Law regulates its own creation

- The Pure Theory of Law recognizes that a study of the statics of law must be supplemented by a study of its dynamics, the process of its creation. **This necessity exists because the law ... regulates its own creation.**”  
(Kelson, *What is Justice?*)

## *Dosso v. State* PLD 1958 SC 533.

- Chief Justice Munir articulated a theory of radical **positivism** that did not distinguish between legality and legitimacy but which validated any revolution as long as it was successful in replacing the old legal order.

# *Dosso v State*

- He said: “But if the revolution is victorious in the sense that the persons assuming authority 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.” at p. 539.

# *Dosso v State*

- Chief Justice Munir had relied on **positivism** and he could be categorized as a positivist
- These remarks were surprising as he had Just a year earlier strongly supported the fundamental right to freedom of religion guaranteed under Article 18 of the 1956 Constitution, stating that it cannot be taken away by a law.

# Inconsistency of CJ Munir

- He said: "The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of the Constitution to say that a right is fundamental but may be taken away by the law. I am unable to attribute any such intent to the makers of the Constitution who in their anxiety to regulate the lives of the Muslims in Pakistan in accordance with the Holy Qur'an and [the] Sunnah could not possibly have intended to take away from Muslims the right to profess, practice and propagate their religion and to establish, maintain and manage their religious institutions, and who in their conception of the ideal of a free, tolerant and democratic society could not have denied a similar right to the non-Muslim citizens of the State." *Jibendra Kishore Achharyya Chowdhury and 58 others v. Province of East Pakistan*, PLD 1957 SC 9, at p. 41.

# Dissenting opinion of Justice Cornelius

- His dissenting opinion of [Justice Cornelius](#) observed:
- “By the Constitution of 1956, the highest authority of an overriding character, governing all laws and legislation in the country, had been given to the principles which were set out and enumerated as Fundamental Rights in Part II thereof. [No law could be made in contravention of those rights on pain of validity.](#)” at p. 533.

# Pakistani jurisprudence

- In the opinion of Justice Cornelius human rights did not depend on a written guarantee because these were elementary rights that did not disappear only because the legal instrument that had contained them was no longer in force.
- Justice Cornelius had based his arguments on **natural law** and his approach had the advantage that he could continue to rely on human rights, although these had disappeared from the 1956 Constitution.

# *Asma Jilani v. The Govt. of Punjab*

- C J Hamoodur Rahman referred to the Objectives Resolution in his search for a *Grundnorm* for Pakistan.
- Discarded Kelson's theory of revolutionary legality, he observed:
- “In any event, if a *Grundnorm* is necessary for us I do not have to look to the Western legal theorists to discover one. Our own *Grundnorm* 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 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 7<sup>th</sup> of March 1949.

# *Asma Jilani v. The Govt. of Punjab*

- Justice **Sajjad Ahmad** in his opinion seems to have formulated a *Grundnorm* which was **Islamic ideology**.
- For C J Rahman it was the idea of trusteeship
- As a matter of fact trusteeship and Islamic Ideology are the two sides of the same coin.

## *Asma Jilani ...*

- J Sajjad said: “The State of Pakistan was created in perpetuity based on **Islamic ideology** and governed on all the basic norms of that ideology, unless the body politic of Pakistan as a whole, God forbid, is reconstituted on an un-Islamic pattern, which will, of course, mean the destruction of its original concept. **The Objectives Resolution is not just a preface. It embodies the spirit and the fundamental norms of the constitutional concept of Pakistan.**” p. 258.

# *Asma Jilani*

- For J **Yaqub** Ali the basic structure of Pakistan was **democracy**. p. 237.
- Justice **Salahuddin** Ahmed also did not consider Islam to be the basic structure of Pakistan.

# *Darvesh M. Arbey v. Pakistan* (PLD 1980 Lah. 206)

- The 7<sup>th</sup> amendment ousted High Courts jurisdiction with regards to areas where armed forces were called in to act in aid of civil administration
- Was challenged in *Darvesh* case
- The L.H.C. referred to the basic features judgments of the Indian Supreme Court &

# *Darvesh case*

- held that any amendment of the Constitution must be within the broad contours of the Preamble and the Principles of Policy of the Constitution
- They declared Islam, federalism, & democracy as the essential features of the Constitution
- If these features didn't survive, the amendment will be *ultra vires*

# *Nusrat Bhutto v. Chief of the Army Staff*

- The Supreme Court declared the takeover as justified under the doctrine of state necessity & *solus populi est suprema lex*.
- The Court concluded that the General's assumption of power constituted "an extra-constitutional step, but obviously dictated by the highest considerations of state necessity and welfare of the people."

# *Nusrat Bhutto v. Chief of the Army Staff (1977)*

- The new legal order was declared as “a phase of constitutional deviation dictated by **necessity.**”
- The regime was even given the right to amend the Constitution.
- This was **first echoed in *Governor General’s case 1955* PLD (F.C.) 435** in which the Federal Court held, in a 3:2 decision, that the Governor General could legislate and validate laws, retrospectively, under the **doctrine of necessity**
- **Any discussion of Grund Norm for Pakistan was absent in the Nusrat Bhutto case**

# *Wukala Mahaz v the Federation of Pak*

PLD 1998 SC 1263

- It was argued that article 63-A (defection) was void because it violated the **basic structure of the Constitution** and the fundamental right to freedom of speech guaranteed under the constitution
- The SC declined to decide the issue, however, **J Raja Afrasiab Khan upheld the basic structure doctrine in emphatic terms.**

# *Zafar Ali Shah v. General Pervez Musharraf, PLD 2000 SC 869.*

- The Supreme Court, in a unanimous decision extended legitimacy to the military takeover, arguing that the constitution did not provide any solution for the present situation,
- the extra-constitutional army takeover was thereby unavoidable and justified according to the [so called] *doctrine of state necessity* and the [secular] principle of “*solus populi suprema lex.*”
- No amendment shall be made in the salient features of the Constitution.
- Absence of Grund Norm at all

# Salient Features of the Constitution

- Since the *Zafar Ali Shah* case (PLD 2000 SC 869) the Supreme Court has repeatedly declared the following as the **salient features** of the Constitution stating that the Parliament has no power to alter these :
  - 1. **Parliamentary form of government;**
  - 2. **Federating Character of the State;**
  - 3. **Independence of judiciary;**
  - 4. **fundamental rights of people along with Islamic provisions.**

# Will the SC strike down constitutional amendments if they are against the BS?

- In *Nadeem Ahmad v the Federation of Pakistan* (2010) the 19<sup>th</sup> amendment was not struck down even though it rejected some of the recommendations of the Supreme Court,
- the Court considered the final say by the Parliamentary Committee in appointing judges as **violative of the independence of the judiciary.**
- if the Supreme Court is to stay true to its own jurisprudence, it **cannot** strike down constitutional amendments even if they go against the basic structure of the constitution.

# From Grund Norm to Salient Features of the Constitution

- Thus, the Supreme Court relied on ‘Kelson’s Grund Norm’ in 1958 (*Dosso case*)
- **Rejected** it in 1972 (*Asma Jilani case*;
- devising GN for Pakistan in *Asma Jilani case* ??
- Ignored it in later constitutional cases in which it resorted to the ‘**doctrine of necessity** (*Nusrat 1977*)’;

# From Grund Norm to Salient Features of the Constitution

- To the 'Basic structure doctrine ( *Darvesh 1980*)';
- to the doctrine of 'state necessity (*Zafar Ali 2000*);
- 2000 to the present: 'salient features of the Constitution'.
- This is the same as the basic structure
- The Grundnorm's discussion is lost!

*End*

*Thank You*

*Q & A*

<http://ssrn.com/author=1633078>