Case Law on the Illegal Dispossession Act, 2005: the *Methodology* and *Quality* of Reasoning

By

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CONSPECTUS

Pakistan's legal system is modeled on the common law; its lawyers and judges are trained in the tradition. They are familiar to the doctrine of *Stare decisis et non quieta mnovere*[1].The origin of the doctrine is not known; one of its earliest statements is, however, found in Croke's Reports, which, in 1584, stated it as:

> "Wherefore, upon the first argument it was adjudged for the defendant, for they said that those things which have been so often adjudicated ought to rest in peace."[2]

The doctrine is accorded technical significance in the field of jurisprudence, and is more often than not, related to methodology of reasoning. A brief survey of the case law related to the Illegal Dispossession Act, 2005[3] in Pakistan may be used as a random example to examine the adherence to the doctrine by the judicature in Pakistan. Simultaneously, the survey may also help in analyzing the *methodology* and the *quality* of reasoning employed by the judiciary in its judgements to enforce fundamental constitutional rights of people. To contextualize the discussion, it may be advantageous to note that the Constitution of Pakistan defines property[4] and

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[1] to abide by the precedents and not to 'disturb settled points.

[2] The Doctrine of Stare Decisis by Thomas Burns (Cornell University) http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1277&context=historical_theses.

[3] Act No. XI of 2005.

[4] Article 260(1) of the Constitution of Pakistan, 1973.

provides for its protection[5]. The constitutional protection has been translated into civil and criminal legislation to ensure protection of property rights. Despite the constitutional protection, the state of protection of the right to immovable property and its enjoyment are not ideal[6]; the enjoyment of right to property is not only cardinal to the Constitution of Pakistan, 1973 and the rule of law in the country, but has bearing on the human rights as well[7]. In this backdrop, the need for a law to help protect the constitutional right to property was felt acutely at all levels for quite some time[8] and the federal legislature responded to the need by promulgating the Illegal Dispossession Act, 2005, which will be the nub of discussion in this article. To present the material in an organized manner, the law has been explained in part one, which will be followed by conceptual survey of the case law in part two, and finally, following the analysis, the final remarks are stated in part three.

I- THE ILLEGAL DISPOSSESSION ACT, 2005

The systemic point of departure, for the instant article, may be to briefly adumbrate the outline of the Illegal Dispossession Act, 2005, which is a short legislation comprising nine provisions. The recital that forms the preamble reads:

> "Whereas, it is expedient to protect the lawful owners and occupiers of immovable properties from their illegal or forcible dispossession therefrom the property grabbers".

The law applies to the whole of Pakistan[9]. The law provides for a penal remedy by criminalizing the act of illegal dispossession. The procedure vests the Court of Session[10] with power to take cognizance of the offence on a complaint[11] filed to it. Though the matter is criminal in nature, but its control is with the court, and therefore, the power of arrest of accused is linked with direction of the court[12]. The

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[5] Articles 23 and 24 of the Constitution of Pakistan, 1973 specifically provides for protection of property rights and lists them as two important Fundamental Rights. The inclusion of these two provisions in the Fundamental Rights make them justiciable as stated in Article 199 of the Constitution of Pakistan, 1973.

[6] The Guide on Land and Property Rights in Pakistan (2011) by the United Nations Human Settlements Programme. http://www.globalprotectioncluster.org/_assets/files/field_protection_clusters/Pakistan/files/HLP%20AoR/Guide_Land_Property_Rights_2011_EN.pdf.

[7] Karachi: Unholy alliance for mayhem by Human Rights Commission of Pakistan. http://hrcp-web.org/hrcpweb/data/ar14c/6-3%20Housing%20-%202014.pdf.

[8] Eradication of 'Qabza' Group Activities (1993) Report No. 19 of the Law and Justice Commission of Pakistan http://www.ljcp.gov.pk/Menu%20Items/Reports_of_LJCP/02/19.pdf. The Law and Justice Commission of Pakistan had proposed draft of a law to deal with 'Qabza' groups; the draft law was titled as the Eradication of 'Qabza' Group (Activities) Act, 1993.

[9] Section 1(2) of the Illegal Dispossession Act, 2005.

[10] Section 4(1) of the Illegal Dispossession Act, 2005.

[11] ibid

[12] Section 4(3) of the Illegal Dispossession Act, 2005.

investigation of the case is to be carried out by the Police[13]. The law provides for attachment of property[14] and eviction from property[15] (as an interim measure) and delivery of property to owner[16] as reliefs to the aggrieved parties.

II- CASE LAW

One the conceptual side, since the law is penal in its nature, therefore, the first question that comes up before any court is about its applicability. There are two schools of thought about its applicability: one school of thought applies it to all types of cases, whereas the other school of thought opines that it is only applicable against 'property grabbers'. The root of the difference of opinion lies in locating the locus of interpretation that controls the legislation: the first school pegs its opinion in the language of section 3 that criminalizes the act of illegal dispossession, whereas the second school hinges its opinion on the preamble and the intent of the legislature behind the law. Succinctly, section 3 of the law has two clauses that define and provide penalty for the offence: both the clauses use general terms of 'no one' and 'whoever' to import in the generality into the application of the law. On the other hand, the term 'property grabbers' has been used in the preamble of the law and placing the locus of interpretation in the preamble restricts the application of the law to 'property grabbers' only.

As a matter of record, briefly, the first school of thought was followed in the cases of *Rahim Tahir*[17], *Muhammd Akram*[18], *Mumtaz Hussain*[19] *and Shahbuddin*[20]. The second school of thought was followed in *Zahoor Ahmad*[21], *Bashir Ahmad*[22] *and Habibullah*[23]. Different judges have authored the judgements of the first school of thought, whereas, invariably, the judgements of the second school of thought were authored by Justice Asif Saeed Khosa. Interestingly, the two schools of thought co-existed in the Supreme Court of Pakistan for more than five years, until in the latest case of *Gulshan Bibi*[24], the first school of thought has been preferred over the second school of thought. The decision has been reaffirmed in the case of *Shaikh*

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[13] Section 5(1) of the Illegal Dispossession Act, 2005.
[14] Section 6 of the Illegal Dispossession Act, 2005.
[15] Section 7 of the Illegal Dispossession Act, 2005.
[16] Section 8 of the Illegal Dispossession Act, 2005.
[17] PLD 2007 SC 423
[18] 2009 SCMR 1066
[19] 2010 SCMR 1254
[20] PLD 2010 SC 725
[21] PLD 2007 Lah 231
[22] PLD 2010 SC 661
[23] 2012 SCMR 1533
[24] PLD 2016 SC 769

Muhammad Naseem[25]. The common point of the two latest judgements is that both have been authored by Justice Faisal Arab, and have been rendered by five member benches of the Supreme Court.

After highlighting the conceptual and record sides of the interpretation of the law, it will be appropriate to treat thematic issues along with analysis separately:

A- ADHERENCE TO THE DOCTRINE OF STARE DECISIS:

Plain reading of the reported case law evinces that the doctrine of stare decisis is not loyally followed. First and foremost requirement of the doctrine is to discover, by the assistance of law officers, or lawyers, or by taking judicial notice of the judgements, as the case may be, the existence of a decision on the point. This discovery is pivotal to the development of law in common law countries; that is the reason that the law reports are so immaculately maintained, and in the age of information technology, all the possible tools of search are utilized to ensure that no judgement on the point under adjudication is left out of the compass of a judge. The second requirement is to categorize the discovered judgement in the hierarchy of the court system: thus a judgement of a lower court, no matter how sound, will not be binding on a superior court. The survey of the case law shows that cases were cross-referred, but the reasoning of the two schools of thoughts were not distinguished to each other resulting in co-existence of two different schools of thoughts. Likewise, the non-uniformity of interpretative techniques brought about different outcomes, hence minimizing the certainty and increasing the discretion. In *Bashir Ahmad* and *Habibullah* cases, earlier cases of *Rahim Tahir, Muhammad Akram, Mumtaz Hussain* and *Shahbuddin* have not been distinguished.

B- *METHODOLOGY* OF REASONING:

The methodology applied by the judges was not uniform as it transpires from the analysis of the reasoning of the case law. In the first set of cases, the premium has been attached to section 3 of the law, which forms the part of the statute; the second set of cases, focused on the preamble and extra-statutory material like the Report of the Standing Committee on the Law, Justice and Human Rights and

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[25] 2016 SCMR 1931

the Officer Report pertaining to the debate in the National Assembly (the way it happened in the *Zahoor Ahmad* case).

C- *QUALITY* OF REASONING:

The qualitative aspects raised in all the reported cases vary. Justice Asif Saeed Khan Khosa, in 2007, when his Lordship was at the Lahore High Court, in *Zahoor Ahmad* case, took cautious view of the law. He restricted its application to 'property grabbers' only and insisted on antecedent material about the accused before entertaining the complaint related to the law. He, clearly then, wanted to check the abuse of the law. On the other hand, Justice Rehmat Hussain Jafri, in *Mumtaz Hussain* case, dealt with the issue of title of property and the jurisdiction of civil courts in such matters. He also touched upon the aspects of retrospective effect of the law, and apparently, its backdated application was likely to be in conflict with Article 12 of the Constitution of Pakistan that prohibits the retrospective applicability of the criminal laws. Another point that *Mumtaz Hussain* case attended to was the interaction of the Pakistan Penal Code, 1860[26] with the new Illegal Dispossession Act, 2005. He noted that the criminalization of illegal dispossession was not new and such an illegal act was already covered under section 441 of the Pakistan Penal Code, 1860. Likewise, both JJ. Asif Saeed Khan Khosa and Rehmat Hussain Jafri discussed about section 145 of the Criminal Procedure Code, 1898[27], which provides preventive powers to deal with disputed property. All these qualitative points discussed in *Mumtaz Hussain* and *Zahoor Ahmad* do not, at all, get attention in the latest *Gulshan Bibi* and *Shaikh Muhammad Naseem* cases. Barring their numerical strength, the specter of overruling of the *Gulshan Bibi* and *Shaikh Muhammad Naseem* cases cannot be will always be there as the perennial questions relating to co-sharers of property, section 441 of the Pakistan Penal Code, 1860, impact of civil litigation, implications of Aritcle 12 of the Constitution of Pakistan, 1973 and section 145 proceedings under the Code of Criminal Proceedings, 1898 have not been attended to in *Gulshan Bibi* and *Shaikh Muhammad Naseem* cases. Declaring a set of cases as 'good' (as happened in *Gulshan Bibi* case) is not enough. All aspects have to be qualitatively ironed out to make the judgements authoritative.

[26] Act No. XLV of 1860.
[27] Act No. V of 1898.

III- FINAL REMARKS

No legal system is perfect; in order to make it functional, it is imperative to follow it completely. Pakistan's judicature has to apply the doctrine of *stare decisis* in full, and has to instill within its organization and culture, the discipline of applying uniform methodology and qualitative reasoning to make enforcement certain and predictable through authoritative and consistent judgements that will ultimately contribute towards the rule of law, which is, at the end a subset of the constitutionalism in a country.