

# Changing Role And Image Of Judiciary In Pakistan From 1988 To 1999

PhD Thesis

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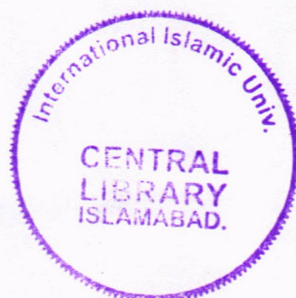
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# CERTIFICATE

This is to certify that the thesis under consideration is an original research study carried out by *Mr. Parvez Ahmed* in fulfillment of the requirement for the Ph.D. I have studied the document and am satisfied with the quality of the work.



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# PREFACE

Judiciary has been an integral part of the societies from the very first day and it is an integral constitutional institution of government. The human beings can live with poverty but cannot live without justice. The system of justice has been present on the earth in one or the other form where we find the historical evidence of society. It is the judicial organ of the state, which restricts the other state organs having arbitrary powers within their legal limits. It also safeguards the basic rights of people, which are necessary for the development of human conscience and society. Our national history is full of political and constitutional upheavals. These upheavals were not resolved politically while the political and constitutional fights were fought in the superior courts. It is natural when politics will enter the premises of court then politicians in power and governments will pressurize the judiciary for achieving their ulterior objectives. The judiciary was really pressurized by different methods; however, judiciary itself did not face the pressures unanimously as an institution. The judiciary had no concern with the politics but had to decide the cases by interpreting the constitution. We examined in this thesis, whether the Judiciary succeeded in this goal of safeguarding the basic human rights, interpreting the constitutional provisions and use of judicial review power as guardian of the constitution. The judiciary's changing role and image has been thoroughly evaluated in this dissertation in light the decisions and interpretations they made.

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Research on sensitive institution like judiciary is a perilous/Hercules' task, particularly when the sword of contempt of court is hanging on the neck. It was the grace and kindness of almighty Allah who gave me courage to leap into deep waters of the subject. There was very little material available in the books on constitutional and judicial history. Most of the authors have hardly written about the role of judiciary.

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# NECESSITY OF REASERCH

None has conducted the research regarding the role played by the judiciary especially on the decisions of political cum constitutional petitions. Most of the writers have stressed in their writings on the constitutional development and political aspects but ignored the role of judiciary. None of the aspect of Pakistan's constitutional history can be complete without uncovering the role played by the judiciary. The history of constitution making is also the history of constitution breaking and dis-figuring of democracy. The sycophant power seekers destroyed the constitutional democracy and its process as well. It is contemptuous that from Governor General Ghulam Muhammad to General Parvez Musharrf, abrogation, suspension, violation and holding in abeyance of constitutions have been an order of the day. The judiciary has to decide the petitions about the above-mentioned actions of presidents and Army chiefs. These decisions left very important effects on Pakistan's political system. The period of 1988 to 1999 is considered very crucial period in our judicial history. The researcher scientifically analyzed the changing role and image of judiciary. Judiciary is the final authority for the interpretation of the constitution and also a guardian of the constitution.

## OBJECTIVES OF REASERCH

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The researcher investigated the judiciary's role during the period mentioned above in the sphere of political developments. The role of judiciary is fixed by the constitution; the researcher has analyzed the role under the constitutional provisions. It is the third vital organ of the state. How it has played its role. The submissive role of the judiciary seriously undermined its image as an independent institution and influenced the political and constitutional system of Pakistan to a great extent.

*Not clearly mentioned the objectives except the Headline*

## USES OF REASERCH

The results/recommendations of this research will help those institutions and persons who are involved in policy making for the country. They can work out plans for the independence of judiciary that is the basic problem, which plagued the judicial and constitutional system of Pakistan. The root cause of judiciary's submissive attitude towards the executive seriously undermined its image. We have made towards the end a number of recommendations and suggestions, which may help the policy makers to make the judicial institution more effective and efficient to deliver justice purely according to the provisions of the constitution. The difficulties and the challenges faced by the constitution and implementing these recommendations in the judiciary can redress constitutional process. (

## REASERCH METHODOLOGY

The researcher has adopted both normative and empirical method which includes the field notes, constitutions, books of constitutional history, official and other primary sources, Law Magazines, research journals, Central statutes (official notifications) of Pakistan, Newspapers and decisions of supreme court and high courts of Pakistan (P L Ds). Pakistan Legal Decisions (P L Ds) were particularly studied for marking out the role and image of judiciary.

*Methodology*  
*not clear*

## ABSTRACT

The objective of this is to examine the role of superior judiciary in Pakistan after 1947. We have mainly focused on the controversial role of the judiciary during the period 1988-1999. It is popularly believed that after the independence Pakistan's judicial system was established closely on the footsteps of the English system. In the early years the judiciary of Pakistan enjoyed independence in deliverance of justice. Afterwards, most of the governments resorted to unconstitutional method to pressurize the judiciary for its ulterior motives. All the three constitutions provided constitutional guarantees to judiciary for independence but the executive's always pressurize it in legal way such as through abuse of power of appointment, parallel hierarchy of courts (Federal Shariat Court, Anti-Terrorists Courts, Military Courts), and amendments in the constitution for curtailing the powers of judiciary. Both democratic and undemocratic regimes used the shameful and blatant methods on the issue of appointments. From 1988 to 1999, five assemblies were dissolved almost on the charges of corruption, inefficiency and were challenged in the Supreme Court. On every occasion, the decision of judiciary was different. Therefore we have focused our analysis on the role of superior judiciary and how its controversial judgments had affected its image. It is important to emphasize that the controversial role of the superior judiciary cannot be examined in isolation from the over all political environment prevailing in the country. Therefore our thesis has been divided into various chapters and each chapter has been used as background to create the necessary link between the past and the present.

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Science vocabulary

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tooth), the code was advanced far beyond tribal custom and recognized no blood feuds, private retribution, or marriage by capture. No one can deny the fact that the law and judiciary are inter-linked and the concept of both cannot be complete or exist without each other. So both the law and judiciary are inseparable facts of life that have existed from the beginning of the human history "Courts do not exist in isolation. Judges are part of the society in which they live." <sup>6</sup> From this, it is quite evident that justice and the implementation of justice is the prime requisite of a peaceful society

Judiciary meant to use the authority and power to uphold what is right, just or lawful.<sup>7</sup> "Courts/ judiciary constitutes an essential element in society's machinery for keeping peace, other wise all social order would be destroyed. It deals with the operation of the judicial branch of government .It explores the some of the fundamental relationships of this branch with legislative and executive branches and analyses the functions, the structure and organization, and finally, the key personnel of courts; the judges. The primary function of any court system in any nation is to help keep domestic peace."<sup>8</sup> A state comes into existence to ensure life; but once in existence, its objective must be to ensure good life for all the citizens. <sup>9</sup> Judiciary as an institution is present from the ancient times of the history. It provides justice to the people according to the laws of the nation. Judiciary is the third organ of the government. "An independent judiciary with power to interpret the constitution and to protect the fundamental rights of the citizens is a common and striking feature of the modern democratic state."<sup>10</sup> The history of the world also stands witness to the fact that judiciary is the heartbeat of a civilized society. As it uses the authority and power to uphold what is right, just or lawful to maintain peace and social order of the society.

It is as much important, as the executive and legislature. It's a decisive test in determining a nation's position in political culture. "Judiciary is the final arbitrator of the constitution and protector of fundamental rights and civil liberties of the citizens. With such a basic role in a constitutional set up, the judiciary's position as an independent institution cannot be over emphasized."<sup>11</sup> Judiciary performs very important functions, which are very essential for the life and happiness of people. It protects the rights and liberties of the citizens from the hands of coercive power of government. No doubt, the system of justice is the foundation of any state. Justice is bound up with the states for

adjudications and the ordering of political society. “Our aim is founding the state was not the disproportionate happiness of any one class, but the greatest happiness of the whole...We should be most likely to find justice....”<sup>12</sup> The judiciary’s role is to provide justice under the law and the constitution, protect human rights, keep the executive in check and ensure that laws enacted by the parliament conforms to the constitution. “There is no better test of the excellence of a government than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen than his senses that he can rely on the certain and prompt administration of justice. But if the law be dishonestly administered, the salt has lost its savour, if it be weakly or fitfully enforced, the guarantees or order fail, it is more by the certainty than by the severity of punishment that offences are repressed. If the lamp of justice goes out in darkness, how great is that darkness.”<sup>13</sup> Around the globe judiciary occupies the place of the third organ of the government who kept accountable to other organ and maintains rule of law for this purpose.

The term “Judiciary” used in the dissertation stands for the provincial high courts and the supreme court of Pakistan excluding the lower courts. Hence the assessment of image of these courts based on the role played by these courts will be examined. “Exercise of a judicial function is but the articulation of the opinion and will of the society.”<sup>14</sup> The role and image of judiciary in Pakistan with reference to constitutional interpretations from 1988 to 1999 is the major issue in this dissertation. Did the judiciary play its role vested by the constitution? The role played by judiciary has been assessed through the measurement of its image. For the better judgment we are defining the terms of “Role” and “Image”.

**ROLE:** The role is the part, character, duty / purpose taken by an actor / person / group or organization in a certain activity and a person’s or thing’s characteristic or expected function.<sup>15</sup> In sociology, role is the behavior expected of an individual who occupies a given social position or status.”<sup>16</sup> In this dissertation, role of judiciary stands for the constitutional duties performed by high courts and Supreme Court of Pakistan.

**IMAGE:** Image is the general opinion about a person, organization; that has been formed in people’s mind.<sup>17</sup> “The character or reputation of a person or thing as generally perceived.”<sup>18</sup> The concept or idea in the mind about something or person.<sup>19</sup> The image of



*Judiciary is but  
there judicial system not  
developed yet*

Judiciary in Pakistan is taken as the public opinion at large and perception of legal and political circles in Pakistan about the role played by the judiciary.

From the first decade, Pakistan has run into frequent, unresolved political crises. These political upheavals unfortunately involved the judiciary of Pakistan that resulted in political disasters according to many observers of Pakistani politics. Political upheavals and individual desires have never been allowed judiciary to establish itself as the custodian of fundamental rights, freedom of citizens, rule of law and the torch bearer of maintaining peace and justice in the country. Issues that could have been resolved by politicians were unfortunately handed over to the judiciary due to number of factors, which have been carefully examined and analyzed in this thesis. We have very carefully examined the role of judiciary and some fundamental questions with regard to the role of judiciary have been examined. The judiciary has been burdened with the task of determining questions, which in a stable constitutional set-up would be left to the politicians, political parties and parliamentarians to resolve. Pakistan politics has also been affected by the constitutional interpretation and constitutional changes made by the judiciary. In other words, the institutions of state were not going with the laws of the country but were finding shelter in the decisions of judiciary. Frequent political and constitutional upheavals in Pakistan like the other developing countries have posed great problems to the judiciary. "The courts in Pakistan have endeavored to safeguard the fundamental rights and freedoms of citizens and to preserve, as far as it lay in their power, the concept of legitimacy of government and the rule of law." <sup>20</sup> No doubt, resolving issues between aggrieved parties and aggressive authorities, which assumed power after overthrowing established governments and dissolving legislatures was Hercules ion's task. Its adjudication was not simple; such upheavals constitute grave challenge to the integrity as well as creativity of judiciary. How the courts have influenced the constitutional structure of the state. Pakistan is executive dominated state; the judiciary in particular has played usually important part in determining the country's political life. Those judicial decisions have been examined with great care that determined the fate of the governments on several occasions. Judiciary's decisions have affected the fundamental rights, the practices of politics and Pakistan's democratic scenario. The role of judiciary becomes important for guarding democracy and

fundamental rights in the absence of well-organized public opinion and strong political checks on the executive. "Paradoxically a judiciary can perform its democratic role only in democratic polity and society. The normative and constitutional framework in which the judiciary operates grows out of the political dynamics of a society. In authoritarian system the independence of judiciary is often limited subject to the whim of the executive."<sup>21</sup> The constitutional institutions could not take strong footings in the new state of Pakistan, thus the Military-Bureaucracy alliance trapped the political system and involved the judiciary in political affairs by getting decision on political matters. "From the country's first decade, Pakistan's judges have tried to match their constitutional ideas and legal language to the exigencies of current politics. Their judgments often supported the government of the day, presumably to retain a degree of future institutional autonomy. This was their chosen path through the 1950s when there was no constitution; during the Martial Law period of the 1960s, when the constitution was a moving target; and under the mixed constitutional rule of Zulfikar Ali Bhutto in the 1970s, when hopes for democracy outweighed its reality.

✓ The judiciary of Pakistan was established on the lines of British judicial system, it had a healthy beginning and the judges earned the reputation of integrity, impartiality and independence. Unfortunately, the unstable and changing regimes pulled the judiciary into political matters for the personal purposes so at times it could not perform its constitutional role, which was vested by the constitution of the state. The administration of justice has always been regarded as one of the great ends of the civilized government. The constitutions of Pakistan 1956, 1962 and 1973 provided the provisions, which ensure an independent judiciary. Its independence was secured by method of appointment of the judges, security of their tenure in the office, and by granting other terms and conditions of service. Satisfactory implementation of these terms enables the judiciary to perform its due role in the society thus inviting public confidence in it. The executive organ tried to control the judiciary through constitutional means such as selection of judges, amendments in the constitution and transfer to Federal Shariat Court. "All citizens are equal before law and are entitled to equal protection of law."<sup>22</sup> The equality before law is certainly provided through the establishment of strong, efficient and independent judicial system. The retiring Chief Justice Nazim Hussain Siddique said in his parting remarks

“that the survival of democracy as well as of the democracy depends solely on the performance of the judiciary, for societies without justice must vanish.”<sup>23</sup> Our leadership unfortunately considered the constitution only a booklet of useless laws so they did every thing in the name of state necessity, a shield provided by the judiciary. Our leadership’s irrational hunger for power inevitably led to corruption, nepotism, favoritism and mal-administration.<sup>24</sup> “Independence of the judiciary truly means that the judges are in a position to render justice in accordance with their oath of office and only in accordance with their own sense of justice without submitting to any kind of pressure or influence.”<sup>25</sup> Judiciary performs a delicate task of interpreting and enforcing the provisions of the constitution and ensures compliance of constitutional provisions by all the organs of state. “A really independent judiciary had eluded Pakistan. Successive governments have tried to manage and manipulate it in their own interests.”<sup>26</sup> During the entire life of Pakistan’s democratic and military rule in which the rulers in Pakistan have occasionally used their power to control the judiciary tempering with the established rules and practices in appointment, transfer of judges, giving undue promotions to certain judges and penalizing others who gave judgments they did not like. Military, bureaucracy, political parties always took steps to pressurize the judiciary and the judges did not resist upholding the independence of judiciary. Thus, judiciary became the part and parcel of the government. The capability of Pakistan judiciary like other third world countries to perform such a free role, however, is made limited due to the authoritarian traditions like the colonial period. The judiciary bore the burden of constitutional and political developments beyond their share and role in the state. The independence of judiciary in Pakistan has been a myth rather than a reality. The perception of submissiveness continues to wreck the image of the judiciary. The judiciary as well as it’s working has been made a cat’s paw. Like the political history of Pakistan the judicial history has also the fate of a puppet. It is a fact that Pakistan has been practically the most undemocratic country even with democratic governments. Similarly judiciary has never succeeded in establishing itself as a constitutional force. Even today, the judicial system of Pakistan has some big question marks on its face.

**The first chapter** is concerned with the evolution of judiciary under the British rule in India. It has been divided into two parts. In the first part it covers the advent of the

English in India and their gradual establishment. The 16<sup>th</sup> century was the century of their fixing strong footing. The 17<sup>th</sup> century proved to be very beneficial for the English. Two events of 18<sup>th</sup> century turned the history of the India they were the battle of Plassy and the grant of Dewany (Revenue Administration) of Bengal, Bihar and Orissa to English by the emperor. After this, the English occupied the whole of India step-by-step by using different means and implemented British system in all fields of administration.

In the second part of the chapter, the journey of judicial reforms from 1772 to 1857 has been traced. The company under took the judicial reforms along with retaining the local judicial system. After that the local judicial system came to an end on the establishment of high courts in 1861. One code of laws was developed for all instead of different codes. The British government continued judicial reforms from time to time and succeeded in anglicizing the judicial system of India and consequently the establishment of Federal court in 1937 under the Indian Act of 1935.

**In second chapter**, the evolution of constitutional development in Pakistan has been discussed. The problems of constitution making, developments in constitution making, political parties role, and the bureaucracy, judiciary and governor general role has been examined. The causes of the failure of constitutions and democracy, the imposition of Martial Law and their role in the separation of East Pakistan have been carefully examined. Zulfaqar Ali Bhutto introduced reforms and implemented the constitution of 1973. With the separation of East Pakistan and the creation of Bangla Desh, Pakistan entered a new phase of constitutional development under the guidance of Zulfaqar Ali Bhutto, a civilian Prime Minister duly elected by the people. Martial Law was imposed as a result of political crisis, which began after the elections of 1977. The third Martial Law remained for nine years in which efforts to implement Islamic system, dictatorial reforms and heavy amendments in the constitution was carried out by Zia, a military dictator for getting desired results. From 1985, the era of parliamentary system begins though the constitutional crises kept in grip the political and constitutional life of the country. The dissolution of National Assemblies and dismissal of governments remained a common occurrence till the 1999 in the hands of presidents under the powers of 58(2) (b) of the constitution. During this period the judiciary remained under stress.

**In chapter three**, pressures on the judiciary through various means have been examined at length. The chapter is concerned about the role played by the different institutions and personalities towards the institutional development of the judiciary in Pakistan. The executive organ of the state used different tactics for seeking the favorable judgments. There were different types of pressures, exerted with wrapping in the silk covered clothes/constitution. The executive organ of the government adopted legal and constitutional means for pressurizing the judiciary. The first and basic pressure on the judiciary began with initiation of process of appointment for judges. The other two pressures for the judiciary were Federal Shariat Court and Amendments in the constitution regarding the judiciary. Provisional Constitutional Order (PCO) was the weapon of undemocratic governments in undermining the judiciary. All pressures exerted on the judiciary legally were for ulterior motives, according to many constitutional experts.

**In chapter four**, the decisions about the dissolution of National Assemblies and dismissal of elected government by the presidents under the power of article 58(2) (b) of the constitution have been discussed. The discussion revolves around the dissolution of National Assemblies that were dissolved from 1988 and ended with another military take over in 1999. Almost, all the Assemblies were dissolved on the same allegations and grounds but the decisions were different in all the petitions. Therefore, in this chapter we have investigated the public image formed as result of controversial decisions taken by the judiciary.

**In chapter five**, the judgments regarding the interpretation of the constitution have been discussed. These interpretations belonged to different aspects of the political system related to the basic rights granted by the constitution-a sacred document of the land. Other decisions were about the political parties act regarding the safeguard of freedom of association, suo moto notice of Supreme Court against Mirza Aslam Beg, the 8<sup>th</sup> amendment case, The Anti Terrorist Act, petitions against 13<sup>th</sup> and 14<sup>th</sup> amendments, the contempt case against prime minister, the military courts establishment and others. This chapter has given us space to examine the role of judiciary as guardian of Pakistan's constitution.

**Chapter six** is an attempt to sum up our finding on the role and image of Pakistan's judiciary. Our conclusion ends with a number of recommendations for improving the image of Pakistan's judiciary, which was badly tarnished during the period under investigation-1988-1999.

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## **CHAPTER: 1**

### **JUDICIARY UNDER BRITISH RULE IN INDIA**

The concept of judiciary is as old as civil society on the earth. India – the oldest living civilization in the world has a very rich history in all the fields of life including judiciary. Dravidian- the local inhabitants of India had established their own system of judiciary. Then Arians adopted that system with slight modifications. There were civil and criminal courts at local level and the Raja was the highest court of appeal. Learned Barhamins advised the judges about the interpretation of Hindu law. Under the punchyat system, cases were decided according to the traditions and customs of Hindu caste system. The punishments were not based on equality and equity but on caste system.<sup>1</sup>

The Arabs stepped in India in 712. A.D.<sup>2</sup> and introduced Qazi system for criminal cases in the areas of their influence while retained the old punchait system for civil cases. The rulers of Sultanate of Delhi introduced the changes in the existing system of judiciary and made it more human. The Qazis were appointed for the deliverance of justice. The Mughals established Islamic judicial system instead of Hindu Punchyat system. The judicial system of Muslim rulers in India was not created purely on the bases of Islamic judicial system though it was the mixture of Islamic, Persian, and local Hindu system. Punchiat system was limited up to the religious matters of Hindu community at local level. The cases were tried and disposed of by Qazis on the provincial and local levels. There was no distinction in criminal cases on religious grounds but the Hindu's civil and religious cases were tried according to the customs and rituals of Hindu caste system with the help of learned Brahmins<sup>3</sup>. The court of appeal against Punchyat decision was Qazi court. The court system was not organized. Jurisdictions and powers were demarcated and the hierarchy not definite.<sup>4</sup>Qazis (Judges) did not depend on the examining of witnesses of both parties; the judges would make his own investigation into the matter before giving judgment.<sup>5</sup> Jurisdiction overlapped because there were no clear territorial limits to the jurisdiction of each court. The highest judicial officer of Mughal state - Qazi

ul quzat (chief justice)- was responsible for the administration of justice. Emperor was the highest court of appeal and fountain of all justice.<sup>6</sup>

After the success of the Renaissance in Europe a revolution came in the field of science and arts. New inventions and discoveries were made. The people of Europe had entered a new era. They wanted to know more about the foreign countries, especially the eastern countries for trade and commerce.<sup>7</sup> Trade had been going on between Europe and Asia for a long time. But after the Turkish occupation and control of the Mediterranean Sea, the European trade was completely at the mercy of the Muslims. Now only two ways were open for the European nations:

- a) Stop the trade with the Asian countries altogether,
- b) Find a new trade route, away from the territorial limits of the Turk Muslims.

At last, a new trade route was discovered to reach Asia for plundering the wealth of this fertile area and also to preach Christianity there.<sup>8</sup>

Many European nations came to India but only the English succeeded in occupying India. They started changing the prevailing judicial system of India and gradually made different amendments to strengthen their rule. Their objective was not to provide justice to the local people but the only motive behind these efforts was to replace the existing judicial system to mould the local people according to their own petty desire of ruling them in the long run. Here the researcher presents an overview of this change in the Indian judicial system under British rule and how it affected the Muslims of the subcontinent of India. Before looking at the salient features of the British judicial system, a brief history and background of the arrival and occupation of the English in the subcontinent of India will be examined in some detail.

### **Arrival of European in Sub-Continent**

Ranjit Singh exclaimed, “Sab Lal Ho Ja-e-ga” (the whole map of India would become red colored).<sup>9</sup> Once Maharaja Ranjit Singh, Sikh ruler of Punjab, saw a map of India in the hands of English officer painted with different colors, he asked the meaning of different colours which were explained that the red colour represents the territories of India which



had passed into the hands of the East India Company. Ranjit Singh abruptly said, “Sab Lal Ho Ja-e-ga”. Hardly after twenty years of his death the whole continent of India had passed into the hands of East India Company. The Europeans came to India through Sea route as a trading nation, and ultimately gave a new turn to the history of this land. Their commercial instinct led them to discover the sea route to India. They had no intention to conquer the country; their objective was to establish commercial relations with India.<sup>10</sup> The geographical discoveries of the last quarter of the fifteenth century deeply affected the commercial relations of different countries of the world and produced far-reaching consequences in the history. At that time, the Mughals did not care to rule the Sea. Resultantly, they failed to save their country due to non-building of a strong navy for the guarding of seacoasts and had paid the penalty for this error.<sup>11</sup>

### **Discovery of Sea Route to India**

Vasco de Gama (Portuguese) found out a new route to India with the help of Arab guides and reached the famous port of Calicut on 20<sup>th</sup> May 1498. The ruler and the people warmly received them. This discovery left long lasting effects on the civilized world. The Portuguese were the first Christian nation of Europe who came to India and acquire political power, and they tried to maintain it by the policy of “Divide et impera” (Divide and Rule) by playing of one state against another on the Malabar coast, where they landed and were warmly received by its rulers and the people.<sup>12</sup> Their arrival and presence did not create much curiosity among the natives. After their establishment to some extent, they prevented the Zamoran (ruler) of Calicut from uniting the several states under his Leadership.<sup>13</sup> He could not foresee the foreign Christian adventurers then sitting at his feet, praying him to grant them permission to trade with India, would uproot his dynasty in near future. The Portuguese began to take part in the political intrigues along with trade after some years of establishment and laid the foundation of Portuguese power in India. They initiated the policy towards establishing a Christian empire in India. It was carried out by all successors. They were the religious fanatics and wanted to impose their religion by force on the people of the country. They were intolerant and rather cruel in their dealings, and therefore not very popular.<sup>14</sup> After them, the English, the Danes, the Dutch and the French came to India for trade. The English succeeded in

establishing their power in India while other nations failed to do so. They adjusted themselves to the environment and circumstances of India “a true mine of Gold”<sup>15</sup> and survived. They succeeded because of unity of English company employees, better position of trade stations, seaports, leadership, support of British government and the occupation of Bengal province where from they got money and soldiers. From the year of establishment to the year 1858 company was authorized to trade with India by charters from the crown. These charters authorized the Governor and company to make laws and orders as were necessary for the good of the company but such laws should not be repugnant to the laws of England. This limited legislative right was the starting point of what became a new legal system in India.

### **Arrival of the East India Company in Sub-continent and its activities**

On December 31, 1600, a group of adventurers of London received a charter from Queen Elizabeth granting it the monopoly of eastern trade for 15 years. The English company, from the very first day of its existence, consisted of adventurers as the directors of the company resolved not to employ any gentleman in any place of charge. The company was formed for the purpose of Sea-trade, and not for any territorial acquisition of foreign country, and was empowered to make maritime emergency regulations. The merchant adventurers attempted to reach India immediately after its establishment for trade. In 1609, they reached the court of Emperor Jehangir and expressed their desire for permission to English for settlement at Surat. They were welcomed by the Emperor but could not obtain any promise due to the resistance by the agents of Portuguese.<sup>16</sup> In 1612, the Portuguese force attacked the English at Surat and was defeated by the English. In 1613, Jahangir sent a farman allowing the establishment of a factory at Surat. The Portuguese then tried to exert the pressure on Emperor for restraining to issuing the farman but in vain. Soon after this success, the King of England sent an ambassador to the Mughal Court in 1615 for concluding a commercial treaty with the Emperor. The ambassador stayed there for three years and succeeded in securing several important privileges for the company but he could not obtain all he asked for. From time to time the British adventurers established many factories or trading stations at various points along the Western Coast, but their activity was not confined to that.<sup>17</sup>

In 1624, on the request of the East India Company, King James I granted the judicial powers to punish civil and military personnel of company in India by martial as well as municipal laws. The Company was empowered to administer justice within their own settlements. So the East India Company got unlimited powers on the fate of their employees. It was the first judicial power that was granted to the company by the King of Britain. The jurisdiction of this judicial power covered the European and British employees of the company.<sup>18</sup> In 1634, the Sultan of Golkunda granted the English a “Golden Farman” in which they were allowed to trade freely in the ports belonging to the kingdom of Golkunda on the payment of duties worth 500 Pagodas a year. In spite of this Golden Farman, the English traders were facing difficulties from the demands of local officers and they continuously looked for the more beneficial place. In 1639, Francis Day obtained the lease of a land from the ruler of Chandragiri, representative of the ruined Vijayanagar Empire, where they laid the foundation of new city “Madaras” and built there a fortified factory, which came to be known as Fort St. George. It was the first fort, which was built on the land of India by the East India Company. Here they became the owners of the land on payment of a small annual sum and were allowed to fortify the place.<sup>19</sup> The English succeeded in building a forte because they provided the money to local ruler for leading luxurious life; in response, the local rulers facilitated the English for maintaining their own false glory. This kind of facilitation for foreigners was due to simplicity or need of the money for luxuries of the rulers.

In 1651, Nawab Shuja of Bengal issued a farman for granting the Company, the custom-duty-free trade in the whole province on annually fixed amount of Rs.3000.<sup>20</sup> The grant of concessions for trade firmly established the English in Bengal. The successor of Sultan Shuja did not consider it binding on them and demanded custom duties similar to other merchants. The restrictions of custom-duty-free trade made the improvement of English trade difficult because all companies had stood on equal footings and the trade markets were equally in the reach of all European companies. So the end of English monopoly on Bengal trade transformed to huge loss. The new charter granted by Cromwell in 1657, gave it fresh opportunities. In the next decades, the Company formed a period of expansion and prosperity. The King Charles (1661) again gained the power and

Cromwell's charter, of course, lost its validity upon the restoration of King Charles. He extended the privileges and powers of the company. "Power was given to the Company to seize and send home interlopers, to wage war and conclude peace with non-Christian princes and to appoint governors, who in conjunction with their councils, were to exercise civil and criminal jurisdiction at the various settlements including non-European, living under the company's jurisdiction."<sup>21</sup> "A peaceful trading body was transformed into a power eager to establish its own position by territorial acquisition, largely in view of the political disorders in the Country."<sup>22</sup> The East India Company took the benefit of the long warfare (Marhatta vs imperial forces and Deacon vs Marhatta forces) in different parts of the Bengal, which weakened the government and encouraged the English company for indulging in internal politics and seeking territorial acquisition. In 1668, Charles II transferred Bombay to the East India Company at an annual rent of ten pounds. He got it from the Portuguese as dowry of his marriage with the princesses of Portuguese. Its transfer paved the way for the expansion of the English rule. The Company was trying to get custom free trade privileges from the first day of its arrival in India, so they succeeded in obtaining a "Farman" from Shaista Khan, Governor of Bengal and Emperor Aurangzeb also verified the same Farman in 1680, that none should take any tax from the Company except the fixed tax. But in spite of these Farmans, the demands of local custom officers continued and their goods were occasionally seized. The local officers seized private goods of company employees because the concession was granted only for the company's trade. The company employees did not differentiate between the personal and company's trade. The Company at last decided to protect themselves by force, for which they thought necessary to have fortified settlements. It happened due to the weaknesses of the local rulers and emperors Concessions. Meanwhile, company established the institutions for administering their settlements. "To complete the organization of the English possessions and especially to check the interlopers who were making such in-roads upon the company's trade, a court of admiralty was created at Bombay in 1684 and another at Madras two years later, both under letters patent obtained from the King in 1683. Further in 1688 a municipality was established at Madras, with a mayor and twelve aldermen, including several Portuguese and Indians -a concession

intended to reconcile the inhabitants to a system of local taxation.”<sup>23</sup> The directors of the company approved the change in Company’s policy to protect their interests by force in 1687 proposed by Aungier-late governor of East India Company. The Directors wrote to Governor at Madras that the establishment of civil and military power needed large revenue to maintain both. It will provide foundation of a large, well grounded; sure English domination in India for all times to come is necessary. In pursuance of this policy, in December 1688, Sir Johan Child blocked Bombay and the Mughal ports on the western coast and pilgrimage traffic to Mecca. Mughal forces retaliated immediately and compelled the company’s forces to flee away. The English had underestimated the force of the Mughal Empire, which was still very strong and could be effectively exercised. Sir Johan at last appealed for pardon to Aurangzeb, who granted it in 1690 on the payment of one and a half lacks of rupees as compensation of losses caused by the Company. The Mughal forces inflicted vigorous military defeat to the English forces but politically the Emperor granted pardon and restored their previous facilities. It shows the inability of ruler who lost the opportunity to crush the English forever. The English request for pardon and Emperor’s acceptance exposed the designs of the company.<sup>24</sup> It is strange that the Indian rulers could not foresee the intention of English. If they had crushed their activities at its initial stage then things would have been different. As compared to the Mughal Emperor, the English took timely decision and changed the policy to protect their interests by submission. So, they secured their interests adopting other ways such as tactics of political intrigues, bribes and they succeeded. In this peaceful atmosphere the East India Company laid the foundation of Calcutta and constructed the fort after six years named as Fort William. This city became the capital of British India until 1911. During this Period Company emerged as a power and succeeded in securing more trade advantages from the emperors and local rulers.

In 1698, the English were granted the Zimandari of three villages of Calcutta and Govandapur on the payment of Rs.1200/- to the previous proprietors. Though the primary purpose was to collect the revenue of these lands, they started holding Zimandari’s courts. As the revenue collection and judicial powers were vested in the same person. These courts had civil and criminal jurisdiction under the indigenous laws, procedures

and Persian language.<sup>25</sup> Meanwhile, in London a bill was passed into law establishing a new company on the lines of a regulated company. Both new and old companies continued their competition in trade but under the public and government pressure, the two companies amalgamated in 1708. The competition of both reduced the ratio of their profit. The expansion of the English Company's trade and influence in India during the first forty years of the 18<sup>th</sup> century was quiet and gradual, in spite of the occasional political disorders of the period, which were not very serious to be overcome. During this period, the company sent an embassy under the charge of John Surman to the Mughal court in 1715 for securing more privileges throughout Mughal India. Hamilton, a surgeon, cured the Emperor Furkh Sayyiar of a painful disease, and the Emperor on his recovery from disease issued three Farmans of concessions accepting their request like the traditions of past Mughal emperors. Their success was partly due to the fact that an English surgeon cured the Emperor of a hateful disease, and partly to the fears of the Delhi government that the British fleet might hold up the Surat trade. The Mughal government had been weak and unable to protect their land. In fact, they were finding shelter in the lap of English company by providing privileges. The position of the Company was finally settled by diplomacy on the conclusion of treaty with emperor, the main clauses of the treaty were that the trade in Bengal was to be free of all dues in consideration of a lump payment of Rs.3000/- per annum, and the existing revenue for the Madras villages and some others was confirmed. The company began the performing of judicial functions in these villages as per tradition of the Mughal government. The same person exercised revenue collection and judicial powers. Freedom from all dues at Surat was compounded for by a payment of Rs.10000/-, while the mint at Bombay was recognized for the coining of rupees.<sup>26</sup> It means the Mughal king himself created a new state within his own state. It was a very sad moment for the Indians when the Emperor approved that the rupees coined by the English company at Bombay was allowed to be used as currency throughout the imperial dominion. This permission had lasting affect because the financial power is always in the hands of government. Though John Surman had not obtained all for which he had asked, he had secured a great deal, and his diplomatic skill stands out as a landmark in the history of the Company's settlement.

“The company was still further recognized as a state within a state, as it could send out ships of war and soldiers, and wage war with non-Christian people and otherwise act in a sovereign capacity.”<sup>27</sup> Due to this Farman, the trade of the Company in Bengal prospered and the English power increased. The Governor of Bengal, Murshad Quli Khan, opposed the grant of additional villages and free trade to Company by the Emperor. At that time the Zamindars in Bengal were collect the revenue, control the administration of justice and inflict the punishments on behalf of the government.<sup>28</sup> He hated the English and continued interference in the company’s trade but could not restrict them due to internal situation of the province and wars with Marhattas. In fact, the company had started to combine commercial pursuits with military and political activities.<sup>29</sup> No doubt he did what he could do with the English to restricting them from his province. The English military expertise had made their space in the courts of local rulers during the declining period of the Mughals because most of the local rulers appointed English expertise to train their army, which created space for English company’s consolidation of power. As a result, the Marhatta and Sikh armies’ emerged very strong. The local rulers had their regular armies but were trained in very typical way and had ordinary weapons.

In 1726, Mayor courts were established in every presidency town for the first time. During this period, the Marhattas-English and Marhattas-Portuguese wars were continued and the English concluded a peace treaty with Marhatta Peshawa in 1739 to avoid the wars. Contrary to appoint English expertist to train their Armymen, The local rulers should have adopted such steps to restrict the foreign interference in their matters. It was the inability of Mughal Emperor who did not crush the local rulers anti state activities. They also developed the excellent terms during these wars both with the Nawab of Carnatic and the Subedar of Deccan in 1757. At that time Bengal lacked any political stability and efficient administration. Conspiracies and chaos were the order of the day and corruption; inefficiency prevailed in every sphere of the state. The English Company created this chaos in Bengal by conspiracies for safeguarding its interests. “It was easier to obtain an imperial Farman than to convince the local officials to obey it, in the disorganized state of the kingdom”<sup>30</sup>. Ali Wardi Khan, who revolted against his master and ascended to the throne of Bengal, proved a capable and strong ruler. But almost his

whole regime was spent in warfare with Marhatta plunders, whose repeated incursions caused countless miseries to the people of Bengal. He concluded a peace treaty with Marhattas in 1751, whereby he agreed to pay them an annual tribute of twelve lacs of rupees as “Chauth” and also ceded to them the revenues of a part of Orissa. “This opened the way for ultimate Marhatta superemacy over Orissa, which could not be done away with by the English till about 1803.”<sup>31</sup> Ali Wardi Khan’s attitude towards the European traders was strict and he tried to control them in the extraordinary circumstances of that time. After concluding the peace treaty with marhattas, he tried to restore the law and order by setting up regular system of administration but could not succeed due to ill health.

### **Battle between the Nawab of Bengal and the East India Company**

#### **(Battle of Plassy)**

Saraj ud Dula, son-in-law was chosen Ali Wardi’s successor but other relatives naturally disliked the arrangement. Nawab selected him because he had no male heir. Shukat Jang and Ghasitu Begum, the widow of Ali Wardi continuously plotted conspiracies against the Nawab to destabilize his rule. In addition to the hostile activities of Rajballabh(ex Diwan) and Shukat Jang, he found himself implicated in a bitter dispute with the English company. Rajballabah supported the Ghasitu Begum because he carried on the business of government on behalf of Begum. The main cause of the dispute was the additional fortification of Calcutta, which the English had recently undertaken. The judicial administration of the factory functions under the powers granted by the charters, under the laws and procedure of England. Both the English and the French had begun to fortify their settlements in anticipation of war with each other.<sup>32</sup> The Nawab on his side pointed out in a plain language that he looked upon the English only as a set of merchants and they were welcome as such, but he disapproved their recent fortification and insisted on their immediate demolition. He also demanded for the surrender of Rajballabh’s family to his government but the English Governor refused to comply. After having no response, the Nawab marched against Calcutta and Fort William surrendered to Nawab after a weak resistance. The capture of Calcutta will always remain memorable in history on



account of the so-called "Black Hole" episode. The Nawab tried to make use of Anglo-French rivalry and seek help from the French but Clive through military skills, bribery and intrigues won the war.<sup>33</sup>

At the same time, the English made requests to Nawab to restore their old privileges of trade in Calcutta. After the fall of Calcutta, the English had begun intrigues with the leading persons of the Nawab government. They won over Manik Chand, the Nawab's officer in charge of Calcutta and Orri Chand, a rich merchant of Calcutta. The Nawab was quite ignorant of the English war preparations and intrigues. Clive marched towards Calcutta, Manik Chand fled to Murshadabad and secretly settled with English and Clive recovered Calcutta without any serious fighting. After this Nawab concluded a treaty of Ali Nagar and accepted all the English demands. It was his U turn to his earlier policy towards the English. Nawab Siraj ud Daula found it extremely difficult to handle the situation he was confronted with. He saw intrigues all around him and ultimately succumbed to the pressure and agreed to sign a treaty with the English, which exposed him as a weak ruler. His fall was now only a matter of time. English was helped by the news of Ahmad Shah Durrani's capture of Delhi which once again forced Siraj ud Dula to hesitate in supporting the French from throwing the English out the province lest he should need British aid in resisting the Ahmad Shah Durrani's expedition. At that time Nawab was ready to wage war on the English with the help of French forces but delayed due to Ahmad Shah Durani's occupation (1757) of Dehli.<sup>34</sup> The French gave him warning of the conspiracy or secret treaty, but even then he failed to act promptly. Knowing that war was imminent, he displayed a lack of decision and energy at this decisive moment. Nawab was the real ruler of Bengal While the nominal rule of Mughal king existed.<sup>35</sup> Ahmad Shah's invasions dealt the final blow to the Mughal empire and the English company started intrigues to hold the trade of Bengal in its hands in these disordering situation. The English conspired with the officers of Nawab and fought the battle for the succession of Mir Jafar as puppet, so that the English could control the affairs of administration from the background. The critical moment of the fate of Bengal reached as planned by the English. The battle broke out in the lands of Plassy where the treachery was on full swing in all ranks of Nawab's army.<sup>36</sup>

The English won the battle and Nawab himself ran away. The commencement of the political supremacy in India of the Christian merchants of England dates from their winning the battle of Plassy in 1757.<sup>37</sup> It paved the way for the conquest of India. After the war of Plassy, Mir Jafar was proclaimed as Subedar of Bengal in 1757. Clive and his colleagues secured large rewards for themselves in addition to the zimindari of the twenty-four Parganas and a large sum for the Company. Clive became the chief patron of the Nawab's kingdom. "The settlement of Bangal affairs took some time, and Clive supported the Hindu Diwan Rai Dulbh, who was distrusted by the Nawab, while Rama Naryan, the Governor of Behar was suspected of flittering with Oudh. As a result of Clive's intervention, Governor of Behar was confirmed on payment of nine lacs of rupees to Mir Jafar."<sup>38</sup> The result of Plassy battle paved the way for the British conquest of Bengal and eventually of the whole of India. In the words of a contemporary observer the East India Company in Bengal behaved like a 'state in the guise of a merchant. The patriotic sons regarded the conspiracy of Mir Jafar and others as the "Great Betrayal" with the native land. If Mir Jafar had loyally fought for the Nawab or for the nation, the English forces might have easily been rooted out from the battlefield of Plassy. The defeat of 1757 definitely established the military supremacy of the English in Bengal. The result of this battle is more important because no battle ever in the world left such a great consequence on the country. Their hated rivals, the French, were ousted and the English obtained large territories for the maintenance of a properly equipped military force.<sup>39</sup> The Company established itself as a single master of land. The English established themselves economically and politically; this was the first step towards the foundation of English rule in India as single master. The Mughal Empire was heading towards the decline after the death of Aurangzab, the English company transformed their role from trading to building up mighty empire for the British people. As a matter of fact, Mir Jafar and his colleagues made the English, the rulers of India. Afterwards Mir Jafar attempted to get rid of the English through a conspiracy with the help of Dutch but failed due to Clive's vigilance. The English replaced Mir Kasim as Nawab of Bengal through a secret treaty. After some time a war broke out at Baxer between the English and Mir Kasim on the payment of transit dues. Mir Kasim lost the war and fled to Patana. There

he formed a confederacy with Nawab Shuja and Emperor Shah Alam II with a view to recovering Bengal from the English. The English defeated the confederacy forces and Shah Alam II immediately joined the English camp, and some time later concluded a treaty with the English. The treaty cleared the path for establishment of British Indian empire.<sup>40</sup> All European colonists had their eyes on this densely populated province of Bengal, extremely rich in natural resources. However, the United Indian forces were defeated by the English forces and the great Mughal King who was taken under siege was obliged to present the Company in 1765 with a license giving them the right among other privileges to collect taxes and maintain an army in Bengal. The year 1765 marked as a turning point in Anglo-Indian history when the emperor Shah Alam II granted the revenue collection and to administer fiscal law for this purpose in Bengal, Bahar and Orrissa.<sup>41</sup> The civil administration was attached with the administration of revenue collection so indirectly the whole administration was transferred to the Company indirectly. Burke called it, "the great act of the constitutional entrance of the company into the body politic of India."<sup>42</sup> So the company became de-facto ruler but the Nawab was a de-jure ruler. The treaty made the Mughal emperor a prisoner of the East India Company.<sup>43</sup>

The English fought many successful wars against their enemies in India and their success was due to joining hands secretly with local influential people, regional rulers and their military commanders. So, they used all this for the interests of the company and then threw them out after gaining objectives. The English used their experience, material sources and Bengali soldiers for the foundation of English Empire in India. After getting financial management (Dewany) the British administrative machinery began their footing slowly for future ruling. The company's indirect ruling in Bengal was for commercial purposes rather than defense.<sup>44</sup> The company was engaged in the game of extending the sphere of influence without the show of its own authority. The English were now unchallenged rulers of Bengal. The company started to grow up in India with commercial privileges and gained complete control of India within a period of two centuries.<sup>45</sup> The company emerged as a single and supreme political power in Bengal. The English strengthened their hold on the government of Bengal by appointing Deputy Subedar of

their own choice for running the state affairs. The appointment of deputy subedar approved by the company marked the virtual end of Independent India particularly the administration of the province of Bengal. After Mir Kasim, Najab-ud-Dula succeeded on throne conditionally by a treaty with the English that the entire management should be left in the hands of Deputy Subedar who would be nominated by the English and could not be dismissed without their consent. Thus the supreme control over the administration passed into the hands of the English, while Nawab remained merely as a figurehead. "For a century and a half the English had been humble petitioners to the Mughal Emperors and their viceroys."<sup>46</sup> But the events of the middle of the Eighteenth century turned the company's position and they exploited the deteriorating situation against their previous patrons. The people and rulers of India were very simple minded, they believed in all the false promises and friendly professions of the English traders. The English always broke their promises and occupied the territories with the help of collaborators. Bengal was never in favour of any European nation. But Clive cheated the simple-minded people as well as rulers and brought it under the direct control of the English without any difficulty.<sup>47</sup>

### **Grant of Dewany(Revenue Collection) and the establishment of Dual system of Government in Bengal**

In 1765, after gaining concession (Allahabad) and before his final departure, the Emperor, by a farman, formally granted the "Dewany" of Bengal, Bahar and Orissa to the East India Company, and also gave it the cities of Benars and Ghazipur. At this time they gained a legal reorganization of the status of the English rule in Bengal, which counted for much even in those days of anarchy and confusion.<sup>48</sup> The Mughal emperor offered the financial management (Dewany) to the English company. The powers of revenue collection and administration of justice were combined; the revenue collecting Zaminidars used judicial authority in their areas. Now these Zaminidars became the agents of the English, which meant the direct control of the English on the judicial administration but according to the native laws and procedure. The great Dewany marked the first great step towards the direct administration of Bengal by the East India Company. The powers of government were divided into Dewani (Revenue) and Nizamat

(Administration). The grant of 'Dewany' by the emperor marked the turning point in the history of India and to administer the fiscal laws for this purpose in Bengal, Behar and Orrissa.<sup>49</sup> But practically, the Company was all in all in all the matters of the province, both in administration and revenue. At that moment, the English colonialism began in India. Now a trader became the ruler of a vast area where Nawab was only a showpiece and a puppet in the hands of the English and the real authority rested with the English.<sup>50</sup> The Nizamat power remained mainly with the Nawab, but he had, by treaty with Emperor Shah Alam II, handed over its exercise to the Company's nominee Naib Nawab (Raza Khan). The Company appointed him as its Deputy Dewan. He was, thus, the Company's deputy for revenue collection and the Nawab's deputy for criminal justice and control of troops. This was a dual system, a government in a double sense.<sup>51</sup> The English Company could instruct Nawab in the usual running of administration and could keep forces for the self-defense. These powers increased the Company's strength to a great extent. As a matter of fact, the king Shah Alam II without any wise thinking dropped the 1/4 of Indian land to the English. The power of Mughal emperor was declining and Emperor Shah Alam II had no option other than grant of Dewany to English company.<sup>52</sup> In theory, the authority of Bengal (under the Emperor) was divided between the Company and Nawab while in practice the administration was in the hands of the Company. The Indian Deputy Dewan was now directly responsible to the East India Company. It was the beginning of the sovereignty of the East India Company in India that ultimately changed in direct rule all over the India.<sup>53</sup> Now the province of Bengal was working under two rulers; one of them was local Nawab and the other was the English Company. The nobles of the lands administered by the British soon became the allies and loyal supporters of the foreign rulers because they were directly responsible for tax collection authorities that were the English.

The English achieved two objectives from the dual system; one was the end of war of sovereignty between the English and Nawab of Bengal. The second objective was to cheat the other European nations under the shadow of local ruler and gaining of self-administration experience for future. "Nor can it be supposed, that either the French, Dutch or Danes will acknowledge the English company as Nawab of Bengal, and pay

into the hands of their servants the duties upon trade, or the quit rents of those districts, which they have for many years possessed by virtue of the royal Farman, or by grants from former Nawabs.”<sup>54</sup> In dual system of government the Nawab was unable to enforce laws and judicial decisions because practically he had no financial powers. It was not possible for Nawab to fulfill the needs of the province in these circumstances because without financial powers his position was just like a tutorial head. The Company hesitated to accept responsibility of administration and Nawab was powerless. So, the whole province was in anarchy and disorder. The Nawab’s workers and the Company’s workers were earning illegal money without fear. The main cause of all evils was the dual system of Bengal. At that time, the Company was unable to take the management of Dewany into its own hands due to the lack of civil servants and their inability to administer the local inhabitants.<sup>55</sup> During the regime of dual government, the province remained under oppression, corruption and distress, which were aggravated by the terrible famine of 1770. Due to horrible famine, “The people went on dying, the family heads sold their cattle, they sold their implements of agriculture, they devoured their seed—grain, they sold their sons and daughters, till at length no buyer of children could be found; they ate the leaves of trees and the grass of the field. In June 1770, the residents at the durbar affirmed that the livings were feeding on the dead. At an early period of the year pestilence and small pox had broken out and the streets were blocked up with promiscuous heaps of the dying and the dead.”<sup>56</sup> Lord Clive’s plan of a double government was gradually breaking down, for with his entire genius as a politician and as a military commander, he had failed to estimate the difference between the details of a government carried on according to the native system.

### **East India Company as ruler of Bengal and the development of judicial system**

The Company’s authorities at home were fully alive to the abuses of the system and in 1772 Warren Hastings was appointed as Governor of Bengal with full powers to reform the administration. “Warren Hastings took over charge of the government of Bengal in 1772. He had to introduce a number of reforming measures to undo the evil of dual system and put the administration of the province on the sound footing.”<sup>57</sup> Hastings abolished the

dual system of government and carried into effect the declared policy of the Company to "Stand forth as a Diwan." He made the Company responsible for almost the entire civil administration of the province. He abolished the posts of the Naib Diwans and removed the treasury to Calcutta. He gave the lease of all lands for five years for the better revenue management and provided courts for civil and criminal justice. Mohammad Raza Khan and Raja Shitab Roy who had been deputy chief of previous administration were terminated on vicious charges of mal-administration but acquitted in trial.<sup>58</sup> To make all kinds of reforms the company ordered him to destroy the whole structure of the double government and the whole plan of reformation was left to his judgment and discretion.<sup>59</sup> Hastings assumed the power of government and took the task to reform the administrative machinery especially the justice system. The administrative machinery of the Company was established for commercial purposes and to adjust it for the administrative purposes was a difficult task. This transition period was very difficult to overcome because the Nawab's government could not provide a solid foundation for the running of new structure. Further, the morale of the Company's Indian servants was very low and a tradition of public service had yet to be building up. "The new government of the Company consisted of a confused heap of undigested material as wild as the chaos itself."<sup>60</sup> The confused wild heap of the company needed a constitution for the running of a government as compared to trading company, which the governor was trying to enforce. Hastings formulated some basic principles towards the close of 1772, and formed the foundation of the mighty structure of the British Indian Judicial administration. The then present judicial system was to build up on the base of Hastings's foundation. In fact, the gradual evolution of the administration of Justice in the period of the English had begun.<sup>61</sup> Before the year 1772, the Indian administration of Justice was closely associated with the management of revenue and the grant of Dewani right in 1765 comprised both of these functions. The English made repeated experiments before a definite system of administration of Justice was evolved. These experiments were closely connected with and may be said to form almost an essential part of those in connection with the land revenue. The English learned Persian, Arabic, Sanskrit and Hindustani (Hindi) in order to understand the social and economic life of Indian people, which would

help them in revenue collection and administering the justice.<sup>62</sup> In any case, both passed through the same process of evolution, and the judicial system at each stage during this experimental period can only be understood with reference to the system of revenue administration. "The company stood forth as Diwan and undertook the collection of revenue by its own agents. In practice it meant the direct control of the whole civil administration for civil justice went with tax collection."<sup>63</sup> It is interesting that the employees of the company government in Bengal had no thought for generosity and justice but only the collection of money and gold was their objective.<sup>64</sup> To avoid the difficult situation, "accordingly civil and criminal courts were established in the districts. The collector presided over the civil courts and merely saw to it that the decisions in the criminal courts were fair. Worn Hastings wanted to introduce some forms and practices of English law without disturbing the existing laws and courts unless grossly repugnant to English Ideas."<sup>65</sup> Before this, in Muslim rule each community enjoyed its own personal law administered according to its customs<sup>66</sup>. For criminal law the Islamic code was enforced on all and administered through Qazi appointed by the Emperor. According to the reforms of Hastings, two kinds of courts were established in each district; the Fajudari adalat with a criminal and the Dewani adalat with a civil jurisdiction. In addition to these, two superior courts were established in Calcutta, viz Sadar Dewani adalat, as court of appeal in civil cases, and Sadar Nizamat adalat for revising and confirming sentences.<sup>67</sup> The Sadar Dewani adalat was presided over by the president and two members of council, who were English. The criminal courts remained in charge of Indian judges according to old customs and precedents, but the collectors and the council exercised some control respectively over the district courts not the Sadar Nizamat adalat.<sup>68</sup> It brought great changes in the administration of justice as the system of revenue administration was separated from system of justice in 1773. For the better ascertaining of the jurisdiction of each court and to prevent confusion and a preservation of justice the matters cognizable by each respectively are declared to be as follows:

**CIVIL:** All disputes concerning property whether real or personal; all cases of inheritance, marriage and caste; all claims of debt, disputed accounts, contracts, partnerships and demands of rent, shall be adjudged by Dewani Adalat.



**CRIMINAL:** All trails of murder, robbery and theft, and all other felonies, forgery, perjury and all sorts of frauds and misdemeanors, assaults, frays, quarrels, adultery, and every other breach of the peace or violent invasions of property, shall be submitted to the Foujdaree Adalat.<sup>69</sup>

“The judges were not paid regular salaries, but they received commission according to the amount of work they did.”<sup>70</sup> In these reforms, the English government separated criminal and civil offences and bound them not to take cognizance of the same subjects and encroach each other’s authority. The system was regular and imposing, but it had two defects: the judges were English. They were both junior as well as ill acquainted with the language of the proceedings. Their expert advisors therefore, often unduly influenced them. Both the new land settlements and a new hope of obtaining justice without fear of executive interference tended to multiply suits. Thus there arose a judicial block which amounted to denial of justice.<sup>71</sup> Hence, the law was for the Hindus and the Muslims, the procedure of the new courts was British, the interpretation of judges was also British. The inexperienced and ignorant of local culture judges created uncertainty.<sup>72</sup> There were two systems (courts) existing side by side. They collected the code of Hindu laws instead of five codes compiled by ten eminent pandits that served as a manual of Hindu law for the new court while Aurangzeb’s digest (Fatawa Alamigiry)) already existed for Muslim law code.<sup>73</sup> The judicial reforms benefited the people of Bengal after the English occupation on the administration. The English endeavored to adapt the local manners, usages, and institutions to combine with the English system of justice. This memorable scheme proved a milestone in the administrative history of India. It established civil and criminal courts in each district, and corresponding courts of appeal in Calcutta- the capital of Bengal and headquarters of the English in India.<sup>74</sup>

### **Regulating Act 1773**

The role of Company was changed after the acquisition of government in Bengal. The British now realized that they had a dominion in India that needed the supervision of government or parliament of Britain. Intervention and supervision of company rule was now inevitable because the ruling of a province was a great responsibility. On the other hand, public opinion in Britain began to view critically the life style of company’s

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servants who came back to Britain with tons of money from India.<sup>75</sup> Company's servants brought their ill-gotten wealth back to England and settled like Lords. So the parliament and public at large criticize the company's tactics inflicted on local Indian rulers. The parliament had to set up different committees to inquire about the administration of Company in India. It is clear that public, press and the parliament were interested to curb the corruption and to get the major benefits for the country. But in all this process the voice of Indian people was absent.<sup>76</sup> Now the Company was becoming a territorial power and some control by parliament was necessary. The politicians and statesmen critically discussed the situation prevailing in India and tried to decide the future of India.<sup>77</sup> Parliament appointed a select committee and a secret committee for ascertaining the facts and giving recommendation for legislation. On the recommendations of these committees, parliament passed the famous "Regulating Act" in 1773. It introduced parliamentary supervision over the Company in India and modified its constitution both in England and in India.<sup>78</sup> It was the first step towards the establishment of British government as ruler over the territories of the English company in India. As regards the administration of justice in India, the main provisions of the regulating act were as following:

Under the Regulating Act, Crown established the Supreme Court of Justice consisting of a chief justice and three judges in India. The establishment of Supreme Court led to nonstop problems as its jurisdiction was not properly defined and it naturally came into conflict with the existing courts of law.<sup>79</sup> Sir Eliych Impey became the Chief Justice of the Supreme Court that had judicial control over all British subjects in the country. But it neither gave the state a definite control over the Company, nor the directors a definite control over their servants, nor the Governor General a definite control over his council, nor the Calcutta presidency a definite control over Madras and Bombay. The act can be mention as confused and mysterious legislation of the period.<sup>80</sup> It followed the English law and procedure of English Courts, which were entirely unknown and mysterious to the people of Bengal. The old local Courts were completely ignored by the judges of the Supreme Court. The English government brought minor changes in 1774 and 1775, so the Amils were appointed: the Indian officers in charge of District Courts and an appeal

lay from their decision to Sadar Dewani adalat in civil cases. A Fojudar was appointed in each district to bring criminals to justice.<sup>81</sup>

### **Nand Kumar Case**

Unfortunately, the year 1775 was troublesome for the well-known Governor General Hastings because he had to face the allegations of receiving bribe. Mr. Nand Kumar, a Barhaman of high rank who had held an important position in the Nawab's government, charged Hastings with taking presents worth many lacs, among them Rs.354105 from Muni Begum, the Widow of Mir Jafar, for placing her control over Nawab's household. But with one stone, Hastings killed three birds; he deprived Mohammad Raza Khan of the Deputy Nawabship of Bengal, disappointed Nand Kumar of the expectations and dissolved the double government in Bengal and brought that province under the direct control of the East India Company.<sup>82</sup> His (Hastings) administrative steps made many enemies as he had killed three birds with one stone with craftiness. Company's council asked him to appear before him and to defend the charges but he refused to meet and defend the charges and face trial before his council. From his negative attitude company's council concluded that the charges against him were true. He was ordered to deposit the money into the company's treasury. "His conduct showed him guilty of the crime charged by Bengali Barhaman. He acted with a high hand and denied the authority of the council to question the integrity of his character." Meanwhile in the month of May 1775, Mohan Parsad charged Nand Kumar with forgery in connection with a will executed five years before in 1770. Hastings laid the matter of will execution before the Supreme Court that was established in 1774. "The alleged crime of forgery (if committed at all) was committed in 1770 but the court came into existence in 1774. So this court could not take cognizance of an offence committed year before its birth."<sup>83</sup> The Supreme Court tried Nand Kumar, found him guilty, sentenced to death, and hanged. There is no doubt that Nand Kumar did not receive a fair trial and there was a "miscarriage of justice" at least in respect of the capital punishment inflicted on him.<sup>84</sup> There is further doubt whether the English law making forgery a capital crime ought to have been considered at this time as applicable to India. The question is very technical and clear. "Chief Justice Impey held that the act under which Nand Kumar was tried and which was passed in 1729, was

extended to India in 1753, and that, therefore, a forgery committed, as his was in 1770, fell under it for which he had the precedent of Govionda Chard Mitra, But Stephen (judge) admits that the rule afterwards universally accepted by the courts was that the English criminal law as it existed in 1726 was what was in force in India at that time, on that reasoning the act of 1729 could not have been applied.” “This chicanery was considered by many a great blot on the character of Warn Hastings.”<sup>85</sup> The jurisdiction of the Supreme Court over the native population was doubtful, and the fact is that the English law making forgery a capital crime was not in operation in India till many years after and Kumar’s alleged forgery had been committed. The foundation of political power of the East India Company was based on the forgery committed by Clive. But that “Heaven born general” was rewarded with peerage for his villainous deed, while the Bengali Bahrahman was hanged for the same offence, assuming that he had committed it.”<sup>86</sup> It is some times said that the execution of Nand Kumar “ was a judicial murder”. It was openly stressed by some at that time that Mohan Parsad-the alleging person was a creature of Hastings, who influenced the judicial decision against the accused (Nand Kumar). “There can be no doubt that the infliction of the death penalty was so excessively severe that it amounted to a miscarriage of justice, and for this at any rate the court, and possibly other persons, may justly be condemned.” Nand Kumar wrote to Clavering (member council) that he was the victim of a conspiracy between the Governor General and the Supreme Court. Further, the judges ignored all the principles of natural justice. Hastings himself had written a few years before in clear words, “ There may be a great degree of injustice in making men liable at once to punishments with which they have been unacquainted, and which their customs and manners have not taught them to associate with their idea of offence.”<sup>87</sup> But it should be noted that Impey was not the only judge who heard the case. There were also his three colleagues and the jury and there is no positive evidence to prove Hasting’s conspiracy with Impey, with whom he was not always on good terms. The conduct of the council members in the case of Nand Kumar seems mysterious. Their conduct may be mysterious due to ethnic sympathies. At this time, “the Supreme Court not only absorbed the powers of the Mayor’s Court, it also

took the place of the Faujdari Court and for the time it left the Sadar Dewani adalat with nothing to do.”<sup>88</sup>

In 1780, the judicial powers of the six provincial Councils were transferred to six courts of Dewani adalat each presided over by a servant of the Company. In 1781 the number of these courts was increased to eighteen and they tried all kind of civil cases. At the same time the duties of Faujdars were transferred to the judges of District Courts. The criminals were tried in the Faujdari adalat under Indian judges, under the ultimate control of headquarter. Justice was dealt out to the highest bidders by the judges, and thieves paid regular revenue to rob with impunity. Hasting filled the country with judges and collectors and they plundered the poor inhabitants with or without pretences.<sup>89</sup> British parliament passed the statute in 1784, defined more clearly the jurisdiction of the Supreme Court, exempting from it the official acts, the Governor General and Council, the Zamindars or farmers, and all matters concerning revenue collection. Hastings again reformed the judiciary maintaining the Indian framework while conforming it to the spirit of British Judicial system and securing even-handed justice between Indian and European.<sup>90</sup>

### **Judicial reforms under Governor General Cornwallis**

During the period of Cornwallis administration, much more important changes were made in all branches of administration, including the judicial system. In 1787, the District Courts were again placed under the collectors. The English collectors vested with the powers of a magistrate could try criminal cases within certain limits. The more important criminal cases were tried before District Criminal Courts and Sadar Nizamat Adalat was the court of appeal. “His (Governor General) Governing idea in the administration of India was to have India, not for Indians but for England.”<sup>91</sup> Most far-reaching changes were made in the administration of justice because the system was at evolutionary stage. The Sadar Nizamat adalat was again transferred from Murshadabad to Calcutta and in the place of a Muhammadan Judge it was presided over by the Governor General and council, assisted by experts in Indian laws.

The judicial reforms of Lord Cornwallis were in many respects open to objection on the changes of existing system. The District Criminal Courts were abolished and their place was taken by four courts of circuit.<sup>92</sup> These courts were presided over by two servants of the Company, assisted by Indian experts and they were to tour through the area of their jurisdiction twice a year. "His so called judicial reforms brought about a state of things to which the gloomiest period of the Pre-British history of Indian does not afford a parallel."<sup>93</sup> Governor General Cornwallis prepared a famous code in 1793, partly by defining the changes already made and partly by introducing new ones accompany in the system which formed the hard base of British Indian administration. "He amended the code of Sir Impay. He published the laws of police and judiciary employees for the guidance and safety of British subjects. The code of law was prepared in combined form and local language. The only defect of these reforms was to neglect the appointment of Indians in judiciary."<sup>94</sup> The changes proceeded on two principles. One of them was the reducing of multifarious duties of the collector, which gave him ultimate authority and made him the sole representative of British authority in a district. Accordingly the collectors were separated from all judicial and magisterial powers, which evolved upon a new class of officers called judges. An unfortunate consequence of Cornwallis's measures was the exclusion of Indians from all higher government posts. Cornwallis had as poor an opinion of Indian probity as a British. His so-called judicial reforms created anarchy in the country and sowed dissensions and mutual jealousies among the natives of India and ground them down to poverty. Cornwallis reduced the people of the country to the position of mowers of weed and drawers of water by excluding them from all high offices of trust and responsibility. Now his predecessors even endeavored to adopt those drastic measures for the exclusion of Indian from the public services of their country.

The four provincial courts of circuit set up in 1790 were re-organized. Each of them now contained three instead of two English judges, and not only served as criminal courts of circuit as before, but also heard appeals from the decisions of the district judges. From them appeals lay in most important cases to the Sadar Dewani Adalat at Calcutta. But in spite of all these reforms, the Indians could not take any advantage for speedy justice. Mill wrote, "They established, by their legislative authority, the very reverse on what

conceivable principles, was speedy and expensive justice good for the government and not good for the people. From which of its imaginary evils was it exempt in the case of the government, and not equally so in the case of the people.”<sup>95</sup> Cornwallis attempted to curb the authority of the collectors still further and to protect Indians from oppression at their hands. The collectors and all the officers of the government were made amenable to the courts for acts done in their official capacities. Even government itself in case of any dispute with its subjects over property had to submit its right to be tried in these courts under the existing laws and regulations. The Company had deprived them of any real power in the administration of justice, over which they (particularly Muslims) had formerly supreme and almost absolute control. He succeeded in establishing the British supremacy in India by demoralizing the Indian people. Neither Clive nor Hastings went to length, which Cornwallis did by excluding permanently, the children of the Indian soil from all high offices of trust and responsibility, not only in the military but also in the civil government of their country.<sup>96</sup> As such, the English continued efforts for Anglicizing the judicial system of justice. A Supreme Court, with similar powers, constitution and jurisdiction, was set up in Madras in 1801 and in Bombay in 1823.

### **Judicial reforms under Governor General Lord Bentick**

Lord Bentick took the charge as Governor General in 1828 and declared that high office was open to all irrespective of race and creed. He appointed Indian judges in the lower courts, gave them wide powers, and better pays. Tylor wrote, “The first reform was applied by the regulation of 1831 to the judicial department in the creation of native judges, and their primary jurisdiction over civil suits. This measure not only relieved the judicial department of a load of work which could never be completed but opened a way to official service which during the last forty years, has been materially enlarged in all departments of the administration.”<sup>97</sup> Lord Bentick abolished the provincial courts of appeal and circuit, which served no useful purpose. It was rather the source of delay in prompt decisions. He also allowed the use of vernaculars in the courts in place of Persian. Probably his future objective may be the enforcement of English as official language in the shadow of permission of local language but he provided relaxation to the natives. He was the first Governor General who acted on the theory that the welfare of the people

should be the principal aim of a ruler. The Modern Review reported, "His great aim was to anglicize and denationalize the natives of India. He did not conceal because he came to believe that the Anglicization of India would be of material advantage to England. With this object among others in view, he tried his best to introduce English as a court language in India."<sup>98</sup> The Bentick's government greatly extended the powers and number of posts of Sadder Amin and created a new post of Principal Sadar Amin. Commissioners were set up in Bengal with a general control over group of Districts and to act as a court of appeal in place of the provincial bodies. He abolished the Cornwallis court of provincial appeals. Powell Price wrote, Thus the foundation of a modern system of administration had been laid down and developed. It had proceeded very much under a system of advance by trial and error but it had advanced. He deserves to be remembered as a great social reformer as he opened the high offices for the Indians. Prof. H.H. Wilson wrote, "By right all the appointments in the public services of India belong to the natives, because they are the children of the soil and also the tax payers."<sup>99</sup>

The charter of 1833 provided base for their consolidation of reforms and codification of laws, and accordingly a law commission was appointed in the year 1834. Macaulay, the leading spirit of the commission, prepared a draft of the Indian penal code but little was done after his departure, and the commission was finally abolished. Before the return of Macaulay to India, two parties had been formed, called the orientalists and the Liberals. Macaulay also took part in the controversy. He presided over the deliberations of two parties and the casting vote of Macaulay as President defeated the contradictory.<sup>100</sup> "The beginning of modern Indian public law appeared in 1833 with the creation of the Indian law commission which in due time (1861) produced the Indian penal code and later the codes of criminal and civil procedure."<sup>101</sup> At this time the Punjab Sikh government of Ranjit Singh had no definite and regular system of judiciary, though the government appointed a judicial officer 'Adalati' in Lahore. The civil disputes were settled by arbitration and by local authorities called Punchyates. The criminal law was unwritten and contained mainly two penalties, fine and mutilation. Ranjit Singh, the ruler of Punjab was the highest court of appeal.<sup>102</sup> Under the Charter of 1853, a new commission was appointment for the planning to create High Courts in India on the lines of British judicial



system and for the compilation of uniform code of law applicable to the whole judicial system irrespective of religion and creed. It submitted plan for the creation of high courts by the amalgamation of the Supreme Court, Sadar Fojudari Adalat and Sadar Dewani Adalat and also for a uniform code of civil and criminal procedure applicable to these High courts and inferior courts of British India. In 1853 the jurisdiction of these courts was limited to (a) British born subjects (b) persons residing within the boundaries of three cities (Bombay, Madras and Calcutta) or having any dwelling house and servants therein and (c) all persons who were directly or indirectly in the service of the Company.<sup>103</sup>

Macaulay wrote, between 1833 and 1853, the British dominion in India had enlarged to such a large extent by means of fraud and force. It was understood that India was not to be governed for the benefit of its inhabitants. India was to be regularly exploited and it's native to be anglicized. Gradually the English implemented judicial reforms and replaced the local institutions with English legal institutions, the Indian civil and criminal procedure codes and the Indian penal code.<sup>104</sup> It affected the Muslims, both in jurisprudence and in judicial employment. The law followed by these courts was the English law of 1726 as subsequently modified expressly with reference to India and the regulations made by the Indian government. But as regards inheritance, succession and contract, Hindu laws and usages were to be applied to the Hindus, and Muslim laws and usages to the Muslims. An appeal lay from the decisions of these courts to the King in Council the statute of 1833 transferred the entire appellate jurisdiction of the King in Council to the newly constituted judicial committee of Privy Council which consisted of the President- the Lord Chancellor and other members including two who held judgeship in the British dominions beyond the sea.<sup>105</sup> The two most notable landmarks in the judicial administration of India viz. the codification of laws and the establishment of High Courts, the foundation of which was laid during the administration of the Company though it completed when India had passed under the Crown. The working of modern Indian public law began in 1833 with the creation of the Indian law commission which in due time (1861) produced the Indian penal code<sup>106</sup> and later the codes of criminal and civil procedure. The idea of systematic code of law in place of varying laws and usages is traceable to an early period of British history. No less than five different codes of statute

law were in force in the British dominion and the position about originality was in confusion. The bodies of learned men from every creed were setup to help the court for interpretations of laws according to their religion and traditions. The Charter of 1853 led to the appointment of a new commission for establishment of high courts and one law code for the high courts. It submitted plans for the creation of High Courts by the amalgamation of the Supreme Court and Sadar Dewani Adalat, Sadar Fajudari Adalat and also for a uniform code of civil and criminal procedure applicable to these High Courts and inferior courts of British India. The purpose of changes in the judicial system was to convert the different codes into the system of English law so that the government could establish Anglicized system and laws.

### **India under direct control of British parliament**

After the war of Independence of India the British parliament decided to takeover the administration of the subcontinent from the Company and therefore, important changes had to be made in the government machinery.<sup>107</sup> “The Indian ‘Mutiny’ of 1857 hardened the imperial resolve to take India at any cost.”<sup>108</sup> The Act of 1858, which embodied these changes, made provision for a council of India and Secretary of State for India. The most powerful trading company of British died its natural death and India came under British parliamentary control. “The first architect of the new civilization in England disappeared completely from the scene.”<sup>109</sup> The government of India under the parliamentary control of British introduced the stamp duty on the judicial cases. This was real irritant for the native Indians who had access to free and rapid justice.<sup>110</sup> They regarded it as price of justice. Under the recommendations of commission appointed in 1853, government introduced important reforms in the judicial system. Their recommendations were accepted and in 1861 the Indian High Courts act authorized the establishment of High Courts in each of the following towns; Calcutta, Bombay and Madras in place of old Supreme Court, Sadar Fajudari Adalat and the Sadar Dewani adalat were abolished after having a age of 90 years.<sup>111</sup> The English had been presenting its requests for concessions for one and half century to the Mughals who had become rulers of the whole country. At the point, they established pure English judicial system.<sup>112</sup> “In 1861 the Indian High Courts act 24 & 25 vic-c.104 authorizes the Queen to establish High Courts of Judicature

at Calcutta, Madras and Bombay and to abolish the Supreme Court.”<sup>113</sup> The judicial reforms were carried out in the amalgamation of the Supreme Court, Queen’s court, Sadar courts and the Company courts, under one Chief Justice.<sup>114</sup> The Islamic system of justice disappeared in 1862 when the penal code and first criminal procedure code came into force. The English company gradually Anglicized the existing Islamic legal and judicial system by implementing the successive laws and regulations.<sup>115</sup> The high court of Bombay had no jurisdiction over the province of Sindh. All the functions of high court were performed by judicial commissioner but the matrimonial cases of European British subjects fell under the jurisdiction of Bombay high court.<sup>116</sup> The Crown was empowered to appoint the Chief Justice and Judges for these High Courts. The appeal against the decisions of high courts was presented before the judicial committee of the Privy Council. The appeal in Privy Council meant the denial of justice because it was out of reach for the ordinary Indians. Perhaps it was provided to give financial benefits to English lawyers because the court was situated in London. Accordingly, the queen exercising her power vested in her majesty by Indian high courts act section 24 and 25 “Vic-c, 104” abolished the supreme court and established high courts at Calcutta, Madras and Bombay. According to this act the composition of the high courts was as follows:

1. One third of the judges of the High Courts were to be recruited from the His Majesty’s Civil Service in India having ten-years experience with three years previous legal experience as a distract judge.
2. One-third of the judges were from among barristers of England or Advocates of Scotland having five-year standing.
3. And the rest might be recruited from among the pleaders of the High Courts or the Officers of the subordinate Judiciary having ten-year experience.
4. The Chief Justice of the High Courts was to be appointed from among the barristers of England or advocates of Scotland.
5. Each of the High Courts was to have a Chief Justice and not more than fifteen judges.<sup>117</sup>

During the absence of Chief Justice of High Court in the office the Governor General in Council in the case of High Court at Calcutta and the local government (Provincial) in other cases, shall appoint one of the other judges of the same High Court, until some person has been appointed by His Majesty or the Chief Justice has returned from his

absence as the case requires. The Governor General in council of Calcutta and the local Governors in other cases may appoint a temporary judge any person with required qualification for the discharge of duties as judge during the absence of a permanent judge. These High Courts were courts of appeal for lower courts. They were also courts of civil appeal for the courts of their territorial jurisdiction. Criminally they had jurisdiction over all which the Supreme Court controlled and had certain powers of appeal and revision. (1) Other powers such as these commented with probate and divorce and the estates of infants and lunatics were given to them. In pursuance of the same policy, a High Court was established in Allahabad and Chief Courts in the Punjab in 1866.<sup>118</sup> “In 1866 a regulation, which was amended in later years, established a Chief Court for the Punjab much on the same lines as the High Courts, though the judges were to be appointed by the Governor General in Council and not as in the case of the High Courts by the Crown.”<sup>119</sup> In 1872 a Court headed by Judicial Commissioner was established in Burma and various improvements were made in 1875. After the extension of British territory in Burma further amendments became necessary and Act VI of 1900 established a Chief Court in Burma.<sup>120</sup> The Indian National Congress came into existence in 1885. After some time of its existence, the Congress mainly concerned itself with criticism of government policy and demands for reforms.<sup>121</sup> Its views were formulated in the shape of resolutions, which were forwarded to the government for their consideration. The congress drew the attention of the government for separation of judicial and executive functions in the administration of criminal justice.<sup>122</sup> In 1911, under the Indian High Courts Act, three High Courts were established at Patana, Lahore and Rangoon. This act enabled the government to establish new High Courts and raise the strength of judges from fifteen to twenty. Due to certain reasons the British government had been reluctant to change the Indian legal system in the beginning as far as to respect the local laws and customs.<sup>123</sup> Now the government was free to reform judiciary, as it liked.

### **Tenure Of Office And Precedence Of Judges Of High Courts**

Judges of the High Courts held their office during the Crown’s pleasure. Any judge could resign from his office at his own will to the provincial governor but in case of Calcutta high court, resignation will be submitted to the governor general in council. The chief

justice of high court and other judges of the high court shall have rank and precedence according to the seniority of their appointment before the other judges of the court and subordinate courts.<sup>124</sup> In the absence of Chief Justice of High Court in the office the Governor General in Council in the case of High Court at Calcutta and the local government (Provincial) in other cases, shall appoint one of the other judges of the same High Court, until some person has been appointed by His Majesty or the Chief Justice has returned from his absence as the case requires.<sup>125</sup>

### **Constitution Of Benches**

Each High Courts may provide its own rules as it thinks fit for the exercise, by one or more judges or by division courts constituted by two or more judges of the High Court of the original and appellate jurisdiction vested in the court. The Chief Justices of each High Court will determine the cases and constitute the several single and division courts.

### **Salaries**

The Secretary of State in Council may fix the salaries, allowances, furloughs, retiring pensions and (where necessary) expenses for equipment and usages, of the Chief Justices and other Judges of the several High Courts and may alter them. But any such alteration shall not affect the salary of any judge appointed before the date of this change. If a judge of a High Court dies during his usage to India or within six months after taking the possession of his office, the Secretary of State shall pay his dues to his legal personal representative, out of the revenue of India, such a sum of money as will. With the amount received by or due to him at the time of his death on account of salary make up the amount of one-year salary and a sum of six-month salary to judge died after taking possession of office.<sup>126</sup>

### **Jurisdiction of High Courts**

All the high Courts have jurisdiction, original and appellate, including admiralty jurisdiction in respect of officers committed on the high seas and all such powers and authority over or in relation to the administration of justice including power to appoint clerks and other ministerial officers of the court, and power to make rules for regulating the practice of the court, all such jurisdiction power and authority as are vested in those

courts receptively at the commencement of this act. The high courts have no original jurisdiction in the matters of revenue collection, which were collected by the revenue authorities.<sup>127</sup>

### **Powers of High Courts With Respect to Subordinate Courts**

Each of the High Courts has superintendence over all courts for the time being subject to its appellate jurisdiction. The High Court may do any of the following things as Call for returns; direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction and will make and issue general rules and prescribe forms for regulating the practice and proceeding of such courts. The High Courts have prepared the prescribed forms in which books entries and accounts shall be kept by the officers of any subordinate courts for maintaining court record. It would Settle tables of fees to be allowed to the Sheriff, attorneys and all clerks and officers of courts to obtain uniformity in the province provided that such rules, forms and tables shall not be inconsistent with the previsions of any act for the time being in force.<sup>128</sup>

### **Alteration of Local Limits of Jurisdiction**

The Governor General in Council may, by order, transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, and authorize High Court to exercise all or any portion of its jurisdiction in any part of British India not included within the limits for which the High Court was established, and also to exercise any such jurisdiction in respect of Christian subjects of His Majesty resident in any part of India or outside British India under the foreign jurisdiction act 1890 and the authentic authority of altering the jurisdiction of any High Court would be secretary of state.<sup>129</sup> The Governor General, each Governor and each of the members of their respective executive councils, shall not be subject to the original jurisdiction of any High Court by reason of any thing counseled, ordered or done by any of them in his public capacity only be not liable to arrest or imprisonment in any suit or proceeding except in any offence not being treason or felony. The exemption under this section from liability to arrest and imprisonment shall extend also to the Chief Justices and other judges of the several High Courts. The order in writing of the Governor General in Council for any act shall, in any proceeding, civil or criminal in any high court acting in the exercise of its original

suffice to mention that the period from 1940 to 1947 was critical for both Congress and Muslim League because both the parties took a very divergent stance on the issue of independence, which ultimately culminated in the creation of two independent states in the Subcontinent, namely, India and Pakistan. With the creation of these two states the British rule in India formally came to an end.

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## **CHAPTER: 2**

### **Constitutional Development In Pakistan**

Political activities in Pakistan have been confused from the first day; Politicians spent much of their time and energy on debating non-issues. Politicians failed to focus their attention in the making of a constitution, delayed the task of constitution making because their political energy was diverted to issues, which required serious political commitment. Finally after long wrangling we succeeded in preparing a constitution popularly known as the constitution in 1956. But prior to this the state of Pakistan witnessed many political upheavals, which included dissolution of Kh. Nazamauddin cabinet in 1953, and the constituent assembly was also dissolved in 1954, both actions were taken by Governor General Ghulam Muhammad. The action of dissolution was challenged in the court but Supreme Court justified the dissolution. It was the first decision of the highest court, which plagued the constitutions and our political system. The evolution of constitutional development is still on so our political system till today is not stable. The struggle between democratic ideal and authoritarian has been the dominant characteristic of our political culture since the very inception of Pakistan. In these circumstances, the role of judiciary became very important because it is that institution of the state that is the guardian of the constitution and guarantor of the fundamental rights of the people. It can bring the country on the way of constitutionalism but it could not play its due constitutional role independently. It became the part and parcel of the executive organ of the state rather than the constitutional organ. Actually, the people have lost faith on the constitutionalism and in the judicial system where judges try to match their constitutional ideas to the requirements of corrupt politics. The drama started from 1954 and still continues, thus the role of judiciary is always favorable to the governments under the shadow of law of state necessity. In this chapter we will examine the constitutional evolution and role of judiciary.

Muhammad Ali Jinnah founder of Pakistan categorically stated "The new state would be a modern democratic state with sovereignty resting in the people and the members of the new nation having equal rights of citizen ship, regardless of their religion, cast and

creed.”<sup>1</sup> Pakistan came into existence on 14<sup>th</sup> August 1947 after the division of India into two states, Pakistan and India. At the time of independence Pakistan had no constitution of its own. The Government of India Act 1935 was adopted as an interim constitution just to run the affairs of the state and for the continuity of government. It was an interim arrangement before the framing of constitution. The framing of constitution is always a tremendous task for any nation. Such a task became more difficult since it was intended to accommodate as many points of views as possible in the constitution.<sup>2</sup> The challenges, the Government faced in both parts of Pakistan were of different nature, contrary to other newly independent nations of the world. The geographical position of the country made it more difficult. Due to the differences, the framers of constitution had to face a number of complex issues, which could not be safely omitted.<sup>3</sup> The first constituent assembly began its work with full national enthusiasm but the sudden death of the founder of the state made the task difficult for the constituent assembly to determine the exact character of the constitution.<sup>4</sup> The untimely death of the father of the nation wrecked the concept of new constitution in the minds of people so the members of constituent assembly it is alleged, fell prey to personal benefits rather than to secure the national interest. The delay in constitution making was natural because the binding political forces were not present before the nation. It was a nation of inexperienced political elites who spent most of their time in opposing the British rule in India. Now different problems raised their heads because the persons who could not move up their breath before the father of the nation were emerging as leaders to exploit the differences for personal objectives. The delay in constitution making continued due to the absence of consensus on the basic characters of the constitution. The first significant step towards the framing of the constitution taken by the constituent assembly was, ‘the Objective Resolution’ passed in March 1949, after inhospitable deliberations. The Prime Minister Liaqat Ali Khan called it, “ the most important occasion in the life of this country, the next in importance only to the achievement of independence”.<sup>5</sup> The ‘objective resolution’ provided the basic principles for constitution making such as Sovereignty of God, democracy, freedom, tolerance, equality and social justice as pronounced by Islam shall be fully observed.<sup>6</sup> It also recognized the freedom of religion and fundamental rights for all the citizens. The critical groups within the Muslim league and ulemas raised objections as the opposition while the

only opposition party-Pakistan National Congress“ objected to it on the plea that it mixed up politics with religion and that it would reduce the minority communities to the status of serfs”.<sup>7</sup> S.C. Chattopadhyaya, protested that the objective resolution would make the non-Muslims, “drawer of water and hewers of wood.” Mr Mandal expressed that posterity will curse him for bringing this resolution forward. In response to Mandal, prime minister said, “if we succeeded in building Pakistan on the basis of this resolution, we shall be able to create conditions that posterity instead of cursing me, will bless me.”<sup>8</sup> The objective resolution created intense religious controversies throughout the country that delayed the constitution making due to ulemas demand for complete implementation of Sharia.<sup>9</sup> The basic objective of the creation of Pakistan as claimed by them. Some of the orthodox ulemas criticized the objective resolution on the ground that it laid too great emphasis on the rights of non-Muslims.<sup>10</sup> The Quaid-e-Azam was of the view that “ in any case Pakistan is not going to be a theocratic state to be ruled by priests with divine mission.”<sup>11</sup> “Mualana Shabbir Ahamad Usmani expressed during the debate on the Objective resolution, “Islam had never accepted the view that religion was a private affair between man and his Creator.”<sup>12</sup> Islam is to rise above all geographical, racial, professional and sectarian prejudices and to form a government on the highest principles of humanity, the invigoration and dissemination of which is the real aim.”<sup>13</sup> Sardar Abdur Rab Nishtar, prophesied that the limitations ensured that,” the ruling authority in a Muslim country cannot be a king, it cannot be a dictator.”<sup>14</sup> He referred to the speeches of Quaid-I-Azam in which he declared that our religion govern not only our relations with God, but also our activities in other spheres of life. We have always described it, and rightly describe, “as a complete code of life.”<sup>15</sup> Our religion governs not only our relations with God, but also our activities in other spheres of life. We have always described it, and rightly so, “as a complete code of life. ”Sir Zaffar ulla Khan whose sect was later declared Qadani said,” the proof of pudding is in its eating. We shall ultimately depend upon the common man and the common woman in Pakistan to apply the laws and the principles laid down in our constitution, the character of the nation is going to ultimately decide our fate. The constitution is merely a paper.”<sup>16</sup> Dr. Umer Hyat Malik conceded, “what we are envisaging will be a democracy of a limited form, it might

be called," Theo-democracy". He suggested the name "Islamic democracy" as needed in the modern history.<sup>17</sup>

Not a single Muslim member of the constituent assembly opposed the resolution. After passing the objective resolution in 1949, the constituent assembly set up several committees and sub committees to work out the details of the constitution as laid down in the objective resolution. Basic principles committee was the main committee for deciding the issues of constitution. The interim report submitted by the Basic Principles Committee set up by the Constituent Assembly on 7<sup>th</sup> September 1950, was severely criticized in East Pakistan. "The citizen of Dacca, mostly East Bengalis were rudely shocked when local dailies carried to them the full text of the Basic Principles Committee report with regard to the future constitution of Pakistan. It came from all walks of life, high officials, professionals, teachers, lawyers, students, medical men; police personnel etc. Their first reaction was that of bewilderment."<sup>18</sup> The report was perceived as the most undemocratic and most reactionary,<sup>19</sup> terribly anti Bengali,<sup>20</sup> not having Islamic character. The East Pakistani leaders challenged that their majority was being reduced to minority. That Urdu would be the only national language; it was taken as an ill will of dominance of Punjabis on their majority.<sup>21</sup> Hostility against Punjabis and Urdu speaking had just begun. The Bengali leadership argued that there would be no harm to the solidarity of Pakistan if the Bengali were declared national language along with Urdu.

On the opposition of the people of East Pakistan, Liaqat Ali Khan, acted in democratic way by giving significance to the popular feelings against the report postponed its consideration on November 21, 1950, and invited suggestions from the public by January 1951. Liaqat Ali Khan was assassinated in October 1951. After his assassination, the incomplete task of constitution was taken up by Prime Minister Khawaja Nazimuddin who presented the second draft of Basic Principles Committee to the constituent assembly on December 22, 1952. This report was also criticized in West as well as in East Pakistan due to different reasons. For the running of administration Quaid-e- Azam and Liaqat Ali Khan relied very heavily on the civil servants due to their profound skill. The administration was based on the British pre independence system having an unlimited power without the interference of politician.<sup>22</sup> They did not honor the wishes of nation. The inexperienced ministers had to depend on the civil service for policy making and

execution. The political system could not gain stability in the country due to the powerfulness of the bureaucracy. The clash between civil servants and politicians was obvious. The hold on key positions in the East Pakistan administration by either Punjabis or Urdu speaking civil servants created feelings among the East Pakistanis that East Pakistan is being neglected and treated merely as a "colony of the West Pakistan".<sup>23</sup> A wild storm was raised in the country against the presentation of the second and the final report of Basic Principles Committee in constituent assembly on December 22, 1952.<sup>24</sup> The report geared to an unending controversy regarding the federal structure of constitution, particularly the quantum of representation in federal legislation. It generated bitterness between East and West Pakistan, tantamount to partitioning the country between east and west<sup>25</sup>. On December 28, 1952 all the parties called the report to be "undemocratic and unconstitutional"<sup>26</sup>. This time the report was postponed for indefinite period due to opposition in the Punjab.<sup>27</sup> The "principle of parity" proposed in the report was not acceptable to people of East Pakistan as their numerical majority had been ignored. "It had been done in utter disregard of the social, linguistic, cultural, economic, and climatic divergence, disequilibria population and lack of geographic contiguity between the two wings"<sup>28</sup>

Along with others objections on the report a great criticism aroused on the appointment of Board of ulema to review the central and provincial legislation and to ensure that nothing is against the teaching of the Quran and Sunnah.<sup>29</sup> The political parties considered it supra legislative body over the parliament which made the representative position of the parliament dubious. Daily Nawa-I-Waqat severely protested with other political elements against the 2<sup>nd</sup> draft of Basic Principles Committee and opposed the parity formula on the ground that it would lead to a permanent domination of one province (East Pakistan) over all other provinces of Pakistan. Both the Bengali and Punjabi Politicians widely criticized it and gave opposite views. The Bengali opposed it due to equal representation of West Pakistan and Punjabis opposed the idea due to division of West Pakistan into nine units.<sup>30</sup> The 2<sup>nd</sup> Basic Principles Committee report was known as "Bengal-Punjabi crisis report. In the words of Z.A. Sulehri, the parity proposal diverted the people thinking to provincialism. The real cause of Pakistan movement to establish a Muslim state was undermined and provincialism emerging as the real source of politics in

the new state of Pakistan. Along with the political problems, the Punjabis domination in civil services and military scared the Bengalis. The statement of Bengali leader in the constituent assembly reflected their fear. "It is country which in reality is not one country. We are going to form one nation out of two people."<sup>31</sup> Despite the defects inherent in the report, Khawaja Nazim ud Din congratulate the nation on the document having maximum agreement among various sections of people. He described it as, "The first golden ray of sun which illuminate the sky."<sup>32</sup> The report must be welcomed as a remarkable achievement.

The Basic Principles Committee's second report again received unfavorable situation and again the deliberations of constituent assembly were postponed for an indefinite period like the first report. The constitutional dispute continued, and in the year 1953, religious group in Punjab launched demonstration and propaganda against the Ahmedis/Qadianis sect. Ahrary Party lead the demonstrations and demanded that the Ahmedis community should be declared a religious minority and the civil and military officers belonging to the sect should be dismissed. The chief Minister of Punjab did not take serious note of the emerging storm. It is alleged that Daultana was using the situation for gaining personal benefits, he aspired to replace Nazim ud din or Zaffar ullah at center."<sup>33</sup> But his Machiavellian calculations took a sudden turn and went beyond his control. In the summer of 1952, food shortage was beginning to be felt and the Punjab government attempted to divert the attention of people to Ahmedis issue. "Anyone with the ability to think could see the Ahrars were merely seeking to restore image marred by their outspoken opposition to the Pakistan demand."<sup>34</sup> The central government imposed Martial Law to overcome the situation of law and order. The Prime Minister had sympathy with anti Qadiyani demands but could not concede due to international pressure <sup>35</sup> however Daultana resigned after personal intervention from the Prime Minister who was also the party president.

The politicians, civil and military officers were angry with Prime minister because of his attitude towards the problem of Ahmadi issue. Prompt military action however saved the situation from further deterioration of law and order situation. In worsening situation, the imposition of Martial Law was a message from the military that the Army would not let politicians or religious groups lead the country to anarchy. It was also a message for USA



to deal with the real power holder and the most organized institution in Pakistan.<sup>36</sup> Martial Law was imposed on the pressure of bureaucracy and Army. Khawja Nazim ud Din was enjoying the majority in the parliament but the bureaucratic and military axis had gone against him.<sup>37</sup> The axis had decided to oust the Prime Minister with the help of Governor General. On 17 April 1953, Governor General ordered him and his cabinet to resign but he refused to do so as dictated because he could conceivably turn the table of his enemies having majority in hand. Conspiracy against an elected government was going on full swings in the Military-Bureaucracy, which headed by governor general. The Governor General under the powers of Article 10 of the adopted constitution dismissed the Prime minister and his cabinet. Despite the constitutional luster, he had, in fact, carried out bureaucratic- military coup.<sup>38</sup>

The Basic Principles Committee 2<sup>nd</sup> report had aroused deadlock in the constitution making process. The deadlock was ultimately resolved with the dismissal of Khawaja Nazim ud Din on 16 April 1953 and appointment of Muhammad Ali Bogra as Prime minister who was ambassador in U.S.A. at that time. He was the personal choice of Governor General and had no party affiliation.<sup>39</sup> In October 1953 Muhammad Ali Bogra presented his famous formulae to the constitution assembly, which, according to him, was acceptable to the representatives of east and west wings? The constituent assembly adopted the Muhammad Ali Bogra formula for the representation of both (East and West) wings. This formula is known as Bogra formula. The allocation of seats in the central legislature was as under:<sup>40</sup>

Sr No	Units	Upper House	Lower House	Total
1	East Pakistan	10	165	175
2	Punjab	10	75	85
3	NWFP& Tribal Areas	10	24	34
4	Sindh, Khair Pur, Bahawal Pur, Balochistan	10	19+1+3+2+4+7	36

	including states& Karachi			
		50	300	350

Under the new formula, hope was expressed that there would be no permanent domination by any wing. Bogara formula was acceptable to all to some extent because it solved the very sensitive problem of quantum of representation. The parity was ensured between East and West Pakistan that no controversial issue were likely to be decided without thirty per cent vote of each zone. As explained by Muhammad Ali Bogra, no government could be formed or continue in office at center unless it had thirty percent members of each zone.<sup>41</sup> The critics of the formula pointed out that these proposals increased the provincialism instead of eradicating them.<sup>42</sup> The grant of equal powers to the upper house was also regarded as undemocratic. The problem faced by the constituent makers reflected the feelings of mutual distrust, fear and suspicion between the people of East and West Pakistan. "The feeling had its origin in a number of factors, political, economic, cultural, linguistic and psychological, etc."<sup>43</sup>

The second issue of controversy between East and West Pakistan was the distribution of powers between the federal and provincial governments. Geography and history of the nation describes the conflict between those who favored the maximum autonomy for provinces and those who favored the strong center. This problem was further complicated by the lack of understanding and mutual distrust between politicians of both wings. The demand for maximum provincial autonomy was due to the geographical position prevailing in Pakistan, the power of center should be limited and residuary powers should be vested in the provinces.<sup>44</sup> If there had been geographical contiguity between East and West Pakistan, the principle of decentralization of power might have been the basis of the constitution, but in order to overcome this natural difficulty of distance that separated the two wings, there was no alternate but to provide a strong central government.<sup>45</sup> However this concept of a strong central government found little support from the Bengalis who were in favor of a weak center and strong provincial assemblies. This was powerfully reflected in Awami League's six- point.

Third controversial issue in the constitution making was that of language. The

controversy was that whether Pakistan should have a single state language, Urdu, or two state languages, Urdu and Bengali. The framers of constitution felt the importance of the issue and accepted Bengali as national language with Urdu. Its decision was too late but finally did help in eradicating the complication of the constitution making.

As Quaid-e-Azam was of the view that “without one state language, no nation can remain tied up solidly together and function. Look at the history of countries. Therefore, so far as the state language is concerned, Pakistan’s language shall be Urdu.”<sup>46</sup> But the multi-lingual solution was a painful inevitability in the existing circumstances. (See details in book written by Taroq Rehman and Syed Khawaja Alqma) It was unrealistic and unwise to ignore the demand of the people of East Pakistan because it was the democratic demand of the majority population.<sup>47</sup> The decision strengthened the democratic culture, national unity and country also. The BPC 2<sup>ND</sup> report gave the power of interpretation of laws to Supreme Court instead of board of ulemas contrary to previous recommendations of Basic Principles Committee.<sup>48</sup> Mean while, the provincial elections were held in East Pakistan, united front (Jugto Feont) secured the overwhelming majority in opposition to Muslim League –the ruling party. United Front demanded the resignation of central government and dissolution of constituent assembly that had gone unrepresentative. Muhammad Ali Bogra stated by rejecting the demands, the task of the framing the constitution was entrusted not only to Muslim League but also to all members specifically chosen for this purpose.

In spite of safeguards from Punjabis and Bengalis leadership regarding the Bogra formula, the Prime minister Bogra announced in the National assembly that both wings had accepted these proposals unanimously. On the proposal of prime minister, constituent assembly considered these suggestions and appointed the constitution drafting committee. Government obtained the services of Sir, Ivor, Jennings, an eminent lawyer for drafting the constitution. Governor General Ghulam Muhammad get annoyed by the two laws passed by the constituent assembly and acted in illegal and undemocratic way for dissolving the constituent assembly. He took advantage of the Bengali and Punjabi group rivalry for assembly dissolution. The Governor General dissolved the constituent assembly when the committee was about to complete the draft of constitution even the prime minister had fixed the date of the promulgation of the constitution that was the birthday of Quaid-I-

Azam. The dissolution was the result of curtailing the powers of Governor General.<sup>49</sup> The constituent assembly passed two bills, one repealed (PRODA) Public and representative offices disqualification Act of 1949 and the second bill amended the sections 9,10,10a and 10b adopted as in interim constitution. It was an attempt to restrain arbitrary and undemocratic power for personal motives that offended the Governor General.<sup>50</sup> The palace intrigues were at peak against the democratic system. Once again Governor General invited Mohammad Ali Bogra to form the cabinet but with the inclusion of Commander in chief General Ayub Khan. General Ayub Khan tried to modernize the armed forces and also tried to secure the support of America for this purpose. During this process and as defense minister, he observed the weaknesses of civil government and made the group of three, Governor General, General Ayub Khan and General Iskander Mirza for clearing the future planning. In this cabinet, the real power was in the hands of General Ayub Khan, Sakindar Mirza and sick Ghulam Muhammad. It cleared the way for the involvement of military in politics.<sup>51</sup> General Ayub Khan's inclusion in cabinet was the beginning of the end of the supremacy of civilian over military power. General Ayub himself accepted the contact with Governor General Ghulam Muhammad but he was waiting for the appropriate moment.<sup>52</sup> "Again it was clear that the Governor General had relied on his supporters in the Punjabi group, the civil service and the Army."<sup>53</sup> The daily "Dawn" commented on the situation in a very beautiful manner," there have indeed been times—such as the October night in 1954 when with a General to the right of him and General to the left of him, a half mad governor General imposed upon a captured Prime minister the dissolution of the constituent assembly and the virtual setting up of a semi-dictatorial executive."<sup>54</sup>

Moulvi Tamizuddin Khan, Speaker of the dissolved constituent assembly challenged the order of the Governor General before Sindh Chief court to issue a writ declaring that the Governor general had no power to restrain the constituent assembly from carrying on its functions. He challenged the proclamation of dissolution of constituent assembly as, unconstitutional, illegal, ultra vires, without jurisdiction, inoperative and void, and asked for a writ of mandamus to restrain the Government from interfering with the exercise of functions as the speaker of the assembly and for a writ of suo warranto with a view to determining the validity of certain appointments to Governor General's council of

ministers.<sup>55</sup> The full bench of the Sindh chief court decided unanimously in favor of Moulvi Tamizuddin Khan and allowed his writ petition. In his decision Sindh chief court held that the Indian Independence act did not contain any express provisions for dissolution of the assembly and, therefore, the Governor General had no power of any kind to dissolve the constituent assembly. It was a sovereign body created for a special purpose and it was to function till that purpose was accomplished.<sup>56</sup> The Sindh chief court thus issued quo-warranto to the ministers in the cabinet and writ of mandamus restoring Moulvi Tamizuddin Khan as speaker of the constituent assembly.<sup>57</sup>

The Federal Government filed an appeal before Federal court against the decision of Sindh chief court. The federal court, therefore, set aside the judgment of the Sindh chief court and declared that the Governor General was legally empowered to dissolve it under the Indian Independence Act 1947. It did it on technical grounds namely that the section 223-A of the constitution of India Act as adopted in Pakistan. By virtue of which the Sindh chief court issued the writs in favor of Moulvi Tamizuddin Khan was "not yet a law"<sup>58</sup> because it had not received the assent of the Governor General and, therefore the Sindh Chief court had no power to issue the writs. After this decision, Justice Munir was accused of standing by his friend and fellow Kakezai Governor General in his hour of need and bent the reasoning to justify his act, which was patently, and play ably malafide. On his retirement Justice Munir addressed the Lahore High court bar association on 22<sup>nd</sup> April 1960, "But in the aforesaid litigation the federal court was confronted more than once with situations, unparalleled and unprecedented in the history of the world. The mental anguish caused to the judges by these cases is beyond description and I repeat that no judiciary anywhere in the world had to pass through what may be described as judicial torture."<sup>59</sup> The basic point that is not to be overlooked for a moment in these cases was that a forcibly ejected ministry had come to a court of law for recognition of its right to remain in office and for obtaining from the court process for its restoration and the court had issued enforceable writs against a de facto government. With all your experience and knowledge derived from textbooks and law reports can you recall to your mind anything even reminiscent of any such situation.<sup>60</sup> If the court had upheld the enforceable writs, I am quite sure that there would be chaos in the country and a revolution would have been formally enacted possibly by bloodshed a far more serious situation than that created by

invalidation of a whole legal system which the new assembly promised by the Governor General in his proclamation could have easily validated.<sup>61</sup> "Where the enforcement of law is opposed by the sovereign power the issue becomes political or military which has to be fought out by other means and the courts espousing the cause of one party against the other merely prepare the ground for bloodshed."<sup>62</sup> The stated justification or explanation is hardly convincing. "These appear to be the lame excuses of a guilty mind."<sup>63</sup> It was the duty of chief justice Munir to apply the law and decide correctly regardless of its consequences. The issuance of writ was his duty and not to enforce it. Qudrat ullah Shahab wrote that one of his assistants used to disappear from the office in Karachi without his permission around the days when Tamiz uddin case was being heard by the Federal court in Lahore. When Shahab called for explanations for absence without leave or permission, the man officially submitted his apology and orally stated that he was going on assignment to Lahore<sup>64</sup>, which were required to be kept secret. He used to deliver confidential message in code words from Governor General to chief Justice Munir. Justice Munir remained defensive in his speeches and statements and adopted apologetic attitude about his judgment in Moulvi Tamiz uddin Khan case for the rest of his life.

The Governor General tried to make the constitution by calling the constitutional convention of provincial assemblies, which reflects his bad intention of dissolving the assembly and making of constitution. The verdict of the federal court in Yousif Patel's case put an end to the efforts of Governor General and his so called "cabinet of talents" to make the constitution by an executive order. He called the constitutional convention elected by existing provincial assemblies<sup>65</sup> to make the constitution of Pakistan in place of the constituent assembly that had been dissolved. The constituent convention would exercise all the powers of constituent assembly under the provision of section 8 of the Independence act. The Federal court declared on 10<sup>th</sup> May 1955<sup>66</sup> that the Governor General had the power to summon a new constituent assembly. In pursuance of the advice of the federal court, the Governor General issued orders to set up the constituent assembly that would be elected by provincial assemblies under principle of parity of representation. The party position in 2<sup>nd</sup> assembly was very different from the previous

one.

Party	Seats
Muslim League	26
United Front	16
Awami League	13
Noon Group	03
Pakistan congress	04
Scheduled cast Federation	03
United progressive party	02
Independent Muslims	01
Others	12
Total	80

67

It was interesting that the ruling party Muslim League lost its absolute majority, but it emerged as a big party in West Pakistan. A coalition of the Muslim league and united Front was formed. Ch Muhammad Ali was sworn in as a Prime Minister of coalition government. The first and most prominent achievement of the new cabinet was the establishment of West Pakistan Act passed by the constituent assembly on 30<sup>th</sup> September 1955. The Act abolished the old subdivisions and merged the province into "one unit."<sup>68</sup> The expectations were that the Act would take away provincial jealousy and make the task of constitution making easier.<sup>69</sup> The author of the techniques for integration was a former chief minister of Punjab, Daultana having a political orientation. According to the report of Daultana, the objective would be fulfilled with skillful propagation,<sup>70</sup> but the Army and civil services were in hurry and government ignored the political parties.

Ch. Muhammad Ali being a sincere and devoted Pakistani worked hard and presented a draft constitution to the constituent assembly on January 1956. On March 23, 1956<sup>71</sup> the constitution was implemented after years of independence and the era of constitutional confusion and public frustration came to an end. The constitution provided parliamentary and federal system, unicameral legislature, fundamental rights, and Islamic and democratic system. The elections were promised soon after the promulgation of the constitution but it could not be held till 1958. The 1956 constitution failed and “in reality the main reason was that the military-bureaucratic elite had established its ascendancy over the politicians as a class, and would not let them function.”<sup>72</sup> During the life time of the constitution, all the four Prime ministers headed by coalition ministries, comprising the parties with no common ideological basis could not pay due attention to the problems facing the nation.<sup>73</sup>

On October 7, 1958. President Iskandar Mirza proclaimed Martial Law, abrogated the 1956 constitution. The central and provincial governments were dismissed, National and provincial assemblies were dissolved. All the political parties were declared illegal. General Muhammad Ayub Khan was appointed as chief martial law administrator.<sup>74</sup> Just after twenty days General Muhammad Ayub imposed Martial law and took over as president by sending Mr. Iskandar Mirza abroad. The absence of popular leader of high caliber to control the situation was the greatest misfortunes of Pakistan. Ayub Khan observed the politicians during his stay as C-in-C and consolidated his position in the Army. Both Mirza and Ayub Khan had engineered the coup<sup>75</sup> but it was obvious that the General, not the president, was the main character. “Even before the year 1953, he was planning to assume all powers, but when he took over as defence minister the time was not yet ripe for any such venture,”<sup>76</sup> Where as Mirza intended to use Martial Law to destabilize the political process, and essentially to eliminate those members of opposition who were undermining his authority but Ayub Khan was determined to chart an entirely different course for the nation.<sup>77</sup> On coming to power he dismantled the entire political system. He got rid of Iskandar Mirza because in the eyes of public, he was responsible for most of the intrigues against the democratic process. Ayub knew his nature so he forced him to resign and send in exile with disgrace on 27<sup>th</sup> October 1958. He got the objective; he was planning to assume all powers even before the year 1953. He introduced certain



reforms and had intention not to allow the things to revert to the old ways.<sup>78</sup> The Elective Bodies Disqualifications ordinance (EBDO) was promulgated for the accountability of public representatives and through this ordinance, most of the government opponent politicians were EBDO'd. Thus this law was misused to disqualify the political opponents with bad intention. He declared the condemnation of the 1956 constitution as unworkable, being full of dangerous compromises, with a potential for disintegration of the country.<sup>79</sup>

Ayub Khan Chief Martial Law Administrator promulgated the laws (Continuance in force) order as new legal order to fill the legal vacuum. It provided the legal framework to the state for continuity of the legal system after the abrogation of the constitution. However, the courts were debarred to issue writ against Chief Martial Law Administrator or anyone exercising power or jurisdiction under his authority. The validity of laws (continuance in force) order and the legitimacy of the imposition of Martial Law itself were soon challenged before the supreme court of Pakistan. The Supreme Court, led by chief justice Munir, upheld the Martial and the laws (continuance in Force order).<sup>80</sup> (See details PLD 1959, Supreme Court, P.533, State Vs Dosso)

### **AYUB KHAN ERA**

Ayub Khan continued to govern the country by an authoritarian system under the Martial law regulations. He made it clear that his intention was to convert the Martial Law into a document that will form the basis of running the country. In 1959, the Basic Democratic system according to the thoughts of Ayub Khan was designed to initiate the broad masses of Pakistan, a great majority of who are illiterate, into the working of the democratic process. The government chooses the B.D. system to mobilize the masses at grass root level for political stability and eventually the presidential stability.<sup>81</sup> The Basic Democrat system, helped in enlisting the active and constructive participation of the masses in the affairs of their local areas.<sup>82</sup> "Under the four-tier model of basic democracies, bureaucracy emerged as the guardian of public activities seeking the political role at the local level."<sup>83</sup> Under the President's order No 3 of 1960, the basic democrats casted their vote in referendum for President and elected Ayub Khan as president for five years and also extended the authority to make a constitution for the country of his own choice.<sup>84</sup>

On 17<sup>th</sup> February 1960, President Ayub Khan appointed a constitutional commission to be chaired by justice Muhammad Shahabbudin to examine the causes of failure of parliamentary system in Pakistan and to recommend how a recurrence of similar causes could be prevented; to submit proposals for constitution which would be based on the Islamic principles of justice, equality and tolerance for consolidation of national unity and stable system of government. On May 6, 1961, the commission submitted its report to President Muhammad Ayub Khan. The commission recommendations were processed by different committees, which recommended presidential form of government but with an effective control of an independent legislature<sup>85</sup> who could not interfere in the affairs of administration for their personal ends. On the recommendations of the commission, a committee appointed by the President framed a new constitution. The constitution prepared in secrecy was imposed on the people on June 8, 1962, a gift by the military regime.<sup>86</sup> The commission had been under constant pressure to accommodate Ayub Khan's personal inclinations regarding the constitution.<sup>87</sup> The 1962. Constitution was framed against the democratic traditions and the people of Pakistan were nowhere in the preparation process. It can be described in the words of Chaudhry Muhammad Ali "as the government of president, by the president, and for the president."<sup>88</sup> "The emphasis clearly shifted from what the people want to what is best for people."<sup>89</sup> It was for the one-man rule as supreme in national affairs. He discouraged the political activities and bureaucracy became the most influential institution in this era.<sup>90</sup> "The president monopolized all powers in both executive and legislation fields."<sup>91</sup> In fact, in the new dispensation, the supreme authority was vested in both president and national assembly.<sup>92</sup> However, the president's emergency powers to dissolve the national assembly made him the final authority. The political parties had no role in the constitution. But on the continuous demand of people, the national assembly dared to pass the bill on the fundamental rights. By this amendment the constitution was to some extent democratized and the rule of law was fully restored in Pakistan.<sup>93</sup> The second amendment in the constitution was just to remove the difficulties felt during the first two years of the enforcement of the constitution. On the agitation/ protest against the university ordinance (West Pakistan University Ordinance 1962.) by the students and Jamat-e-Islami, both the provincial governments declared the Jamat-e-Islami to be 'unlawful association'.<sup>94</sup> These

notifications were challenged before the high courts of Lahore and Dacca. The Lahore high court dismissed the petition and Dacca high court accepted it.<sup>95</sup> Appeals against both decisions were made to the Supreme Court and were heard together. The Supreme Court, by unanimous verdict, held that the declarations by the provincial governments as unlawful and against the principle of natural justice.<sup>96</sup> The criminal law amendment act of 1908 was held repugnant to the fundamental right of 'Freedom of association'. The court judgment is one of the most important ones in constitutional law of Pakistan. It provided protection to the political parties against the government that was exercising its powers subjectively to ban them and crush their activities.<sup>97</sup>

The first term of Ayub Khan as a president was to expire on 14<sup>th</sup> February 1965. The first presidential election was held in January 1965 under the 1962 constitution. The Basic Democrate members elected in November 1964 casted their votes in favor of Ayub Khan for their personal interests.<sup>98</sup> Madar-i -Millat Miss Fatima Jinnah as a unanimous candidate of the "Combined Opposition Party" could not win the election because " these elections had been rigged--- the entire conduct of these elections had been marred by flagrant official interference, police high handedness, intimidation, corruption and bribery---." <sup>99</sup> The opposition parties demanded for a caretaker government to hold fair and free elections but the ruling party rejected these demands.<sup>100</sup> Ayub was ruling the country very peacefully while the opposition was divided so he had no danger from any corner. Media was propagating the successes of government in every field but the nature was planning some thing different from the thoughts of Ayub Khan. After the ceasefire in Kashmir in 1949, there had been minor incidents on the Indo-Pak ceasefire line in Kashmir, but the tension between the countries burst out into a large-scale war in September 1965. The war came to an end on 23 September 1965 without any decision adopting the U.N.O. resolution to ceasefire passed on 20<sup>th</sup> September 1965. The war and subsequent Tashkent agreement led to the political death of Ayub Khan<sup>101</sup> where as, " Kashmir played a major role in Ayub Khan's decision to oust the parliamentary government and abrogate the 1956 constitution."<sup>102</sup> Again it became the cause of Ayub's weakness. As per Tashkent Declaration, Pakistan and India agreed to renounce the use of force in the settlement of their disputes and withdraw their troops to the position of 5<sup>th</sup> August 1965,<sup>103</sup> before the outbreak of open hostilities between the two countries. The

declaration was a thunderbolt to the Pakistani people because they successfully resisted the Indians on the battlefield. The drama – publicity/propaganda of the government ensured the publics that they had won the war. The reaction of political parties on the Tashkent agreement was combination of hot and cold. Most of West Pakistan political parties condemned the agreement but East Pakistan parties did not care and demanded for greater provincial autonomy. Ayub was still optimistic to lead the nation ignoring the factual position of unrest, so he decided to celebrate the decade of development. His government's celebrations of the decade of development in October 1968 faced the disturbances. The common people were unhappy due to unequal distribution of wealth in the country. The political leaders pointed out that Ayub's economic planning had not improved the life of common people while the twenty-two families were controlling the whole economy of the nation.<sup>104</sup> Major and sudden crises developed in West Pakistan in November 1968 against the government on interception and the registration of case against the students returning from Landi Kotal by the custom authorities. The students agitated against the act of government. The students were already unhappy with the government and were agitating in favor of their demands. Bhutto stood with the students and propagated against the Ayub regime, "a dictatorship under the label of democracy."<sup>105</sup> Bhutto and other political leaders were arrested and the reaction exploded in clashes. The educational institutions were closed for indefinite period. Z.A.Bhutto gained dramatic popularity due to the representation of sentiment of masses and lack of leadership in the ranks of opposition.<sup>106</sup> The anti –government agitation gained momentum. Bhutto got the benefit of the situation and his party manifesto of Roti, Kapra and Makan had radically changed the political climate in West Pakistan, while the Awami League had gained ground in East Pakistan for autonomy.<sup>107</sup> All offers from the government side went in vain because the opposition parties in East and west wing insisted on their demands. The political leaders of Pakistan especially the west wing leaders who succeeded in building agitation, wanted to bring down the Ayub's regime. The military and Bureaucracy refused to support the Ayub regime in the last days of severe demonstration arranged by the politicians of both wings and students. Ayub under the compulsion of endless severe demonstration, bad health and non-cooperative attitude

of military-Bureaucracy, resigned from the president ship. He admitted, "Quiet frankly, I have failed. I must admit that clearly. Our laws were for a sophisticated society."

### **General Yahya Khan' s Martial Law and Political Crises**

25<sup>th</sup> March, 1969. Ayub resigned due to the perpetual unrest in both wings of the country, the eruption of political violence, the endless series of demonstrations, the emergence of PPP as a dynamic force in West Pakistan and the Awami League's six points in East Pakistan.<sup>108</sup> Army Commander in chief General Agha Muhammad Yahya Khan took over the office of President. Ayub Khan made the gross constitutional violation by not handing over the authority to the speaker of national assembly. Yahya Khan imposed Martial Law, abrogated the constitution of 1962, dissolved the national and provincial assemblies and put ban on political activities.<sup>109</sup> On 28<sup>th</sup> March, 1970. Yahya announced the Legal Framework Order, which would lay down the basic principles for future constitution of Pakistan. He declared his main objective, "is the peaceful transfer of power to the people", and general elections will be held on October 1970 under the Legal Framework Order (LFO). According to the legal framework order, Yahya, produced a "steel frame" to limit the national assembly's freedom of legislation and at the same time legalize his authoritarian rule for future or for coming civilian set up.<sup>110</sup> The specifications of the Legal Framework Order for the future constitution indicated that military regime had strong reservations for national document. The transfer of power from Ayub to Yahya did not shift political power from the hands of the military and bureaucracy. In fact it provided another opportunity to these elements to exercise political power without any popular and constitutional restraints.<sup>111</sup> Yahya decided some national issues on the demand of politicians but without the mandate of people. These issues were dismemberment of one unit, principle of adult franchise, end of the parity (representation) and 120 days for framing the constitution. After the enforcement of Legal Framework Order, the twenty-four political parties were in the contest. Each group believed that it had a chance, since no one quite knew about the preferences of voters. The general elections held on 7<sup>th</sup> December, 1970 were free, fair and impartial and resulted in an overwhelming victory for Mujib's Awami League in East Pakistan and large majority for Bhutto's Pakistan Peoples Party in West Pakistan. The observers considered the

elections” a significant and successful first step” toward the restoration of civilian government<sup>112</sup> but the actors had charted differently. Immediately after the elections, the Awami league and its leader Mujib declared that Awami league could not amend the six point formulae and “none would be able to stop us from framing a constitution on the basis of six point program.”<sup>113</sup> The political parties and people of East Pakistan were annoyed from the attitude of West Pakistan political leadership and central government and they were trying to obtain complete provincial autonomy. For this purpose, the intellectuals of East Pakistan drafted these points and submitted to different leaders but Mujib accepted it and tried to discuss with leaders of west wing political parties. It could not be considered due to certain reasons. Mujib’s Awami League adopted it as future programme and amended it to six clear issues for presentation before the public. These six points were as under:

1-A federal constitution for Pakistan.

2-Central government portfolios to be limited to defense and foreign affairs only.

3-The two provinces to have separate currencies or, alternatively, restrictions on the movement of capital funds from one province to another.

4-All taxes to vest in the province of collection.

5-All foreign exchange earned by East Pakistan to be at the disposal of East Pakistan.

6-An East Pakistan militia to be formed.<sup>114</sup>

The central government did not care about these points but the Awami League’s propagation further poisoned the atmosphere, which was already under tension. On the announcement of six points, Mujib said that these points are negotiable and that it was not the Bible. But ultimately Mujib transformed it into the symbol of Bengali aspiration. After the election results, Awami League leaders changed the tone and expressed their desire in clear words that they will not compromise other than six points. Professor Muzaffar Ahmed, a prominent Awami leaguer said that the election results “showed that Bangladesh refused to be a colony and would never bow to any people or nation.”<sup>115</sup> Maulana Bhashani who had boycotted the elections, extended his support to Mujib and declared, “complete independence for East Bengal from Pakistan had now

become inevitable.”<sup>116</sup> The Awami league was not prepared to accept any amendment in the six-point formula and Pakistan Peoples Party leadership was not ready to concede all six points. Yahya tried to bring them close to settle the disputes but failed and decided to use the coercive power of the state to affirm the power of central government. Bhutto did not want the negotiations to succeed. Mujib, meanwhile, was in the hands of extremists who, due to their extremist’s object of secession of East Pakistan, were making things difficult day by day.<sup>117</sup> Many forces were working for secession. Failure of political negotiation and the decision of Yahya Khan’s government to use force against the elected representative of East Pakistan marked the end of Jinnah’s Pakistan. India largely indulged in the affairs to disintegrate Pakistan. Indian parliament passed a resolution moved by Prime Minister Indra Ghandi, on 31<sup>st</sup> March 1970, and called upon Pakistani Government to stop, “the massacre of defenseless people” in East Pakistan.<sup>118</sup> India provided important assistance in establishing the Mukti Bhani’s base camps, recruitment, organization and training of Mukti Bhani by the border security force and army.<sup>119</sup> India’s involvement in the internal crises of Pakistan ultimately led to a war between the two countries, which finally paved the way for the emergence of a new state called Bangala Desh. Pakistan army after a month’s of internal and external war surrendered before the Indian army in December 1970. On December 16, 1971 the literature of political history got an introduction with the word of “Dacca Debacle”. With the emergence of Bangala Desh as a new political entity, Pakistan entered a new phase in its political life. The secession of East Pakistan disgraced Pakistan Army thoroughly. The army could not continue no longer. Yahya Khan resigned under the pressure of army officers and public demonstrations against the military regime.<sup>120</sup> He handed over the power to Z.A.Bhutto chairman of Pakistan Peoples Party and leader of the majority party in West Pakistan. He took over the power in the dual capacity of president and Chief Martial Law Administrative.

### **Democratic government of Z.A.Bhutto**

As Chief Martial Law Administrator, he issued orders and pronouncements carrying whole range of subjects. Bhutto announced under the Martial Law regulation on 2<sup>nd</sup> January 1972 that ten categories of industries were being taken over by the state for the

benefit of the people of Pakistan. He pinned the wings of judiciary under the Martial Law regulation. Under the President's order, no court, including Supreme Court and the high courts, could call in question any provision of this order.<sup>121</sup> On March 11, 1972, the land reforms regulation was introduced under Martial law. Under the order no court could call in question any provision of the land reforms regulation. On 1<sup>st</sup> April 1972, by another reform Government took over the management of private schools and colleges. Another reform introduced by Bhutto was Martial Law regulation that Government could proceed against any person in government service who was corrupt or known to be corrupt, guilty of misconduct, inefficient or engaged in subversive activity and barred court jurisdiction.<sup>122</sup> "The series of reforms alienated the investors and they turned hostile against Bhutto." On 14<sup>th</sup> April 1972 the national assembly passed the interim constitution. Bhutto, in a characteristic move lifted Martial Law by enforcing the interim constitution on 21<sup>st</sup> April 1972, to take the credit of personal desire. Bhutto was sworn in as president under the constitution.<sup>123</sup> No doubt Bhutto was very intelligent, experienced man and had the power to mould any kind of situation in his favor without difficulty. He did not tolerate any kind of opposition. He dealt with heavy hand his political critics. He used the weapon of Martial law regulations to suppress them though he was champion of democracy and fundamental rights. His government arrested two of his critics under the Martial Law regulation to teach a lesson to opposition. Malik Ghulam Jilani, a political leader from Lahore, and Altaf Gauhar, Editor-in-chief, Dawn, Karachi were arrested and placed under preventive detention under the defense of Pakistan rules and Martial Law Regulation No, 78. The arrest of Malik Ghulam Jilani and Altaf Gohar under the Martial Law regulation no 78 was challenged in High courts of Lahore and Sindh. Both High courts dismissed the constitutional petitions and both appealed to the Supreme Court. The High Courts relied on the decision of Supreme Court in the case of state vs. Dosso for dismissing the constitutional petition. Supreme court considered the two basic questions; firstly, whether the jurisdiction of courts exists under the provisions of the jurisdiction of courts (removal of doubts) order, 1969, secondly, whether the doctrine enunciated in the case of state vs Dosso was correct and applicable. Supreme court held that these assumptions were not justified, so court declared the Martial Law illegal. The Supreme court held that Kelsen's theory was no means a universally accepted one, nor was it a



theory that could claim to have become a basic doctrine of science of modern jurisprudence,<sup>124</sup> The supreme court declared Yahya Khan's martial Law to be illegal and confirmed the principle of civilian supremacy in the national political system.<sup>125</sup> They observed that Ayub had no power under the constitution of 1962 to hand over power to any body. He could have resigned and the speaker of the national Assembly could have taken over as an acting president.<sup>126</sup> The jurisdiction in Asma's case was certainly a departure from the past particularly the Dosso case. The judgment was widely appreciated. It was also criticized because it was given after the over throw of the usurper. However, Asma's case was an important milestone in the judicial history of Pakistan.<sup>127</sup> The chief justice wrote, "the assumption of power by Agha Muhammad Yahya Khan as Chief Martial Law Administrator and later as president of Pakistan was an act of usurpation, and was illegal and unconstitutional."<sup>128</sup> The chief justice dilated on recognition that had been given to successive maneuvering for usurpation of power under pseudonym of Martial law by the Supreme Court in the Dosso case.<sup>129</sup> Kamal Azfar, prominent jurist opined, "Asma's case has ever since been the bright star in Pakistan's constitutional firmament."<sup>130</sup> It cannot be forgotten that court's bold decision came after he had ceased to hold office.

Martial Law was lifted on the promulgation of interim constitution. Interim constitution was a temporary arrangement. The National assembly constituted a committee for preparing the draft of constitution. The draft of the constitution was debated and discussed in the national assembly till the government and opposition agreed to a draft which was passed unanimously by all the political parties and assented to by the president on 12<sup>th</sup> April 1973 and was enforced on 14<sup>th</sup> August, 1973. The ruling Pakistan Peoples Party felt miraculously lucky to have got unanimous authentication of the constitution.<sup>131</sup> The constitution reflected the aspirations of the people and presented an improvement on the previous constitutions.<sup>132</sup> The salient features of the 1973 constitution were federal, parliamentary form of government, bicameral legislature, provincial autonomy, Islamic provisions, fundamental rights, and emergency powers. Bhutto remarked that "the constitution is our hope and belief that under the inspiring guidance of God Almighty, the people of Pakistan will speak for their constitution and will protect it for all times to come."<sup>133</sup> The unanimous constitution of 1973 is one of Bhutto's significant successes.

“His ouster from power, even some of his bitter opponents demanded for the restoration of this constitution. They considered it a great national asset because, unlike the two previous constitutions, it represented a broad national consensus.<sup>134</sup> Bhutto’s bargaining skill had a part in producing this consensus, but the opposition’s willingness to be reasonable and realistic also had a role. They had all made concessions, and they all had made gains.”

Bhutto was ambitious to run the country according to his own ways so he initiated the policy to drive the governments of North Western Frontier Province and Balochistan to the wall. Bhutto government had been fully involved to destabilizing the National Awami Party-Jamiat Ulema Islam coalition government so that the Pakistan Peoples Party could form government in these provinces. Government alleged that the tribesmen of Balochistan were equipping with weapons so they could separate their province. On 14<sup>th</sup> February 1973, Bhutto government dismissed the Balochistan government for opposing the use of federal troops to control the uprising of Jamote tribe in Lasbella. The National Awami Party-Jamiat Ulema Islam alliance government in North Western Frontier Province resigned in protest. Thus both the provinces were placed under Governors rule causing great disillusionment to the people. Bhutto uprooted the majority provincial governments, suspended the fundamental rights and undermines the provincial autonomy. The language crises began in Sindh province due to undue support of chief minister Mumtaz Ali Bhutto for Sindhi language, cousin of prime minister. Sindh assembly language bill resulted in widespread agitation in urban areas of Sindh. Bhutto was a sindhi and he was convinced with the arguments of sindhi nationalists. At last, federal government came forward and took the matter for decision in its hands. Infact, language crises inflicted a great loss to national integration. Bhutto introduced reforms to improve the civil service according to the environment of the country. The past guarantees of civil service were withdrawn; the ordinary laws enacted from time to time by the parliament regulated their services. The Bhutto government initiated a programme of ‘Lateral Entry’ into the public service to weaken the Bureaucracy. The persons holding mid career positions were appointed to middle management and higher positions in the central and provincial governments.

## Amendments in 1973 constitution

The constitution is a sacred document of the land and like a living organism, which flourishes and grows with the passage of time and in accordance with the requirements of time and society. A constitution amendment is introduced in the constitution for the betterment of public and to fulfill the needs of the changing circumstances. A constitutional amendment demands serious reflection by the government, consultation with the opposition and a clued-up public debate on the issue of enactment in the media. After all the discussion, an opportunity should be provided for a comprehensive debate in the parliament... It is amazing that just about a year after the unanimous adoption of the 1973 constitution, Z.A. Bhutto's government began to see deficiencies in this convent and proceeded to amend it. Most of the amendments were introduced to increase the powers of executive organ.

The first amendment was introduced in constitution in 1974. Pakistan recognized the Bengla Desh as an independent Muslim state on the eve of 2<sup>nd</sup> Islamic summit conference held in Lahore in 1974. Pakistan put this issue to an end for once and for all. Article 1<sup>st</sup> of the constitution was amended for this purpose. This amendment also included, the amendment in political parties act 1962, procedure for transfer of high court judges from one high court to other high court, and establishment of services tribunal for employees<sup>135</sup>.

The 2<sup>nd</sup> amendment was very important. It added new clause in the constitution. Bhutto took the issue of "Ahmids"(Qadianis) to the national assembly, which after extended considerations passed the second amendment bill declaring Ahmedis non-Muslim minority. The definition of Muslim was added under the clause (3) of the constitution<sup>136</sup>.

Bhutto and his colleagues passed the 3rd amendment to curtail the powers and demoralize the judiciary because mostly relief was given to political opponents by judiciary that was not favorable<sup>137</sup>. Under this amendment, the courts were prohibited to grant bail before arrest to a person unless a case was registered. The proclamation of emergency entered indefinitely until resolution of disapproval was passed by parliament in joint session. In view of this amendment, Pakistan remained under emergency for more than twenty years for political reasons.

Under the 4<sup>th</sup> amendment in the constitution, the powers and jurisdiction of the courts for granting relief to political opponents, particularly in exercise of constitutional jurisdiction under article 199 was curtailed<sup>138</sup>. The members of opposition were denied to speak and were physically thrown out of the national assembly and the amendment bill was passed in the absence of opposition<sup>139</sup>.

The 5<sup>th</sup> constitutional amendment bill introduced in the national assembly was for the establishment of high courts for Blochistan and Sindh, extending the period of separation of judiciary from the executive, the fixation of terms of the chief justices of high courts and supreme court, compulsory transfer of judges from one high court to another, new laws of contempt of court, and restriction of jurisdiction of high courts to grant interim bail.<sup>140</sup> During the debate on the bill, the judiciary was fully chastised by ruling party as "the judiciary had been trying to encroach upon the functions of the legislature and executive"<sup>141</sup> and "the independence of judiciary did not mean the supremacy or sovereignty of the judiciary."<sup>142</sup> In spite of the walk out of the opposition during the second reading, bill was passed by the national assembly and just after three days also by the senate.<sup>143</sup> The lawyers and politicians at large criticized the amendment for it harmed the independence of judiciary as the third organ of state. A unanimously adopted constitution was made controversial and disputed.

The sixth amendment bill was moved before the house and passed very quickly, because it was the last session before the dissolution of assembly for fresh elections. The amendment extended the terms of chief justice of Supreme Court and high courts beyond the age of retirement. The chief justices who had attained the age of retirement and had not completed the term of office would continue to hold the office, as the case may be.<sup>144</sup> It was just to accommodate chief justice Yaqoob Ali (friend of Mr. Bhutto) who was retiring in the middle of 1977 after serving less than two years as chief justice of Pakistan.<sup>145</sup> All the amendments were manipulative fabrications only by the ruling party. These manipulations made the widely and largely accepted document by all the political and religious circle of the country, contentious and dubious.

The death of Hayat Muhammad Sherpao in an explosion on February 8, 1975 made the federal government to move, and it declared the National Awami Party to be an unlawful

organization, closed its offices and arrested many of its leaders as traitors via an executive order.<sup>146</sup> The government alleged that the National Awami Party was “operating in a manner prejudicial to the sovereignty and integrity of Pakistan”<sup>147</sup> The federal government filed a reference in the Supreme Court to the same effect. They held that the National Awami Party was acting in a manner prejudicial to the sovereignty and integrity of Pakistan. It never reconciled itself to the existence and ideology of Pakistan, and had attempted to bring secession<sup>148</sup> through insurrection, terrorism, and sabotage. It was an ex-prate judgment based on ex-prate proceedings. The defense party boycotted the court after raising objections on the sitting of two judges on the bench, which were rejected. The federal government fulfilled its ambitions of forming its governments in North Western Frontier Province and Blochistan by using the politics of “guns and gold” to induce defection from amongst independent and National Awami Party members.<sup>149</sup>

On 7<sup>th</sup> January, 1977, Prime Minister Z.A. Bhutto dissolved national assembly and announced general elections in March and “assured the nation that they would be fair”<sup>150</sup> The nine opposition parties came together in a electoral alliance called the Pakistan National Alliance (PNA) to oppose the Pakistan Peoples Party in the election. Bhutto was active and still popular in the masses but his party leadership was corrupt, ineffective and interested in personal benefits.<sup>151</sup> Both the parties launched the campaign lively and it seemed that the contest would be neck to neck,<sup>152</sup> and that the Pakistan Peoples Party would have to work hard to win. Bhutto was confident about the winning of elections and a majority in national assembly required to amend the constitution. He conveyed the clear message in his election speeches that he was going back to the people to seek a mandate for bringing about a change in the country’s political and constitutional structure.<sup>153</sup> The election results were surprising for all the election contestants. Pakistan National Alliance an alliance against Pakistan Peoples Party rejected the results and even Pakistan Peoples Party leadership was surprised on such a wonderful success. The Pakistan National Alliance alleged that the elections had been rigged on a massive scale, rejected the results and boycotted the provincial assembly elections<sup>154</sup> No doubt; there was something wrong with the elections. But the responsibility and extent of rigging is still to be determined. The Pakistan Peoples Party would have won a “clear majority” in a fair election.<sup>155</sup> The Pakistan National Alliance leadership launched a mass movement to secure Bhutto’s

resignation, dismissal of newly elected assemblies and holding of new elections under the supervision of judiciary and Army.<sup>156</sup> The Pakistan National Alliance movement gained momentum and forced Pakistan Peoples Party for a negotiated settlement between Pakistan Peoples Party and Pakistan National Alliance leadership for the solution of the election problem. On 26<sup>th</sup> April 1977, Martial Law was imposed partially in three cities under article 245 of the constitution that was challenged before the Lahore High Court. The full bench declared it unconstitutional.<sup>157</sup> To come out of the situation, Bhutto maneuvered to put the matter in the hands of the people through a "referendum".<sup>158</sup> Accordingly, the 7<sup>th</sup> amendment to the constitution was passed to provide for referendum.<sup>159</sup> Meanwhile, the constitutional steps and political dialogue continued side by side for solving the crises. At last, on 4<sup>th</sup> July 1977, Zulfakar Ali Bhutto and Pakistan National Alliance reached an agreement after too many intervals and decided to sign the accord.<sup>160</sup>

### **Martial Law 1977**

On 5<sup>th</sup> July 1977 General Zia ul Haq imposed Martial Law through out the country. He did not abrogate the constitution but held it in abeyance. The national and provincial assemblies and cabinet were dissolved. The military did not take over because of a breakdown in negotiations; rather the break down in negotiations took place due to military interference. General Zia promised free and fair polls in 90 days and transfer of power to the elected representatives of the people.<sup>161</sup> "When the generals take over government they are usually eloquent about their desire to get back to barracks, often they do not go."<sup>162</sup> General Zia had meetings with political leaders and discussed the matters with them. . On 28<sup>th</sup> July 1977 all political leaders were released from the "protective custody". The bold and confronting speeches of Mr.Bhutto impelled military generals to scheming the containment of the person.<sup>163</sup> From getting rid of Bhutto, Military government decided to open the murder case where Bhutto was named in the First Investigation Report (FIR) registered on murder of Nawab Muhammad Ahmad Khan in November 1974. On the criminal complaint lodged by family members of Ahmed Raza, the proceedings of the case began and in the initial stage it was transferred to High court. Bhutto was arrested<sup>164</sup> and bail was granted by Justice M.A.Samadani of

Lahore High court on the grounds of circumstantial evidence.<sup>165</sup> After the bail, his threatening words frightened the already scared members of military junta who decided to get rid of him once for all. The full bench of Lahore High court cancelled Bhutto's bail and held, "there appears reasonable grounds for believing that the respondent has been guilty of an offence punishable with death sentence or imprisonment for life."<sup>166</sup> The judges also observed that there was an evidence of motive on the part of Bhutto who had been threatening Ahmed Raza on the floor of national assembly. In the beginning Bhutto boycotted the trial after rejection of his application for the bail case. The high court convicted all the accused for criminal conspiracy and murder, and sentenced them to death.<sup>167</sup> It has been argued that the case never got a fair trial. Bhutto was murdered through judiciary but this murder never could be buried. The case discolored the image of the judiciary in Pakistan.

The majority of PNA members demanded postponement of elections and complete accountability before holding elections.<sup>168</sup> It was the consequent outcome of differences among PNA leaders and the danger of Bhutto's coming to power again. After the arrest of Bhutto, Nusrat Bhutto was leading the party and attracting large crowds that demoralized the PNA and government.<sup>169</sup> On 16<sup>th</sup> October 1979, Zia announced the postponement of elections on the request of politicians for the sake of accountability and for the restoration of law and order situation in the country.<sup>170</sup> After the postponement of elections Zia came out with his actual designs when he said in obvious terms that elections in the country would be held only when he and his colleagues were certain of "positive results".<sup>171</sup>

### **Nusrat Bhutto Case**

On 20<sup>th</sup> September 1977, Begum Nusrat Bhutto challenged the validity of Martial Law in a constitutional petition filed before the Supreme Court of Pakistan. The petition was against the detention of Bhutto under Martial Law regulation in its original jurisdiction for enforcement of fundamental rights under constitution. The full court after initial hearing ordered the admission of the petition and the immediate transfer of Bhutto and other accused to Rawalpindi.<sup>172</sup> On the admission of Nusrat Bhutto's petition, the military rulers were worried about the role of Chief Justice who was chief justice due to

sixth amendment. (For details on the issue see chapter III according to the sixth amendment) The army suspected that chief justice would play the game of Pakistan Peoples Party against military rulers. As a precautionary measure Zia issued the Chief Martial Law Administrative order no.6 of 1977. By this orders, the constitution was amended so that 5<sup>th</sup> and 6<sup>th</sup> amendment were withdrawn. The consequent result of this amendment was that chief justice Yaqoob Ali, who had crossed the age of retirement, ceased to hold the office of chief justice of Pakistan.<sup>173</sup> On next hearing, Bhutto and his party had new Supreme Court and justice Anwar ul Haq had taken over as chief justice. The counsel for the petitioner relied and emphasized on<sup>174</sup> "Asma Jilani case. He contended that Zia, Chief of Army Staff, had no authority under the 1973 constitution to impose Martial Law in the country. His act was illegal and unconstitutional. The Supreme Court decided the petition that extra constitutional step taken by the Armed forces of Pakistan was justified by requirements of state of necessity and welfare of the people. The Martial law was declared valid under "law of state of necessity".<sup>175</sup> The petition challenging the detention of Bhutto and others was dismissed as incompetent under the Martial Law order no 12. The court also authorized General Zia to amend the constitution under the doctrine of state necessity. The court had no power or authority or any convincing reason to authorize a single person to change the basic law of the country. In Zia's words," What is a constitution? It is a booklet with ten or twelve pages. I can tear it up and say that from tomorrow we shall live under a different system. Is there any body to stop me? Today the people will follow wherever I lead. All the politicians, including the mighty once Mr Bhutto, will follow me with their tails wagging."<sup>176</sup> He defaced the constitution by abusing his powers. He violated not only the spirit but also the letters of the constitution.<sup>177</sup> The court handed over a loaded gun to the military dictator to injure the constitution. After the decision of Nusrat Bhutto's case, military junta decided to postpone the elections. Now their government had been legalized. With the announcement of postponement of elections, all parties were dissolved, political activities were banned, all newspapers and journals said to be involved in anti national activities were closed. The press censorship was imposed. The right to strike by workers and right to lock out by factory owners was made void. He also announced that criminal cases being heard in Martial Law courts could not be challenged in civil courts. He firmly



declared that the process of Islamization would be speeded up.<sup>178</sup> He emphasized that now Martial law will be run like martial law.<sup>179</sup> Zia and Pakistan National Alliance were using each other for getting rid of Bhutto. Now Zia became an absolute dictator. The decision regarding military court's jurisdiction was clearly against the verdict of Supreme Court in Nusrat Bhutto case. Conclusively, Zia made a constitutional amendment-adding Article 212-A to the constitution for establishing military courts and tribunals in the country.<sup>180</sup> By this amendment, the military courts and tribunals which were existing and functioning under the Army Act were clothed with constitutional recognition and the powers of judicial review reserved for superior courts by the Supreme court in the judgment of Nusrat Bhutto's case, were completely abolished.

It was a testing time for the political parties when all were dissolved and ML authorities decided to complete the process of accountability before the elections. Asghar Khan challenged the dissolution of his party (Tehrik-e-Istiqlal) before the Lahore High Court.<sup>181</sup> During the proceeding chief justice Maulvi Mushtaq Hussain demanded for various explanations from the federal government, which were not acceptable to Military regime. During the arguments of the petition, Maulvi Mushtaq, the chief justice made certain gratuitous and looming remarks against the federal government. It is difficult to realize what he wanted to achieve by these remarks and by reserving the decision for some time. The Martial Law government reacted strongly and promptly promulgated a constitutional amendment on May 27, 1980 barring the high courts from making any judgment relating to the validity of Martial Law regulations.<sup>182</sup> It restricted the "writ jurisdiction" of high courts and barred them from making an order relating to the validity or effect of any Martial Law regulation or any Martial Law order or anything done, or action taken, or intended to be done, or taken there under. It also prohibited them from reviewing the judgments or sentences passed by military courts or tribunals or from taking any action against anyone acting with the authority of Martial Law administrators. Moreover Military courts were given exclusive jurisdiction under Pakistan Penal Code (PPC) over case of treason, subversion, sedition, sabotage, activity prejudicial to Martial Law, and ridiculing of members of Armed forces.<sup>183</sup> It also confirmed that superior courts, jurisdiction had been curtailed retrospectively. The government slighted Maulvi Mushtaq in a manipulative manner. Government sent him to Supreme Court as adhoc

judge in humiliating way. By this amendment, Zia over ruled the civil rule. He deemed fit the military rule and justice to the country.

The Blochistan high court was dealing with a matter of military courts, decision to execute the death sentence. The high court endeavored to issue orders to the prisoner authorities to abstain from carrying out the sentences. The authorities were to execute the death sentence given by military court.<sup>184</sup> The High court reminded the jail officers that any execution would be illegal and also contempt of court. The jail authorities defied Martial Law authorities to hang a person without authority. The chief justice and his colleagues stood firm and military did /could not carry out the sentences.<sup>185</sup> Despite the constitutional amendment of May 1980, Blochistan High court continued to hear cases in which vires of article 212-A had been challenged. The full bench in its judgment dated 12 July 1980, declared that the amendments have failed to come up to the test of necessity laid down in Nusrat Bhutto's case.<sup>186</sup> The division bench of Blochistan high court held that an ordinary citizen could not be tried by a military court for offence created by ordinary laws provided such offence was not committed by way of resistance to Martial Law itself.<sup>187</sup> The government went to appeal and Supreme Court observed that the propositions and observations made by the court were too wide and open to exception and would require careful examination in a proper case. For the decision of the provincial government to try the respondent under ordinary law applicable to the case, the appeal had been rendered in fructuous. A final decision was tactfully avoided.<sup>188</sup> Zia again showed lack of confidence on superior courts by setting up Federal Shariat Court.<sup>189</sup> The judges were handled in a very tricky way to accept the offices of the judges of. Federal Shariat Court. The Federal Shariat Court, a manipulative creation of Zia, soon ran foul of him and started creating serious problems .Zia again introduced an amendment to appease the Ulema and introduced more three judges into the court in addition to five judges.<sup>190</sup> The judgment by the Federal Shariat Court on the review application in Federation vs. Hazoor Baksh case exposed that there was lack of personal independence on the part of judges. The court was helpless to reach politically desired results.<sup>191</sup> Zia tried to establish parallel hierarchy in the judiciary.

## **Provisional Constitutional Order (PCO) 1981**

The night between 24<sup>th</sup> March and 25<sup>th</sup> March 1981 was chosen to enforce the Provisional Constitutional Order (PCO) to serve as the constitution of Pakistan for years to come.<sup>192</sup> Now nobody, no institution, and no law could challenge Zia's authority. The Provisional Constitutional Order abolished the "position of 1973 constitution. Hence the judiciary was adversely affected as the Provisional Constitutional Order curtailed the powers granted by the 1973 constitution. It was made sure that even a remote and meager chance of a challenge to the lawful authority of Zia from judiciary was completely deactivated. The set up of federal council, the creation of office of the vice president, non enforceability of fundamental rights, permission to work only to registered political parties, curtailing of powers of judiciary were the salient features of Provisional Constitutional Order. The most astounding provision of the Provisional Constitutional Order was that the superior court judges were required to take a new oath under Provisional Constitutional Order. More over it was the option of the president to give or not give oath to any judge. It was a severe humiliation of judiciary of Pakistan. After a careful survey of the prevailing political environment, the pre dominant majority of the judges favored taking the oath under Provisional Constitutional Order. The judges of Provincial high courts met the same fate in the hands of military government. Some of the judges were ready to take the oath but they were denied for no reason but a reason. Some courageous judges like the Supreme Court judge Drab Patel dared to refuse to take the oath in the way prescribed by the military. This was a painful episode in the constitutional and judicial history of Pakistan. The judiciary, as an organ of state was slighted and disgraced by military government that has no respect for the rule of law and an institution under the constitution.<sup>193</sup> The judges and generals were equally responsible for this entire regretful episode. The judges had to stand for the dignity of the institution. They sacrificed the prestige and the honor of the institution at alters of their personal ambitions and careers. In this way they reduced an important organ of state to a mere government department and behaved, as they were government servants instead of members of the independent state institution. By their conduct, they let down and undermined the judicial organ of the state and caused an irreparable damage to its prestige. It was the "rape of Judiciary" by the military and judges.<sup>194</sup>

The Provisional Constitutional Order was challenged in Lahore High court by a retired army general who was convicted and sentenced by a Field General Court Martial. He contended the Provisional Constitutional Order on the ground that during the subsistence of 1973 constitution, the Provisional Constitutional Order could not be issued, nor could Chief Martial Law Administrator, an army officer under oath to defend the constitution, give such a provisional constitution in its suppression.<sup>195</sup> The division bench of high court upheld the Provisional Constitutional Order as valid and as a recognized proclamation of 5<sup>th</sup> July 1977, read with laws (continuance in force) order, 1977, and could not be superior or higher status than its ancestor. The Provisional Constitutional Order, therefore, was just another order of Chief Martial Law Administrator and did not lay down or give a new legal order. Since the Supreme Court had conceded to Chief Martial Law Administrator the power to amend the constitution, the Provisional Constitutional Order could not be said to be in excess of or ultra vires of the powers of Chief Martial Law Administrator. The judges carefully avoid examination of Provisional Constitutional Order on the touchstone of Nusrat Bhutto case. Who could deny the fact that extra constitutional step of Martial Law was validated by the Supreme Court; subject to the condition that superior court would exercise the powers of judicial review against acts and orders of Martial Law authorities. The Provisional Constitutional Order denied all such powers. More over it was beyond expectation that the judges, who had taken oath under Provisional Constitutional Order Would, invalidate the same.

## **Federal Council**

The federal council was created as an interim arrangement made by the dictator so that the nominees thereto were expected to serve as arm of the military government. It was also provided under the Provisional Constitutional Order, that president could constitute a Federal council<sup>196</sup> (Majlis-e-Shura) to perform functions that were to be assigned to it by president. The president could nominate up to 350 members of the council. The purpose was to fulfill the vacuum of representative legislature body and to create a political lobby for Zia and his associates. The Federal Council could recommend to the president the enactment of law, or the amendment of an existing law but the president was not bound by their recommendations. The president could dissolve it any time and it would be

automatically dissolved upon the establishment of permanent representative institution. It was a fake parliament and exposed crookedness of Zia to the people of Pakistan. Zia promulgated President's order to establish the institution of Ombudsman (Wafaqi Muhtsub)<sup>197</sup> just to divert the thinking of people. (Establishment of the office of Wafaqi Muhtsub(ombudsman) The jurisdiction of ombudsman was extended to all departments of federal government and statutory corporations or other institutions established or controlled by federal government. The court could hear cases of administration's acts of omissions that caused neglect, inattention, delay, incompetence, inefficiency and ineptitude in administration or discharge of duties and responsibilities. It was also an attempt to fill the gap of representative institution in the country and institution to redress the grievances against the abuse of power and authority by the federal bureaucracy. . It could not bring out the tangible benefits to the citizens of Pakistan. It was another evasive step to step down the judiciary. Due to the persistent and consistent pressure by democratic and political forces in the country and external forces to restore the democracy, Zia gave his constitutional plan on 12<sup>th</sup> August 1983. (Speech in Majlis-eshura. 12<sup>th</sup> August 1983) The people could not believe it in the face of his past record.<sup>198</sup>

Zia announced that elections would be in two steps. He declared that in the first stage local bodies elections and in the second stage the elections to the Provincial, National Assemblies and Senate will be held and this process would be completed by the 23<sup>rd</sup> march, 1985. This constitutional plan formed the basis of revival of the constitution of 1973 order 1985 that was promulgated immediately after the general elections of February 1985 and later it was incorporated into the constitution with some modifications as 8<sup>th</sup> amendment to the constitution. General Zia was puzzled about his position after the elections. He wanted to be the president of country but without facing the public at large and political parties. He knew that he could not be elected in fair elections. So ingenious design (Presidential Referendum) was made by his brilliant and contriving advisors. The referendum order, 1984 was passed, putting complete question to the citizens but, in essence, seeking endorsement of the powers initiated by Zia for Islamization in Pakistan. The contrived question was not difficult but impossible to answer the question in negative in any respect. After getting 97.77 votes in the referendum, Zia came out of fear about his future.<sup>199</sup>

## **Elections 1985 and the restoration of democratic rule**

The general elections were held in February 1985 on non-party basis. The opposition parties boycotted the elections for the reason that their demand for party based elections and restoration of 1973 constitution were not met. Before the parliament could meet on 23<sup>rd</sup> March 1985, the constitution was comprehensively and manipulatively amended through a president's order, known as Revival of the constitution of 1973 (RCO) on 2<sup>nd</sup> March 1985.<sup>200</sup> It made fundamental and significant alternations in the original document of 1973. As many as sixty-five articles were amended/ substituted/ added/ modified /varied / deleted omitted. The main features of the Revival of the constitution order were, the insertion of women and minorities, increase in time to assent the bill by president, president's discretion to appoint Prime Minister, change in the procedure of amendment in constitution, separate electorate for minorities, detailed conditions of qualification and disqualification for member of national assembly and provincial assembly, appointment of chief justices of High court and powers of high courts, appointment of forces chiefs, governors of provinces, and national security council. It can be commented that nothing was beyond the powers of president. All the government offices were puppets. It was the unique system of government introduced in Pakistan by the Zia. There is no example of such system working in the world. The representatives have nothing to do and a person without people back up -president- has all the things to do by his discretion. Only encouraging thing was that the Revival of the constitution order replaced the reprehensible Provisional Constitutional Order. On 10<sup>th</sup> March 1985, Zia promulgated new order enforcing all but 27 articles of the amended constitution. Twenty-one of the left suspended articles were related to the fundamental rights and writ jurisdiction of High courts.<sup>201</sup> Article 6 was, also not enforced that described the abrogation or subversion of the constitution as high treason punishable under law.

On 23<sup>rd</sup> March 1985, Junejo a veteran politician from Sindh nominated by Zia was elected unanimously in the national assembly as the prime minister of Pakistan.<sup>202</sup> Zia created a subordinate government working under the umbrella of military with him being the ultimate repository of power. But Junejo was of the view that a civilian government could not co-exist with martial law for a long time and that the transitory arrangements

should be arranged at the earliest. Zia wanted the national Assembly and the civilian government formed under Junejo to accept his constitutional package of the Revival of the constitutional order. It was a hard pill to swallow for the elected assembly and an elected government. Junejo government moved a constitutional amendment bill<sup>203</sup> (Eighth amendment) for the validation of Martial Law acts and paved the way for lifting the martial law in due course. The amendment was accepted but 18 articles in all were amended, added, modified, or omitted to save the 1973 constitution as possible.<sup>204</sup> The 8<sup>th</sup> amendment was clearly a capitulation or at least a compromise, on the part of civilian government to get martial lifted. Zia's amendments (tempering and additions) in the 1973 constitution changed the entire complexion of the supreme document of the country.

Martial Law was lifted on 30<sup>th</sup> December 1985. The government lifted the emergency and restored fundamental rights. In this way, government got rid of Martial Law.<sup>205</sup> On the restoration of fundamental rights in the country, Benazir Bhutto returned to her country on 10<sup>th</sup> April, 1986. She led a procession through the city of Lahore and addressed a very large crowd.<sup>206</sup> After such a reception she visited the whole country and found herself very popular everywhere. In spite of her popularity, she decided not to challenge the government backed by military. She had learnt a lot from the past. Afghan war had very long lasting effects on Pakistan's political setup. It provided support for Zia to continue his military rule. It introduced many evils in the Pakistani society especially in the military elite. The war made most of high officials corrupt. The end of war treaded towards the end of Junejo government. The Geneva accord under Junejo government frightened the military persons.<sup>207</sup> The Ojheri Camp incident and the stand on the incident by Junejo was not acceptable to military generals. It proved to be last straw that broke the camel's back. The military leadership decided to assert itself and undo its own democratic experiment. Zia acted to save his rule and shield military generals.

On 29<sup>th</sup> May 1988, General Zia, in exercise of his powers under article 58(2)(B) of the constitution, through a short order dissolved the national assembly and as a consequence, the Junejo government was dismissed.<sup>208</sup> The order of the president was challenged before the Lahore High court as unconstitutional and without Lawful authority. The full bench of the high court decided the constitutional petition in the case entitled, "Muhammad Sharif vs. Federation of Pakistan." The court decided in favor of petitioner

and held that it would be injudicious exercise of discretion to restore the assembly and, for the reasons; the court declined the request for restoration of the assembly and the cabinet.<sup>209</sup> The judgment of Lahore High Court was challenged before the Supreme court of Pakistan which decided the matter in the case titled, "Federation of Pakistan vs. Haji Saif ullah Khan." Thus, the Supreme Court upheld the judgment of the Lahore High Court and found that the pre requisite prescribed for the exercise of power in this behalf did not exist and, therefore, the action of dissolution was not justified in law. The Supreme Court also denied the relief of restoration of assembly and cabinet.<sup>210</sup> After dissolving the Junejo government, Zia was exposed and suddenly felt isolated. He destroyed the building of his democracy by himself. His constitutional plan of 12<sup>th</sup> August 1983 had failed and to gain new life and legitimacy to his regime, he once again fell back on political exploitation of Islam. He promulgated an ordinance on 15<sup>th</sup> June 1988,<sup>211</sup> (16 days after the dissolution of assembly) for the enforcement of Shariah in Pakistan. Shariah was declared the supreme source of law in Pakistan and ground norm for the policy making by the courts in the country. They were required to refer all questions of repugnancy of any law or provision of law to shariah in Federal shariat court. The commissions were to be appointed for islamization of economy and education, promotion of Islamic values through mass media and expeditions of codification of Islamic laws. However, the financial obligations incurred or to be incurred and contract made or to be made between national institutions and foreign agencies would remain valid, binding and operative and no court could pass any order or make any decision about any such obligation or contract.

Zia was killed in an accident on 17<sup>th</sup> August 1988 near Bahawal Pur on his return from demonstration of tanks. Under the constitution, Ghulam Ishaq khan, chairman of senate took over as acting president. He arranged for elections as scheduled by Zia. The party based elections to national assembly and provincial assemblies were held in a peaceful atmosphere on 16<sup>th</sup> and 19<sup>th</sup> November 1988 respectively.<sup>212</sup> They appeared, by and large, to be free and impartial as is evident from the almost universal acceptance of verdict by all the political parties. Pakistan people's party won as a national political party and Islami Jumhari Ittehad as a regional party. But the polls gave a divided verdict between the Pakistan Peoples Party and Islami Jumhari Ittehad. The 27 independents could tip the



balance. The Pakistan Peoples Party headed by Benazir faced, and fulfilled the task of forming an alliance with other parties and independent to show its majority in the national Assembly so as to be invited to form the government. After forming an alliance and making a deal with the establishment, Benazir took the oath as Prime Minister on December 1st, 1988.<sup>213</sup> Consequently, Pakistan Peoples Party voted for Ishaq Khan instead of Nawabzada Nassar ullah Khan who was with them in movement for restoration of democracy. Ishaq Khan was elected as a President of Pakistan for five years by using his position as the sitting President.<sup>214</sup>

In Sindh and North Western Frontier Province, Pakistan Peoples Party formed the provincial governments. In Punjab, Islami Jumhari Ittehad led by Nawaz Sharif formed the government. In Blochistan, the situation was more complex. It was very difficult to form government, particularly when the two largest parties, Jamiat Ulema Isl;am and Balochistan National Alliance did not see eye to eye with one another. On 1<sup>st</sup> December 1988, Jamali formed a very fragile government with the support of speaker's casting vote.<sup>215</sup> On 15<sup>th</sup> December 1988, he advised the governor to dissolve the assembly on the fear of no confidence at any time. The dissolution was challenged in the Blochistan High Court that Chief Minister was not empowered to advise the dissolution of the assembly because he had not obtained a vote of confidence. The high court accepted the writ and restored the assembly on 23<sup>rd</sup> January 1989.<sup>216</sup> Within a year, Benazir Bhutto lost the confidence of her main allies-Muhajar Quami Movement and Awami National Party. They joined hands with Nawaz Sharif chief minister of Punjab who was against her government from the very beginning. Nawaz Sharif with their support submitted a no-confidence resolution on 24<sup>th</sup> October 1989.<sup>217</sup> On 1<sup>st</sup> November, after debate in the assembly, the motion was put to vote and defeated.

After a year, the president and Prime Minister ran into conflict with one another. The president was constantly pressing his powers and position and avoided making appointments on prime minister's advice.<sup>218</sup> The conflict between the president and the Prime Minister was particularly sharp in two areas namely the appointment of military chiefs and superior court judges. The Lahore High Court observed that the Prime Minister did not find mention in article 193 amongst the persons with whom the president was required to consult before appointing the judges. The judgment was challenged by

the federal Government before the Supreme Court. However, after lengthy arguments, the federal government withdrew the petition for leave to appeal purportedly on the basis of mutual agreement reached between president and prime minister<sup>219</sup> regarding appointment of judges of High courts, chief justices of High courts, judges of the Supreme court, and the chief justices of the supreme court. But it could not last long and the president applied coup de grace by issuing an order under article 58(2) (b) of the constitution on 6<sup>th</sup> August 1990, thereby dissolving the National assembly of Pakistan and in consequences the Prime Minister and cabinet ceased to hold office.<sup>220</sup> The provincial assemblies were also dissolved in manipulative ways.

The order of dissolution of the National Assembly was challenged before the Lahore high court and Sindh high court. The Lahore High Court decided the writ petition upholding the orders of dissolution passed by the President. The Sindh High Court did the same. The judgment of Lahore High Court was challenged before the Supreme Court of Pakistan.<sup>221</sup> The Supreme Court upheld the judgment of the Lahore High Court by majority in *Khawaja Ahmed Tariq Rahim vs. the Federation of Pakistan*.<sup>222</sup> Aftab Ahmed Khan Sherpao, the ousted chief minister of North Western Frontier Province, challenged the order of dissolution of the provincial assembly before the Peshawar High Court. A full bench of Peshawar High Court, by a majority of four to one accepted the constitutional petition and declared the impugned order of dissolution of the North Western Frontier Province assembly and dismissal of the provincial cabinet thereby ultra virus of the constitution, without law full authority, and, therefore of no legal effect. The judgment was never given effect and soon was suspended by Supreme Court. And set aside on technical grounds. The Sind High court dismissed such constitutional petition that the order of dissolving the assembly by governor was justified.<sup>223</sup> As a result of October 1990 general elections, Mr. Nawaz Sharif, president of *Islami Jumhari Ittehad* formed a strong government at federal level and in Punjab also. In other provinces situation was not so pleasant for the government of Nawaz Sharif but they managed it in their own way<sup>224</sup>. The Nawaz government introduced economic reforms, which included privatization, denationalization, free movement of foreign exchange in and out of the country, and incentives to foreign and Pakistan entrepreneurs to invest in industry and other sectors of economy.<sup>225</sup> In July 1991 the government for establishing special courts

for trial of heinous offences, the 12<sup>th</sup> amendment to the constitution was passed by parliament.<sup>226</sup> The separation of judiciary from executive was due and on the writ petition of Sharif Faridi and other advocates was accepted by Sindh high court and was decided by a majority of six to one. The supreme court of Pakistan upheld the judgment of Sindh high court.

The president Ishaq Khan was in good relations with Prime Minister in early days of government but with the passage of time, both were away from one another for a number of political and constitutional reasons. Nawaz sharif tried to undermine the president and consequently president in retaliation dissolved the national assembly and dismissed his cabinet on 18<sup>th</sup> April 1993.<sup>227</sup> The president arranged a caretaker setup. The Supreme Court accepted the writ petition and decided for restoration of dismissed government in the last week of May 1993 but could not last for the stipulated period.<sup>228</sup> After restoration of national assembly and government Nawaz sharif decided to undermine the Watoo government in Punjab province. Watoo as chief minister tendered advice to the governor for dissolving the provincial assembly that was immediately complied. The Lahore high court declared on the writ petition the orders of the governor without lawful authority and of no legal effect. The restored assembly was again dissolved on the advice of Chief Minister just after restoration. The federal government resorted to proclamation under article 234 of constitution by passing a resolution by the joint session of both houses but it was never sent to president. In this situation Prevaiz Elahi filed a petition before Lahore High Court.<sup>229</sup> But it was not decided in the face a compromise between president and prime Minister brokered by the army high command on July 18, 1993. Under the compromise formula president and prime minister had to quit. The neutral caretaker governments were installed at the federal and provincial levels to hold free and fair elections. Accordingly under the caretaker government the general elections to the national assembly were held on 6<sup>th</sup> October 1993 and elections to provincial assemblies on 9<sup>th</sup> October 1993.<sup>230</sup> As a result of elections, Benazir formed the government at the center and in the provinces of Sindh and Punjab. In North Western Frontier Province and Blochistan governments were formed with alliances by Sabir Shah (PML (N) and Zulfiqar Magsi respectively,<sup>231</sup> After that Farooq Laghari was elected as a president of Pakistan. On February 25, 1994, the president issued a proclamation under article 234 of

the constitution directing the governor of North Western Frontier Province to assume the functions of the government of North Western Frontier Province that the powers of the provincial assembly should be exercised by parliament. .Sabbir shah, Chief minister challenged the validity of the proclamation before the Supreme court of Pakistan under the article 184(3) of the constitution.<sup>232</sup> On 21<sup>st</sup> April 1994, the court restored the Sabir Shah government and declared governor's rule as illegal. On 24<sup>th</sup> of April Aftab Sherpao was elected, as chief minister and the restoration of Sabir government could not get effect tangibly. The Supreme Court of Pakistan was approached by Benazir government for an extension of time given by the court in case of Sharif Faridi. The court denied to the government ultimately. For this legal reforms ordinance 1996 was promulgated on 20th March 1996 and separation of judiciary from executive was started.<sup>233</sup> This was followed by succeeding ordinances after every four months till it became an act of parliament. The court decision gave a chance to the president to have his own will.

On 5<sup>th</sup> November 1996, the president dissolved the national assembly and dismissed the P.M and her cabinet under the article 58(2)(b) of the constitution. Miraj Khalid was appointed as caretaker prime minister and general elections were announced to be held on 3<sup>rd</sup> February 1997. The dissolution of National assembly was challenged before the Supreme Court under its original jurisdiction by Syed Yousaf Raza Gillani, speaker of the national assembly on 11th November 1996. Benazir also filed petition in this regard. The Supreme Court in its judgment dismissed the petition by majority of six to one and upheld the order of the president.<sup>234</sup> As a result of February elections, Pakistan Muslim League (Nawaz group) formed the government in coalition with Awami National Party and Mujahar Quami Movement. Nawaz Sharif was elected as Prime minister of Pakistan on 18<sup>th</sup> February 1997. Although Nawaz Sharif had obtained 2/3 majority in the national assembly but Laghari emerged very powerful after dismissal of Benazir government. The 13<sup>th</sup> amendment was introduced in a very manipulative way in the assembly and was passed unanimously. It was to repeal the president's discretion to dissolve the national assembly and to take away the powers of appointments of governors and chiefs of armed forces.<sup>235</sup> It bound the president to act on the advice of Prime minister. Nawaz Sharif government moved 14<sup>th</sup> amendment in national assembly to check the problem of defection and passed on 3<sup>rd</sup> July 1997. The 14<sup>th</sup> amendment added an article 63-A to the

constitution.<sup>236</sup> During then short rule of Nawaz Sharif, a conflict between Sharif's government and the judiciary surfaced.

The chief justice of Pakistan had certain reservations on certain issues regarding judiciary matters. But the government had its own thinking and way of governance. The main differences between government and the chief justice were on the matters of anti terrorist law, recommendation of judges from high court to supreme court, arrest of some officers in Faisal Abad, notification of reduction in number of judges in supreme court, suspension of 14<sup>th</sup> amendment, contempt of court against Prime minister on remarks against judiciary in parliament and some others. On 28<sup>th</sup> November 1997, the Supreme Court building was attacked by Pakistan Muslim League (N) workers to prevent the bench from hearing of contempt against prime minister.<sup>237</sup> The judges were divided into two camps, only Mian Ajmal wisely stayed out of this conflict.( details in chapter 5)

In Asad Ali's case, the Supreme Court ruled that justice Sajjad ceased to hold the office of chief justice of Pakistan and ordered his reversion to the position of a judge.<sup>238</sup> President Leghari was confronted with a hostile environment by the government that he had no way except to resign on 2<sup>nd</sup> December 1997.<sup>239</sup> After his resignation Wasim Sajjad, chairman senate took over as acting president. On December 31, 1997, Rafique Tarrar was elected as president of Pakistan.<sup>240</sup> Pakistan Muslim League (N) government had designs of ruling the country with an absolute power. In order to gain absolute power government acted in a way that was not acceptable to the actual power centers. The nuclear tests and tilt on Kashmir issue by the government were those steps, which put the government into troubled waters.<sup>241</sup> On 12<sup>th</sup> October 1999, the Nawaz government was removed by the military. All the control of country was taken by armed forces. Once again the old game of Provisional Constitutional Order, then legitimization of military action through Supreme Court and permission to amend the constitution in the betterment of nation was replayed.<sup>242</sup> The drama of referendum and five years term for president and restoration of democracy under the umbrella of genuine forces again was staged to befool the nation and its poor people, who had achieved Pakistan to be a democratic state to be run under the guidance of elected representatives. Now, it is the common occurrence for the masses and politicians of Pakistan.

Pakistan has passed her fifty-seven years but is still standing on the same footing as it was at the time of independence. In these years, it passed through many ups and downs and the political system could not get stability. The first constituent assembly could not prepare the constitution so the undemocratic forces used this for their own ulterior objectives and strengthen the hold of establishment in the country. It was the Bureaucracy, which was very organized and trained. Bureaucracy occupied the top position in the government after the death of Liaqat Ali Khan. They conspired with undemocratic forces and used the fickle tactics to oust the elected governments; otherwise they had no space to rule in the presence of democratic traditions. The dismissal of Kh Nazamuddin cabinet was undemocratic because he had majority in the parliament. The root cause of the failure of the Pakistan's political system was the decision of Supreme Court who justified the Governor General's decision of dissolution. It was the first blow to the coffin of democracy in Pakistan. The judiciary always tried to facilitate the executive rather than the constitutional provisions. Judiciary did not differentiate between the democratic and undemocratic regimes but always decided the petitions on suitability rather than the law. Judiciary made itself the part and parcel of executive organ and the executive organ used the constitutional provision for their ulterior objectives. The judiciary could not come out from the law of state necessity and governments used this law as shield for their authoritarian rule. After getting legalization, the authoritarian regimes interpreted the decisions of judiciary according to its will and facilitation. In spite of all kinds of humiliations judiciary continued the support of executive, provided them opportunity for unconstitutional acts. The judiciary had lost its creditability and people do not expect justice from the judiciary because it has degenerated over the years. It is clear that we have not learnt from our past mistakes. We are prone to make the same mistakes repeatedly with ever more disastrous consequences every time.

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## **CHAPTER: 3**

### **PRESSURES ON JUDICIARY**

An independent and impartial judiciary is universally recognized, as a basic requirement for the establishment of the rule of law is and an inevitable and inseparable part of a democratic and civilized way of life.<sup>1</sup> Any kind of pressure on judiciary creates destruction in the society, so the people should make efforts for preservation of independent judiciary for its future generation. An independent judiciary free from the pressures is regarded as the sine que non in the democratic or other form of government. The necessity of independent judiciary has been recognized throughout the human history<sup>2</sup>. It is an acknowledged fact that only fair judicial system can stand for the protection of the rights of citizen.

In this chapter, we will examine the state of judiciary in Pakistan. How independent is our judiciary and what we have done so far to preserve its independent identity. Let us therefore begin our chapter with a brief history of our judicial past before we examine the present. On independence, Pakistan inherited a healthy judicial system with a reputation for integrity and competence<sup>3</sup>. We adopted the British judicial system of pre independence by amending the Indian act of 1935, in 1947. For details on how the British legal system replaced the Mughal system of justice, see my first chapter. The amended act provided security and constitutional guarantees to the judiciary. We have continued with the British judicial system. The superior court judges maintained the tradition of separation from the executive authorities in early years (till 1954) and they felt independent in delivering justice. First Chief Justice (Mian Abdul Rashid) federal court maintained the tradition inherited from the pre independence Judges. His tenure was very peaceful and impartial. "Between the years 1947-71, the judiciary in Pakistan maintained a reasonable degree of freedom of action and asserted its statutory powers in deciding issues on legal merit. It did not hesitate in setting aside those decisions given by the executive branch that infringed on laws or, were ultra vires of the constitution. The court judgments enjoyed respect and the executive branch implemented them in letter and spirit"<sup>4</sup> However, all judgments were not free of criticism. Justice Muneer's doctrine of

state necessity was criticized publicly and remains till today controversial decision of our superior judiciary. However it was tolerated as a sine que non of democratic dispensation. After this brief introduction let us examine the present state of judiciary in terms of political pressure and interference. It is popularly believed that the reputation of our superior judiciary is at stakes because of overt and covert interference from political and military circles. These kinds of allegations require a careful examination of the political system and environment in which we operate as a nation. The executive perceives the judiciary as an instrument of the states, which should facilitate the exercise of government's authority rather than restrict it<sup>5</sup>. This kind of perception has put our judicial system under tremendous amount of pressure. These pressures seriously undermined the image of our judicial system. With out an independent judiciary a socio-political stability and rule of law cannot be achieved in the country.

The first step to pressurize the judiciary began at the time of appointments when executive organ of the state appointed political affiliated persons. The influential persons within the executive and judiciary employed blatant and unashamed methods for their friends and young relative's induction in judiciary<sup>6</sup>. The factor of favoritism and nepotism led to decline and put the judiciary under pressure. Federal Shariat Court, permanent benches of the high courts, harassment to judges and their families and amendments in the constitution relating to the judiciary compelled them to work under the pressure of the executive. These pressures are domicile's swords on the judiciary, which are totally in the hands of executive. We could not create democratic culture because we did not give chance to judiciary for making just and impartial decision<sup>7</sup>. There is no doubt that it is the executive organ of the state, which pressurizes the judiciary for its ulterior motives. Although we are independent nation but the colonial factor is present in our minds<sup>8</sup>.

### **Appointments Of Judges**

It is an established fact that appointment of the judges of superior courts on purely merit bases is essential to distribute justice to the society. Political managers of Pakistan considered this issue and categorically mentioned the qualification, experience, and method of appointment in various constitutions of Pakistan from 1947 to 1973. There are

some evidences that some heads of government misused these powers of appointments and some time this issue became the most controversial among President, Prime Minister and Chief justice of Pakistan. Ultimately the Supreme court of Pakistan interpreted concerned clauses and explained the procedure of appointments by the full bench under headship of chief justice Sajjad Ali Shah in a case entitled 'judges case' in 1996 accordingly<sup>9</sup>. The appointments used as an instrument to pressurize the judges of superior courts are analyzed hereafter.

## **POLITICAL APPOINTMENTS**

The appointments made during the first fifteen years (1947-1962) of Independence have generally been acknowledged as fair and unimpeachable<sup>10</sup>. There is no doubt the judiciary enjoyed great prestige in newly independent state. The basic cause of their respect was their freedom of conscious and the implementation of the concept of rule of law. Almost each and every department including the executive respected its findings. In the first eleven years, the judiciary enjoyed respect and confidence<sup>11</sup>. The game of favoritism started, in particular, during the regime of president Ayub Khan. He made a number of appointments of politically affiliated persons to superior courts on political and personal considerations<sup>12</sup>. An unfortunate thinking took hold in the successive governments that the persons, who are appointed, as Judges should, feel beholden to them. The decline in appointments continued that also personal considerations and nepotism even superseded political considerations. Judges and other men of influence shrewdly planned the careers for their near and dear ones, planning to lead them eventually to superior judiciary<sup>13</sup>. This consideration paved the way for implementing the executive's agenda because these judges were devoid of morale courage to stand with justice. The influential persons employed the blatant and unashamed methods for their young relative's induction into judiciary. They were inducted as Assistant Advocates General and then promoted to Deputy Advocate General or Advocate General, thus paving way for their elevation as judges of High Courts<sup>14</sup>. It was a stepping stone and have become nurseries for appointment to the superior judiciary, but the plantation in such nurseries was restricted to the near relatives of the men of influence. Some of the judges appointed were not even known as advocates and majority of lawyers practicing in

the high court heard about them just at the time of their appointment.<sup>15</sup> The factor of favoritism and nepotism led to decline and put our judiciary under pressure. Such judges naturally lacked in confidence and no wonder they act in arrogant and unpleasant manner toward the people and favored their appointees in difficulties. They acted as judicial tyrant. They belonged to the elite class of country and they always supported the government's stand. They were not appointed on merit and they were sitting on the seats of justice by the grace of executive. It is also the bad luck of our nation that whenever any political leader or dictator got a free hand in the appointment of judges, he abused it to accommodate his friends, relatives and favorites all at the cost of the merit<sup>16</sup>. The ordinary lawyers could never manage to be appointed as judges in spite of having all the professional qualifications. The executive right from the initial appointment to post appointment manipulates the process of appointment by influencing the appointment process at every step. An ordinary lawyer cannot dream of being taken as law officer, not to talk of being a judge because he does not belong to the class of privileged few. Honest, efficient, intelligent and unimpeachable judges like A.R. Cornelius, M.R Kayeni, Mian Abdul Rashid, Drob Patel are becoming rare species in Pakistan judiciary and if the method and manner of appointment to superior judiciary continues to be what it is, they may even become extinct<sup>17</sup>.

### **MARTIAL LAW 1958**

The plague of favoritism started particularly, during the Regime of president Ayub Khan who made a number of judicial appointments on political or personal considerations. Ayub Khan started the tradition of interview from the candidates before appointment as judge of Superior Courts, which gave rise to arbitrary and highly subjective consideration for selection. What a strange, one of the candidates was not appointed merely because his shoes were rather gaudy and did not go with the suit he was wearing during the interview. A candidate from Lahore was asked if he was a typical Lahori, which he did candidly admit. It cannot be said if he liked the answer but the candidate was not appointed. The candidate may create problem in future due to his boldness in answering the president<sup>18</sup>. He made an appointment to the High Court (Judge) of a member of the National Assembly in return for his vote in favour of government in power on vulnerable matter. A story of appointment circulated in Ayub regime in the judiciary was that a politician from

legitimizing martial law in Nusrat Bhutto's case<sup>28</sup>. But only four were confirmed out of fourteen judges appointed in these two batches because chief justice Maulvi Mushtaq Hussain had been removed unceremoniously. His replacement Justice Shamim Hussain Quadri was openly hostile to Maulvi Mushtaq Hussain and his appointees. He said in open court "Chicks will go with the hen".<sup>29</sup> General Zia's regime was the peak of favoritism and nepotism in appointing the judges, as the military-judiciary alliance obliged their relatives and friends. "He succeeded in creating a parallel court structure by establishing the federal Shariat Court which has clearly undermined the institution of judiciary"<sup>30</sup>. He appointed hand picked judges in this court from the judiciary and the terms and conditions of their services were at his sweet will. He continued the policy of 'ad-hocism' even in judiciary.

### **MUHAMMAD KHAN JUNEJO 1985-1988**

Later on during the parliamentary regime of Junejo some appointments were made in the judiciary. All were on the recommendation of influential persons especially of ruling party but through complete process contrary to Zia's one-man show. After the dismissal of Junejo government President Zia appointed judges in the high court without the consultation of Prime Minister, which was a legal requirement of the constitution of Pakistan under articles 177 and 193 even after 8<sup>th</sup> amendment<sup>31</sup>. General Zia expired in the air crash. M.D. Tahir filed a petition in the Lahore high court against these illegal appointments. The high court set aside his request that under article 193, the president was not bound by prime minister's advice in appointing the judges<sup>32</sup>.

### **BENAZIR BHUTTO's IST REGIME 1988 - 1990**

Benazir was elected as Prime minister in December 1988. After some months, a dispute arose between the President and Prime minister, on the appointments of judges in the high courts. Both were assertive about their constitutional powers of appointment of judges<sup>33</sup>. Already, in the petition filed by M.D. Tahir, challenging the appointment of judges in the high courts during Zia era. Lahore high court accepted it as sole right of the president to appoint the judges. The judges validated the appointments of judges made by Zia without consultation of Prime Minister<sup>34</sup>. Finding no way, the federal government

ethnic group will have monopoly in the judiciary in the future”<sup>55</sup>. In other three provinces, government again succeeded in appointing their favorites while the judiciary also received their share. The Nawaz Sharif government did not confirmed the three judges, “on the bases of pick and choose and only those judges were not confirmed who were not liked.”<sup>56</sup> Nawaz Sharif’s main stress was on the establishment of Anti Terrorist Courts where he could be able to accommodate the favorites as judges at his own discretion. He delayed appointments in superior courts and was intending to appoint them near the next elections so that they could help him to win for the next term.

### **FEDERAL SHARIAT COURT**

“I must say that the spirit of Islam, demonstrated during the recent movement was commendable. It proved that Pakistan, which was created in the name of Islam, would continue to survive only if it sticks to Islam. I consider the introduction of Islamic system as an essential pre requisite for the country.” Zia promised the nation for the enforcement of Islamic system in his address on 5, July 1977 upon the promulgation of Martial Law.<sup>57</sup>

Zia, to legalize his government used the name of Islam and sets up of Shariat benches were one of them. He established the Shariat Benches as a first step towards the implementation of Islamic system. At last he used these benches to pressurize the judiciary by making service rules for this set up. Firstly, the establishment of Shariat benches was announced on first Moharram of 1978 <sup>58</sup>and established in 1979 that a Shariat Bench will be set up at each high court and a Shariat appellate bench in the Supreme Court. Their function was to declare the existing laws invalid if they were repugnant to the Holy Quran and Sunnah<sup>59</sup>. Zia stated that the religious courts were meant to supplement not to replace the conventional court system.<sup>60</sup> Zia killed two birds with one stone. He fulfilled the wish of Ulema as well as managed to create soft corner for his government. Mulana Maudadi and others described it “as a land mark in the history of the country.” Mufti Mehmood named “the Shariat Bench order as a land mark in the enforcement of Nizam –e- Mustafa. Mian Tufail Mohammad stressed and suggested, “The provisions relating to the Shariat Benches must be incorporated in the constitution”.<sup>61</sup> Zia accepted the suggestion of religious leaders and amended the



constitution by adding the Shariat Benches as Chapter 3-A, of the constitution.<sup>62</sup> These important laws having been excluded from the jurisdiction of the benches as follow;

1-Constitution

2-Muslim Personal Law

3-Procedure of a court or Tribunal

4-Any Fiscal Law<sup>63</sup>

There was no constitutional guarantee for Shariat Benches to continue permanently and it depended on the coming government.<sup>64</sup> Religious parties leadership pressed and stressed on Zia for the establishment of qazi courts but the bullet slipped away close to the ear. In response, Zia established the federal Shariat Court as parallel hierarchy in the existing system. He set up the federal Shariat Court after one year's establishment of Shariat Benches by amending the constitution of 1973<sup>65</sup>. The court was set up with powers to declare invalid any law or provision of the law as repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (pbuh] It had a revision cum appellate jurisdiction, it could examine the record of any case decided by any court relating to the enforcement of Hadood, for determining the correctness of the court findings.<sup>66</sup> He debased and destroyed the 1973 constitution by carrying the false mask of religion<sup>67</sup>. He did all this just for his personal satisfaction of weakening the traditional judiciary. The judiciary was under the cloud due to the introduction of structural changes in their constitutional safeguards. It was to pressurize the judiciary; even though such powers had been conferred only a year earlier on Shariat Bench of High Courts under the constitutional amendment orders 1979. . It was a major blow to our judiciary. Before the establishment of this parallel court, the high court had the power of checking laws repugnant to the holy Quran and Sunnah. It is clear as day light that injunctions of Islam, as laid down in the Holy Quran and Sunnah of the holy prophet (pbuh) are the supreme law of Pakistan ever since the objective resolution of 1949. There was no need of Federal Shariat Court to judging the law repugnant to the Quran and Sunnah. Thus the 1973 constitution already provided the institution of Islamic ideology council for this purpose and it was fulfilling it's described and prescribed duties. He declared his no confidence in the wisdom and power of the judiciary, although the judiciary in Pakistan has almost always obliged the rulers<sup>68</sup>. The intention of the

creation of Federal Shariat Court is seen as the forum to pressurize the judiciary and gaining the favor for his government. "He (Zia) believed in the form rather than in the spirit of Islam."<sup>69</sup>

The federal Shariat Court was to consist of five members, including the chairman, who was to be a judge of High Court or Supreme Court of Pakistan, who was to be appointed by the president.<sup>70</sup> Moreover the federal Shariat Court judges have to hold office at the discretion of the president rather than under the constitutional structure fixed for judiciary.<sup>71</sup> It was a direct attack on the service structure of the judges of judiciary. The president was empowered to send High Court judge to the federal Shariat Court without their consent. If he refused to accept appointment as a member of federal Shariat Court he would be deemed to have retired from his office.<sup>72</sup> The judges of federal Shariat Court were to be appointed and removed on the sweet will of the president. "His (Zia's) acts come under the mischief of the Islamic law."<sup>73</sup> He could assign to the judge any other office and was required to perform such other function as the president may deem fit.<sup>74</sup>

Judiciary cannot resist the executive because the judges of Pakistan are often weak due to the flaws in appointment process. The appointment and transfer of the federal Shariat Court judges depended on the discretion of the president at that time. It was the president who can fix their remunerations and he could appoint them anywhere to any post of that pay scale.<sup>75</sup> In 1980, Mr justice Aftab Hussain was transferred to the federal Shariat Court without any cause and his consent. Although, he had cooperated with Zia government in the judgment of Muhammad Ahmad Khan's murder case.<sup>76</sup> "Thus a federal Shariat Court consisting of hand picked judges of the president was set up as a super constitution"<sup>77</sup>. When the services of judiciary will be in the hands of executive, it would be very difficult for them to decide cases on merit. There are few judges who resisted the executive like A.R. Cornealious, Drob patel, S.M. Samadani and few others. Justice S.M.Samdani told the Chief Martial Law Administrator during a meeting that the military bureaucracy is equally responsible for the evils of nation as the civil bureaucracy.<sup>78</sup> The distribution of justice is very difficult task, which demands independence, mental peace and security of the state that was snatched from judiciary by the undemocratic governments.

The first Chief Justice of Federal Shariat Court justice (retired) salahuddin Ahmad wrote a judgment of adultery. He followed the liberal view and held that Islamic law did not

support stoning to death<sup>79</sup>. It roused the wrath of Zia-ul-Haq and religious parties against the judgment. General Zia-ul-Haq made a public statement that courts (judiciary) were frustrating his program of Islamisation.<sup>80</sup> President Zia granted appellate and revision powers under the Provisional Constitutional Order. Now the position of Federal Shariat Court became stronger due to appellate and revision powers, which other wise was dealing with abstract and academic controversies and questions. The High courts lost their appellate powers in criminal cases, which they were using since the inception of High Courts. The judgment about adultery by the first Chief Justice of the Federal Shariat Court was revised and set aside by the chief Justice, Aftab Ahmad. The court was empowered to review its decisions as a face saving device.<sup>81</sup>

Under the Provisional Constitutional Order three ulemas were introduced into the court in addition to five judges<sup>82</sup>. He appointed the ulema as judges in the Federal Shariat Court who had no legal training and regular legal knowledge.<sup>83</sup> These newly appointed ulema judges were given standing on equal footing with High Court judges. Zia put the judiciary under pressure and introduced new hierarchy in the form of the Federal Shariat Court. The ulema judges were under the obligation of government. Their job was too dependent on the sweet will of the president. It was a continuous pressure on the judiciary by the executive to gain favor and legitimize military rule in Pakistan. Zia mobilized a class of so called ulema, and tried to create courts for them in the name of Qazi courts. "His Islamization of laws was nothing but window dressing"<sup>84</sup> Zia painted the structure of justice in a new and controversial color under the cover of federal Shariat Court<sup>85</sup>. Zia mixed religion and politics by making the institution of Federal Shariat Court. He made and used this institution for strengthening his power, and to obtain the political support of religious people and parties. "Zia made the judiciary subservient to his ill will and introduced a parallel court"<sup>86</sup>. All governments after Zia used this institution for pressurizing the judiciary and gained their hidden objectives.

Benzir Bhutto said that she believes in the Holy Quran and Sunnah bestowed upon us by the almighty Allah but not in the supremacy of Federal Shariat Court.<sup>87</sup> Benazir Bhutto in her second term launched her decisive plan to dominate the judiciary and used the Federal Shariat Court as a tool. She appointed justice Mahboob Ahmed chief justice Lahore high court as a judge of federal Shariat Court.<sup>88</sup> He refused to take up the new

office and opted for retirement before time. He was the senior most judge of Lahore high court so he should have been sent to Supreme Court. The government attempted to sideline him due to his opposition in the appointment of ppp workers (lawyers) as new judges in Lahore High Court. She achieved her objective after his retirement. Justice Mohd Ilyas of Lahore high court was sent to federal Shariat Court as a judge without his consent. He was punished by the government for his attachment with opposition.<sup>89</sup> The high court bar also opposed this appointment. "He had been treated very unfairly". He told Sajjad Ali Shah chief justice of Pakistan<sup>90</sup>

Benazir government and Pakistan Peoples Party was hankering to dominant the judiciary because they had learnt the lesson from the past experiences with courts. She wanted to appoint her party loyal lawyers as judges at any cost. She sent Nasir Aslam Zahid chief justice Sindh High Court to Federal Shariat Court for accommodating the Abdul Hafeez Memon as chief justice of Sindh high court who had the record of having been sworn as a judge six times<sup>91</sup>. He was also hurdle in the appointment of pro ppp judges in the Sindh high court. Nasir Aslam Zahid accepted the new appointment and the new chief justice recommended the pro ppp lawyers for the appointment as judges of Sindh High Court. "Nasir Aslam Zahid was consigned to the Shariat Court because of his uncooperative attitude"<sup>92</sup>.

### **Provisional Constitutional Order(1981)**

"Provisional constitutional order (P.C.O) was a crude and vindictive method of removing the judges from their judicial responsibility at the whims of the Martial Law authority This was a direct assault on the principles which govern the role of judges, and the constitutional authority under which they function."<sup>93</sup>

The constitution of 1973 was many times suspended, amended and customized by democratic as well as military dictators. For the stop gape arrangement to run the state business, Legal Frame Work Order, Provisional Constitutional Order and laws continuation in force introduced in the original document of 1973 by the respective rulers. After the imposition of 1977 Martial Law, the country was run under the Martial Law orders and regulations issued by the Chief Martial Law Administrator and likewise, provincial Martial Law Administrator's were issued regulations within the jurisdiction of their respective provinces. Zia did not abrogate the 1973 constitution but declared its

suspension till the appropriate time<sup>94</sup>. In the initial stage of Martial Law Zia needed the support of judiciary for the legitimization of his coup'dete' and to suppress the Pakistan Peoples Party. Zia took advantage of the judiciary for few years and then came down upon them with heavy hands. During the co-existence period, the martial law courts and judiciary were working smoothly and both of them did not feel any kind of conflict on the question of jurisdiction. Meanwhile the controversy of judicial review soon came on surface; the judicial review to military courts decisions was creating hurdles for the smooth running of Martial Law Government. The courts started asserting their authority and making the operation of military courts difficult by exercising the power of judicial review, the political pressure started rising and the judiciary an inexorable part of the national milieu, increasingly granted stay orders to redress the grievances of the oppressed in respect of the cases tried or under trial in the military courts. Such stay orders took a long period to vacate because under the law no time limit was prescribed for the judiciary to complete the process. Zia and his cronies felt uneasy from the attitude of judiciary and started to study the ways for getting rid of them from this constitutional institution.

The military courts felt they should be able to function without undue interference from the High Courts.<sup>95</sup> Martial Law authorities were not happy on the interference of judiciary and demanded that the operation of the military courts be ousted from judiciary's jurisdiction. To keep up both the courts within respective jurisdiction Sharif-ud-Din Pirzada suggested to Zia that they should sought the advice of the Chief Justice of Pakistan. A meeting held in Zia's house, Chief Justice Supreme Court and Chief Justice Lahore High Court after mutual discussion suggested that an additional article<sup>96</sup> (Article 212-A be incorporated in the constitution which stated that no civil court including the High Court should grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of the military court extends.) be incorporated in the constitution to avoid the situation of clash between the Martial Law authority and judiciary.<sup>97</sup> It was a marriage of convenience arrangement because Martial Law and independent judiciary are two different things, who always run in opposite directions. Judiciary is the protector of basic human rights and Martial Law always suspends the basic human rights. However, both General Zia and Chief Justice Supreme

Court were happy on this solution and felt that the amendment would serve the purpose to full extent. But the wishes of any man cannot be fulfilled until their wishes have a moral support beyond his philosophy or his actions. The Article 212-A was completely in the favor of Martial Law courts and negation of the judicial review. The article debarred the jurisdiction of regular courts<sup>98</sup>. It handicapped the judiciary while judiciary had retained the power of judicial review in its hands in Nusrat Bhutto's case, which was accepted by the Martial Law authorities although for the time being.

Tussle continued between the military authorities and judiciary in spite of additional article 212-A, both remained confused on this complicated issue. At the same time different benches of High Courts were dealing with the petitions against the introduction of article 212-A in the constitution. One bench of Sindh High Court held that article 212-A has not abated the power of judicial review and another bench held the opposite view<sup>99</sup>. The bench who held the opposite view supported the view that the Supreme Court had never claimed to be above the constitution nor to have the right to strike down any provision of the constitution. Instead of addition the article 212-A, judiciary had been divided into two clear groups, one was accepting it and other was maintaining their right of judicial review on the actions of Martial Law government. Zia succeeded in dividing the judiciary and he took advantage of it for strengthening his rule. In this way a group of judges of his favor was prepared, which was his aim to weakened the judiciary and safeguard his government in future. This complicated and confused situation reached its height when unlike the Sindh High Court; Balochistan High Court came out with quite opposite judgment that it had the jurisdiction to set a side the sentences awarded by the military courts in spite of amending the constitution by martial law authorities.<sup>100</sup> Baluchistan High Court set a side military courts decisions as routine affairs, which was seen by the military dictator as an affront to the provincial administrative authorities. This critical situation intensified the pressure on Zia and his colleagues. The provincial Martial Law Administrator's demanded Zia, either lift the Martial Law or enforce it firmly<sup>101</sup>. The judiciary was seen as the main hurdle in the enforcing of punishments to keep the government and society stable. At the same time two sets of rulings of the High courts were operative in the country. Martial Law authorities were in confusion on this situation. The Supreme Court did not make any effort to resolve this dichotomy despite the appeals

against these judgments were pending before the Supreme Court. Supreme Court did not try to clear the situation. The pending appeals in the Supreme Court created an impasse and a situation of conflict emerged between the judiciary and military courts<sup>102</sup>. The provincial Martial Law Administrator and Governor of Balochistan felt that the judiciary has been creating difficulties with a purpose, despite repeated requests of Provincial Martial Law Administrators, Zia began to sense trouble and started to mend the situation with the judiciary. On the orders of Zia, secretary law justice S.A. Nusrat requested the Chief Justice of Supreme Court of Pakistan for early hearing of appeals of government petitions but Chief Justice showed no respect to his request. Chief Justice Supreme Court said that the courts were too busy with other important cases<sup>103</sup>. It is possible that Chief Justice was right however; it was not a proper way to reply to the head of the state. The government was not satisfied with the reply. In this confused and complicated situation, the Zia government came to the conclusion that judiciary as a matter of policy had adopted delaying tactics. Martial Law government felt that the judiciary was in a mood to resist government pressure by using the power of judicial review. In Nusrat Bhutto case judiciary provided every legal power to the then government to run the state business even to amend the constitution for this purpose, without imposing any strict condition.

“The Provisional Constitutional Order extinguished judicial powers.<sup>104</sup>” Judiciary forgot the essence of constitutionalism, as “An independent judiciary is the antithesis of Martial Law. An independent judiciary can only function under the umbrella of the constitution and under the shadow of the gun of a brown duke of Wellington.<sup>105</sup>” As the judiciary was challenging the Martial Law government, the Chief Martial Law Administrator was compelled to promulgate the Provisional Constitutional Order. On 24th March 1981<sup>106</sup>. According to the Provisional Constitutional Order. All orders and actions taken by the regime were considered to be legally valid, and notwithstanding any judgment of any court could be called into question in any court on any ground whatsoever<sup>107</sup>. The immediate cause of enforcing the Provisional Constitutional Order was the growing friction between the Martial Law authorities and superior courts.<sup>108</sup> It was unexpected for the superior judiciary but they had to accept it. “This order virtually and effectively put the constitution of 1973 in abeyance”<sup>109</sup>. Under Provisional Constitutional Order, the judges of Supreme Court and High Courts and the judges of the Federal Shariat Court to

take a fresh oath which provided that a judge will discharge his duties and perform his functions to the Best of his ability in accordance with the Provisional Constitutional Order and the law.<sup>110</sup>(Article 17 of the P.C.O). The matter of oath taking was considered on the personal and political basis, all were invited to take oath except for those who did not agree to attest their loyalty to the Martial Law rule<sup>111</sup>. The judges were to take oath at the expense of losing their jobs in case of their refusal to do so. "The government retained the discretion to re-appointment only those judges whom they wanted to continue.<sup>112</sup>" Confronting with conscience the chief justice Supreme Court and other three judges refused to take the new oath and accordingly lost their offices. A substantial number of High Court judges retired on this occasion on the dispute of new oath. All was done for the prolongation of Zia's tyrannical rule and to get judicial legitimacy by suppressing them under Provisional Constitutional Order.<sup>113</sup>

**Table No.1 , Oath Taking of The Judges of Superior Courts Under PCO**

Court	Oath taken	Invited to take oath but did not take	Not invited for Oath
Supreme Court	8	3	
Federal Shariat Court			1
High Courts	40	5	9
Total	48	8	10

Zia with stroke of a pen shook the whole judiciary. The chief justice Supreme Court and three judges refused to take the new oath and accordingly lost their offices.<sup>114</sup> "The prime movers behind this unprincipled and unparalleled piece of legal jiggery-popery were none other than Messrs A.K.Brohi and Sharif-ud-Din Pirzada<sup>115</sup>." Both always played their role in establishing the Martial Law Governments. This order put the judiciary under pressure vesting all the powers of their existence in the hands of Chief Martial Law Administrator while the Supreme Court had legalized the military coup d, eta. Zia exerted complete pressure to make it an instrument of his misdeeds. He like a barbarian military dictator viewed the judiciary as an instrument of the state, which should facilitate the exercise of government's authority rather than restrict it<sup>116</sup>. Some of the senior judges reacted by not taking the oath under Provisional Constitutional Order but most of the



main objective was to strengthen and prolong his rule at any cost. In Provisional Constitutional Order all the limitations and restrictions were imposed on judiciary alone and the judges were forced to take oath according to the will of the Chief Martial Law Administrator. "Blatant interference in the composition, jurisdiction, and independence of judiciary on such a massive scale was unprecedented in the history of the country."<sup>121</sup> So they became a part of a government and in no way a challenge for the rulers. All the institutions except judiciary were under his direct control. Now he put the judiciary under the Provisional Constitutional Order. Most of the judges were eager to take new oath and for this purpose they contacted the concerned corners who were astonished on such behaviour. "The generals later in a meeting, giggled and laughed at the way these judges ran to them, falling on their faces and stepping over one another, begging them to give them oath."<sup>122</sup> The government had promised to work under the guidance of judiciary in Nusrat Bhutto's case to achieve the right of amendment in constitution. Now the government of Zia was in a position to run the state according to its own will and nothing was left for the judicial review. It curtailed the judiciary's powers, position, respect, and independence.<sup>123</sup>

The unbridled supremacy of executive in Pakistan reached its peak when the ruling military junta promulgated a series of Martial Law regulations. Zia got this supremacy by promulgating Provisional Constitutional Order a new kind of constitution. Zia humiliated the judiciary particularly in the public eyes through Provisional Constitutional Order that no judge could entertain the thought of defying the martial law government actions. The matter of oath under Provisional Constitutional Order was discussed in judiciary and majority of the judges favored taking the oath<sup>124</sup>. Molvi Mushtaq Hussain who played a pivotal role in the Bhutto case was not given invitation to take oath by the Zia government. Mr. Anwar-ul-Haq urged Zia to invite Molvi Mushtaq for the oath, but Zia did not agree<sup>125</sup>. Those people who have been used by Zia were wiped out on difference of opinion and opposition to Martial Law authorities. This is a golden rule of ruling elites, which is applicable to all ages and almost time immemorial. All the rulers of the world applied this rule accordingly. Zia also used the persons around him and threw them out of his government but he dealt with the judiciary with an iron hand through legal means. Maulvi Mushtaq and other judges, generals (Chishti, K. M. Arif); politicians

But the judiciary due to its independence was not cooperating with him, as he desired<sup>128</sup>. Judiciary has its own compulsions in dealing with the government because its role is to provide justice to the people. So it could not go with the desires of government or their representatives. Z.A. Bhutto's government decided to pressurize the judiciary by curtailing the powers and jurisdiction of the judiciary because his government felt that some of the decisions taken by the judiciary in the early phase of his rule were not in line with the requirement of his popular politics. These decisions were falling heavy to his autocratic style of ruling<sup>129</sup>.

"The 1973 constitution, which had the approval and support of all the political parties in the country, was undoubtedly one of Bhutto's greatest achievement. It is unfortunate that Bhutto violated its sanctity by a series of unilateral amendments in the teeth of opposition from his political opponents.<sup>130</sup>" The Article 199 of the constitution empowers the high courts to issue writs in the nature of "Corpus Mandamus Habeas Warrant" etc. Under the article 199 clause (1) high court can direct a person to refrain from doing anything, which he is not permitted by law to do. However, high court directs government to bring the detainee before it so that court may satisfy itself that he is not being held without lawful authority or in an unlawful manner<sup>131</sup>.

Bhutto government introduced fourth amendment to prevent the judiciary from granting relief to political opponents, particularly in exercise of the constitutional jurisdiction under article 199. The judiciary's powers were curbed for personal interests under this Amendment. The newly added amendment prevented the High Courts to prohibit the making of an order for the preventive detention of a person and also prohibited the courts from granting bail to detainee under pre-emptive detention law.<sup>132</sup> This was a major curtailment of constitutional jurisdiction of High Courts to come to facilitate the political victims or even to grant bail to such people during their detention. Unfortunately the amendment was passed in a democratic set up. The amendment was passed without the presence of opposition. It was very critical moment in the parliamentary history of Pakistan and also Bhutto regime. The amendment was passed in a very regrettable manner. The opposition demanded to have a full flagged debate particularly regarding the curtailment of the powers of the High Courts. The behavior of the government party was very harsh towards the opposition; they denied the opportunity to the opposition to

Minister Zafuqar Ali Bhutto himself.<sup>141</sup> An independent judiciary was declared an integral part of democracy under the 1973 constitution, drafted and enforced by the PPP government under the leadership of Zafuqar Ali Bhutto. He declared in the National Assembly on 4<sup>th</sup> September 1976, “the judiciary couldn’t become a parallel executive by wholesale misapplication, misrepresentation and misinterpretation of the laws. This must be very clearly understood and anyone who does not understand it does so at his own peril. Each organ must remain in its sphere of influence in its own orbit. It cannot transgress into the executive function, into the executive organ. It has been necessary to introduce Fifth Amendment as a result of the transgressing by the judiciary of its functions into the executive branch<sup>142</sup>.” The language of Prime Minister Zafuqar Ali Bhutto in National Assembly was very insulting towards the judiciary. The ruling party did not maintain the respect of the basic institution of state. Bhutto extended very insulting expression in the National Assembly about the third pillar of state. He tried to exert pressure on judiciary for his ulterior motives. He faced the aftereffects of this humiliating tone after the imposition of Martial Law, during the proceeding of murder case registered against him during his own regime.<sup>143</sup> Federal Education minister, Mr. Abdul Hafiz Pirzada said, “The judiciary had been trying to encroach upon the functions of the legislature and the executive. If the judges were not happy with their positions, then they should quit their office and contest elections to occupy seats in the parliament.<sup>144</sup>” He also defended the fixing of tenures of the Chief Justice of Supreme Court, Chief Justice of High courts because all other state offices like the president; the Prime Minister and members of parliament had a fixed term of office.<sup>145</sup> He justified the fixing of tenure of Chief Justice that one could visualize the frustration of the other judges if the incumbent Chief Justice continued for fifteen years or more. He justified the appointment of best talent as a Supreme Court judge, transfer of judges from one High Court to another.<sup>146</sup> Pirzada said that there was consensus all over Pakistan that the interpretations of superior courts about their own powers of contempt were harsh and the relief was necessary for the victims of contempt cases, which would be necessary according to the principal of justice and rule of law. The courts were using the law of contempt as a weapon against the persons and institutions on personal dealings other than arose of actual contempt of a judge<sup>147</sup>. One of the members of the opposition, Mulana

Abdul Mustafa Alazhari, said that a unanimously adopted constitution was being made controversial and disputed by the amendment<sup>148</sup>. Bhutto said in his winding up speech, "The judiciary had to be subordinate to the law rather than to legislate or execute law. His government wanted harmonious co-existence of all three organs of the state, legislature, executive and the judiciary with none of them transgressing into the orbit of the other. The independence of judiciary did not mean the supremacy or sovereignty of the judiciary. We are compelled to amend the constitution by repeated decision of the judiciary trespassing into the field of the executive."<sup>149</sup> The opposition protested on the imposition of limitations and staged a walk out during the second reading of the bill<sup>150</sup>. It is obvious that the amendment was introduced to curtail the powers of judiciary by making the judges insecure under the shadow of transfer without consent of Chief Justices. The amendment was made for the transfer of a high court judge to another high court without his consent if such transfer is for a period of one year only. Mainly this amendment provided a mechanism in the hands of executive to exert pressure on the judiciary. The power of transfer of a high court judge without his consent was a permanent Damocles' Sword on the judiciary. In this way the judiciary was fully chastised so the chief justice had no option except compulsory retirement after fixed term. The judiciary was snubbed, its powers to punish for contempt of court were amended, and existing constitutional provisions of Contempt Act 1926 in this regard were withdrawn.

Justice Sardar Mohammad Iqbal and justice Ghulam Safdar Shah, both were forced into retirement as they had completed a period of four years as Chief Justice of high court because they had not accepted their elevation to Supreme Court. According to the 5<sup>th</sup> amendment if a judge of a high court did not accept appointment as a judge of the Supreme Court, he would deem to have retired.<sup>151</sup> The people of different fields criticized the amendments and saw it as an attempt to undermining the independence of judiciary<sup>152</sup>. Prime Minister Bhutto defended the 4<sup>th</sup> and 5<sup>th</sup> amendment in his inaugural address to the jurist's conference in which he declared that the Anglo-Saxon jurisprudence was not sacrosanct. He criticized the judicial obstructions in the way of the government by granting bails to opposition<sup>153</sup>. Oftenly government circles criticized the judiciary for performing traditional function of safeguarding fundamental rights because

We could observe the difference of Bhutto government's attitude on different occasions. On the introduction of 4<sup>th</sup> amendment bill in the constitution they fixed the term of four years for Chief Justice of High Court, even if he had not attain the age of retirement. This amendment is an opposite face and another example of the arbitrary style of working of the Bhutto government. The sole beneficiary of this amendment praised publicly, "I can say from my personal knowledge that the prime minister, by conviction, has great respect for the judiciary from the lowest to the highest rung<sup>161</sup>." It is right that the officials of the government praise the rulers but the judiciary's role has been different from other institutions of the state. Chief Justice Yaquab Ali's praise and certificate of appreciation to Bhutto did not enhance his self-respect and the image of judiciary but he himself got the additional limit of service as fixed tenure although he had reached the age of retirement due to the amendment of Bhutto era<sup>162</sup>. Bhutto era came to an end on the enforcement of Martial Law after a bitter political campaign launched by PNA during the elections of 1977. Nusrat Bhutto moved the petition in the Supreme Court against the detention of ex Prime Minister Bhutto in its original jurisdiction for enforcement of fundamental rights under the constitutional article 183 (3) of the 1973 constitution, which had been held in abeyance by the Martial Law authorities<sup>163</sup>. Bhutto's exit from politics brought Pakistan, once again into the hands of Military Generals. Zia took over the reins of government by ousting Bhutto from power and tried to clear the judiciary from those judges who were beneficiary of Bhutto era like the chief justice of Pakistan Yaquab Ali, who supported Bhutto in his decisions. In this way, the military janta had to face many difficulties, so they hit the nail in time and withdrew the 5<sup>th</sup> and 6<sup>th</sup> amendment of the 1973 constitution through Martial Law orders<sup>164</sup>. These amendments were introduced by Bhutto regime. Democracy was once again subverted in Pakistan. Who is responsible for it needs a separate examination and perhaps a Ph.D thesis to examine the causes of democracy's failure in Pakistan.

Justice Yaqub Ali Chief Justice of Pakistan who was the genuine beneficiary of Bhutto government presided over the Supreme Court bench and admitted the petition. The bench ordered the immediate transfer of Bhutto and other accused to Rawalpindi jail and adjourned the case for few days.<sup>165</sup> Zia perceived that judiciary was playing the role of government's opposition so he decided to teach them lesson specially to Chief Justice of

Pakistan It was impossible for Zia to provide opportunity of judicial relief at the cost of his neck.<sup>166</sup> Zia on 22 September 1977 issued on Chief Martial Law Administrator order No.6 of 1977, which amended the article 2 of laws (continuance in force) order 1977<sup>167</sup>. The effect of this order was that the term of constitution was to be construed as if articles 179, 195 and 199 of the constitution had not been amended by any of the acts amending it<sup>168</sup>. The consequent result of this amendment was that chief justice Yaqoob Ali, who had crossed the age of retirement, ceased to hold the office of chief justice of Pakistan. On next hearing, Bhutto and his party had new Supreme Court as justice Anwar-ul-Haq had taken over as chief justice. Supreme court judges welcomed the new chief justice and called it a divine doctrine that had done justice to his legal heir<sup>169</sup>.

The seventh amendment was enacted after the people have risen in revolt against the Bhutto government as a result of the rigged elections held in 1977. The government and opposition had failed to reach an agreement on the solution of crises and fresh elections. Bhutto was a shrewd politician but unfortunately he could not foresee the coming events and their results. He amended the constitution during the crises which provided the provision of referendum<sup>170</sup> to escape from re-election and as well as the judiciary was concerned, the amendment prohibited the High Courts from exercising jurisdiction over people and property of an area where the armed forces had been brought in aid of civil power<sup>171</sup>. This amendment was against the democratic and constitutional structure and barred the judiciary from playing its due role<sup>172</sup>. It means that there would be no judicial authority to listen to public against the arbitrary actions of government in the area controlled by armed forces for the aid of civil administration. No body could approach the judiciary for any kind of relief. It was very disgraceful for the democratic government to suspend the basic rights of the people, which have been granted by the constitution itself. It was the negation of the basic document of the country. The seventh amendment's portion relating to imposition of Martial Law was challenged in the Lahore High Court and Sindh High Court. It is very interesting that the Lahore High Court on 2<sup>nd</sup> June 1977 ruled that there was no provision in the constitution for the imposition of Martial Law and declared the 7<sup>th</sup> amendment null and void<sup>173</sup>. The federal government filed the petition of appeal in the Supreme Court against the ruling of high court requesting to set aside the decision.<sup>174</sup> Three-member bench of the Supreme Court was constituted for

hearing the appeal of federation. Supreme Court of Pakistan rejected the appeal against the High Court's ruling<sup>175</sup>. However, the federal government's review petition was accepted and full bench was constituted to hear the appeal<sup>176</sup>. Before the hearing of this review petition, Martial Law had been imposed in the country. Meanwhile General Zia took the affairs of state in his hands and began to review the action of previous government issued during the crises. The Chief Martial Law Administrator withdrew the amendment through Martial Law orders before the hearing of revision petition by a Supreme Court bench<sup>177</sup>.

General Zia in his press conference in Tehran, capital of Iran clearly demonstrated his desire to rule the country for a long time. He said, "What is the constitution? It is a booklet with ten or twelve pages. I can tear them up and say that from tomorrow we shall live under a different system. Is there anybody to stop me? Today the people will follow wherever I lead. All the politicians including the mighty Bhutto will follow me with their tail wagging."<sup>178</sup> When Zia took over the rein of government, he promised the nation of an early return to democracy. He promised the holding of election within 90 days, which later became a national joke because he did every thing to perpetuate his rule. General Zia was not answerable to anybody in the country so he felt no difficulty in introducing the amendment in constitution. Zia had his own agenda, which he introduced in the shape of Martial Law regulations before the holding of election. At last the elections were held in 1985 on non-party basis after 9 years long Martial Law rule. Zia announced his plan for of "sharing of power rather than transferring it to the people's representatives"<sup>179</sup>. General Zia was conscious about the actions taken after the coup of 1977 and wanted the approval of parliament. The newly elected government and legislature was anxious about the lifting of Martial Law while the General Zia imposed the condition of indemnity for his whole era. Zia declared if parliament passed the indemnity clause, article 270 named as constitutional eighth amendment then he will lift the Martial Law. The eighth amendment provided the immunity for all acts and actors involved in the military government since the coup d, et at of 1977. The indemnity changed the essential character of the 1973 constitution. S. M. Zafar, accurately predicted that the change would move the government "from a black out to a brown out" (Muslim 17-9-85) General Zia amended the 1973 constitution several times and consequently by issuing the

revival of constitutional order 1985. The newly elected parliament under the umbrella of Martial Law passed the eighth amendment with some changes in Revival Of Constitution Orders, a price of lifting the Martial Law and restoration of 1973 constitution. According to this amendment as many as 66 articles of the 1973 constitution were affected and it changed the basic structure of the constitution. Some of the provisions were related to the institution of the judiciary, those affected the independence of judiciary, and its pressure was felt even during the democratic government.

The provisions relating to the judiciary endorsed in the eighth amendment were as under

- 1-The Supreme Court was empowered to transfer any case pending before any High Court to any other High Court<sup>180</sup>.

- 2-It was provided for the first time that the president could request one of the judges of the Supreme Court to act as Chief Justice of a High Court<sup>181</sup>. This provision has been grossly abused till the decision of judge's case in 1996. At various occasions, at least five judges of the Supreme Court have been asked to act as Chief Justice of the Lahore High Court and the Sindh High Court for intended periods of time running into several years<sup>182</sup>. This provision caused great harm to the independence of the judiciary.

- 3-The permanent benches of the High Courts, which were mentioned in the Provisional Constitutional Order, were incorporated in the constitution and thus their establishment was made part of the permanent constitution.

This amendment also provided a blanket indemnity and constitutional protection to all orders actions decision and policy measures adopted by the Martial Law authorities including the judgments of military courts at any level. Independent parliamentary group strongly criticized the amendment bill and described it as a calculated attempt to perpetuate Martial Law in the country in democratic guise.<sup>183</sup> "The 8th amendment was a piece of constitutional engineering to provide a bridge for transition from military rule to democracy and to entrench General Zia in dominant position in the post martial law constitutional arrangement."<sup>184</sup> The 8<sup>th</sup> amendment introduced major changes in the 1973 constitution, the provisions relating to judiciary were used ever since. These provisions caused great harm to the independence of judiciary. It had further undermined the position and prestige of the judiciary, which has been lost all under the Provisional Constitutional Order. We may conclude that most of the amendments made in the 1973



constitution were to pressurize the judiciary. Every government treated the judiciary as its opposition instead as instrument for providing justice and guardian of fundamental rights.

The rule of nepotism/favoritism in appointments of judge, the Federal Shariat Court as subversive tool in the hands of executive, and occasionally introduced amendments in the basic document of the land (1973 constitution) exerted pressures on the judiciary and hindered it to deliver justice in a defined way. The prevalence of such pressures contributed towards denting the good image of judiciary.

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## **CHAPTER: 4**

### **DECISION UNDER THE STATE OF NECESSITY**

The decisions under state of necessity by the judiciary in Pakistan during 1988 to 1999 had put a tremendous influence on the socio- political milieu of the country. The decisions also put a bleak mark on the image page of the judiciary. The judiciary by the use of state of necessity rule could not perform its due constitutional and independent leading role in a newly emerged state and did not step courageously after wards and during the period under study. In the chapter, the analysis of the decisions by the judiciary in petitions against the dissolution of assemblies during the time period of 1988 to 1999 has been made and an attempt has been made to reveal the role and image of the judiciary. The decisions of the judiciary remained changing from case to case. The judiciary could not direct the nation to follow the constitutional path.

### **DEMOCRATIC GOVERNMENT OF 1985**

The elections for the National and four provincial assemblies were held on a non-party basis on 25th and 28th February 1985.<sup>1</sup> Pakistan Peoples Party boycotted the non-party elections but ignored the fact that those non-party elections were better than no elections. The new parliament held its inaugural session on 23 March 1985.<sup>2</sup> Mr. Muhammad Khan Junejo from Sindh became the Prime Minister of Pakistan on the nomination of President Zia ul Haq while General Zia ul Haq retained his dual status as the President of Pakistan and chief of the army staff. Zia's dual position was not popular within the Army and was adversely commented upon in undertones.<sup>3</sup> He did not care about the undertone criticism because he wanted to retain his power as army chief. Martial Law was lifted on 31 December 1985 after the introduction of 8<sup>th</sup> amendment in the constitution of 1973, passed by the new parliament.<sup>4</sup> After the lifting of Martial Law, Junejo in public pronouncements tried to take the credits for lifting of Martial Law and, the restoration of basic rights after eighteen years.<sup>5</sup> With these announcements he affirmed that the nation's ills are due to prolonged undemocratic rule. Such views and announcements by Junejo were not easily digestible for Zia.<sup>6</sup> Junejo made some humble efforts within the political

space provided to him by Zia to establish a political culture within a limited democratic set up. He took practical steps towards the strengthening of democracy. He stressed that he had taken the power not shared the power. Zia had said before the elections and on lifting the Martial Law that the power will not be transferred but shared.<sup>7</sup> Junejo in his first meeting with president asked without courtesy and thanks when the Martial Law would be lifted.<sup>8</sup>

Zia by now was habitual using unlimited powers as dictator but in a civilian setup he was confronted with the problem of procedure. After the lifting of Martial Law in December 1985, the battle started between the Prime Minister and President over minor matters of protocol (use of falcon aircraft, Junejo, appointments of Secretaries and Ambassadors).<sup>9</sup> Junejo behaved like a chief executive of the government and Zia perceived it as an act of disloyalty or disobedience because he had appointed him as his subordinate. Zia advised the foreign office to prepare a summary for visit to Africa, but Junejo turned down the summary with a request that the Prime Minister should be making all the foreign tours. Zia had been expecting from Junejo that he would work under his authority like the Prime Minister's of South Korea, Sri Lanka, Egypt or Nepal. Junejo, however, turned out to be a man of very strong nerves. He wanted to act as a powerful Prime Minister as late Z.A. Bhutto. "Junejo felt he carried the same title as Bhutto; came from the same province and the same social background, lived in the same residence as Bhutto, flew in the same plane as Bhutto and was entitled to the same perks and privileges that Bhutto had while he was Prime Minister."<sup>10</sup> He started challenging or undermining Zia intentionally. Zia was helpless because Junejo was Chief executive and Zia was only constitutional head having tutorial powers of government affairs although he had the power to dissolve the National Assembly under the article (58)(2)(b). Zia did not care about the rules of business and frequently wrote directives to ministers for a quick response. The government officials were adopting the procedure of reply through PM's secretariat. Zia was not habitual of this routine work and became annoyed on the delay. Junejo requested Zia to address all the directives to him directly and promised their speedy implementation. This was in conflict with Zia's style and the direct personal approach. Zia became anxious on the information received from his advisors that Junejo

is trying to get resolution passed by the N.A calling upon Zia to seek retirement from the army and the appointment of a full time chief of army staff.

Zia had initiated a process of normalization of relation with India. Zia met the Indian journalists, intellectuals, judges, etc, all of who enjoyed his hospitality and admired his easy-going manner, his friendship, informality, and modesty.<sup>11</sup> Both the countries were discussing the trade and economic cooperation on the ministerial level. Junejo government reversed the process by passing a strong worded resolution on Kashmir and ousted Dr. Mehbub ul Haq as finance minister who was negotiating on trade and economic cooperation with Indian counterpart.<sup>12</sup> Both steps went against the wishes of Zia but he could not do any thing.<sup>13</sup> India also reacted in the same coin that splintered this attempt. Zia became very sad and his desire of normalization relations with India remained in dol drums.

In July 1987, Junejo visited U.S.A that gave him more confidence. He felt himself powerful as compared to Zia after receiving a 'pat on the back' from U.S president Ronald Reagan. Zia remarked about this visit to one of his confidants, "I hope this visit does not go to his head".<sup>14</sup> Junejo removed Major General Agha Naik Muhammad as head of the intelligence Bureau without clearing this decision in advance with Zia. He also replaced foreign minister with an emerging leader from Karachi, which offended the president.<sup>15</sup> Junejo felt that Zia was not pleased with him and was encouraging his rival politicians. In this way, the relationship between Zia and Junejo was increasing suspicion and mutual distrust still Zia was in control. In the political front Zia felt that Junejo, in some form or the other, gave free hand to Benazir Bhutto to abuse Zia. He thought that it was the legal and morale duty of the government to defend the president because the government runs with teamwork and in the name of the president. Zia at one stage was convinced that there was an understanding between Junejo and Benazir because she was soft on Junejo.<sup>16</sup> Her only target for humiliation was Zia. This criticism of Benazir added insult to Zia's injuries. Zia felt that his choice of Prime Minister was wrong. He was strengthening his position as Prime Minister as compared to Zia who was expecting his loyalty and gratefulness. He started challenging his creator and behaved as an independent powerful Prime Minister. Junejo seemed determined to nibble at the

presidential authority at every available opportunity. Junejo was undermining his position as chief of army staff by encouraging criticism within the army on the wearing of dual hats (as president and COAS).<sup>17</sup> The most important suspicion of Zia was the encouragement of general K. M. Arif as substitute chief of army staff. Zia became anxious on the information received from his advisors that Junejo was trying to get resolution passed by the National Assembly calling upon Zia to seek retirement from the Army. "The aim was to put Zia under morale pressure and to remove him from his power base. President addressed the joint session of parliament in April 1988, which was not received with enthusiasm by the M.N.A's. It was suggested that the parliament should relieve the president of his military responsibilities. President Zia felt acutely insecure under these circumstances"<sup>18</sup>.

Junejo ousted Zia's men from cabinet and then ordered the foreign secretary to adopt constitutional procedure and to discontinue the previous practice of sending papers relating to all-important foreign policy decisions to Zia. "Zia was not used to this, it upset him greatly".<sup>19</sup> Junejo ejected the foreign office from the reach of Zia, which was his favorite area. "Privately, Zia had started expressing his disgust with Junejo and civilian set up."<sup>20</sup> As the Afghan issue seemed to be reaching a conclusion and Zia wanted to settle the issue according to his own wish, Junejo concluded Geneva agreement with Soviet Union with the consultation of political parties' leaders and without consulting/considering the will of President Zia.<sup>21</sup> Geneva agreement was another cause of irritation for Zia. Junejo independently signed an agreement with the U.S.S. R on 14<sup>th</sup> April 1988 over the withdrawal of soviet forces from Afghanistan against the will of Zia and his military junta.<sup>22</sup> He had consulted the political leaders, including, Benazir without Zia's consent. Zia and his military colleagues were not in favour of the Geneva agreement and disliked the consultation of Junejo with political leaders especially Benazir Bhutto.<sup>23</sup> During the budget session, Junejo asked federal secretaries and military generals to give up big staff cars in favour of small Suzuki cars for economic reasons. He used the expression, "Putting generals into Suzukis."<sup>24</sup> The generals' felt insulted and humiliated and saw the move as an attempt to subvert their unchecked perks and privileges. They protested before Zia that they had been belittled. The actions of Junejo irritated the generals and they advised Zia for strict action.



## **Ojheri Camp Incident**

An explosion occurred at Ojheri ordinance depot situated in Rawalpindi near Islamabad on 10<sup>th</sup> April 1988.<sup>25</sup> Due to fly of weapons (rockets, missiles and others) it destroyed the lives of hundreds and thousands people. The military establishment attempted to cover up the incident but the press and parliament clamored for truth and demanded for an impartial and exhaustive enquiry and punishment for those responsible for the grim tragedy of the twin cities (Rawalpindi and Islamabad) people.<sup>26</sup> An enquiry into the Ojheri camp incident<sup>27</sup> was treated by military Generals as blatant interference in their military affairs. The enquiry could expose the misdeeds of many Generals and they called it the humiliation of military as an institution. The Ojheri camp's rope was tightening around the neck of general Akhtar Abdul Rehman.<sup>28</sup> He felt that he would be held responsible for this incident and the disciplinary axe would fall on him. He would be held responsible for selecting the place for arms in Middle of the city. "Before he could be blamed and punished, he concocted stories, filled Zia's ears with falsehood, and pushed him into an unconstitutional act."<sup>29</sup> Junejo put the army generals at the doors of civilians. Junejo was becoming unbearable for Zia and his generals. According to Zia, he had not transferred the power to civilian but shared the power with them. The conflict between the civilian and military authorities on the Ojheri incident became a major reason for the parting of ways between Zia and Junejo. Junejo was sincere and an honest man and he did not care about the military high ups and bureaucracy. Both were faced with awkward situation in the hands of Junejo government. Zia had inducted Junejo as Prime Minister but he became full-fledged Prime Minister as powerful as any of the Prime Minister of Pakistan. The real bone of contention was on the use of authority between the two with the expedition that Zia's powerful status will go unchallenged. This tussle had happened for the first time in the history of Pakistan. The battle of power game had begun since the days of Liaqat Ali Khan. The war of power game continued except with some intervals even on some petty issues.

## **Dismissal of Junejo's Government And Dissolution National Assembly**

Having come under pressure from the military leadership, particularly after the Ojheri incident, Zia decided to act in order to please and protect his generals. Junejo government had decided to take action against some senior army officers on the enquiry of Ojheri camp incident. Addressing a function at the Defense College in Rawalpindi, president Zia said loathing towards the defense minister, "we need patrons and not prosecutors."<sup>30</sup> The PM Muhammad Khan Junejo had gone on a foreign tour of China, South Korea and Philippines and there he spoke with deserved pride about the lifting of the Martial Law, the restoration of democratic institution and the restoration of human rights in Pakistan.<sup>31</sup> He returned on 29<sup>th</sup> May 1988 after a successful tour but soon after the return Zia with dramatic suddenness, made a breath taking announcement before the press that he had dissolved the National Assembly and dismissed the federal cabinet with immediate effect under article 58 (2)(b) of the constitution.<sup>32</sup> On 30<sup>th</sup> May 1988 addressing the nation on T.V and Radio, Zia leveled allegations against the Junejo government and announced his next priorities.<sup>33</sup> He announced a caretaker government but without a Prime Minister. Thus, he committed a breach of the provision of the constitution that requires necessary to appoint Prime Minister to head the caretaker government.<sup>34</sup> The caretaker cabinet did not include Mr. Junejo, but most of the ministers of Mr. Junejo's cabinet. The National Assembly was dissolved in order to remove Mr. Junejo.<sup>35</sup> Zia himself assumed the powers and the duties of the Prime Minister and presided over the cabinet meetings. He announced that the elections would be held on non-party bases once again and elections to the National Assembly would be held on 16<sup>th</sup> November 1988.<sup>36</sup> Thus he again committed a breach of the provision of the constitution, which required him to hold general elections within ninety days of the dissolution of the NA by the president at his discretion under article 58(2)(b). (Article 48 (5) He was very shrewd man and deliberately fixed a date 172 days after the dissolution of the National Assembly. He willingly fixed the election date extending to ninety days." The dismissals and his hesitancy in setting an election date within the constitutionally prescribed time fueled rumors of renewed emergency governance or Martial Law".<sup>37</sup> His objective was to consolidate himself as a powerful ruler with constitutional authority. Now he appeared like a medieval ruler in

this constitutional age. Even on the announcement of election date, the general public remained extremely doubtful of Zia's real intention. Again his credibility was low and now he was fighting a lost battle for his own survival in the government.

### **Dissolution of the National Assembly challenged**

Junejo did not challenge his dismissal and dissolution of National Assembly in the court. None other political party and M.N.A. challenged the validity of Zia's order of dissolution in the court. After Zia's death, the order of dissolution passed by general Zia ul haq and the governors of the provinces were challenged before the Lahore High Court by Haji Saifullah member of the National Assembly and Muhammad Sharif member of provincial assembly and some others. The order of the president was challenged before the Lahore High Court as unconstitutional and without lawful authority and of no legal effect in a constitutional petition. Nobody had the courage to challenge the order of dissolution in Zia's life. General Zia's death and the date for new elections inspired the members of former assemblies for petition.<sup>38</sup> Under the basic human rights, it was challengeable in superior courts and should have been challenged immediately after the dissolution. Meanwhile, the political parties had begun their election campaigns and the election commission was announced for holding the next elections. The major constitutional issue arose about the exercise of discretionary powers by the president under the 8<sup>th</sup> amendment to dissolve the N.A before the expiry of the term for which it was elected. In the decision, the Hon'ble court (Lahore High Court) unanimously held the order of dissolution of the National Assembly as illegal and without legal authority, but on account of the fact that fresh elections were going to be held very soon, the Hon'ble court refused to give the other relief, to the petitioners.<sup>39</sup> The exercise of this power led to serious conflicts between two top constitutional functionaries, the president and the Prime Minister.

The judgment of the Lahore High Court was challenged before the supreme court of Pakistan by the federation<sup>40</sup>. A full Supreme Court bench consisting of twelve learned judges<sup>41</sup> heard these appeals. The learned advocates appearing for the petitioners argued that no such situation had arisen in which the government of the federation could not be

carried on in accordance with the provisions of the constitutions and appeal to the electorate was necessary. They further submitted, "that the government of the federation was being carried on quite smoothly and that the president acted mollified to usurp all authorities and become repository of the entire state power."<sup>42</sup> They argued that the discretion conferred upon the president by the relevant article of the constitution had to be objective, based on facts and he could not be fanciful or arbitrary nor act on speculation or imagination. It was also argued that there could be no caretaker cabinet without there being a Prime Minister because according to article 91(1) of the constitution it has been provided that there shall be a cabinet of ministers, with Prime Minister at its head to aid and advice the president in the exercise of his functions. Without Prime Minister, there could not be a legally constituted caretaker cabinet.<sup>43</sup> The learned advocate of the federation of Pakistan argued that the "discretion" was to be exercised by the president alone. It was the president's subjective satisfaction of the situation that authorized him to dissolve the National Assembly. The learned attorney General argued that these matters are not justice-able.<sup>44</sup> Nobody could imagine the different interpretation of the sections of constitution. Attorney General said that according to article 48(5) (b) the president was to appoint a caretaker cabinet not that its head being a Prime Minister is required under article 91.<sup>45</sup>

After hearing the arguments advanced on both sides of the Bar, the court observed, "the matter is justice-able and there is no prohibited zone for the superior judiciary to interpret and enforce the constitution."<sup>46</sup> In the context of arguments of learned advocates the Hon'ble court observed that all the reasons given by the president to dissolve the National Assembly are bald, vague, general or such as can always be given as have been given with disastrous effects.<sup>47</sup> "For a minor disease big dose of medicine could not be given so as to kill the patient."<sup>48</sup> The court observed and accepted the submission of attorney General that no responsible person had challenged the action because of this long delay the petitions were suffering from laches and were therefore, liable to be dismissed on this ground alone. During this long interval, nobody dared challenge his order of dissolution in the court<sup>49</sup>. The attorney general mentioned the case of Moulvi Tamizuddin Khan who had challenged the order of dissolution of the constituent assembly (1954) by the then Governor General within fifteen days of its dissolution while in the present case no

responsible person had challenged the order of president, neither the leader of the house nor its speaker.

Thus the Supreme Court upheld the judgment of the Lahore High Court and found that the prerequisite prescribed for the exercise of powers in this behalf did not exist and therefore, the action was not justified in law and denied the relief of restoration of National Assembly and the Junejo cabinet because the process of election was in full swing in the country at that time. The hon'ble court observed that, "It was quite clear that the national interest would be better served by a recourse to electorate than by the restoration of the dissolved assemblies, provided, of course, the holding of the elections at a very early date was ensured."<sup>50</sup> In a nutshell, all the political parties of Pakistan were preparing for the elections, the court felt no difficulty in coming to the conclusion that an appeal to the electorate was the proper course to be followed and the same was in the collective good of the people. The hon'ble court, therefore, very clearly directed, "We, however, emphasize that the general elections scheduled for the 16<sup>th</sup> and 19<sup>th</sup> November, 1988, shall be held on the said dates and an opportunity be thus afforded to the people of Pakistan to choose their own representatives in a free, fair and impartial election."<sup>51</sup> The political parties did not challenge the stipulated 90 days limit for election after the dissolution of the parliament. Elections under a slightly delayed schedule were far more acceptable to them than no elections at all.

Mr. Justice Shafiur Rehman wrote in his separate judgment, "the petitioners were not entitled to the relief sought by them. While doing so the learned judge took special notice of the fact that though the petitioners were directly and immediately affected by the dissolution of the assemblies, etc. None of them came forward to challenge any of these acts of omission and commission made by the president. The learned judge noted that it was only when the late General Mohammad Zia Ul Haq disappeared from the scene on account of an unforeseen disaster and after the stage had been fully set and the whole nation was preparing itself for the general elections that these writ petitions were filed by the petitioners. This conduct of the petitioners, the learned judge observed, does not entitle them to any discretionary relief in the matter".<sup>52</sup> The Supreme court held that allegations for dissolution of National Assembly had no nexus at all with the conditions

prescribed in the article 58(2)(b) of the constitution. "All the judges held that the president's order of dissolving the National Assembly was illegal, and they clarified that article 58(2)(b) could be invoked by the president only when there was a constitutional breakdown. The question was whether it should be restored. It was an accident of history if Zia's plane had not crashed near Bahawalpur then nobody had dare to file a petition against the dissolution. The full court heard the dissolution case using the power of judicial review and declared President Zia's discretionary powers under article 58(2)(b) were not personal. These were constitutional powers.<sup>53</sup> Junejo announced that his party is going to contest the coming elections.<sup>54</sup> All the Supreme Court judges opined that dissolution was illegal but the ex leader of the house declared his will for contesting elections. So the elections should be held, there was no need for the other relief.<sup>55</sup> The summer of 1988 was very stormy in the judicial and political history of Pakistan. The Supreme Court decided the two important constitutional cases, one (political parties act) in the lifetime of Zia and the other after his death. These decisions of the judiciary can be taken as a victory for elections, in a more important sense they were a public achievement for the thought of constitutionalism.<sup>56</sup>

### **Benazir Bhutto's First government (1988-1990)**

The General elections of the National Assembly and provincial assemblies were held in the country on the 16<sup>th</sup> and 19<sup>th</sup> November 1988.<sup>57</sup> These elections were held under the supervision of Ghulam Ishaq Khan acting president of Pakistan. All the small parties including two main parties, Pakistan Peoples Party and Islami Jumahari Ittehad took part in these elections. Both main parties, one headed by Benazir Bhutto and the second headed by Mian Nawaz Sharif attracted the large crowds during the election campaign. Most of the new generation of leaders emerged such as Benazir Bhutto, Nawaz Sharif, Altaf Hussain and Maulana Fazlurrehman "were all midnight's children." All the parties accepted that the elections were free, fair, peaceful and impartial. So these elections appeared to be free and impartial. The turnout percentage of voters was rather as low as forty percent as compared to fifty two percent in 1985 party less elections.<sup>58</sup> The low turnout was due to the strict implementation of the condition to produce the identity card at the time of vote casting. No party could get the absolute majority in the parliament for

making the government. However, the Pakistan Peoples Party won the largest number of seats, 92 in the National Assembly and Islami Jumahari Ittehad won the 54 seats out of the 205.<sup>59</sup> The election results were as under,

#### National Assembly Election, 16 November 1988

##### Party Position

	Punjab	Sindh	NWFP	Balochistan	FATA	Islamabad	Total
No of Seats	115	46	26	11	8	1	205
PPP	52	31	9	1			93
IJI	45		8	2			55
JUI (FR)			3	4			7
JUI (D)			1				1
PAI	3						3
PDP	1						1
ANP			2				2
NPP (K)	1						1
MQM		13					13
BNA				2			2
INDEPENDENTS	12	2	3	2	8	1	27

(The Nation, 18th November 1988)

The Pakistan Peoples Party had vindicated its position as the largest national party in the country, which reinforced their image as compared to Islami Jumahari Ittehad. Though it did not get a clear majority but as the largest single party claimed its right to form government. As a first step Benazir Bhutto made alliances with Mahajar Quami Movement and Jumaia Ulema Islam (Fazal ur Rehman) and some independents that gave them clear majority. The alliance majority resulted in the nomination of Benazir Bhutto by the president on 1<sup>st</sup> December 1988. Benazir Bhutto (Chairperson of PPP) formed the government on the invitation of president but with handcuffed position. Her government was very weak because she had to depend on the members of small parties in the National Assembly. These parties often blackmail the government by their in-genuine

demands. Ghulam Ishaq Khan won the presidential election as the candidate of Islami Jumahari Ittehad but Pakistan Peoples Party also voted for him while the Nawabzada Nusrulla Khan was ignored who had been their companion since the moment of Movement for Restoration of Democracy. The election of Ghulam Ishaq Khan was a result of the deal between the acting president and Prime Minister. Accordingly, Mst. Benazir Bhutto as Prime Minister of Pakistan formed her cabinet under the invisible conditions imposed by the president and she continued in that position till 6<sup>th</sup> of August 1990.<sup>60</sup>

On becoming the Prime Minister, Benazir had to face different kinds of problems. Some of the problems were very complex and the pro-Zia forces were trying for a showdown in the beginning of her rule. "However, carried away by the electoral triumph, by a will to power, by her political charisma and by a fund of goodwill in the west, she allowed her programme to be deflected from the main task of democratic and socio-economic reconstruction for which so much hope had been placed in her by so many".<sup>61</sup> Benazir faced the domestic as well as foreign relation problems while she succeeded on the foreign front and failed in domestic test. She started confrontation on many domestic fronts at a time. Soon after the assumption of the office of Prime Minister, she strongly condemned the addition of 8<sup>th</sup> amendment to the constitution. Her opposition to the amendment was not new but it gained momentum after taking the oath. Prime Minister Benazir Bhutto announced, "We don't like this constitution, but this is the constitution we accept."<sup>62</sup> The acquiescence seemed far from her mind.<sup>63</sup> The Pakistan Peoples Party needed the help of Islami Jumahari Ittehad for repealing the 8<sup>th</sup> amendment because the government did not have the requisite majority. In the meantime, the government was going on a course of confrontation with Islami Jumehari Ittehad. On the one hand, the government could not make consensus with Islami Jumehari Ittehad and Punjab province, where the Islami Jumehari Ittehad was in power and being the biggest province in the country, its political importance could not be ignored by any government at the center. On the other hand, she wanted to protect her newfound powers vested under the 8<sup>th</sup> amendment. So she opened the front against the president without making consensus with opposition parties in the parliament. "The federal government and the Punjab provincial government did not see eye to eye on various issues and their differences were deep-



rooted".<sup>64</sup> Islami Jumehari Ittehad insisted on the retaining of 8<sup>th</sup> amendment for gaining the favor of president. Benazir Bhutto's policy of confrontation with the president proved disastrous for her in the long run. Ghulam Ishaq Khan, a "strong believer in non-parliamentary and non-electoral politics,"<sup>65</sup> saw great advantage in retaining the amendment and used it to out her government.

Benazir's father Zulfikar Ali Bhutto was very popular in Punjab particularly among the oppressed and poor people. The Pakistan Peoples Party had always retained its power base in the Punjab. But the 1988 elections reversed the position that was a great loss for the Pakistan Peoples Party, which the Pakistan Peoples Party could not digest easily. On losing majority in Punjab, Benazir accused Islami Jumehari Ittehad in her first press conference for committing selective rigging in Punjab.<sup>66</sup> It was her first attack on the Punjab government and Islami Jumehari Ittehad. So the rift began between Benazir Bhutto and Nawaz Sharif on the establishment of Punjab government. Pakistan Peoples Party could not digest the Nawaz Sharif government in Punjab, so Benazir and her close associates started planning to topple the Punjab government. Both leaders could not create a working relationship in the interest of Democracy and the country. While both parties had same programme such as strengthening the parliamentary democracy, free market economy, de-regulation, and denationalization of industries and financial institutions.<sup>67</sup> The bitter confrontation rose between the two sides on the considerations of power and personal rivalry, more than any real differences on the national policy or political ideology.

Apparently the Federal government has believed that Islami Jumehari Ittehad government in Punjab could not survive the determined opposition of the center. The federal government depended on its control over funds and the key bureaucracy. A Pakistan Peoples Party government in the Punjab was also considered essential for the stability of the Pakistan Peoples Party government at the center. The MNA'S and MAP'S of the Pakistan Peoples Party from Punjab did not enjoy the desired access to provincial administration to sustain their constituencies. "The hard liners in the party insisted on a speedy demolition of the Islami Jumehari Ittehad government".<sup>68</sup>

The rift further increased when federal government removed senior civil servants from the province (chief secretary and others) without consultation and posted new officers of their own choice. The Punjab government refused to obey the orders and promptly filled the offices rendered vacant with officers of the provincial civil service. Now federal government realized its failure that it could recall its officers but it could not enforce their posting in the provinces. Nawaz Sharif stood in the way of federal government with the support of president.<sup>69</sup> Confrontation with the federal government lost Punjab government and Islami Jumehari Ittehad members of parliament and provincial assemblies access to the financial institutions. The provincial government of Punjab set up a provincial bank, The Bank of Punjab for the easy access of Islami Jumehari Ittehad politicians for loan facilities and also demanded the no objection certificate from central government for the establishment of Television station which was refused by the federal govt. The Punjab government also demanded the meeting of the council of common interests and establishment of National Finance Commission to fulfill the constitutional obligation. All these issues were raised to discredit the Pakistan Peoples Party government and to maintain pressure on the weak Pakistan Peoples Party government. Without the complete support of president the central government could do nothing. "Ishaq was obviously supporting Nawaz Sharif in his opposition to Benazir and was making life difficult for her",<sup>70</sup>

The Pakistan Peoples Party government launched the "operation Punjab" plan to overthrow the Nawaz Sharif government by winning the independent MPA'S and Islami Jumehari Ittehad MPA'S having sympathy with Pakistan Peoples Party. Nawaz government reacted and paid back in the same coin by maneuvering the loyalties of some Pakistan Peoples Party MPA'S. Horse-trading was at its peak from both sides but Nawaz Sharif maintained his majority and remained in office. The PPP earned the bad name from this campaign. The central government could not impose its will on the rebellious provinces of Punjab and Balochistan because the president supported the Islami Jumehari Ittehad government. In fact, he was not neutral and fear of 8<sup>th</sup> amendment greatly restricted center's power to put the Punjab government on the defensive in its confrontation with the center. In response to the operation, the Islami Jumehari Ittehad moved a no confidence motion in the National Assembly against the PPP government.<sup>71</sup>

Both parties ignored the political and moral norms and it became difficult to judge which party was more to be blamed. "Trading for MNA'S votes had never been done on such a scale and the amount of money that was said to be involved in purchasing and retaining loyalties was estimated to be in millions of rupees. Furthermore, the opposition, fearful that efforts would be made to win defectors back to its fold with still greater inducement, took an unusual turn of confining 'vulnerable' members to safe houses in Lahore and Murree. Police escort was also arranged to protect the MNA's there and in Islamabad. The government, in order to ensure that its supporters did not succumb to Islami Jumehari Ittehad's overtures, moved them to a hill resort. The members made their appearance only on the day of the voting,"<sup>72</sup> The no confidence motion failed to oust Benazir Bhutto government.<sup>73</sup> Here it is important to point out that politics of horse-trading left a bad taste for the growth of political culture in Pakistan.

There were other disputes, which widened the gap between Benazir government and the president as well as Islami Jumehari Ittehad. These disputes were on the appointments of judges in the High Courts, the appointment of military chiefs and the people's works programmes of federal government. Under the eighth amendment of the 1973 constitution, the president had the power to appoint in his discretion the military chiefs. Prime Minister's circles were pleading for their right of appointment while the president refused to accept the arguments. He announced that these appointments fall purely within his discretionary domain. The Prime Minister retreated from her stand because she wanted to avoid organized confrontation, which came from various directions, and it chided the president and Punjab based Islami Jumehari Ittehad government. While in all this process, opposition was standing with the president. But this issue caused the enormous tension in relations between the Prime Minister and the President. It appears that the military power maintained a neutral stance on disputed issues and gave the president a free hand to confront Benazir Bhutto because the constitution placed the power in the discretion of the president.<sup>74</sup>

The dispute on the appointments of the judges of the superior courts (judiciary) was a major irritation between the Prime Minister and the President. Their working relationship was exposed before the public. Although the issue had been decided by the Lahore High

Court on the writ petition filed by M.D.Tahir, an advocate. During the period of caretaker government between 17<sup>th</sup> august, 1988 and 1<sup>st</sup> December, 1988, the president had appointed eleven judges in the Lahore High Court without the recommendation of Prime Minister because the government after that time was being run without the Prime Minister.<sup>75</sup> The Lahore High Court observed in M.D.Tahir's petition that the prime minister was not mentioned in article 193 amongst the persons with whom the president was required to consult before appointing the judges. So high court upheld the validity of the appointments.<sup>76</sup> On the arising of dispute, the federal government challenged the Lahore high court judgment before the Supreme Court<sup>77</sup>. The appeal was accepted belatedly due to interpretation of sensitive issue. Both parties argued in detail before the full bench of the court consisting of eleven judges. "The president and Prime Minister continued to fight publicly about their relative powers and the arenas in which they could be exercised. Additionally, the Punjab government opposed the Pakistan Peoples Party by supporting petitioners trying to strengthen presidential powers".<sup>78</sup> During the pending of petition, the president reaffirmed his powers as chief executive. A political analyst 'Shah Khan' characterized the situation and upper hand of president in state affairs as a "peculiar constitutional challenge." The petition was withdrawn on the basis of mutual agreement reached between the president and the Prime Minister.<sup>79</sup> The question of appointments, thus, remained unresolved.<sup>80</sup>

The dispute on the direct launching of people's works programmes in the provinces was a cause of frustration for the province of Punjab and Balochistan, also cause of anger for the president.<sup>81</sup> It was seen as interference in the provincial autonomy that had been guaranteed by the constitution. Both provincial governments were controlled by the opposition, Islami Jumehari Ittehad. They insisted on the implementation of this programme through their Local Government department. Federal government was using this programme to oblige their MNA's and party officials.<sup>82</sup> Benazir government by passed the provincial governments from playing their constitutional role. The affair of chairman joints chief of staff committee, the dispute over the appointments of the judges of the superior courts and the people's works programme and provincial autonomy seemed to show that the system of power sharing under the 8<sup>th</sup> amendment had an inbuilt tension which casts its shadow over the whole body politic. Political life in the country

became stagnant and working traditions of democracy disappeared from the scene. The center and provincial governments of Punjab and Balochistan gave unnecessary importance to minor incidents, which paved the way for the president to dissolve the National Assembly. Even in the province of Sindh, the law and order situation was out of control. The Pakistan Peoples Party workers remained free from the approach of administration due to involvement of Prime Minister's husband Asif Ali Zardari. Her government could not take action against the culprits in internal Sindh, it only took action against the Mujahar Quami Movement outside pacca qaula in Hyderabad. Cities of Karachi and Hyderabad remained paralyzed during her tenure except for some time when both were in an alliance. It seemed that the entire tenure of Benazir revolved around center-province conflict, aggravated by party conflicts, clash of personalities between the president and prime minister on the constitutional powers and war of personal interests contrary to national interest. The working relations between the president and prime minister had deteriorated to a point of no return. The government seemed to lose the confidence both of the president and the military.

### **Dismissal of Benazir government and Dissolution of the National Assembly**

On 6<sup>th</sup> August 1990, president Ghulam Ishaq Khan under the powers article 58(2)(b) of the constitution dissolved the National Assembly and dismissed the Benazir Bhutto's government with immediate effect, mainly on the charges of corruption and incompetence. President constituted a caretaker government headed by parliamentary opposition leader Ghulam Mustafa Jatoi, and called for the new elections.<sup>83</sup> The order of dissolution of the national assembly was soon followed by the dissolution of the provincial assemblies. The Balochistan and Punjab assemblies were dissolved on the advice of their chief minister's and the governors dissolved the North Western Frontier Province and Sindh assemblies by using their discretionary powers under article 112 of the constitution. Benazir protested against the order of the president and alleged that the president is playing the game of opposition. Benazir Bhutto did not challenge the dissolution in the Lahore High Court or Supreme Court. Khawaja Ahmad Tariq Rahim ex minister of Benazir cabinet challenged the dissolution of National Assembly in the

Lahore High Court.<sup>84</sup>The first paragraph of the order passed by the President on 6<sup>th</sup> August 1990, read as follows which was very important. "The president having considered the situation in the country the events that have taken place and the circumstances, and among others, for the reasons given below, is of the opinion that the government of the federation cannot be carried on in accordance with the provisions of the constitution and appeal to the electorate is necessary."<sup>85</sup>He gave the reasons for dissolution that National Assembly, as a representative institution of people was not working according to the wishes of people. In fact the government was indulging in corrupt practices, scandals (horse trading) for political and personal gains. The federal government with a majority in National Assembly was at loggerhead with provincial governments. And both were making the running of normal administration difficult for each other. Their confrontation and deadlock adversely affected the integrity, solidarity and well being of Pakistan. The federal government in spite of provincial governments repeated demands did not call the meetings of the council of common interest and the National finance commission. Both were statutory bodies but the federal government started people's works programme in violation of Provincial autonomy under article 59 of the constitution. The federal government could not protect the province of Sindh under article 148 (3) of the constitution against internal disturbances (riots, arson dacies Kidnapping for ransom, politics of violence among citizens) despite the heavy loss of life and property in rural and urban areas. The federal government did not care much about the constitutional institutions; such as the superior judiciary and have been publicly ridiculing its integrity attacked and attempts made to impair its independence. The institution of senate has been ridiculed which is an integral part of parliament. The civil service statutory corporations, authorities, and banks have been misused for personal gains; political ends and article forty-five have been exercised by federal cabinet without prior approval of the president.<sup>86</sup>

The order of dissolution of the National assembly by the president was challenged before the Lahore High Court and the Sindh High Court. The writ petitions were also field in the Balochistan High Court and the Peshwar High Court.<sup>87</sup>The federation of Pakistan invoked the Jurisdiction of the Supreme Court under article 186-A of the constitution for consolidation of the entire writ petitions pending in the four High courts.<sup>88</sup> On 15<sup>th</sup>

September 1990, the Supreme Court transferred the writ petitions pending in the Balochistan High Court to the Sindh High Court, while that pending in the Peshawar High Court was transferred to the Lahore High Court for further proceeding.<sup>89</sup> A full bench of Lahore High Court decided the writ petition through short numinous order on the 14<sup>th</sup> October 1990 upholding the order of dissolution of National Assembly and dismissal of federal cabinet passed by the president.<sup>90</sup> A full bench of the Sindh High Court heard the petitions for several days and also upheld the orders of dissolution by the president.<sup>91</sup> The full benches of both High Courts dismissed the petitions unanimously.

The petitioner Khawaja Ahmad Tariq Rahim was not satisfied with the judgment of the Lahore High Court and therefore, he challenged the judgment of Lahore High Court before the Supreme court of Pakistan.<sup>92</sup> The petitioners prayed for postponement or stay of the impending elections during the pendency of the petition in the Supreme Court was rejected because the holding of election within ninety days was a constitutional obligation. "Chief Justice Zulla remarked that judges were not bound to sit late hours and decide political cases within a stipulated time".<sup>93</sup> The petition of Kawaja Ahmad Tariq Rahim was heard by a full court consisting of twelve learned judges on 4<sup>th</sup> December 1991. During the three-day proceedings the advocates of both sides gave arguments on important legal and constitutional questions arising out of the judgment of Lahore and Sindh High Court. However, all the learned judges unanimously upheld the judgment of Lahore and Sindh High Courts and declared the order of dissolution of National Assembly by the president was valid and refused to grant relief to the petitioner by a short order. Two of the learned judges namely, Mr. Justice Abdul Shakoor Salaam and Mr. Justice Sajjad Ali Shah, wrote dissenting Judgments though agreeing with the other learned judges as regards the dismissal of petition.<sup>94</sup>

The grounds of the president's order of dissolution were sustainable as they were based on the facts and circumstances.<sup>95</sup> The higher courts, with one exception, declared the move to be according to the constitution. "The court, following not precedent but its practice, decided against Benazir and held that Ghulam Ishaq Khan had acted properly in dismissing the Pakistan Peoples Party government. Three years later, in an identical reference, filed by the same president, against Benazir's successor, Mian Nawaz Sharif,

the same court held that the dismissal was not in accordance with the constitution".<sup>96</sup> The conspiracies continued against her government that could be seen, "The decision to dump Benazir was taken, according to General Mahsud Alam, at a crops commanders' meeting held in Rawalpindi on 21<sup>st</sup> July 1990. It seems that Aslam Beg had decided to get rid of Benazir some six months before her government was dismissed and his purpose was to put things right in Sindh in a matter of weeks."<sup>97</sup> The mastermind behind the operation was the president Ghulam Ishaq Khan who was malicious, prejudiced, and malafided in nature towards the Benazir government. The president's allegations against her government were not new for the people of Pakistan. The same kind of allegations were leveled to dismiss the governments from Governor General Ghulam Muhammad (1954) to president Ghulam Ishaq Khan. All the rulers adopted the same strategy to dismiss the cabinets and dissolution of assemblies. "Like rulings in earlier courts, the courts took its direction from political winds and refused to examine the soundness of president's arguments and or the sufficiency of his claims."<sup>98</sup> In fact, the issue of dissolution was concerned with the constitution, so it deserved parliamentary debate or prior judicial scrutiny before the implementation of presidential orders.

### **Nawaz Sharif Government (1990-1993)**

The general elections were held in October 1990, under the supervision of caretaker government headed by Ghulam Mustafa Jatoi opposition leader in Benazir government.<sup>99</sup> Two main alliances, Islami Jumhari Ittehad and Pakistan Democratic Alliance, contested the elections. The Islami Jumhari Ittehad that included the Pakistan Muslim League as big partner won the 105 seats while the Pakistan Democratic Alliance that included Pakistan Peoples Party as big partner won 45 seats. Most of the prominent leaders lost their seats. Small parties position was as poor as in the past elections.



### Party position of elections held on 1990

Provinces	IJI	PDA	MQM	JUI	ANP	ANP	JUP	PKMAP	JWP	IND	TOTAL
NWFP	8	5		4	6					3	26
PUNJAB	91	14				3				6	114
SINDH	3	24	15							4	46
Balochistan	2	2		2		2		1	2		11
FATA										8	8
FCT	1										1
Total	105	45	15	6	6	2	3	1	2	21	206

The Pakistan Democratic Alliance alleged that the general election had been rigged on a massive scale for defeating the Pakistan Democratic Alliance and Ghulam Ishaq Khan had played a major role in the rigging by making a speech on Radio and TV in which he asked the people to vote against Pakistan Democratic Alliance. They also alleged that the president made appointments of such people to the election commission whose duty was to ensure the defeat of Pakistan Democratic Alliance candidates.<sup>100</sup> Their allegations may be correct to some extent, because the caretaker governments favoured the Islami Jumhari Ittehad candidates but their support was limited. No doubt, the Pakistan Democratic Alliance contested the election in the adverse environment compared to its main opponent Islami Jumhari Ittehad.

Nawaz Sharif, president of the Islami Jumhoori Ittehad , was elected prime minister with 153 votes having two third majority in the parliament. Islami Jumhoori Ittehad got the majority of seats in three provinces except Sindh. "With the aid, assistance, and abetment of Ishaq Khan, coupled with the maneuvering and manipulation of Jam Sadiq Ali, the Pakistan Democratic Alliance was rendered into a minority despite being the largest party in the assembly".<sup>101</sup> So the hidden hands changed the Pakistan Democratic Alliance majority into minority in Sindh province. To restrict the Pakistan Democratic Alliance, a majority party from forming the government, created a sense of deprivation in the province that ultimately destroyed the law and order situation.

The relationship between President Ghulam Ishaq Khan and Prime Minister Nawaz Sharif was cordial and Nawaz Sharif enjoyed the confidence and guidance of the president in all matters of governance. This relation remained cordial till the appointment of army chief. After the death of general Asif Nawaz Junaja, in January 1993, a dispute arose between the president and prime minister on the appointment of the chief of the army staff. This issue turned their relations extremely sour. It was repetition of history with variation, Governor General and prime minister were quarrelling for absolute powers by misinterpreting the constitutional provisions. They did not learn any lesson from their past history. Prime Minister Nawaz Sharif wanted to amend the constitution for restoration of real parliamentary system. He wanted to undo the discretionary powers of the president to dissolve the national assembly and also to appoint Chiefs of armed forces. The president did not agree with this purposed amendment and publicly announced to fight for the retention of 8<sup>th</sup> amendment in the constitution.<sup>102</sup>

Prime minister was offended with president when president appointed General Abdul Waheed Kakar as new army chief without consulting or even informing him. Nawaz Sharif perceived this appointment as a challenge to his authority because "he and his family wanted to have their way with the armed forces so that his stay in power was not threatened".<sup>103</sup> The Prime Minister considered the action of president as a signal of danger for himself and for his government in future. Nawaz Sharif was now confronted with a situation where he needed the support of the opposition led by Pakistan Democratic Alliance leader Benazir, for repealing the 8<sup>th</sup> amendment.<sup>104</sup> Benazir had

offered Nawaz Sharif co-operation in his attempt to repeal the 8<sup>th</sup> amendment. This proposal was not accepted by Nawaz who was obviously obliged to Ishaq Khan for dismissing Benazir and for paving the way to his rise to power".<sup>105</sup> Now it was Benazir's turn. In this battle, Benazir was the winner and she paid back Nawaz Sharif in his own coin by using Ghulam Ishaq Khan against Nawaz Sharif.

The political war between the Prime Minister and the president finally reached a point of no return when the Prime Minister came out publicly on 17 April 1993 and attacked the president on Radio and T.V and said that he was actively encouraging intrigues and conspiracies to destabilize his government.<sup>106</sup> President Ishaq Khan was an old combatant so he collected material to pay back the prime minister in the same coin. He gathered his advisors for responding to the charges raised by the prime minister on T.V and Radio. He called on the Sharif ud Din Pirzada an old guard and known as a permanent advisor to all military governments. He had earned a reputation for molding the constitutional provisions as needed to legitimize their actions. He proved himself adept at distorting the constitution and framing laws in order to suit the convenience of his masters. He is an experienced lawyer on constitutional matters but it is popularly believed that he always used his energies for strengthening the military or totalitarian rule.

### **Dismissal of Nawaz government and Dissolution of National Assembly**

On 18 April 1993, Ishaq addressed the nation on Radio and T.V and dissolved the National Assembly, dismissed the Prime Minister and his cabinet with immediate effect under the powers conferred on him under article 58 (2) (b) of the constitution.<sup>107</sup> It was in retaliation to Nawaz Sharif's address on Radio and T.V and considered as counter attack of an old bureaucrat. For the fulfillment of constitutional obligation, he immediately installed the caretaker Prime minister and his cabinet. "The popular reaction to this order of the president was that he had acted out of spite, and people felt that president and the parliamentary system of democracy could not go together. The deposed prime minister thus became a national hero."<sup>108</sup> Soon after the president's order of dissolution of the National Assembly and dismissal of the cabinet, Mr. Ghour Ayub, the speaker of the

National Assembly rushed to the Rawalpindi bench of the Lahore High Court early in the morning of 19<sup>th</sup> April 1993 and filed a petition before the High Court Rawalpindi bench challenging the order of the dissolution passed by the president and praying for restoration of the National Assembly. The Rawalpindi bench of the Lahore High Court forwarded the petition to its headquarter at Lahore and soon the Lahore High Court issued notices of the petition to the attorney general and fixed a date for hearing of the petition and the application for the interim relief.<sup>109</sup>

Nawaz Sharif, the ousted prime minister directly challenged the dissolution of national assembly and dismissal of his cabinet before the Supreme Court on 26<sup>th</sup> April, 1993, under article 184(3) of the constitution with a pray that the order of dissolution of national assembly and that of the dismissal of the prime minister and his cabinet be declared illegal and without any legal authority.<sup>110</sup> According to article 184(3) of the constitution, a petition can be filed in the Supreme Court only if it raises a question of public importance with reference to the enforcement of any of the fundamental rights conferred by chapter 1 of part ii of the constitution.<sup>111</sup> This article confers the fundamental rights on citizens to form and join political parties. The Attorney General raised the objection in the first hearing of petition that the Supreme Court did not have the jurisdiction to entertain the petition, as the petitioner's cause of action does not fall in violation of fundamental rights of article 17.<sup>112</sup> If Nawaz Sharif had challenged the dissolution of national assembly in the High Court, then it would not have been possible for him to get final decision from the Supreme Court before the new assembly had been elected as the past history tells us.

The petition was heard by a full bench of eleven judges, headed by the chief justice of Pakistan Dr Nasim Hasan Shah on day-to-day basis.<sup>113</sup> On 26<sup>th</sup> May 1993, the supreme court accepted the constitutional petition of Nawaz Sharif by a majority of one to ten, holding in its short order that the impugned orders of dissolution did not fall within the domain of the powers conferred on the president in this behalf and was, therefore, not sustainable under the constitution.<sup>114</sup> "The chief justice has also relied upon judgments in which a very liberal interpretation was placed on words in order to give relief to a litigant, but, with due respect, the interpretation of article 17(2) goes far beyond a liberal

interpretation of the words, the right to form or be a member of a political party, in this clause. Additionally, the judgments cited are distinguishable, because the petitioner was not without a remedy. He could have filed a writ petition in any High Court to challenge the president's order, but he thought his interests would be served better if he went to the Supreme Court directly.<sup>115</sup> The national assembly, the prime minister and his cabinet were thus restored and were held entitled to function with immediate effect by majority view, with only justice Sajjad Ali Shah dissenting. The appointment of caretaker government was held to be of no legal effect. However, all actions taken and orders passed by the caretaker government, which were in accordance with the constitution and which were required to be done and taken for the ordinary orderly running of the state were held to be valid.<sup>116</sup> The courage demonstrated by the court was unprecedented in the history of Pakistan. The court was again expected to rule in favour of the chief executive. The Supreme Court responded to Nawaz Sharif's writ petition with steadfastness as well as surprising readiness. The court ruled that president had acted illegally and unconstitutionally, and thus insisted that the government be restored. The president's dream of salvaging the judiciary came to an end when the Supreme Court decided the case against the president for the first time in the history of Pakistan. The office of president had transformed into a Shiva-like god who seemed to be ready to take every thing down with him in one great fit of personal rage. "The people of Pakistan had watched with disgust the unfolding drama of the dissolution of assemblies and subversion of the constitution by Ghulam Ishaq Khan. The verdict of the Supreme Court, indeed, was an indictment of the president by the highest judicial forum of Pakistan. The supreme court judgment in Muhammad Nawaz Sharif's case completely demolished the myth of the president's lordship of the national assembly and prime minister".<sup>117</sup>

Justice Dr Nasim Hasan Shah chief justice of Pakistan made very strong observations during the proceedings of the case. For example, on 24 May he observed, the dissolution of the assembly in the case of Moulvi Tamizuddin Khan was justified by the court in the interest of the country. In the case of Begum Nusrat Bhutto the Doctrine of Necessity was passed into service to justify the action and that was again relied upon in 1988 and 1990 for not restoring those assemblies and governments, and the time had come for the court to decide the matter strictly in terms of the constitution.<sup>118</sup> Some members of the public

misconstrued these observations. Some judges on the full bench also did not like these remarks and requested the chief justice not to make strong observation on the merits of the case during the hearing.<sup>119</sup> The majority judgment in the case of Mian Nawaz Sharif vs Federation of Pakistan was well received in Pakistan and abroad and was termed a landmark judgment. During the hearing of petition, chief justice Nasim Hasan Shah made an observation in the court that he would not be like Chief Justice Muneer, and that his decision in this case would please the nation.<sup>120</sup>

“The chief justice of the supreme court declared the judgment as an historic judgment and lauded the independence of the judiciary to the skies.”<sup>121</sup> But Benazir Bhutto, declared that the judgment had been obtained by the use of “Chamak”. The whole atmosphere was surcharged and stories of passing crores of rupees through foreign banks became household talk. Workers of the ppp demonstrated before the Lahore high court, chanting slogans against “Chamak” and “Lotus”. The prestige of the judiciary laid licking in the dust.”<sup>122</sup> Justice Nasim Hasan Shah rejected the allegation “chamak” and declared the decision as crystal clear in their logic and rule of law.<sup>123</sup> All the allegations given by the president against Nawaz Sharif were same as made against Benazir Bhutto in 1990. The majority of the judges refused to accept the president’s evidence and observed that the president had to prove his allegations against the deposed prime minister. This principal was correct because the burden of proof would be provided, who leveled the allegations. Unfortunately, this universally accepted principal had not been taken by the Supreme Court in Tariq Rahim’s case. The dissenting judge, justice Sajjad Ali Shah, therefore rightly pointed out that the majority judges had used one yardstick for upholding president Ghulam Ishaq Khan’s order dismissing Benazir Bhutto and a different yardstick for setting aside president Ghulam Ishaq Khan’s order dismissing Mian Nawaz Sharif. He wrote in his dissenting judgment, “Seemingly, it so appeared that two prime ministers from Sindh were sacrificed at the alter of 58(2)(b) of the constitution but when the turn of the prime minister from Punjab came, the tables were turned.”<sup>124</sup> Justice Sajjad Ali Shah dismissed the petition because he held that the president’s case against Mian Nawaz Sharif was supported by stronger evidence than the case against Ms Benazir Bhutto in 1990, yet, Tariq Rahim’s case had not been overruled. For majority of the judges the views of Justice Sajjad Ali Shah was disturbing and some judges complained to chief

justice for moving this case to Supreme Judicial Council for violation of article ix of the code of conduct for judges of Supreme Court and High Courts.<sup>125</sup> The chief justice did not agree with their suggestion because dissenting was his personal view. However, the observation of dissenting judge was appreciated by one particular party (PPP). So much so that that bound copies of the dissenting note were circulated in Pakistan and abroad. Justice Sajjad Ali Shah was rewarded for his dissension by his appointment as the chief justice of the Supreme Court on 5<sup>th</sup> June 1994, superseding three senior colleagues in breach of the convention of appointing the senior-most judge as the chief justice<sup>126</sup>. Justice Sajjad Shah reminded the members of the judgment in the Moulvi Tamizuddin Khan case in which there had been one dissenting voice of justice Cornelius.<sup>127</sup> But the situation of 1954 was different as compared to the situation of 1993. We cannot equally compare both the judges due to their dissenting views because later's views gave some kind of ethnic smell. "It will be an dark day for Pakistan if the judges of apex court divide on the ethnic or provincial basis".<sup>128</sup>

It was historic that the Supreme Court declared that the President's order of 18<sup>th</sup> April 1993 as being without lawful authority and restored both the national assembly and the dismissed government of Nawaz Sharif. "Pakistan's history is littered with the wrecks of destroyed assemblies and governments. For the first time the highest court in the land has recalled a dead assembly to life. If this is not historic it is hard to figure out what it is."<sup>129</sup> On restoration of the National Assembly and Government by the Supreme Court, The News, Islamabad, wrote "The first such judgment of its kind in the country's history signifies not the victory of a single individual or party, but the vindication of the rule of law. Had such judgments been delivered in the past too, democracy would have been much stronger."<sup>130</sup> The Pakistani people and press praised the decision and role of chief justice. "The Pakistan Supreme Court has made a valuable contribution towards upholding the supremacy of the constitution and its judgment will be a contribution towards the development of constitutionalism and the rule of law in our south Asian region. It shows that the Supreme Court can play a vital role in consolidating democracy and upholding the supremacy of the constitution."<sup>131</sup> It is a historic verdict of the supreme court that will prove a milestone in the legal and constitutional history of Pakistan. "Repeated dissolutions of the supreme legislatures of the country by autocratic rulers had

created an impression that even the highest courts had become a handmaiden of whoever happened to be in power. This verdict would now restore the judiciary's credibility and enhance its past prestige in the eyes of the public."<sup>132</sup>

### **Benazir Bhutto Government II Term( 1993-1996)**

The elections were held under the supervision of caretaker government at the center as well as in the provinces.<sup>133</sup> Wasim Sajjad, the chairman of Senate took over as acting president and Moeen Qureshi an unknown person in Pakistan was appointed as caretaker prime minister.<sup>134</sup> He was accepted as political outsider and neutral person for holding the general elections. The general elections of National Assembly and provincial assemblies were held on 6<sup>th</sup> and 9<sup>th</sup> October 1993, which were fair, free and impartial. Results of the National Assembly election 1993

#### **Party Position**

Party	Punjab	NWFP	Sindh	Balochistan	Total
PPP	47	5	33	1	86
PML(N)	52	9	10	I(Islamabad)	72
PML(J)	6	—	—	—	6
PIF	—	2	1	—	3
ANP	—	3	—	—	3
JWP	—	—	—	2	2



IJM	—	2	—	2	4
P-K MAP	—	—	—	3	3
BNM(Hayee)	—	—	—	1	1
BNM(Mengal)	—	—	—	1	1
NPP	—	—	1	—	1
NDA	1	—	—	—	1
Pakhtoon- Khawah Qami Party	—	1	—	—	1
United Deni Mehaz	1	1	—	—	2
Independents	5	1	1	1	8

Source: The Nation, 8<sup>th</sup> October 1993

In this election, the Pakistan Peoples Party won 86 seats and the Pakistan Muslim League (Nawaz group) won 72 seats out of 208. As a result of elections, no political party or political alliance won the clear majority in the National Assembly. Pakistan Peoples Party and Pakistan Muslim League (Nawaz group) stood as equal political forces but the religious parties alliance (Pakistan Islamic Front), suffered a humiliating electoral defeat. PPP secured the support of independent members and some small parties. Benazir Bhutto

was elected Prime Minister by securing 121 votes on 19 October 1993.<sup>135</sup> In provinces, the situation was quite different from the center. In North Western Frontier Province and Balochistan Pakistan Muslim League (N) formed the Governments and in Punjab the alliance of Pakistan Peoples Party and Pakistan Muslim League (Junejo group) formed the Government while in Sindh, the Pakistan Peoples Party formed the government with absolute majority. These assemblies elected Farooq Ahmed Leghari as President of Pakistan, whose election was held on 13<sup>th</sup> November 1993.<sup>136</sup> Farooq Leghari, a candidate of the Pakistan Peoples Party, got 274 votes and Wasim Sajjad, a candidate of Pakistan Muslim League (N) got 168 votes.<sup>137</sup> Benazir Bhutto secured her government against the exercise of discretionary powers of the President by electing Farooq Leghari as president of Pakistan.<sup>138</sup> Almost every impartial observer had thought that the threat of the 8<sup>th</sup> amendment had been abolished by getting elected Farooq Leghari, a Bhutto loyalist as president.<sup>139</sup> Against the political norms, “in a goodwill gesture unknown to Pakistani politicians, Sajjad conceded defeat and congratulated Leghari on his election.”<sup>140</sup> Leghari after winning the election, during his first speech stated that “the sooner the eighth amendment was lifted, the better it would be.”<sup>141</sup> His words to repeal the 8<sup>th</sup> amendment were appreciable that confirmed his commitment with the democracy. But the Pakistan Peoples Party government could not use his good offices for the restoration of 1973 constitution. In spite of all good wishes of the president, the Pakistan Peoples Party government began their foul play with the help of the president to sack the North Western Frontier Province government of Sabir Shah.<sup>142</sup> The Pakistan Peoples Party headed by Aftab Ahmad Sherpao failed to win over the members of treasury benches, so the federal government by the blessing of the President, imposed the Governor’s rule because the Pakistan Peoples Party could not do so as long as the Sabir Shah government was in office. “A classic example of intrigue, influence peddling, and outright bribery ripped apart the relative tranquility in the North Western Frontier Province, where a Pakistan Muslim League-Awami National Party coalition had formed the government. Pakistan Peoples Party operators, armed with huge sums of money, enticed and ultimately won over enough borderline members of the ruling coalition to weaken, and thus bring down, the provincial government. Governor’s rule was soon lifted to allow the PPP to form the government.”<sup>143</sup> All this was done with the legal and moral

support of president. In this situation the president seemed to be the only president of Pakistan Peoples Party.

During her second tenure, Prime Minister Benazir Bhutto was weakened by family feuds. Her brother Murtaza Bhutto came back to Pakistan and became an open critic of her government and her husband Zardari. His participation in politics was a political threat for Benazir and her spouse particularly in the province of Sind. The Bhutto family was divided into two opposite camps, Benazir and her husband Asif Zardari on one side and Murtaza Bhutto with his mother on the other side. Murtaza asked the prime minister Benazir Bhutto, "to kick out the killers of her father, hold new elections, and denounce her husband, Asif Zardari who, he asserted, had plundered the country's wealth."<sup>144</sup> For the safety of her government, Benazir came out with heavy hands and occupied the party as co-chairperson of Pakistan Peoples Party.<sup>145</sup> On 20<sup>th</sup> September 1996, Murtaza Bhutto was killed along with his seven companions in police encounter when he was near his residence.<sup>146</sup> Murtaza Bhutto's widow, Ghinwa openly blamed Prime Minister's husband Asif Zardari for her husband's murder.<sup>147</sup> She defended her government's performance on all fronts and alleged the involvement of president Farooq Lagheri in the murder conspiracy of Murtaza Bhutto, and also demanded the resignation of the president.<sup>148</sup> The law and order situation in the whole country deteriorated particularly in Karachi.<sup>149</sup> The provincial capital and big industrial city of the country was in turmoil but federal as well as the provincial government did not take strict action as necessary.<sup>150</sup> The sectarian terrorism was at its peak but the Benazir government was asserting that every thing was all right and under control. Benazir and his ministers did not care about the feelings of people and their killings in sectarian terrorism.<sup>151</sup>

Benazir's foreign policy was very weak, despite dozens of trips abroad as Prime Minister at a very heavy cost to the exchequer; Pakistan's relations with other countries suffered a serious set back. "Washington was increasing the pressure on Benazir for freezing the country's nuclear programme. Some American officials involved Pakistan for supporting the Mujahideen in Kashmir and Sikh uprising (revolt) in India's Punjab".<sup>152</sup> She refused to accept the pressure on nuclear programme at any cost.<sup>153</sup> It was shocking for us that even our traditional friends and neighbors like Iran and China drifted closer to India. The

government had been propagating its Kashmir policy but in fact, Government lost its image by twice withdrawing resolutions from the UNO for condemning India on Human rights abuses and crimes against humanity in occupied Kashmir<sup>154</sup>.

In her second tenure, Judiciary came under tremendous amount of pressure. Although it was part of the manifesto of the Pakistan Peoples Party in the 1993 General election to introduce judicial reforms and lay down objective standard for the appointment of judges. (PPP, Election-manifesto 1993) But the Pakistan Peoples Party government opposed the appointment of judges according to decision of judge's judgment.<sup>155</sup> The intentional delay in implementing the judges' judgment became an open confrontation between the two constitutional officials. It became public, when the president filed reference No.2 of 1996 in the Supreme Court on 21 September 1996<sup>156</sup> but this confrontation came to an end on the dissolution of National Assembly and dismissal of Benazir cabinet by the president Farooq Leghari, an old loyal worker of Pakistan Peoples party.<sup>157</sup> The government did not enforce the judges' judgment although the prime objective of this judgment was to secure the independence of judiciary. The implementation of the Supreme Court judgment had assumed urgent public importance and that delay in the implementation was hurting public interest.<sup>158</sup> This controversy started from the first tenure of Benazir Bhutto and further increased since 20 March 1996, Supreme Court judgment, that needed to be speedily resolved once and for all. Benazir ridiculed the judgment on the floor of the assembly.<sup>159</sup> She resisted enforcing the judge's judgment. Finding no way the President referred the following question of law for the consideration and opinion of the Supreme Court and the High Court's under article 177 and 193 of the constitution are subject to the provisions of article 48(1) of the constitution.(reference no2)<sup>160</sup> She alleged that the president had malafide intention against her government, because he referred the matter to the court at a time when she was in a state of shock due to her brother's murder which was of political nature. When she was in severe shock on the murder of her brother Murataza Bhutto, the president filed the reference no 2, while the Supreme Court had been opened forcibly.<sup>161</sup> It seemed that Benazir Bhutto had not learnt any lesson from her past dismissal. She gave her husband an open hand in politics, which destroyed her image as a political leader. Zardari along with "Federal ministers,

federal secretaries and other high ranking officials were having an open session in bribery, Kickbacks, and commissions.”<sup>162</sup>

Benazir purchased property (Surray Palace) in London worth several millions of pounds, which shook her image in public and in the eyes of her party workers, which were her precious assets.<sup>163</sup> Benazir had virtually no economic policy. She could not raise the investment and even She failed to attract any appreciable foreign investment except in the energy sector, which was attracted at a very heavy cost to the consumers of electricity in Pakistan. Textile, the most important industry of Pakistan, which produced a lot of foreign exchange, suffered heavy loss due to poor economic policies of Benazir government.<sup>164</sup> Bank loans were increasing day by day and nationalized bank's functioning was not normal due to political interference and nobody made serious effort to build up the banking institution, which works as backbone of the country's economy.<sup>165</sup> Benazir once again failed in establishing her credentials as efficient leader, “Doubts in the public mind, her dishonesty and lack of integrity turned into belief when scandals after scandals broke out in the national and foreign press describing how Benazir and her cronies were systemically milking the country.”<sup>166</sup> The cat was finally out of the bag in the form of dismissal of Benazir cabinet. On 4<sup>th</sup> November 1996 President Farooq Leghari dissolved the National Assembly and dismissed the Benazir Bhutto's government under article 58(2)(b) of the constitution. Meraj Khalid, a former speaker of National Assembly (PPP government) and a former Chief Minister of Punjab, was appointed caretaker Prime Minister.<sup>167</sup> There was a sigh of relief when she was removed. Generally, the public hailed president Leghari's action<sup>168</sup>

### **Dismissal of Benazir government and Dissolution of National Assembly**

The dissolution of National Assembly and dismissal of Benazir government by the President Farooq Leghari was challenged before the Supreme Court under article 184 of the constitution of Pakistan in its original jurisdiction by Syed Yousaf Raza Gillani, speaker of the National Assembly on 11 November 1996.<sup>169</sup> He stated in his petition that the federation was carried out in accordance with the provisions of the constitution but it was not enough to merely allege that the government was not being run in accordance

with the constitution of Pakistan. There was neither any allegation of constitutional deadlock nor the machinery of the government had broken down completely and its authority eroded. The orders passed hurriedly with malafide intention and without a proper and judicious application of mind.<sup>170</sup> Two days after the filing of the petition of speaker Yousaf Raza Gillani, Benazir Bhutto also filed a petition before the Supreme Court challenging the order of dissolution of the National Assembly and the dismissal of her cabinet.

The important dispute that became the main cause of dissolution was the ridiculing the judgment of Supreme Court of 20 March 1996 and deliberate delay in its implementation. Benazir denied that she had ridiculed the judiciary or its decision but the parliament had power to initiate or pass any law regarding judicial organ and the speeches in parliament are constitutionally protected. She held several meetings with the President and chief justice Supreme Court for seeking guidance, that the judgment be implemented in full and without any reservation. The government took steps to separate the judiciary from executive before the deadline fixed by the Supreme Court. For this purpose the federal government promulgated the law reforms ordinance, 1996 and accordingly, all provinces issued notifications required under the ordinance for its promulgation. The chief justice of Pakistan had expressed his satisfaction upon the process of separation of the judiciary from the executive.<sup>171</sup> She also submitted that the allegation of nepotism, corruption and violation of rules in the administrative affairs were bogus and as the Supreme court ruled out that these allegations did not constitute any ground that was sufficient in itself to justify an order under article 58(2)(b) of the constitution. She submitted that the president's orders on the above grounds are not sustainable under the provisions of the constitution and the situation had not arisen in which the government of the federation is not carried out according to the provisions of the constitution. The petitioner enjoyed the support of the majority in National Assembly and the president's action was meant to create instability and uncertainty among the whole nation. However, the appeal to the electorate was not necessary.<sup>172</sup>

Benazir's petition was heard by a bench of only seven judges out of fourteen judges, constituted by Chief Justice of Pakistan, keeping intentionally the number of senior

judges out of the bench.<sup>173</sup> Benazir Bhutto's senior counsel Aitzaz Ahsan, requested the court on its first hearing, "It was a very sensitive issue and involved future of the country, so the chief justice should constitute the full court for hearing of dissolution case, as it was done in the past." That was not given due consideration. "There was wisdom in this practice as it eliminated the possibility of any manipulation by an unscrupulous chief justice to constitute a bench of his own choice, which could be pressurized into adopting his viewpoint. Secondly, in such an important matter the Supreme Court should speak with one voice and the judgment should comprise the full Supreme Court bench."<sup>174</sup> Only four days before the general elections, the petition was dismissed which proved to be the last straw on the back of the Pakistan Peoples Party. The Supreme Court bench upheld the President's order of the dissolving the National Assembly and dismissing the Benazir Bhutto's cabinet by the majority of six judges to one. "Benazir Bhutto, and also some observers, maintained that the timing of the Supreme Court judgment had been so manipulated as to put the last nail in the coffin of the Pakistan Peoples Party."<sup>175</sup> "The supreme court's decision, only four days before the election brings grave consequences to their election campaign. Someone said that with the Supreme Court verdict on Benazir Bhutto's dissolution petition out of the way, all was set for the February 1997 elections."<sup>176</sup> The public at large discussed both the aspects of Supreme Court's verdict, whether it was delivered in time or was it delayed purposely? "Normally, the politicians play their cards very carefully and concurrently avail both legal and political remedies, keeping in view the importance of time and political expediency. Secondly, whether the mind of the voter would have been affected by the verdict of the court, and to what extent, are hypothetical questions."<sup>177</sup>

The majority of the judges on the bench held that the reasons given by the president are sufficient for the dissolution. Only one judge Zia Mahmood Mirza wrote a dissenting judgment that cannot be ignored. There is not only difference of opinion but also this created easy to dig facts from the decision. The majority of the judges (six) held that there was sufficient material available to the President for making objective opinion in support of the order of dissolution of National Assembly and dismissal of Benazir cabinet under article 58(2)(b). In brief, the court held, the president's order valid, as these were the reasons given by the majority judges. The President had reached the objective form of

opinion that the situation had arisen in which the government could not be carried on in accordance with the provisions of the constitution. For this purpose, the president had sufficient material in support of the ground of dissolution. The court considers the opinion not satisfaction of president and examines the bonfide contention in exercise of powers article 58(2)(b). The court held that sufficient material was available that there were extra-judicial killings, custodial deaths, illegal arrests, torture, illegal searches and seizures on the orders of the government and its functionaries. Such extra- judicial killing, seizure and searches not only violate the right to live but also infringe on the dignity of man and the privacy of the home and denying treatment according to the rule of law. The government deliberately did not implement judgment of Supreme Court in the judges' judgment (commonly known as judges case). There was a general impression of the government that corruption, favoritism, nepotism and undue benefits can be seen in the high offices of the government. They were guilty of corrupt practices and gross abuse of power against the provisions of the constitution. The corruption in government departments and corporations was at its peak. They were making appointments on financial gains in violating the rules and regulations. The government created harassment among the judges by introduction of the bill in National Assembly, proposing to send a judge on forced leaves if 15 percent of the total members of the National Assembly moved a complaint of misconduct against him. The government did not take the solid steps to separate the judiciary from executive. The government violated the basic rights article 14 by taping the telephones of judges, leaders of political parties, and high- ranking civil and military officials. (Benazir considered the supreme court a grave risk to the security of Pakistan and directed phone tapings of the superior judiciary , besides that of the chairman of senate, and other high ranking civil and military officers.<sup>178</sup> The court did not consider the grounds regarding the murder of Murtaza Bhutto, sale of Burma Castrol shares in PPI, shares of Qadirpur Gas Field in PPI because these cases were pending in the court of law, Hakim Ali Zardari's purchase of property in a foreign country since he was not part of government and allegation against Nawaz Khokhar at the time of induction in the cabinet.



## **Dissenting Judge judgement**

Justice Zia Mahmood Mirza wrote in his dissenting decision, that the ground of extra-judicial killings against the Federal Government is not correct because the President remained actively associated with the government policies regarding the situation in Karachi for a period of three years and always appreciated, supported the policies of government and steps taken by it to combat terrorism. There was no contempt or disqualification proceeding initiated against Prime Minister. The president cannot base on the ground of ridiculing the judgment in the judges case, its deliberate delay or non implementation, phone tapping and eaves dropping was not available to the president for the dissolution of national assembly. The moving of bill of accountability of judges through national assembly was not a sufficient ground because it is the assembly's discretion to pass or reject any bill moved by the government. It is necessary that the situation must arise where the government of the federation could not be carried on in accordance with the provisions of the constitution. As held in the case of Haji Saifullah breakdown of constitutionalism mechanism, a stalemate, a deadlock in ensuring the observance of the provisions of the constitution. As interpreted by justice Shafiur Rehman, in his separate note written in the case of Haji Muhammad Saifullah, and as observed in Ahmad Tariq Rahim's case,<sup>179</sup> where there is an actual or imminent breakdown of the constitutional machinery, where there takes place extensive, continued and passive failure to observe numerous provisions of the constitution creating an impression that the country was being governed by extra-constitutional methods.

With due respect to the members of the bench, it is observed that the impression of the Benazir supporters that, she was not given a fair hearing because relations had been too much strained, after the 20<sup>th</sup> March judgment by the Supreme Court in the judges case between Benazir and chief justice Sajjad Ali Shah. The political analysts and judicial thinkers were astonished that why, Benazir was not given the same relief that Supreme Court gave to Nawaz Sharif in 1993. "The answer lies in the very valid and legal concept that the grounds and reasoning were not the same."<sup>180</sup> Benazir Bhutto commented on the Supreme Court's judgment that the court's decision is not unexpected. She knew that the decision would come at the time of election. She said those people who cannot finish us

politically they are finishing us judicially.<sup>181</sup> She said it is a fact, one Government is restored and other is not restored. If the daughter of Bhutto is dismissed from Prime-Ministership then it is right and if Nawaz Sharif is dismissed then it wrong. She declared that it is a part of history and the future historians/generations would decide the actual position of right and wrong.<sup>182</sup> Benazir Bhutto made deliberate damage to herself and her government by appointing justice Sajjad Shah ignoring the rule of seniority second time in the history of Pakistan. She met poetic justice when she was undone by her own nominee as president and chief justice. Her confrontation with the president and superior judiciary finally brought her downfall.<sup>183</sup> President Farooq Leghari commented that this decision would open new avenues for the better future of democracy and democratic institutions. The Supreme Court verified my order of dissolution because I used the constitutional power in the best interest of the state.<sup>184</sup>

### **Nawaz Sharif Government II Term( 1997-1999)**

The general elections were held on 3<sup>rd</sup> February 1997, Nawaz Sharif got a heavy mandate in the general elections.<sup>185</sup> According to the election results the Pakistan Muslim League (Nawaz group) headed by Mian Nawaz Sharif won a two third majority in the National Assembly and the party also got about 90% of the seats in the Punjab and North Western Frontier Province assemblies. In Sindh and Balochistan no party had an absolute majority though in Sindh the PPP had obtained more seats than any other party.<sup>186</sup>

#### **Party Position**

Party	NA	PP	PS	PF	PB
PML(N)	134	212	15	31	5
PPP	19	2	36	4	1
HPG(Haq Prast Group)	12	—	28	—	—
ANP	9	—	—	28	—
BNP	3	—	—	—	9
JUI(F)	2	—	—	1	6
JWP	2	—	—	—	6
NPP	1	—	3	—	—
PPP(SB)	1	—	2	—	—
BNM	—	—	—	—	2

PDP	—	1	—	—	—
PKMAP	—	2	—	—	2
PML(J)	—	2	—	2	1
UNA	—	—	1	—	—
Independents	19	21	15	11	8
Total	202	238	100	77	40

Source The News, 6<sup>th</sup> February 1997

Nawaz 'Sharif was very happy with the election results which gave him two third majority in the National Assembly. He stated that he could implement his party's manifesto for the welfare of people and strengthening the state institutions.<sup>187</sup> Benazir denounced the election results as being "Engineered"<sup>188</sup> Qazi Hussain Ahmad, leader of the Jamaat-e-Islami, declared that the low turn out was a reflection by the voters of the corrupt electoral process and said that Jamaat-I-Islami would not recognize the government formed as a result of this election.<sup>189</sup> Farooq Ahmad Leghari, the president was now placed in a peculiar situation. He was a president who was voted to the office of the president with the full support of Pakistan Peoples Party. He was a loyal lieutenant of Benazir Bhutto but by one of the strongest freak of fortune he was responsible for ousting Benazir Bhutto's government out of power. It was now important for him to work out a working relationship with Nawaz Sharif who was now in power with a two third majority in the parliament. His position was vulnerable.

Nawaz Sharif government achieved its first target by altering the discretionary powers of the president, which he had got under the 8<sup>th</sup> amendment in the constitution. The constitutional thirteenth amendment was passed within hours on 4 April 1997 by relaxing the usual rules of business regarding the constitutional amendment<sup>190</sup>. The 13<sup>th</sup> amendment was passed unanimously because all the political parties were against the 8<sup>th</sup> amendment and both the major parties had suffered at the hands of the president.<sup>191</sup> Once again, the Prime Minister became most powerful chief executive as it was in original 1973 constitution. President with regard to Prime Minister became the tutorial head with only ceremonial powers as envisaged by the original constitution of 1973

After passing the thirteenth amendment Nawaz Sharif felt relaxed with no authority to challenge him in his designs for future actions. The position of unchallenged power,

unfortunately led him to conflicts with other institutions such as judiciary, Army, Political parties, leadership and Bureaucracy. During the crises between judiciary and executive Leghari resigned on 2 December 1997, and blamed Nawaz for the constitutional crisis.<sup>192</sup> "His resignation brought to an end the high drama of conflict between the judiciary, the executive and the legislature."<sup>193</sup> After the resignation of Farooq Ahmad Leghari, Nawaz Sharif had a free hand to pick any body for the office of the president. After some consultation, the federal cabinet announced on 15 Dec 1997 justice Mohammad Rafiq Tarrar as candidate of Pakistan Muslim League (N) for president.<sup>194</sup> This appeared to be the personal choice of Nawaz Sharif and his family and it was Nawaz Sharif who disclosed it to his cabinet in a specially convened meeting on 15 Dec 1997. Tarrar was a religious man, he was respected for being an honest judge, an amiable character and man of conviction, if once he believes in something right or wrong, he preserves it with intensity and passion. The only reason for his nomination that appears to have prevailed with the Prime Minister could be his steadfast personal loyalty to Nawaz and his family, which seems to have out-weighed the political logic of regional political balance among the office of Prime Minister and president. Nawaz Sharif's only aim to save his government from future crises was fulfilled and the government had faced no challenge from any quarter of the country.

Running a government in a country like Pakistan is not an easy task for a political party, where the roots of democracy are very weak and all governments heavily rely on bureaucracy in running the day-to-day affairs of government. Therefore, very early in the day Nawaz Sharif's government ran into various kinds of crises which resulted in eluded decisions like freezing of all foreign currency accounts in local banks regardless of whether they belonged to residents or non-residents, failure to hold political alliances with Awami National Party, Muhajar Quami Movement and the Balochistan National Party, failure to revive and regenerate economic activity, Tension between the province of Punjab and all other provinces particularly on the issue of Kalabagh dam, deterioration of law and order situation, sectarian violence, humiliation of judiciary and concentration of all powers in his hands like a private Empire.

The first conflict with the most powerful institution came when the chief of army staff, General Jehangir Karamat in his address to the Naval War College on October 5, 1998, proposed the establishment of a national security council for addressing important issues which were regarded as revolt against elected government and he was forced to resign as chief of army staff for making such proposal.<sup>195</sup> General Pervez Mushraf replaced him but the sudden resignation of General Jehangir Karamat caused resentment in the rank and file of the Army because it was seen as an act of humiliation of the Armed forces.<sup>196</sup> The prime minister saw the appointment of Pervez Musharaf as an act of magnanimity which would keep Pervez Musharaf under his sway, compared to a general originally belonging to the Punjab or the North Western Frontier Province.” After the resignation of chief of army staff, Nawaz Sharif was seen as someone who had stripped the president through the 13<sup>th</sup> amendment, neutralized the parliament through the 14<sup>th</sup> Amendment, forced the president to resign, driven out the Chief Justice of Pakistan and at last he successfully got the resignation of Army Chief.<sup>197</sup> After establishing himself as a powerful Prime Minister, he took major initiative towards normalization of the relationship with India. Atal Behari Vajpayee, Prime Minister of India visited Lahore by bus, after the meeting of both prime ministers, a joint communiqué was issued known as ‘Lahore Declaration’ pledging, among other things, a commitment from their respective governments, to “intensify their efforts to resolve all issues, including the issue of Jammu and Kashmir”.<sup>198</sup> For the move of normalization of relations with India Nawaz Sharif was generally favored by the people except the ‘Jamaat-I-Islami, whose workers demonstrated against the move. But these steps towards peace did not last long when Kashmiri freedom fighters (Mugehideen) occupied the Kargill –Drass Mountain peaks just across the (LOC) line of control. The freedom fighters surprised the Indian military command and put them on the defensive. India successfully opened a propaganda front on international level, in which they succeeded in putting Pakistan on the back foot. International environment was not in favour of any kind of conflict in South Asia therefore; Pakistan was put under pressure to withdraw the forces.

Pakistan and its Armed forces suffered a lot of humiliation at the international level. Kargil crises increased tension between the Nawaz government and leadership of the armed forces. Nawaz Sharif in his statement blamed the army leadership for the Kargill

misadventure.<sup>199</sup> It was rumoured that Nawaz Sharif was planning to sack another Army Chief Parvez Musharraf and to appoint in his place some one else of his own personal choice. This crisis took a fateful turn on the 12<sup>th</sup> October 1999 when the chief of army staff General Mushraf was returning from official visit of Sri Lanka and on that day Nawaz Sharif tried to promote Lieutenant General. Zia ud Din (who was junior to several of his colleagues and from the engineer crops) to General and appoint him as Chief of Army staff but the Army crops commander did not allow him to take over the charge of new appointment.<sup>200</sup> An Announcement was made on T.V about the appointment of new chief of army staff but it was soon interrupted and the T.V went off the air for a few hours. It is right, the constitution authorized the Prime Minister Nawaz Sharif to retire General Parvez Musharf as chief of army staff but it was necessary that the matter should have been dealt with in a dignified manner. He was retired in a stage of confusion and hurry and the retirement was publicized in a manner insulting to army chief which was unbearable for the army.<sup>201</sup> People were anxious to know the situation but after few hours the T.V screens displayed the announcement that the Nawaz government had been dismissed and that General Parvez Mushraf would soon be addressing the nation.<sup>202</sup> Later it was transpired that during the taking over of sensitive places and installations, an attempt was made by Nawaz sharif and his officials not to allow the PIA plane, with General Mushraf aboard, to land at Karachi airport. Beyond this point there are many stories, which surrounds the Hijacking incident that ultimately resulted in a military take over.

### **Overthrow of civilian (Nawaz)government**

On 13<sup>th</sup> October 1999, General Parvez Musharf announced that the Nawaz Sharif had been removed and the armed forces had moved in and taken control of the affairs of the county. Nawaz Shaif government was dismissed and parliament and four provincial assemblies had been dissolved with immediate effect. Once again, for the fourth time in the history of Pakistan, the Military took over the control of government by derailing the democratic order. Parvez Musharraf proclaimed that the constitution would be held in abeyance but the president would, however, continue in office and he himself assumed the office of Chief executive.<sup>203</sup> “Once again ‘Khaki shadows’ loomed large over

Pakistan.”<sup>204</sup> General Parvez Mushraf announced that all the courts would continue to function and exercise their respective powers and jurisdiction but the courts would not have the power to make any order against the chief executive and or any person exercising power or jurisdiction under his authority.<sup>205</sup> It was also stated that the president was to act on the advice of the chief executive. He announced a six members National Security Council for the decision of policy matters and also announced the seven-point agenda for future.<sup>206</sup>

1-Re-building of national confidence and morale;

2-Strengthening of the federation by removal of inter provincial disharmony and restoration of national cohesion;

3-Revival of economy and restoration of investor’s confidence;

4-Ensuring law and order and dispensing speedy justice;

5-Depoliticization of state institutions;

6-Devolution of power to grass –root level, and

7-Ensuring swift and across the board accountability.<sup>207</sup>

A number of petitions were filed in the Supreme Court challenging the validity of military takeover on 12<sup>th</sup> October 1999 under article 184(3) of the constitution. Nawaz Sharif had filed these petitions and other Pakistan Muslim League (N) leaders challenging the military take over as void and prayed for restoration of the Assemblies.<sup>208</sup> Supreme Court entertained all the petitions and fixed the date of hearing on 31<sup>st</sup> January 2000. The government was anxious about the entertaining of petitions; the panic started in the government circles as the date of hearing was approaching. “ It was strongly rumored that these petitions might be accepted and the assemblies might be restored and the Nawaz government reinstated.”<sup>209</sup> The government was ready to hit the judiciary so it did on 25<sup>th</sup> January 2000, by promulgating the oath of office (judges) order, 2000.<sup>210</sup> According to the order all the judges of the superior courts were required to make oath to the effect that they would discharge their duties and perform their functions in accordance with the proclamation of emergency of 14<sup>th</sup> October 1999 and the Provisional Constitutional Order as amended from time to time. The order provided that if a judge

would not take oath, he would cease to hold office.<sup>211</sup> Chief Justice and other five judges of the Supreme Court refused to take oath. Only seven judges out of thirteen took oath and the senior most judges amongst them, Irshad Hassan Khan was appointed the chief justice of Pakistan. Two judges from Lahore High Court, three judges from Sindh High Court and two judges of Peshawar High Court were not given the oath and thus they ceased to hold office. None of the judges of the High Courts refused to take oath voluntarily.<sup>212</sup>

The petition of Syed Zafar Ali Shah, ex-MNA from Pakistan Muslim League (N) was heard by a full bench of twelve judges headed by chief justice Irshad Hassan Khan. The judgment was announced on 12<sup>th</sup> May 2000, the petition was dismissed unanimously.<sup>213</sup> The Supreme Court in its judgment justified the takeover by the military on 12 October 1999, and allowed three years to military for implementing its seven-point manifesto before returning to democratic path. The Supreme Court also confirmed the power to amend the constitution on the Chief Executive, General Pervez Mushraf (COAS) that raises a specter of similar abuse once again.<sup>214</sup> It was unfortunate that the Supreme Court once again ignored the rotten fact of the past when Zia made frequent amendments in the unanimously adopted constitution by using the power vested by the court.

The court declared, "Constitutional deviation made by the Chief of Army Staff, General Pervez Musharrf for the welfare of the people rather than abrogating the constitution or imposing the Martial Law by means of extra constitutional measure is validated for a transitional period on ground of State necessity and on the principal that it is in public interest to accord legal recognition to the present regime with a view to achieving his declared objectives and that is in the interest of the community that order be preserved."<sup>215</sup> "All the institutions of state were being systemically destroyed and the economy was in a state of collapse due to self-serving policies of the previous government, which had threatened the existence, security, economic life, financial stability and credit of Pakistan; where a situation had arisen under which the democratic institutions were not functioning in accordance with the provisions of the constitution."<sup>216</sup>



“The disparaging remarks against the judiciary crossed all limits with the rendering of judgment by the court in the case of Sh. Liaqat Hussain, declaring the establishment of Military Courts as ultra vires of the constitution, which resulted into a slanderous campaign against the judiciary launched by the former Prime Minister registering his helplessness in the face of the judiciary not allowing him the establishment of Military Courts as a mode of speedy justice; where the image of judiciary was tarnished under a well conceived design.”<sup>217</sup> The supreme court judgment of 13<sup>th</sup> May 2000 have brought back to square one as we were once again standing on the same footing as in the 1977 when martial law was validated by the supreme court, highest court of the country in Nusrat Bhutto’s case.

The military takeover in the country was justified because the constitution did not provide solution for the crises with which the country was plagued. The constitution always protects the rights of the people and not the interests of the rulers.<sup>218</sup> Supreme court gave the power of amendment in the constitution to president for the running of government and implementation of its reform (Seven point agenda) agenda. Those parties who are saying that Supreme Court has no authority to conform the power of amendment in the constitution on the chief executive, they should go to the Supreme Court for this purpose.<sup>219</sup> The Supreme Court conform the power of amendment in the constitution on the executive which was not prayed during the hearing of Syed Zafar Ali Shah’s case by the military government.<sup>220</sup> Nation thought that the court had buried the doctrine of necessity by giving the judgment against the ordinance (1998) of establishment military courts for all times to come. This was the unanimous judgment given by the nine-member bench of the Supreme Court. Within a period of less than two years its ugly face resurfaced again and found favour with the members of the full bench of the Supreme Court in the case of Syed Zafar Ali Shah and others Vs General Mushraf, chief executive of Pakistan and others, justifying the military take-over of 12 October 1999. The judges were not in position to give any judgment against their oaths taken on 27<sup>th</sup> January 2000 under “the oath of office (judges) order, 2000”.<sup>221</sup>

The political system of Pakistan from the first decade of existence was besieged by the intrigues of political leadership; Politicians handle power as an instrument to rule the

people without ethical restraints that led to political and constitutional dishonesty. Pakistan leadership could not provide the stable environment necessary for the awareness of people for democracy. The political system was derailed in the initial stage of constitutional development by the democratic leadership in the guise of undemocratic activities. It was the conspiracy of the ruling classes mainly the feudal class and their model was that the interest of the ruling class must be safe and sound. These intriguers attacked the political system in 1954 and got dissolved constituent assembly with the unconstitutional act of Governor General. It was the main attack on the constitutional and political system of Pakistan that was succeeded because the judiciary interpreted the law in favor of the Governor General by validating his action. Judiciary provided the loophole to the future constitutional breakers. Our country's history is full of military interventions and legalization of their rule from the judiciary under the law of state necessity. Under the 8<sup>th</sup> amendment of the 1973 constitution, which was introduced in 1985 on the pressure of Chief Martial Law Administrator, president was empowered to dissolve the National Assembly but the discretion of the president should be objective based on facts not based on the speculation or imagination. From 1988 to 1999, five Assemblies have been dissolved almost on the same allegations. These dissolutions were challenged before the judiciary as unconstitutional with the petitioners prays for the restoration of assembly and cabinet. Judiciary decided the petitions and in every petition their decision was different, only one petition was accepted and the assembly was restored. Judiciary decided these cases under pressure or according to the constitutional provisions. The dissolutions were political and upholding of these decisions of dissolution too became a political. The judiciary of Pakistan remains under trial before its people.

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- <sup>149</sup> *Dawn*, Karachi, September 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> 1996
- <sup>150</sup> Ziring, Lawrence, op-cit, p. 559, *The Financial Times*, London, 11th April 1996
- <sup>151</sup> Khan, Hamid, op-cit, p. 796
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- <sup>154</sup> Ahmad, Ghafoor Professor, op-cit, p.286
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- <sup>157</sup> *Dawn*, Karachi, 7th November 1996
- <sup>158</sup> Shah, Hasan Nasim, op-cit, p.120, PLD 1998,SC, p.431
- <sup>159</sup> PLD 2000,Supreme Court, p.1217
- <sup>160</sup> *Dawn*, Karachi, 7th November 1996,sajjad296
- <sup>161</sup> PLD 1998,Supreme Court, p.439
- <sup>162</sup> Ghafoor, Ahmad Professor, op-cit, p. 623
- <sup>163</sup> Ibid, p.573
- <sup>164</sup> PLD 1998,Supreme Court, pp.514-516
- <sup>165</sup> PLD 1998,Supreme Court, p.510-511
- <sup>166</sup> Mehmood, Safdar, Dr, op-cit, p.397
- <sup>167</sup> *The Muslim*,6<sup>th</sup> November 1996
- <sup>168</sup> Mehmood, Safdar, Dr, op-cit, p.397
- <sup>169</sup> PLD 1998, Supreme Court, p.388 (Constitutional Petition No 58 of 1996) *Dawn*, November 12, 1996.
- <sup>170</sup> PLD1998, Supreme Court, pp.388-389
- <sup>171</sup> *Dawn*, Karachi, 4th October 1996
- <sup>172</sup> PLD 1998,Supreme Court, pp.637, 767
- <sup>173</sup> The dissolutions of Assemblies' cases were always heard by the full court except this case.
- <sup>174</sup> Ajmal, Mian,op-cit, p. 210
- <sup>175</sup> Shah, Ali Sajjad, op-cit, p.321
- <sup>176</sup> *The Muslim*, Islamabad, 2nd February 1997
- <sup>177</sup> Shah, Ali Sajjad op-cit, p. 322
- <sup>178</sup> PLD 1997,Supreme Court, P.502, 565, *The Frontier Post*, Peshawar, 21<sup>st</sup> December 1996
- <sup>179</sup> PLD 1992, Supreme Court, p. 822
- <sup>180</sup> Shah ,Hasan Nasim, op-cit, p.115
- <sup>181</sup> Hafiz,Amin, op-cit, p.199
- <sup>182</sup> *Dawn*, Karachi,30<sup>th</sup> January 1997
- <sup>183</sup> Rais Bakhsh, Rasul, *op-cit*, p. 272
- <sup>184</sup> Hafiz,Amin, op-cit, p.199
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- <sup>192</sup> *Dawn*, Karachi, 3rd December 1997
- <sup>193</sup> Khan, Hamid, op-cit, p.832
- <sup>194</sup> *Dawn* ,16<sup>th</sup> December 1997
- <sup>195</sup> *The Muslim*, Islamabad, 6th October 1998
- <sup>196</sup> Mian Ajmal, op-cit, p.342
- <sup>197</sup> Khan,Hamid, op-cit, p.932.
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- <sup>199</sup> *The News*, Lahore, 13tn June 2000
- <sup>200</sup> *The Muslim*, Islamabad, 13<sup>th</sup> October 1999 (T.V News, 12th October 1999)
- <sup>201</sup> Arif,Mehmood Khalid, op-cit,p.442
- <sup>202</sup> *The Muslim, Jang, TheNews, TheNation, Dawn*,13<sup>th</sup> October 1999
- <sup>203</sup> General Parvez Musharaf address to nation on T.V. on13th October 1999
- <sup>204</sup> Arif,Mehmood .Khalid , op-cit, p.443
- <sup>205</sup> PLD 1999,Central Statutes, Vol LI, p.446 (Provisional Constitutional Order 1999)

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- <sup>206</sup> *The Muslim*, 18th October 1999  
<sup>207</sup> *Ibid*  
<sup>208</sup> PLD 2000, Supreme Court, p.869, 917 (Constitutional petition No 62 of 1999, Syed Zafar Ali Shah Vs General Pervez Musharraf and others)  
<sup>209</sup> Khan, Hamid, op-cit, p.935  
<sup>210</sup> PLD 2000, Central Statutes, Vol LII, P.86  
<sup>211</sup> *The Muslim* 26<sup>th</sup> January 2000  
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<sup>214</sup> PLD 2000, Supreme Court, pp.1219, 1220  
<sup>215</sup> PLD 2000, Supreme Court, p.1218  
<sup>216</sup> PLD 2000, Supreme Court, p. 1217  
<sup>217</sup> PLD 2000, Supreme Court, p.1217  
<sup>218</sup> Sajjad Ali Shah's address to Lahore High Court Bar Association on 20<sup>th</sup> October 1999  
<sup>219</sup> Mian Ajmal, op-cit, p.218  
<sup>220</sup> *Nawa-I-waqat*, 23rd August 2000  
<sup>221</sup> PLD 2000, Central Statutes, Vol LII, p.86

## **CHAPTER: 5**

### **CONSTITUTIONAL INTERPRETATIONS**

The legislative, executive and judiciary-the pillars of the state play their role interdependently. The legislative has to legislate under the constitutional provisions and the judiciary provides check on the legislation by constitutional interpretations. The constitutional interpretations by the higher courts are also a form of legislation. During the period 1988 to 1999 petitions were filed before the higher courts challenging the legislation as ultra vires of constitution and basic rights. In this chapter, the decision of the judiciary in the cases of parliament acts (political parties Act, Contempt Cases, Anti-Terrorist Act, Constitutional Amendments and executive-judiciary- confrontation) and that of the contempt of court has been examined. By examining these decisions we will make an attempt to evaluate the image of higher judiciary in Pakistan. We have stated earlier in this thesis that our superior judiciary remained under stress since 1958. During the period 1988-1999 we are of the opinion that the executive interference increased which seriously affected the working of the judiciary. Some of the decisions taken by the superior courts seriously tarnished its image.

#### **Political Parties**

Pakistan's history of fifty-seven years is an unpleasant history of mismanagement exhibited by its elites, both civilian and military bureaucracy. Pakistani nation has been witnessing with pain. The journey of its society under the command of despots and demagogues with a deep sense of agony, anguish and distress. Repeated military intervention in politics gave our civilian bureaucracy enough space to subvert the growth a viable political culture. At the core of state building in the creation of a government that has a monopoly of legitimate power and that is capable of enforcing rules throughout the state's territory. Promotion of democracy means rule of law, public accountability and popular consent, all these ingredients necessary for the growth of a healthy political culture was subverted by a ruling elite who had no role in the creation of Pakistan. First formal military intervention in Pakistani politics came about in October 1958.<sup>1</sup>



Commander-in chief of the Pakistan army general Ayub Khan took over the command of the state of Pakistan and ousted president Iskander Mirza in a bloodless coup. Ayub Khan had very little patience for the politicians and therefore after the bloodless coup took few major steps to marginalized the role of the politicians.<sup>2</sup> Here the researcher will critically examine the measures adopted by Ayub Khan to marginalize the politicians and how Ayub succeeded in his objective. How much space was provided to various political parties by civilian and military rulers after the demise of Ayub Khan. It is popularly believed that Zia in his long rule of 11 years played havoc with the political culture of Pakistan who took many steps to de-stabilize political parties in Pakistan. Zia was the first military ruler to have laid his hand on political party act enacted during the Ayub Khan era. All these actions/amendments regarding the political parties were challenged in the superior court. How the superior judiciary, custodian of the constitution and interpreter of the rule of law faced the various challenges and responded to these challenges. These episodes had direct bearing on the image of our higher judiciary. The judicial judgments on the various enactments and amendments played a pivotal role in constructing the image of the superior judiciary. During the fifty-seven years of Pakistan's history the judiciary remained under tests, trial and stress.

### **Ayub Khan and Political Parties**

Ayub Khan was personally against the political parties and accused them of causing instability and uncertainty in the country. He promulgated a law known as 'EBDO' "Elective Bodies (Disqualification) Order, 1959" for disqualification of politicians, subjected to enquiry for misconduct of politicians by a tribunal to be appointed by the president or a governor.<sup>3</sup> The term of misconduct of politician was defined as any subversive activity, preaching of any doctrine or committing an act which contributed to political instability, bribery, corruption, favoritism, nepotism, willful misadministration, willful misapplication of public money and any other abuse of power or position.<sup>4</sup> Ayub Khan used this wide range law for the disqualifications of members of elected bodies. The Martial Law government disqualified or EBDO'd, several politicians like Suhrawardy, Qayyum Khan, and Ayub Khuhro and many others through this harsh law.<sup>5</sup> There is no doubt that politicians of national standing and sound reputation were deliberately humiliated in the eyes of people through the abuse of this law. The

application of this law was based on personal grudges; score setting, victimization and personal disliking. This law played a major role in disqualifications.<sup>6</sup> Under the 10 May 1962 ordinances, the revival of political parties was banned until the legislation of National Assembly. On 8<sup>th</sup> June 1962, Martial Law was lifted with the enforcement of 1962 constitution. There were a number of political parties working in the country at the time of the imposition of Martial Law in October 1958. The oldest and major party was the Muslim League that had enjoyed power for a short duration. The second major party was the Awami League working under the leadership of Suharwardy. Its strength was concentrated in the East Pakistan with small followers in West Pakistan. Maulana Bhashani, on the arising of dispute with Suharwardy separated his group from Awami League and joined the National Awami Party. The third major party was National Awami Party; its leadership had opposed the Muslim League during the making of Pakistan. During the freedom movement this party struggled for unity with India and, after independence, became the champion of the provincial autonomy. There were some other parties working on different manifestos like The Krishk Sramik Party, The Republican Party, The Nizam-I-Islam Party and The Jamaat-I-Islami.<sup>7</sup> It is important to mention here that the ban on political parties continued even after the enforcement of new constitution and hence the real democratic freedom and role of political parties was still a desire or a dream. However on 14<sup>th</sup> July, the government draft for the political parties was introduced in the national assembly and it was passed virtually without any modification.<sup>8</sup> The president gave his assent on 16<sup>th</sup> July 1962 and the political parties bill became law.<sup>9</sup> The act was hard nut to crack for the president and also for political parties but both had no choice. The political parties however, immediately started their operations after its enactment.

With the arrival of Yahya Khan in 1969, a new dictator, the Yahya Khan did not ban the political parties.<sup>10</sup> The political fate as well as sufferings of the political parties did not change. General elections were held in 1970 and PPP emerged as a political power in west Pakistan with Z.A. Bhutto as its head. Bhutto allowed political parties to work freely and perform their political activities under the limits of the constitution. General Zia took over the government through a military coup on 5<sup>th</sup> July 1977 and in his first address to the nation, he promised the holding of general elections in ninety days. But following the

illegal and unconstitutional traditions of his military predecessors General Zia postponed the general elections on 1<sup>st</sup> October 1977, banning all political activities.<sup>11</sup> Zia announced that the process of accountability would be completed first and then a new date for polls be fixed. Zia fixed the date of 17th November 1979 for elections as promised to the nation. Again on 16<sup>th</sup> October 1979, General Zia postponed the elections and banned all the political parties and their activities with the comments that there was no concept of political parties in Islam.<sup>12</sup> In 1979 General Ziaul Haq amended the political parties act of 1962 through a Martial Law ordinance and sections 3-A, 3-B, and 3-C were added to it.<sup>13</sup> According to the provisions of the amended act, all the political parties were bound to submit their accounts to the election commission and then apply for registration.<sup>14</sup> The political party, which failed to do so could not participate in any election, or perform any kind of political activity. If any party acts against Ideology of Pakistan, independence of judiciary and spread disaffection against the armed forces, his registration might be cancelled.<sup>15</sup> However, a large number of political parties remained unregistered and refused to obey Zia's dictatorial orders. The major political parties, the Pakistan Peoples Party, Pakistan National Alliance and National Democratic Party did not apply for registration and stayed out of election process.<sup>16</sup> Despite staying out Pakistan National Alliance expressed its intention of participating in the election on the fixed date of 17<sup>th</sup> November.<sup>17</sup> Sixteen minor political parties got themselves registered.<sup>18</sup> So, Zia succeeded in his master plan of keeping Pakistan Peoples Party out of the general elections proposed to be held in 1979, if held. While keeping Pakistan Peoples Party out through amended political parties act, Zia postponed the elections for indefinite period. After eight years rule Zia announced the scheme of power sharing with the civilian government. He, once again, amended the political parties act 1962 in January 1985, before the general elections were to be held on non-party basis. He did not want to see any Pakistan Peoples Party leader in the National Assembly who could create problems to his authority. Zia could not crush Pakistan Peoples Party in eight years with all kinds of arbitrary powers how could he finish them with the amendments in political parties act. He wanted a workable, obedient parliament elected on a non-party basis that may agree to any of his terms and conditions for the transfer (rather sharing) of power and the lifting of Martial law. The political parties act 1962 amendment of January 1985 banned

the persons who had at any time after 1 December 1971, been an office bearer or even a member of the executive committee at the national or provincial set up of political party or had been federal minister or advisor or provincial minister, at any time between 1 December 1971 and 5 July 1977 which had neither been registered nor declared eligible to participate in election by the election commission by 11 October 1979 would not be qualified for a period of seven years to be elected or chosen as a member of parliament or provincial assembly.<sup>19</sup> These provisions of amended political parties act cleared that the entire leadership of the Pakistan Peoples Party was disqualified from being elected to the parliament and provincial assemblies. Zia ensured to keep the Pakistan Peoples Party out from taking part in general elections because Pakistan Peoples Party remained unregistered and refused to take part in non-party elections.

In 1987, finding no way Benazir co-chairperson of the Pakistan Peoples Party challenged the amended provisions of the political parties act 1962 as unconstitutional and violative of the fundamental rights of freedom of association under the constitution of 1973,<sup>20</sup> directly before the Supreme Court in its original jurisdiction under article 184 (3) of the constitution.<sup>21</sup> The following grounds were presented in support of the petition:

The requirement of registration of political parties, unlimited power to cancel the registration, submission of its accounts and finance for audit to election commission was highly unconstitutional, unreasonable and against the fundamental rights. The provisions regarding the participation of political parties in election were discriminatory and arbitrary. The President allowed Pakistan National Alliance to participate in election indirectly, because they had not applied for registration directly and the members of federal council were allowed to participate in election was discriminatory and arbitrary rule contrary to other political parties. The freedom of association order 1978, applying restriction on the freedom of association beyond the ambit of article 17 and Revival of Constitutional Order provisions could not override article 17.<sup>22</sup> The amendment made in the political parties act between 5 July 1977 and 11 Nov. 1985, though validated under the 8<sup>th</sup> amendment, had the status of ordinary law and could be struck down as unconstitutional if found to be violative of the fundamental rights under the constitution.<sup>23</sup> The bench of eleven judges headed by chief justice of Pakistan justice Muhammad Haleem heard the case. During the hearing, the federal government raised

two objections, firstly, that Benazir Bhutto was not an aggrieved party as no act detrimental to her had been taken under the provisions of the law being challenged and secondly, that she should have approached the High Court first, particularly when similar petitions were already pending in some of the High Courts.<sup>24</sup>

The Supreme Court accepted the constitutional petition of Benazir ignoring the objection raised by the federal govt. The Court held that the enactment might overt the fundamental rights of the person by its very terms. In such a case the violation of fundamental right would be complete and therefore, there could be no reason why the person so prejudicially affected by the law should not be entitled immediately to avail himself /herself of the constitutional remedy.<sup>25</sup> The Supreme Court declared that a political party

could also be an 'aggrieved party' and could be entitled for the constitutional remedy.<sup>26</sup> The Supreme Court rejected the second objection of federal government that principal of choice of forum of High Court would not be inviolable and genuine exception could exist to take it out of practice. The exception was applied in favour of the case in hand and court observed that the rigid adherence to precedent might lead to injustice and proper development of the law.<sup>27</sup> The Supreme Court also held the validation of laws under article 270-A had not given the protection to existing laws, which were violative of fundamental rights. The political parties act 1962 had not given validity against constitutional violations because it is not mentioned in the seventh schedule to the constitution wherein the laws mentioned had been given constitutional protection. The freedom of association order, 1978 being an ordinary law itself, could not give any protection to the provisions of political parties act 1962 as against fundamental rights under article 17 and its remaining on the statute book would be of no effect. The court held that the audit of political parties accounts, the expression of 'security of Pakistan', Election commission's power of cancellation of registration and registration of political parties was declared violative of article 17 of the constitution.<sup>28</sup> Chief Justice Mohammad Haleem wrote the opinion of the court, which was concurred by five judges and remaining five judges also concurred with the Chief Justice but each of them added their separate concurring note. The Supreme court announced the judgment on 20<sup>th</sup> June 1988, declared and held to be void the section 3(1), 3-A, 3-B, 3-C and 6 (1) of political parties

act 1962 (to the extent stated) being inconsistent with the fundamental rights of freedom of association as enclosed in article 17 of the constitution.<sup>29</sup>

All the judges held that Pakistan was a parliamentary democracy and that democracies could not exist without the party system. They then examined the said clause and held that the provisions of section 3-B of the political parties act were arbitrary, unreasonable, and void, because they were inconsistent with the said clause.”<sup>30</sup> Zia could not imagine such a decision from Supreme Court. Before this critical juncture, he had dissolved the National Assembly on 29 May 1988, dismissed Junejo’s government and announced that elections would be held on non- party basis.<sup>31</sup> Zia was against the working of political parties and was of the opinion that political parties and Islam cannot go together. The judgment paved the way for the working of political parties and party based election for future. Supreme Court declared that non-party elections are against the essence of constitution.<sup>32</sup> It is, of course, one of the very few judgments given against Zia while he was still in power and for this reason this judgment stands out. It was a deathblow for the Zia’s system to suppress every institution for safeguarding his absolute power.<sup>33</sup>

“It was also the first judgment that whittled down the validation clause under article 270-A, which was inducted as a result of the 8<sup>th</sup> amendment to the constitution.”<sup>34</sup> This decision cut down Zia’s dream of non- presence of political parties in the National Assembly, which could create difficulties for him and his government. It was a victory for democratic forces over the dictatorial forces. The Supreme Court decision could be regarded as the recognition of basic rights included in the constitution. “Democracy cannot survive in the country, because it is not the function of judges in a democracy to decide what a country’s constitution should be. In a democracy, it is the right of the people, through their elected representative, to decide what the constitution of the country should be.”<sup>35</sup>

### **Mirza Aslam Beg Case (contempt of court case)**

On 4<sup>th</sup> Feb.1993, Mirza Aslam Beg (Retired) chief of army staff (COAS) stated in meet the press in Lahore that “During the hearing of Haji Mohammad Saif Ullah’s case he had sent a message to the judges of the Supreme Court that the government of Mohammad Khan Junejo should not be restored and that the elections be allowed to take place because the government machinery was by then in full gear.”<sup>36</sup>

Supreme Court of Pakistan took Suo motto notice of Mirza Aslam Beg's statement and started proceeding of contempt of court against him on the statement reported by daily newspapers. On 13 Feb 1993 a Notice of contempt was issued against Mirza Aslam Beg on his statement before the press by justice M.A. Zulleh, chief justice of Pakistan.<sup>37</sup> He also nominated a bench of five judges headed by chief justice for hearing the case of contempt. The Supreme Court bench began its usual proceedings against Mirza Aslam Beg. The people of Pakistan anxiously watched the proceeding of the Supreme Court because Mirza Aslam Beg was stressing on the truth of his statement. The reporting of newspapers generated great interest in the public because the daily proceeding of case were reported by the newspapers. The whole country was watching the progress of the case through the reporting of newspapers. Mirza Aslam Beg (R) chief of army staff appeared in the court on 20 Feb 1993, on the notice of the court and was represented by his counsel Fakhruddin G. Ibrahim. On his appearance in the Supreme Court General (R) Aslam Beg admitted that he had sent a message to the chief justice of the Supreme Court of Pakistan in good faith and in the public interest through a person who enjoyed a top position in the govt. He had taken the stand after reporting in newspapers and said that he had taken such step for the interest of state.<sup>38</sup> He said, I am ready to face the court, because I did all this for the interest of nation and my intention was not to scandalize the Supreme Court or disgrace the judges.<sup>39</sup>

He made a positive assertion that the message had been sent through Wasim Sajjad. Wasim Sajjad was called on by the court as witness, he appeared in the court and was examined on 4<sup>th</sup> March 1993.<sup>40</sup> Wasim Sajjad stated in the court that he did not carry any message to the judges of the Supreme Court in connection with the case.<sup>41</sup> Although, Beg constantly maintained that he was telling the truth. During the hearing, on several occasions, harsh words were exchanged and the Chief Justice chided Aslam Beg.<sup>42</sup> On the day of decision Wasim Sajjad visited the chief of army staff residence as the entries in the register show but his visit cannot be regarded for this purpose because he refused the truth of statement. The story was based only on the imagination of Mirza Aslam Beg (R) chief of army staff. The third important witness, the then chief justice of Pakistan, was not called on for witness who could confirm or deny the statement. Why he was spared, it remained unexplained.<sup>43</sup> At last, the judgment in contempt case was finally

announced on 30 March 1993 in which Mirza Aslam Beg was convicted for contempt but not sentenced for the reason that he had already been reprimanded in court. The decision received bad comments from various quarters, why under this judgment a person who had been convicted, released without being sentenced.<sup>44</sup> The Supreme Court was hearing the contempt case against former chief of army staff, Mirza Aslam Beg and the whole nation was waiting for the decision very anxiously. The contempt case ended leaving many questions unanswered in the minds of people.

During the hearing, a journalist Shahid Orackzai, interrupted the proceedings of court and was convicted for contempt and sentenced to jail.<sup>45</sup> The court asked him to apologize before the court on his behavior. He had refused to apologize and therefore, an order was passed on 1 March 1993 that he may be sent to jail until he purged.<sup>46</sup> In spite of going to jail, he did not apologize to the court.<sup>47</sup> He preferred to go to jail then to bow before the court. It is our nation's misfortune that due to these small incidents the prestige of our superior judiciary was tarnished. Having soft corner for the journalist, the Supreme Court directed its Registrar to visit him in jail periodically to find out if he was prepared to apologize. "Later under orders of the court, he was set free with out any apology having being given by him, either in writing or verbally."<sup>48</sup>

### **Mahmood Khan Achakzai petition (Status of 8<sup>th</sup> Amendment)**

General Zia-ul Haq drastically amended the constitution of 1973 in 1985 through the elected legislature of Pakistan by adopting the set procedure of the constitution. During the life of Zai ul Haq no one dared to knock the door of court in this regard. After almost two years of his death Abdul Majeeb Pirazada challenged the 8<sup>th</sup> amendment in 1990. The Supreme Court on this important constitutional matter gave its verdict in 1997.<sup>49</sup> The Supreme Court on this important constitutional matter gave its verdict in 1997. Achak zai pleaded that "The proposed changes altered the basic character of the constitution; it must be seen as the minimum price (8<sup>th</sup> amendment) that the nation had to pay for the transfer of power from the Army to the civilians."

The 1973 constitution was promulgated with the consensus of all the political parties in the National Assembly (without dissenting vote) and formally implemented on 14<sup>th</sup> August 1973 on 26<sup>th</sup> anniversary of the independence of Pakistan. It embodied the best possible arrangement to accommodate the various political issues, economic interests and



demands as manifested by political parties in their manifestos as compared to 1956 and 1962 constitution.<sup>50</sup> The 1973 constitution unanimously approved was undoubtedly one of Bhutto's greatest achievements but he violated its sanctity by a series of unilateral amendments in the teeth of opposition from his political opponents."<sup>51</sup> Z.A. Bhutto the architect of this constitution introduced and passed seven-amendments within a short span of approximately four years. Most of the amendments were introduced to tame the judiciary and suppress the opposition. On 5<sup>th</sup> July 1977, General Ziaul Haq, the Chief of Army Staff took over the government and imposed Martial Law in the country, keeping some parts of the constitution in abeyance. The Martial Law continued till the introduction of 8<sup>th</sup> amendment in the 1973 constitution by the parliament. Generally, the 8<sup>th</sup> amendment was not received well and was described as "a modified rule of Martial Law...destroying the very basis of the 1973 constitution."<sup>52</sup> The 8<sup>th</sup> amendment to the constitution was introduced in 1985, from that moment it had been at the center of political controversy particularly on the addition of article 58(2)(b). President Zia got amended the constitution for strengthening his own position from the weak parliament.<sup>53</sup> This amendment was passed as a compulsion, leveled by the chief Martial Law administrator for the restoration of democracy and lifting of Martial Law. Zia amended the constitution for his own continuance and survival as president, for keeping the tight grip on the power politics because he did not want to depend on the newly elected parliament.<sup>54</sup> He announced it would be a share of power but not transfer of power to the civilian government. At this critical moment, the newly elected government had no choice except to pass the amendment. All the political parties were opposing the amendment particularly due to the discretionary powers (Article 58(2)(b)) vested in the president. The political parties regarded it as a "calculated attempt to perpetuate Martial Law in the country in civilian guise."<sup>55</sup> Nobody dared to challenge this amendment in the court in the life of General Zia but too many appeals were filed in the superior courts after his death.<sup>56</sup> The appeals against this unpopular amendment were pending before the Supreme Court since 1990.<sup>57</sup> During the pending of this petition the power to dissolve the National Assembly and dismiss the government had been exercised on four occasions and each time after being thoroughly judicially reviewed by the superior judiciary. All the four dissolutions of assemblies and dismissals of governments were challenged before the

Supreme Court and on every occasion, the petitioners got different judgments. On two occasions, the exercise of such presidential power was upheld and on the other two occasions, it was held that the power was exercised invalidly. However, on only one occasion the National Assembly and the federal government was restored.<sup>58</sup> During and after the proceeding of these dissolution cases, the Supreme Court kept these appeals pending while the matter was very sensitive because it belongs to the interpretation of the constitution. The appeal against 8<sup>th</sup> amendment should have been decided on priority basis in the interest of democracy.

The attorney general of Pakistan raised the following objections before the court in response to these petitions against the 8<sup>th</sup> amendment. Mehmood Khan Achhazie in continuation of previous petition filed a new case in which he challenged the 5<sup>th</sup> November 1996 order of dissolution as invalid under article 58(2)(b), because he had challenged the 8<sup>th</sup> amendment.<sup>59</sup> "In all the petitions, the proclamation of dissolution was called in question, and the 8<sup>th</sup> amendment was also challenged."<sup>60</sup> After long pending the petition against 8<sup>th</sup> amendment Chief Justice Sajjad Ali Shah decided to hear all such cases ahead of the cases concerning the dissolution of the National Assembly and dismissal of government of Benazir Bhutto in 1996 after ascertaining the views of the members of Bar. The court decided to hear all the pending petitions regarding the 8<sup>th</sup> amendment.<sup>61</sup> Apparently, the philosophy beyond this petition was that if the 8<sup>th</sup> amendment is held to be invalid, then the discretionary power of the president to dissolve the National Assembly and dismissal of government would not be available and president orders would consequently become void and unconstitutional then the assembly and government would be automatically restored.

The petitioners raised the following objections in support of his petition:

The decision of the Supreme Court in Nusrat Bhutto's case was violated by General Zia in promulgating and enforcing amongst others Provisional Constitutional Order of 1981 and referendum order of 1984. Under the Martial Law regulation, Zia initiated the amendments in the constitution in the form of revival of constitutional order before the announcement of election date. According to the decision of Nusrat Bhutto's case, the basic structure of the constitution cannot be changed.<sup>62</sup> But General Zia had done all this by making self-interpretations of the Nusrat Bhutto's case. The National and provincial

assemblies elections were held on non-party basis in 1985 and their functioning could not be taken as duly elected bodies under the constitution. Consequently, finding no way the Parliament under compulsion passed the invalid Eighth amendment by pressing their emotions for the sake of democracy. The National Assembly was elected on the non-party basis in 1985, was unconstitutional, illegal and could not thus amend the constitution. The parliament altered the parliamentary character of the constitution to presidential.<sup>63</sup> The basic structure of the constitution of Pakistan has been given in the objective resolution and any amendment that violates such a basic structure would itself be invalid. The 8<sup>th</sup> amendment changed the basic structure of parliamentary form of government to presidential form, which was against the soul of objective resolution of 1949 and was liable to be declared as void, unconstitutional.

The Supreme Court heard all the concerned parties at length and upheld the 8<sup>th</sup> amendment as valid amendment in the constitution. Parliament used its power to amend the constitution, whatever the situation may be. It is the core power of parliament that could not be snatched at any cost. The main points of Supreme Court's decision were that the article 239 confers unlimited power to the parliament to amend the constitution, yet it cannot amend in complete violation of Islam nor can it convert democratic form into undemocratic.<sup>64</sup> Similarly, courts cannot abolish amendment in the constitution. It is an important legal theory that even if the constitution is suspended or abrogated the judiciary continues to hold its position to impart justice and protect rights of the people.<sup>65</sup> The court held that the 8<sup>th</sup> amendment did not alter the basic features of the constitution and was, therefore, valid – "a complete legal enacted piece of legislation". The court held that the amendment was introduced in the constitution in 1985. After this introduction, three general elections were held on party basis but none of the parliament did touch this amendment so that this amendment was ratified. Article 58(2)(b) had not tilted the balance of power and concentrated powers in the hands of the indirectly elected president.<sup>66</sup> There was little response on this judgment because the eyes of all the peoples were focused on the coming judgment of Benazir Bhutto's dismissal case. The judgment of the Supreme Court was fair and impartial. There was an open field for the people's representatives to alter this amendment through constitutional process. It was a political question, so it should have been solved politically rather than by the judicial process.

## **Anti Terrorist Act 1997**

“The judiciary has no right or power to start agitation as an adversely against a proposed law, or to make press statements or to pass resolutions through chief justices’ committees and thereby generate a public confrontation. Justice Sajjad Ali Shah, without taking his colleagues into confidence, generated an estrangement between the executive and the judiciary over a law, which had not even been enacted at that time.”<sup>67</sup>

It is very strange in this civilized age that the democratic government was willing to establish separate courts for the management of law and order situation. Law and order situation in the country was gradually deteriorating since 1988 and especially in 1997; Karachi was under the grip of terrorism. “Political workers, sectarian zealots, and the local mafia were indulging in acts of terrorism as a weapon to expand or maintain their influence in the political arena. Two factions of the Muhadda Quami Movement were out to destroy each other.”<sup>68</sup> Both the ethnic and religious clashes and killings were common in different parts of the country. The Prime Minister viewed that peace and economic development were interlinked, and restlessness in the society, hampered the economic activity, causing hunger, poverty, ignorance, diseases, and backwardness. For these heinous reasons<sup>69</sup> Prime Minister was convinced after consultation with his cabinet members and high officials that for combating terrorism with an effective and efficient method, the enactment of special law was necessary. Therefore Prime Minister suggested the promulgation of special law and special courts as was done in his first tenure for the rapists and other terrorists. The government amended the constitution under the 12<sup>th</sup> amendment; article 212-B was inserted for the establishment of special courts for trial cases in the shortest possible time.<sup>70</sup> Anti Terrorist Act was necessary. Generally, the government was considering fixing the responsibility on existing judicial system and their slow process of disposing the cases. Prime Minister wanted to provide every citizen with rapid and inexpensive justice at his/her doorstep. Sajjad Shah suggested that quick disposal of cases and justice at the doorstep could be provided by improving the existing judicial system and haste in disposing the cases could result in then miscarriage of justice.<sup>71</sup> The prime minister discussed the idea with chief justice Sajjad Shah, who opposed the idea of anti terrorist courts excluded from present judicial system. “Prime Minister Nawaz initially agreed with the chief justice that to create a parallel judiciary

would be an undesirable step. However, he changed his mind later.”<sup>72</sup> It is also important that the Pakistan Law Commission in its meeting opposed the idea of setting up of special courts for curbing terrorism.<sup>73</sup> The meeting of the committee of chief justices were held in which the ways of early disposal of heinous crimes cases under the suppression of terrorists activities act, 1975 with some amendments was considered. The committee opposed in advance, the special law and special courts for speedy trials on the pattern of those that were provided under the 12<sup>th</sup> amendment. The committee suggested that the High Courts would nominate additional session judges through an administrative order to deal with heinous crimes cases only and there was no need for setting up special courts under a parallel judicial system because the people had full confidence in the existing judicial system.<sup>74</sup> The rules of conduct of the judges of superior courts prohibit them from entering into any controversy with other constitutional institutions. A meeting was held in Lahore at the residence of Prime Minister, which included the prime minister, chief justice, chief minister, and Majeed Nizami of the Nawa-I-Waqat, they discussed the proposed Anti Terrorist Act and reached an agreement.<sup>75</sup> It seems to be very strange that the chief justice of Pakistan was discussing about the enactment of laws with the prime minister and both were concluding the agreement in the presence of Mian Muhammad Sharif (father of Prime minister). Chief Justice Sajjad Shah mentioned the compromise and chief justice Lahore High Court made a statement for the newspapers on behalf of the chief justice of Pakistan that the government had been told not to set-up special courts, but to rely on the existing judicial system, as the forum of parallel judicial system had always been used for victimization of political opponents.<sup>76</sup> Here it is pertinent to quote ex- Prime Minister Z.A.Bhutto, who has said, “ Each organ must remain in its sphere of influence, in its own orbit. It cannot transgress into the orbit of others. The judiciary cannot transgress into the executive function, into the executive organ.”<sup>77</sup> It is very difficult to understand the discussion of chief justice of Supreme Court with prime minister and others about the proposed law and arrive at any kind of settlement.

The parliament passed the Anti Terrorist Act on the 13<sup>th</sup> August 1997 and after the President’s consent it became law. The Anti-Terrorist law was a gift from the government to the people of Pakistan on the eve of golden jubilee celebrations. The National Assembly looked like a fish market during the entire proceedings in spite of the presence

of the leader of the house, and repeated calls for order made by the speaker of the house.<sup>78</sup> Members of Muhatada Quami Movment remained absent and the PPP staged a walk out after protest that the bill is against fundamental rights. The law provided special courts for trial of terrorist activities with appeal to an appellate tribunal other than high court and forum of Supreme Court as a final; court of appeal was excluded. Aitzaz Ahsan, leader of the opposition in the senate, declared that this black law might be used for political victimization, add to the miseries of innocent people and a deathblow to the existing judicial system.<sup>79</sup> The act authorize the armed forces and civil armed forces (Police) to open fire against a person likely to commit a terrorist act, confession admissible before the police officer, entering in a house without a search warrant. General Jehangir Karamat supported the new law and said that new law was the first step in the right direction and it might bring peace and stability.<sup>80</sup> Qazi Hussain Ahmad said that this kind of black law had no precedent even in the colonial era of British rule.<sup>81</sup> The most important and controversial provision was that the appointments of the judges of special courts were to be appointed by the federal government and did not enjoy the security of tenure like the ordinary judicial system.<sup>82</sup> Supreme Court opposed the attempt of government to establish a parallel system of courts or tribunals, which would not be subject to judicial review, or administrative control of the superior courts.

The Anti Terrorist Act 1997 was challenged before the Lahore High Court as violative of fundamental rights and had given law-enforcing agencies a licence to kill. A full bench of the Lahore High Court upheld the law as valid by a majority of four to one.<sup>83</sup> The judgment of Lahore High Court was challenged before the Supreme Court in a constitutional petition filed by Mehram Ali. During the hearing, the attorney general mentioned the acts passed in Britain to suppress the Irish Republic Army activities and in India, the enactment of TADA. It is important that Attorney General agreed that the government was ready to amend the provisions of the act inconsistent with the fundamental rights of the constitution in conformity with the recommendations made by the Supreme Court.<sup>84</sup> The Supreme Court in its judgment declared volatized the twelve provisions of the act as invalid and brought special courts at par with ordinary courts working within the existing judicial system.<sup>85</sup> The bench unanimously held that the powers of law enforcing agencies (power of the police to enter houses and search without

warrants, trial in absentia, confessions before police officers) needed to be suitably amended.<sup>86</sup> The bench also directed the government to make suitable amendments in the Anti Terrorist Act to vest the appellate power in a High Court instead of an appellate tribunal. That the law would be administered within the normal judicial system and Supreme Court would be the final court of appeal. . The Anti Terrorist Act provisions which were held to be invalid in their present form were sections 5 (2) (i), 10,14,19, (10)(b), 24,25,26,27,28,35, and 37.<sup>87</sup>

According to legal experts, after this decision of the apex court, those convicted under the Anti Terrorist Act will also be able to approach the Supreme Court after a High Court verdict. The government amended the law in terms of the Supreme Court's judgment.

"This was great morale defeat for the government whose incompetence and lack of sense and direction had been exposed."<sup>88</sup> In its judgment, the Supreme Court took a pragmatic view of the prevailing situation and directed the government to amend the Anti-terrorist Act in the light of its observation.<sup>89</sup>"This (Anti- terrorist act) brought the judiciary and the executive into a collision course."<sup>90</sup> Prime Minister Nawaz Sharif and his government were committed to establish a parallel court structure of Anti- terrorist courts for accommodating the members of Pakistan Muslim League (Nawaz group) and their relatives as special courts judges.<sup>91</sup> What a misfortune for the founder of the Anti-Terrorist Act that he had to appear as accused in the special court on the charges of attempt to murder, treason, hijacking, and kidnapping which were set up by him, provided that the opposition of chief justice Sajjad Shah, political parties and parliamentarians. Nawaz Sharif's son demanded that the case against his father should be tried in a civil court and not in a special court under special law.<sup>92</sup> Bad deeds bring bad results.

### **13<sup>th</sup> Amendment (repeal of 8<sup>th</sup> amendment)**

The 13<sup>th</sup> amendment was introduced during the second tenure of Nawaz Sharif in which a heavy mandate was given to his party Muslim League. Nawaz Sharif like his other predecessors was also the victim of the 8<sup>th</sup> amendment. Therefore after the 1997 election he had an excellent opportunity to do away with the 8<sup>th</sup> amendment and establish his position as a powerful Prime Minister (with heavy mandate at his back). He therefore made his intention very clear to the architects of the 8<sup>th</sup> amendment that he would do

away with this unwanted power bestowed to the president by molesting the constitution of 1973. Here, it is very important to mention that before the general election of 1997, President Leghari emerged as a very powerful person because he got away with the dismissal of Benazir government and the new government appeared to be in good term with him. He used his position and situations as required for strengthening his key position and interests in the newly elected government.<sup>93</sup> A silent dispute soon arose between the president and Prime Minister when President Leghari appointed Shahdud Hamid, an old friend and civil service colleague as Governor of Punjab to preserve his upper hand against the wishes of Prime Minister Nawaz Sharif and his colleagues. The conflict between Nawaz Sharif and the president Farooq Ahmad Leghari was inevitable because these two personalities came from very different backgrounds, Farooq Ahmad Leghari was a feudal to the core-with solid bureaucratic training, where as Nawaz Sharif had an urbane industrial background. Therefore, each side began to prepare a programme for a show down in which without any doubt Nawaz Sharif had an upper hand. Pakistan Muslim League (Nawaz group) had been very anxious about the repealing of 8<sup>th</sup> amendment since the dissolution of their government in 1993. They moved the thirteenth amendment act of 1997 and passed it within few hours by relaxing the usual rules regarding constitutional amendment particularly those concerning advance consideration and repeated readings on 1st April 1997.<sup>94</sup> The amendment was passed unanimously because both the major parties had suffered under this amendment at the hands of the president on different occasions. The small parties were also in support of government on this democratic issue.

Nawaz Sharif cabinet decided very secretly to amend the 8<sup>th</sup> amendment and got the support of opposition, which was natural because the PPP had been prey to this power. "If it were not for the fact that the amendment had been passed in the late hours of the night, the president, the armed forces or the judiciary might have intervened and stopped it."<sup>95</sup> This amendment had great significance for the political set-up in the country because it tilted the balance of power in favor of the prime minister as required by the parliamentary system.

The 8<sup>th</sup> amendment was fatal for the elected government and National Assembly and it was the victim of the 8<sup>th</sup> amendment four times at the hands of the powerful presidents.



The thirteenth amendment finally did away with the 8<sup>th</sup> amendment and ushered in a dawn of new era in the constitutional history of Pakistan. The governments elected in the general elections of 1985, 1998, 1990 and 1993 could not complete their five year terms due to the presence of 8<sup>th</sup> amendment in the constitution. Seeing the past destructions caused by this amendment to the elected bodies of people under the powers of this amendment, all the political parties and legal circles were right on reaching the consensus that the power of 8<sup>th</sup> amendment did enormous harm to the democratic system of government and it should be altered for the safe future of democracy. It is a fact, the Nawaz Sharif government gained complete support of opposition on this amendment process.<sup>96</sup> Benazir was happy and supported the government's move. She had been calling the president 'Farooqul Haq Leghari' because he had dismissed her government without any justification, thus acting in a manner similar to Ziaul-Haq. The leader of the opposition Benazir Bhutto, an unfailing critic of Nawaz Sharif, supported the amendment in the both houses of parliament. She also congratulated the prime minister on the happiest occasion of deleting the Martial Law government amendment.<sup>97</sup> Once again the president became tutorial head of state having no powers of dissolving the National Assembly and dismissal of governments. The president's discretionary power under article 58 (2) (b) and the Governor's power under article 112 (2)(b) were done away with other powers vested under the 8<sup>th</sup> amendment. President Farooq Leghari assented the 13<sup>th</sup> constitutional amendment bill, clipping his own discretionary powers, which was not an easy task.<sup>98</sup> Under the thirteenth amendment, the appointments of provincial governors, chief of the armed forces, Chief Justices and judge of Supreme Court and High Courts were made binding on the president with the advice of the Prime Minister<sup>99</sup> whereas under the 8<sup>th</sup> amendment such appointments were made by the president after consultation but not on advise of the Prime Minister.[amendment bill] Only the appointment of chief election commissioner by the president was not touched in this amendment intentionally or otherwise.

#### **14<sup>TH</sup> Amendment (Law of Defection)**

The problem of floor crossing, horse-trading and defection had been the main source of political instability in the past years. The problem of defection and political horse- trading in the politics of Pakistan destroyed democratic system since the death of Prime Minister

Liaqat Ali Khan. The members of parliament preferred their personal interests as compared to national interests. The period of six years from 1952 to 1958 was the period of defection and horse-trading. All the political parties were frustrated and disappointed with the defection of their members and at the same time found themselves helpless to do any thing about the culture of defection. Nawaz Sharif's government took a decision to put an end to the culture of defection by introducing a bill in the national assembly. Nawaz Sharif's party had the required two third majority to put an end to the culture of defection which remains popular even today in the political; culture of Pakistan.

Nawaz Sharif government introduced the fourteenth amendment bill in the parliament and both the houses of parliament passed the constitution amendment bill on 1st July 1997.<sup>100</sup> The president assented the bill on 3<sup>rd</sup> July 1997; thus, it completed the process of constitutional amendment.<sup>101</sup> The amendment added the article 63-A to the constitution of 1973. Parliament passed the constitutional amendment bill in too much haste, without any debate, and with no dissenting vote.<sup>102</sup> The amendment was passed in a matter of minutes at midnight by relaxing the rules of procedure. Opposition protested on the introduction of amendment bill and its draft. They were unaware about the bill but at last it was passed unanimously.<sup>103</sup> The amendment was necessary to put an end to the horse- trading culture opened during the Benazir Bhutto's tenure in 1989.<sup>104</sup> (Muslim26october1989) In 1993, Punjab government was over thrown by Manzoor Wattoo's horse-trading and support of president Ghulam Ishaq Khan.<sup>105</sup> Sherpao over threw North Western Frontier Province government in 1994 with the help of federal government, blatant bribery and horse-trading.<sup>106</sup> According to the amendment, if a member of parliament or provincial assembly defects, then the head of the political party to which he belongs or on whose ticket he was elected himself or through another person authorized on his behalf may give notice to him to show cause within seven days why disciplinary action should not be taken against him. After the show cause notice, the disciplinary committee of the party would decide whether he violated the party constitution. If disciplinary committee decides against such a member, he can appeal to the head of the party who's decision would be final?<sup>107</sup> (Article 63-A of the fourteenth amendment) The action of the party head cannot be challenged before any court, including the Supreme Court or a high court.<sup>108</sup> In case a member votes contrary to any

party direction or abstains from voting against party policy, the head of the party concerned, after examining his explanation, would determine whether or not such member has defected. On receiving the decision of the party head, the presiding officer of the house would send it to the chief election commissioner within two days, who would decide the matter within seven days of the receipt of the case.<sup>109</sup> It is right that the defections in political parties had created many problems for the establishment of democracy. The 14<sup>th</sup> amendment resolved the defection problem while making the party heads of political parties in parliament and in provincial assemblies virtual dictators. The amendment did effectively not only put to end the culture of horse-trading but also at the same time subverted the culture of dissent against the party head, acting as a virtual dictator. The amendment was unanimously passed while the opposition protested on the initial stage of introduction of the amendment. It is very strange and against the usual traditions of democracy that the action of the party leader cannot be challenged before any court, including the supreme court and a high court because all party heads wanted to keep dissenting members under control.” The change fully reflected the aspirations of the people who felt ashamed that their chosen representatives carried invisible price tags on their heads.”<sup>110</sup> The members of parliament had been puppet or mere rubber stamps in the hands of party heads. It was against the basic rights guaranteed by the constitution. Both main party leaders, Nawaz Sharif and Benazir Bhutto tried to kill dissension within their members by adopting undemocratic manner but by legal means.

On 24<sup>th</sup> October 1997, Dr Abdul Basit on behalf of the Vokla Mahaz (Lawyers Association) filed a petition, invoking the Supreme Court’s original jurisdiction under article 184(3) of the constitution.<sup>111</sup> The petition was heard by a bench of three judges headed by chief justice. The petitioner prayed that the 14<sup>th</sup> amendment be suspended. Unfortunately all the MNA’s from the respondent group had been reduced to rubber stamps, entirely in the control of one person, who was not a parliamentary leader but a political boss. “It violated fundamental rights outlined in article 19, which permits freedom of speech and recognized the right of the members of parliament to speak freely and in conformity with their conscience, on the floor of the assembly.”<sup>112</sup> On 27<sup>th</sup> October 1997, the federal government requested the bench on the hearing of 14<sup>th</sup> amendment case for an adjournment and grant of sufficient time so that the provinces

could also be made parties to the case. The bench rejected the request that the hearing of the case was very important in the given circumstances, and the attorney general was asked to take the proposed government stand.<sup>113</sup>

On 29<sup>th</sup> October 1997, Supreme Court bench hearing the petition of 14<sup>th</sup> amendment passed an interim order because all the counsel wanted sufficient time to argue. "In such circumstances we deem it fit and proper to grant interim relief in the terms that no adverse action shall be allowed to be taken against any member of the parliament in pursuance of newly added article 63-A which is impugned in these petitions. His order shall remain operative till the final disposal of the petitions."<sup>114</sup> (Interim order of the court on 29<sup>th</sup> october 1997) On the suspension of 14<sup>th</sup> amendment, prime minister and the members of his cabinet, members from the Pakistan Muslim League (Nawaz group) and its allied parties reacted in strong words against the decision. Prime minister called the decision against 14th amendment as illegal, and declared that parliament would take notice of this descion as the custodian of the constitution. "The Apex court's descion was alleged to have revived and legalized the practice of horse- trading and Lotatism (change of loyalty)".<sup>115</sup> A meeting of Pakistan Muslim League (Nawaz group) was held where the situation after Supreme Court decision was discussed, after the meeting prime minister addressed the press conference in his chamber. He called the order of Supreme Court 'illegal' and 'unconstitutional'. He said that nobody could call into question an amendment passed by the parliament. He said that his party scrapped the 8<sup>th</sup> amendment and he is playing the constitutional; role for strengthening democracy.<sup>116</sup> Prime Minister mentioned the meeting of 'big four' (president, prime minister, chief justice, chief of army staff) at mid night where the issues had been resolved but chief justice violated the spirit of the decision taken in the meeting of the big four, hence we are free to play other options in this regard.<sup>117</sup> In the evening session of National Assembly on 29th October, some members of the treasury bench made strong remarks in their speeches against the chief justice of Pakistan and said that the order was violative of supremacy and sovereignty of parliament. There was no such example in the democratic country of the world where the chief justice of Supreme Court and prime minister of the country confronted each other. The parliamentarians asked the prime minister to take a serious notice against the chief justice because the authority of parliament was in danger and the

chief justice had gone too far in his opposition.<sup>118</sup> Their reaction was natural in light of the confrontation between the prime minister and chief justice. "The supremacy of the parliament versus the independence of judiciary was eyeball to eyeball in confrontation."<sup>119</sup>

Chaudhry Mohammad Ikram, an advocate, filed a petition in the supreme court on 30<sup>th</sup> October 1997 under article 204, alleging that contempt had been committed by prime minister, law minister, five MNAs and the editors of three dailies (Muslim, Jang, Nawa-I-Waqat).<sup>120</sup> The contempt of court petition was filed in the Supreme Court regarding the strong and ridiculing remarks passed by the above persons against the Supreme Court bench and chief justice of Pakistan. The petitioner prayed that the proceeding of contempt be initiated against the above persons. Meanwhile, on 31<sup>st</sup> October 1997, Syed Iqbal Hyder challenged the thirteenth amendment as void through constitutional petition before the Supreme Court under the article 184(3) of the constitution.<sup>121</sup> The petition was promptly entertained and fixed for regular hearing whereas the government was expecting the pendency of this case for indefinite period. Pakistan Muslim League (Nawaz group) parliamentary party took a serious note on the proceeding of this case by the Supreme Court. The government held a number of discussions in Islamabad with provincial Chief Minister's and planned strategy for future course of action. The situation was very tense. The executive judiciary rift created the position of war between two pillars of government, which was very dangerous for the state.

On 12<sup>th</sup> November 1997, on the hearing of contempt case the court passed orders for the issuance of a notice simpliciter and informed contemnors about the process of the court.<sup>122</sup> S.M.Zafar represented the prime minister and informed the court that the prime minister had expressed his regard for the judiciary, particularly for the Supreme Court and requested for one month's time to file a proper reply but the petitioners requested that it be a short one. He wanted to gain time for government to settle the controversy with chief justice or arranging substitute means. Shahid orakzai, editor of the daily "The Muslim" told the court that the attorney general C.M.Farooq, was thumping his desk in the National Assembly when the respondents were ridiculing the apex court. So attorney general should not be a prosecutor in this case.<sup>123</sup> The respondents expressed apology at this first opportunity, and further time was sought to file a written statement. If the

respondents prayed for unconditioned apology on the ridiculing statement against judiciary in written form then the notice could have been vacated, or withdrawn if the court was satisfied by the sincerity with which the apology had been made.<sup>124</sup> But in spite of unconditional apology it was the discretion of the court to drop the contempt case or continue it. After the issuance of contempt notices, the reconciliation efforts gained momentum from the government side. But the issue could not be resolved due to intransigent attitude of both sides.<sup>125</sup>

During the proceeding of the contempt case, the government continued the parliament sessions to counter any move from the judiciary to weaken the position of the government. In the meetings of (PML (N) parliamentary party, several proposals were made by the members to solve the problem with judiciary.

1- considers the Proposal to clip the powers of the chief justice to constitute the benches of Supreme Court judges.

2- Powers of the chief justice be vested in a committee of senior judges

3- Introduction of a bill in the parliament to provide for appeal in the contempt of court case which was to be heard by the remaining judges of the Supreme Court.

4- Proposal through parliament that the full court of the Supreme Court hear all the cases against the Prime Minister.

5-Amendment to impeach a judge found guilty of contempt of parliament, it would not be challenged in any court including Supreme Court,

6- If any amendment carried out by the parliament had already been suspended by any court, then such amendment would stand restored, when the parliament would pass this amendment.<sup>126</sup>

Contrary to the parliamentary party proposals and government planning, the material for the contempt proceeding of 29<sup>th</sup> October had submitted to the court by the concerned departments as directed by Supreme Court. It included the recording of speeches, written and complete record of the National Assembly proceedings, Pakistan Television transmissions and the speech made by the prime minister on Iqbal day was before the court for the judgment.<sup>127</sup> So every thing was ready for action as every thing is justified in love and war. Finding no way of compromise with chief justice, Nawaz Sharif declared on 14<sup>th</sup> November 1997 that he would appear in the Supreme Court to defend himself but

would not tender an apology. On 17<sup>th</sup> November 1997, the prime minister appeared before the court with full pomp and show (Ministers, Members of Parliament and party men).<sup>128</sup> Prime Minister and his advisors thought that the appearance of Prime Minister would satisfy the judges and that would end the matter. If it were not done then it would be apparent that the move had some deep motive behind it. Then the government would be in a position to adopt steps necessary to curb the chief justice's confrontational attitude. During the proceeding of the contempt case, the parliament, where the government two third majority took measures through the parliament to amend the contempt of court law benefiting the prime minister in the controversy of judiciary and executive. All this was done for saving the prime minister from the consequences of the contempt proceedings.

On 17<sup>th</sup> and 18<sup>th</sup> November, the parliament passed the contempt of court (Amendment) Bill, 1997, by the national assembly and the senate, respectively, providing shelter to prime minister in the Supreme Court contempt case for second appeal.<sup>129</sup> The right of appeal was created because the office of prime minister was at the mercy of the judiciary. Opposition members (Aitzaz Ahsan, Raza Rabbani, Masood Kasur, Iqbal Haider,) in the senate criticised the bill that the government's motive is to help out prime minister facing contempt preceding in the Supreme Court by this amendment.<sup>130</sup> Pakistan Muslim League (Nawaz group) supported the amended law because in UK a judge was not allowed to sit on the bench in which his own contempt was involved. While in Pakistan, the concerned judge himself sits on the bench. It is against the natural justice so the justice and impartiality of the court would be in danger. For this purpose the right of appeal should be available to every aggrieved party or individual. The Parliament amended the contempt of court law 1976 under which a second forum of appeal was provided in the Supreme Court against his decision in contempt case. In this bill section 2 and 4 were inserted<sup>131</sup> in substitution of the original sections in the contempt of court act 1976. If a bench of the Supreme Court exercising its original jurisdiction issued a show cause notice or passed any other interim order in the contempt of court case then an appeal against such notice or order lie before the remaining available Supreme Court judges with in the country. If 50 percent or more of the Supreme Court judges passed such an order then the matter would be put up for reappraisal of the full court on the

application of an aggrieved person. Impugned show cause notice or order passed on the original shall remain suspended automatically until the final disposal of the matter.<sup>132</sup> The amendment bill passed by the parliament was sent to the President for assent on 18<sup>th</sup> November 1997. On the same day, before the President gave his assent to amendment bill of contempt, two petitions were filed challenging the validity of the newly passed contempt of court (Amendment Bill 1997). The petitions were filed in the Supreme Court by the Naveed Malik (President Independent Solidarity Front) and Syed Iqbal Haider (chairman Muslim Welfare Movement).<sup>133</sup>

Iftkhar Hussain Gillani advocate argued that article 191 gave powers to chief justice to make rules regulating the practice and procedure of the court, make the roster, constitute benches, and assign cases to judges for disposal. Item 55 of the federal legislative list also states that the parliament could not curtail the jurisdiction of the Supreme Court and could only legislate for increasing its jurisdiction and not decreasing it.<sup>134</sup> (Article 191 and item 55 of federal list) Under the proposed law, the right of appeal was given to the contemnor before the judges who were not the members of the bench in the contempt proceedings and only filing of an appeal would result in an automatic stay. Through this bill, the administrative powers of the chief justice had been taken away and on the same another forum had been created in the apex court, which gave appellate powers against the decision of the judges in the Supreme Court.<sup>135</sup>

Syed Iqbal Haider prayed that the proposed law (contempt of court Amendment, act 1997) was a violation of the principle of separation of judiciary from the executive and the jurisdiction could not be curtailed.<sup>136</sup> A three-member bench of the Supreme Court heard these petitions on 19<sup>th</sup> November 1997 and court restrained the president from giving his assent to the bill and further clarified that if assent has already been given the operation of the contempt of court (Amendment bill 1997) was suspended until orders.<sup>137</sup> "The court, without waiting for serving of the notice on the respondents, deemed it fit to direct the president not to give assent, and if assent had already been given by then, then the operation of the contempt of court (Amendment) Act 1997, was suspended until further orders."<sup>138</sup> Meanwhile, three-member team of the government met the president for getting the assent quickly. But the president refused to give the assent and told the delegation that he has no option but to comply with the orders of the Supreme Court,



which had asked him not to give his assent. He said that he had always cooperated with the government even on the eve of enacting the 13<sup>th</sup> amendment, which had taken away his powers of dissolving the assemblies.<sup>139</sup>

A day after, on 21<sup>st</sup> November 1997, during the proceedings of 13<sup>th</sup> amendment case, Syed Iqbal Haider argued that Pakistan Muslim League (Nawaz group) and its allied parties had demolished the constitutional stricture in the name of its massive mandate by repealing article 58 (2)(b) where the president status has been reduced to a tutorial head. The office of the president was no more in a position to play an effective role in the governance of the country.<sup>140</sup> He stated, the legislature had thus exposed the country to the threat of Martial Law and if it was imposed the constitution would be abrogated and fundamental rights of citizens suspended.” The people were unaware of what was being done to the constitution and the system of governance by the government.

Shahzad Jahangir argued that article 58(2)(b) had shut the doors of Martial Law because it provided checks and balances between the two powers 8<sup>th</sup> president and the Prime Minister. He defended the article 58(2)(b) on the grounds that it was an effective check on the fanciful and arbitrary use of power of the any Prime Minister.<sup>141</sup> The amendment was passed without proper and detailed hearing and debate by relaxing the concerned rules. After the repeal of Article 58(2)(b) no remedy was available in the constitution if such a situation arose which had now in fact surfaced. The court refused to grant intern relief. Shehzad Jahangir referred to Adolph Hitler president of Germany and said that he too had come to power with massive mandate but he destroyed democracy.<sup>142</sup> “The passage of the thirteenth amendment was almost a constitutional coup yet all it achieved was to do away with the concept of an exterior check on the prime minister and his cabinet”.<sup>143</sup> While this amendment removed the fear of dissolution of assembly under which the members of National Assembly were living. Only first and last dark aspect of the picture was that the safety valve controlling of constitutional breakdown came to an end. Now the constitutional breakdown if occurred could not restrict the military’s direct or indirect intervention, as had happened in July 1977.<sup>144</sup> “Leghari supported this amendment publicly but in private he was deeply disturbed. A President dreaming of a second term in office became a wounded tiger. The stage was set for intrigue.”<sup>145</sup> Chief

justice Sajjad Shah wanted to use this petition as an instrument to blackmail the government especially Prime Minister Nawaz Sharif.

### **Normalization Efforts**

Meanwhile, General Jehangir Karamat chief of the armed forces(COAS) held separate meetings with the president and the prime minister. Benazir appreciated that the chief of army staff had so far maintained a non-partisan stance.<sup>146</sup> General Karamat held consultations with senior commanders on the issue of executive-judiciary dispute and told them about the steps taken to bring about a truce between the warring pillars of state. For this purpose, the Director General Inter Services Intelligence conveyed a message of Chief Of Army Staff to chief justice to adjourn the contempt case against Prime Minister for two weeks, in order to enable the COAS to try and find a solution, in the larger interest of the country.<sup>147</sup> Chief justice promised to honor the initiative taken by the Chief Of Army Staff. "This was done after the plea of S.M.Zafar and in the backdrop of the development that brought about a temporary truce between the three warring pillars of the state after a reluctant but behind the scene intervention of the army."<sup>148</sup> The bench adjourns the case for one week in a good faith. "Hence one week's time was allowed which was subsequently used for manipulation to file cases against the chief justice of Pakistan and to obtain orders from the benches at other registries suspending the notification of chief justice appointment."<sup>149</sup> After the adjournment was granted, the attorney general went to his office and told them for one week's adjournment. He said, "For God's sake do whatever you like within the time, otherwise Shah sahib will not spare you."<sup>150</sup>

### **Quetta Bench Decision**

Prime Minister and his party used the precious one-week time for preserving its position at every cost and they succeeded in it by getting the decision against the appointment of chief justice from the Supreme Court registry benches of Quetta and Peshawar.

Petitions were filed against the chief justice challenging that at the time of appointment chief justice was not the senior most judge as required by the 'judges case'. The appointment of chief justice was challenged before the Quetta registry bench of the Supreme Court.<sup>151</sup> Now the dispute entered its final phase because the adjournment time was ending but the situation was still confused. Prime Minister consulted his legal

advisors and senior Pakistan Muslim League (Nawaz group) lawyers about tackling the situation. They advised that the government have to get rid of the chief justice by fair or foul means. They decided that that an order had to be obtained from the registry bench, fully backed by the government, and whether or not that order was legal it would be implemented.<sup>152</sup> On 25<sup>th</sup> November, government expedites his activities for getting rid of from chief justice through the legal proceedings of Supreme Court registry benches. Three persons, Rafiq Tarrer, Shahbaz Sharif, and Shaher Yar Shiekh reached Quetta in an official aeroplane in the evening while the night landing at Quetta was not allowed but they got the special permission for landing. They met the two judges of Quetta registry and discuss the matter of mutual interest.<sup>153</sup> Malik Asad Ali filed the petition against the appointment of chief justice under the judge's judgment.<sup>154</sup> On 26<sup>th</sup> November 1997, the two judge of Quetta registry bench (justice Irshad hasan khan and justice Khalilur Rehman) passed an interim order suspending the order of notification of appointment of justice Sajjad Shah as chief justice of the supreme court of Pakistan on the ground that he was not the senior most judge of the supreme court at the time of his appointment and ordered to relinquish the powers (judicial and administrative functions) of the chef justice till further orders.<sup>155</sup> Chief justice after obtaining the details from assistant registrar Quetta suspended the order passed by Quetta registry and could not be given effect for the reason that proper procedure has not been followed.<sup>156</sup> The prime minister sent the proposal for appointment of Ajmal Mian as chief justice Supreme Court as per orders of Quetta bench under article 48 but president refused to do so. The proposal of the Prime Minister to the president shows the kind of close nexus between the judges of Quetta bench and the government about the orders, which had to be passed in the proceeding in the court.

### **Peshawar Bench Decision**

On 27<sup>th</sup> Nov 97, the Peshawar registry bench of the Supreme Court heard the petition filed by Akhundzada Bahrawar Saeed.<sup>157</sup> The Peshawar bench agreeing with the Quetta bench finding and further directed that the petition should be heard in Islamabad by fifteen judges excluding the chief justice Sajjad Shah and senior most judge Ajmal Mian. The third judge of the Peshawar registry did not participate in the proceeding.<sup>158</sup> Justice Saeeduzzaman Siddique second senior most judge took over the charge of

administration of the chief justice and passed an order for full court hearing of petition filed against the appointment of Sajjad Shah in the light of judges case. He directed the registrar supreme court to make necessary arrangements for full court session at Islamabad on 1<sup>st</sup> December 1997, accordingly.<sup>159</sup> Sajjad Shah said, "All promises made during talks were an eyewash and were intended to gain time to strike at the proper opportunity."<sup>160</sup> On 27<sup>th</sup> November 1997, during the hearing of 13<sup>th</sup> amendment petition and Quetta bench interim order, the Pakistan Muslim League (Nawaz group) supporters and lawyers sitting in the courtroom raised slogans and protested and took objection to the presence of chief justice in the bench that the Quetta bench suspended him. The slogans were 'shame shame, chor chor, no no, jialay judge jialay judge'.<sup>161</sup> The shouters disrupt the proceeding and the courtroom was in complete disorder. With great difficulty the hearing continued and the bench passed the order suspending Quetta bench orders by 4 to 1, calling the case from Quetta for hearing with the bigger bench.<sup>162</sup>

### **Supreme court storming incident**

On 28 November 1997 the Supreme Court bench headed by the Chief Justice Sajjad Ali Shah took up the contempt case against the Prime Minister Nawaz Sharif. The workers of Pakistan Muslim League (Nawaz group) entered the Supreme Court building by force and started shouting slogans against Supreme Court judges and Chief Justice along with burning the effigy outside. The mob attacked the court and no proceedings took place at all.<sup>163</sup> These workers came from Lahore under the leadership of Pakistan Muslim League (Nawaz group) ministers. (Under a pre- planned move, Pakistan Muslim League (Nawaz group) workers stormed the Supreme Court building, thus preventing the bench from continuing the hearings of contempt case Pakistan Muslim League (Nawaz group) workers from various places in the Punjab were taken to Islamabad in buses under the leadership of their respective MNA's and MPA's. Obviously, Pakistan Muslim League (Nawaz group) ministers and members of parliament and provincial assemblies led these workers at the time of attack.<sup>164</sup> The government sponsored the attack and it was indeed one of the most disgraceful assaults on the courts in the judicial history of Pakistan. No person can imagine of storming the Supreme Court of Pakistan, which is the highest judicial institution of the country. It is the guardian of the constitution and fundamental rights of people. The Pakistan Muslim League (Nawaz group) leadership and workers did

not care the prestige of this honorable institution. When the workers of Pakistan Muslim League (Nawaz group) were attacking the Supreme Court building, the police contingent present there stood aside like spectators.<sup>165</sup> Some time had gone after proceedings continuation; the contempters began rising slogans against judiciary and proceeding of court. There was violent uprising outside the courtroom, which portrayed the scene of fish market. It appeared that a big mob wanted to rush into the courtroom. The security agencies did not play their role to control the mob. In the meantime a few persons did succeeded in doing so and one of them informed the judges that they should rise and go away as a fully charged mob behind him was forcing entry into the court room to take the Chief Justice to custody. The mob was very excited and raised high-pitched slogans as they were in the process of raiding the courtroom. There was a flood of activities outside the court against the proceeding of contempt case against Nawaz Sharif. In such a confused situation, the court adjourns the proceedings and the judges retired to the Chamber of Chief Justice on the help of police.<sup>166</sup> Later on, the registrar came and informed the Chief Justice in a state of shock that he had been manhandled by a big mob in the Supreme Court building and they made a raid on the courtroom where the contempt case was being heard against the respondents, including the parliamentarians.<sup>167</sup> It was reported that after the attack the assailants were asked by the Pakistan Muslim League (Nawaz group) leaders to have a lunch at the Punjab house where they were addressed and of course applauded by the Chief Minister of the Punjab as if they had just won a war.<sup>168</sup> Subsequently a bench of three judges of the Supreme Court held an inquiry into the matter of storming of the Supreme Court on 28 Nov.1997. The bench enquired the duty staff administration and examined witnesses under oath. Some person voluntarily gave the witness to disclose the secret of attack because it was the matter of national prestige.<sup>169</sup> Immediate after the storming of the building the Chief Justice wrote to the president requesting army protection. He alleged that the government's ministers whose faces had been recorded by the close circuit television cameras fitted inside the Supreme Court building led the attack on Supreme Court. In the same letter the Chief Justice also requested the president to send a reference against the five Supreme Court judges at the Quetta and Peshawar registries to the supreme judicial council for misconduct.<sup>170</sup> In response to the letter of Chief Justice, the president wrote a letter to the

Prime Minister asking him to provide army protection to the Chief Justice, as it was the procedure of government prescribed under the law. The Prime Minister ignored the advice of the president, due to personal conflict. Chief Justice finding no response wrote directly to the Chief Of Army Staff for army protection.<sup>171</sup> The Chief Of Army Staff also adopted the rules of business and sent the letter to secretary defense for necessary action. In spite of all this the Supreme Court had been stormed which was not the destruction of a Supreme Court but it was the destruction of nation's morale and state institutions. It was an unfortunate incident, which could not be washed out from the history of nation. In this deteriorating situation the bar associations observed strike on 1<sup>st</sup> December 1997 to protest against the attack on Supreme Court.<sup>172</sup> Life in the courtroom came to a stand still. Meanwhile the office bearers of the Supreme Court bar association and Lahore high court bar association tried to resolve the issue of division among the judges by holding informal meeting of both group of judges over a cup of tea. The disputed matters were discussed from both sides in the presence of bar members and in their absence also but the judges could not reach consensus. Obviously the bar efforts went in vain.<sup>173</sup> It was the last effort to save the remaining prestige and honor of the highest court of the Pakistan which was carried out by the members of bar. Justice Saeedud Zaman Siddique, second senior most judge took the administration of chief justice.<sup>174</sup> Now the two chief justice were working in the supreme court and two courts were held in the supreme court on 1<sup>st</sup> December 1997, in the same building in the different court rooms, one bench was backed by the prime minister and the other was backed by the president which finally lost the game of power politics. Its strange Sajjad Ali Shah later alleged, that the government did not keep the promises made to him.<sup>175</sup> It was an embarrassing moment in our judicial history.

Suddenly, on 2<sup>nd</sup> December 1997, three member bench headed by chief justice Sajjad Ali Shah heard the petition of 13<sup>th</sup> amendment and suspended its operation without hearing the any arguments from the government side which was against the universal principles of justice. Chief justice took a biased action that had long been awaited due to arising great tussle between the chief justice and prime minister.<sup>176</sup> Now the stage was set for the president Farooq Leghari to use this power for the dissolution of National Assembly and dismissal of government as he did against Benazir Bhutto government in 1996. The

chief justice had removed the only lingering hurdle to sack the government of Nawaz Sharif by reviving the article 58(2)(b),<sup>177</sup> a controversial provision which, had been inserted in the constitution on the pressure of chief martial law general Zia. The president could not deliver the final coup de grace to prime minister because the army decided to play according the constitution without entering the political arena.<sup>178</sup> At this critical moment, the supreme judges had been divided into two groups, which tarnished the image of our judiciary. So the prestige of our Supreme Court and nation was at stake. Simultaneously, a ten members bench of Supreme Court met in an adjoining room of chief justice and immediately held the orders issued by the chief justice in abeyance and restrained the president from acting on the ruling. The bench also held that justice Ajmal Mian, the senior judge, should immediately assume the administrative powers of the chief justice.<sup>179</sup> So in this final attack, the ten members bench succeeded and justice Sajjad Shah went on long leave but in all this process the image of superior judiciary had shattered in the eyes of people and on the international level. "His (Farooq Leghari) links with chief justice Sajjad Shah on the 13<sup>th</sup> amendment and his vain attempt to drag the military into the political quagmire against Prime Minister Nawaz Sharif exposed his wheeling-dealing tactics."<sup>180</sup> The controversy came to an end when on 2<sup>nd</sup> December 1997, the chief justice gone for long leave till his retirement and the president resigned from his office.<sup>181</sup> (3<sup>rd</sup> December 1997) After the departure of Sajjad Ali Shah, on 15<sup>th</sup> December 1997, the new Chief Justice Ajmal Mian appointed one of the Judges of the Supreme Court, 'Abdul Rehman Khan to hold an inquiry into the incident for fixing the responsibility.<sup>182</sup> Justice Abdul Rehman Khan enquired the matter and submitted his report to chief justice on 18<sup>th</sup> February 1998, in which he held that those individuals who had forced their entry into the court premises and raised slogans against the judiciary were prima facie guilty of gross contempt of court. According to his recommendation that most of the contemnors individuals had to be identified through different sources, it would be appropriate that a bench of this Supreme Court be constituted for initiating contempt proceedings for the outrageous incident.<sup>183</sup>

Accordingly a bench of three judges of Supreme Court was constituted by the Chief Justice Ajmal Mian to hold contempt proceedings against persons responsible for the incident<sup>184</sup>. The bench issued show cause notices for contempt of court to twenty-six

persons including two members of the National Assembly (MNAs) and three members of the Punjab assembly (MPAs) on 3<sup>rd</sup> July 1998. The court decided to issue show cause notice to 26 persons after observing large numbers of documents, watched the videocassettes containing the coverage of the incident and examined 53 witnesses.<sup>185</sup> Ultimately, the charges for contempt of court were framed against seven persons including two MNAs and three MPAs. The remaining persons were either discharged after issuance of warning or cases against them were postponed indefinitely. Most of them were the government employees responsible for the security of Supreme Court. The court accepted their apologies and warned them that they should be very careful in future about the dignity and decorum of the court. Charges of contempt were framed against only seven persons. The court after examining the witnesses and considering arguments acquitted them that the contempt had not been proved beyond the reasonable doubt.<sup>186</sup> The court held that action of storming the Supreme Court building on that specific day was not natural but it was planned. The purpose of planners of attack was to disturb the court which was conducting contempt proceedings against prime minister Nawaz Sharif at that time. However, all the accused were acquitted despite reaching the conclusion that the action of the mob or crowd amounted to a flagrant contempt of court.<sup>187</sup> The court given reason for the acquittal of accused was that the evidence did not specifically point out any of the respondents to the extent that it could be said that the case against any one of them had been established beyond reasonable doubt.<sup>188</sup> “This judgment was not well received by the public and the members of the Bar. People were surprised that even the seven persons against whom charge had been framed had been let off on technical grounds. Ajmal Mian justified the judgment that judges render good as well as bad judgments. The above judgment may belong to the later category.”<sup>189</sup> The Judgment was contradictory and confused in its reasoning and findings. It deeply disappointed to the people of Pakistan. The decision fixed the question mark on the role and image of judiciary that had been already injured due to Executive-judiciary controversy and division of judges into two opposite groups.

### **Shahid Orakzai’s Revision Appeal**

Shahid Orakzai, a freelance journalist moved an application in the Supreme Court that the bench had not been constituted properly and the acquittal of respondents needed re-



examination. The application and pray was not proper but chief justice entertained it because the case needed re-examination with regard to new law of contempt of court.<sup>190</sup> Chief Justice treated the application as an appeal. Chief Justice constituted five-member bench for the proceeding of contempt case, which continued for long rather pending while the decision was announced in 2000.<sup>191</sup> The court convicted seven persons and sentenced them to undergo simple imprisonment for one month and a fine of Rs=5000/- each.<sup>192</sup> They were found guilty of committing contempt of the Supreme Court. The judgment came after the ouster of Nawaz Sharif so it did not create many impacts because Pakistan Muslim League (Nawaz group) was not in power at that time and the court was free to decide the case. The application of appeal was entertained when the Nawaz Sharif was in power while the Supreme Court can dismiss the application on technical grounds if he wanted. The attack on Supreme Court was worst act that needs no concession for upgrading the prestige and honor of institutions.

The contempt case filed against the Prime Minister Nawaz Sharif was clubbed with other contempt cases pending before the Supreme Court and was heard on 19<sup>th</sup> January 1998 by full bench comprising of seven members headed by Justice Ajmal Mian. The court acquitted the Nawaz Sharif, his ministers, members of national assembly and senators and others just on the grounds of special circumstances of that time. “

The main finding in the contempt case was that the contempt is to be viewed in the light of attending circumstances”<sup>193</sup> The court must have extended some type warning to the contemnors whatever the circumstances were. The same yardstick was applied and surrounding circumstances in each case were considered to appreciate the gravity of the contempt. The court tried to please all contemnors particularly Nawaz Sharif but could not grease the public minds in the country.

After the exit of chief justice Sajjad Shah and president Farooq Leghari, seven-member bench of Supreme Court headed by chief justice Ajmal Mian heard the petition of 13<sup>th</sup> amendment. The new atmosphere was not usual for the petitioner, so they remained absent from the court. Neither the petitioner, nor his counsel came to defend their petition on 16<sup>th</sup> March 1998. Consequently, the petition was dismissed for non-prosecution.<sup>194</sup> At last the right of parliament for amending the constitution was accepted and confirmed by the Supreme Court. A seven-member bench headed by chief justice Ajmal Mian, heard

the petition and declared the 14<sup>th</sup> amendment as valid under the constitution by six to one majority judgment.<sup>195</sup> The chief justice, wrote the decision and four judges concurred with the judgment while two judges, though concurring, wrote different finding about some clauses of the 14<sup>th</sup> amendment. The chief justice held that the freedom of speech in a parliamentary form of government, subject to reasonable restrictions, was Sine quo non and article 63-A could not be construed in a manner which would defeat the basic feature of the parliamentary form of government. The court held that there had been a consistent view from the very beginning in Pakistan that a provision of the constitution cannot be struck down by holding that it was violative of any prominent feature, characteristic, or stricture, and that it has no application to strike down a constitutional amendment. The chief justice, writing for the majority disagreed that the article 63-A would also include the conduct of members of parliament outside the house and article 63-A (ii) of the constitution also does not debar a high court or the Supreme Court from examining any order passed or action taken against a member.<sup>196</sup> It was held that at this critical juncture, it cannot be assumed that article 63-A could be exploited or misused by the leader of a political party. Justice saiduzzaman siddiqui and Justice Irshad Hasan Khan, though concurring with majority judgment, wrote different findings regarding the clauses (A), (B), and (C) of explanation to article 63 and A(1) and declared them of independent each other. They held that the amendment covers the acts of an elected member of a political party both inside and outside the house. They held if an elected member of a political party acts against the declared policy of the party or his code of conduct outside the assembly is as much damaging to the image and working of that party as his conduct inside the assembly.<sup>197</sup> The different acts of a member inside and outside the house were looked upon with suspicion by the people and were likely to lose the confidence of its electorate. A member elected on the ticket of a political party, publicly denounces the declared policy of the party, that member cannot claim the right to represent that party in the assembly on any moral, ethical, or legal grounds. If an elected member of a political party feels that he cannot stand by the policies of the party, he may leave his representative character. Justice Mamoon Kazi dissented from the majority judgment and declared the judgment as violative of the fundamental rights and, therefore, void and unenforceable.<sup>198</sup> After this judgment, the head of a political party has been made

stronger by the stamp of Supreme Court. The political party head can take action against his member and the member can be disqualified if he commits a breach of the party discipline, violates the code of conduct and the party's declared policies, or votes contrary to any direction issued by the parliamentary party to which he belongs or absent from the voting in the house against the party policy or in relation to any bill. All these conditions were applied for the party members in the best sense of strengthening the democratic system.<sup>199</sup> The problem of defection was always remained a source of trouble for the political parties and governments in the past. However, the breach of party discipline or party's code of conduct would be presumed only when a member commits such a violation inside the house, which is necessary for the success of parliamentary system.

### **Military Courts**

It is very strange in this civilized age that the democratic government was willing to establish Military Courts for the control of law and order situation. Law and order situation in the country was gradually deteriorating since the 1988. Both ethnic and religious clashes and killings were common in different parts of the country, especially; the situation in urban cities of Sindh particularly in Karachi was getting out of control. The situation went out of control particularly when Hakim Saeed a highly respected public figure was murdered on 17<sup>th</sup> October 1999, in broad daylight when he was going to his Matib (Clinic).<sup>200</sup> He was a philanthropist, former Governor of Sindh, social worker, and founder of Hamdard Foundation. A great wave of anger and non-security spread over the country. The prime minister visited the bereaved family of the deceased Hakim Saeed in Karachi and expressed his determination to combat and uproot terrorism.<sup>201</sup> Karachi is capital city of Sindh province and it is the only seaport of Pakistan, which carries on export, and import of whole country. The government cannot bore too much disturbance in such a industrial and seaport city so the murder of Hakim Saeed intensified the efforts of government to control the terrorists. The blame of Hakim Saeed's murder was put on Muthada Quami Movement and Nawaz decided to crack down on the Muhatada Quami Movement.<sup>202</sup> It is also observed that sectarian killings all over the country had been very common. So the need had been felt for new laws to control of sectarian terrorism, which had been poisoning the conscious, and morale of the society.

The government decided to control the terrorist activities by the establishment of military courts of trial of civilians. On this behalf Pakistan Armed forces (Acting in aid of Civil power) ordinance, 1998 was promulgated on 20<sup>th</sup> Nov 1998.<sup>203</sup> This ordinance allowed the establishment of military courts for trial of civilians charged with offences mentioned in the schedule to the ordinance. It was very difficult to take step of establishment of military court in a democratic system. But government had to swallow the pill for the betterment of law and order situation. The sectarian killings and Karachi situation was destroying the economic life of country. The ordinance was enacted on the bases of article 245(1) of the constitution, "The Armed Forces shall, under the directions of the federal government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so."<sup>204</sup> A new offence named the "civil commotion" was added as section 5 of the ordinance (xii of 1998) and made punishable extend seven years rigorous imprisonment. Soon the military courts were established and called it temporary arrangement for the betterment of deteriorated law and order situation. The alleged terrorists were put on trial in military courts, while the government was democratic and basic rights were intact. The Muhatada Quami Movment leadership and some of the convicts challenged the ordinance (establishment of military courts) before the Supreme Court under the article 184 (3) of the constitution as violative of the constitution.<sup>205</sup> The Supreme Court accepted the petition and decided that the law for establishment of military courts for civilian offences void and unconstitutional.<sup>206</sup> "By striking down the law for establishment of military courts for civilian offences it did a great service to the nation."<sup>207</sup> The Supreme court declared the ordinance No.-XII of 1998 (Acting in aid of the Civil power) unconstitutional and that the cases in which sentences had already been awarded but not yet executed would stand set aside and the cases should stand transferred to the anti- terrorist courts in terms of the guideline provided in this descion for disposal in accordance with the law However the evidence already recorded in the pending cases should be read as evidence in the cases so transferred provided that it would not beyond any powers of the presiding officer in this regard available under the law.<sup>208</sup> However, the sentences and punishment already awarded and executed would be treated as past and closed transactions. While the solution to menaces of terrorism in Karachi that had already taken toll of thousand of

innocent lives and had adversely affected the economy of the entire country should be found within the framework of the constitution.<sup>209</sup> The court rejected the attorneys general's view that the military courts are justified on the basis of doctrine of necessity, however they did not fit in the hierarchy of courts provided by the constitution<sup>210</sup>. The court laid down the following guidelines for the government for achieving the objective to control the terrorism. The court once again gave guidelines to government for combating the terrorist activities while upholding the constitutional norms and through constructive judicial activism.<sup>211</sup> The Supreme Court did two unusual things, firstly the fixing of seven day for the pronounce judgment by the special court, secondly the nomination of two Supreme Court judges to monitor the implementation of guidelines.<sup>212</sup> Undoubtedly the step taken by the government in this behalf was inherently unconstitutional. Nawaz Sharif publicly expressed his dissatisfaction with the judgment. "The disparaging remarks against the judiciary crossed all limits with the rendering of judgment by the court in the case of Sh. Liaqat Hussain, declaring the establishment of Military Courts as ultra vires of the constitution, which resulted into a slanderous campaign against the judiciary launched by the former Prime Minister registering his helplessness in the face of the judiciary not allowing him the establishment of Military Courts as a mode of speedy justice; where the image of judiciary was tarnished under a well conceived design."<sup>213</sup> His reaction exposed his claims to democratic credentials. Often the government used the judicial decisions for their own interests. They used the name of state and nation but the real objective beyond their government had been personal. The Supreme Court ignored the government's explanation and prime minister's letter explaining the situation for establishing the military courts but the court decided the case strictly according to the provisions of the constitution.<sup>214</sup> Nawaz sharif's dissatisfaction on the judgment exposed his real thinking beyond his attitude. It was misfortune for our county that no body took the right descion for the benefit of the nation. They always pressurized the judiciary with different methods to get descion as they wanted to be. Nawaz Sharif and his government was unhappy on the judgment of military courts, they did not accept it with the core of their heart so a vigorous campaign against the judicial system was launched and continued for months on electronic media. The game of using the judicial decisions and judiciary for the personal interest still continue.

Judiciary is pressurized from its appointments to its retirement. No doubt it is an institution, created by the constitution, and guaranteed by the constitution. But the executive organ of the state, which has all powers to implement the law and decisions of the courts, always ignored duties and independence of judiciary. Later on, Nawaz Sharif publicly accepted the Supreme Court's decision<sup>215</sup> and declared it a blessing especially for him in his own case. After the take over, when Nawaz Sharif was facing the trial, Azizullah sheikh advocate met Nawaz in jail to seek instructions and mentioned to him, "that if the military courts had not been held as unconstitutional by the supreme court he would have been facing trial in one of the military courts and by then his case would have been finalized."<sup>216</sup> Nawaz Sharif candidly admitted that it was his mistake to establish the military courts for the trial of civilians for civil offences.<sup>217</sup> One could learn a lesson from this instance, but people do not learn lessons from history. They repeat the same mistakes over and over and have to face the consequences when they are out of power. The constitutional interpretations of the political /constitutional case during the period 1988 to 1999 by the judiciary were extra burden on the ordinary operations of the institution. All the constitutional interpretations were related to the fundamentals rights given under the 1973 constitution. The roles of judiciary throughout the period under study remained changing and unstable. Particularly in the executive –judiciary conflict the court did not act constitutionally. The chief justice taking a political role tried to confine the legislative powers of the parliament by court's stick. Due to the undue political role taken by the judiciary, it was attacked, divided and ruled by the executive. Such an extra constitutional role of the judiciary shattered its image as an institution – a custodian of constitution of the land and a protector of basic human rights.

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## **CHAPTER: 6**

### **Conclusion**

The role of judiciary in Pakistan's fifty-eight years chequered history is one of stress and strains. It is almost impossible to assess the performance and role of judiciary in Pakistan as an independent institution in isolation from its political milieu. Pakistan's political history is replete with long and short repeated military interventions and constitutional deviations. How seriously these acts of omission and commission has affected the image of superior judiciary cannot be subjected to quantitative assessment. In our thesis we have made an attempt to demonstrate that since the first military intervention in 1958 our judiciary not only lost its independence, so vital for smooth running of an institution, but also remained under stress because of repeated interference by the executive, both civilian and military. During the period, under investigation (1988-1999) executive interference became a norm. Justice's Muneer's 'Law of Necessity', became an effective legal tool in the hands of both dictators and democrats to de-spirit the constitution of the country. Ayub abrogated the 1956 constitution, produced after lot of wrangling among the political elites of East and West Pakistan. The judiciary remained silent and allowed in a way the abrogation of constitution by a military dictator. After the burial of the first constitution, Ayub Khan customized 1962 constitution, which was readily accepted by the judiciary, and bureaucracy in, what they called, the greater national interest. The 1969 political upheaval led to the fall of Ayub's government and brought in another military dictator to power who presided truncation of Jinnah's Pakistan. The break up of Pakistan in 1971 brought Z.A.Bhutto to power. Bhutto, a highly ambitious politician with impressive sense of history, was the first civilian ruler in Pakistan who genuinely enjoyed the support of the masses. During his rule it looked for a while that the crisis of political legitimacy has been resolved for the first time in the political history of Pakistan. The 1973 constitution was a landmark in our constitutional history and it did provide constitutional safeguards for judiciary. How did Bhutto and his government dealt with the judiciary? On this issue we need to focus our attention and

examine how the judiciary was treated under democratic rule .Was the judiciary left alone to perform its duties free of any executive interference .Our finding clearly demonstrate that unfortunately such was not the case. Those politicians who championed the cause of democracy in Pakistan found it extremely difficult to run the country on democratic lines. Hierarchically structured bureaucracy in collaboration with military and feudal politicians played a pivotal role in subverting the growth of democratic political culture in Pakistan. Z.A.Bhutto, a politician par-excellence was the last hope. He too faltered, and did not allow the judiciary to function freely with full constitutional protections. As a result the opposition parties in Pakistan united against Bhutto's government to fight an election, which Bhutto announced ahead of time. The election result was not accepted by the opposition and the plea taken by the opposition was that the election was heavily rigged. The political crises created by the opposition provided the men in uniform an excellent opportunity to intervene and which they did in July 1977. Martial Law was imposed in the country by Zia ul Haq who then ruled Pakistan for eleven years. Zia was the ruler who defaced the unanimously accepted constitution and chained the judiciary through constitutional means/amendments. However in 1985,Zia decided to share power with civilian government headed by Muhammad Khan Junejo, but unfortunately it could not go for a long and in 1988 Junejo's government was sacked by Zia. The plane crash ended the Zia's dictatorial rule and a civilian government was formed by the Benazir in the end of 1988.

The role of judiciary in Pakistan during the years (1988-1999) remained under tremendous stress and strains since the year 1988 onwards. The role of judiciary has been subjected to close scrutiny by its critiques. The judiciary could not maintain and preserve its image established in early years due to the pressures exerted on the institutional structure from time to time by the executive through constitutional means.

After the independence, Pakistan established a healthy judicial system as inherited with a reputation for integrity and competence. The judiciary maintained the tradition of isolation from the executive authorities in early years and was fully independent in delivering judgments. The interim constitution provided

constitutional safeguards to judiciary for its independence and the same were also provided in all the constitutions. Despite constitutional guarantees it faced different types of pressures such as, in process of appointments, amendments in the basic documents (constitutions), introduction of callous amendment in the constitutions through Provisional Constitutional Orders and eventually their legalization, and establishing parallel hierarchy in judicial system such as Federal Shariat Court.

After a careful study of the role of judiciary in Pakistan, it is important to point out that it is extremely difficult to assess the performance of Pakistan's judiciary on its own and as an independent institution which is both neutral and powerful enough to withstand any pressure from outside, in the exercise of its duties as the custodian of justice and constitution. History of Pakistan's superior judiciary unfortunately is no different from the history of Pakistan itself. Most of the Pakistan's institutions, especially the judiciary and our political institutions remained under constant tests and trials and stresses and strains. There was lack of a balance between the authorities of the state and integrity of the institutions.

Our case study of the period 1988- 1999 clearly demonstrated how our judiciary for various reasons remained under stress to resolve political battles in court. The story of under trial started in 1958 when the first military intervention took place in Pakistan. Since the time of Ayub Khan the judiciary of Pakistan remained under trial. All have been documented in our various chapters in details. For the smooth running of any socio-political system there is a need to strike a balance between the various institutions of the state. This balancing act is carried out through the constitution of a state, which is considered by all living within that polity as its guiding document. Judiciary tried to maintain this balance as custodian of the constitution and protector of the fundamental rights but it could not perform it up to mark. On the other hand various kinds of pressures exerted by the democratic and undemocratic rulers proved unbearable and hence caused irreparable loses to the form and fame of the judiciary. It is a truism that there have been a variety of pressures exerted on the judiciary at each and every step from 1958. Following are some of the glimpses of the forms of pressure faced by the judiciary.

Transparency in the appointment of judges is always the prime requisite for an independent working of the judiciary. This front pillar was shackled by various democratic and undemocratic regimes by applying the negative forces of nepotism, favoritism and obliging efforts. Such negative blows dented the integrity, eligibility, and competency of the judiciary. Ayub Khan was the first ruler to put our judiciary under stress, which has been discussed in chapter two and three. It is really unfortunate that the history of Pakistan specially political and constitutional set up of the country has many undesired black spots on its bright and beautiful face. Democracy has suffered unimaginably at the hands of undemocratic persons and regimes. Constitutions and judiciary received defacing strikes from dictators since the abrogation of 1<sup>st</sup> constitution in 1958. As far as the implementation of Provisional Constitutional Order is concerned, there has been a permanent cat and mouse play between the fair application of Provisional Constitutional Order and the personal liking and disliking of individual undemocratic minds. General Zia did this with the whole structure of constitutional judiciary. The judiciary faced such a scar that reduced its structure, solidarity and image to ashes. It scraped Bhutto's unique document, the 1973 constitution. This unprecedented deformation still goes on in one way or the other. The establishment of Federal Shariat Court in the presence of formal judiciary was not only a surprising rather un-understandable step of General Zia's own definition, composition and implementation of parallel hierarchy. No explanation has yet been discovered as to what made General Zia decide that the service of judges will be the sole discretion of the president contrary to the constitutional guarantees enjoyed by the formal judiciary. All the governments have made the same use of the Federal Shariat Court as laid by General Zia that is a tool for pressuring the judiciary for ulterior motives. Simply because the judges appointed by the president are the puppets playing in the hands of the maker. The iv, v, vi, vii and the viii amendments had no other aim or utility except to curtail the powers and to pressurize the judiciary and to control the affairs of judiciary for mysterious motives under the cover of constitution. A brief review of the constitutional history of Pakistan enables us to say that the judiciary and the constitution were only a plaything in the hands of the democratic and undemocratic

individuals. The rulers used every possible and easiest way of deforming and violating constitution to make personally aimed and desired amendment in the constitution for pressurizing the judiciary.

The role of judiciary during the years (1988-1999) in deciding the political/constitutional cases has been highly controversial. In certain cases it played due and defined role, while in most of the cases it could not withstand the pressure as well as deviated from the constitutional obligations. In a highly charged political environment the judiciary has to decide the political petitions in the light of constitutional provisions but it was not allowed to act independently. Their decisions affected the political system and judiciary's image as a whole. A fragile executive not only tried but also maintained pressure on judiciary for favorable decisions. The delivery of judgments is the sole job of judiciary was also usurped by various individuals/institutions. It's a pity that the constitutional interpretational judgments made by the judiciary were in no way independent and impartial due to certain reasons. For resolving the political and constitutional upheavals in Pakistan, the judiciary had to decide the constitutional petitions.

General Zia amended the political parties act 1962 from 1977 to 1985. In 1988, Supreme Court on the petition of Benazir Bhutto declared the sections 3(1), 3-a, 3-b, 3-c and 6(1) of political parties act 1962 to be unconstitutional and being inconsistent with the fundamental rights guaranteed in article 17 of the constitution. The judgment was unanimous. The public at large and General Zia himself never expected such a bold, an impartial judgment from the judiciary and this decision proved to be the first step towards the improvement of judiciary's image and stabilizing the democratic system. Perhaps it was the first and finest decision ever made since the rule of Zia (1977). While the case against political parties was under process in the court, president suddenly and surprisingly dissolved the National Assembly and dismissed Junejo's Government. Again in 1988, a case against the dissolution of National Assembly and dismissal of cabinet as an unconstitutional step was filed. The case was decided in favor of the petitioner but his pray for restoration was refused. This was a fair and judicious judgment and it restored the lost glory of the judiciary to a great extent. In new government the tug

of war between the president and the prime minister did not end despite the impartial decisions of the court in favor of the democratic forces. In 1990, president dissolved Benazir Government on the charges of corruption and inefficiency. Supreme Court on the petition of against the dismissal of Benazir government and dissolution of National Assembly by President upheld the order of president as valid unanimously. The democratic circles did not swallow the pill by the judiciary.

Supreme court took suo motto notice of contempt on the remarks made by Mirza Aslam Beg (Retired) Chief Of Army Staff in the 'Meet the Press' claiming that he dictated the terms to the chief justice supreme court not to restore the Junejo government. He was convicted for the same but court acquitted him for he had already been reprimanded in court during the proceeding of the case. The defensive decision went in favor of Mirza Aslam Beg. However, it was a weak decision that reflected the weakness of the superior judiciary. His acquittal left many questions unanswered in the public mind about the judiciary's role and image. During the contempt proceeding, a journalist Shahid Orackzai interrupted the proceeding of Supreme Court. The court took a serious notice of his rude attitude and asked him to apologize. He refused to apologize. Supreme Court sentenced him on contempt conviction and he was sent to jail. It is amazing that a person facing the trial of contempt of court was acquitted while a person appeared in the court as a witness got a contempt punishment due to his rash behavior.

Conflict between the President and the Prime Minister regarding the appointment of new army chief resulted in dismissal of Nawaz government. The order of the dissolution of National Assembly and dismissal of Nawaz government in 1993. was challenged in the Supreme Court (directly) for the first time in the judicial history of Pakistan. But the credit of direct hearing on day-to-day basis goes to chief justice Dr. Nasim Hasan Shah who courageously decided this. After a comprehensive hearing, the Supreme Court restored the National Assembly and Nawaz government. The judgment was accepted and applauded in and outside the country. However it was the first judgment against the president's action that completely demolished the myth of president as god. People at large have always desired to see an independent judiciary, powerful enough to decide cases purely on merit. It was



not the victory of the individual or party but it was the victory of the nation, constitution, and the success of democracy. The verdict also enhanced the prestige to an extent and restored the credibility of judiciary in the mind of public. Once again the most crucial and critical aspect of judiciary's role was tested in the case about the legal position of the 8<sup>th</sup> amendment. Supreme Court held the 8<sup>th</sup> amendment as valid piece of legislation as the parliament used its constitutional power for amending the constitution. The judgment was accurate because the political questions should be solved politically. The decision came after seven years pendency, which affected judiciary's image and dented judiciary's role to some extent. The petition was decided purely on the constitutional provisions but it appears, as justice delayed is justice denied.

In 1996, the president-an old worker of PPP once again dissolved the National Assembly and dismissed Benazir's government. The dissolution of the national assembly and dismissal of Benazir government was challenged as unconstitutional. Supreme Court upheld the president's order of dissolution as valid and constitutional. The small bench and delaying tactics of court created doubts and shattered the image in the minds of public. Such cases indicate how the superior judiciary was involved in the politics of intrigues and subversion of democracy in Pakistan. The judgments of the superior judiciary therefore seriously undermined the growth of a healthy political culture in Pakistan. It will not be an exaggeration to point out that almost all the important organs of the state, including the superior judiciary were no more than puppets. The bureaucracy and the military establishment became a part of political intrigues, which seriously undermined the growth of a healthy political culture based on the notion of judicious accountability. In a similar way the 12<sup>th</sup> amendment (Anti-Terrorist Act) passed by the parliament on 13<sup>th</sup> august 1997, was challenged in the Lahore High Court as violation of fundamental rights. A full bench upheld the Anti-Terrorist Act as valid, which was challenged before the Supreme Court. The Supreme Court in its decision invalidated the eleven provisions of the act and brought special courts at par with ordinary courts. In its decision the Supreme Court did not allow the government to dictate its terms and hence took a solid step in its image building. The 13<sup>th</sup> and 14<sup>th</sup>

amendments (law of defection) were passed by the parliament unanimously by relaxing the rules of business. However, 14<sup>th</sup> amendment initiated some unending crisis. The 'Vokala Mahaz Baray Tahafiza Dastoor'(Lawyer Association) challenged this amendment in the Supreme Court on the grounds of violation of basic rights. Supreme Court in its decision suspended the 14<sup>th</sup> amendment. It was passed and suspended in a state of urgency. The decision of Supreme Court gave rise to a controversy between the government and the Supreme Court especially the chief justice. Regarding the decision, some of the government representatives (Prime Minister and Parliamentarians) used abusive language against the bench and in response to that the office bearer of bar association filed the petition of contempt of court against the prime minister and parliamentarians. The respondents of the contempt case decided to face the petition rather than tendering unconditional apology. On the other hand, government tried to amend the existing law of contempt. Again the court immediately suspended the amendment regarding the law of contempt on the petition of president 'Independent Solidarity Front'. The controversy between the government and chief justice Supreme Court left a bad taste in the judicial history of Pakistan. It is strange that during the crisis, a series of petitions were filed against the prime minister due to the encouraging behavior of the chief justice because he was accepting the petitions for hearing. Open confrontation between the government and the chief justice brought the whole situation to a point of no return. The judiciary executive conflict took a very ugly turn and put the credibility of the state of Pakistan at stake. It gave the chief of the army staff the required space to play the role of a mediator, which brought the conflict between the judiciary and the executive to a stand still. The efforts of army chief bore fruit hence the chief justice adjourned the petitions against government for a week to reach some understanding with the government. However, the whole process seriously tarnished the image of the superior judiciary. For the government of Nawaz Sharif it was a question of survival. Therefore the executive used all its power to subvert all moves made by the chief justice. Now or never was the strategy, adopted by Sharif's government. End justifies the means became the norm, which was adopted by both the sides. Nawaz Sharif and his party used all its

resources to win the conflict against the chief justice. The president too got himself involved in this politics of intrigue. The government of Nawaz Sharif manipulated the Quetta and Peshwar registry benches of Supreme Court to initiate a move obtaining the suspension order of chief justice's appointment. The appointment of Chief Justices was challenged in the Quetta and Peshawar registry benches separately. Both Quetta and Peshawar benches suspended the appointment of Chief Justice and issued the order for the formation of full court bench for further hearing of the same case. The tragedy did not end here as on the date of hearing the contempt case some unknown persons attacked the Supreme Court and made any proceeding of the case impossible. The highest court was trampled under the feet's of attackers and the security staff witnessed the scene of attack as spectator. The incident was planned and occurred due to the deviation of judiciary from its role. The hearing of the cases was again quite surprising as the Supreme court was itself divided into two benches that is one headed by the Chief Justice Sajjad Shah and the other by the second senior most judge Saeeduzzaman Siddique. In this situation of confusion and deprivation, Supreme Court bar association tried to solve the problem of division of judges but their efforts were in vain rather failed because the masters of power game had used both groups. The division of judges shook the role and image of judiciary. When all mediation efforts failed then both the benches tried to negate and suspend any orders/ decision of each other regarding any petition. It appeared from the issuing of interim orders by chief justice bench and suspension of interim orders by the ten-member bench as the auction of orders going to take place among two groups of judges contrary to who was right or wrong but it is definite that the respect and prestige of the supreme court was at stake. It appears that the judges were not sitting in the Courtroom but standing in the market. With the suspension of 13<sup>th</sup> amendment, the president had to face unavoidable crises that ultimately forced him to resign. With the oath of acting president (Chairman Senate) the suspension orders of current Chief Justice were notified and a new Chief Justice was appointed. Both, the chief justice Sajjad Shah and president left the national scene forever with disgrace. An inquiry against the attackers on Supreme Court was made under the supervision of the new Chief Justice. However

26 persons faced the contempt of Supreme Court attack trial. The court acquitted them all because the contempt had not been proved beyond the reasonable doubt. However in review petition about seven persons were sentenced. The all pending cases regarding the contempt of court were decided collectively quitting the alleged persons regarding their action-taking place in special circumstances. The court dismissed the case of the 13th amendment as no one pursued it. After the hearing of the 14<sup>th</sup> amendment case the court gave a divided decision. Some judge agreed that defection law was valid within as well as outside the parliament while some judges deviated with the opinion that law of defection was not applicable outside the parliament.

After the crisis Nawaz spent some time peacefully but soon formulated a policy, which was perceived by the judiciary as an attempt to upset the traditional system of judiciary. Government promulgated an ordinance (Acting in aid of civil power) for trial of civilian in Military Courts in 1998. Government of Nawaz Sharif initiated a move based on article 245(1) of the constitution adding a new offence 'civil commotion' as section 5 of the ordinance. The Mujahar Quami Movement leadership and some convicts challenged the ordinance (Establishment of military courts) before the Supreme Court under the article 184(3 of the constitution). Supreme Court declared the establishment of military courts for civil offences unconstitutional, which was considered to be a bold decision. This decision enhanced the image of the superior judiciary. Nawaz Sharif government came face to face with the most powerful institution that is the armed forces on the 12<sup>th</sup> of October 1999. This was undoubtedly the most historical crisis as well as a conflict between a democratic government and the armed forces. The story ended with General Pervaiz Mushraf's emergence as the Chief executive. A number of petitions were filed in the Supreme Court challenging the validity of military take over. A full court bench later dismissed the petition unanimously, justifying the military take over, granting the power to amend the constitution without the government's pray and allowed three years to General Mushraf for completing his seven-point agenda before holding the elections. The military coup was justified under unavoidable circumstances but without the support of constitutional

provisions. The justification of this decision by the superior judiciary remains shrouded in mystery. However, no precedent of such military coup is to be found in the history of Pakistan.

In a nutshell, through our detailed study and exploration of the role of judiciary since 1988 to 1999, it can be said that during the tests and trials and pressures and power appliance, our judiciary sustained some indelible black spots that are yet to be cleaned to give it an image of an independent, impartial and completely powerful institution and to become a model institution to be followed and envied. The judiciary's role continued to support the executives/presidents except in some cases that can be counted on finger's tips. Judiciary tried to give practicable decisions while we only need to implement the provisions of the constitution strictly so that none could dare to break the provisions of the constitution and democratic process. The role of judiciary remained doubtful, weak and ambiguous during the period under study. Unfortunately, it could not adhere to its due and defined role due to different kinds of pressures and hence failed to build a favorable image in the minds of its people. It served the rulers not the nation. It accommodated the actions of rulers rather than restricting them from such unconstitutional actions. It could not succeed in upholding the rule of law in the country. In some cases it dared to play its actual role of acting according to the constitution and put the things on the constitutional course. In most of the cases it could not perform its real job due to shackles of different pressures. It did not stick to the provisions of the constitution but in some of the cases the superior judiciary tried to decide cases according to the circumstances and fell back on the law of state necessity unnecessarily. The image of judiciary is judged from its decisions that are not exemplary. It became the part of an undemocratic culture and failed to show the legal way for the better future of the nation. The overall image of the judiciary in the minds of the peoples of Pakistan is a mixture of confusion and hope. Every citizen of Pakistan has normative believe in the rule of law. People desire an independent powerful judiciary free of executive pressure. Is it a dream that the people of Pakistan want to fulfill? I am convinced, as a researcher that it is not at all a difficult task to create a judiciary free of pressure from its political milieu. The difficult task of establishing

an independent judiciary in Pakistan can be achieved without any difficulty, only if the political forces strive with commitment in this direction. Hence the following are recommendation based on our findings.

### **Recommendations**

Based on our research following recommendations are suggested to improve the image of our judiciary.

First, the mode of appointments in the judiciary needs some suitable changes. The responsibility of appointments should be confirmed on the supreme judicial council. The council will search the best talent in all respects for the purpose and after meaningful scrutiny it will make recommendations for appointments.

Second, the formation/organization of supreme judicial council must be changed to make it a commanding and realistic institution than a dead constitutional institution.

Third, the adhoc and acting judge's appointments and transfers should be restricted strictly and permanently.

Fourth, Federal Shariat Court may be restructured according to the needs of time. Its formation and appointment system should be restructured on positive lines to impede its use as a tool to pressurize and manipulate the judiciary .

Fifth, the full court meeting of judges in High Courts and Supreme Court should be held once in three months so that the solution of problems facing in delivering the justice could be searched out mutually. This gesture will improve the potentialities and qualities of the judges and consequently the delivery of justice.

Sixth, The 'LAW OF STATE NECSSITY' must be wiped away from our books of law and be buried forever. The decisions of the judiciary must be based on complete constitutional and legal notes irrespective of personal likings and disliking.

Seventh, the judiciary is required to facilitate the democratic culture to flourish and discourage any undemocratic attempt effecting the form and fame of judiciary.

Eighth, Any amendments made in the constitution regarding judicial system should be applied with a view to make this institution more powerful and practicable.

Ninth, A complete overhauling of the weaknesses of the existing judicial system is necessary which may help to improve the role and image of judiciary.

# **APPENDIX NO. 1**

## **THE OBJECTIVES RESOLUTION**

“In the name of Allah, the Beneficent, the Merciful”

Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust;

This Constituent Assembly representing the people of Pakistan resolves to frame a Constitution for the sovereign independent State of Pakistan.

Wherein the State shall exercise its powers and authority through the chosen representatives of the people;

Wherein the principle of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed;

Wherein the principle of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed;

Wherein the Muslim shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah;

Wherein adequate provision shall be made for the minorities to profess and practise their religions and develop their cultures;

Wherein the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;

Wherein shall be guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought expression, belief, faith, worship and association, subject to law and public morality;

Wherein adequate provisions shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;

Wherein the independence of the judiciary shall be fully secured;

Wherein the integrity of the territories of the Federation, its independence and all its rights including its sovereign rights on land, sea and air shall be safeguarded;

So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity”.

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## (English Daily)

1	Dawn	Karachi/Lahore
2	The Muslim	Islamabad
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4	The Nation	Lahore
5	The Frontier Post	Peshawar
6	The Pakistan Times	Lahore
7	The Morning News	Karachi
8	Khayan International	(Tehran) Iran
9	The Guardian	London
10	The Pakistan Observer	Dacca
11	The New York Times	New York
12	The Khaleeg Times	United Arab Emirates
13	Harold Tribune	Paris
14	The Bangla Desh Observer	Dhaka
15	The Financial Times	London

## (URDU Daily)

1	Nawa-I-Waqat	Lahore
2	Jang	Karachi/Lahore
3	Imrose	Lahore
4	Masraq	Lahore
5	Khabraan	Lahore
6	Express	Lahore

## JOURNALS

1	Herald	Karachi
2	News line	Karachi
3	Pakistan Horizon	Karachi
4	Third world quarterly	Karachi
5	Sindh quarterly	Karachi
6	View point	Karachi



# **PAKISTAN LEGAL DECISIONS**

## **(SUPREME COURT & HIGH COURTS JUDGMENTS)**

### **PLDs**

Maulvi Tamaziudin Khan Vs Federation of Pakistan	Sindh Chief Court	1955
Federation of Pakistan Vs Maulvi Tamaziudin Khan	Federal Court	1955
The State Vs Dosso	Supreme Court	1958
Usif Patel Vs Federation of Pakistan	Supreme Court	1972
Asma Jilani Vs The Government of the Punjab	Supreme Court	1972
Nusrat Bhutto Vs Chief of Army staff	Supreme Court	1977
Benazir Bhutto Vs Federation of Pakistan	Supreme Court	1988
Federation of Pakistan Vs Haji Saif ullah Khan	Supreme Court	1989
Ahmad Tariq Rahim Vs Federation of Pakistan	Lahore High Court	1990
Ahmad Tariq Rahim Vs Federation of Pakistan	Supreme Court	1992
Muhammad Nawaz Sharif Vs Federation of Pakistan	Supreme Court	1993
Hazoor Baksh Federation of Pakistan	Federa Shariat Court	1981- 1983
Al-Jehad Trust Vs Federation of Pakistan	Supreme Court	1996
Mehmood Khan Achakzai Vs Federation of Pakistan	Supreme Court	1997
Benazir Bhutto Vs Farooq Ahmad Leghari	Supreme Court	1998
Asad Ali Vs Federation of Pakistan	Supreme Court	1998
Wukala Mahaz Barai Tsahafaz Dastoor Vs Federation of Pakistan	Supreme Court	1998
Syed Masroor Ahsan Vs Ardeshir Cowasjee	Supreme Court	1998
Mehram Ali Vs Federation of Pakistan	Supreme Court	1998
Sh. Liaqat Hussain Vs Federation of Pakistan	Supreme Court	1999
Federation of Pakistan Vs Federation of Pakistan	Supreme Court	1981
Federation of Pakistan Vs Federation of Pakistan	Supreme Court	1983
Sh. Liaqat Hussain Vs Federation of Pakistan	Supreme Court	1999
Zafar Ali Shah VsPervez Musharraf,Chief Executive of Pakistan	Supreme Court	2000

# CENTRAL STATUTES GOVERNMENT OF PAKISTAN

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PLD 1983	XXXV
PLD 1985	XXXVII
PLD 1986	XXXVIII
PLD 1988	XXXX
PLD 1989	XLII
PLD 1990	XLIII
PLD 1991	XLIV
PLD 1993	XLV
PLD 1994	XLVI
PLD 1995	XLVII
PLD 1996	XLVIII
PLD 1997	XLIX
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