CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN

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whose rights would not have been trampled upon had the ruling elite faithfully followed the constitutional and democratic path set for the nation by its founder Quaid-i-Azam Mohammad Ali Jinnah

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Preface

This is an abridged version of my book *Constitutional and Political History of Pakistan*, published by Oxford University Press in 2001. While working on this book, care has been taken not to lose its continuity and value as a comprehensive account of the constitutional history and related political developments in Pakistan. Critical analyses of laws, judgements, and political events have been included.

The purpose of this book is to help students of law, political science, history and public administration in their study of the Constitution and constitutional history of Pakistan at college or university level. It also provides useful information for lawyers and the general reader.

The content has been updated to include constitutional and political developments over the last four years of the present government. Important constitutional cases decided during this period have been included and elaborated with critical analysis. The Legal Framework Order 2002 (LFO) and the resulting Seventeenth Constitutional Amendment, have been discussed and analysed.

Hamid Khan September 2004

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PART ONE

Pre-Partition Constitutional and Political History

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INTRODUCTION

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1 The State of Undivided India

INTRODUCTION

The earliest Muslims to travel to India may have sailed from Arabia in the lifetime of Prophet Muhammad (pbuh). For centuries, Arab traders and sailors had been familiar with the ports of western India. Some of them settled there, and it seems that certain rajas of Madras, whose prosperity depended on the maritime trade, encouraged their youthful subjects to become Muslims and learn navigation.1 The descendants of these Arabs and the converts are still to be found on the Malabar coast. However, the Muslims' arrival in the Indian subcontinent in great numbers started with their invasion of Sindh in ad 712 under the leadership of Muhammad bin Qasim. The Muslims followed in waves of conquest until Delhi fell to Muslim forces under Shahabuddin Muhammad Ghori in 1192.

The Delhi Sultanate was founded by Qutubuddin Aibak in 1206 and Muslim power continued to expand until it reigned supreme over the entire subcontinent. Five Turkish/Afghan dynasties ruled Delhi till 1526. The Muslim sultans belonging to these dynasties ruled by decrees *(farmans).* The sultan was the chief executive, sole legislator, and the chief judge of the land. The powers of executive, legislature, and judiciary were concentrated in him. He administered justice to both Muslim and non-Muslim subjects. The Hindus acquired the status of *dhimmies;* persons who, while retaining their own religion, were exempted from military service on payment of a poll tax.2 The Delhi sultans, however, preferred adherence to the principles of Islamic law while administering justice to their subjects. Nevertheless, the unrestrained power of the sultan and his whims and wishes were the law of the land. Each sultan divided his territory into provinces *(subas),* run by provincial governors *(subedars).* Magnificent and luxurious courts, rewards for obedience, suppression of dissent, pious dispositions, and instilling fear and awe in the hearts of the ruled, rather than

seeking the consent of the people, were the chief traits of such rule.3

The Turko-Afghan Muslim dynasties were succeeded by the Mughals. Babur, the first Mughal to rule the Indian subcontinent, came from a small kingdom in Turkistan. He defeated the last of the Turko-Afghan dynasties, the Lodhis, and laid the foundation of the Mughal empire. The period of its first six emperors (1526-1707) is known for the glory and power of the Mughals. These emperors are known for laying the foundation of the modern administration of India and for introducing a system of agricultural revenue administration which still prevails in India and Pakistan.

Akbar (1556-1605), subdued the entire subcontinent except the extreme south, and ruled over Afghanistan as well. He tried to unite Muslims and Hindus by adopting a policy of appeasement towards his Hindu subjects. He accepted in marriage, for himself as well as for his son, women of Hindu Rajput chieftains. He prohibited the levy of taxes on Hindu pilgrims and the collection of *Jizya,* the differential tax (or protection tax), claimed from non-Muslims. Cow slaughter was made illegal. He even founded a new religion, *Din-e-Illahi,* synthesizing Muslim and Hindu faiths. This religion, however, did not survive him.

For transacting the affairs of the state, Mughal emperors appointed heads of various departments: the Imperial Household under the Khan-e-Saman; the Imperial Exchequer under the Diwan; the Military Pay Department under the Mir Bakhshi; the Judiciary under the Chief Qazi; Religious Endowment and Charities under the Sadurs Sudar; and the Mohtasib, who censored public morals. Qazi Courts usually followed the interpretations of divine law by eminent Muslim jurists. The Mughal empire was initially divided into twelve provinces and finally into fifteen during the reign of Aurangzeb. The provinces were further divided into districts and sub-divisions. The Mughal

government freely borrowed and adopted PersioArabic rules of governance and mixed them with elements and institutions of Hindu empires of yore. The Mughals were prone to centralization. Despite their despotic disposition, most emperors never allowed their imperial rule to degenerate into unbearable tyranny for the masses.4

Aurangzeb (1658-1707), was the last of the great Mughals. He tried to rule strictly in accordance with the tenets of Islam. He reintroduced *Jizya* for non-Muslim subjects but it was made clear that the objective was to allow non-Muslims to buy exemption from military service. He did not dismiss non-Muslims from his service because he believed that religion had no concern with the secular business of administration. One of his achievements, for which he is particularly remembered, is a detailed compilation of Muslim Jaws known as *Fatawa-Alamgiri.*

After the death of Aurangzeb, the Mughal empire quickly fell into decay. Although it survived in name until 1857, it slowly disintegrated and became ineffective. In 1739, Delhi was sacked by invaders from Persia led by Nadir Shah. The Marathas became a power to be reckoned with until they were crushed by Ahmed Shah Abdali in the third battle of Panipat in 1761.

The British, French, Portuguese, and the Dutch fought amongst themselves for domination of the subcontinent until finally the *British* got the better of the other colonialists. In the weakened Mughal empire, successor states were created in Bengal, Oudh, Rohilkand, Hyderabad, and Mysore, led by Muslim rulers. Sikhs dominated the Punjab for some time. The British East India Company, after disposing of their European rivals, dealt with the Muslim, Hindu, and Sikh rulers of the states one by one. However, the rulers of Mysore, Hyder Ali and Tipu Sultan, did put up a stiff resistance and kept the British at bay for some time. By the middle of the nineteenth century, the British East India Company completely dominated the Indian subcontinent. The last attempt at throwing off the British yoke failed in 1857 when the Company's forces fought back and suppressed the mutiny of Indian soldiers (known as the War of Independence). The last of the Mughal emperors, Bahadur Shah Zafar, was formally deposed. Simultaneously, the East India Company's rule was

brought to an end and India was made a colony of the British Crown.

The Mughals had ruled by decree with the emperor concentrating all executive, legislative, and judicial powers in himself. The status of the subjects and the justice administered to them depended largely on the disposition of the sovereign and the calibre and integrity of men appointed by him as administrators and judges.

No written constitutions are known to have existed during the Muslim rule of India from 1206 to 1857. Governments were run more or less on the principles of monarchy. The eldest son was expected to succeed his father as sultan or emperor. However, there were no fixed rules of imperial succession. On the death or decline of almost every emperor, there was a fratricidal war until the strongest claimant eradicated all possible threats and proclaimed himself emperor.

Although the emperor or sultan was the repository of all powers of State, day to day administration was carried out by his appointed governors and justice was administered by his appointed judges (Qazis). Judgments were given at different levels in different matters by either the head of the family, village, caste, the court of the guild, the governor of the province, the minister of the king, or even the king himself.5 Litigation was brief and the execution of the judgment was swift.

BRITISH EXPANSIONISM IN INDIA

The desire of the British to trade with India and South East Asia grew out of their need to import spices. On 31 December 1600, Queen Elizabeth I granted a charter, for fifteen years initially, to the Governor and company of Merchants of London trading into the East Indies. The Charter authorized the London Company to trade freely into and from the East Indies.6

This Charter provides, *inter alia,*

that it shall and may be lawful to and for them, or the more Part of them, being so assembled, and that shall then and there be present, in any such Place or Places, whereof the Governor or his Deputy for the time being, to be one, to make, ordain and constitute such, and so many reasonable laws, Constitutions,

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It appears i was formed m; and not for sovereignty ove maritime emergt is somewhat si subordinate legis Besides the le^ and Company, it It was empowen limit and provide Penalties, by Impi and Amercements, and against all Off Constitutions, Ord< them.”

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1683, the Company was er on and to conclude pi Consequent to this, the Coi the right to raise, arm, trai army. In 1686, the Compa

Orders and Ordinances, as to them, or the greater Part of them, being then and there present, shall seem necessary and convenient, for the good Government of the Company, and of all Factors, Masters, Manners and other Officers, employed or to be employed in any of their Voyage and for the better Advancement and Continuance of the said Trade and Traffic.7

It appears from this that since the Company was formed mainly for the purpose of sea-trade, and not for any territorial acquisition or sovereignty over a foreign country, power to make maritime emergency regulations was granted. This is somewhat similar to the power of modern subordinate legislation.8

Besides the legislative function of the Governor and Company, it had immediate judicial function. It was empowered to ’lawfully impose, ordain, limit and provide such Pains, Punishments and Penalties, by Imprisonment of Body, or by Fines and Amercements, or by all or any of them, upon and against all Offenders, contrary to such Laws, Constitutions, Orders and Ordinances, or any of them.”

Emperor Jahangir allowed the Company to trade with India and to manage the Company’s factory in Gujarat without any interference from the central government but subject to the approval of the local Viceroy, Prince Khurram, who did not raise any question regarding this grant. He was in the habit of upholding the Company’s interest in the local area. Gradually, the Company managed to establish factories in different parts of India, particularly in the coastal areas of the country. Throughout the seventeenth century, it was one of the basic aims of the Company to acquire territorial control by establishing factories in important trade and political centres of India.10

This Charter was renewed by King James I in
1609 for perpetuity. However, it could be cancelled at any time by a royal decree, after giving three years’ notice to the Company. Charles II issued a new Charter in 1661 increasing the authority of the Company and making it more effective. In
1683, the Company was empowered to declare war on and to conclude peace with any ruler. Consequent to this, the Company was also granted the right to raise, arm, train, and muster a strong army. In 1686, the Company established its own

royal mint. Around 1698, the British government wanted to raise a loan, and therefore auctioned the monopoly of trade in the East Indies. As the Company could not raise the requisite amount, it was wound up and a new Company was formed similar to the old one.11

The establishment of the New East India Company coincided with the disintegration of the Mughal empire after the death of Aurangzeb in
1707. As mentioned earlier, after struggling with rival colonialists from France and Holland, the Company succeeded in driving them out and establishing its own supremacy over a large part of India. To begin with, the Company established its administrative control over Bombay. After the battle of Plassey and Buxor, it extended its control and administration to Bengal, Bihar, and Orissa. On the fall of Seringapatam in the fourth Mysore war in 1799, the last real resistance to

the expansionism of the Company offered by the Sultans of Mysore also collapsed and the Company continued to extend its hegemony over the subcontinent without much resistance.

LEGISLATIVE CONTROL BY THE BRITISH PARLIAMENT

The expansion of the Company's rule in India made it imperative for the British government to find ways and means to supervise such control. This resulted in legislation being passed by the British Parliament. The Act of 1773 granted the British government powers to regulate the affairs of the Company in India.12 Apart from making extensive provisions for internal management of the Company, it endorsed the appointment of Warren Hastings as the first Governor-General of India along with his four counsellors.13 Provisions were made for the establishment of a Supreme Court of Judicature at Fort Williams and for its effective jurisdiction.14 This Act left much to be desired because it was inherently vague and unclear. It did not make clear the division of powers between the British government and the Company and became a useless piece of legislation in the face of swiftly changing circumstances in India. The Amending Act of 1781 was passed to

remove the defects in the parent Act but all the difficulties were not removed.15

These Acts were followed by what is known as Pitt's India Act of 1784, whereby the supreme authority was placed in the hands of the British government of the day which acted through a Board of Control. It introduced a dual control system under two bodies, the Board of Control and the Court of Directors.16 The Governor-General of India was accountable to both of these bodies which made his position difficult and the administration under him cumbersome. The Act of 1786 made Cornwallis Governor-General of India as well as the Commander-in-Chief of the Indian military forces with the power to override his Council.17 In 1788, the Declaratory Act was passed vesting full powers and supremacy in the Board of Control, thus transferring power to the Crown.18 The Charter Act of 1793 empowered the Governor-General of India and the Governors of the Indian Provinces to override their respective Councils.19 The GovernorGeneral was given direct control over the Presidencies of Calcutta, Madras, and Bombay.20

Further provisions were made to regulate the government of British territories in India and for better administration of India under the Government of India Act, 1800.21 This Act provided for the establishment of a Supreme Court of Judicature at Madras.22 Provisions were also made for jurisdiction of Courts in Bengal, Madras, and Bombay.23 The Charter Act of 1813 expressly proclaimed the sovereignty of Britain over India and the Company was reduced to an administrative organization.24 The Government of India Act 1833, fully declared the authority of the Crown, restricting the trade monopoly of the Company till
30 April 1854, and led to the codification of laws for India.25 The Government of India Act of 1853 further reduced the authority of the Company by reducing the number of directors from twenty-four to eighteen and by introducing six nominees of the British government on the Board of Directors.26 During this period, the Company kept expanding its control over the Indian subcontinent. Around
1856, the Company controlled the entire subcontinent except the Princely states which also accepted the overlordship of the Company. The Princely states that tried to tow an independent line were forcibly brought under control. The last

symbol of Mughal power, Bahadur Shah Zafar, was removed from office in 1857.

The dual control system introduced by Pitt's India Act of 1784 continued up to 1858 when it was abolished and replaced by the Secretary of State for India. The uprising of Indian soldiers in 1857 provided a pretext for the British government to assume direct control over India. The Act of 2 August 1858 ended the regime of the East India Company and with it the dual control system. The Board of Directors of the Company held its last meeting after the said Act and formally handed over to its British sovereign the vast empire it had built in India with skill, cunning, and enterprise. The Company created history by proving that a skilful trading company could take over a vast country, rather a subcontinent, fraught with internal strife, power rivalries, religious animosities, and lack of central authority.

Although colonization of India had been completed by the East India Company by 1858, the British government formally assumed control over the administration of India after a

Proclamation issued by Queen Victoria on first November, 1858.27 Under this Proclamation, civil and military officials in the service of the Company were retained and all treaties and engagements made with the native princes of India by the Company were protected. The Proclamation promised the Indians some fundamental rights. These included: freedom of religion, safeguard against discrimination on the basis of race or creed, or in services; equal and impartial protection of the law; and protection of property rights inherited from ancestors. The Proclamation also extended recognition to the ancient rights, usages, and customs of India.

THE GOVERNMENT or INDIA ACT.
1858

In order to administer India in accordance with the Proclamation, the British Parliament passed the Government of India Act in 1858.28 It was, in effect, a constitutional document for colonial India. Under this Act, the territories under the control and administration of the Company were transferred to and vested in the Crown. The

Secretary of State was empowered previously exercis< of Control (which consisting of fittee the Act. The coum relating to the Govi Kingdom under the State.30 The Secreta opinion of the majo record reasons for d the revenues of Inc control of the Secret. The accounts for eai laid before the Britisl of State could sue or England in the name Council as a body coi sions in force at the tir in force and made ap State and member! indemnified against *m* the performance of *tl* liabilities, costs, and c were to be paid out of I The Government < amended in 1859 and India, Governors and c by the Secretary of Sta empowered to sell and personal estate in India Crown and to execute ani

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Secretary of State, who was to sit in Parliament, was empowered to exercise powers that were previously exercised by the Company or the Board of Control (which was abolished).29 A Council, consisting of fifteen members, was established by the Act. The council was to conduct all business relating to the Government of India in the United Kingdom under the direction of the Secretary of State.30 The Secretary of State could override the opinion of the majority of the Council but had to record reasons for doing so.31 The expenditure of the revenues of India was made subject to the control of the Secretary of State and the Council.32 The accounts for each financial year were to be laid before the British Parliament.33 The Secretary of State could sue or be sued in India as well as in England in the name of the Secretary of State in Council as a body corporate.34 All acts and provisions in force at the time were saved and continued in force and made applicable.35 The Secretary of State and members of the Council were indemnified against any personal liability regarding the performance of their official duties and all liabilities, costs, and damages in respect thereof were to be paid out of the revenues of India.36

The Government of India Act, 1858 was amended in 1859 and the Governor-General of India, Governors and certain officers (authorized by the Secretary of State and the Council) were empowered to sell and dispose of all real and personal estate in India which was vested in the Crown and to execute any contracts in this behalf.37

THE INDIAN COUNCILS ACT, **1861**

The Government of India Act, 1858 was concerned with the business of the Government of India to be transacted in the United Kingdom. It made no provision for the administrative set-up in India. It was therefore necessary to provide for an internal framework for the administration of India and to incorporate the native population in the administration. Decentralization of authority was also deemed necessary.

With these objectives in view, the Indian Councils Act was passed in 1861 to make provisions for the Council of the Governor-General and for the Local Government of the Presidencies

and Provinces of India.38 The Council of the Governor-General was composed of five members, three to be appointed by the Secretary of State with the concurrence of a majority of the members of his Council. The other two were appointed by the Crown, one being a barrister and the other the Commander-in-Chief of the Armed Forces in India.39 In addition to these five ordinary members of the Council, the Governor-General was empowered to nominate six to twelve additional members to his Council for making laws and regulations.40 The Council of the Governor-General was empowered to make, repeal, amend, or alter any laws and regulations for India subject to the assent of the Governor-General or the Crown.41 The Governor-General was also empowered to make Ordinances having the force of law in cases of urgent necessity.42

Provision was also made for the composition of Councils for the Governors of the Presidencies of Madras and Bombay. These Councils could frame laws and regulations for their respective Presidencies subject to the assent of the Governor concerned.43 The Governor-General could constitute new provinces, alter provincial boundaries,44 and appoint Lieutenant-Governors and

their Councils for such provinces.45

CONSTITUTIONAL DEVELOPMENTS BETWEEN **1861 AND 1909**

While the Indian Councils Act, 1861 did provide a framework for legislation and administration within India, it was not an exhaustive piece of constitutional legislation. The gaps in the Act were filled by various laws of constitutional importance. The East India (High Courts of Judicature) Act,
1861, provided for the establishment of High Courts in Calcutta, Bombay, and Madras.46 Judges of the High Courts held their offices at the Crown's pleasure.47 Upon establishment of the High Courts of Calcutta, Madras, and Bombay, the Supreme Courts of Sudder Dewany Adawlut and Foujdary Adawlut at these places were abolished and their jurisdiction stood vested in these High Courts.48 These High Courts exercised all such civil, criminal, admiralty, vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and

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of the two nation theory and believed that Hindus and Muslims could not have an equal share in power. Syed Ahmad opposed the demands of the Indian National Congress for the enlargement of the representative government in India and the recruitment of Indians for government service by open competitive examination. In his view, representative government was inexpedient for a country inhabited by two different nations, Hindus and Muslims. Regarding competitive examinations, he believed that Muslims had not yet acquired sufficient knowledge of the English language and other modern sciences to adequately compete with others.64 An important political development during this period was the formation of the Indian National Congress in 1885, on the initiative of Allan Octavian Hume, a retired British official, and under the presidency of the Viceroy, Lord Dufferin. The Party originally intended to throw up a cadre of native politicians beholden to the British rulers to help the latter improve administration, but, with the passage of time, the Congress grew into the most powerful political organization in India. Although a number of Muslims joined the Congress, many influential Muslim leaders, including Syed Ahmad, advised them against it. Muslim leaders were afraid that in a Congress dominated by Hindus, Muslims would be at a disadvantage.

The partition of Bengal in 1905 embittered relations between Hindus and Muslims. The reason for partition was mainly administrative. In those days Bengal included the present Bihar and Orissa, and it was difficult to administer such a large area and population with one Governor. The agrarian economy of Bengal was dominated by the capitalists of Calcutta, and this was hindering local initiative for progress and industrialization. The partition of Bengal was meant to lead to greater administrative efficiency and to encourage local initiative. The Muslims of Bengal welcomed partition, but the Hindus bitterly opposed it. The latter thought that it would weaken their economic and political position. Violent agitation by Hindu members of the Congress convinced the Muslims that they had to create their own political force and leadership. The British government, under pressure from Hindus, later annulled the partition of Bengal in 1911.65

The fears of Hindu domination within the Congress and the situation arising from the agitation against the partition of Bengal were addressed by some influential Muslim leaders by forming the All-India Muslim League in Dhaka in
1906 with the aim of protecting political and other rights of Indian Muslims. The All-India Muslim League was later recognized as the political body representing Indian Muslims which later spearheaded the Pakistan movement.

Another development during this period was the Muslims’demand for separate electorates at all levels of government, district boards, municipalities, and legislative councils. They drew the attention of the Viceroy to the fact that in the United Provinces, while Muslims constituted 14 per cent of the population, they had not secured a single seat under joint franchise.66 These views were communicated to the Viceroy by a Muslim delegation led by the Aga Khan in 1906. The delegation requested that Muslims be granted separate electorates in future reforms. The Viceroy, Lord Minto, assured them that he was entirely in accord with their case and agreed to extend favourable consideration to their demand for a separate electorate.

THE MiNTO-MoRELY REFORMS,
1909-19J9

By 1909, there was widespread political awakening amongst the Indians. Active political participation of Indians was reflected in the formation and influence of political parties such as the Indian National Congress and the All-India Muslim League. So much so, that the local self-government reforms introduced by Lord Rippon did not meet the political aspirations of the Indian people who wanted greater participation in government, provincial as well as central, at the highest levels. One factor which contributed to movements for greater reform was the triumph of Japan in the Russo-Japanese War of 1904-5. Japan's victory raised the hope in the hearts of the Indians that India, too, could become a great power. There was also a change in public opinion in Britain with the Liberals' accession to power in 1906. They did not subscribe to the archaic notior s of an endless

wardship of a permanently adolescent India.67 Another factor was the growing strength of Indian public opinion. The demand for greater participation in government became more and more pronounced after the Viceroyalty of Lord Curzon (1899-1905), who had an autocratic style of governance and disregarded Indian opinion.

The British government considered it advisable not to ignore the rapidly changing political atmosphere in India. In 1907, Lord Minto, the Viceroy, disclosed in the Legislative Council that the people of India would be given greater opportunity to express their views on administrative methods. In December 1904, Lord Morley, the Secretary of State, introduced his famous Bill in the British Parliament which was passed in 1909 as the Indian Councils Act. This Act is popularly known as the Minto-Morley reforms.

THE INDIAN COUNCILS ACT, **1909**

The Indian Councils Act, 1909 enlarged the size of Legislative Councils of the Governor-General and the Governors of various Provinces,68 which included the nominated as well as elected members. Indians became entitled to nomination or election as members of these Legislative Councils, subject to conditions laid down in the regulations made by the Governor-General with the approval of the Secretary of State.69

The functions of the Legislative Councils were increased and individual members in the Imperial Legislative Council could move resolutions relating to alteration in taxation. Matters of general public interest could also be discussed in the Legislative Councils and members could ask questions and supplementary questions.

In the rules framed under this Act, official majority was given up in the Provincial Legislative Councils, though working majorities were maintained. Official majority was, however, maintained in the Central Legislature. In the provinces, university senators, landlords, district boards, municipalities and Chambers of Commerce were to elect members of the Legislative Councils. Muslims were given separate representation and Muslim members of the legislature were to be

elected by Muslims alone. The demand for a separate electorate was thus accepted.

These reforms did not satisfy the Indians. Although elections to Legislative Councils were introduced, the number of voters was limited due to strict qualifications of property and education imposed on franchise. Further, the system of election was indirect. The people were to elect members of local bodies who were to elect members of electoral colleges who, in turn, were to elect members of the provincial legislatures. The members of the Provincial Legislature were to elect members of the Imperial Legislature. These reforms also made no change in the composition of the executive though the legislatures could criticize its actions. The Act gave great weight to vested interests by giving special representation to landlords, chambers of

commerce and other influentials. There was official majority in the Imperial Council. Non-official majorities in the provincial councils were nullified by the fact that they included nominated members. While parliamentary reforms were introduced, no responsibility was given to the councils. In short, the reforms led to a lot of confusion. The result was widespread criticism of the government70 though some of it was thoughtless and irresponsible.

The inadequacy of the reforms of 1909 and the resultant discontent and disappointment of the people gave rise to revolutionary and terrorist activities. The reversal in 1911 of the 1905 partition of Bengal annoyed the Muslims. They saw it as a concession to the Hindus who had challenged the government. The undoing of the province of East Bengal meant that Muslims would lose their majority and once again be dominated by the more advanced Hindu community.71 It was a clear breach of assurances and commitments made by the British regarding the inviolability of the partition. The years following the cancellation of the partition of Bengal marked a turning point in the history of Indian Muslims. It could be argued that the seeds of Pakistan were sown by this one event.

By 1916, hopes of a speedy and conclusive British victory in the War had disappeared and disillusionment had set in. This realization brought the Muslim League close to the Congress. In the Lucknow-Pact of 1916, the Muslim League and

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the Secretary of State-in-Council was required to pass a law abolishing any High Court.81 Prior sanction of the GovernorGeneral was required to introduce Bills on the following subjects:82

(a) The public debt or public revenues of India.

(b) Religion or religious rites and usages of British subjects in India.

(c) Discipline or maintenance of the land, naval, or air forces.

(d) Relations of the Government of India with foreign states or Indian states.

(e) Any measure repealing or amending any Act of legislature or any Ordinance passed by the Governor-General.

The Governor-General could also prevent consideration of a Bill or a part of it if, in his opinion, it ’affects the safety or tranquility of British India, or any part thereof.83

6. The Governor-General could issue an Ordinance for a period of six months which had the same force and effect as an Act of the Central Legislature. He had the power of veto over the Bills passed by the Central Legislature. He could withhold his assent and return a Bill for reconsideration.84 He could also reserve the Bill for the signification of His Majesty’s pleasure. The Crown could disallow any Bill passed by the Indian legislature or Ordinance issued by the Governor-General.

7. The Central Budget was presented before the Central Legislature in the form of demands for grants. There were certain non-votable items which were not open to discussion unless the Governor-General so allowed. All other items were submitted to vote. In an emergency, the Governor-General was empowered to authorize such expenditure as, in his opinion, was necessary for the safety or tranquility of British India or any part thereof.85

DIARCHY IN THE PROVINCES

A partially responsible government was introduced *the form of a* diarchy, that is,

dual government. The executive of the provinces was divided into two parts, one responsible to the legislature and the other responsible to the British Parliament through the Governor and the Governor-General.86 Departments such as education, local self-government, public health, public works, industries and so on, known as transferred subjects, were allocated to ministers who were elected members of the Provincial Legislature. Departments such as police, administration, finance, land revenue administration, irrigation and canals described as reserved subjects, were headed by nominated officials, generally ICS officers (taken from the executive council of the Governor), who were responsible only to the Governor.87 The transferred

departments were also indirectly controlled by reserved departments, because they depended for revenue on the finance department, a reserved subject. The Governor headed both reserved as well as transferred departments and could easily override the decision of his minister or a member of his executive Council. No principle of Cabinet or collective responsibility was introduced in the working of the provinces.88

This system of diarchy, which operated from
1921 to 1937 in the provinces, had many drawbacks. The division of administration into two parts within the same province was contrary to the principles of efficient administration. The division of subjects into reserved and transferred was confusing and haphazard. Many initiatives and reforms were lost in red-tapism. The ministers, who were representatives of the people, and members of the executive council, who were mostly bureaucrats, did not generally pull together.

Inspite of these drawbacks, diarchy worked in some provinces. There were joint deliberations between the two parts of government in some departments. It proved to be a transitional stage between bureaucracy and responsible government. Considering the general restlessness and discontent in post-war India, the Act was an experimental adventure in Indian constitutional history.89

CENTRAL AND I

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Two separate lists we one containing centr; subjects.90 The cent foreign and political t and customs, posts , copyright, currency a including railways, ai and shipping, civil an major courts, quarant list included local se sanitation and medic public works, water revenue administrati forests, co-operati\ including justice, pc concurrent list but a to fall within the do doubt, the Governo decided whether a p belong to a provinci

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CENTRAL AND PROVINCIAL LEGISLATURES AND THEIR POWERS

Two separate lists were drawn up under the Act, one containing central and the other provincial subjects.90 The central list included defence, foreign and political relations, public debts, tariffs and customs, posts and telegraphs, patents and copyright, currency and coinage, communications including railways, aircraft, waterways, commerce and shipping, civil and criminal law and procedure, major courts, quarantine, and so on. The provincial list included local self-government, public health, sanitation and medical administration, education, public works, water supplies and irrigation, land revenue administration, famine relief, agriculture, forests, co-operative societies, law and order including justice, police and jails. There was no concurrent list but all the residuary subjects were to fall within the domain of the centre. In case of doubt, the Governor-General and not the courts, decided whether a particular subject did or did not belong to a province.

The sources of revenue for the centre were customs, income tax, non-alcoholic excise including salt, opium, railways, posts and telegraphs, currency and coinage, and tributes from the Indian states. The sources of revenue for the provinces were land revenue, irrigation, excise on alcoholic liquors, stamps, registration fees, forests, and minerals. The provinces could also impose taxes on succession, betting, gambling, advertisements, and amusements. The raising of loans by the provinces inside India needed special sanction of the Governor-General, while for a loan sought outside India the prior permission of the Secretary of State was needed. The provinces were given a certain amount of money out of the proceeds of the income tax collected by the central government while the provincial governments made contributions to the centre to meet its deficit."

Under the Act of 1919, the Central Legislature had two chambers: the Council of State and the Legislative Assembly. The Council of State was the upper house and was composed of 60 members,
34 elected and the remaining nominated. Of the 26 nominated members, not more than 20 could be

officials. Of the 34 elected members, 19 were elected by general constituencies and the rest by communal and special constituencies; eleven Muslims, one Sikh and three Europeans. Elections were direct but the franchise was extremely restricted. For instance, United Provinces (UP) elected seven members but only those paying 5000 rupees as land revenue or 1000 rupees as income tax could cast their votes. The total number of electors in all of British India for the Council of State in 1925 did not exceed 17,000.92

The Legislative Assembly was the lower house and had 145 members; 26 were officials, 14 nominated non-officials, and the remaining 105 elected. Out of the elected members, 53 were elected from the general seats, thirty Muslims, two Sikhs, nine Europeans, seven landlords, and four from Indian commerce. Qualifications of voters differed from province to province. For instance, in UP a person owning a house with annual rental value of rupees 160 could vote in urban constituencies and a person paying land revenue of rupees

150 annually could vote in rural constituencies. The total franchise for electing members of the Legislative Assembly in the year 1926 was only
1,128,331 throughout British India.93

The Central Legislature had the power to make laws for all subjects and servants of the Crown in British India. It could not make any law affecting the powers of the Secretary of State for India or the Governor-General. It could not make laws affecting the public debt of India, religious rights or usages, armed forces and foreign relations.94

The provincial legislatures were all unicameral and were called Legislative Councils.

POLITICAL DEVELOPMENTS,
1919-1935

The period from 1919 to 1935 was very important and turbulent from the standpoint of political and constitutional developments in India. The Indian National Congress, in its annual session in 1919, condemned the Montford Reforms as 'inadequate, unsatisfactory and disappointing'.95 It called on the British government to take immediate steps to establish a fully responsible government in India.

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deprived of her homelands in the terms settled for the armistice. Thrace was given to Greece and the Asian portions of the Turkish empire were divided amongst Britain and France as mandated territories. A High Commission was appointed with a view to deprive the Sultan of all his powers.

Muslims in India were enraged by these events and the Ali brothers, Maulana Muhammad Ah and Shaukat Ali, launched what they called the Khilafat Movement and approached Gandhi for help. Gandhi seized this opportunity to lead the Muslims in India. He threatened to launch a movement of non-cooperation if the terms of peace with Turkey did not meet the sentiments of Indian Muslims. The Khilafat Movement came to an end in 1923 when Mustafa Kamal Ataturk seized power m Turkey and expelled the British, French, and Greek forces from Asia Minor and Thrace.

The Delhi Muslim Proposals were included in Jinnah's fourteen points which were adopted by Muslim League in March 1929. In view of subsequent resolution, the earlier resolution loses its significance. Thus there is no need of inclusion or mention of Delhi proposals on these two plages

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protests and disorders and a number of people in Delhi and Ahmadabad were killed by police firing. ,

The worst incident occured in Amritsar where, on 13 April 1919, under the orders of Army corn- government, mander, Brigadier-General Dyer, troops opened j indiscriminate fire on a peaceful but large public • meeting in the Jallianwala Bagh. Four hundred

^<ioipVe died in this incident and another 1200 were wounded. In order to control further outbreaks oi r

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The Simon Commission

In September 1925, a resolution was carried in the Central Assembly advising the British government to make fundamental changes in the Constitution of India, making the government fully responsible It also called for a round table conference, representing all interests, to prepare a detailed! scheme to be placed before the Legislative

Satyagraha

Political trouble started with the passing of the Anarchical and Revolutionary Crimes Act, 1919, based on the Report of the Rowlatt Committee headed by Justice Sidney Rowlatt. This Act provided for speedy trial of offences by a special court consisting of three High Court judges. This court could meet in camera and could take into consideration evidence not otherwise admissible under the Evidence Act. No appeal was provided against the decision of the court. Provincial governments were also given wide powers in matters of arrest, searches and seizures, confinement of suspects, censorship, and so on.96 The Act was bulldozed through the Central Legislature by the official majority despite strong opposition and warnings by every single nonofficial Indian member, elected or nominated. Muhammad Ali Jinnah resigned from the Central Legislature in protest.

M.K. Gandhi launched a movement of *Satyagraha* against the Act and *called* for countrywide strikes. Although he intended to start a peaceful and non-violent movement against this Draconian law, the movement led to violent

of the Punjab from 15 April ID

Gandhi decided to call off *Satyagraha because of*

the violence and killings it had unleashed.

Khilafat Movement

During the First World War, Lloyd George, the Prime Minister of Britain, made a solemn promise to Indian Muslims that Turkey would not be deprived of the lands of Asia Minor and Thrace, populated predominantly by people of Turkish stock. This promise was not kept and Turkey was

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government appointed a commjss)07>, entirely of Englishmen and headed by Sir Simon, to inquire into the working of the systen (*of government, the growth* of education, and the > *development of* representative institutions *m I* British India. The Commission was also asked to report on the desirability of establishing the principles of responsible government and *I* extension, modification, or restriction of the degree f of responsible government then existing under the Act of 1919. |

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The Simon Commission was boycotted by political parties and other representative organizations in India. Resolutions were passed condemning the exclusion of Indians from the Commission. The day the Commission landed in India, a countrywide *hartal* was observed. The Commission was greeted with black flags and no one, including the Central Assembly, co-operated with the cornmission. Thus a step taken ostensibly to appease and pacify Indians produced contrary results.

The Report of the Simon Commission was published in May 1930. It considered the ultimate constitutional framework for the whole of India as a federation, and the place of the provinces in that set-up. The Report declared that the framework could not be unitary and must be federal, not merely in response to the growth of provincial loyalties, but because it was only in a federation that the Indian states could be expected in due course of time to unite with British India. The Report made the following recommendations:

1. Diarchy should be abolished in the provinces and provincial administration should be entrusted to ministers responsible to their legislatures. Franchise should be expanded and the legislature enlarged.

2. Each province should be given a Legislative Council of its own and its representation in the Central Legislature should be strengthened.

3. At the centre, the Central Legislature should be refashioned on the federal principle. The members of the Federal Assembly or the Lower House should be representatives of the provinces and elected by the Provincial Councils. The elections and nominations to the Councils of States should also be on a provincial basis.

4. As far as the Central Executive was concerned, no substantial change was recommended. The entire government could continue to be composed of official nominees and it was not responsible to the legislature. There was to be no diarchy at the centre.

5. The Report said that an All-India Federation would be set up in the distant future.97

The Report was, generally condemned by Indians.

The Nehru Report

After the boycotting of the Simon Commission, an all-parties conference was formed to propose a constitution for India. It held its meeting in Bombay in May 1928 and appointed a committee headed by Pandit Motilal Nehru to consider and determine the principles of a Constitution for India. The Report of the all-parties conference, commonly known as the Nehru Report, was published in August 1928.

The Nehru Report proposed a fully responsible government both at the centre and in the provinces. It proposed that the provinces be assigned enumerated functions, whereas residuary powers were to be assigned to the government of India. The Central Legislature should be bicameral, composed of a Senate and a House of Representatives. The Senate should consist of two hundred members elected by the Provincial Legislative Councils, through proportional representation with a single transferable vote. The House of Representatives would have a membership of five hundred. The members were to be elected by means of joint non-communal constituencies on the basis of adult franchise. The distribution of seats amongst the provinces, both in the case of the Senate and the House of Representatives, was to be proportionate to population. In ordinary legislation, both the chambers were to possess equal powers, but with regard to Money Bills, the House of Representatives was to be given the supreme power. No measure affecting the discipline or maintenance of any part of the military forces was to be introduced except on the recommendation of the Defence Committee consisting of ministers and military experts.

The Governor-General was to be appointed by the British government. He was to be paid out of Indian revenues and his salary was not to be altered during the tenure of office. The Governor-General was to act on the advice of his executive council. The Prime Minister was to be appointed by the Governor-General and other ministers were to be appointed by him on the advice of the Prime Minister. The Executive Council was to be collectively responsible to Parliament. The

Govemor-General-in-Council was to appoint High Commissioners and other representatives similar to those appointed in Canada and other dominions.

Military services were to be guaranteed their existing rights and privileges but in the civil services, the legislatures were to have full powers to make laws and regulations. The central government was to exercise the same rights and discharge the same obligations towards the Indian states, arising out of treaties or otherwise, as the government of India had hitherto exercised or discharged.

The government of a province was to be vested in the Governor to be appointed by the King. He was to be paid out of provincial revenues. The Governor was to act on the advice of the Provincial Executive Council whose number was not to exceed five. The Chief Minister was to be appointed by the Governor and other members of the Executive Council were to be appointed by him on the advice of the Chief Minister. Legislative Councils in the provinces were to be reconstituted on the basis of joint electorate and adult franchise. The North-West Frontier Province, Sindh, and Balochistan were to have the same status and form of government as other major provinces.

Provisions were to be made for a Supreme Court consisting of the Lord President and other justices of the Supreme Court who were to be appointed by the Governor-General-in-Council, but were not to be removed from office except on an address from both Houses of Parliament praying for such removal on the ground of misbehaviour or incapacity. The Supreme Court was to have both original and appellate jurisdiction. Provision was also made for preferring appeals to the King-inCouncil under certain circumstances.

The Governor-General-in-Council was to appoint a Committee of Defence, consisting of the Minister of Defence, the Minister of Foreign Affairs, the Commander-in-Chief, the Commander of Air Forces, the Commander of Naval Forces, the Chief of General Staff, and two other experts. The functions of the Defence Committee would be to advise the government and the various departments concerned on questions of defence and general policy.

The Report provided for the fundamental rights, nineteen in number, which were to be embodied in the Constitution. Fundamental rights were to guarantee freedom of life, liberty, property, speech, assembly, and freedom of conscience and religion. They also guaranteed all citizens the right to free elementary education and equality before the law as well as equal civil rights. There were to be no penal laws of a discriminatory nature. No person would by reason of his religion, caste, or creed suffer in any way in public employment, office of power or honour, and in the exercise of any trade or calling. All citizens were to have an equal right of access to and use of public roads, public wells, and all other places of public resort. Parliament was to make suitable laws for the maintenance of health of all citizens and for securing a living wage for every worker, as well as laws for the protection of motherhood, the welfare of children, and the economic consequences of old age, infirmity, and unemployment. Finally, men and women were

to have equal rights as citizens.

The Report proposed joint electorates with reserved seats for minorities on population basis with the right to contest for additional seats. There were to be no reserved seats for any community in the provinces of Punjab and Bengal, and it was suggested that full protection should be given to the religious and cultural interests of the Muslim community. New provinces were to be created on the basis of language.98

The Nehru Report was considered and accepted by the all-parties conference held in Lucknow on 28 August 1928. A large section of Muslims, however, rejected the proposal of communal representation on the basis of joint electorates. The Indian National Congress, in its session on 31 December 1928, accepted the Nehru Report.

Jinnah's Fourteen Points

In March 1929, the Muslim League held its meeting in Delhi. It was at this forum that Jinnah presented his Fourteen Points as the minimum Muslim demand for any political settlement. The Muslim League, rejecting the Nehru Report, passed a resolution adopting the Fourteen Points, which are given below:

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The form of the future Constitution should be federal in structure with residuary powers vested in the provinces. A uniform measure of autonomy should be granted to all the provinces. All legislatures, central and provincial, and other elected bodies in the country should be constituted on the definite principle of adequate and effective representation of minorities in every province without reducing the majority in any province to a minority or even equality. In the central legislature, Muslim representation should not be less than one-third. Representation of communal groups should continue to be based on separate electorates, but the option to abandon separate electorate in favour of a joint electorate at any time, should be given to every community.

6. Any territorial redistribution that might at any time be necessary should not in any way affect the Muslim majority in the Punjab, Bengal, and North-West Frontier Provinces. Full religious liberty, that is, liberty of belief, worship, and observance, propaganda, association and education should be guaranteed to all communities. No Bill or resolution or any part thereof should be passed in any legislative or any elected body if three-fourths of the members of a community in that particular body opposed such a Bill, resolution or part thereof on the ground that it would be injurious to the interests of that community, or alternatively such other methods should be devised which might practically deal with such cases.

Sindh should be separated from the Bombay Presidency.

10. Reforms should be introduced in the NorthWest Frontier Province and Balochistan on the same footing as in other provinces. Provision should be made in the Constitution giving Muslims an adequate share along with the other Indians in all the services of the state and in local selfgoverning bodies having due regard to the requirements of efficiency.

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12. The Constitution should embody adequate safeguards for the protection of Muslim culture and for the promotion of Muslim education, language, religion, personal laws, and Muslim charitable institutions and for their due share in the grants-in-aid given by the state and by self-government bodies.

13. No Cabinet, either central or provincial, should be formed without there being at least one-third Muslim ministers.

14. No change should be made in the Constitution by the central legislature except with the concurrence of the states constituting the Indian federation.99

The Delhi Muslim Proposals were included in Jinnah's fourteen points which were adopted by Muslim League in March 1929. In view of subsequent resolution, the earlier resolution loses its significance. Thus there is no need of inclusion or mention of Delhi proposals on these two plages.

Civil Disobedience Movement and Round Table Conference

The Viceroy, Lord Irwin, was convinced that it was not possible to maintain unrepresentative central government for all times to come. He conferred with the newly formed Labour government in England and made a statement in October 1929 that the ultimate goal of India's constitutional progress was the attainment of dominion status.

The views of Indians and the British government differed on the subject. Indians demanded a Constituent Assembly to draft a Constitution for India. Gandhi and Lord Irwin met to iron out the differences but did not succeed and the civil disobedience movement was launched in March 1930. Thousands of people all over the country deliberately violated laws and courted arrest. Repression was in full force. Ordinances were issued in quick succession by the government to meet the situation. Editors and proprietors of newspapers and printing presses were arrested and fined. There seemed to be a complete breach

between the government and the nationalist movement in the country.100

After the publication of the Simon Commission Report and its condemnation by the people of India, the British government called the first round table conference in London. The conference met in November 1930. As the Congress leaders were in jail, the government appointed those men belonging to other parties, communities, and interests to represent India whom it considered predisposed towards it. It was not considered advisable to proceed with the work of the final form of the future Constitution of India in the absence of the representatives of the Indian National Congress; therefore, it was decided to call a second round table conference and, in the meanwhile, efforts were made towards a reconciliation between Congress and government. Consequently, Gandhi withdrew the civil disobedience movement and the famous GandhiIrwin Pact was signed in March 1931.

At the second round table conference, many problems were considered but no solution could be conclusively reached. Consequently, the work was referred to various committees which were required to submit detailed reports. As regards the question of communal representation, the British government said it had been obliged to give its own award.

The third round table conference, in November
1932, was called by the British Government rather reluctantly as it was of the opinion that the remaining work on the draft of the Indian Constitution could be done in India. The session of the third round table conference lasted from
17 November to 24 December. The Labour Party did not co-operate in the deliberations and the Indian National Congress was unrepresented in this session. Delegates to the Conference merely discussed the reports of the various committees appointed by the second round table conference and decided a few more points.101

1932. The scope of this award was purposely confined to the arrangements to be made for the representation of British Indian communities in provincial legislatures. Consideration of representation to the central legislature was deferred for the time being since it involved a question of the representation of Indian states which needed further discussion.

According to the Award, elections to the seats allocated to the Muslim, European, and Sikh constituencies were to be held separately by voting on separate communal electorates covering the whole area of a province. Special provisions were made for excluded areas. Provision was to be made in the new Constitution of India to allow the revision of electoral arrangements after a lapse of ten years with the assent of the communities affected, for the ascertainment of which suitable means were to be devised. All qualified voters who were not voters in the Muslim, Sikh, Indian, Christian, Anglo-Indian, or European constituencies, were entitled to vote in a general constituency. Seven seats were reserved for the Marathas in certain selected plural-member general constituencies in Bombay. Members of the depressed classes who were qualified to vote were given a general constituency. However, special seats were to be reserved for them to be filled by election from special constituencies in which only members of the depressed classes electorally qualified were entitled to vote. Any person voting in such a special constituency was

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also entitled to vote in a general constituency.

The election of Indian Christians was to be held by voting in separate communal constituencies. Anglo-Indians were to vote on communal lines. Women were also given special representation. Electors of a particular community were to elect their quota. Special seats were allotted to commerce and industry as well as mining and planting which were to be filled up by election through the Chamber of Commerce and other associations. Their details were to be worked out *later. Seats allotted to land holders were to be filled*

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6. Queen Eiizabe

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However, the proportion was not to be materially changed.

Gandhi, in a letter written in March 1932 to Sir Samuel Hoare, Secretary of State for India, had warned that he would resist with his life the grant of separate electorates to the depressed classes. When the British government refused to move in the matter and the condition of Gandhi became serious on account of his fast unto death, Indian leaders made up their mind to modify the Award by mutual agreement. Negotiations took place and ultimately the Poona Pact was signed in September 1932, and was accepted by the government.

The Poona Pact reserved seats for depressed classes out of the general electoral seats in the provincial legislature as follows. Madras 30, Bombay with Sindh 15, Punjab 8, Bihar and Orissa 18, CP 20, Assam 7, Bengal 30, and UP 20. The total number of reserved seats for the depressed classes was thus 148.

The depressed classes were to have representation in the central legislature on the principle of joint electorate and seats were to be reserved for them in the same way as in the case of the provinces. 18 per cent of the general seats for British India were to be reserved for them. They were also to be given fair representation in the local bodies and in the public services, subject to educational qualifications.102

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When the scheme regarding the future Constitution of India was worked out, the British government issued a document known as the 'White Paper' in March 1933. It stated that the basic idea of the new Indian Constitution would be diarchy at the centre and responsible government in the provinces. In April 1933, a Joint Select Committee of the British Parliament was appointed with Lord Linlithgow as its chairman, to examine and report on government proposals contained in the White Paper. The Committee submitted its report in December 1934. The fundamentals given in the White Paper were not changed but many changes in the structure of the federal and provincial legislatures and other matters were recommended. A bill was drafted on the basis of the recommendations in the report which was passed by both Houses of the British Parliament by July 1935 and received the Royal assent in August 1935.' It was called the Government of India Act, 1935.

The broad principles on which the Act was based were the autonomy of the provinces and the powers of their legislatures to make the legislatures almost wholly elective, to introduce the principles of a Cabinet system at the provincial level, and to enlarge participation of Indians in the government at the centre. Thus the foundation was laid on which a new Constitution could be built.

THE GOVERNMENT OF INDIA ACT, 1935

The Act was a comprehensive statute running into 321 sections and two schedules. It was a comprehensive written Constitution given to India by its colonial masters. The special features of the Act were:

i. The polity of India was reconstituted on a federal basis, although the Constitution of India was unitary and the provincial governments derived their powers by

devolution from the central government and discharged their functions under the superintendence, direction, and control of the Governor-General and ultimately the Secretary of State for India. The Act thus created a federation.

ii. Partial responsibility in the form of a diarchy at the centre was introduced.

in. The provinces were granted autonomy and responsible government.

iv. The Governor-General of India and the Governors of the provinces were granted extensive powers by way of safeguards, reservations, special responsibilities, overriding powers, and so on.

v. New institutions like the Federal Court, Federal Railway Authority, the Reserve Bank of India (the Central Bank), and the Public Service Commissions for the federation and the provinces were created under the Act.

vi. Burma was separated from India.

vii. The Act prescribed the method whereby a state could join the federation and also provided for the legal consequences which followed from such an accession. The ruler of a state desiring to federate could execute an instrument of accession on behalf of himself, his heirs, and his successors, defining therein matters in which the state agreed to federate and thereby accepting the jurisdiction of the federation in all such matters. The Crown could refuse to accept an Instrument of Accession if it was inconsistent with the scheme of the federation. But once a state had acceded to the federation and was approved by the Crown, it could not secede from the federation.

viii. The area of federal jurisdiction extended to the whole of British India including the states that had acceded. In relation to the

provinces, there was a three-fold division of functions and the subjects were divided into the federal, provincial, and concurrent lists. The federal legislature alone had the power to make laws with respect to the matters enumerated in the federal list. The subjects enumerated in the provincial list were within the exclusive domain of the provincial legislatures. Both the federal and provincial legislatures were competent to make laws on subjects enumerated in the concurrent list. In case of conflict and inconsistency, the federal law prevailed and the law of the province or state was void to the extent of such repugnancy.2

THE FEDERAL EXECUTIVE

The executive power and authority of the federation was vested in the Governor-General as he was the representative of the Crown. The Crown in turn issued an Instrument of Restrictions to the Governor-General which contained directions as to the way in which he could exercise the authority conferred upon him. The extent of the executive authority of the federation included:3

(a) matters with respect to which the federal legislature had power to make laws;

(b) raising in British India on behalf of the Crown naval, military, and air forces and the governance of the King's forces borne on the Indian establishment, and

(c) exercise of such rights, authority, and jurisdiction as were exercisable by the Crown by treaty, grant, usage, sufferance, or otherwise in and in relation to the tribal areas.

However, the jurisdiction of the federal government was subject to two limitations. Firstly, the federal executive authority did not extend in any province to matters except those expressly provided in the Act with respect to which the provincial legislature had the power to make laws. Secondly, it extended to a federated state subject to such limitations as might be specified in its Instrument of Accession. The executive authority .

of the ruler of a federated state was, however, to continue to be exercisable in that state regarding matters with respect to which the federal legislature had the power to make laws, except in so far as it was excluded by virtue of a federal law.

The Governor-General, as head of the federal executive, had supreme command of the military, naval, and air forces in India. This command, however, was subject to the power of His Majesty to appoint a Commander-in-Chief, to exercise in relation to those forces such functions as might be assigned to him.

The federal government was not concerned with the powers connected with the exercise of the functions of the Crown in its relations with the Indian states. These were exercisable by His Majesty's representative appointed for the purpose, but His Majesty could appoint one person to fill both the offices of the Governor-General and Representative of the Crown in relation to

Indian states.

The Government of India Act, 1935 established diarchy at the centre. Administrative functions with respect to defence, ecclesiastic affairs, foreign relations except relations between the federation and any part of His Majesty's dominions, and the tribal areas, were to be exercised by the GovernorGeneral at his discretion. To assist him in the exercise of these functions, the Governor-General was empowered to appoint councillors not exceeding three in number. The salaries and conditions of service of the councilors were to be prescribed by His Majesty-in-Council. They were responsible to the Governor-General alone and were in no way responsible to the federal ' legislature for any act done by them in the exercise of their duties.

All other executive powers were to be exercised by the Governor-General with the help and advice of the Council of Ministers, subject to the exercise by the Governor-General of special powers and responsibilities. The number of ministers was not to exceed ten. Ministers were to be chosen by the Governor-General to hold office during his tenure. It was stipulated in the Act that ministers should be chosen from amongst the members of the federal legislature and that a minister who for a period of six consecutive months was not a

member of eithe legislature, should al to be a minister. Tl salaries as might b< legislature and in th Governor-General, minister was not to The Governor-Gen preside at meetings The control of mini transferred depar following limitatior

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member of either chamber of the federal legislature, should at the expiry of that period cease to be a minister. The ministers were to get such salaries as might be determined by an act of the legislature and in the absence of it as fixed by the Governor-General, provided that the salary of a minister was not to vary during his term of office. The Governor-General, at his discretion, might preside at meetings of the Council of Ministers. The control of ministers over the administration of transferred departments was subject to the following limitations:

1. Ministers had no right to tender advice on matters in respect of which the GovernorGeneral was required to act at his discretion;

2. In cases where the Governor-General was empowered to exercise his individual judgment; and

3. When the Governor-General acted in the exercise of powers entrusted to him in the discharge of his special responsibilities.

In all matters which involved his special responsibilities, the Governor-General was required to exercise his individual judgment as to the action to be taken. He could, however, seek ministerial advice, but he need not act thereupon.

The matters in which the Governor-General had a special responsibility were:4

(a) the prevention of any grave menace to the peace or tranquility of India or any part thereof;

(b) the safeguarding of the financial stability of the federal government;

(c) the safeguarding of the legitimate interests of minorities;

(d) the securing to, and to the dependants of, persons who were or had been members of the public services, any rights provided or preserved for them by or under the Act and the safeguarding of their legitimate interests;

(e) the securing in the sphere of executive action of the purposes which the provision of Chapter in of Part V of the Act of 1935 (which dealt with commercial discrimination) were designed to secure in relation to legislation;

(f) the prevention of action which would subject goods of United Kingdom or Burmese origin

imported into India to discriminatory or penal treatment;

(g) the protection of the rights of any Indian state and the rights and dignity of the Ruler thereof; and

(h) the securing of the due discharge of his functions with respect to matters in relation to which he was by or under the Act of
1935 required to act at his discretion, or to exercise his individual judgment, was not prejudicial or impeded by any course of action taken with respect to any other matter.

All executive action of the federal government was expressed to be taken in the name of the Governor-General, who also made rules for the more convenient transaction of the business of the government and for the allocation of business among the ministers.

THE FEDERAL LEGISLATURE

The Federal Legislature was to be bicameral and it consisted of the King, represented by the Governor-General, and the two Chambers, the Council of State, and the House of Assembly.5 The Council of State was to consist of 156 representatives of British India, and not more than 104 representatives of the Indian states.6 Out of
156 seats to be filled by the representatives of British India, 150 seats were to be allocated to governors' provinces and chief commissioners' provinces. There were 75 general seats, 6 for scheduled castes, 4 in the Punjab for Sikhs, 49 Muslims, 6 women, 7 European, 2 Indian Christians and one Anglo-Indian. Six seats were to be filled by persons chosen by the GovernorGeneral at his discretion. The Council of State was to be a permanent body, not subject to dissolution, but one-third of its members were to retire every third year.

The House of Assembly was to consist of 250 representatives of British India and not more than 125 representatives of the Indian states. The life of

the House of Assembly was five years, unless sooner dissolved. The Governor-General could, at his discretion, from time to time summon, prorogue, and address the chambers or send messages or dissolve the House of Assembly provided that the chambers be summoned to meet at least once every year.

The Council of State and the House of Assembly were to choose from among their members respectively a President and a Speaker to preside over these chambers. A member holding office as President or as a Speaker was to vacate his office if he ceased to be a member of the chamber over which he presided. He could at any time resign his office and he might be removed from his office by a resolution of the Council or Assembly, as the case might be, passed by a majority of all its then members.

Bills other than financial bills could originate in either chamber. In general, a bi// was not to be deemed to have been passed by the chambers of the legislature unless it had been agreed to by both chambers.7 If a Bill passed by one chamber was rejected by the other, or it did not agree to the amendments made in the -Bill, or more than six months had elapsed from the date of the reception of the Bill by the other chamber and it had not been passed by that chamber, the GovernorGeneral could summon a joint sitting of both the chambers for the purpose of deliberating and voting on the Bill. But in case of a Finance Bill or a Bill which affected the discharge of his functions in so far as he was required to act at his discretion or to exercise his individual judgment, he could

the Governor-General had known by *notificatm* that the King had assented thereto. Power was reserved by the Crown to disallow any Act assented to by the Governor-General.

At the start of every financial year, Jfcf Governor-General was to put before both chambers an ’annual financial statement’ giving the estimated receipts and expenditure of the federation for that year.8 The estimates of expenditure embodied in the annual financial statement to show separately (a) the sums required to meet expenditure charged upon the revenues of the federation, and (b) the sums required to meet other expenditure proposed to be made from the revenues of the federation. The following items were charged on the revenues of the federation:

1. the salary and allowances of the GovernorGeneral and other expenditure relating to his office for which provision was required to be made by order in Council;

2. debt charges for which the federation was liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service of redemption of debt;

3. the salaries and allowances of Ministers, Councillors, the Financial Adviser, the Advocate-General, Chief Commissioners, and the staff of the Financial Adviser;

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4. the salaries, allowances, and pensions payable to the Judges of the Federal Court, and the pensions payable to the Judges of High Courts;

5. expenditure for the purpose of the discharge

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summon a joint sitting, even though the above conditions had not been fulfilled.

After the Bill had been passed by both the chamber it was presented to the GovernorGen" al who: might give his assent in the name o His Ma esty; withhold his assent; reserve the BiU

wnicn it was presented to the Governor-General,

with respect to reserved subjects;
6 expenditure on the discharge of the functions ' of the Crown in its relations with Indian

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Any question on whether any proposed expenditure fell within a class of charges on the revenue of the federation was to be decided at the Governor-General's discretion. The items of expenditure so charged upon the revenues of the federation were not to be submitted to the vote of the legislature.

The Act placed a number of restrictions on the legislative powers of the Federal Legislature. These restrictions were set out in section 108 which provided: unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in, either chamber of the Federal Legislature any Bill or amendment which:

(a) repeals, amends, or is repugnant to any provisions of any Act of Parliament extending to British India; or

(b) repeals, amends, or is repugnant to any Governor-General's or Governor's Act or any ordinance promulgated at his discretion by the Governor-General or a Governor; or affects matters in respect of which the Governor-General is by or under the Act, required to act at his discretion; or repeals, amends, or affects any Act relating to any police force; or

affects the procedure for criminal proceedings in which European and British subjects are concerned; or

(f) subjects persons not resident in British India to greater taxation than persons resident in British India, or subjects companies not wholly controlled or managed in British India to greater taxation than companies wholly controlled or managed therein; or

(g) affects the grant of relief from any federal tax or income in respect of income taxed or taxable in the United Kingdom.

(C)

(d) (e)

The Federal Legislature had no power (a) to make any law affecting the sovereign or the Royal knily, or the succession to the Crown, or the sovereignty, dominion, or suzerainty of the Crown in any part of India, or the law of British nationality, or the Army Act, the Air Force Act, or the Naval Discipline Act, or the Law of Prize or

Prize courts; or (b) except in so far as was expressly permitted by any subsequent provisions of the Act of 1935, to make any law amending any provision of this Act, or any Order in Council made thereunder, or any rules made under this Act by the Secretary of State, or by the GovernorGeneral or a Governor in his discretion, or in the exercise of his individual judgment; or (c) except in so far as was expressly permitted by the Government of India Act to make any law derogating from any prerogative right of the King to grant special leave to appeal from any court.9

No federal law was valid which contravened the provision made in the Government of India Act against discriminatory legislation. Restrictions were also imposed on the authority of both the Federal and Provincial Legislatures to pass discriminatory legislation in certain matters against British subjects domiciled, British trading companies incorporated, and ships registered, in the United Kingdom. If the Governor-General using his discretion certified that the discussion of a Bill, clause, or amendment would affect the discharge of his special responsibility for the prevention of any grave menace to the peace or tranquility of India, he might at his discretion direct that no further proceedings should be taken in relation to it.

The Governor-General was invested with extraordinary powers of legislation and could issue ordinances having the same force and effect as an Act of the Federal Legislature assented to by the Governor-General. The Act made a distinction between functions in the discharge of which the Governor-General was required by the law to act at his discretion or to exercise his individual judgment, and other functions. In respect to the former, the Governor-General could at any time, at his discretion, promulgate such ordinance as in his opinion the circumstances of the case would required subject to the following conditions:

1. The maximum period for which an ordinance could remain in force was six months. But it could be extended, by a subsequent ordinance, for a further period not exceeding six months.

2. When the operation of an ordinance was extended for a further period, it was to be

communicated forthwith to the Secretary of State for India and it was to be laid by him before each House of Parliament.

3. The ordinance, like the Act of the Federal Legislature, was subject to disallowance by the King.

4. In respect of their subject matter, ordinances were governed by the same limitations as applied to Acts of the Federal Legislature. If and so far as an ordinance made a provision which the Federal Legislature would not be competent to enact, it was void.

The Governor-General was also empowered to promulgate ordinances during the recess of the legislature. It was provided that if at any time when the Federal Legislature was not in session and the Governor-General was satisfied that circumstances existed which rendered it necessary for him to take immediate action, he could promulgate such ordinances as the circumstances appeared to him to require. An ordinance promulgated under such circumstances was to be laid before the Federal Legislature and it ceased to operate at the expiry of six weeks from the re-assembly of the legislature, or, if before the expiry of that period resolutions disapproving of it were passed by both chambers, upon the passing of the second of those resolutions.I0

The Governor-General was also empowered to make laws in the form of Governor-General's Acts at his discretion in matters relating to functions in which he was required to act at his discretion or to exercise his individual judgment. The exercise of this power was subject to the following limitations: (a) The Governor-General was required to explain by message to both the chambers the circumstances which in his opinion rendered legislation essential. He could either enact forthwith, as a GovernorGeneral's Act, a Bill containing such provisions as he considered necessary, or attach to his message a draft of the Bill which he considered necessary. When he attached a draft to his message, he might at any time after the expiry of one month enact, as the Governor-General's Act, the Bill proposed by him to the chambers either

in the form of the draft communicated to them or with such amendments as he deemed necessary. But before so doing, he was to consider any address which might have been presented to him by either chamber with reference to the Bill or to any suggested amendment.

(b) The Act was to be communicated forthwith to the Secretary of State and it was to be laid by him before each House of Parliament.

(c) It was subject to disallowance by the Crown.

The Act contained special provisions enabling the Governor-General to act promptly in the event of a breakdown in the constitutional machinery. If at any time the Governor-General felt that a situation had arisen in which the government of the federation could not be carried on in accordance with the provisions of the Act, he could using his discretionary powers, issue a

Proclamation declaring that his functions now be extended to all or any of the powers vested in or exercisable by any federal body or authority, other than the Federal Court. Such a proclamation was to be communicated to the Secretary of State for India and laid by him before each House of Parliament. The proclamation was to cease to operate at the expiry of six months unless before the expiry of that period it had been approved by a resolution of both Houses of Parliament in which case it continued in force for a further period of twelve months from the date on which it would otherwise have ceased to operate. If, at any time, the government of the federation had for a period of three years been carried on under such a proclamation, then, at the expiry of such a period the proclamation would cease to have effect and the government of the federation was to be earned on in accordance with the provisions of the Act of 1935. If the Governor-General by a proclamation assumed to himself any power of the federal legislature to make laws, any law made by him in the exercise of that power would continue to have effect until two years had elapsed from the date *on* which the proclamation ceased to have effecl, unless sooner repealed or re-enacted by the Act of the appropriate legislature."

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THE FEDERAL COURT

Under *the* Government of India Act, 1935, a Federal Court was to be established.12 It was to be the interpreter and guardian of the Constitution and a tribunal for determination of disputes between the constituent units of the federation.

The Federal Court was to consist of a Chief Justice and not more than six puisne judges who were to be appointed by the King to remain in office till the age of sixty-five. The King could increase the number of judges on presentation of an address by the Federal Legislature to the Governor-General for submission to the King. For appointment as a judge, one had to be either a judge of a High Court in British India or in a federated state for at least five years, a Barrister of England or Northern Ireland of at least ten years' standing, a member of the Faculty of Advocates in Scotland of at least ten years' standing, or had to be for at least ten years a pleader of a High Court in British India, or in a federated state or of two or more such courts in succession. For appointment as Chief Justice of India, it was necessary that one should be a Barrister or Pleader of at least fifteen years' standing. A judge could be removed from his office by His Majesty on the ground of misbehaviour or infirmity of mind or body, if the Judicial Committee of the Privy Council, on a reference made to them by His Majesty, recommended his removal.

The court's jurisdiction was three-fold: original jurisdiction, appellate jurisdiction in appeals from High Courts in British India, and advisory jurisdiction. The court exercised original jurisdiction in any dispute between any two or more of the following parties; the federation, any of the' provinces, or any of the federated states, if and in so far as the dispute involved any question (whether of law or fact) on which the existence or extent of a legal right depended, provided that the said jurisdiction did not extend to a dispute to which the state was a party.

The appellate jurisdiction of the Federal Court extended to appeals from any judgment or decree or final order of a High Court in British India, if the High Court certified that the case involved a substantial question of law as to the interpretation

of the Act of 1935, or any Order in Council made thereunder.13 An appeal also rested in the Federal Court from a High Court in a federated state on the ground that a question of law had been wrongly decided, being a question which concerned the interpretation of the Act of 1935, or of an Order in Council made thereunder or the extent of the legislative or executive authority vested in the federation by virtue of the Instrument of Accession of that state, or arose under an agreement made under Part VI (the administrative relations between federation and states) in relation to the administration in that state of a law of the federal legislature.14

The appellate jurisdiction of the Federal Court was extended to some civil cases also by an Act of the Federal Legislature provided that no appeal lay unless the amount of the claim or subject matter in dispute was not less than 50,000 rupees or such other sum not less than 15,000 rupees as was specified in the Act, or special leave of the Federal Court had been obtained.15

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The Federal Court was also invested with advisory jurisdiction. The Governor-General could, at his discretion, refer to the Federal Court any question of law of special public importance for consideration and report.

An appeal could be brought to the Privy Council (His Majesty-in-Council) from a decision of the Federal Court:16

(a) given in the .exercise of its original jurisdiction any dispute which concerned the interpretation of the Act of 1935, or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the federation by virtue of the Instrument of Accession of any state, or arose under an agreement made under Part VI (Administrative relations between federation, provinces, and states) of the Act of 1935, in relation to the administration in any state of a law of the Federal Legislature, without leave, and

(b) in any case, by leave of the Federal Court or of His Majesty-in-Council.

PROVINCIAL GOVERNMENTS

With the separation of Orissa from Bihar and Sindh from Bombay, and the severance of Burma from British India, there were eleven Governor's provinces, namely: Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces and Berar, Assam, the North-West Frontier Province, Orissa, and Sindh. Section 290 provided that the Crown by Order in Council might create a new province, increase the area of any province, diminish the area of any province, and alter the boundaries of any province. It was, however, provided that before the draft of any such Order was laid before Parliament, the Secretary of State would take steps for ascertaining the views of the Federal Legislature as also of the government and the legislature of the province which was to be affected by such an order. These preliminary consultations were to be directed towards both the proposal to make the Order and the provisions to be inserted therein.

In form, the executive authority of a province was similar to that at the centre and it was to be exercised on behalf of the Crown by a Governor. The Governor received his appointment from the King by a commission under the Royal Sign Manual and was constitutionally responsible to the Governor-General. An Instrument of Instructions was issued to each Governor on the assumption of office.

Subject to the provisions of the Act of 1935, the executive authority of each province extended to matters with respect to which the legislature of the province had power to make laws. The administration of the province might, for purposes of convenience, be grouped under three heads:

(a) functions in the discharge of which the Governor was required to act on the advice of the Council of Ministers;

(b) functions in the discharge of which he was required to exercise his individual judgment; or

(c) functions in respect of which he was required to act at his discretion.

Where a question arose regarding whether a given matter fell in one category or another, the

decision of the Governor was final and the validity of anything done by the Governor could not be called into question on the ground that he ought or ought not to have acted at his discretion.

It was provided that even though the Governor could act at his discretion, he should exercise his functions with the help and on the advice of a Council of Ministers.17 The ministers were chosen and summoned by the Governor and they held office at his pleasure. The Act provided that if a person appointed minister was for a period of six months not a member of the Provincial

Legislature, he ceased to be a minister at the expiry of that period. The salaries of the ministers were determined by an Act of the provincial legislature and until then fixed by the Governor, provided that the salary of a minister was not to vary during his term of office. The Governor could, if he so wished, preside at the meetings of the Council of Ministers.

In the exercise of the functions left to his discretion or to his individual judgment, the Governor was required to act in accordance with the directions given to him by the GovernorGeneral. But the validity of anything done by him could not be called into question on the ground that it was contrary to the directions so issued. Before giving his directions, the Governor-General was required to satisfy himself that nothing in the directions required the Governor to act in any manner inconsistent with the Instrument of Instructions issued to him by His Majesty with the approval of both the Houses of Parliament.

The Governor was entrusted with the following special responsibilities, in the exercise of which he acted in his individual judgment:

i. the prevention of any grave menace to the peace or tranquility of the province or any part thereof; ii. the safeguarding of the legitimate interests

of minorities;

in. the securing to, and to the dependants of, persons who were or had been members of the public services, any rights provided or preserved for them by or under the Act, and the safeguarding of their legitimate interests;

iv. the securing in the sphere of executive action of the purposes which the provisions

of Chapter in of dealt with discrin secure in relation the securing o government of an provisions of the partially excluded the protection of state and the right thereof; and the securing of tf directions lawfulh VI of the Act (w' trative relations) 1 at his discretion.18

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of Chapter in of Part V of the Act (which dealt with discrimination) were designed to secure in relation to legislation;

v. the securing of the peace and good government of areas which by or under the provisions of the Act were declared to be partially excluded areas;

vi. the protection of the rights of any Indian state and the rights and dignity of the Ruler thereof; and

vii. the securing of the execution of orders or directions lawfully issued to him under Part VI of the Act (which dealt with administrative relations) by the Governor-General at his discretion.18

The following were the more important functions in the exercise of which the Governor was required to act at his discretion: appointment and dismissal of ministers, determination of their salaries (unless fixed by an Act of the legislature), allocation of business among ministers, presiding at meetings of the Council of Ministers, and the making of rules for the transaction of the business of the provincial government.

PROVINCIAL LEGISLATURES

In every province, there was to be a legislature which was to consist of the King, represented by the Governor and one or two chambers. The provinces of Madras, Bombay, Bengal, the United Provinces, Bihar, and Assam had **bicameral** legislatures, whereas the remaining five provinces had **unicameral legislatures.** Where there were two chambers of the provincial legislature, one was known as the Legislative Council and the other as the Legislative Assembly, and where there was only one chamber, it was known as the Legislative Assembly. The composition of the chamber or chambers of the legislature of a province was such as was specified in relation to that province.19

Representation in the Legislative Assembly of each province was based mainly on the allocation of seats to various communities and to specified interests. There were separate electorates for Muslims, Sikhs, Indian Christians, Anglo-Indians,

and Europeans. The details of the distribution of seats were based upon the Communal Award, with such modifications as had been rendered necessary, first by the later proposal to create a new province of Orissa, and, secondly, by the Poona Pact.

The Communal Award did not contain proposals for the composition of Legislative Councils. The composition of Legislative Councils was, however, based upon the same principles as the Communal Award. As these were to be much smaller bodies than the Legislative Assemblies it was, therefore, not possible to provide in them for the exact equivalence of all the interests represented in the Legislative Assemblies. But the Act provided for the inclusion of a certain

number of seats to be filled by nomination by the Governor at his discretion with a view to redressing any possible inequality or for securing some representation for women.

The Legislative Council was a permanent body, one-third of its members retiring once in every three years. It was not subject to dissolution. The Legislative Assembly, unless sooner dissolved, continued for five years. Membership of both the federal legislature and the provincial legislature at the same time was prohibited. If a person was chosen a member of both legislatures then, at the expiration of such period as might have been specified in rules made by the Governor of the Province, that person's seat in the provincial legislature was to become vacant, unless he or she had previously resigned his or her seat in the federal legislature.

A Bill passed by the Legislative Assembly, in provinces with unicameral legislatures and by both the chambers in provinces with bicameral legislatures, was presented to the Governor who was empowered to use his discretion either to give his assent to it in the name of the King, or to withhold assent, or to reserve it for the consideration of the Governor-General. A Bill reserved for the consideration of the GovernorGeneral might be assented to by him in the name of the King or he might withhold his assent or reserve it for the signification of the King's pleasure.

Even when a Bill had received the assent of the Governor or the Governor-General, it could be

disallowed by the King within twelve months from the date of such assent. A measure thus disallowed was to be duly notified by the Governor concerned. No discussion could take place in the provincial legislature with respect to the conduct of any Judge of the Federal Court or of a High Court in British India or in a federal state in the discharge of his duties. If the Governor certified that discussion of a Bill introduced or proposed to be introduced, or any specified clause or a Bill, or of any amendment moved or proposed to be moved to a Bill, would affect the discharge of his special responsibility for the prevention of a grave menace to the peace and tranquility of the province, or any part thereof, he could at his discretion direct that no proceedings or no further proceedings should be taken in relation to the Bill, clause, or amendment and effect would be given to that direction.

Limitation on the Legislative Power of the Provincial Legislatures

Provincial legislature had the power to make laws for the province or for any part thereof in respect of any of the matters enumerated in List II (Provincial) or List in (Concurrent). It had no power to make any law affecting the sovereignty or dominion of the Crown over any part of India, or amending any provision of the Government of India Act, 1935, or derogating from the prerogative right of the King to grant special leave to appeal to any court. It had, moreover, no power to pass any law of a discriminatory nature against any British subject or company carrying on business in the province. The prior sanction of the GovernorGeneral, using his discretion, was required for the introduction into the legislature of any Bill or amendment which:

(a) Repealed, amended, or was repugnant to any provisions of any Act of Parliament extending to British India; or

(b) repealed, amended, or was repugnant to any Governor-General's Act, or any ordinance

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(c) affected matters in respect of which Governor-General was by or under

Government of India Act, required to act at his discretion; or

(d) affected the procedure for criminal proceedings in which European British subjects were concerned.

Without the previous sanction of the Governor, no Bill or amendment could be introduced or moved which:

1. Repealed or amended or was repugnant to any Governor's Act, or any ordinance promulgated at his discretion; or

2. repealed or amended or affected any Act relating to any police force.

Special Provisions Relating to Financial Bills

No Financial Bill could be moved or introduced except on the recommendation of the Governor nor could it be introduced in the Legislative Council. A Financial Bill, as defined in the Act, was a Bill:

(a) for imposing or increasing any tax; or

(b) for regulating the borrowing of money or the giving of any guarantee by the province or for amending the law with respect to any financial obligations undertaken or to be undertaken by the province; or

(c) for declaring any expenditure to be expenditure charged on the revenues of the province or for increasing the amount of such expenditure.

The annual financial statement or Budget was laid before the chamber or chambers for discussion. Voting was done only in the Assembly and for that purpose distinction was made between the items relating to expenditure charged on the revenues of the province and other expenditure The following items of expenditure were declared by the Act20 to be expenditure on the revenues of India and expenditure so charged -was not submitted to the vote of the Assembly, though it css&V'SR. <JJ8RHSsad, except in case of expenditure

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for which provision was required to be made by order in Council;

(b) debt charges, including interest, sinking fund charges, and redemption charges;

(c) the salaries and allowances of Ministers, the Advocate-General, and the Judges of the High Court;

(d) expenditure for excluded areas;

(e) sums required to satisfy any judgment, decree, or award of any court on arbitral tribunal;

(f) any other expenditure so charged by this Act or any Act of the provincial legislature.

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Where any question arose whether a proposed expenditure did or did not fall within any of the above clauses, it was to be decided by the Governor, whose decision was final.

The expenditure not charged on the revenues of the province was submitted in the form of demands for grant to the Legislative Assembly. It was expressly laid down in the Act that no demand for grant could be made except on the recommendation of the Governor. The Assembly had the power to assent to, or refuse, or reduce the amount specified in any demand but the Governor was empowered to restore and treat as sanctioned any such proposed expenditure in whole or in part if in the opinion of the Governor the same was necessary for the due discharge of his special responsibilities.

The Governor, like the Governor-General, possessed the power to promulgate ordinances during the recess of the legislature. He could promulgate ordinances at any time in any matter using his discretion or individual judgment to make laws in the form of Governor's Act. An ordinance issued by the Governor or a Governor's Act, had the same force and effect as an Act of the provincial legislature. The Governor was also given special powers to make regulations for territories declared by the King as 'excluded areas' or 'partially excluded area'. The administration of excluded areas was carried on by the Governor at his discretion. No Act made by the federal legislature or a provincial legislature applied to an excluded area unless the Governor had so decided, with such exceptions and modifications as he considered necessary. The Governor could also

make regulations for the peace and good government of such an area which might repeal or amend any federal or provincial act or any existing Indian law applicable to it. Such regulations were required to be submitted forthwith to the GovernorGeneral and had no effect until assented to by him. These were subject to disallowance by the King like an Act of the provincial legislature.21 '

The Governor was also given special powers in case of the failure of the constitutional machinery in the province. If, at any time, the Governor believed that a situation had arisen in which the government of the province could not be carried on in accordance with the provisions of the Government of India Act, 1935 he could, using his discretion by Proclamation, declare that he had assumed upon himself all or any of the powers vested in or exercisable by any provincial body or authority other than a High Court, subject to the following conditions:22

1. No Proclamation declaring the failure of the constitutional machinery could be issued without the concurrence of the GovernorGeneral.

2. The Proclamation was to be forthwith communicated to the Secretary of State and it was to be laid by him before both Houses of Parliament.

3. The Proclamation ceased to operate on the expiry of six months unless its continuance had been approved by resolution of both Houses of Parliament, but no such Proclamation could in any case remain in force for more than three years.

4. Any law made by the Governor when the Proclamation was in force continued to have effect

for a period of two years after the expiry of the Proclamation, unless sooner repealed or enacted by an Act of the appropriate legislature.

FORMATION OF MINISTRIES IN THE PROVINCES

The federal part of the Constitution was not largely put into operation but the provincial part came into force on 1 April 1937. In the provincial elections,

the Congress Party had won the majority of the seats in eight provinces. Initially, the Congress refused to form the governments. However, later on, when an assurance was given that the Governors would not use their special powers, the Congress formed ministries in the provinces where the Party was returned in majority. The Muslim League did not do well in these elections and secured only 51 out of a total of 482 seats reserved for Muslims. The Muslim League offered to join the Congress ministries, but on honourable terms. This was not acceptable to the Congress who demanded that the Muslim League should cease to function as a separate group in the legislature and should come under the control of the Congress high command. The Muslim League refused such humiliating terms offered by a power drunk party. The Congress ministries functioned from July
1937 to October 1939. In September 1939, the Second World War broke out and Britain declared war on Germany. The Governor-General declared India a belligerent country on the side of Britain and the Allies. Neither the central legislature nor the provincial governments were consulted over this. The Congress was in a dilemma and as a protest asked its ministers in the provincial governments to resign in protest. Provincial autonomy thus came to an end all of a sudden. No other group could form the ministries consequently, the Governors suspended the Constitution in the eight provinces where Congress had been in office. Section 93 of the Act came into operation and the Governors carried on the entire work of administration with the help of their advisers. Parliamentary government came to an end and the rule of the Governors began which lasted till until the end of the war. This was done by amending the Act because the Governor's Proclamations of Emergency could not last longer than six months under the Act of 1935. The Defence of India Rules was in force throughout India during the Second World War. It restricted the powers of the ministers in other provinces where. Governors began to force their will upon the ministers in the day-to-day administration. Mr Allah Bux, the Chief Minister of Sindh, was dismissed from the office of premiership although he enjoyed the confidence of the legislature. This was an act of great constitutional impropriety. The

resignation of Mr Fazlul Haq, prime minister of Bengal, was also obtained under similar circumstances.

CONCLUSION

It cannot be denied that the Government of India Act, 1935 was not a perfect piece of legislation It fell far short of the aspirations and demands of the people of India. Some of its shortcomings and defects were:

1. Indians were not given control over the government of their country. They could not change or amend their Constitution. This was a serious drawback and a large number of states did not join the federation.

2. Indian states were given a privileged position' under the Constitution. The representation given to them both in the Council of State and the Federal Assembly was more than what was

due to them on the basis of then territory, population, and the contributions made by them to the revenues of the federal government. While the members from British India were to be elected by the people, the Indian princes were allowed to nominate their quota. Critics pointed out that as the Indian princes were under the control of the political department of the Government off India and did what they were directed to do,[their representatives were obviously under the control of the British government. They could not dare to vote against their masters The nominees from the Indian states could be used by the British government in India! to serve their own interest and stop thef progress of the country. \

3. It was against the canons of democracy tot have indirect elections to the federal assembly. .

4. Indians resented the control which exercised! by the Secretary of State for India over the; Indian Civil Service, the Indian PoliceService, and other All-India Services. \

5. Even though the Indian Army got the lion's! share of the Indian budget, Indians werej given absolutely no control over it, as(defence was a reserved subject.

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6. The discretionary powers of the Governors reduced provincial autonomy to a farce. Those powers and responsibilities frustrated the powers and functions of the provincial legislature and the executive. The Governor was made the sole judge to decide whether any particular matter fell within his discretionary scheme or affected any of his special responsibilities. The Governor could become a virtual dictator of the province within the letter of the law.
7. The powers of the provincial legislatures were very restricted. The upper chambers were deliberately made reactionary bodies.

NOTES

1. Bokhan, Abrar Husain, *Constitutional History of Indo-Pakistan,* 1964, M. Mohammad Suleman Qureshi & Sons, Lahore, pp. 96-7.

2. *The Government of India Act 1935,* Seventh Schedule and Sections 99, 100, 101, 102, 103 and 107.

3 *Government of India Act 1935,* Section 8.

4. Ibid.,

5. Ibid.,

6. Ibid.,

7. Ibid.,

8. Ibid.,

9. Ibid.,

10. Ibid.,

11. Ibid,

12. Ibid,

13. Ibid,

14. Ibid,

15. Ibid,

16. Ibid,

17. Ibid,

18. Ibid,

19. Ibid,

20. Ibid,

21. Ibid,

22. Ibid,

Section 12.

Section 18.

Schedule I.

Section 30, 31.

Section 33 to 37.

Section 110.

Section 42.

Section 45. Section 200. Section 205. Section 207. Section 206. Section 208. Section 50. Section 52. Fifth Schedule. Section 78. Section 88. Section 45.

3 Countdown to Partition

Although both the Congress and the Muslim League were critical of the Government of India Act, 1935, they decided to participate in the elections during the first weeks of 1937. Their electoral programmes were similar and it was expected that they would be able to co-operate in the provinces as they were already doing in the central assembly. The results of the elections shattered all such hopes. The Congress obtained outright majorities in five out of eleven provincial assemblies and was the largest party in two others. Congress ministries were formed in Bombay, Madras, Central Provinces, United Provinces, Bihar, Orissa, and the North-West Frontier Province. In Bengal and the Punjab, coalition governments were formed under the leadership of Muslims who were members neither of the Congress nor of the League. In the North-Western Frontier Province, Dr Khan Sahib, a Muslim nationalist, allied himself with the Congress but in the Hindu majority provinces where the League captured a substantial number of Muslim seats, it confidently expected to be asked to form coalition ministries with the Congress. Jinnah, as Chairman of the League's Election Board, made it clear that co-operation with the Congress was desired provided that it was a general coalition between independent parties. This expectation of the League was well founded, particularly in the United Provinces where the League's candidates had run on a common platform with the Congress and had won more Muslim seats than any other party and had received, what it considered to be, definite assurance of a coalition before the elections. When the election results were declared and Congress found itself in an overall majority, it offered the League terms which no independent political party could have accepted. Leaguers would be taken into the Cabinet only if the party dissolved its parliamentary organization and if all its representatives became members of the Congress. Thereafter, all policy decisions would be made by a majority vote

of the Congress Party, Obviously, suchhumiw terms were not acceptable to the League •

The leaders of Congress, now drunk victories, insisted that the Congress was the national organization and denied the existonl any other party. This was in effect an attean claim the right to be recognized as the if inheritor of power from the British. JawaM Nehru declared in March 1937 'there areonl)» forces in India today, British Imperialism ani Indian Nationalism as represented by| Congress'. Jinnah reminded him immediatelji there was a third party to be reckoned will,! Muslims. On coming into power, Coup ministries immediately ordered the hoisting olj Congress flag on government buildings $• *Bande Matram* was made compulsory ill legislative assemblies and educational mstitiit» Hindi was introduced in schools and COB Vidya Mandir Educational Scheme, which J introduced to confuse the Muslims about Isl^ ideology, was put into practice. The Coi$ imposed its will on the Muslim minorities

THE PAKISTAN (LAHORE) RESOLUTION, 1940 '

What occurred between 1937 and 1940 eye-opener for Muslims in India T Congress ministries in various provinces t. Muslims convinced them that they had to ST. for a separate homeland. One of the fount Hindu Mahasabha, Lala Lajpat Rai, sugges1: partition of India between Hindus and Mus • early as 1924. Savarkar, the PresiJ' Mahasabha, frequently referred to HIP Muslims as 'two nations'. Iqbal had p idea "of a Muslim state before the Leagix Rehmat Ali had coined the name of 'Pa^

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Punjab. It was also used as the basis of the SixPoint Programme spelled out by Mujibur Rehman in 1966 which ultimately led to the break up of Pakistan in 1971. It can, however, be said in defence of the Resolution that perhaps it was the only statement on which Jinnah could get consensus of the Muslim community all over India. There were, after all, contradictions between Muslim interests in majority and minority provinces, and between an apparently separatist demand for autonomous Muslim states and the need for a centre capable of ensuring the interests of Muslims in the rest of India.2

SECOND WORLD WAR AND THE TERMINATION OF CONGRESS MINISTRIES

The Second World War broke out on 1 September
1939, when Nazi Germany attacked Poland, and Britain and France declared war on Germany. The attitudes of the Congress and the League towards the British government during the Second World War were very different. Congress provincial ministries in Madras, Central Provinces, Bihar, United Provinces, Bombay, Orissa, and NorthWest Frontier Province resigned in October 1939 after passing identical resolutions in the assemblies of these provinces, deploring the ’Declaration of War without the consent of the Indian people’ and calling for the immediate treatment of India as ’an independent nation entitled to frame her own Constitution’. As the war continued, the Congress demand for immediate independence became more strident. In October 1940, Gandhi launched an individual civil disobedience campaign in which Congressmen were nominated by him to make speeches opposing India’s participation in the war and to court imprisonment. In the course of this, national leaders such as Patel and Nehru, together with most of the former Congress provincial ministers, were arrested.

The League’s attitude towards the government throughout the war was one of limited cooperation. A working committee resolution in September 1939 expressed deep sympathy for Poland, England, and France, but it urged that the

Indian Muslim troops should on no account* used to fight against Muslims. It also demands fair treatment for the Arabs in Palestine, called ” justice for Muslims in the Congress rule. provinces, and for the abandonment of the fedsf part of the Government of India Act, 1935 On. these points, they received a measure t satisfaction, and although the League reftsed i support the war effort unless the government firm. committed itself in favour of Pakistan, it provincial ministries gave quiet assistance

The League gained by the absence of Congra from the political scene. At one point or anotte there were League ministries in Bengal, thePunjit Sindh, the North-West Frontier, and Assam In remaining provinces, the assemblies te prorogued and the administration was earned«f by British Governors with official advisers Jim. regularly re-elected as President of the Leaji strongly asserted party discipline When Ik [Viceroy appointed the Muslim provincial prams as members of the National Defence Council in j
1941, Jinnah obtained their immediate resignations I because the invitations had not come

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throughpy| channels. By doing so, he lost the allegianc Fazlul Haq, Premier of Bengal, but the was strengthened for Fazlul Haq was repk., the loyal Leaguer, Nazimuddm. Similarly, al in the Punjab Khizar Hayat Khan defied and remained premier of a coalition govern^ even on his expulsion from the League, helostlk support of a great part of the Muslim electorate I this way, Jinnah was able to assert party authonlj over Muslim politics throughout India

THE CRIPPS' MISSION, 1942

In March 1942, it appeared to many people in India that the Japanese could over-run India with tlx same ease with which they had conquered SoiitiEast Asia. Subhas Chandra Bose, who had escaped from India in 1940, began organizing the kk National Army with Indian prisoners-of-w captured by the Japanese.

It was in these circumstances that the Bnti<- government sent a prominent member of the \L Cabinet, Sir Stafford Cripps, to India with a drar

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declaration for discussion arrived in Delhi on 23 Marc with Indian leaders, and de without achieving anything which Cripps brought v Constituent Assembly c representatives from the pr< representatives from the Inc upon the cessation of host understanding on behalf of t to accept and implement th by the Constituent Assemb province or state would be f not to adhere to the new ised. Meanwhile, the p mce or region unwillii proposed Union could stay 'ing entities if they so , ate Union, constitutiona of India, a roundabout conce of partition. The Muslim I Cripps Proposals because provinces would have signif basis of joint electorates Electorates. The British gove ontrol of the defence of Indi< war effort, but invited the imr participation of leaders of the the Indian people in the tas military, moral, and material i The Congress rejected the of Gandhi, who regarded it as of a failing bank. The Muslim j it because it did not c unequivocally. Of the Cong Rajgopalachari favoured acc< offer and the formation of a prosecuting the war. He clearh obstacle in the way of India's fr security was lack of agreer Congress and the Muslim L leadership, Congress membe legislature passed a resolutic recommending acceptance of Pa The leaders in control of Con proposal and Rajgopalachari wa;

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declaration for discussion with Indian leaders. He arrived in Delhi on 23 March 1942, had discussions with Indian leaders, and departed a fortnight later without achieving anything. The draft declaration which Cripps brought with him promised a Constituent Assembly consisting of elected representatives from the provinces and nominated representatives from the Indian states immediately upon the cessation of hostility. It also gave an understanding on behalf of the British government to accept and implement the Constitution framed by the Constituent Assembly, provided that any province or state would be free either to adhere or not to adhere to the new provisions cripps, proposed. Meanwhile, the provision was that any province or region unwilling to come into the proposed Union could stay out, and if the non acceding entities if they so desired could form a Separate Union, constitutionally equal to the Union of India, a roundabout concession of the principle of partition. The Muslim League turned down Cripps Proposals because the non-acceding provinces would have signify their assent on the basis of joint electorates and not Separate Electorates. The British government would retain ontrol of the

defence of India as part of the world jr effort, but invited the immediate and effective participation of leaders of the principal section of the Indian people in the task of organizing the military, moral, and material resources of India.3

The Congress rejected the offer on the advice of Gandhi, who regarded it as a post-dated cheque of a failing bank. The Muslim League also rejected it because it did not concede Pakistan unequivocally. Of the Congress leaders, only . Rajgopalachari favoured acceptance of Cripps' offer and the formation of a national front for prosecuting the war. He clearly saw that the main obstacle in the way of India's freedom and national security was lack of agreement, between the Congress and the Muslim League. Under his leadership, Congress members in. the Madras legislature passed a resolution in April 1942, recommending acceptance of Pakistan in principle. The leaders in control of Congress rejected the proposal and Rajgopalachari was driven into exile.6

THE 'QUIT INDIA' MOVEMENT

On the failure of the Cripps' Mission, Gandhi began to press for an immediate withdrawal of the British from India and the transfer of power to the Congress without a prior settlement with any other party. According to him, the presence of the British in India was an invitation to Japan to invade it. Their withdrawal would remove such bait. Even if it did not, he thought that India would be in a better position to cope with the invasion. These ideas were formally adopted by the All India Congress committee meeting held in Bombay on
8 August 1942, in the famous 'Quit India' Resolution which demanded the withdrawal of British power from India and authorized the starting of a mass struggle, on non-violent lines, on the widest possible scale. Gandhi called the resolution open rebellion. This time, the government did not take time to act. Gandhi and other Congress leaders were arrested and Congress committees were declared to be unlawful associations. Widespread disorder soon broke out. Railways, post offices, telegraph and telephone systems, and police stations were attacked.

The Muslim League saw in these actions an attempt to coerce the British into handing over power to a Hindu oligarchy led by the Congress Party. The Muslims were not any less insistent on the attainment of independence but they felt that the purpose of the Congress agitation was to bring about the establishment of Hindu raj and to deal a death blow to the Muslim goal of Pakistan. To Gandhi's slogan of 'Quit India', Jinnah replied, 'Divide and Quit'.

In May 1944, Gandhi was released on medical grounds. Soon afterwards, he wrote to the Viceroy offering renunciation of the civil disobedience programme and full co-operation in the war effort by the Congress if a declaration of immediate Indian independence was made and a national government responsible to the central assembly was formed. During the earlier years of the war when the British were sustaining reverse after reverse, Gandhi had objected to Indian participation, giving a fundamental religious principle of *Ahinsa* (non-violence) as the reason. Now, with Allied victory assured, *Ahinsa* was

conveniently laid aside so that Congress could gain its political goal.

ELECTIONS TO PROVINCIAL AND CENTRAL LEGISLATURES, **1945-46**

The Second World War came to an end with the surrender of Japan on 15 August 1945. British general elections at the end of July resulted in a large Labour majority. Congress leaders who had cultivated close relations with the leaders of the Labour Party over the years felt elated at this unexpected turn of events and immediately started exploiting their position of vantage. British policy had consistently favoured the maintenance of India as a single administrative and political entity. Conservatives like Lord Linlithgow had emphasized it as much as had the soldier statesman, Lord Wavell. Congress leaders expected even stronger support from the Labour Party on this issue which was dividing the Congress and the Muslim League. The issue was put to test at the general elections for the provincial and central legislatures in the winter of 1945-46. Both Congress and the Muslim League exerted themselves to the utmost because the constitutional future of India depended on the outcome of these elections. The results showed a decisive victory for the idea of Pakistan. The League won all Muslim seats in the Central Assembly and 446 out of a total 495 Muslim seats in provincial assemblies. The Congress won a similar victory in the Hindu constituencies and came to power in all the provinces that had a Hindu majority. In Bengal, the Muslim League won 113 out of a total 119 Muslim seats, and was able to form a ministry with Huseyn Shaheed Suhrawardy as Chief Minister. In the Punjab, the Muslim League captured 79 out of 86 Muslim seats. In Sindh, a Muslim League ministry was formed. Only in the North-West Frontier Province did the League fall short of a majority by winning only 17 out of a total of 36 Muslim seats and the Congress formed a ministry under Dr Khan Sahib.5

The 1946 elections proved conclusively that the Muslim League alone represented the Muslims of India, but this only increased the hostility of the Congress towards it. Instead of recognizing the

representative character of the Muslim Leapei coming to terms with it, the Congress persist^ its policy of dividing the Muslims and deirJ political power to the trusted representatives ofi Muslim community even in the provinces win Muslims were in a majority. In this way, Conj deepened Muslim suspicions, intensified i munal discord, and made an amicable settlei impossible.

THE CABINET MISSION PLAN, **1946**

On 9 February 1946, the British gov announced its decision to send a special to India consisting of three Cabinet Ministers seek, in association with Viceroy Lord Wavell in consultation with Indian leaders, an a on constitutional issues. The Cabinet consisting of Lord Pethwick-Lawrence, Secretary of State for India, Sir Stafford ” the President of the Board of Trade, and A.’ Alexander, the first Lord of Admiralty, arrived i New Delhi on 24 March 1946. At that time,’ were serious differences on constitutional issn’ between the Congress and Muslim League, Tit] Congress wanted a single Constituent AssemblyH draw up a Constitution for an all-India fedenl1

government and legislatures dealing with affairs, defence, communications, fundamenlill rights, currencies, customs, and planning as wtl as such other subjects as, on scrutiny, might k found to be intimately allied to them. The” League had passed a resolution demanding tin the six provinces of Bengal and Assam in tk! north-east, and the Punjab, North-West Frontier Province, Sindh and Balochistan in the north-vis, be constituted into a sovereign independent stt of Pakistan and that two separate constitutionmaking bodies be set up by the peoples of Pakistan and Hindustan for the purpose of framing’’ respective Constitutions.

The Cabinet Mission conducted individual negotiations with the top leaders of the two parties and, in early May 1946, arranged a joint meeting in Simla in which both Congress and the Muslim League were duly represented. However, neithei party accepted the proposals of the other. Tk

f fundamental issue was whether there | one sovereign state for the whole subco *i* two independent states. Either solutioi the presence of minorities and both th< and the Muslim League agreed that should receive adequate constitutional Indeed, this was the only common g mediation of the Cabinet Mission couli the gulf between them.

On 16 May 1946, the Cabinet Mis’ Viceroy published a statement containi solution to the constitutional probler point of the plan was the preservation state. On administrative, economic, grounds, they rejected the propc independent sovereign states. The J
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1. There should be a Union of both British India and the which should deal with subjects: foreign affair; communications, and shoul necessary to raise the fins these subjects.
2. India was to be divided i A, B, and C. Zone B wa Punjab, Sindh, and No Province. Zone C was tc and Assam. Zone A wa rest of the provinces of were to settle the provin the provinces included ii were also to decid constitution should b provinces and, if so, v should deal. The repr zones of India and the then to re-assemble < Constitution.

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Jritish government d a special mission Cabinet Ministers to oy Lord Wavell and aders, an agreement e Cabinet Mission ck-Lawrence, the Sir Stafford Cripps, jf Trade, and A.V. idmiralty, arrived in i. At that time, there institutional issues luslim League. The stituent Assembly to an all-India federal lealing with foreign itions, fundamental nd planning as well i scrutiny, might be o them. The Muslim ion demanding that and Assam in the Sforth-West Frontier an in the north-west, m independent state ;parate constitution-
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fundamental issue was whether there should be one sovereign state for the whole subcontinent, or two independent states. Either solution involved the presence of minorities and both the Congress and the Muslim League agreed that minorities should receive adequate constitutional protection. Indeed, this was the only common ground. The mediation of the Cabinet Mission could not bridge the gulf between them.

On 16 May 1946, the Cabinet Mission and the Viceroy published a statement containing their own solution to the constitutional problem. The focal point of the plan was the preservation of the single state. On administrative, economic, and military grounds, they rejected the proposal for two independent sovereign states. The Mission could see no justification for including within a sovereign Pakistan those districts of the Punjab, Bengal, and Assam in which the population was predominantly non-Muslim. The Mission, however, saw force in the apprehension of Muslims that their cultural, political, and social life may submerge in a purely unitary India dominated by Hindus.

The Cabinet Mission, therefore, made the recommendation that the new Constitution of India should be made on the following lines:

1. There should be a Union of India, embracing both British India and the Princely states which should deal with the following subjects: foreign affairs, defence, and communications, and should have the powers necessary to raise the finances required for these subjects.

2. India was to be divided into three ZonesA, B, and C. Zone B was to consist of the Punjab, Sindh, and North-West Frontier Province. Zone C was to consist of Bengal and Assam. Zone A was to consist of the rest of the provinces of India. These zones were to settle the provincial constitution for the provinces included in each section. They were also to decide

whether group constitution should be set up for these provinces and, if so, with what subjects it should deal. The representatives of these zones of India and the Princely States were then to re-assemble and settle the Union Constitution.

3. Regarding the constitution-making machinery, it was provided that the Legislative Assemblies of the provinces would elect the members of that body on the basis of one representative for one million of the population. Muslim and Sikh legislators were to elect the quota of their communities determined on the basis of population. Others were to elect the representatives for the rest of the population.

4. The Union should have an executive and a legislature constituted of representatives from British India and the Princely States. Any question raising a major communal issue in the legislature should require for its decision a majority of the representatives present and voting of each of the two minor communities as well as a majority of all the members present and voting.

5. All subjects other than the Union subjects and all residuary powers would vest in the provinces.

6. The states would retain all subjects and powers other than those ceded to the Union.

7. Provinces would be free to form groups with executives and legislatures, and each group could determine the provincial subjects to be taken in common.

8. The Constitution of the Union and of the group would contain a provision whereby any province could, by a majority vote of its Legislative Assembly, call for a reconsideration of the terms of the Constitution after an initial period of ten years and at ten yearly intervals thereafter.6

An interim government representing the major parties had to be formed by the Viceroy to carry on the administration. The paramountcy of the British government over the Princely States would lapse when the Indian Union came into being and it would be for each state to negotiate its future relationship with the Union.

On 6 June 1946, the Muslim League, satisfied that Muslim interests would be safeguarded because of the grouping proposal, accepted the plan and agreed to join the interim government ’in the hope that it would ultimately result in the establishment of a complete Pakistan’; and after

obtaining an assurance from the Viceroy that ’we shall go ahead with the plan, so far as circumstances permit, if either party accepts’.7 On
26 June, the Congress accepted the constitutionmaking part of the plan but refused to join the interim government. As a result, the plan was shelved and the Cabinet Mission then adjourned further discussions of the interim government until elections for the Constituent Assembly had taken place. Meanwhile, the Viceroy formed a caretaker government of civil servants.

Maulana Abul Kalam Azad, who was the President of the Congress at that time, favoured the Cabinet Mission Plan and paid tribute to the way in which the Mission conducted the negotiations.8 According to him, the acceptance of the Cabinet Mission plan by both Congress and Muslim League was a glorious event in the history of the freedom movement in India. It is unfortunate that Maulana Azad decided to retire as the President of Congress in 1946 despite the general feeling in the party that since he had conducted the negotiations till then, he should be charged with the task of bringing them to a successful close and implementing them.9 Azad chose Nehru as his successor, a step he regretted later because it was Nehru who sabotaged the plan. He stated that the Congress had agreed only to participate in the Constituent Assembly and regarded itself free to change or modify the Cabinet Mission plan as it thought best. Nehru was wrong and the matters settled in the plan could not be the changed unilaterally by Congress without the consent of the other parties to the agreement.10 Jinnah immediately issued a statement that this declaration of Nehru demands a review of the whole situation. The Muslim League, according to him, had accepted the plan as it was assured that the Congress had also accepted the scheme and that the plan would be the basis of the future Constitution of India. Since the Congress President had declared that the Congress could change the scheme through its majority in the Constituent Assembly, this would mean that the minorities were placed at the mercy of the majority.”

DIRECT ACTION PLAN AND THE INTERIM GOVERNMENT

The Muslim League regarded the failure of A! Cabinet Mission plan as a direct breach of flu promise held out by the Viceroy. Jinnah’s vw that since Congress had rejected the Mission^ the Viceroy should call upon the League to f«i the government, was correct. The League accused the Viceroy of having promised that fc interim government would consist of fivt Congress, five League, and two other me but subsequently, this proposal was modified ti include six Congress, five League, and three otto members. The League also strongly challenged tin good faith of the Congress in accepting the long term proposals citing the statement of Nehru n
10 July that ’the big probability is that there ml be no grouping’.12

The League thus withdrew its acceptance of the proposal, called on all Muslims to renounce fa titles, and decided on a campaign of ’Direct Action’ to achieve Pakistan and to get rid of tin slavery under the British. There was no otk course open to the Muslim League becaust otherwise there would be Hindu domination at the centre in times to come. The resolution of ’Direct Action’ authorized the working committees of the League to prepare a programme immediately

16 August was fixed as ’Direct Action Day’ who Hindu-Muslim communal riots broke out in Calcutta on an unprecedented scale. In Calcutti alone, four thousand people were killed, another five thousand were killed in Bihar, and there fifty thousand homeless refugees in East Benu

The Congress withdrew its objection to entering the interim government, and on 24 August, the Viceroy’s Council was re-formed with all its members nominated by Congress, with Nehru as its vice president. The Congress government at the centre did not act to prevent communal riots an! Muslim interests suffered due to their lack of representation at the centre. The Muslim League then decided to join the interim government and u October 1946, five League nominees led by Liaquat ”Ali Khan, including a scheduled caste Hindu, entered the interim government.

CONSTITUENT ASSE ATTLEE’S STATEME FEBRUARY **1947**

Elections to the Constituen place in July 1946 and the met for the first time in Ne
1946. Out of 296 members, secured 212 seats, and the Muslim League refused deliberations. Jinnah and J London, where an attempt conflicting interpretations < and to induce the Leagu< proceedings of the Ass Congress was proceeding wi in the absence of th
22 January 1947, the ’Objec passed.

On 31 January 1947, the a resolution protesting that of postponing the sittings fundamental points of prini had not only acted on its ov Cabinet Mission plan but h the Assembly which were cl of the plan. The ’Objectiv by the Constituent Assemb proclaimed an independent of procedure had been ma directions in the plan whi central Constitution was no the provincial and regiona had been settled. The Le; upon the British governmi plan had failed.

On 20 February 1947, A Minister, made an impo announced that the British g full self-government to Brit at the latest. In the mean statement, preparatory me£ hand in advance and 1 introduced in due course to transfer of power. The Bri negotiate an agreement re; out of the transfer of pow of those to whom they pro The future of the Princely

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CONSTITUENT ASSEMBLY AND ATTLEE’S STATEMENT, FEBRUARY 1947

Elections to the Constituent Assembly had taken place in July 1946 and the Constituent Assembly met for the first time in New Delhi in December
1946. Out of 296 members, Congress and its allies secured 212 seats, and the League 73 seats. The Muslim League refused to participate in its deliberations. Jinnah and Nehru were invited to London, where an attempt was made to reconcile conflicting interpretations of the Mission’s plan, and to induce the League to take part in the proceedings of the Assembly. Meanwhile, Congress was proceeding with constitution-making in the absence of the League and on
22 January 1947, the ’Objectives Resolution’ was passed.

On 31 January 1947, the Muslim League passed a resolution protesting that the Congress, instead of postponing the sittings of the Assembly until fundamental points of principle had been settled, had not only acted on its own interpretation of the Cabinet Mission plan but had forced decisions in the Assembly which were clearly outside the scope of the plan. The ’Objectives Resolution’, passed by the Constituent Assembly on 22 January, had proclaimed an independent federal republic. Rules of procedure had been made in violation of the directions in the plan which envisaged that the central Constitution was not to be considered until the provincial and regional (group) constitutions had been settled. The League, therefore, called upon the British government to declare that the plan had failed.

On 20 February 1947, Attlee, the British Prime Minister, made an important declaration. He announced that the British government would grant full self-government to British India by June 1948 at the latest. In the meantime, according to the statement, preparatory measures would be put in hand in advance and legislation would be introduced in due course to give effect to the

final transfer of power. The British government would negotiate an agreement regarding matters arising out of the transfer of power with representatives of those to whom they propose to transfer power. The future of the Princely States had to wait until

the date of final transfer of power. It was also announced that Lord Mountbatten was to succeed Lord Wavell as the Viceroy of India, who would be entrusted with the task of transferring power into Indian hands.

THE MOUNTBATTEN PLAN,
3 JUNE 1947

Lord Mountbatten reached New Delhi on 24 March
1947 and declared that he would complete the work of transfer of power into Indian hands within the next few months in consultation with Indian leaders. On his arrival, he was faced with a desperate situation. The central Cabinet was so divided as to be almost impotent; in the Punjab, the Unionist government was tottering under the attack of the Muslim League; and in the NorthWest Frontier, there was a Muslim League civil disobedience campaign. All over the country, fierce communal clashes were taking place and private armies were being formed for the final struggle for power. The civil services were bitterly divided on communal lines and headed by dispirited Englishmen, anxious to retire. British troops were already being repatriated, and the morale of the Indian Army was uncertain.14 It was evident that the unity of India could not be maintained. Mountbatten started a new series of conferences and talks with the Congress, Muslim League, and Sikh leaders. He tried to persuade Jinnah to join the Constituent Assembly, but without success. After all, Jinnah understood the consequences because it would have meant submission and capitulation to brute majority as the League was out-numbered by the Congress by
73 to 199. Mountbatten later claimed that he had worked ’hand in glove’ with Indian leaders at every step of development of the new plan, but this claim is not substantiated from the writings of a number of British authors who had access to the inner story of the transfer of power. It is now quite clear that his final draft for the transfer of power was prepared in consultation with Mountbatten’s Hindu constitutional adviser, V.P. Menon, and that this draft had been shown only to Nehru. The Muslim League and its leaders were not taken into confidence at the time of making the final draft.15

On 3 June 1947, the British government accepted the principle of the partition of India and undertook to hand over dominion status, to the successor governments on 15 August with the implicit right to secede from the Commonwealth.

The Mountbatten Plan of 3 June 1947, did not elaborate any constitutional proposals. It outlined the procedure to ascertain the wishes of the people of those areas in which the majority of representatives boycotted the Constituent Assembly and whether their Constitution should be framed by the existing Constituent Assembly or by a new and separate Constituent Assembly, in other words to determine whether they wished to join Pakistan or not. In Bengal, the Punjab, and Sindh, the choice was left to the member's of the provincial legislative assemblies. But the assemblies of Bengal and the Punjab would each meet in two parts, one representing the Muslim majority districts and the other the Hindu majority districts. Each part would vote separately on the questions, whether or not the province should be partitioned and if so which Constituent Assembly the areas it represented should join. But there was also a provision that if any member of the Legislative Assembly so demanded, a vote of the whole should be taken if the two parts decided to remain united. If in either part of the Legislative Assembly the verdict went in favour of partition, the province would be provisionally divided on the basis of Muslim majority and non-Muslim districts. Thereafter, a boundary commission would demarcate the boundaries of the two parts of the province on the basis of contiguous majority areas of Muslim and non-Muslim.

The North-West Frontier Province presented a problem. Though it was a Muslim majority province it still had a Congress ministry in power. The responsibility of making the crucial decision of joining India or Pakistan could not fairly be entrusted to the Provincial Assembly, in which Hindu and Sikh minorities, though counting only eight per cent of the population, had been given no less than twelve seats out of a total of fifty. It was, therefore, necessary to give the province an opportunity of deciding whether it wished to form a part of Pakistan. Hence the plan provided that the Viceroy, in consultation with the provincial

government, should arrange for a referendum of the electors to the Assembly.

If the decision in Bengal should go in favourof partition, a similar referendum would be held i Muslim majority districts of Sylhet in Assai province. Special administrative arrangement were made to determine the wishes of the peopk of Balochistan.

The new plan concluded with an announcetnat which promised to make the transfer of pow much simpler and even earlier than June 194 The decision was to introduce legislation durinf the current session of the British Parliament t> the transfer of power in 1947 on a dominion sat.' basis to either one or two successor authonw according to the decision taken under the plar This would be without prejudice to the right of th Constituent Assemblies to decide in due cour\ whether India or Pakistan should remain \ntir the British Commonwealth. It soon became knor that 15 August 1947 was the date on which i British would hand over power.

Both the Congress and the Muslim Leagii accepted the plan. The Muslim majority parts o' India decided in favour of Pakistan. By the endr June, the procedure for deciding on the unit; r partition of Bengal and the Punjab had betworked out, in each case it had resulted in a verdi; in favour of partition. The Sindh Assent registered this decision on 26 June, 1947. Ih referendum in the North-West Frontier Provma and in the district of Sylhet similarly resulted i favour of Pakistan. In Punjab, Khizar Ha;i Tiwana, who headed the Unionist mimstn resigned making way for the Nawab of Mamdoi leader of the Muslim League in Punjab, to fin the government.

It may be pointed out here that the partition! •*of* Bengal and the Punjab was a painful act. ft percentage of Muslim population in Bengal *u*
55 and in the Punjab 57.16 Both the provinces ougk to have joined Pakistan as a whole. Perhaps tk vagueness of the Lahore Resolution led to tk partitioning of these provinces. Reported!) Mountbatten pointed out to League leaders tht the area of Pakistan, as envisaged in the Latot Resolution, did not include the entire provinces«' Punjab, Bengal, and Assam because the Late Resolution carefully used the phrase 'areas 11

which the Muslims are numerically as in the north-western and eastern z If the framers of the Lahore Resolu dear and confident about Muslim r entire provinces of Punjab, Bengal they would have been more specific Mountbatten argued, the Muslim Lei oppose the partition of these provinc clearly hinted at by the Lahore Res used the term 'areas' without clearly provinces the term 'areas' constitute

The increasing tempo which ma plan, as compared to the Cabinet was further accelerated by the Indian Bill. Within one month, the Bill referred to the Viceroy, and discusse the Congress and League leaders, so it was introduced in the British p!
18 July, only fourteen days after its the Bill received the Royal assent. Oi the Indian Independence Act was pa: birth of the new dominions was n splitting of the interim government into two groups, representing the t governments-India and Pakistan.18

Lord Mountbatten went to Karacl inaugurate the new state of Pakistan
1947.

THE INDEPENDENCE ACT,

The Independence Act, 1947 was er effect to the Mountbatten Plan of 3 J formalized and legalized what had 1 by the British government as a pi people of India. The Act provided fo of India and the establishment of tw< dominions to be known as India and] effect from the 15 August 1947.1! government was to cease to have co affairs of the dominions, provinces, > the dominions after 15 August 1947. of the sovereignty of the British gov the Indian states, treaties and agreerr the British and any of the authoritie: areas also lapsed.20

referendum of

which the Muslims are numerically in a majority asm the north-western and eastern zones of India'. If the framers of the Lahore Resolution had been clear and confident about Muslim majority in the entire provinces of Punjab, Bengal, and Assam, they would have been more specific. Accordingly, Mountbatten argued, the Muslim League could not oppose the partition of these provinces as this was clearly hinted at by the Lahore Resolution which used the term 'areas' without clearly defining what provinces the term 'areas' constituted.17

The increasing tempo which marked the new plan, as compared to the Cabinet Mission plan, was further accelerated by the Indian Independence Bill. Within one month, the Bill was drafted, referred to the Viceroy, and discussed by him with Ike Congress and League leaders, so that on 4 July, it was introduced in the British parliament. On
18 July, only fourteen days after its introduction, the Bill received the Royal assent. On the day after the Indian Independence Act was passed, the legal birth of the new dominions was marked by the splitting of the interim government in New Delhi into two groups, representing the two successor governments-India and Pakistan.18

Lord Mountbatten went to Karachi to formally inaugurate the new state of Pakistan on 14 August 1947

THE INDEPENDENCE ACT, **1947**

Hie Independence Act, 1947 was enacted to give effect to the Mountbatten Plan of 3 June 1947. He formalized and legalized what had been held out by the British government as a promise to the people of India. The Act provided for the partition of India and the establishment of two independent dominions to be known as India and Pakistan, with effect from the *15* August 1947.19 The British government was to cease to have control over the affairs of the dominions, provinces, or any part of the dominions after *15* August 1947. With the end of the sovereignty of the British government over the Indian states, treaties and agreements between the British and any of the authorities in the tribal areas also lapsed.20

COUNTDOWN TO PARTITION

43

The salient features and the provisions of the Act

are enumerated below:

I. A Governor-General was provided for each of the new dominions who was to be appointed by the Crown, subject to the law of the legislature of either of the new dominions; the same person could be Governor-General of both the new dominions.21

2. The legislatures of the two dominions were made fully sovereign and were given powers to make laws having extra-territorial jurisdiction. The Governor-General of each dominion had full

power to assent. No Act of Parliament of the United Kingdom on or after 15 August could extend to any of the new dominions.22

3. The Constituent Assembly of each of the dominions was given the power to frame a Constitution; pending which each of the dominions and all provinces and other parts thereof were to be governed as nearly as could be in accordance with the Government of India Act, 1935. The Governor-General of each dominion was empowered till 31 March 194823 to make necessary omissions, additions, adaptations, and modifications in the provisions of the Government of India Act, 1935 and of the Orders in Council, rules and other instruments made thereunder.24 After 31 March 1948 (later extended to 31 March 1949), the Constituent Assembly of a dominion had the power to make such modification or adaptation. Until a new Constitution was framed for each dominion, the existing Constituent Assemblies were temporarily made the dominion legislatures.

4. The office of the Secretary of State for India was abolished25 and the provisions of the Government of India Act, 1935 relating to appointments to the Civil Service or civil posts under the Crown by the Secretary of State ceased to operate. However, all those who had been appointed by the Secretary of State before 15 August 1947 to the Civil Service of the Crown or those who had been appointed as Judges of the Federal Court or

a High Court before such date were to continue as such in either of the dominions.26

5. The Indian armed forces were divided between the two dominions and the GovernorsGeneral were to make provision for such division for the command and governance of those forces.27 British forces in India, including His Majesty's Air Force and Naval Force, were not to form part of the Indian forces on or after 15 August 1947.28

6. The existing Instruments of Instructions to the Governor-General and the Governors of the provinces would lapse and they would act without such Instruments.29

7. The laws of British India and of the several parts thereof existing immediately before 15 August 1947 would, as far as applicable and with necessary adaptations, continue as the laws of each of the new dominions and the several parts thereof until other provisions were made by laws of the legislature of the dominion in question or by any other legislature or other authority having power in that behalf.30

8. The province of Bengal, as constituted under the Government of India Act, 1935, ceased to exist and in its place were constituted two provinces known as East Bengal and West Bengal. The District of Sylhet was to form part of the new province of East Bengal and the boundaries of these two provinces were to be determined by the award of a boundary commission appointed by the GovernorGeneral of British India.31

9. The province of the Punjab, as constituted under the Government of India Act, 1935 ceased to exist and in its place two new provinces were constituted to be known as West Punjab32 and East Punjab. The boundaries of the two new provinces were to be determined by a boundary commission appointed by the Governor-General of British India and, until such determination, the districts specified in the Second Schedule of the Act were to be treated as territories comprising the new province of West Punjab. The remaining territories in the province of the Punjab at the time of the passing of the

Act were to comprise the territories of tit new province of East Punjab.33

THE PRINCELY STATES OF INDIA

As discussed above, the Indian Independence Aa
1947, terminated all treaties and agreemeats between the British government and the rulers«' Indian states as of 15 August 1947. Lore Mountbatten, at a press conference held on 4 in 1947, said that the Indian states had independent in treaty relations with the British all with the lapse of paramountcy, they would assort an independent status and were absolutely fretlij choose to join one Constituent Assembly or fej other, or make some other arrangement.34

There were 562 states throughout British Mi Pakistan was contiguous with only fourteen, whkk included the State of Jammu and Kashmir, tit rest were geographically linked with the India Union. On the question of whether the states coi become independent, there was a differenced

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opinion between the Congress and the Musk League. The Congress maintained that since At states did not have the means to establish international relations or to declare war, they coi not become sovereign independent states ail should enter the political structure of one or tk other dominion government. The League felt tk the states were under no compulsion to join eifa dominion and should be left free to decide fa themselves. However, Jinnah said it was in tin mutual interest of the states and the dominion governments to make necessary adjustments 1 Moreover, there was real conflict of interest o»e i the two largest states, Kashmir and HyderaW* Kashmir, contiguous to Pakistan, had a Muski majority and a Hindu ruler. Hyderabad, contiguous; to India, had a Hindu majority and a Muslim nils i India wanted to hold on to both Kashmir aaij Hyderabad. Kashmir was an integral part of tk1 Muslim concept of Pakistan. Hyderabad, whit: had been ruled by a Muslim dynasty from the toof the Mughal Empire, occupied a special place the sentiments of Muslim India. Muslim Leae,, leaders were in deep sympathy with Hyderabaddesire to-be independent.

With the persuasion of Mountba skill of V.P. Menon, secretary to tr department, and the cunning of Sarc minister in charge, the accession of India continued and the fear balkanization of India was put to resl drew up an instrument of accessioi external affairs, and communic; standstill agreement to cover existing for customs, currency, and similar r Patel assured the Princes that their s autonomous but for the three abov< scheme was simple and statesman! entering into long and difficult ne each individual state, every state with two standard documents f variation was allowed. It was interest of most states to enter i agreement but they were told th possible without an instrument of *i* Patel and V.P. Menon handled th and skilfully but the real credit fi them into signing the instrument < to Mountbatten's diplomacy.36 *I* Chamber of Princes on 25 July 19 as Crown Representative and ga
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By contrast, he did nothi although as Crown Represent: equal duty to both dominions. (every disputed case of access weight in favour of India. He a role in the occupation of Jamn the Indian forces. When Mou the states of Jodhpur and Ja accede to Pakistan, he inten Maharaja of Jodhpur that alth legal standpoint he could ace action would conflict wi underlying the partition of It into believing that serious con break out in his state. Conseq and Jaisalmir acceded to Indi to the principle underlying 1 'when he accepted the a dominion of Kapurthala whic
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With the persuasion of Mountbatten and the skill of V.P. Menon, secretary to the concerned department, and the cunning of Sardar Patel, the minister in charge, the accession of the states to India continued and the fear of possible balkanization of India was put to rest. V.P. Menon drew up an instrument of accession for defence, external affairs, and communications and a standstill agreement to cover existing arrangements for customs, currency, and similar matters. Sardar Patel assured the Princes that their states would be autonomous but for the three above subjects. The scheme was simple and statesmanlike. Instead of entering into long and difficult negotiations with each individual state, every state was confronted with two standard documents from which no variation was allowed. It was in the obvious interest of most states to enter into a standstill agreement but they were told that this was not possible without an instrument of accession, Sardar Patel and V.P. Menon handled the Princes firmly and skilfully but the real credit for manoeuvering them into signing the instrument of accession goes to Mountbatten's diplomacy.36 He addressed the Chamber of Princes on 25 July 1947 in his capacity as Crown Representative and gave a reception on
28 July. On both occasions, he advised, canvassed, and persuaded the Princes to sign the instrument of accession in favour of the dominion of India.

By contrast, he did nothing for Pakistan although as Crown Representative he owed an equal duty to both dominions. On the contrary, in every disputed case of accession, he threw his weight in favour of India. He also played a major role in the occupation of Jammu and Kashmir by the Indian forces. When Mountbatten learnt that the states of Jodhpur and Jaisalmer wanted to accede to Pakistan, he intervened and told the Maharaja of Jodhpur that although from a purely legal standpoint he could accede to Pakistan, his action would conflict with the principles underlying the partition of India. He was scared into believing that serious communal trouble might break out in his state. Consequently, both Jodhpur and Jaisalmir acceded to India. He paid little heed to the principle underlying the partition of India 'when he accepted the accession to Indian dominion of Kapurthala which had Sikh rulers but
64 per cent of the population was Muslim'.37

In marked contrast to the spate of accession to the Indian dominion, no state acceded to Pakistan before 15 August. The states that were contiguous to West Pakistan and had a Muslim majority and Muslim rulers were quite a few, Bahawalpur, Khairpur, Kalat, Las Bela, Kharan, Makran, Dir, Swat, Amb and Chitral. Bahawalpur acceded to Pakistan on 3 October 1947, followed by Khairpur, Chitral, Swat, Dir, and Amb during the next few months. The States of Las Bela, Makran, Kharan, and Kalat, after protracted negotiations, acceded to Pakistan by the end of March 1948.38

The Princes, who were lured into signing the instruments of accession in favour of India, met a sad end. They lost control of their states, even their own assets, in a few years and their states were absorbed into the contiguous state provinces of the Indian Union.

The haste in the implementation of the partition plan accomplished within two-and-a-half months led to hectic negotiations. It has been widely felt that the decision to advance the date of the transfer of power from June 1948 to August 1947 was a disastrous error of judgment. In two-and-a-half months, a new federal government had to be set up in Karachi and the services and assets of the Indian government and of three provincial governments had to be divided. On

15 August, authority was handed over to provincial governments whose boundaries had not been defined, half of whose police and administrative services were in the process of transfer, and East Punjab did not even have a temporary capital. This chaotic situation led to mass murders, abductions, and arson in every district of the Punjab which the authorities had neither the will nor the capacity to check.

The matter of accession of states remained unsettled, leading to permanent conflict between India and Pakistan over the state of Jammu and Kashmir, resulting in repeated hostilities between the two neighbouring countries. Pakistan was suddenly saddled with the colossal problem of settling 10 million refugees due to the disturbances that led to an exchange of population between West Punjab and East Punjab, coupled with a million deaths and abductions. It seems that every effort was made to create problems for Pakistan at its very inception with the expectation on the part

of Indian Congress that it would soon collapse under the burden of its problems.

Another misfortune that befell Pakistan at the crucial stage of transfer of power was that the incumbent Governor-General of India was biased and unfair towards Pakistan, and partial towards India. It is an acknowledged fact of history that Mountbatten was very friendly to Nehru and hostile to Jinnah. He expressed his dislike for Jinnah in a number of statements and even in his memoirs.39 He did everything to inconvenience the Muslim League leadership and to help the Indian Congress. Mountbatten ensured that the birth of Pakistan was made as painful as possible.

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PART TWO

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PART TWO

Constitutional and Political

Developments from

August 1947 to October 1958

4 Birth of a

Among the original members of th Assembly, Muhammad Ali Jinnah1 eminent. He was not only the Govi and President of the Constituent ASSJ architect and founder of Pakistai dynamic leadership, Muslims of the were united. His had been the ama ment of raising the Muslim League in (1937-47) from a poorly orga1 representing a minority of a minority force which could successfully c British and Hindus combined. Whei up the leadership of the Muslim Le he found the Muslims of India a dei weak lot without leadership or orgi surrounded by an intolerant and at majority which possessed vast numbers, wealth, and propaganda. \ period, he became the accredited Muslims who affectionately bestowi title of Quaid-e-Azam, the great lea<

After being elected the first pr< Constitutent Assembly on 11 Augus delivered his memorable presidentia indeed one of his most importan which he clearly outlined the ideal *i* Pakistan, its constitutional structure, and aspirations of its people. Also cl were the two main functions of tf Assembly; framing the future C< Pakistan and its functioning as a si being the federal legislature of Paki

The first duty of the governmen was maintenance of law and order of life, property, and religious \ citizens. He identified bribery ai (which he called ’a poison’), bla nepotism, and jobbery as the j afflicting society which had to be st called upon the majority and minorit in Pakistan, Muslims and Hindus r bury the hatchet, forget the past, £

4 Birth of a Nation and Death of Jinnah

Among the original members of the Constituent Assembly, Muhammad Ali Jinnah1 was the most eminent. He was not only the Governor-General and President of the Constituent Assembly, but the architect and founder of Pakistan. Under his dynamic leadership, Muslims of the subcontinent were united. His had been the amazing achievement of raising the Muslim League in just ten years ’1937-47) from a poorly organized party, representing a minority of a minority, to a political force which could successfully challenge the British and Hindus combined. When Jinnah took up the leadership of the Muslim League in 1937, he found the Muslims of India a demoralized and weak lot without leadership or organization, and surrounded by an intolerant and arrogant Hindu majority which possessed vast resources in numbers, wealth, and propaganda. Within a short period, he became the accredited leader of the Muslims who affectionately bestowed on him the title of Quaid-e-Azam, the great leader.

After being elected the first president of the Constitutent Assembly on 11 August 1947, Jinnah delivered his memorable presidential address. It is indeed one of his most important speeches in which he clearly outlined the ideal and concept of Pakistan, its constitutional structure, and the hopes and aspirations of its people. Also clearly spelt out were the two main functions of the Constituent Assembly; framing the future Constitution of Pakistan and its functioning as a sovereign body being the federal legislature of Pakistan.

The first duty of the government, he declared, was maintenance of law and order and protection of life, property, and religious beliefs of the citizens. He identified bribery and corruption (which he called ’a poison’), black-marketing, nepotism, and jobbery as the greatest evils afflicting society which had to be stamped out. He called upon the majority and minority communities in Pakistan, Muslims and Hindus respectively, to bury the hatchet, forget the past, and co-operate

with each other. He exhorted them to concentrate on the well being of the people, especially of the poor. He declared that all citizens of Pakistan, regardless of their colour, caste or creed, would enjoy equal rights, privileges, and obligations.

I cannot emphasize it too much. We should begin to work in that spirit and in course of time all these angularities of the majority and minority communities, the Hindu community and the Muslim community-because even as regards Muslims you have Pathans, Punjabis, Sunnis, Shias and so on and among the Hindus you have Brahmans, Vashnavas, Khatris, also Bengalees, Madrasis, and so on-will vanish. Indeed if you ask me this has been the biggest hindrance in the way of India to attain the freedom and independence and but for this, we would have been free peoples long ago. No power can hold another nation, and specially a nation of 400 million souls in subjection; nobody could have conquered you, and even if it had happened, nobody could have continued its hold on you for any length of time but for this. Therefore, we must learn a lesson from this.2

He then proceeded to affirm the right to religious freedom in the following words:

You are free; you are free to go to your temples, you are free to go to your mosques or to any other places of worship in this state of Pakistan You may belong to any religion or caste or

creed-that has nothing to do with the business of the state.

Now, I think we should keep that in front of us as our ideal and you will find that in course of time, Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the state.

It is evident from this speech that Jinnah's prescription for the Constitution of Pakistan included guarantees that: one, all citizens of Pakistan would be equal regardless of their belief, caste, or creed; two, that all citizens would be

guaranteed freedom to practise whatever religion they believed in; three, that all religious, sectarian, ethnic, linguistic, and other similar distinctions would cease to mattter in political sense, and the Constitution would ensure that the nation should progress regardless of such distinctions; and, four, that Pakistan would not be a theocratic state and religion would be a citizen's private and personal matter.

In short, Jinnah visualized Pakistan as a modern, progressive, and democratic state whose energies would be harnessed towards the uplift of the people, especially the masses and the poor, and evils such as corruption, bribery, black-marketing, nepotism, and jobbery would be stamped out. This was a re-affirmation of what Jinnah had told Doon Campbell, Reuter's correspondent in New Delhi in 1946:

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 citizenship regardless of their religion, caste, or creed.3

THE INTERIM CONSTITUTION: ADAPTATION OF THE GOVERNMENT OF INDIA ACT, **1935**

Under the provisions of the Indian Independence Act, 1947, the Government of India Act, 1935 became, with certain adaptations, the working Constitution of Pakistan.4 The Pakistan (Provisional Constitution) Order, 1947 established the federation of Pakistan which included (1) the four provinces of East Bengal, West Punjab, Sindh, and the North-West Frontier Province; (2) Balochistan; (3) any other areas that might with the consent of the federation be included therein;

(4) the capital of the federation, Karachi; and

(5) such Indian states that might accede to the federation.

Under the original Act of 1935, the position of the Governor-General was unique. As the representative of the British Crown in India, he was invested with the final political authority in the country and given the widest discretionary powers and special responsibilities. As the

representative of the British Crown, he could exercise such prerogatives as the Crown delegate to him. The supreme command of land, naval, and air forces was vested in him. the exercise of his functions, the Governor-G was to be aided and advised by a council except! relation to powers relating to (1) defence, affairs, and ecclesiastical affairs; (2) administration of British Balochistan; and (3) other matters as were left by the Act to i discretion and in which the ministers had* constitutional right to advise. The Act also imposd upon the Governor-General

certain wide ml important special responsibilities in the sphere of the ministries which he was to discharge in to ’ individual judgment’. In such matters, the minifflj concerned had the right to tender advice but tin Governor-General could reject it. Regarding lit exercise of all other powers vesting in tk Governor-General, the ministers were given tin final word. The reason for vesting such wide ail discretionary powers in the Governor-General*1!! described by the joint parliamentary committees1 ’the vital importance in India of a stroi| executive’. These discretionary powers and tit special responsibilities were restricted through i amendment in the Indian Independence Act, *W,* Under Section 8(c) of the Act of 1947, thepoweo of the Governor-General or any Governor to act I his discretion or to exercise his individual judgment lapsed from 15 August 1947. Ik Governor-General was presumed to act on tk’ advice of his ministers. But, under the Governmat of India Act of 1935, as adapted in Pakistan,tk Governor-General continued to enjoy wide ant substantial powers. He was the executive the federation and all executive actions of tk federal government had to be taken in his namt Some of the key appointments were to be madefy the Governor-General. Thus he had the right K appoint the prime minister and other fedenl ministers. The council of ministers would hoi office during his pleasure.5 The Governor-General also had the power to appoint the principal milta officers, Governors of the provinces, the Advocate General of the federation, the Chief Justice anc other judges of the Federal Court, and many otic important officials.

The Governor-General had tl summon and prorogue the federal 1 could also assent to bills passed I legislature or send them back for re His sanction was required for bills c relating to a number of specific affecting the coinage or currency oi or the Constitution or functions of of Pakistan could be introduced ii legislature only with the sanction ol General.6 The Governor-General positive power of legislation by O had the same force of law as an A< legislature. Such ordinances, howi first laid before the federal legislate If the federal legislature should they would continue to have the f(Governor-General also had enorr control over the provincial govet this authority was derived from power over the Governors’ action: of his functions with respec summoning, and dismissing ministers, a Governor was un control of the Governor-General. While the list of the powers < General under the Act of 193 hensive, no discretionary power Governor-General under the A Pakistan. With effect from 14 governmental activity was br control of the Cabinet which * the Constituent Assembly. The G powers enumerated above wen exercised on the advice of the C The original plan of one Cor for all of India had to be disi differences between the Hindus and two Constituent Assembliei for India and the other for the Pakistan. The inaugural session Assembly of Pakistan was he!
10 to 14 August 1947. J.N. Mi the minority community from unanimously elected as temper

- first day of the session. Jinna! elected unopposed as presiden Assembly on 11 August.

consisted of twenty-four members and it could co-opt not more than ten, not necessarily from amongst members of the Constituent Assembly. The Basic Principles Committee set up three sub-committees:

1. Sub-committee on federal and provincial constitutions and distribution of powers.

2. Sub-committee on franchise.

3. Sub-committee on the judiciary.

The Basic Principles Committee empowered the sub-committees to co-opt technical experts, up to two or three, as advisers who would not, however, have the right to vote. The sub-committees were further allowed to tour various parts of Pakistan to collect information and take evidence if and when necessary. **The Basic Principles Committee** submitted its interim report on 7 September 1950, and its final report in December 1952. The interim report of the Basic Principles Committee had to be withdrawn because it was undemocratic and unpopular. Even in advance of a constitution being framed, it provided that the head of state could wholly or partly hold the constitution in abeyance. Liaquat Ali Khan surreptitiously and unilaterally attired the constitution to prevent Hamid ul Haq Chowdhry from becoming Chief Minister of East Bengal.

Another important committee of the Constituent Assembly was on ’Fundamental Rights of the Citizens of Pakistan’ and on ’Matters Relating to Minorities’. Set up in the inaugural session of the Constituent Assembly on 12 August 1947, it was authorized to add certain members, who were not necessarily from amongst the Constituent Assembly. This was done with a view to giving representation to the communities, such as Christians, who were not adequately represented in the Constituent Assembly. The committee, as mentioned above was divided into two sections, one dealing with ’Fundamental Rights’ and the other with ’Matters Relating to Minorities’. The interim report of the former was adopted by the Constituent Assembly in 1950, and the final report in 1954. The discussion of ’Matters Relating to Minorities’ took a long time because of the complexity of its task and the time taken in obtaining the opinions of minority communities. Many memoranda and suggestions were received

by the committee. The question of joint or sepa* electorates entailed lengthy discussions.9

Two other committees of the Constite Assembly were, the ’State Negotiating Committee to deal with the representation of the Prince States which had acceded to Pakistan, and it:’ ’Tribal Areas Negotiating Committee’ which dot with matters relating to the tribal areas.10

Despite the paramount position of the Govern1! General, the Interim Constitution envisaged: parliamentary form of government headed by i prime minister. A council of ministers w provided for with joint responsibility to the fedeti legislature.11 The daily business of the fe1 government was run by the prime minister the assistance of the council of ministers.

Under Section 8(i) of the Act of 1947, powers and functions of the federal legislate! were to be

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exercised by the Constituent Assembly which was to hold regular sessions.12 It wasi unicameral legislature presided over by a Speaks, or in his absence, the Deputy Speaker.14

Each province was headed by a Governor «bo was to be appointed by the Governor-General and served at his pleasure.14 Parliamentary form of government was also provided for the provinces. There was ”to be a council of ministers headed bj the chief minister. The provincial legislatures, also unicameral, had a life of five years unless dissolved earlier.15 A long list of disqualifications fa membership of the provincial legislature included the holding of any office of profit, insolvency, lunacy, dismissal from government service, conviction for moral turpitude, and so on.16

The Governor-General was vested with tin power to promulgate ordinances in cases of a emergency. An ordinance could authorize expenditure from the revenues of the federation Ordinances promulgated before 31 December 1945 were not required to be laid before the federal legislature but after such date, they were required to be so laid and would expire on a resolution a disapproval or at the expiry of six weeks from tbt reassembly of the legislature.17

The Governors were also empowered to promulgate ordinances when provincial legislatures were not in session and circumstances appeared to them to require immediate action. The ordinances were required to be laid before the provincial

legislatures and expired on re’ disapproval or at the expiry of six we reassembly of such legislatures.18

The Interim Constitution provided

Court consisting of the Chief Justio

and not more than six puisne judg

appointed by the Governor-General, *i*

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Council. For appointment as judge

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standing. The Chief Justice had t

years standing and could only b

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the time of their own appointment

Court had original jurisdiction in

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was binding on all courts in 1

Governor-General had the powi

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Two High Courts were consl Interim Constitution, the Dhaka East Bengal) and the Lahore Hij Punjab). Each High Court had to Justice and a number of juc appointed by the Governor-Genei appointment as a judge of a Hig had to be a Barrister or pleader c often years standing, a member < for at least ten years, out of v\ have been a district judge for a or ought to have held a judicial ten years. A judge could only t grounds of misbehaviour, or in body, by the Governor-General i so reported on a reference bein] High Courts retained their pow<

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legislatures and expired on resolution of disapproval or at the expiry of six weeks from the reassembly of such legislatures.18

The Interim Constitution provided for a Federal Court consisting of the Chief Justice of Pakistan and not more than six puisne judges, all to be appointed by the Governor-General. A judge could not be removed except on the ground of nsbehaviour or of infirmity of mind or body on the report of the Judicial Committee of the Privy Council. For appointment as judge to the Federal Court, a person had to be either a judge of a High Court for at least five years or a Barrister or pleader of a High Court of at least ten years standing. The Chief Justice had to have fifteen years standing and could only be taken from amongst Barristers or pleaders or judges of High Courts who had been such Barristers or pleaders at the time of their own appointment.19 The Federal Court had original jurisdiction in the matter of disputes between the federation and any of the provinces, provided such dispute related to a question of legal right.20 The Federal Court had appellate jurisdiction over the High Courts.21 The law declared by the Federal Court or Privy Council was binding on all courts in Pakistan.22 The Governor-General had the power to refer any question of law of public importance for the opinion of the Federal Court, and the court was to •eport on such reference in terms of the opinion of majority of judges present at the hearing of the jse”

Two High Courts were constituted under the nterim Constitution, the Dhaka High Court (for nast Bengal) and the Lahore High Court (for the Punjab). Each High Court had to consist of a Chief Justice and a number of judges, fixed and appointed by the Governor-General. To qualify for appointment as a judge of a High Court, a person had to be a Barrister or pleader of any High Court of ten years standing, a member of the civil service for at least ten years, out of which he ought to have been a district judge for at least three years or ought to have held a judicial office for at least ten years. A judge could only be removed on the grounds of misbehaviour, or infirmity of mind or body, by the Governor-General if the Federal Court so reported on a reference being made to it.24 The High Courts retained their powers and jurisdiction

that they exercised prior to the establishment of the federation.25 Later on, the High Courts were vested with the jurisdiction to issue writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto,* and *certiorari.26* In addition to the High Courts in Lahore and Dhaka, the Chief Court of Sindh continued to function in Karachi for the province of Sindh. There was also a Court of Judicial Commissioner in Peshawar which had the functions of a chief court for the North-West Frontier Province (NWFP).

PARTITION OF PUNJAB: THE CARNAGE AND REFUGEE PROBLEM

At the beginning of August 1947, widespread rioting broke out in the Punjab which intensified as the date of the partition of India drew near. There is considerable evidence to show that the riots

were started by the Sikhs and the Rashtriya Swayam Sevak Sangha.27 On the announcement of the partition plan in March 1947, and the resignation of Khizar Hayat ministry, Master Tara Singh, the Sikh leader, openly called for violent resistance. He stood at the steps of the Legislative Assembly Chamber in Lahore, rattled his *kirpan* (sword or dagger), and raved, 'This will decide'.28 Unfortunately, that was the opening of a horrible chapter of carnage in Punjab. There was immediate retaliation by the Muslims.

There is substantial evidence that rioting in West Punjab was a repercussion of the massacre in East Punjab. Auchinleck, in his farewell letter to Major-General Rees, commander of Punjab Boundary Forces, referred to the massacre in East Punjab and stated 'the whole movement was undoubtedly planned long beforehand and soon gave rise to inevitable repercussions in the West Punjab'.29 In September 1947, widespread violence and disturbance broke out against Muslims in Delhi, forcing a large number of them to flee to Pakistan, particularly to Karachi which was swarming with refugees from Delhi.

The situation in the Punjab was grim. Whole sections of Lahore, Amritsar, Sheikhupura, Jullundur, and indeed most of the principal cities of the Punjab were in flames. In the villages, armed bandits plundered, burned, massacred, and raped

women. Thousands of women-Muslim, Hindu, and Sikh-were abducted, never to be seen again by their relatives. The Punjab Boundary Force, containing both Muslim and non-Muslim troops and commanded by British senior officers, was utterly incapable of maintaining peace. Its troops refused to fire on members of their own communities. It had to be disbanded, leaving the armies of Pakistan and India responsible for their respective area. The Muslims living in Sikh states in East Punjab met the worst fate. They did not even have protection of the Indian Army.30 Abul Kalam Azad stated from personal knowledge that some members of the former undivided Indian Army killed Hindus and Sikhs in Pakistan and Muslims in India.31 In Kapurthala state, with a Sikh ruler, Muslims were in a majority. All of them were either killed or driven out. Those who survived were harassed by guerilla groups, went without food and sleep, and encountered unprecedented floods along the escape routes. More were drowned than slaughtered and very few could reach Pakistan.32

The Governments of India and Pakistan, having failed to stop the slaughter, decided at the end of August to assist the complete evacuation of Muslims from East Punjab and of non-Muslims from West Punjab. A Joint Military Evacuation Organization was set up in Lahore. Mixed guards were provided for the refugee camps as well as armed escorts for foot, railway, and motor convoys.33 Within a matter of weeks, over twelve million people had left their homes and gone forth on foot, by bullock-cart, by railway, by car, and by plane to seek shelter and safety in the other dominion. They had no earthly possessions save the clothes they wore and, more often than not, these were in tatters. They had seen babies killed, corpses mutilated, and women dishonoured. Death had stalked them on the way. Tens of thousands had died on the road of starvation and disease, or had been killed by Sikh murder gangs.34 The Pakistan government estimated that in the exchange of population, excluding those from Kashmir, approximately 6,500,000 refugees came into Pakistan. Of these, 5,200,000 came from East Punjab and East Punjab states, 360,000 from Delhi and the remainder from other parts of northern India.35 It is believed that about 1,000,000 Muslims

lost their lives or were abducted. The number o’ refugees West Punjab had to accommodat exceeded by some 1,700,000 the number o’ refugees who had left.36 The main burden o! rehabilitating refugees was borne by West Punjab which lay in the path of incoming refugees.

A good part of the blame for the carnage in Punjab lies with Mountbatten. He deliberated avoided disclosing the details of the Boundarj Commission Award to political leaders until 18 August, three days after the grant of dominion status.37 His tactic of postponing the Award did nothing to prevent a violent eruption in the Punjab It was a complete failure of responsible political leadership which brought anarchy to the Punjab While Punjab writhed and turned in blood Mountbatten coldly claimed credit for bavin; accomplished, in less than two-and-a-half months one of the ’greatest administrative operations 11 history’.38

THE KASHMIR ISSUE

As if the refugee problem was not enough to divert the attention of the government of Pakistan from constitution-making, the state of Jammu ant Kashmir posed a threat to the stability of the nev nation with seemingly endless hostility betweer India and Pakistan. The state had about 80 per cent Muslims, but its ruler was Hindu. The Indian government secured, under questionable circumstances, an instrument of accession from the Hindu Maharaja on 27 October 1947, thus openint the way to India's military intervention in Kashmir There is a strong viewpoint that the Maharaja ol Kashmir never signed any Instrument of Accession and that the Indian Archives do not have any such Instrument.39 Under Mountbatten's direct guidance air-borne units of the Indian Army landed IB Srinagar, thus halting the advance of liberation forces outside Srinagar. This was most shocks to the people of Pakistan because from the time the Lahore Resolution of 1940 was passed Kashmir had been regarded as an essential part 01 Pakistan, both politically and economically. The government of Pakistan resisted the popular clamour, particularly in the West Punjab, for open armed intervention, and proposed to India in the

meeting held on 1 November 194"? Governors-General of the two do fighting should be stopped and a pie be held under the joint control Pakistan. India did not respond pos proposal and claimed Kashmir as its The matter was taken up befon Council of the United Nations whei counter-charges were made by the A five-power commission was sei United Nations to offer its good oi about a settlement. Pakistan was con its regular troops to counter a m offensive against the liberation for Kashmir in the spring of 1948. D« from extremists, both India and Pal from an all-out war and fighti localized. In 1949, in pursuance of the United Nations Security Counci India and Pakistan to withdraw the Kashmir so that the United Nation' free, fair, and impartial plebiscite to will of the people of Jammu and Ka fire was secured by the UN commis to its commitment, India declined t UN resolutions.

JINNAH'S DEATH, SEPTEMBER **1948**

Jinnah had been suffering from c the lungs and in the last three year: disease became serious. It was a we secret, for had it been known th terminally ill, the Congress and thi have dragged on the process of ind transfer of power and thus would that Pakistan never came into exi the last two years of his life, Jinnal largely by his will and determ Pakistan become a reality. He w night first to see Pakistan become state and then to attend to the gi that confronted Pakistan in its infai of poor health, normal work becE for him. The last public function tl against medical advice, was the op< of the State Bank of Pakistan on 1

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meeting held on 1 November 1947 between the Governors-General of the two dominions, that fighting should be stopped and a plebiscite should be held under the joint control of India and Pakistan. India did not respond positively to this proposal and claimed Kashmir as its territory.

The matter was taken up before the Security Council of the United Nations where charges and counter-charges were made by the two countries. A five-power commission was sent out by the United Nations to offer its good offices to bring about a settlement. Pakistan was compelled to send its regular troops to counter a massive Indian offensive against the liberation forces and Azad Kashmir in the spring of 1948. Despite pressure from extremists, both India and Pakistan desisted from an all-out war and fighting remained localized. In 1949, in pursuance of a resolution of the United Nations Security Council calling upon India and Pakistan to withdraw their forces from Kashmir so that the United Nations could hold a free, fair, and impartial plebiscite to determine the will of the people of Jammu and Kashmir, a ceasefire was secured by the UN commission. Contrary to its commitment, India declined to abide by the UN resolutions.

JINNAH's DEATH, SEPTEMBER **1948**

Jinnah had been suffering from consumption of the lungs and in the last three years of his life the disease became serious. It was a well-kept medical secret, for had it been known that Jinnah was terminally ill, the Congress and the British might have dragged on the process of independence and transfer of power and thus would have ensured that Pakistan never came into existence. During the last two years of his life, Jinnah was sustained largely by his will and determination to see Pakistan become a reality. He worked day and night first to see Pakistan become an independent state and then to attend to the grave challenges that confronted Pakistan in its infancy. As a result of poor health, normal work became impossible for him. The last public function that he attended, :amst medical advice, was the opening ceremony i the State Bank of Pakistan on 1 July 1948.

Jinnah spent his last days in Ziarat, a remote Balochistan hill station about fifty miles from Quetta. His condition rapidly worsened and by the beginning of September he had pneumonia as well as tuberculosis and cancer of the lungs.40 On
9 September, his doctors gave up hope but such was his devotion to duty and love for Pakistan that even in a state of unconsciousness he was heard muttering aloud:

The Kashmir Commission have an appointment with me today; why haven't they turned up? Where are

they?41

Jinnah was flown to Karachi on 11 September
1948. He was carried in an army ambulance from the Air Force base at Mauripur, Karachi, where his plane had landed at 4:15 p.m. The ambulance broke down after covering about five miles with Jinnah's pulse going down rapidly. 'Nearby stood hundreds of huts belonging to the refugees who went about their business, not knowing that their Quaid, who had given them a homeland, was in their midst, lying helpless'.42 He died shortly afterwards. Wrapped in a simple shroud, he was buried the next day in Karachi. Millions of Pakistanis wept for him. They truly felt orphaned.

Jinnah is recognized as the sole spokesman of Indian Muslims in united India. From the late 1930s, his main concern was the arrangement by which power at the centre was to be shared

once the British quit India.43 But if Jinnah and the League were to play their part at the centre, they needed a mandate from the Muslims in the provinces. This mandate was finally won in the elections of 1946. It would be unfair to Jinnah to regard him as a communal leader. He was far above that. It is alleged by his detractors that he used the communal card as a political tactic, not an ideological commitment.44 In fact, he used the communal factor for none of the purposes. His outlook was much wider and his political thinking far too liberal. His primary concern was thwarting the domination of a brute Hindu majority in united India and to let the Muslim majority provinces and areas form a modern state where they could prosper unhindered by fear and prejudice.

A recurring question is: Why did Jinnah not give a Constitution to put to an end to all the

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controversy that followed? With the benefit of hindsight it can said be that it would have been highly desirable if he had done that. He was a democrat in every sense of the word and did not wish to pre-empt the Constituent Assembly. Some of his remarks on the subject are worth noting:

The Constituent Assembly may take some time to accomplish its task of framing the final constitution of our state. It is a stupendous task and it may take
18 months or, two years before it can come into full operation.45

Pakistan is now a sovereign state absolute and unfettered and the Government of Pakistan is in the hands of the people. Until we finally frame our constitution which, of course, can only be done by the Constituent Assembly, our present provisional constitution based on the fundamental principles of democracy not bureaucracy or autocracy, or dictatorship, must be worked.46

Qadeeruddin Ahmad, former Chief Justice of West Pakistan High Court, says:

I personally do not believe that he thought in terms of permanently binding the coming generation to any specific constitutional pattern. This was against his democratic temperament and inconsistent with his legal acumen.47

Another reason that prevented Jinnah's intervention in constitution-making was the heavy burden of dealing with the refugee problem and the Kashmir dispute. Had these stupendous problems not befallen the nation in its infancy, Jinnah might have goaded the Constituent Assembly into concluding its task expeditiously.

Nevertheless, Jinnah did indicate the broad guidelines for Pakistan's Constitution in various statements and speeches. Had these guidelines been followed in the right spirit, Pakistan might not have landed itself in the constitutional morass it finds itself in today. Jinnah desired to see Pakistan a true democracy based on equality and freedom for all citizens regardless of their religion, colour, or creed; devoted to development and progress; free from religious, sectarian, ethnic, provincial, linguistic, and racial prejudices, and with the guarantee of freedom of religion to the minorities.

NOTES

1. Jinnah was by now acclaimed as 'Quaid-e-Azn',| the Great Leader, by Indian Muslims.

2. *Quaid-e-Azam Mohammad Ali Jinnah,* Speectel *and Statements as Governor-General ofPahsul*
1947-48. Published by Government of Fatal Ministry of Information and Broadcastii|.|

Directorate of Films & Publications, Islamabad]
1989, pp. 42 to 47.

3. Quoted by Mohammad Munir, *From Jinnah to h* I published by Vanguard Books Ltd., Davis *M*\ Lahore, 1980, p. 29.

4. Section 8 of the *Indian Independence Act, M*

5. *Government of India Act, 1935* as adapted ;| Interim Constitution, Section 10.

6. Ibid., Section 153.

7. Ibid., Section 51.

8. Choudhry, G.W., *Constitutional Developmntl Pakistan,* 1969, Longman Group Ltd., Lomta,| p. 19.

9. Ibid., p. 21.

10. Ibid., p. 22.

11. Government of India Act, 1935 Section 9.

12. Ibid., Sections 18 and 19.

13. Ibid., Section 22.

14. Ibid., Section 48.

15. Ibid., Section 61.

16. Ibid., Section 69.

17. Ibid., Section 42.

18. Ibid., Section 88.

19. Ibid., Section 200.

20. Ibid., Section 204.

21. Ibid., Section 205.

22. Ibid., Section 212.

23. Ibid., Section 213.

24. Ibid., Section 220.

25. Ibid., Section 223.

26. Ibid., Section 223 A.

27. See appendices to *'The Sikh Plan'* and '7

in Action', published by the West Punjik] Government, Lahore, 1948.

28. Khan, Muhammad Zafarullah, *The Forgotten Itm \ Memoirs of Sir Muhammad Zafrullah Khan. I* by A.H.Batalvi, 1991, Vanguard Books, Lahore, | p, 139.

29. Ali, Chaudhri Mohammad. *The Emergence* o/| *Pakistan,* Services Book Club, 1988, p. 258.

30. There are witnesses who say that at places, Into 1 Army units provided protection and even cover o! I artillery fire to the Sikh bands attacking Musto | villages in East Punjab.

31. Azad, Maulana Abul Kalam, *Inc*
1959, Orient Longmans, Calcutt

32. Symonds, Richard, *Making o.* Allied Book Corporation, Karac

33. Ibid.

34. Ali, Chaudhri Mohammad, *1 Pakistan, supra,* note 29, p. 261

35. Symonds, Richard, *supra,* note

36. Ali, Ch. Mohammad, *supra,* no

37. Jalal, Ayesha, *The Sole Spok, Muslim League and the Demon* Cambridge University Press, C

38. Ibid, referring to Mountbattt Indian Constituent Assemt
15th August 1947.

39. Lamb, Alastair, *Incomplete Pa* University Press, Karachi, p. 1

M. Azad, Maulana Abul Kalam, *India Wins Freedom,* \959, Orient Longmans, Calcutta, p. 202.

32. Symonds, Richard, *Making of Pakistan,* 1966, Mlied Book Corporation, Karachi, p. 83.

33 Ibid.

34 All, Chaudhri Mohammad, *The Emergence of Pakistan, supra,* note 29, p. 261.

35 Symonds, Richard, *supra,* note 32, p. 83.

36 All, Ch. Mohammad, *supra,* note 29, p. 264.

37 Jalal, Ayesha, *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan* 1985, Cambridge University Press, Cambridge, p. 293.

38 Ibid, referring to Mountbatten's address to the Indian Constituent Assembly at New Delhi, 15th August 1947.

39. Lamb, Alastair, *Incomplete Partition, 2002,* Oxford University Press, Karachi, p. 166.

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1948.

[arullah,^ *Forgotten Years.* mmodZa/niHah Khan. Edited
1. Vanguard Books, Lahore,

iammad. *The Emergence of* Jook Club, 1988, p. 258 , who say that at places, Indian :d protection and even cover of
- Sikh bands attacking Muslim njab.

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University Press, p. 368.

41. Ibid., quoting Dr Ilahi Bakhsh, *Last Days,* p. 40.

42. Ibid., quoting Fatima Jinnah, *My Brother,* p. 369.

43. Jalal, Ayesha, *The Sole Spokesman, supra,* note 37, pp. 4-5.

44. Ibid., p. 5.

45. Speech at Sibi Durbar; 14 February 'New Era of Progress for Baluchistan', *supra,* note 2, p. 139.

46. Address to a gathering of the Civil Officers of Baluchistan at Sibi; February 14, 1948, *supra*, note 2, p. 143.

47. Ahmad, Qadeeruddin, *Pakistan - Facts and Fallacies*, 1979, Royal Book Company, Karachi, p. 170.

5 TheObje

The first significant step towarc Constitution was taken by Assembly in March 1949 v resolution on the ’Aims am Constitution’, popularly known Resolution. It laid the foi Constitution and indicated the b structure. It was described as t occasion in the life of Pakistan, only to the achievement of ii Resolution and the debate on it £ because they bring out the polit the then government of Pali principal critics. The Resolutic Liaquat and the leading memb< and the opposition participated i The text of the Resolution Constituent Assembly was:

’In the name of Allah, th< Merciful:

Whereas sovereignty over tl belongs to God Almighty alone which He has delegated to the through its people for being exi limits prescribed by Him is a sai This Constituent Assembly people of Pakistan resolves to fr; for the sovereign independent St Wherein the state shall exerci authority through the chosen repi people;

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5 The Objectives Resolution, 1949

The first significant step towards the framing of a Constitution was taken by the Constituent Assembly in March 1949 when it passed a resolution on the 'Aims and Objects of the Constitution', popularly known as the Objectives Resolution. It laid the foundation of the Constitution and indicated the broad outlines of its structure. It was described as the most important occasion in the life of Pakistan, next in importance only to the achievement of independence. The Resolution and the debate on it are of great interest because they bring out the political philosophy of the then government of Pakistan and of its pnncipal critics. The Resolution was moved by Liaquat and the leading members of the Cabinet and the opposition participated in the debate.

The text of the Resolution as passed by the Constituent Assembly was:

'In the name of Allah, the Beneficent, the Merciful:

Whereas sovereignty over the entire universe belongs to God 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 oeople of Pakistan resolves to frame a constitution tor the sovereign independent State of Pakistan;

Wherein the state shall exercise its powers and nrthority through the chosen representatives of the [feople;

Wherein the principles of democracy, freedom, ality, tolerance, and social justice as enunciated

|f Islam shall be fully observed;

; Wherein the Muslims shall be enabled to order

Kir lives in the individual and collective spheres

I accordance with the teachings and requirements m as set out in the Holy Quran and the

Wherein adequate provision shall be made for the minorities freely 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 provision 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.'

Liaquat explained the concept and the spirit behind the Resolution in his speech before the Constituent Assembly while introducing the Resolution on 7 March 1949. Some important extracts from his speech are:'

We, the people of Pakistan, have the courage to believe firmly that all authority should be exercised in accordance with the standards laid down in Islam so that it may not be misused. All authority is a sacred trust, entrusted to us by God for the purpose of being exercised in the service of man, so that it

does not become an agency for tyranny or selfishness. I would, however, point out that this is not a resuscitation of the dead theory of divine right of kings or rulers, because, in accordance with the spirit of Islam, the preamble fully recognizes the truth that authority has been delegated to the people, and to none else, and that it is for the people to decide who will exercise that authority.

For this reason it has been made clear in the Resolution that the state shall exercise all its powers and authority through the chosen representatives of the people. This is the very essence of democracy, because the people have been recognized as the recipients of all authority and it is in them that the power to wield it has been vested. This naturally eliminates any danger of the establishment of a theocracy.

You should notice, Sir, that the Objectives Resolution lays emphasis on the principles of democracy, freedom, equality, tolerance, and social justice, and further defines them by saying that these principles should be observed in the constitution as they have been enunciated by Islam. It has been necessary to qualify these terms because they are generally used in a loose sense. It has, therefore, been found necessary to define these terms further in order to give them a well-understood meaning. Whenever we use the word democracy in the Islamic sense, it pervades all aspects of our life, it relates to our system of government and to our society with equal validity, because one of the greatest contributions of Islam has been the idea of the equality of all men. Islam recognises no distinctions based upon race, colour, or birth. Similarly, we have a great record in tolerance, for under no system of government, even in the Middle Ages, have the minorities received the same consideration and freedom as they did in Muslim countries.

Muslims 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 the *Sunnah.* It is quite obvious that no non-Muslim should have any objection if the Muslims are enabled to order their lives in accordance with the dictates of their religion. You would also notice, Sir, that the state is not to play the part of a neutral observer, wherein the Muslims may be merely free to profess and practise their religion, because such an attitude on the part of the state would be the very negation of the ideals which prompted the demand of Pakistan, and it is these ideals which should be the corner-stone of the state which we want to build. The state will create

such conditions as are conducive to the bi of a truly Islamic society, which means that fte will have to play a positive part in this effort We believe that no shackles can be put on i and, therefore, we do not intend to hinder an) u from the expression of his views. Nor do »e ir to deprive anyone of his right of forming assocaW| for all lawful and moral purposes. In short, we to base our polity upon freedom, progress, and justice. We want to do away with social but we want to achieve this without causing suffn| or putting fetters upon the human mind and lar. inclinations.

As soon as the Resolution was moved, Muslim member, Prem Hari Barma, proposed M the Motion be circulated for eliciting pii| opinion thereon by the 30 April, 1949.’2

This motion was vehemently supported r> another non-Muslim member, Sris Ctofa Chattopadhyaya, in the following words'"

Mr President, I rise to support the amendniffli circulation of the Resolution for eliciting pik opinion. I want to make a few observations abort amendment. First, in the course of the last 18mfl that have passed after the partition, no 'Objetw Resolution' was brought forward. In factik 14 August 1947, when Pakistan became a sovw; state, we thought no such Resolution was necs» at all. The thing that matters is the constitution «i and not a theoretical resolution on the objects of the constitution. In fact, n committee of this House was formed to consua: Resolution. In India they had an Objecw Resolution because the Britishers were still to and it was necessary to tell the people and tie n what her constitution would be like after the ta left. Even that was before August 1947, wto sovereignty was made over to the people of Pita and India. In some countries there have h Objectives Resolutions after a bloody revolu because everything was in a chaos. But the cat different here in Pakistan. Some 18 months ^ Britishers had left and we are now free to do*1 like. And we have been going on without I Objectives Resolution for so long. As a mam fact, I understand, the Sub-Committee I Fundamental Rights have already finalized! Report. There was no difficulty to recow Fundamental Rights even without this Objedi Resolution. The fact is that it is the actual constM

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that will matter and a the one before us may not be i we had an idea that the cc < m the eternal principles ol social justice. We thought would not be mixed up. Tj Quaid-e-Azam Muhammac But the Resolution before We got notice of it some not been able to understanc some of the paragraphs < require study, consultatioi friends, both Muslims an< titizens of our country who their servants. But the til purpose has been too shor example, what the Resoluti< the Preamble, *viz,* that:- 'So universe belongs to God / authority which He has dc Pakistan through its people fc the limits prescribed by Hin thing for which we requin understand before accepting way. Then come to paragn principles of democracy, free(and social justice, as enunci fully observed.' has been mi not clear to us-the non-Mu; study it, in consultation wil Bengal and for the sake of cla we left East Bengal this tim such a Resolution was to be 1 was no indication of it in circulated.

Liaquat opposed the motio vote that very day, 7 March 1(

PROPOSED AMENDME

The days following the movin Resolution generated a lively c some non-Muslim members *t* Assembly, namely Bhupend Professor Raj Kumar Chakn: Barma, Kamini Kumar Datta, Mandal, participated vigorously number of objections to the members also moved a 1; amendments which are reprodu<

to the building up means that the state m this effort, m be put on thought to hinder any person s. Nor do we intend forming associations ;s. In short, we want ”progress, and social ih social distinctions, wut causing suffering Mn mind and lawful

was moved, a nonarma, proposed ’that for eliciting public ril, 1949.’2 ,ently supported by iber, Sris Chandra wing words:3

port the amendment for ion for eliciting public ,w observations about the irse of the last 18 months, partition, no ’Objectives forward. In fact after dstan became a sovereign Resolution was necessary -rs is the constitution itselt Solution on the aims and ion. In fact, not even a *ms* formed to consider this they had an Objectives Br4hers were still there ell the people and the world

,uld be like after the British ore August 1947, when the ver to the people of Pakistan

:0untries there have been , after a bloody revolution s in a chaos. But the case is stan Some 18 months ago, we are now free to do as we
3een going on without any for so long. As a matter of the Sub-Committee on have already finalized their no difficulty to recommend even without this Objectives
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that will matter and a theoretical resolution like the one before us may not be necessary at all. So long as we had an idea that the constitution would be based on the eternal principles of equality, democracy, and social justice. We thought that religion and politics would not be mixed up. That was the declaration of Quaid-e-Azam Muhammad Ali Jinnah in this House. But the Resolution before us has a religious basis. We got notice of it some four days back. We have not been able to understand fully the implications of some of the paragraphs of the Resolution. They require study, consultation, deliberation with our friends, both Muslims and non-Muslims, and the citizens of our country who are our masters. We are their servants. But the time given to us for the purpose has been too short. Frankly speaking, for example, what the Resolution means and implies in the Preamble, viz, that:- ’Sovereignty over the entire universe belongs to God 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;’ is a thing for which we require time to study it and understand before accepting or modifying it in any way. Then come to paragraph four: ’Wherein the principles of democracy, freedom, equality, tolerance, and social justice, as enunciated by Islam, shall be fully observed.’ has been mentioned. This again is not clear to us-the non-Muslims. We need time to study it, in consultation with our friends in East Bengal and for the sake of clarification. In fact when we left East Bengal this time we had no idea that such a Resolution was to be brought forward. There was no indication of it in the Agenda papers circulated.

Liaquat opposed the motion which was put to \ote that very day, 7 March 1949, and defeated.

PROPOSED AMENDMENTS

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The days following the moving of the Objectives Resolution generated a lively discussion in which some non-Muslim members of the Constituent Assembly, namely Bhupendra Kumar Datta, Professor Raj Kumar Chakravarty, Prem Hari Barma, Kamini Kumar Datta, and Birat Chandra Mandal, participated vigorously and raised a large number of objections to the Resolution. These members also moved a large number of amendments which are reproduced below:4

1. ’That the paragraph beginning with the words ”Whereas sovereignty over the entire universe...” and ending with the words ”...is a sacred trust” be omitted.’

2. ’That in the paragraph beginning with the words ”Whereas sovereignty over the entire universe...” for the words ”State of Pakistan through its people” the words ”people of Pakistan” be substituted.’

3. ’That in the paragraph beginning with the words ”Whereas sovereignty over the entire universe...” the word ”within the limits prescribed by Him” be omitted.’

4. ’That in the paragraph beginning with the words ”This Constituent Assembly...” after the word ”independent” the word ”democratic” be inserted.’

5. ’That after the paragraph beginning with the words ”This Constituent Assembly...”, the following new paragraphs be inserted:-

”Wherein the national sovereignty belongs to the people of Pakistan;

Wherein the principle of the state is government of the people, for the people, and by the people”.’

6. ’That for the paragraph beginning with the words ”Wherein the state shall exercise...”, the following paragraph be substituted:-

”Wherein the elected representatives of the people-in whom shall be centered and in whom shall belong legislative as well as executive authority-shall exercise their powers through such persons as are by law authorized to do so. The elected representatives shall control acts of Government and may at any time divest it of all authority”.’

7. ’That in the paragraph beginning with the words ”Wherein the principles of democracy...”, the words ”as enunciated by Islam” be omitted.’

8. ’That in the paragraph beginning with the words ”Wherein the principles of democracy...” after the words ”as enunciated by Islam”, the words ”and as based upon eternal principles”, be inserted.’

9. ’That in the paragraph beginning with the words ”Wherein the principles of

democracy...” after the words ”as

enunciated by Islam", the words "and other religions", be inserted.'

10. 'That in the paragraph beginning with the words "Wherein the principles of democracy..." after the words "as enunciated by Islam", the words "but not inconsistent with the Charter of the Fundamental Human Rights of the United Nations Organization", be inserted.'

11. 'That in the paragraph beginning with the words "Wherein the Muslims shall be..." for the words "Muslims shall", the words "Muslims and non-Muslims shall equally" be substituted.'

12. 'That in the paragraph beginning with the words "Wherein the Muslims shall be...", for the words "Islam as set out in the Holy Quran and the *Sunnah",* the words "their respective religions" be substituted.'

13. 'That in the paragraph beginning with the words "Wherein the Muslims shall be...", after the words "Holy Quran and the *Sunnah",* the following be added:-

'in perfect accord with non-Muslims residing in the State and in complete toleration of their culture and social and religious customs".'

14. 'That for the paragraph beginning with the words "Wherein adequate provision shall be made for the minorities", the following paragraph be substituted:-

'Wherein shall be secured to the minorities the freedom to profess and practise their religions and develop their cultures and adequate provision shall be made for it".'

15. 'That in the paragraph beginning with the words "Wherein shall be guaranteed...", after the word "guaranteed", the words "and secured to all the people of Pakistan" be inserted.'

16. 'That in the paragraph beginning with the words "Wherein adequate provision shall be made to safeguard...", for the words "and depressed classes", the words "classes and Scheduled Castes" be substituted.'

17. 'That in the paragraph beginning with the words "Wherein adequate provision shall

be made to safeguard..." between4 words "backward" and "depressed class1,' the words "and labouring" be inserted'

THE DEBATE ON RELIGIOUS MINORITIES

Out of the long speeches made by the non-Mu> • members of the Constituent Assembly, the sj». of Birat Chandra Mandal,5 made on 9 March 1»was an eloquent and representative one for _

minorities parts of which are:

Sir, I hear that *ulemas* are insisting on this pmc.? of Islam. Are there not *pandits* in India who cot not insist on political thinkers of India to adopt si: a constitution. Are there not Bishops in England in America - or in any other country wkl dominated by Christians on the face of the gttt where these *ulemas, I* mean the Bishops, havevois The constitution has all along been and every* on the face of the globe established on danoar and specially on the economic thinking of is political people of individual countries Bntir I find a great deviation in our beloved Pakistan Ii> a newly built up dominion. The founder oft dominion most unequivocally said that Pakistanis! be a secular state. That great leader of ours IK said that the principles of constitution will be te: on Islam. i

Individuals might have religion, but the argot no religion. So, in the interests of the ^ which I am an humble member, I bring it t notice through the President that you will \ responsible because you are the sponsor Resolution not only to the countries in the which have made their constitutions in the p.< also to the posterity who will think of mate constitutions in the future. So, I tell you again ,, again to ponder over this Resolution before i finally adopt it.

Bhupendra Kumar Datta also made an elope speech while opposing the Objectives Resolute Some extracts from his speech are n below:6

On the one hand, you run the risk of subject religion to criticism, which will rightly be resell as sacreligious; on the other hand, so far as (less

and state policies are cone curb criticism. Political modern democratic instituti grow and progress by critic broader basis. As long as *y* the region of politics, criticis even severe and bitter.'

'But as you bring in relij of faith, you open the dooi criticism. You then leave it wide open. Sir, I feel-I believe-that were this Res< this House within the life-tim Pakistan, the Quaid-i-Azam, in its present shape. Evei Honourable mover of this Re affairs in the state, I have no be stilled or absolutism will 1 itself

'But, Sir, we are framing will outlive us, may be, even m generations. So, as far as nun against it, let us not do anythin consign our future generations t destiny. May be, may God forl perhaps even within our li troublous times as we live in-a a Yanshikai, or a Bacheha-i-Saki to impose his will and authorii may find a justification for it in

Mian Mohammad Iftikharud< the Resolution, but for other reas< his speeches are as under:7

What I am trying to stress is that this Resolution do not mean Resolution is not the product of tf this House. This Resolution is si voice of the seventy million peop This Resolution is supposed to b< I have every right to criticize it bi we are taking upon ourselves responsibility which we are not disc Had we given the world a constitution, a fine ideology, a new' real democracy, I think, we would h great task. On this occasion, I have and I am not doing this to blame any section of this House,-I am saying £ progressive, as revolutionary, as den dynamic as that of any other state

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..” between the lepressed classes”, F” be inserted.’

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by the non-Muslim isembly, the speech eon9 March 1949, ntative one for the

isting on this principle *its* in India who could of India to adopt such Jishops in England nor ther country which is the face of the globe, he Bishops, have voice. g been and everywhere tablished on democracy lomic thinking of the ual countries. But, Sir, ir beloved Pakistan. It is n. The founder of this ly said that Pakistan will eat leader of ours never institution will be based

religion, but the state has
• interests of the state, of ember, I bring it to your ent that you will be held are the sponsor of this ne countries in the world mstitutions in the past but will think of making their e. So, I tell you again and us Resolution before you

to also made an eloquent ie Objectives Resolution. i. speech are reproduced

run the risk of subjecting hich will rightly be resented
3ther hand, so far as the state

and state policies are concerned, you cripple reason, curb criticism. Political institutions-particularly Modern democratic institutions-as we all know, Sir, grow and progress by criticism, from broader to still broader basis. As long as you remain strictly within the region of politics, criticism may be free and frank, even severe and bitter.’

’But as you bring in religion, or things as matters of faith, you open the door ajar for resentment of criticism. You then leave it to absolutism to fling it wide open. Sir, I feel-I have every reason to believe-that were this Resolution to come before this House within the life-time of the great creator of Pakistan, the Quaid-i-Azam, it would not have come in its present shape. Even with you, Sir, the Honourable mover of this Resolution at the helm of affairs in the state, I have no fear that criticism will be stilled or absolutism will find a chance to assert itself.’

’But, Sir, we are framing a constitution, which will outlive us, may be, even many of our succeeding generations. So, as far as human reason can guard against it, let us not do anything here today that may consign our future generations to the furies of a blind destiny. May be, may God forbid it, but some day, perhaps even within our lifetime-extremely troublous times as we live in-a political adventurer, a Yanshikai, or a Bacheha-i-Sakao may find a chance to impose his will and authority on this state. He may find a justification for it in this Preamble.’

Mian Mohammad Iftikharuddin also opposed the Resolution, but for other reasons. Extracts from his speeches are as under:7

What I am trying to stress is that the words used in this Resolution do not mean anything. This

Resolution is not the product of the League Party in this House. This Resolution is supposed to be the voice of the seventy million people of our country. This Resolution is supposed to be their voice, and I have every right to criticize it because I feel that »e are taking upon ourselves a tremendous responsibility which we are not discharging properly. Had we given the world a proper Islamic constitution, a fine ideology, a new way of achieving real democracy, I think, we would have performed a great task. On this occasion, I have a right to sayand 1 am not doing this to blame any member or any section of this House,-I am saying as is, perhaps, as progressive, as revolutionary, as democratic, and as dynamic as that of any other state or ideology. I do

hope that even at this stage this House, realizing its great responsibility, will incorporate in its Objectives Resolution those principles which will make real democracy possible. And if it fails to do that, at this stage, I do hope it will do so in the actual constitution and then the world will know what we really mean by the Islamic conception of democracy and social justice.

Dr Ishtiaq Husain Qureshi, Maulana Shabbir Ahmed Osmani, Sardar Abdur Rab Khan Nishtar, Nazir Ahmad, Dr Omar Hayat Malik, Nur Ahmad, Dr Mohammad Husain, Begum Shaista, and Chaudhry Mohammad Zafarullah Khan spoke in support of the Resolution and opposed the amendments moved in it.

Maulana Shabbir Ahmed Osmani expressed his views to support the Objectives Resolution as under:8

Islam has never accepted the view that religion is a private affair between man and his creator and as such has no bearing upon the social or political relations of human beings. Some other religious systems may expound this theory and may, incidentally, be too idealistic to possess a comprehensive and all-embracing code of life. But Islam has no use for such false notions and its teachings are in direct contradiction to them. The late Quaid-e-Azam made the following observations in the letter he wrote to Gandhiji in August, 1944:

’The Quran is a complete code of life. It provides for all matters, religious or social, civil or criminal, military or penal, economic or commercial. It regulates every act, speech and movement from the ceremonies of religion to those of daily life, from the salvation of the soul to the health of the body; from the rights of all to those of such individual, from the punishment here to that in the life to come. Therefore, when I say that the Muslims are a nation, I have in my mind all physical and metaphysical standards and values.’

Sardar Abdur Rab Khan Nishtar, who was one of the closest associates of Jinnah, stoutly defended the Resolution and made the following remarks in his speech on 10 March 1949.9

The first and the main opposition was voiced against the Preamble of the Resolution and the basic idea

that was put forward in support of the adverse criticism was that politics is different from religion; politics should be divorced from religion and politics should have nothing to do with the religion. Both have different spheres and thereafter, they should not be mingled together in the affairs of the state. Well, Sir, so far as this point is concerned, the world knows, and particularly those who belong to the IndoPak continent know it very well, that on this point there is a fundamental difference between the Muslims and the non-Muslims. I can well understand the reason for that difference. Maybe the nonMuslims who advocate divorce between religion and politics look at this point from the point of view of their own religion. May be their religion lays down that religion is only a matter which concerns the relations of a man with his creator and thus far and no further. But we, the Muslims and our Leader, the former Leader of the Muslims, the Quaid-e-Azam, have declared it from thousands of platforms that our outlook on life and of life is quite different from the outlook of our friends. We believe that 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 described it, as a complete code of life.

Chaudhry Mohammad Zafarullah Khan, Foreign Minister of Pakistan, in his speech of 12 March 1949 before the Constituent Assembly supporting the motion, tried to allay the fears and apprehensions of the minorities in the following words:

To the opening statement in the Preamble that sovereignty over the entire universe belongs to God Almighty alone, I do not conceive that any person believing in God could take exception. The rest of the Preamble, though based on the assumption that all authority, political or otherwise, which man has been invested with, has been delegated by the Supreme Ruler and must be exercised within the limits said by Him, is designed to emphazise that political authority vested in a people and by them entrusted to the State is a sacred trust and must be exercised and administered in that spirit. Some controversy has been raised as to whether that authority rests primarily in the people or in the state. From the Islamic point of view, there can be no doubt that such authority or sovereignty as Islam concedes to mankind, vests in the people and in the Quran it is the people who are commanded to entrust that

authority into the hands of those who are 111 respect fit to exercise it. The state is the *sen* the people and is like any other instrument i other sphere brought into being for the pup serving the people.

RESOLUTION ADOPTED

Winding up the debate on the Motion of Ota Resolution on 12 March 1949, Liaquatmaa following remarks re-assuring the non-Mus’r

Sir, let me tell my Honourable friend that the £... guarantee that the non-Muslims can have, the get only through this Resolution and through in .- manner and, therefore, I would request him noi, misled by interested persons and do not think moment that this Resolution is really intended

•>•• really result, in driving out the non-Muslims ’•• Pakistan or reducing them to the position of-, described hewers of wood and drawers of water • real Islamic society, let me tell you, Mr Presicr. there are no classes of hewers of wood and dmr of water. The humblest can rise to the hig^ position. As a matter of fact, let me tell \. Mr President, what we have provided here minorities I only wish that the sister dominion, India had provided similar concessions and sun,.’ safeguards for the minorities in India. Here, »e r guaranteeing you your religious freefa advancement of your culture, sanctity of \OL personal laws, and equal opportunities, as «ell i equality in the eye of the law. What have they do» on the other side? No question of culture. Asa *sme* of fact, the personal law of Muslims is not to * recognized in India. That is the position.

Sir, my Honourable friend, Mr B. C. Mandal.tot me that posterity will curse me for bringing forwc this Resolution. Let me tell my friend, if wesro in building Pakistan on the basis of this Resolute we shall be able to create conditions that postenti instead of cursing me, will bless me.

Sir, I would just once again tell my friends, on fc I other side, that whether you believe us or whether va ’ do not believe us; whether you desire it or whedir you do not desire it, as long as you are citizens o1 Pakistan, we are determined to do the right thing ki you for the simple reason that our religion tells us tc do so; for the simple reason that we are trying to i build up this state on morality and on higher values | of life than what materialism can provide. ’

At the conclusion of the s amendments proposed by the members were put to the vote of Assembly. These amendments were House by ten against twenty-one.1 who voted for the amendments we

1. Mr Prem Hari Barma

2. Prof. Raj Kumar Chakravar

3. Mr Sris Chandra Chattopad

4. Mr Akshay Kumar Dass

5. Mr Bhupendra Kumar Datt.

6. Mr Jnanendra Chandra Maj

7. Mr Birat Chandra Mandal

8. Mr Bhabesh Chandra Nand

9. Mr Dhananjoy Roy

10. Mr Harrendra Kumar Sur

The names of those members wh the amendments are:

1 Mr A. M. A. Hamid

2. Maulana Mohd Abdullah-e

3. Mr Abul Kasem Khan

4. Maulana Mohd Akram Kha

5. Mr Fazlur Rahman

6. Prof. Ishtiaq Husain Quresl

7. Mr Liaquat AH Khan

8. Dr Mohammad Husain

9. Mr Nur Ahmad

10. Mr Serajul Islam

11. Maulana Shabbir Ahmed C

12. Khwaja Shahabuddin

13. Begum Shaista Suhraward)

14. Mr Nazir Ahmad Khan

15. Sheikh Karamat Ali

16. Dr Omar Hayat Malik

17. Begum Jahan Ara Shah Na

18. Sir Mohd Zafarullah Khan

19. Sardar Abdur Rab Khan N-

20. Khan Sardar Bahadur Khai

21. Pirzada Abdus Sattar Abdu

After voting on the amendm Resolution was placed before I Assembly and was adopted.12

It is unfortunate that there was ; Resolution along communal members voted against the

amend Muslim members voted for the ar

ic Motion of Objectives
949, Liaquat made the ing the non-Muslims.10

ible friend that the greatest islims can have, they will ution and through no other ould request him not to be ms and do not think for a m is really intended or will lut the non-Muslims from i to the position of-as he

and drawers of water. In a ne tell you, Mr President, wers of wood and drawers

can rise to the highest }f fact, let me tell you,

have provided here for lat the sister dominion of ar concessions and similar ties in India. Here, we are mr religious freedom, ;ulture, sanctity of your I opportunities, as well as

law. What have they done stion of culture. As a matte / of Muslims is not to be

is the position, iend, Mr B. C. Mandal, told •se me for bringing forward :11 my friend, if we succeed he basis of this Resolution, te conditions that posterity ill bless me.

again tell my friends, on the au believe us or whether you ler you desire it or whether long as you are citizens of ned to do the right thing by i that our religion tells us to :ason that we are trying to arality and on higher values ilism can provide.

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At the conclusion of the speech all the amendments proposed by the non-Muslim members were put to the vote of the Constituent Assembly. These amendments were rejected by the House by ten against twenty-one." The members who voted for the amendments were:

1. Mr Prem Hari Barma

2. Prof. Raj Kumar Chakravarty

3. Mr Sris Chandra Chattopadhyaya *A* Mr Akshay Kumar Dass

Mr Bhupendra Kumar Datta Mr Jnanendra Chandra Majumdar Mr Birat Chandra Mandal Mr Bhabesh Chandra Nandy Mr Dhananjoy Roy
10. Mr Harrendra Kumar Sur

The names of those members who voted against the amendments are:

Mr A. M. A. Hamid

Maulana Mohd Abdullah-el Baqui

Mr Abul Kasem Khan

Maulana Mohd Akram Khan

Mr Fazlur Rahman ~ ~

Prof. Ishtiaq Husain Qureshi

Mr Liaquat Ali Khan

Dr Mohammad Husain

Mr Nur Ahmad

10. Mr Serajul Islam

11. Maulana Shabbir Ahmed Osmani

12. Khwaja Shahabuddin

13. Begum Shaista Suhrawardy Ikramullah

14. Mr Nazir Ahmad Khan

15. Sheikh Karamat Ali

16. Dr Omar Hayat Malik

17. Begum Jahan Ara Shah Nawaz

18. Sir Mohd Zafarullah Khan

19. Sardar Abdur Rab Khan Nishtar

20. Khan Sardar Bahadur Khan

21. Pirzada Abdus Sattar Abdur Rahman

After voting on the amendments, the main Resolution was placed before the Constituent Assembly and was adopted.12

It is unfortunate that there was a division on the Resolution along communal lines. Muslim

members voted against the amendments and nonMuslim members voted for the amendments. One

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cannot escape the conclusion that the Resolution might have sown the seeds of suspicion, alienation, and distrust among the minorities against the majority. It might have been more prudent to accept some of the amendments proposed by the members representing the minorities in order to reach an understanding with them so that the Resolution could have been passed by consensus. It cannot be denied that some of the proposed amendments were quite reasonable and moderate and their point of view ought to have been accommodated in the larger national interest.

NOTES

1. *The Constituent Assembly of Pakistan Debates,* Volume V-1949, pp. 2-7.

2. Ibid., p. 8.

3. Ibid., p. 9.

4. Ibid., pp. 98, 99 & 100.

5. Ibid., pp. 48-9.

6. Ibid., pp. 13-17.

7. Ibid., pp. 54 & 55.

8. Ibid., pp. 44, 45 & 46.

9. Ibid., pp. 55, 56, 59, 60, 61 & 62.

10. Ibid., pp. 94-8.

11. Ibid., pp. 98, 99 & 100.

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12. Ibid., pp. 100 & 101.

6 Debates Assembly

After Jinnah's death, the crucial iss was whether the Governor-Genen constitutional head of state with th< and his Cabinet exercising real exe otherwise. At that time, Liaqw power. He chose to remain prime meant that the Cabinet form of go^ become effective. Khwaja Na2 became the second Governor-Gene be willing to assume the customa the office without Jinnah's real j 'delightful, honest, respected, dynamic'. The position of the Gc during this period was similar t< dominions-he became the figurehead while real power was e Prime Minister and his cabinet, continued until the death of Liaquai
1951.'

During the period immediat Jinnah's death, there develo] competition for influence, wealt prestige between the various politic personalities. The arena in which tl first manifested itself was the or framing the Constitution which was expression to Pakistan's polity. It Jinnah's guiding hand was espe because he would have been able, ti all the interested parties a due sens(to moderate selfish aspirations and convince the elite that the drav constitution presented a task which t quickly undertake. What counted the politicians and members of tl

Assembly was Viow power -was 1

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east *and West Pakistan;* how far th modern state could be squared with I

6 Debates within the Constituent Assembly

After Jinnah's death, the crucial issue to be decided was whether the Governor-General should be the constitutional head of state with the Prime Minister and his Cabinet exercising real executive power or otherwise. At that time, Liaquat wielded real power. He chose to remain prime minister which meant that the Cabinet form of government was to become effective. Khwaja Nazimuddin, who became the second Governor-General, appeared to be willing to assume the customary privileges of the office without Jinnah's real power. He was delightful, honest, respected, and not very ihnamic'. The position of the Governor-General during this period was similar to that in other dominions-he became the constitutional 'igurehead while real power was exercised by the Prime Minister and his cabinet. This harmony Continued until the death of Liaquat on 16 October 1951.'

During the period immediately following Jinnah's death, there developed a fierce competition for influence, wealth, power, and

prestige between the various political interests and personalities. The arena in which this competition first manifested itself was the organization for framing the Constitution which was to give formal expression to Pakistan's polity. It was here that Jinnah's guiding hand was especially missed I because he would have been able, to enforce upon all the interested parties a due sense of proportion to moderate selfish aspirations and, above all, to convince the elite that the drawing up of a constitution presented a task which the nation must quickly undertake. What counted far more with the politicians and members of the Constituent Assembly was how power was to be divided between the centre and the provinces and between East and West Pakistan; how far the shape of a modern state could be squared with the principles of Islam; and how the different competing interests-landlords, religious leaders, businessmen, industrialists-could receive recognition of their claim to power and influence.2

When Jinnah died, he could, in the nature of things, have no real successor, but Liaquat who continued as Prime Minister, inherited a share of his leader's prestige and remained in office until his assassination in 1951. The nation-wide authority which Jinnah had exercised disappeared just at the moment when it was needed to sublimate regional and personal jealousies into a sustained effort for the common good. Before he died, Jinnah had delivered a series of stern warnings against the dangers which 'provincialism' held for the future of the nation.3 It was this spirit of partisanship which haunted and frustrated Liaquat throughout his term of office. His authority was not unchallenged and some of his colleagues were too ambitious to accept his advice. Some of his ministers began to form their own groups of supporters in the Assembly and

even to communicate their own views to the press when they differed from the majority opinion in the Cabinet. All this considerably hampered the Prime Minister in his task of consolidating the work which Jinnah had begun and weakened the prestige of the central government throughout the country.4

BASIC PRINCIPLES COMMITTEE AND ITS INTERIM REPORT

After the passing of the Objectives Resolution in
1949, the Constituent Assembly set up a number of committees and sub-committees to work out the details of the Constitution on the principles as laid down in the Objectives Resolution. The Basic Principles Committee was the most important one.

It had twenty-four members who were not required to be members of the Constituent Assembly. It set up three sub-committees:

1. Sub-Committee on federal and provincial constitutions and distribution of powers;

2. Sub-Committee on franchise; and

3. Sub-Committee for judiciary.

The Basic Principles Committee also set up a special committee for ’Talimaat-i-Islamia’, which consisted of reputed Islamic scholars to advise on matters arising out of the Objectives Resolution. Another special committee was assigned the task of recommending appropriate nomenclatures.5

Without finalizing its recommendations regarding several other matters such as financial allocations, nomenclatures, qualifications of the head of the state, and so on, the Basic Principles Committee presented to the Assembly an interim report.6

The first draft Constitution, as prepared by the Basic Principles Committee, was presented to the country by Liaquat Ali Khan in 1950. Its salient features were:

1. The Objectives Resolution was to be incorporated in the Constitution as a directive principle of state policy and was not to prejudice the incorporation of fundamental rights in the Constitution.7
2. There was to be a head of state, to be elected for five years by a joint session of both the Houses of central legislature. He was not to be a member of either House and, if so, he had to cease to be a member after his election. A person could not be elected head of state for more than two full terms.8 He was to appoint the commanders-in-chief and officers of the armed forces. His discretionary powers were confined to granting clemency and appointment of election tribunals.9

3. The Head of the state was to appoint as Prime Minister a member of the central legislature who commanded the confidence of both houses of the central legislature jointly. Ministers were to be appointed on the advice of the Prime Minister.10
4. The central legislature was to consist of two houses:

(a) the house of units representir. legislatures of the units;

(b) the house of the people elected« people.’’

The report did not give a full pickthe composition and size of the house i people as the sub-committee on franck:. not completed its work by 1950. Butt. made clear that the existing

prmir, including Balochistan, should have e.. representation in the house of units Ii *$* further laid down that the two houses or' federal legislature should have equal pc and in the case of a dispute on any quest, a joint session of both houses should* summoned for taking the final decis thereon.12 The power to convene a jc session was to be vested in the head of* state and to be exercised in the follow' cases:13

(a) Conflict between the houses ofa legislature;

(b) Election and removal of the Headofi State; t

(c) Consideration of the budget and *m* money Bills; and

(d) Consideration of a motion of» confidence in the Cabinet.

It was recommended that the Gate would be responsible to both the houses «| the legislature. Thus the first draft piw '- for a bicameral system with u.. representation of the various units u (J upper house and equality of powers behw the two houses. Of course, if the popdi house should have greater numbers, itwoulj be in a stronger position, but this was mj made clear, the strength of the two hoia| being undefined. The dissolution of tit central legislature was to take place on ii advice of the Prime Minister.14

. There was to be a head of the province each province to be appointed by the hea; the sta'te and was to hold office during <•: latter's pleasure.15

6. The head of the provinci Chief Minister a member majority in the provincia ministers were to be appc of the Chief Minister.16

7. There was to be one hou each province elected b; period of five years. It coi the advice of the Chief M

8. The head of the state an provinces were given po\ ordinances during the legislature concerned was

9. Urdu was to be the natior state.19

The reaction to the first draf

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REPORT OF THE COMM FUNDAMENTAL RIGHTS MATTERS RELATING TC MINORITIES

The committee on the fundan citizens submitted its report befor Assembly which was accepted in The proposed Constitution gua to all citizens including the 11 mil the minority communities in a 76 million to apply to the Sup enforcement of their fundamental i the model of some of the new cor world, the constitution-makers gu

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6. The head of the province was to appoint as Chief Minister a member who commanded a majority in the provincial legislature. Other ministers were to be appointed on the advice of the Chief Minister.16

7. There was to be one house of legislature in each province elected by the people for a period of five years. It could be dissolved on the advice of the Chief Minister.17

8. The head of the state and the heads of the provinces were given powers to promulgate ordinances during the period when the legislature concerned was not in session.18

9. Urdu was to be the national language of the state.19

The reaction to the first draft Constitution was most unfavourable in East Pakistan. The main point of criticism related to the quantum of representation in the proposed central legislature. All the units were given an equal number of seats in the upper house. East Pakistan, where a majority of the country's population lived, had equal representation with each of the four provinces in West Pakistan thus reducing the representation of the majority of the population in Pakistan to onefifth This fact assumed great importance because the upper house was vested with powers equal to that of the lower house. It was thus apprehended that the majority of the people might be converted into a minority. East Pakistanis also did not favour the idea of Urdu being the only state language.20

REPORT OF THE COMMITTEE ON FUNDAMENTAL RIGHTS AND MATTERS RELATING TO MINORITIES

The committee on the fundamental rights of citizens submitted its report before the Constituent Assembly which was accepted in 1950.

The proposed Constitution guaranteed the right to all citizens including the 11 million members of the minority communities in a population of
76 million to apply to the Supreme Court for enforcement of their fundamental rights. Following the model of some of the new constitutions of the world, the constitution-makers guaranteed certain

fundamental rights to the citizens, both Muslims and non-Muslims in Pakistan. The fundamental rights included the following important provisions: equality of all citizens before the law; equal protection of law to all citizens; no discrimination on grounds of religion, race, caste, sex, or place of birth with regard to access to places of public entertainment, recreation, welfare, or utility. Every qualified citizen would be eligible for induction in the services of the state irrespective of religion, race, caste, sex, descent, or place of birth. Every citizen was guaranteed freedom of speech, conscience, expression, association, profession, occupation, trade, or business. No community would be prevented from providing religious instruction to the pupils of its own community and the personal law of every community was guaranteed. No person would be compelled to pay any special taxes the proceeds of which would be specifically appropriated for the propagation of any religion other than his. (The non-Muslim members of the Constituent Assembly often expressed the apprehension that in an 'Islamic state', Islam would be propagated and maintained with public money and that the non-Muslims would be forced to pay taxes for this purpose.) Further, it was provided that there would be no discrimination against any community in the matter of exemption from or concession in taxes granted with respect to religious institutions. No discrimination in admission to educational institutions would be permitted. The report of the fundamental rights of citizens received favourable comments both inside and outside the Constituent Assembly. It was quite a comprehensive list of rights and Liaquat could claim, with some justification, that 'all the essential rights have been provided'.21

In addition to these fundamental rights which were applicable to Muslims and non-Muslims alike, special safeguards for minorities were provided in the Constitution. The Committees on Fundamental Rights set up a sub-committee on matters relating to minorities at its first meeting held in 1948. The Minorities Committee included representation from all groups of the minority population. The sub-committee issued the following questionnaire to important individuals and organizations in the country with a view to

ascertaining the views of the public on this complicated question:

1 . What should be the political safeguards of a minority in the centre and in the provinces?

2. What should be the economic safeguards of a minority in the centre and in the province?

3. What safeguards should be provided for a minority with regard to matters religious, educational, social, and cultural?

4. What methods are suggested to make the safeguards effective?

5. Should any of the safeguards be eliminated later and if so, how, when, and under what circumstances?

6. Any other remarks or suggestions with regard to safeguards for a minority.

The suggestions received from the public were numerous and often divergent. They were circulated in a consolidated form to the members of the sub-committee which made its decision in the light of suggestions and proposals received from the public.22

Some of the Hindu leaders had maintained that they did not want any safeguards, but regardless of what they said, it was clear from the beginning that safeguards were needed for the religious minorities, particularly when the Constituent Assembly decided to have an Islamic Constitution. In one of the memoranda submitted to the Constituent Assembly by the minority cornmunities, it was demanded that the Hindus should get representation in the legislature not only according to their numbers but also some 'weightage' should be given to them. For instance, in East Bengal, where the Hindus constituted about
23 per cent of the entire population, it was demanded that they should get 41 per cent of the seats in the East Bengal legislature.23

Other safeguards considered essential for the minorities were as follows:24

1 . They should be protected from the threat of physical persecution. In the months following partition, there were riots in India

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%Tu VWislan resulting in the death of members of the minorities but by 1950 Pakistan could *justly poiat_out^jhat not a*

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had passed since partition without i» physical persecution of the miir community of Muslims. There was *atr.* time no threat of physical persecution ot. minorities in Pakistan. This was fret admitted by the minorities themselves

2. Religious minorities must possess freer of conscience in its widest sense. ThatK. already been provided in the fundamer. rights of citizens by 1950.

3. Minorities which differ from the majonn language and culture should have the rip to run their own schools provided, of corn' that they conformed to the gene'. regulations of the government regardu.; education and that such schools weren? used to inculcate a spirit of hostility to tit majority of the state. This was also cfaii provided in the fundamental rights.

In its final report on the minorities' rights,!1 Constituent Assembly added the followuj safeguards in addition to those already prov for in the fundamental rights:

1. 'Any minority residing in the terntoiy Pakistan or any part thereof having a distu language, script, or culture of its own shout not be prevented from conserving the same
2. 'The state shall not discriminate in granting aid to educational institutions, discnminait against any educational institution merely c the ground that it is mainly maintained by religious minority.

3. 'There shall be a Minister for Mmontj Affairs both at the centre and in tit provinces to look after the interests of tit minorities and to see that the safeguard! provided in the constitution for the minorities are duly observed'.25

THE ASSASSINATION OF LIAQUAT ALI KHAN,

After *the* death of Jinnah, the mantle *ofleade"*

mm, he kept the reputation of being a However, his moderation and refusa rash courses offended the extremist, h of a peaceful solution of the Kashmi negotiations with Nehru over the] religious minorities and the resetth refugees, and his eagerness to ratic Pakistan relations in the interest of be offended extremists and religious] opponents, backed by the Press, attac for not observing *purdah.* These attac] unfortunate because she was a rerm earnestly working for the amelion conditions of women so that they coulc status with men and play their legiti society. The attacks on her were intended to embarrass Liaquat.26

Liaquat earned personal enmit1 religious fanaticism which might ha reason behind his assassination in Ra
16 October 1951 while he was address meeting. His assassin was killed on the security forces thus destroying all evid were rumours at the time that political have plotted to remove him but the mo inquiries by an expert loaned by Sc(failed to connect the individual assass interest group in political circles.27

Liaquat's death was a blow to Pakis he was the last real link with Jinnah. I stock and long experience were bey Although he lost Jinnah's confidenc extent in the latter's last days28 and

was complicity in the alleged rigging of provincial elections in 1951, he stooc shoulders above Jinnah's other co Liaquat Ali Khan was responsible for Jinnah to return to India to lead tr League.29 His services during the movement as Jinnah's chief deputy cann emphasized.

He was succeeded as prime minister

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groups which confronted

him, he kept the reputation of being an honest man. However, his moderation and refusal to rush into rash courses offended the extremist. His acceptance of a peaceful solution of the Kashmir dispute, his negotiations with Nehru over the protection of religious minorities and the resettlement of the refugees, and his eagerness to rationalize IndoPakistan relations in the interest of both countries,

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REPORT OF THE BASIC PRINCIPLES COMMITTEE, 1952

As discussed earlier, the first report of the Basic Principles Committee was severely criticized, particularly in East Pakistan. By postponing its’ consideration in accordance with the wishes of

the people, Liaguat acted in *a demfftyatic w&r. 7%e*

opponents, 6adceo/ 6y the Press, attacked his wife for not observing *purdah.* These attacks were most unfortunate because she was a remarkable lady, earnestly working for the amelioration of the conditions of women so that they could enjoy equal status with men and play their legitimate role in society. The attacks on her were essentially intended to embarrass Liaquat.26

Liaquat earned personal enmity based on religious fanaticism which might have been the reason behind his assassination in Rawalpindi on
16 October 1951 while he was addressing a public meeting. His assassin was killed on the spot by the security forces thus destroying all evidence. There were rumours at the time that political rivals might have plotted to remove him but the most searching inquiries by an expert loaned by Scotland Yard failed to connect the individual assassin with any interest group in political circles.27

Liaquat's death was a blow to Pakistan because he was the last real link with Jinnah. His political stock and long experience were beyond doubt. Although he lost Jinnah's confidence to some extent in the latter's last days28 and was accused of complicity in the alleged rigging of the Punjab provincial elections in 1951, he stood head and shoulders above Jinnah's other companions. Liaquat Ali Khan was responsible for persuading Jinnah to return to India to lead the Muslim League.29 His services during the freedom movement as Jinnah's chief deputy cannot be overemphasized.

He was succeeded as prime minister by Khwaja Nazimuddin, the Governor-General at that time. Ghulam Muhammad, who had been Finance Minister from the earliest days of Pakistan, was selected as Governor-General.

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ffjs /report was referred fact to tie Constituent

Assembly on which they invited proposals and suggestions from the public by January 1951 and a sub-committee was appointed to examine them. The sub-committee made its report to the Basic Principles Committee in July 1952, and it was presented as the second draft to the Constituent Assembly by the then Prime Minister30 Nazimuddin on 22 December 1952.

Salient Features of the Report:

1. The Objectives Resolution was adopted as a Preamble to the proposed Constitution.

2. The head of the state was required to be a Muslim and to be elected for a term of five years at a joint sitting of both the houses of the federal legislature.31 The head of state could not hold office consecutively for more than two full terms.32

3. The Prime Minister was to be appointed by the head of the state who also appointed the other ministers on the advice of the Prime Minister.33 The Council of Ministers was to be collectively

responsible to the House of the People only.34

4. The proposed federal legislature under the second draft comprised two houses of parliament as in the first draft. The House of Units was to consist of 120 members. The legislature of East Bengal was to elect sixty of their members according to the principle of proportional representation by means of a single transferable vote. West Pakistan seats were to be allocated as follows, also to be elected according to the principle of proportional representation by means of a single transferable vote by their respective legislatures:35

5.

Punjab

Sindh

North-West Frontier

Tribal areas

Bahawalpur

Balochistan

Baloch states

Khairpur

Capital of Federation

The house of the people was to consist of 400 members, of whom 200 were to be directly elected from East Bengal, and 200 from West Pakistan. The seats allowed to West Pakistan were divided as follows: Punjab 90

Sindh 30

North-West Frontier 25

Tribal areas 17

Bahawalpur 13

Balochistan *5*

Baloch States 5

Khairpur 4

Capital of Federation 11

200

Under the second draft, the House of the People was to enjoy the real authority; the House of Units could only recommend revision of hasty legislation. All Money Bills had to originate in the House of the People. In case of any conflict between the houses, joint sittings of both were provided for in which a simple majority would decide the issue.

The second draft brought the principle of parity between East and West Pakistan as most important contribution towards solving the problem of representation and it claimed to ’bring about a constitutional balance of power as well as of responsibilities’ between the two wings of Pakistan. Seats were to be allocated to communities in the House of the People.36 The singlemember territorial constituencies were to be drawn in such a manner as to ensure that within a unit or the capital of the federation, *all the constituencies of a*

7.

particular community could have, as;. possible, equal number of votesr 0.
200 seats allocated to East Bengal were reserved for Muslims, 2-1 • scheduled castes, 20 for other Hindus Christians, and 2 for Buddhists Oui i i seats allocated to Punjab, 88 were resr: for Muslims and 2 for Christians T’« was no seat reserved for the minorito I the NWFP, Tribal Areas, Bahawalpun.. Balochistan, Balochistan states , Khairpur State. Out of 30 seats allocate: Sindh (minus Karachi Federal Area) were reserved for Muslims, 2 for Send. Castes, and 1 for other Hindus For’j Karachi Federal Area, 11 seats »r allocated, 10 for Muslims and I sac; Parsis.38 The allocation of reserved seats & the minorities necessarily require preparation of separate electorates li members of the Basic Principles *Comsat* representing the minorities, namely S Chattopadhyaya, B.K. DattaandPremHti Barma, recorded their dissent against if provision of allocation of seats to lk| communities.

For each of the provinces, states, capitalij

federation, and tribal area, the word’«

was used. There was to be a head oft1

unit for each unit appointed by thetidi

state serving at his pleasure for Ik

maximum period of five years at a time’

The Chief Minister of each unit was to It

appointed by the head of the unit and otic

Ministers were to be appointed on ikj

advice of the Chief Minister.40

For each unit, there was to be a unicarnta)

legislature composed of members cho«i

by direct election. The number of memta

of the legislature of a unit was to tit

between 75 and 350 as determined byi

law of the federal legislature which n

also to provide for the actual number«

seats to be reserved for various

munities on the basis of population

as practicable.41 The ministers in the •

were to be collectively responsible to *it*

legislatures of the units.42

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9. The head of the state was to promulgate ordinances when the federal legislatu However, an ordinance before the federal legisl expire six weeks from Similar provision was mi the heads of the units reg. tion of ordinances.44

10. The authority to dissolve People was vested in the] normally to be exercised the council of ministers. V could command confiden of the People, the head of be authorized to dissolve people in exercise of his di fresh elections.45 Similai made for the heads of the i the dissolution of th legislatures.46

11. The judiciary was to be

Supreme Court of Pakistai

Chief Justice and two to :

The Chief Justice was to
the head of the state and ol
to be appointed by the h
after taking into con
recommendations made
Justice.47 The qualificatio
ment as Judge of the Supre
be five years as a Judge of
being Barrister or Advocate
standing.48 Provisions wen
acting Chief Justice and a
The original jurisdiction <
Court existed in case of <
the Federal Government ai
units or between two 01
Appellate jurisdiction was
in criminal, civil, and other
the judgments, decrees or J
High Court.51 The decisions
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authorities, executive and
were required to act in its a
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when the federal legislature was not sitting. However, an ordinance was to be laid before the federal legislature and would expire six weeks from its reassembly.43 Similar provision was made in respect of the heads of the units regarding promulgation of ordinances.44

10. The authority to dissolve the House of the People was vested in the head of the state, normally to be exercised on the advice of the council of ministers. Where no ministry could command confidence of the House of the People, the head of the state was to be authorized to dissolve the house of the people in exercise of his discretion and hold fresh elections.45 Similar provision was made for the heads of the units in regard to the dissolution of their respective legislatures.46

11 The judiciary was to be headed by the Supreme Court of Pakistan consisting of a Chief Justice and two to six other judges. The Chief Justice was to be appointed by the head of the state and other Judges were to be appointed by the head of the state after taking into consideration the recommendations made by the Chief Justice.47 The qualifications for appointment as Judge of the Supreme Court was to be five years as a Judge of a High Court or being Barrister or Advocate of twelve years standing.48 Provisions were also made for acting Chief Justice and ad hoc Judges.49 The original jurisdiction of the Supreme Court existed in case of dispute between the Federal Government and one or more units or between two or more units.50 Appellate jurisdiction was to be conferred in criminal, civil, and other matters against the judgments, decrees or final orders of a High Court." The decisions of the Supreme Court were to be final and binding on all authorities, executive and judicial, which were required to act in its aid.52 There were provisions for special leave to appeal against any judgment, decree, or order of a High Court; review of its own Judgments

I and *ca-d&rs, ftad* advisory jurisdiction on

reference by the head of the state.53 Judges

of the Supreme Court could not be removed, except on the ground of misbehaviour or infirmity of mind or body on reference from the head of state. The alleged ground was to be enquired into by a Bench of three judges of that court.54

12. There was to be a High Court for each of the units of East Bengal, the Punjab, Sindh and the NWFP.55 Every judge of a High Court was to be appointed by the head of the state on the recommendations of the Chief Justice of the Supreme Court, who in the case of appointment of a judge, other than Chief Justice of the High Court, was required to consult the Chief Justice of the High Court concerned before making his recommendations.56 The qualifications for appointment as a judge of a High Court were to be a Barrister or Advocate of any High Court often years standing; a member of former Indian Civil Service of at least ten years standing having been a District Judge for at least three years; having been a judicial officer for at least ten years; or, in the opinion of the head of the state, a distinguished jurist.57 A Judge could only be

removed on the ground of misbehaviour or infirmity of body or mind if the Supreme Court, on reference made by the head of the state, recommends his removal.58 There were also provisions for appointment of acting Chief Justice and Additional Judges.59 The High Courts were to have all such jurisdictions, including appellate and revisional, which they had before commencement of the Constitution, but such jurisdiction was subject to variation by the appropriate legislature.60 In addition, the High Courts were to be conferred with powers to issue writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and *certiorari.61*

13. There were guarantees to be provided to the civil servants of the federation and the units against dismissal, removal, or reduction in rank without opportunity to

I show cause.62

14. Directive Principles of State Policy were to be made part of the Constitution.63

Like the first draft of the Constitution presented in September 1950, the second draft, though more exhaustive as compared to the first one, evoked the same response. This time, the reaction in the Punjab was extremely unfavourable. Critics saw no logic in treating a single unit, East Bengal, of equal importance with all other units put together and regarded it as a violation of the federal principle under which all the units, large or small, should get equal representation in the Upper House, as is the case in the United States and some other federations.

The critics seemed to overlook the fact that East Pakistan had a larger population than the total of nine units of West Pakistan put together. The composition and lesser powers of the Upper House were also attacked. The Punjab leaders demanded representation in the Lower House to be on the basis of population and in the Upper House to be on the basis of equality of the units, and for the two Houses to have equal powers. It may be recalled here that these provisions of the first draft had been attacked in East Bengal, and the Constitution-framers had to modify those proposals to meet their demands. Although the new proposals were opposed in the Punjab, reaction to the second report was not unfavourable in the smaller units of West Pakistan. For instance, at a meeting held in Peshawar on 30 December 1952, the Chief Minister of the NWFP and other leaders expressed a favourable opinion on the second draft.64 The opposition to the second report in the Punjab forced the Constituent Assembly to postpone its deliberations for an indefinite period. The country seemed to face a constitutional deadlock of great magnitude. National unity was threatened. For some time it appeared that no compromise was possible which would be acceptable to the two wings of Pakistan.

An analysis of the second draft and the main objections to it reveal that while some of the objections, as in the case of the first draft, were inspired by a deliberate intention to create a constitutional deadlock, there were obvious defects in the new proposals. They may be summarized as follows:

1. The draft did not acknowledge democratic way the fact that East Bengali a majority of the total populatiocountry.

2. It did not pay due respect to thefac1. West Pakistan had the major part i country’s territory.

3. By giving to the Upper House a comp identical to that of the Lower House, iir.; the former a weak replica of the flow the People and reduced its utility

4. The lack of a constitutional provision IB taf the two Houses were unable to resolu’ conflict in joint session.65

ANTI-AHMEDIYA MOVEMEIVT, MARTIAL LAW, AND DISMISSAL 01 NAZIMUDDIN’S GOVERNMENT

In the provincial elections held in Punjab n I1 the Muslim League led by Mian Mumtaz emerged victorious. With support *from* Ulema-i-Islam, the Ahrars and, above all, wtiki help of the government machinery, it wot I) seats which later increased to 166. Only!1 cent of the total votes were cast * Die la won fifteen of the twenty-three urban sea Daultana was elected unopposed as ChiefMini' and the leader of the League's parliamentary)!!' The Punjab soon faced serious food partly created by landlords who had turnedfe due to the modest reforms made by the DauJia government in favour of agricultural tenants

The Ahmedis (whom their opponents also *a* to as Mirzais or Qadianis) were a close-in community who believed that Mirza Giiili Ahmad (1835-1908) was a prophet *orwbi,tol* subservient to Prophet Muhammad (PBOH) 1 belief was regarded as blasphemous In i Muslims for having infringed upon the cantoj principle of Islam regarding the finality of prophethood of Hazrat Muhammad (m group of Mirza Ghulam Ahmad's followers in Lahore called the Lahori Party did not to the claim of his prophethood. Nevertheless, were targets of anti-Ahmediya sentiments sentiments, where they existed, had also m and political overtones. The Ahmedis •

prominent positions in go in the professions. *1* /afarullah Khan, was the of the sect and, naturall) Majhs-e-Ahrar, a politica anti-Ahmediya agitation ij

The anti-Ahmediya agit Laused serious difficul government. In early Marc nots erupted throughout Pu Major General Azam, tl imposed martial law in Lai in the city. General Ayub, C Pakistan Army, proved th< would not allow the countr The situation for Nazimudd due to slashing of defence because of stringent financ annoyed the military leaders for action against Nazimuddi

In the face of such , Nazimuddin considered appe Government to recall the Gc could allege with justificc Muhammad was physically in involved in a conspiracy with military commanders to destab government. Nazimuddin *i* confidence of the Constituent *A* defeat his opponents in, th< Nazimuddin was a simple man a He failed to take initiative in tim Ghulam Muhammad to strike J
1953 he was summoned by Gh along with his cabinet and ordere Nazimuddin declined he was disi his cabinet. He tried appealing Palace only to discover that ove service had been deliberately put Even the British High Commii getting into this situation and o Nazimuddin's telegram to the Quee General had acted under Section 11 Government of India Act. Na; became victim of a bureaucratic-m

jld in Punjab in 1951, [ian Mumtaz Daultana upport from Jamiat-ind, above all, with the achinery, it won 153 , to 166. Only 52 per re cast.66 The League y-three urban seats.67)osed as Chief Minister e's parliamentary party, erious food shortages, who had turned hostile i made by the Daultana gricultural tenants, icir opponents also refer nis) were a close-knit ;d that Mirza Ghulam i prophet or nafei, though Auhammad (PBUH). This
3 blasphemous by the inged upon the cardinal •ding the finality of the Muhammad (PBUH). A Ahmad's followers based jri Party did not subscnbe jthood. Nevertheless, the\ mediya sentiments. Thesi existed, had also matenal ies. The Ahmedis held

prominent positions in government service and also in the professions. The Foreign Minister, Zafarullah Khan, was the most influential member of the sect and, naturally, the main target of the Majlis-e-Ahrar, a political party that had initiated anti-Ahmediya agitation in the Punjab.

The anti-Ahmediya agitation and food shortages caused serious difficulties for Nazimuddin government. In early March 1953, anti-Ahmediya nots erupted throughout Punjab. On 6 March 1953, Major General Azam, the Area Commander, imposed martial law in Lahore and restored order rathe city. General Ayub, Commander-in-Chief of Pakistan Army, proved the point that the army would not allow the country to fall into anarchy. The situation for Nazimuddin further deteriorated due to slashing of defence budget by one third because of stringent financial conditions. This annoyed the military leaders and the stage was set for action against Nazimuddin government.

In the face of such a grave situation, Nazimuddin considered appealing to the British Government to recall the Governor General. He could allege with justification that Ghulam Muhammad was physically incapacitated and was involved in a conspiracy with the bureaucrats and military commanders to destabilize his democratic government. Nazimuddin still enjoyed the confidence of the Constituent Assembly and could defeat his opponents in, the Assembly. But

Nazimuddin was a simple man and not an intriguer. He failed to take initiative in time and thus allowed Ghulam Muhammad to strike first. On 17 April 1953 he was summoned by Ghulam Muhammad along with his cabinet and ordered to resign. When Nazimuddin declined he was dismissed along with his cabinet. He tried appealing to Buckingham Palace only to discover that overseas telegraphic service had been deliberately put out of operation. Even the British High Commissioner avoided getting into this situation and did not transmit Wimuddm's telegram to the Queen. The Governor General had acted under Section 10 of the adapted Government of India Act. Nazimuddin thus vame victim of a bureaucratic-military coup.68

THE MUNIR REPORT, **1954**

After the disturbances of 1953 had subsided and martial law withdrawn, a special Act was passed constituting a Court of Inquiry to investigate the causes of disturbances, the circumstances leading to the imposition of martial law, and the adequacy or otherwise of the measures taken to suppress the disturbances. It was to be a public inquiry and Justice Muhammad Munir, Chief Justice of the Lahore High Court at that time, was nominated as the President of the Committee and Justice Kayani as its member. The inquiry commenced on 1 May 1953 and the report was presented to the Government on 10 April 1954. The record of the inquiry was colossal-it consisted of 1600 pages of written statements, 2600 pages of evidence, 339 formally proved documents, numerous letters, some of which exceeded a 100 pages, and a host of books, pamphlets, journals, and newspapers. The report itself covers 387 closely printed pages. In the course of the inquiry, almost every conceivable subject was touched upon and the issues underlying the inquiry, which frequently emerged in all their directness and with all their implications, were very deep and fundamental to the new state of Pakistan.69

The committee examined the viewpoints of all leading *ulema* in the country at that time. All the *ulema* were unanimous in their belief that the Ahmedis were *kafirs* (disbelievers) and anyone becoming an Ahmedi was liable to the death penalty because apostasy in an Islamic state was punishable by death.70

The committee also found from the interviews with leaders of various sects and schools of Islam that they could not stand one another and called each other *kafirs* as well. According to the Barelvi *ulema*, Deobandis and Wahabis were outside the pale of Islam and well liable to the death penalty if they fell within the definition *ofmurtad*, namely, if they had changed and not inherited their religious views. According to a *fatwa* of the Deobandis, all Isna Ashari Shias were *kafirs* and *murtad* for not believing in the *sahabiyyat* of Hazrat Siddiq-i-Akbar and *qazif* (deniers of the status) of Hazrat Aisha Siddiqa.71

The authors of the Report conclude:

’The net result of all this is that neither Shia nor Sunnis nor Deobandis nor Ahl-i-Hadith nor Barelvis are Muslims and any change from one view to the other must be accomplished in an Islamic state with the penalty of death if the government of the state is in the hands of the party which considers the other party to be *kafirs.* And it does not require much imagination to judge of the consequences of this doctrine when it is remembered that no two *ulema* have agreed before us as to the definition of a Muslim’.72

’Keeping in view the several definitions of a Muslim given by the *ulema,* need we make any comment except that no two learned divines are agreed on this fundamental. If we attempt our own definition as each learned divine has done and that definition differs from that given by all others, we unanimously go out of the fold of Islam. And if we adopt the definition given by any one of the *ulema,* we remain Muslims according to the view of that *alim* but *kafirs* according to the definition of every one else’.73

The Report ends with the following observations:

’And it is our deep conviction that if the Ahrar (the leading party) had been treated as a pure question of law and order, without any political considerations, one District Magistrate and one Superintendent of Police could have dealt with them. Consequently, we are prompted by something that they call a human conscience to inquire whether in our present state of political development, the administrative problems of law and order cannot be divorced from a democratic bed-fellow called a ministerial government which is so remorselessly haunted by political nightmares. But if democracy means the subordination of law and order to political ends-then Allah knoweth best and we end our report’.

THE MUHAMMAD ALI FORMULA: COMPROMISE FORMULA ON FEDERAL LEGISLATURE

It has been discussed above that the second draft of the Basic Principles Committee, which was presented by Prime Minister Nazimuddin in *1952,* came under severe *criticism, especially from the*

Punjab. On the dismissal of Nazimuddin’sgovei;- ment, Muhammad Ali Bogra was appointed Pnt Minister who regarded it as one of his pnnciptj tasks to overcome the constitutional deadlock

He was soon successful in achieving a mise on the issue of representation between Eu1 and West Pakistan in the federal legislature ft formula, known as the ’Muhammad Ali Formula was presented to the Constituent Assembly a,
7 October 1953 and adopted by it on 6 Octofce
1954.

The ’Muhammad Ali Formula’ was as follow

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i. The federal legislature should be composed c two Houses-the House of Units and the How of the People.

The total strength of the House of Ik would be fifty, to be equally divided among I five units which were constituted in *lit* following manner:74

A. East Bengal;

B. Punjab;

C. North-West Frontier Province, Frontier States, and the tribal area;

D. Sindh and Khairpur.

E. Balochistan, Balochistan State Union Capital of the Federation (Karachi) and ill State of Bahawalpur.

The distribution of seats among the followui 'Units' which consisted of more than oneprovim or state was to be as under:

1. North-West Frontier Province including Frontier States and the Tribal Area: 10

2. Sindh and Khairpur. 10

3. Balochistan including Balochistan States Union 3

4. Capital of Federation (Karachi) 3

5. State of Bahawalpur. 4

The House of Units would be elected indirect!) by the legislatures of the units, and where then was no legislature, the system of election was ti be determined by an act of the federal legislature

Apart from these seats, two additional seats were reserved for women.75

ii. The House of the People was of three hundred to be divid units as follows:76

A. East Bengal

B. Punjab

Cl North-West Frontier Pro

C2 Frontier States and Triba

Dl Sindh

D2 State of Khairpur

El Balochistan

E2 Balochistan States Union

E3 Capital of Federation

E4 Bahawalpur State

in. Equal powers were to be Houses. There was provi session of the two Houses i the head of the state and for of confidence. Decisions w« a simple majority, provide such a majority included at of the members from each West Pakistan).

iv. In case of a difference of op two Houses, a joint session < would be called and the me be passed by a majority vc the majority included thirty members from each zone, could not be solved, the ft provided that the head of dissolve the legislature but amended when the formula the Constituent Assemt producing a serious flaw Similarly, the provision that state would be elected from from that to which the Prim< belong was also amended, that this provision might , handicap in the working of The formula, however, improvement compared to the drafts of the Basic Princip while it maintained the pri between East and West Pak substantial departure from th« the second draft. The distrib

Nazimuddin’sgovernS was appointed Prime

ing a comproPresentation between East £ feral legislature. His Muhammad Ali Formula’

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Formula’ was as follows:

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r Province, Frontier rea;

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basis of provincial interests. National unity and national feelings were considerably damaged and therein lay the root cause of the difficulty in finding a basis for representation in the legislature under the future Constitution. Each unit feared the domination of the other and, consequently, the framers of the Constitution had to evolve the formula of a government based on regional parity. The difficulties involved in such an arrangement were regarded as a painful necessity.78

THE CONTROVERSY BETWEEN PROVINCIAL AUTONOMY AND A STRONG CENTRE

The second issue in the controversy between East and West Pakistan was regarding the distribution of powers between the federal and the provincial governments. This problem was not peculiar to Pakistan; it is faced when framing any federal Constitution. An indispensable quality of the federal state lies in a distribution of powers between the federal authority and the federating units. A federal Constitution attempts to reconcile the claims of regional sovereignty and state sovereignty.

Geography and history alike demanded that Pakistan should have a federal government. While there was general agreement over this, conflicts developed, later between those who wanted maximum autonomy for the provinces with a weak centre and those who favoured a strong central government with provinces enjoying limited autonomy. The makers of the Constitution were at great pains to steer a course midway between these two conflicting aims. The problem was further complicated by the lack of understanding and mutual distrust between the people of the two wings. Disgruntled politicians in both wings wanted not only provincial autonomy but also a weak centre. The school demanding greater authority for the provinces claimed that in view of the geographical facts prevailing in Pakistan, the powers of the centre should be strictly enumerated and residuary powers should be vested in the provinces.79

It is rather strange that demands for maximum autonomy came first from the largest unit, namely

East Pakistan, which should not have of domination. Unfortunately, this fear struck! in East Pakistan. The people of that region they were neglected by the central governs! and did not have a reasonable, fair, and adequ share in the central government and administrate They feared an increase in the power of the MI would mean a corresponding decrease in *in* power and influence. The national conveili which was held in Dhaka on 4 and 5 Ni
1950, demanded that only three subjects defence, foreign affairs, and currency, should given to the centre and the rest should be the provinces.80 This demand for maxn autonomy in East Pakistan gained farther from a new political formation, the United which secured an overwhelming victory in a provincial election in March 1954 There« popular opinion in favour of giving more pwr to East Pakistan’s provincial government baz» it had been felt over seven years that the proi *t* could best be administered in by the legislate Dhaka rather than by the central legislature Karachi.8’

The school advocating greater authonty fin centre used similar arguments in support o. strong

national government. A.K. Brohi, *k;* Minister for Parliamentary Affairs in Pakistan. & that if there had been geographical contigr between East and West Pakistan, then ”i principles of decentralization of power might to’ been the basis of the Pakistan Constitution, but order to overcome this mutual difficulty of 4 distance that separates the two wings, there»« no alternative but to provide for a strong can government.82

The demand for a strong national governs was supported by a majority of members oft first Constituent Assembly. It was felt that a SB, a government was necessary to fight provincials! which had so nearly succeeded in tearing the natu apart. They held that the only guarantee fort, strong Pakistan was in a strong central governM but that in framing a Constitution they could w altogether ignore the demands for maxuM| provincial autonomy and decentralization

After prolonged discussions, the C Assembly arrived at a compromise relati,. .. distribution of powers that was somewhat diffosp

from two generally accej distribution of powers in powers might be distributed either the Constitution mighl the federal authority could remainder to the federating i or it might state what power could possess and leave tr federal authority (as in Cana two methods was acceptable course was adopted, devised t when they distributed *pov,* Constitution for undivide< Government of India Act, 193 of discussion which ultin promulgation of the Governm
1935, Muslims had demandei the provinces because in som< there was a preponderant Mus they felt that they would be abl The Hindus, on the other hand concentration of power in the British constitutional experts promise by submitting two *I* which the federation and the pro would have exclusive legislativ to enumerate in a third list enumerating which they would jurisdiction. Residual powers wi in the centre nor in the province General, acting at his discretion to allocate to the central autl provinces, as he might see fit, the on such subjects.83

The framers of the Pakistan Ci that the method devised by the Bi great use in finding a compromis who demanded a strong centre and In the final draft of 1954, they folk of preparing three lists of sul provincial, and concurrent. The cen was given wide powers to manage i •flairs, currency and banking, c< ifaeign commerce, and scores of ot **»fl,** there were sixty-six items in t The provincial list included for ’mprising such matters as law an .jalth, education, agriculture, trade, and other subjects of local interest.’

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themselves for months in working at an acceptable solution, but the task proved to be complex and difficult. In May 1954 they presented the following

formula which was accepted by the Constituent

Assembly:

1. The official languages of the Pakistan Republic should be Urdu and Bengali and such other languages as might be declared to be such by the head of the state on the recommendation of the provincial legislatures concerned;

2. Members of Parliament should have the right to speak in Urdu and Bengali in addition to English;

3. Notwithstanding anything in the above Article, for a period of twenty years from the commencement of the Constitution, the English language should continue to be used for all official purposes of the Republic for which it was being used immediately before such commencement;

4. For examinations of the central services, all provincial languages should be placed on an equal footing;

5. Provision should be made to teach Arabic,

Urdu, and Bengali in secondary schools to

enable students to study one or two of these

in addition to the language used as the

medium of instruction;

6. The state should take all measures for the development and growth of a common national language;

7. A commission should be appointed ten years after the commencement of the Constitution to make recommendations regarding the replacement of English; and
8. Notwithstanding anything in the foregoing Articles, the federal legislature might by law provide for the use, after the expiry of the period of twenty years from the commencement of the Constitution, of the English language for such purposes as might be specified in the law.85

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growth of a common national language, it pi ’ indication what the common language stak ’ In the meantime, it was provided that *M* would continue to be used as the official 1«| of the state for a period of twenty years. *Jkl* Minister, Muhammad Ali, explained ttai formula attempted to reconcile the demands t sections of the people. It tried to accede to demand of the Bengalis and, at the same ’J sought to maintain linguistic unity. In ^ framers of the Constitution obviously «d\ postpone the issue for twenty years wkexpected a better environment for a solutw problem.

From the theoretical point of view, a :,,. lingual state is not desirable as it raises c< problems. But nations are made, up of k-. beings whose deep feelings on questior* language are vitally important. No do* • adoption of one state language, if it werepo«> would have been preferable from the standpoir national unity, but it would have been unra and unwise to ignore the demand of thepeopl East Bengal. The East Pakistanis insisted Bengali as one of the state languages and to i uniformity of language under such circumsi might have been detrimental to the national for which Jinnah had wanted one state lai The adoption of Bengali would have I stronger ties and better understanding bettvea peoples of the two wings. The multi-lu| solution, it would seem, was a pragmatic a| in the existing circumstances.86

The main items in the United F me were as follows:

1. Recognition of Bengali < language at par with Urdu.

2. Rejection of the draft Coi dissolution of the Constituent its replacement by a directly <

3. Complete autonomy for East matters except defence, foreij currency, which would be re; central legislature.

4. Complete freedom from the regard to export of jute.

5. Consultation between the cer Pakistan on the allocation exchange for imports.

6. Abolition^ of the Indo-Pakistani visa system and of existing re trade between East and W(Devaluation of the Pakistani rup

It was clear from the day of its adoption that the formula could satisfy no one. While according equality of status to Urdu and Bengali as official languages and providing that the state should take all measures necessary for the development and

ELECTIONS IN EAST *PAKISTAN*

Before the adoption of the draft Constitute i the report of Basic Principles Committee, promo elections were held in East Bengal from *I*
11 March 1954 resulting in an overwhelming Mir for the United Front (Jugto Front), an alliance; parties opposed to the ruling Muslim League

Out of 309 seats, the United Front (corasdu of three Muslim parties-the Awami Muse League,

the Krishak Sramik Party and the Ni» i-Islam) gained 223 seats; the Muslim League, If Independents, 3; Khilafat-e-Rabam, 1, *at* minorities, 72.

About 65 per cent of the electorate polls, in which all five members of tl Muslim League ministry lost their seat The defeat of the Muslim League in, which had 56 per cent of the total po Pakistan, led to demands for the resign; central government and the dissolut Constituent Assembly as unrepresentat demands, were rejected by Muhammai stated: The task of framing the Consti not entrusted to the Muslim League as si all members, Muslim or non-Muslim, sj chosen for this purpose. There is no gc party and no opposition in the Co Assembly'. For members from a p province to resign merely because their j gone out of office in that province w argued, create an unworkable precedent., to one or other of the provincial legislator be held practically every year, and if the (of the central government changed whenev party came to power in one of the provinc would be no stability or continuity.

Following the Prime Minister's statem Working Committee of the Muslim League its members from East Bengal in the Con Assembly not to resign their seats.

The main items in the United Front's programme were as follows:

1. Recognition of Bengali as an official language at par with Urdu.

2. Rejection of the draft Constitution, the dissolution of the Constituent Assembly, and its replacement by a directly elected body.

3. Complete autonomy for East Pakistan in all matters except defence, foreign policy, and currency, which would be reserved for the central legislature.

4. Complete freedom from the centre with regard to export of jute.

5. Consultation between the centre and East Pakistan on the allocation of foreign exchange for imports.

6 Abolition, of the Indo-Pakistani passport and visa system and of existing restrictions on trade between East and West Bengal. Devaluation of the Pakistani rupee.87

DEBATES WITHIN THE CONSTITUENT ASSEMBLY "1

AMENDING THE ACTS OF **1954**

81

About 65 per cent of the electorate went to the polls, in which all five members of the outgoing Muslim League ministry lost their seats.

The defeat of the Muslim League in East Bengal which had 56 per cent of the total population of Pakistan, led to demands for the resignation of the central government and the dissolution of the Constituent Assembly as unrepresentative. These demands, were rejected by Muhammad Ali who stated 'The task of framing the Constitution was not entrusted to the Muslim League as such, but to all members, Muslim or non-Muslim, specifically ciosen for this purpose. There is no government , party and no opposition in the Constituent i Assembly'. For members from a particular province to resign merely because their party had (one out of office in that province would, he argued, create an unworkable precedent. Elections to one or other of the provincial legislatures would lie field practically every year, and if the character of the central government changed whenever a new jarty came to power in one of the provinces, there »ould be no stability or continuity. Following the Prime Minister's statement, the I Working Committee of the Muslim League ordered ; its members from East Bengal in the Constituent Assembly not to resign their seats.

The Constituent Assembly, in the same session in which the Report of Basic Principles Committee was adopted, passed two important Bills. On the
20 of September 1954 it repealed the Public and Representative Offices (Disqualification) Act of 1949 ss The Actj popularly known as 'PRODA', was passed while Liaquat Ali Khan was the Prime Minister and had been widely welcomed in the country as an effective and proper remedy

against abuses of maladministration and corruption in public life. By this Act, complaints could be made to the Governor-General or to the Governors of provinces who, if satisfied with the substance of the allegations made, could order an inquiry to be conducted by judges of the High Court. If a person was found guilty, punishment would take the form of suspension of the right of holding public office for a specified number of years. The Act was applied on several occasions against ministers, including provincial Chief Ministers, and, in several cases, the inquiry went against ministers. Its hasty repeal by the first Constituent Assembly was unfortunate and considerably lowered the prestige of the Assembly in the estimation of the people. There was a suggestion in some quarters that the repeal had been effected in order to favour some members of the Constituent Assembly.

The second enactment was the amendment of sections 9, 10, 1OA, and 1 OB of the Government of India Act, 1935, as adapted for Pakistan.89 The net result of that amendment was to divest the Governor-General of his powers to dismiss his ministers who would no longer hold office during his pleasure but would instead be individually and collectively responsible to the federal legislature. Obviously, the Constituent Assembly did this to prevent the repetition of acts such as the dismissal of the Nazimuddin Cabinet in April 1953. It could be described as an important step towards the growth of parliamentary democracy in Pakistan, but the amendment was made in such haste that it could be termed a ’constitutional coup’.

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DISSOLUTION OF THE CONSTITUENT ASSEMBLY AND PROCLAMATION OF A STATE OF EMERGENCY

With the constitutional issues at last settled and the drafting entrusted to experts working under a deadline of 1 January 1955, the Constituent Assembly was adjourned *'sine die.* The GovernorGeneral (Ghulam Muhammad), stung by the Assembly's action in curtailing his powers, struck back. On 24 October 1954, he dissolved the Constituent Assembly and announced an end to what he described as 'parliamentary bickering'.90 He issued the following proclamation:

The Governor-General having considered the political crisis with which the country is faced, has with deep regret come to the conclusion that the constitutional machinery has broken down. He therefore has decided to declare a state of emergency throughout Pakistan. The Constituent Assembly as at present constituted has lost the confidence of the people and can no longer function.

The ultimate authority vests in the people who will decide all issues including constitutional issues through their representatives to be elected afresh. Elections will be held as early as possible. Until such time as elections are held, the administration of the country will be carried on by a reconstituted Cabinet. He has called upon the Prime Minister to reform the Cabinet with a view to giving the country a vigorous and stable administration. The invitation has been accepted.

The security and stability of the country are of paramount importance. All personal, sectional and provincial interests must be subordinated to the supreme national interest."

The significant thing in the proclamation was that it did not say in clear and specific terms that the Constituent Assembly was dissolved. It only said that the Constituent Assembly had 'lost the confidence of the people and can no longer function'. Another important omission was that it nowhere specified any provisions or sections of the Independence Act or Government of India Act,
1935 under which the proclamation was issued. Normally, whenever any order or proclamation is made the provision of law under which the power

is exercised is indicated. The proclamation q the subject of lengthy legal disputes which will k discussed in the next chapter.

The two hasty enactments by the Constirt Assembly led to a new series of poling manoeuvres and intrigue such as had ch, Pakistani politics since the death of Jinnah Liaquat. Compromises and formulas which been widely proclaimed as the best con: solutions to certain problems were

now assailed. The dissolution of the Constil Assembly threw the country into chaos confusion by reviving old rivalries and n old controversies. It is true that the first Constitta Assembly had made undue delay in framing 4 Constitution. It is equally true that the En Pakistan elections of 1954 had demonstrated ft it had lost the confidence of the people to a jn extent, yet it is difficult to justify the Gow General's action in abruptly dismissing Constituent Assembly when it was about to its work. If it had been dissolved immediately the election in East Pakistan, there might have some justification but its dissolution after i attempt to curb the undemocratic and arbitri powers of the Governor-General clearly indie* that the real motive of the Governor-General i dissolving the House was personal and was« based on any democratic principles or traditim His subsequent attempt to give the country Constitution through the decrees rather tha Constituent Assembly also substantiates the that his motivation was purely personal.

Ghulam Muhammad instructed Muhammad .1 Bogra, the Prime Minister, to form a Cabi without the benefit of parliament. Hastely, Cabinet was put together which included Map General Iskandar Mirza, Dr Khan Sahib, a General Muhammad Ayub Khan, who was i Commander-in-Chief of the Pakistan Army. 1 was the beginning of the army taking overcralii responsibilities as a Cabinet member, this tine,) the Minister for Defence. This was also 4 beginning of the end of the supremacy of civil over military power.

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31. Para 13, Chapter I, Part in. Messrs S.C. Chattopadhyaya, Prem Hari Banna, B.K. Datta, and Begam Shah Nawaz on the Basic Principles Committee has recorded their dissent against this

provision.

32. Paras 16 and 17, Chapter I, Part in. *Constitutional Foundations of Pakistan,* compilation by Safdar Mahmood, 1990, Jang Publications, Lahore, Report from pages 84 to 156.

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34. Para 38, Chapter II, Part in.

35. Para 43, Chapter II, Part in.

36. Para 46, Chapter II, Part HI.

37. Para 43 (ii), Chapter II, Part in.

38. Schedule II to the Report.

39. Paras 81, 83 and 84, Chapter I, Part IV.

40. Para 89, Chapter I, Part IV.

41. Para 98, Chapter II, Part IV,

42. Para 92, Chapter I, Part IV.

43. Para 70, Chapter II, Part in.

44. Para 130, Chapter II, Part IV.

45. Para 58, Chapter II, Part in.

46. Para 111, Chapter II, Part IV.

47. Paras 161, 162 & 163 of Chapter I, Part X.

48. Para 164, Chapter I, Part X.

49. Para 170, Chapter I, Part X.

50. Para 175, Chapter I, Part X.

51. Para 176, Chapter I, Part X.

52. Paras 179 & 180, Chapter I, Part X.

53. Paras 182, 183 and 184, Chapter I, Part X.

54. Para 168, Chapter I, Part X.

55. Para 193, Chapter II, Part X.

56. Para 195, Chapter II, Part X.

57. Para 196, Chapter II, Part X.

58. fiara 200, Chapter II, Part X.

59. Paras 202 & 203, Chapter II, Part X.

60. Para 204, Chapter II, Part X.

61. Para 207, Chapter II, Part X.

62. Para 224, Chapter I, Part XI.

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1990, Jang Publishers, Lahore. The Report is from page 157 to 237.

75. Para47(i).

76. Para 46.

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82. Ibid., Vol. XV, No. 12, p. 349.

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7 An Era <

')n the dissolution of the Ci and the proclamation of < Governor-General, the focu controversy shifted to the c Court of Pakistan, which wai Pakistan under the Governmen as adapted in Pakistan, was c historic verdicts on fundanu issues. The judgments that fol questions than were answered i judgments can still be heard i tional developments in Pakistai

MOULVI TAMIZUDDIN CASE

The first challenge to the procla the President of the Constituent, Moulvi Tamizuddin Khan, a m and sincere convictions. He proclamation as ’unconstitutiot *vires*, without jurisdiction, inop< and asked for a writ of mandam government from interfering wit his functions as President of the *t* a writ of *quo warranto* with a vie the validity of certain appoi Governor-General’s Council of IV The full bench of the Chief decided unanimously in favc Tamizuddin Khan and allowed h The Court overruled the objection of the federal government that Government of India Act, 1935, the courts with the power to *mandamus* and *quo warranto* had i assent of the Governor-General am valid piece of legislation and no r< be granted by the chief court the *sme way, the Court also* overn *objection* against the new Section 1(

November 1950. *;*, Vol. XVI, No. 27,

nal Development in

Committee, adopted nstituent Assembly, ist II (Unit) and List

1 An Era of Legal Battles

On the dissolution of the Constituent Assembly and the proclamation of emergency by the Governor-General, the focus of constitutional controversy shifted to the courts. The Federal Court of Pakistan, which was the apex court in Pakistan under the Government of India Act, 1935 as adapted in Pakistan, was called upon to give historic verdicts on fundamental constitutional issues The judgments that followed raised more questions than were answered and echoes of these judgments can still be heard in current constitutional developments in Pakistan.

MOULVI **TAMIZUDDIN KHAN'S**

CASE

I He first challenge to the proclamation came from I the President of the Constituent Assembly, the late jMoiilvi Tamizuddin Khan, a man of high repute I fld sincere convictions. He challenged the I proclamation as 'unconstitutional, illegal, *ultra* I KB, without jurisdiction, inoperative, and void' I ad asked for a writ of mandamus to restrain the I pvemment from interfering with the exercise of I to functions as President of the Assembly and for I iwitof *quo warranto* with a view to determining I lie validity of certain appointments to the I Governor-General's Council of Ministers.1 I The foil bench of the Chief Court of Sindh I Wed unanimously in favour of Moulvi I Imizuddin Khan and allowed his writ petition.2 jilt Court overruled the objection taken on behalf I of the federal government that Section *223-A*, I Government of India Act, 1935, which invested Ik courts with the power to issue writs of liwtoiiis and *quo warranto* had not received the I seuiofthe Governor-General and was thus not a Hill piece of legislation and no relief could thus p panted by the chief court thereunder. In the I me way, the Court also overruled a similar I Action against the new Section 10 which limited

the discretion of the Governor-General in his choice of ministers. Interpreting the provision of the Indian Independence Act regarding assent of the Governor-General, the Court held that it did not provide that assent was necessary but only stated that if assent was necessary, then the GovernorGeneral would have the full power. It was held that the Constituent Assembly had the sovereign power and supreme prerogative to amend and repeal existing laws and form and bring into force a new Constitution. The Court observed that when His Majesty's own intervention to give validity or force to the measures of the Constituent Assembly was not required, then how could the intervention of His Majesty's representative be required.

The Sindh Chief Court was indeed mindful of its previous ruling in which it had held that 'there is no limit imposed upon the legislative powers of the Constituent Assembly sitting as a constitutionmaking body'.3 One of the judges on the Bench of Sindh Chief Court, Justice Mohammad Bakhsh, noted that while deciding two previous cases where statutes involved had

not received the assent of the Governor-General, ’the Federal Court knew very well that no assent of the Governor-General had been obtained to this Act of the Constituent Assembly, and, therefore, it must be taken for granted that the Federal Court did not think that assent to be necessary’.4

On the power of the Governor-General to dissolve the Constituent Assembly, it was held that the Indian Independence Act did not contain any express provision 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. The right to dissolve the legislature, it was observed, had ceased to be a prerogative in England and it was difficult to hold that the prerogative which had ceased in England was revived in Pakistan after 1947.

The Chief Court of Sindh thus issued quowarranto to the ministers in the new Cabinet prohibiting them from exercising the office of minister and the writ of mandamus restoring Moulvi Tamizuddin Khan to the office as President of the Constituent Assembly was issued restraining respondents from interfering with his duties and from obstructing him in the exercise of his functions.

The Federal Court Judgment

An appeal to the Federal Court against the decision of the Sindh Court was filed by the government. By a majority of four to one the Federal Court, decided, on 21 March 1955, in favour of the government and rejected Moulvi Tamizuddin's petition challenging the proclamation of the Governor-General.5 The most significant point in the Federal Court's judgment was that it did not go into the question of whether the Constituent Assembly was rightly dissolved by the GovernorGeneral. It reversed the judgment of the Sindh Court on technical grounds namely, that Section
223A of the Government of India Act as adapted in Pakistan by virtue of which the Sindh Court issued the writ in favour of Tamizuddin Khan was 'not yet a law' because it had not received the assent of the Governor-General. The Court held that the enactments of the Constituent Assembly, whether it functioned as the central legislature or as the constitution-making body, required the assent of the Governor-General and since Section
223A of the Government of India Act had not received such assent, it was not yet law and, therefore, the Sindh Court had no power to issue the writs.

The majority in the Federal Court, interpreting the provision of the Indian Independence Act, 1947, concerning assent by the Governor-General6 held that it made the Governor-General a constituent part of the legislature in as much as the right to give assent necessarily included in it the right to withhold assent. Every bill must, therefore, be presented to him to provide him an occasion to exercise that right and, unless a bill was so

not function and the proposed legislation dull become law. The requirement of assent to; dominion legislation by the Crown, or representative, was indispensible and had u instance ever been dispensed with by the Cnm

The legislation of the Constituent Assembly a sub-section (1) of Section 8 is a part of government of the dominion within the meanii! section 5 and the whole Scheme of the Govemi of India Act proceeds on the assumption ttei Governor-General represents the Crown wte assents in Her Majesty's name to the laws ofi federal legislature.7

The position of the Constituent Assembly i held to be that of the legislature of the donm when it made laws for the Constitution of I dominion and the federal legislature in its find was under the limitations imposed upon it by Government of India Act, 1935.

Since the decision of the majority of theft Court was based on invalidity of section 223A the Government of India Act, 1935 for wart assent of the Governor-General, therefore, Court did not

go into the other issues in the

Dissent of Justice A. R. Cornelius

Justice A. R. Cornelius wrote a strong dii opinion stating that there was no obligation all laws made by the Constituent Assembly rfj constitutional nature required the assent of Governor-General for their validity and His principal reasons for reaching suck conclusion were:

i. There were two precise acts of Governor-General which could not interpreted otherwise than as acts of U of allegiance to the British sovereign first act was of the first Governor-Gar Quaid-e-Azam Muhammad Ali JIIE who, while taking oath as Govern General, refused to accept the earlier k which required the Governor-General bear ’full faith and allegiance to

and which successors al required that he should bi to the constitution and 1 Majesty. The second Governor-General Ghulai deviation of the long- star on accession of a new Bn royal styles and titles si assent ’as well of the Pi dominions as of the P£ United Kingdom’, no s brought before the Const for its assent upon the ace throne of Queen Elizabeth Hence, Her Majesty was symbol, although as Que< more substantial position have been claimed.

ii. The nature of freedom ext Indian Independence Act, making ’free peoples’ in tl Pakistan and India which n that peoples of the domini advantage of representat according to British pattern

in. The extent of freedom a countries which, as domi replace the Indian empire, material degree greater thar older dominions had gainec the Statute of Westminster the circumstance which co application of the speci; ’Independent Dominions’ t< states which were brought by means of this higl instrument, the Indian Inde
1947.

iv. The argument that the Assembly derived power to the dominion under sectioi Indian Independence Act o fact that the Constituent Assi a body, not a creation o Parliament. It was a body supra-legal power to dischai

for *Pakistan. Its* powers ii

legislation did not
• of assent to the e Crown, or its le and had in no th by the Crown.

:nt Assembly under is a part of the hhm the meaning of of the Government ssumption that the e Crown when he to the laws of the

it Assembly was of the dominion istitution of the re in its function d upon it by the

ty of the Federal section 223A of >35 for want of , therefore, the ues in the case.

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rong dissenting obligation that Assembly of a assent of the and operation. :hing such a

acts of the could not be acts of denial overeign. The :rnor-General,

Ali Jinnah, s Governor; earlier form >r-General to ance to His •cement with t that he took

and which successors after him did take, required that he should bear true allegiance to the constitution and be faithful to His Majesty. The second act belonged to Governor-General Ghulam Muhammad. In deviation of the long- standing practice that on accession of a new British monarch, the royal styles and titles should require the assent 'as well of the Parliaments of the dominions as of the Parliament of the United Kingdom', no such matter was brought before the Constituent Assembly for its assent upon the accession to British throne of Queen Elizabeth II in June 1953. Hence, Her Majesty was indeed a mere symbol, although as Queen of Pakistan a more substantial position might perhaps have been claimed.

, The nature of freedom extended under the Indian Independence Act, 1947 resulted in making 'free peoples' in the dominions of Pakistan and India which necessarily meant that peoples of the dominions enjoyed the advantage of representative institutions according to British pattern. in The extent of freedom accorded to the countries which, as dominions, were to replace the Indian empire, was in a very material degree greater than that which the older dominions had gained in 1931 under the Statute of Westminster 1931 that was the circumstance which could justify the application of the special description 'Independent Dominions' to the two new states which were brought into existence by means of this highly effective instrument, the Indian Independence Act, s 1947.

iv The argument that the Constituent Assembly derived power to make laws for the dominion under section 6(1) of the Indian Independence Act overlooked the fact that the Constituent Assembly was, as a body, not a creation of the British Parliament. It was a body created by a supra-legal power to discharge the supralegal function of preparing a constitution for Pakistan. Its powers in this respect

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vi.

belonged to itself inherently by virtue of its being a body representative of the will of

the people in relation to their future mode

of government.

With respect to the necessity of assent by the Governor-General to laws of a constitutional nature passed by the Constituent Assembly, a serious doubt had arisen at a very early stage. The Law i Ministry of the Government of Pakistan

was of the opinion that such assent was essential but the Constituent Assembly had throughout maintained the view that assent was not necessary, and acting on that view, had made and promulgated a rule, bearing No. 62 in the rules of the Constituent Assembly to give formal expression to that view. This rule, as originally framed on the
24 February 1948 at a meeting presided over by the President, the Quaid-e-Azam Muhammad Ali Jinnah, merely provided that when a Bill had been passed by the Assembly, a copy of it should be signed by the President. As this was not followed by any provision for submission to the Governor-General for his assent, it was understood to provide a sufficient formal act to give validity as law to the Bill as passed, but apparently doubts were felt on this subject, and the rule was amended at a meeting presided over by the Deputy President, Tamizuddin Khan, and held on the 22 May 1948 to read as follows:

When a Bill is passed by the Assembly, a copy thereof shall be signed by the President, and it shall become law on being published in the Official Gazette of Pakistan under authority of the President.

The rule expressed very clearly the opinion of the Constituent Assembly on the subject and had been acted upon for nearly seven years and acquiesced in and accepted by the Executive, including the GovernorGeneral.

The Constituent Assembly was to be placed above the Governor-General, the chief executive of the state, for two reasons,

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firstly that the Constituent Assembly was a sovereign body, and secondly because the statutes under and in accordance with which the Governor-General was required to function, were within the competence of the Constituent Assembly to amend. The Executive Government of the federation had never, until after the event of
24 October 1954, shown any sign of doubt on this point.

vii. The Constituent Assembly being designed to be a sovereign body and to exercise sovereign power, including power to alter the constitution subject to which the Governor-General was intended to act, it would clearly be inconsistent with the design and purpose if the ’qualified negative’ assent by the Governor-General were imposed upon its constitutional laws.

viii. It being within the complete power of the Constituent Assembly to determine the constitution of the ’Legislature of the Dominion’, or Union Legislature, and to determine the scope of its legislative competency as well as the mode in which its laws should be enacted, the British Parliament could not affect to prescribe the requirement of assent, as an essential formality, in respect of the laws made by such a legislature. This would usurp the functions of the Constituent Assembly. To impose such a requirement upon laws of a constitutional nature made by the Constituent Assembly would be a direct affront to the position and authority of that body.

ix. There could be no possible doubt that neither the British sovereign nor the Governor-General, as such, was part of the Constituent Assembly.

Concluding Remarks

The judgment of the Federal Court in Tamizuddin Khan’s case paved the way for future justifications by the judiciary of patently arbitrary, malicious, and capricious acts of the executive on hypertechnical grounds or self-serving theories or

concepts. Much has been written on the mote behind this majority judgment. The judgment was that of Chief Justice Muhaaa Munir with which three other judges concra The ability and competence of Justice beyond any doubt. His motives have, *horn* been seriously criticized by many writers, Ht accused of standing by his friend and fell Kakkezai8 Governor-General Ghulam Mutan in his hour of need and bent the reasoning to ja his act which was patently and palpably *aitft* Qudratullah Shahab, who was principal sea* to the Governor-General at the time, recounts his Memoirs, *Shahabnama,* that one ofl assistants used to disappear from the one Karachi without his permission for days togd around the time when Tamizuddin Khan’s a was being heard by the Federal Court in L When Shahab called for explanations for at without leave or permission, the man offii. submitted his apology but orally stated thatk.. going on assignments to Lahore which» required to be kept secret. He used to de ’ confidential messages in code words iron. Governor-General to Chief Justice Munir.’ *C:* all, Ghulam Muhammad had acted in retaliate. the curtailment of his powers by the G Assembly. It is unfortunate that such an was

taken only a few days after the ConsulAssembly had finally, after seven year continuous struggle and deliberations, agreed m Constitution. The loss of this colossal effort i Constitution-making in the early days of Pate cannot be overly lamented.

Justice Munir remained defensive a apologetic about his judgment in Tanradk Khan's case for the rest of his life.10 He \\ spoke on this point on various occasions luin said in defence of his judgment at the time ofhj retirement as Chief Justice of the Supreme 0*; of Pakistan, in his reply to the address by tieftjt Court Bar Association, Lahore on the *12* Ajn
1960, is reproduced below:"

'The federal Court could have said in Apnl IK when it dismissed Moulvi Tamizuddin Kk'i petition that no writ could issue against an estaUf government, however illegally constituted the 4 *facto* government may be. That would have *wt*

legal recognition of a revolv case nor in any of the subseqi

The Court found that for Governor-General a legal p< to be found in the constitutk the Court had upheld the e quite sure that there would 1 country and a revolution woi enacted possibly by bloodsh situation than that created bi whole legal system which promised by the Governor-Ge tion could have easily validah

Situations such as these ar deal with unless the courts kno writs would be restored and en say that on 9 February, the c state was at the service of the (Governor-General? And if eve, where such power resides, a d the very efficacy of the law, an be beyond the pale of judicia being enforceable, who was to e the Court itself in a position to committed by their disobedienci

The Chief Court had men constitutional instrument and ga thereof with the aid of some lav process, regardless of the events which made it impossible for the

At moments like these, publ <>und in the books; it lies else events that have happened. Whe of the law is opposed by the sc issue becomes political or militai fought out by other means ai espousing the cause of one party merely prepare the ground for blc like this, the very origin of tl uncertain, the law-giving agency 1 of metamorphosis and the existii with some inchoate law neither of so long as the state of uncertainty la or define.

But as I have said, though the Cc the petition for writs on the groun being asked for against a *de fach* refrained from doing so and decide the law of the land, finding that the no jurisdiction to issue them.'

The above justification or explan convincing. These appear to be the

vritten on the motivation idgment. The leading lief Justice Muhammad other judges concurred, nee of Justice Munir is motives have, however, by many writers. He is his friend and fellow eral Ghulam Muhammad •nt the reasoning to justify ly and palpably *malafide.*

0 was principal secretary

1 at the time, recounts in *nama,* that one of his >pear from the office in mission for days together Tamizuddin Khan's case Federal Court in Lahore.

- explanations for absence ission, the man officially ut orally stated that he was , to Lahore which were scret. He used to deliver in code words from the 'hief Justice Munir.9 After i had acted in retaliation to powers by the Constituent unate that such an action days after the Constituent [y, after seven years of d deliberations, agreed on a i of this colossal effort at i the early days of Pakistan ated.

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could have said in April 1955 Moulvi Tamizuddin Khan's ;ould issue against an established •er illegally constituted the *de* lay be. That would have meant

AN ERA OF LEGAL BATTLES

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legal recognition of a revolution. But neither in that case nor in any of the subsequent cases did we say so. The Court found that for the action taken by the Governor-General a legal power in that behalf was to be found in the constitutional instrument itself. If the Court had upheld the enforceable writs, I am quite sure that there would have been chaos in the country and a

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revolution would have been formally enacted possibly by bloodshed, a far more serious situation than that created by the invalidation of a whole legal system which the new Assembly promised by the Governor-General in his Proclamation could have easily validated.

Situations such as these are not for the courts to deal with unless the courts know for certain that their writs would be restored and enforced. But who could say that on 9 February, the coercive power of the state was at the service of the Court and not with the Governor-General? And if even a doubt arises as to where such power resides, a doubt must arise as to the very efficacy of the law, and the situation would be beyond the pale of judicial process. The writs being enforceable, who was to enforce them and was the Court itself in a position to punish the contempt committed by their disobedience?

The Chief Court had merely looked into the constitutional instrument and gathering the meaning thereof with the aid of some law reports had issued process, regardless of the events that had happened which made it impossible for the writs to be enforced. At moments like these, public law is not to be found in the books; it lies elsewhere, *viz.*, in the events that have happened. Where the enforcement of the 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 by espousing the cause of one party against the other merely prepare the ground for bloodshed. At a time like this, the very origin of the laws becomes uncertain, the law-giving agency being in a process of metamorphosis and the existing law struggling with some inchoate law neither of which the courts, so long as the state of uncertainty lasts, can recognize or define.

But as I have said, though the Court could dismiss the petition for writs on the ground that they were being asked for against a *de facto* government, it refrained from doing so and decided the case under the law of the land, finding that the Chief Court had no jurisdiction to issue them.'

The above justification or explanation is hardly n\mcing. These appear to be the lame excuses

of a guilty mind. It was Justice Munir's duty to apply the law and to decide correctly regardless of the consequences. The issuance of writ was his province and not its enforcement. Had Chief Justice Marshal been inhibited by considerations like these while issuing the writ in Marbury v Madison12 the constitutional history of the USA would have been quite different. It is the bold decisions of courts that set the law on the right course. A timid and spineless judiciary leads to constitutional disaster.

However, the most significant aspect of the judgment is that although it runs into 64 pages, there is no finding as to whether the GovernorGeneral could dissolve the Constituent Assembly. There is a consensus of opinion that this judgment caused incalculable harm to the constitutional development of Pakistan and rocked the constitutional ship of the country in its infancy. This judgment irreparably undermined the image and credibility of the judiciary of Pakistan in the public eye.

THE USIF **PATEL CASE**

As a result of the judgment of the Federal Court in Tamizuddin Khan's case, as many as forty-six

Acts on the statute books became invalid. The country was faced with a legal vacuum. Six days after the judgment of the Federal Court, the GovernorGeneral promulgated the Emergency Powers Ordinance IX of 1955 and assumed powers to:

1. Make provision for framing the Constitution of Pakistan;

2. Make provisions to constitute the province of West Pakistan;

3. Validate laws which had been passed by the Constituent Assembly but had not received the assent of the Governor-General;

4. Authenticate the Central Budget; and

5. Name East Bengal as East Pakistan.13

’A ’state of grave emergency’ was declared throughout Pakistan, presumably to prevent the breakdown of the constitutional machinery of the country, but the Governor-General’s emergency powers were soon challenged before the Federal

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Court. A full bench of the Federal Court, presided over by Chief Justice Munir, declared on 13 April in another leading constitutional case of this period, *UsifPatel v The Crown,* that power to make provisions to the Constitution of the country could not be exercised by the Governor-General by means of an ordinance.14 The court, therefore, held Section 2 of the ordinance promulgated by the Governor-General on 27 March 1955 (Ordinance No. IX of 1955) as *ultra vires.* It was made clear by this latest judgment of the Federal Court that the power to make any provisions to the Constitution of the country was not conferred by law on anybody except the Constituent Assembly whose continuing legal status was recognized.

The Emergency Powers Ordinance, 1955 provided that every constitutional law specified in column one of the schedule to that ordinance should be deemed to have received the assent of the Governor-General on the date specified in column two of the schedule and to have had full legal force and effect from that date. One of the laws so specified was the Indian Independence (Amendment) Act, 1948. In the preamble as well as in Section 10 of the ordinance, the GovernorGeneral was empowered to make ’by order such provisions as appear to him to be necessary or expedient for the purpose of making provision as to the constitution of Pakistan’.

Under Section 9 of the Indian Independence Act, the Governor-General had been empowered to make by order such provision as appeared to him to be necessary or expedient for bringing the provisions of that Act into effective operation and for making adaptations of the Government of India Act, 1935. This power by the terms of the section could not be exercised after 31 March 1948. By the Indian Independence (Amendment) Act, 1948, the Constituent Assembly had extended the period for the exercise of this power by one year till
31 March 1949. The Governor-General had thus added section 92 A to the Government of India Act, 1935, according to which, under certain circumstances, the Governor-General could issue a proclamation authorizing the Governor of a province to make laws for that province. The powers under section 92 A had been exercised by the Governor-General in respect of the province of Sindh and Governor of that province in exercise of

the powers thus conferred on him had enacted)! law called the Sindh Control of Goondas *Mm 1952.*

A person who had been declared to be *agom* (ruffian) under the Sindh Control of Goondas i challenged the Act as invalid because ’Governor’s’ authority for that Act was proclamation by the Governor-General umff section 92 A of the Government of India Act, WJ’ that the section was invalid because it was add* to the Government of India Act after 31 Mw
1948, and that the extension by the Ind« Independence (Amendment) Act, 1948, oftheds of making orders under Section 9 of the Independence Act from 31 March 1948 is
31 March 1949, was itself invalid, because *it* Amendment Act had not received the Govern General’s assent. The Federal Court, *relyingx* the authority of Moulvi Tamizuddin Khan’s tax and Chief Justice Munir being the author juik, held that the power of the Governor-General t: promulgate ordinances did not go beyond th federal legislature’s powers to make laws, fc since

the Indian Independence (Amendment] A-
1948, being a constitutional provision beyond ft federal legislature's power to enact, hadro received the Governor-General's assent, ilw invalid and that because the Governor-Gen subsequent attempt to validate it by the Emerges Powers Ordinance would itself amount constitutional legislation, the attempted legislattc was void for the reason that such legislation coil only be passed by the Constituent AssemWi though with the assent of the Governor-General

The decision of the Federal Court presented lit country with a constitutional crisis of a gi magnitude than when the Governor-General ia dissolved the Constituent Assembly The cenlz Law Minister, H. S. Suhrawardy, frankly staa the position when commenting on the decision *c* the Federal Court. He said: 'The country is *fact.* with a grave situation."5 There was no fedcr. legislature in existence competent to validated which were declared null and void by the Fedm Court. Even provincial legislatures were deemec to have been illegal since the laws under wild those bodies had been elected were illegal Ink the entire legal and administrative system *vasts* the verge of collapse. The courts were flooded wtf

cases challenging varioi government. The continued u proprieties was bad for tJ business, and for the organize

GOVERNOR-GENERAL REFERENCE TO THE FEDERAL COURT

Important political developmc decision of the Federal Coi Governor-General's emergen Governor-General immediate 'Constituent Convention' to meei government also announced that the Federal Court to detail wh, should be taken to validate the lav Court's ruling, the Governor-Genei not restore. Some steps were urgi avoid a complete breakdown of th machinery. On 16 April the Goi assumed powers to validate thirty laws 'subject to any report from the *and* until such time as the Constituej could consider them. Two days late Court restrained all other courts fro with this step pending its decisior referred by the Governor-General, suggested to the Governor-General tl enlarge the terms of reference to inclu question whether the Constituent As. been rightly dissolved. The Court poin the new Constituent Convention's powers might be challenged on the grou Convention was an illegal body. Unle decided whether the Constituent Asse been legally dissolved and the new 01 constituted, there might be 'litigation sort'. The government accepted this sugge from 25 April the Court heard argument enlarged reference.

The arguments before the Court judgment were almost an education in Bri Commonwealth constitutional history, turni *aha* on the powers of the Crown represer the Governor-General. As Sir Ivor Jej pointed out, the litigation which followi dissolution of the Constituent Assemb

;d on him had enacted a ’ontrol of Goondas Act,

n declared to be a *goonda* Control of Goondas Act, s invalid because the y for that Act was a jovernor-General under mmentof India Act, 1935, ilid because it was added ndia Act after 31 March ^tension by the Indian ent) Act, 1948, of the date Section 9 of the Indian)m 31 March 1948 to self invalid, because the it received the Governor;ederal Court, relying on Tamizuddin Khan’s case r being the author judge, the Governor-General to did not go beyond the wers to make laws, that idence (Amendment) Act, Dnal provision beyond the ower to enact, had not •General’s assent, it was e the Governor-General’s lidate it by the Emergency rould itself amount to i, the attempted legislation that such legislation could j Constituent Assembly, >f the Governor-General, ederal Court presented the itional crisis of a greater he Governor-General had nt Assembly. The central uhrawardy, frankly stated tienting on the decision of aid: ’The country is faced ”5 There was no federal competent to validate laws
11 and void by the Federal legislatures were deemed ice the laws under which lected were illegal. In fact, linistrative system was on ic courts were flooded with

cases challenging various actions 6f the government. The continued uncertainty about legal proprieties was bad for the government, for business, and for the organized life of the citizens.

GOVERNOR-GENERAL’S REFERENCE TO THE FEDERAL COURT

Important political developments followed the decision of the Federal Court rejecting the Governor-General’s emergency powers. The Governor-General immediately summoned a ’Constituent Convention’ to meet on 10 May. The government also announced that it would request the Federal Court to detail what interim steps should be taken to validate the laws which, by the Court’s ruling, the Governor-General himself could not restore. Some steps were urgently needed to avoid a complete breakdown of the constitutional machinery On 16 April the Governor-General assumed powers to validate thirty-five of these laws ’subject to any report from the Federal Court’ and until such time as the Constituent Convention could consider them. Two days later, the Federal Court restrained all other courts from interfering with this step pending its decision on matters referred by the Governor-General. The Court, suggested to the Governor-General that he could enlarge the terms of reference to include the basic question whether the Constituent Assembly had been nghtly dissolved. The Court pointed out that the new Constituent Convention’s validating powers might be challenged on the ground that the Convention was an illegal body. Unless it were faded whether the Constituent Assembly had been legally dissolved and the new one rightly constituted, there might be ’litigation of every son’ The government accepted this suggestion and from 25 Apnl the Court heard arguments on this (ilarged reference.

The arguments before the Court and its judgment were almost an education in British and Commonwealth constitutional history, turning *inter ik* on the powers of the Crown represented by lie Governor-General. As Sir Ivor Jennings fouled out, the litigation which followed the dissolution of the Constituent Assembly of

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Pakistan on 24 October 1954 dealt with the fundamental principles of constitutional law which was of interest throughout the Commonwealth because it was unique in the legal history.16

The questions referred to the Federal Court for its opinion by the Governor-General were:

1. What are the powers and responsibilities of the Governor-General in respect of the Government of the country before the new Constituent Convention passes the necessary legislation?

2. The Federal Court having held in Usif Patel's case that the laws listed in the Schedule to the Emergency Powers Ordinance could not be validated under section 42 of the Government of India Act, 1935, nor retrospective effect given to them, and no Legislature competent to validate such laws being in existence, is there any provision in the constitution or any rule of law applicable to the situation by which the GovernorGeneral can by Order or otherwise declare that all orders made, decisions taken, and other acts done under these laws shall be valid and enforceable and those laws which cannot without danger to the state be removed from the existing legal system shall be treated as part of the law of the land until the question of their validation is determined by the new Constituent Convention?

3. Whether the Constituent Assembly was rightly dissolved by the Governor-General?

4. Whether the Constituent Convention proposed to be set up by the GovernorGeneral will be competent to exercise the powers conferred by section 8 of the Indian Independence Act, 1947, on the Constituent Assembly?

In a lengthy opinion17 by the full court consisting of five judges, these questions were answered by a majority of four to one as follows:

Answer to Question No. 1. That this question was too general and need not be answered.

Answer to Question No. 2. That in the situation presented by the Reference the Governor-General has during the interim period the power under the

common law of civil or state necessity of retrospectively validating the laws listed in the Schedule to the Emergency Powers Ordinance, 1955, and all those laws, until the question of their validation is decided upon by the Constituent Assembly, are during the aforesaid period valid and enforceable in the same way as if they had been valid from the date on which they purported to come into force.

Answer to Question No. 3. That on the facts stated in the Reference, namely, (1) that the Constituent Assembly, though it functioned for more than 7 years, was unable to carry out the duty to frame a constitution for Pakistan to replace the transitional constitution provided by the Indian Independence Act, 1947, (2) that in view of the repeated representations from and resolutions passed by representative bodies throughout the country the Constituent Assembly, in the opinion the GovernorGeneral, became in course of time wholly unrepresentative of the people of Pakistan and ceased to be responsible to them; (3) that for all practical purposes the Constituent Assembly assumed the form of a perpetual legislature; and (4) that throughout the period of its existence the Constituent Assembly asserted that the provisions made by it for the constitution of the dominion under sub-section (1) of section 8 of the Indian Independence Act were valid laws without the consent of the Governor-General, the Governor-General had under section 5 of the Indian Independence Act legal authority to dissolve the Constituent Assembly.

Answer to Question No. 4. That subject to this:

1. that the correct name of the Constituent Convention is Constituent Assembly;

2. that the Governor-General's right to dissolve the Assembly can only be derived from the Indian Independence Act;

3. that the arrangements for representation of states and tribal areas can, under the proviso to sub-section (3) of section 19 of the Indian Independence Act, be made only by the Constituent Assembly and not by the Governor-General; and

4. that the Governor-General's duty being to bring into existence a representative legislative institution he can only nominate the electorate and not members to the Constituent Assembly;

The new Assembly, constituted under the Constituent Convention Order, 1955,18 as amended to date, would be competent to exercise all the powers conferred by the Indian Independence Act, 1947, on the

Constituent Assembly, including those undersn
8 of that Act.

Once again, the dissenting judge was Just Cornelius who wrote his own lengthy opinion! these questions referred by the Governor-Gam His answers to the questions were as under

Answer to Question No. 1. The point had been pin beyond doubt in the leading Judgment in then Moulvi Tamizuddin Khan in the pai reproduced below:

’The Governor-General of Pakistan is by the King or Queen and represents him or to the purposes of the government of the dominion authority of the representative of the Kingexl the exercise of the Royal prerogatives in so fir; is applicable to the internal affairs of the State or Province, even without express subject to any contrary statutory or provisions.’

Answer to Question No. 2. The answer* question was subservient to the answers to Questions No. 3 and 4 and was answered at thti Answer to Question No. 3. In view ofthedi the majority of the judges in Moulvi T; Khan’s case, the Constituent Assembly as in the Indian Independence Act, 1947,11 ’legislature of the dominion’ for the purposes government of the dominion. The majontyof judges have also held that the Governor-Genii1 invested with all the Royal prerogatives, *ax* where barred by express words or nectssr intendment. The prerogative of dissolution of 2 legislature is recognized to exist in all represent’’ institutions in the British Commonwealth of N«u| and there are no words in the relevant instniffi taking away expressly or by necessary ini this prerogative power in relation to the ’lq of the dominion’. Consequently, the GovernGeneral must be held to possess the prerogaiwt| dissolve the Constituent Assembly.

The exercise of a prerogative power is w justiciable matter. Therefore, the question wl the act of dissolution was ’rightly’ performed to,1 not arise within this court’s jurisdiction ~’~ enquiry must be limited to the legality of

Answer to Question No. 4. The powers cofia by section 8 of the Indian Independence Act, l)f on the Constituent Assembly can only be exertm by a successor body, of the same name, suomni by the Governor-General, in the discharge of a 4f>

so to do, which arises out (to, his order dissolving thi The duty of summoning doe include, the exercise of any j the constitutional instrumei performed in accordance w which were expressly folio; the Constituent Assembly 01 as stated with clarity in parag of the Cabinet Delegation { Viceroy and Governor-Gene the 16 May 1946.

Justice Cornelius returned t Question No. 2 as under:

a. There is no provision in tl rule of law applicable to t the Governor-General can Court’s decision in the c, Proclamation or otherwis enumerated in the Schedu Powers Ordinance, 1955, w permanently.

b. The expression ’laws wl danger to the State be remo legal system’ is altogether no answer can be offered to i question.

The legislative powers of th< under the existing constitution the terms of section 42, Goveri 1935. Those powers are suffii Governor-General to stay all pr other than the Federal Cour provisions referred to are called i such action as the proposed Con (Constitutional Assembly) may respect thereof.

DOCTRINE OF LAW or

It is thus noticeable that the F ’Reference by HE the Governor
1955 FC 435) had to fall back uj of state- necessity to take Pakis constitutional impasse it had led t by the judgments of the Moulvi Ta case and Usif Patel case by vali< listed in the schedule to the Eme

nbly, including those under section

lissenting judge was Justice e his own lengthy opinion on Ted by the Governor-General uestions were as under:

No. 1. The point had been placed leading Judgment in the case of m Khan in the paragraph

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3. In view of the decision of

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so to do, which arises out of, and is complementary to, his order dissolving the Constituent Assembly. The duty of summoning does not involve, and cannot include, the exercise of any political initiative outside the constitutional instruments in force. It must be performed in

accordance with the basic principles which were expressly followed in the setting up of the Constituent Assembly of 1947. These principles as stated with clarity in paragraph 18 of the Statement of the Cabinet Delegation and His Excellency the Viceroy and Governor-General of India, issued on the 16 May 1946.

Justice Cornelius returned to the answer to the Question No. 2 as under:

a. There is no provision in the Constitution and no rule of law applicable to the situation, by which the Governor-General can, in the light of this Court's decision in the case of Usif Patel, by Proclamation or otherwise, validate the laws enumerated in the Schedule to the Emergency Powers Ordinance, 1955, whether temporarily or permanently.

b The expression 'laws which cannot without danger to the State be removed from the existing legal system' is altogether vague and, therefore, no answer can be offered to the second part of the question.

The legislative powers of the Governor-General under the existing constitution are confined within the terms of section 42, Government of India Act,
1935 Those powers are sufficient to enable the Governor-General to stay all proceedings in courts other than the Federal Court, in which legal provisions referred to are called in question, pending such action as the proposed Constituent Convention (Constitutional Assembly) may see fit to take in respect thereof.

DOCTRINE **OF LAW OF NECESSITY**

It is thus noticeable that the Federal Court in

Reference by HE the Governor-General' *(PLD*

1955 FC 435) had to fall back upon the doctrine

of state necessity to take Pakistan out of the

constitutional impasse it had led the country into

1 'kjudgments of the Moulvi Tamizuddin Khan

id Usif Patel case by validating the laws

n the schedule to the Emergency Powers

Ordinance, 1955 on the basis of such doctrine. One more case is worthy of mention, where the doctrine of state necessity was once again invoked by the Federal Court.19

In this case, two Acts of the Constituent Assembly, namely Privy Council (Abolition of Jurisdiction) Act,

1950 and Constituent Assembly for Pakistan (Increase and Redistribution of Seats) Act, 1949 came under scrutiny by the Federal Court for not having received the assent of the Governor-General. The majority of the Court (again led by Chief Justice Munir) held that although Privy Council (Abolition of Jurisdiction) Act, 1950 was not originally assented to by the Governor-General and although it could be supposed to have been declared invalid by the judgment of the Federal Court in Moulvi Tamizuddin Khan's case, still the Act having been validated temporarily and retrospectively by the GovernorGeneral (as a result of Federal Court Judgment in Governor-General's Reference on the basis of the doctrine of necessity), it was at that time a valid law.

It was argued that since the Constituent Assembly for Pakistan (Increase and Redistribution of Seats) Act, 1949 by which the Assembly added six members to its personnel, had not received such assent, therefore, the Privy Council (Abolition of Jurisdiction) Act, 1950 having been passed by an illegally constituted Assembly, was invalid and did not confer jurisdiction in the Federal Court to hear the appeal. On this proposition, there was marked difference in the opinion and the conclusion of the majority led by Chief Justice Munir on the one hand and Justice Cornelius on the other. The majority held:

The general rule is that if legislature illegally adds to its members and the persons so added take part in discussion and voting, the laws passed by it are void. In the case of companies and statutory bodies, like municipal corporation, the rule is well-settled that the proceedings of such bodies are vitiated by strangers taking part in and voting at their meetings. Since the Privy Council (Abolition of Jurisdiction) Act, 1950 was passed not by the Constituent Assembly as defined by section 19(3)(b) (Indian Independence Act, 1947), but by that Assembly with six illegally added members, it was not a valid law, having been passed by an illegally constituted legislature of the dominion.

However, the Privy Council (Abolition of Jurisdiction) Act, 1950 was held valid on the ground of civil or state necessity, having been validated by Governor-General's proclamation of emergency of 16 April 1955. Justice Cornelius held the Acts of the Constituent Assembly valid notwithstanding the participation of those six newly included members on the basis of following reasons:

As a juristic person, a Corporation is distinct from the Corporators, and certainly, it cannot be right to think that the acts of such a juristic person are vitiated *ex post facto* because of the discovery made subsequently that some of the Corporators, who participated in the acts of the Corporation perfectly bonafide, lacked the necessary qualifications or were either not validly appointed or included as Corporators. Where the defect is of subsequent discovery, and the inclusion and participation of the affected members is entirely bonafide, their presence cannot operate to vitiate either the constitution of the Corporation or the acts of such Corporation.

Justice Cornelius thus held the Act to be good and valid size. The Federal Court, thus, introduced the doctrine of necessity in the cases of Reference of the Governor-General and Ali Ahmad Husain Shah, which had a major impact on the constitutional cases to come later.

THE IMPACT or CONSTITUTIONAL CASES

These constitutional cases left a major impact on the politics of the country. The entire constitutional and administrative set-up was shaken to its very foundation. The mischief caused by finding justification for an arbitrary, malicious, and capricious act of a Governor-General, who was neither mentally nor physically fit, had to be undone with enormous judicial jugglery and pedantic and abstract legal reasoning. The Federal Court had to import an alien concept of civil or state necessity to get out of the legal mess it had created without fully realizing the potential mischief of the doctrine for the future constitutional course of Pakistan. Chief Justice Munir, who was at the centre of this, cannot escape responsibility for setting the country on an

uncertain constitutional and political cow attendant colossal losses in socio-pok economic terms.

SECOND CONSTITUENT ASSEMJI

The Federal Court's decision in the RefereiK the Governor-General cleared the w summoning the second Constituent Assent' verdict of the Federal Court in Usif Pali had put to an end the efforts of t Muhammad and his nominated Cabinet to -± Constitution by executive decrees.

The Federal Court unanimously declare, the task of framing a Constitution had *lit* performed by a Constituent Assembl; " decision was made on 13 April andtwoda\>- the Governor-General, Ghulam Muhamnu proclamation, summoned a sixty-ir 'Constituent Convention' to meet on 10 Ma The Convention was to be elected from the e\ provincial assemblies and its function woi replace the first Constituent Assembly.20

The Convention, unless dissolved earlier < stand dissolved at the expiry of six mon would be presided over by a person appoir the Governor-General. Of its sixty membera srs were to be reserved for non-Muslims in [4 Pakistan. The number of the seats were alloej as follows: >

East Pakistan 30

Punjab 16

North-West Frontier Province 3 Sindh 4

The remaining seven would be the Governor-General on the basis of one a; from Balochistan, Frontier States, KhairpurSffi Bahawalpur State, and Karachi. The Tribal te had two representatives.

The proclamation of the Governor-Generaln amended by subsequent orders. Within fife days, two new orders were issued.21 The fot« related to the method of election to the Constmn Convention. It provided that the procedure fc election- would be the same as had been adcp for the Constituent Assembly elected in 1947fc is, by the method of proportional repress*

with a single transferable v General issued a second an
27 April under which the Cor eighty members and would *i* federal legislature. The Convention would now have were exercised by the first Cc under the provisions of Secti Independence Act. The compc follows:

East Pakistan 40 ($

Punjab 21 (1

NWFP 4

Sindh 5 (1

The Governor-General woi members as follows:

Balochistan

Balochistan States Union

Frontier States

Tribal Areas *'.*

Khairpur State 1

Bahawalpur State *1*

Karachi 1

The composition of the Con on ihe principle of parity of repn East and West Pakistan. In E leader of the United Front, A.K threatening to boycott the Const on the ground that it did not gii majority of seats on the basi Subsequently, as a result of a *dt* Minister, Muhammad Ali, unc mentary institutions suspended restored in East Pakistan, the Ur to accept parity of representat League, under Law Minister ! already accepted it.22

In the meantime, further step Constituent Convention had to 1 the opinion of the Federal < ascertained. The Federal Coui
10 May that the Governor-Gener summon a new Assembly but lisl conditions before it could be rej constituted:

1 The correct name of tl Convention should be Const

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ENT ASSEMBLY

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sixty members, seven ion-Muslims in East : seats were allocated

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aid be nominated by e basis of one each tates, Khairpur State, :hi. The Tribal Areas

overnor-General was iers. Within fifteen ;sued.21 The first one on to the Constituent t the procedure for is had been adopted elected in 1947 that tional representation

AN ERA OF LEGAL BATTLES

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with a single transferable vote. The GovernorGeneral issued a second amendment Order on 27 April under which the Convention would have eighty members and would also function as the federal legislature. The new Constituent Convention would now have all powers which were exercised by the first Constituent Assembly under the provisions of Section 8 of the Indian Independence Act. The composition now stood as follows:

East Pakistan 40 (9 for non-Muslims)

Punjab 21 (1 for non-Muslims)

NWFP 4

Sindh 5 (1 for non-Muslims)

The Governor-General would nominate ten members as follows:

Balochistan 1

Balochistan States Union 1

Frontier States 1

Tribal Areas 3

Khairpur State 1

Bahawalpur State 2

Karachi 1

The composition of the Convention was based on the principle of parity of representation between East and West Pakistan. In East Pakistan, the leader of the United Front, A.K. Fazlul Haq, was threatening to boycott the Constituent Convention on the ground that it did not give East Pakistan a majority of seats on the basis of population. Subsequently, as a result of a deal with the Prime Minister, Muhammad Ali, under which parliamentary institutions suspended since 1954 were restored in East Pakistan, the United Front agreed to accept parity of representation. The Awami League, under Law Minister Suhrawardy, had already accepted *it.22*

In the meantime, further steps to summon the Constituent Convention had to be postponed till the opinion of the Federal Court could be ascertained. The Federal Court23 declared on 10 May that the Governor-General had powers to summon a new Assembly but listed the following conditions before it could be regarded as legally constituted:

1 The correct name of the Constituent Convention should be Constituent Assembly;

2. The Governor-General's right to dissolve the Assembly could be derived only from the Indian Independence Act;

3. The arrangement for representation of states and tribal areas could be made only by the Constituent Assembly and not by the Governor-General; and

4. The Governor-General had no power to nominate any members of the proposed Convention (the Governor-General had planned to nominate ten members).

The Court held that the duty of summoning a new Constituent Assembly must be performed in accordance with the basic principles which were expressly followed in the setting up of the first Constituent Assembly in 1947. These basic principles were stated in paragraph 18 of the British Cabinet Mission plan of 16 May 1946.

In pursuance of the advice given by the Federal Court, it became necessary to supersede the earlier orders setting up a Constituent Convention. The Governor-General's Order No. 12 of 1955 was issued to set up a Constituent Assembly and the name 'Constituent Convention' was

dropped.24 Now all the eighty members of the Constituent Assembly were to be elected and no provision was made for the nomination of some members by the Governor-General. In fact, the effect of the latest order was to set up a Constituent Assembly which was similar in structure to its predecessor. As with the first Assembly, the members were to be elected not directly but indirectly by members of the provincial legislature by the method of proportional representation with a single transferable vote. Special provision was made for elections in Balochistan and Karachi as there were no provincial legislatures in those units. Regarding the independent states and tribal areas, the arrangements for representation were left to the Constituent Assembly when summoned. The only novel element in the structure of the new Assembly was the principle of parity of representatives between East and West Pakistan. The GovernorGeneral in his order asserted his power to summon, prorogue, and dissolve the proposed Assembly by virtue of his powers under the Indian Independence Act, 1947 under which the new Assembly was supposed to have been set up. The Governor-

General also retained the right to nominate a Chairman of the Assembly till the President was elected.

Party positions in the second Assembly were very different. In the first Constituent Assembly, the Muslim League had an absolute majority, since it had captured almost all the Muslim seats. It was clear from the beginning that the Muslim League would not enjoy that position in the new Assembly. It was in East Pakistan that its position changed most radically. Out of 309 members in the East Pakistan provincial legislature, the League had only ten members and it could get only one seat from that province. In fact, it did not want to contest the election in East Pakistan but Prime Minister Muhammad AH, who was also the President of the All-Pakistan Muslim League, persuaded it to give him a ticket from East Pakistan. The United Front and the Awami League shared between themselves the Muslim seats from East Pakistan. In West Pakistan, the League captured all the Muslim seats from Sindh and NWFP. In the Punjab, however, internal divisions prevented it from having the monopoly. It lost three seats to the dissident group led by Malik Feroz Khan Noon, while Mian Iftikharuddin, the most vocal critic of the government in the first Assembly, retained his seat.

With twenty-five members in the house of eighty, the Muslim League was still the largest single party in the new Assembly but it had neither an absolute nor even a simple majority. The party position in the Assembly was as follows: Muslim League 25

United Front 16

Awami League 12

Noon Group 3

Pakistan Congress 4

Scheduled Caste Federation 3

United Progressive Party 2

Independent Muslim 1

Others 6

Since no single party was in a position to command a majority, the various groups lost no time in seeking alliances. Seven out of fourteen members of Ghulam Muhammad's Cabinet either did not stand or failed to get elected to the new Assembly. A reshuffle of the Cabinet was therefore

inevitable. A coalition of the Muslim Lear. the United Front was ultimately form Chaudhri

Mohammad Ali, the former Fr. Minister, as prime minister. Muhammad AH quietly resumed his old assignment as Amk to the United States.

Chaudhri Mohammad Ali, as leader r coalition party, contributed largely to the w of the new Assembly in framing a ConsW Other prominent members of the new ASE were H.S. Suhrawardy, leader of the Oppos^ who, from the very beginning, showed his a as a great parliamentarian, and A.K. the leader of the United Front, who assistt prime minister greatly in arriving at a ci over constitutional problems.

There was a complete absence of women the second Assembly. In the first Assembly, had been two women members and it was that the number would increase. Some figures who had dominated the first Assembly,! as Khwaja Nazimuddin, Sardar Nishtar, Khan, and Maulana Akram Khan, were not il new Assembly. Like its predecessor, the Constituent Assembly was elected indirectly

The immediate task before the SKI Constituent Assembly was to revalidate ii statutes which had become null and void as an of the legal disputes that followed the dissolfl of the first Assembly. The task was not too easy it involved the delicate discussion of the those statutes. The government, however, successful in revalidating the statutes and country was finally rescued from a critical predicament.

The Assembly first met on 7 July 1955 immediately passed the Validation of Laws
1955 which legitimized 38 Acts of the Assembly. The Governor-General, Mirza,25 assented to these in October.26

WEST **PAKISTAN** ESTABLISHED *u*\ ONE UNIT

The first important and highly controversial! performed by the second Constituent *i* was the unification of West Pakistan. I
30 September 1955 the Assembly passed » S

merging 310,000 square province. West Pakistan ha three Governors' provinci missioner's province, a nur had acceded to Pakistan, , Geographically, they formed with easy communication linguistic and ethnic distincti new Bill was to unify these i province to be known as 'We

The Bill was hailed

administrative rationalization

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simplify the federal structure

Constitution. Now the task WE

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Itfay of making a Constituti

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’would remove provincial rival

so far as it related to West Pals

The merging of the entire V big project. Some of the advanl supporters are undeniable, but of provincial boundaries by an and tabooing the names, Punj Baloch, and so forth, could change a long established Provincialism could only chan; the outlook and policies of son fanned provincial feelings a promote their narrow political ii

While the One Unit scheme could be supported on various gi which it was established was not criticism. The original plan had it by executive decrees. The government to introduce the One first announced by the Prime Min Ali, on 22 November. This was Governor-General’s Order No. *I* <lp a council for the adminis fNdstan.28 Then, in March 195! , General assumed powers to coi [province of West Pakistan by an

he Muslim League and timately formed with i, the former Finance •.Muhammad AliBogra iignment as Ambassador

l AH, as leader of the jd largely to the success framing a Constitution. rs of the new Assembly leader of the Opposition inning, showed his talent an, and A.K. Fazlul Haq, i Front, who assisted the i arriving at a compromise

lems.

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nt and highly controversial^ e second Constituent A ation of West Pakistan)55 the Assembly passed a

merging 310,000 square miles into a single province. West Pakistan had formerly comprised three Governors' provinces, one Chief cornmissioner's province, a number of States which had acceded to Pakistan, and the tribal areas. Geographically, they formed a homogeneous block with easy communications but with marked linguistic and ethnic distinctions. The result of the new Bill was to unify these various units into one province to be known as 'West Pakistan'.27

The Bill was hailed as a measure of administrative rationalization. It was claimed that the unification of West Pakistan would greatly amplify the federal structure of the proposed new Constitution. Now the task was to evolve a pattern in which the two provinces, East and West Pakistan, would be placed on a footing of equality. There was substance to the claim. The problem of representation of the various units in the proposed federal legislature had been a big hurdle in the »ay of making a Constitution. It was further claimed that the unification of West Pakistan would remove provincial rivalry and jealousy, in »far as it related to West Pakistan. The merging of the entire West Pakistan was a big project. Some of the advantages claimed by its aiprters are undeniable, but that mere abolition of provincial boundaries by an administrative act aid tabooing the names, Punjab, Sindh, Pathan, Baloch, and so forth, could not automatically change a long established cultural identity. Provincialism could only change by a change in ike outlook and policies of some politicians who tinned provincial feelings and prejudices to rar narrow political interests. the One Unit scheme in West Pakistan wild be supported on various grounds, the way in ;ikhitwas established was not free from serious rihmm The original plan had been to introduce \ecutive decrees. The decision of the nent to introduce the One Unit scheme was -inounced by the Prime Minister, Muhammad
11 on 22 November. This was followed by the Goemor-General's Order No. 8 of 1954 setting a council for the administration of West ? Then, in March 1955, the Governorassumed powers to constitute the new of West Pakistan by an Order.29

The attempt to introduce the one-unit scheme by executive decrees was frustrated by the decision of the Federal Court in Usif Patel's case. Three provincial ministries, the Noon ministry in Punjab, the Rashid ministry in NWFP and the Pirzada ministry in Sindh, were dismissed by the central government on this issue. In similar circumstances, the ministry governing the State of Bahawalpur had been dismissed and the state legislature dissolved on 2 November 1954.

In Sindh, the Government dismissed Pirzada Abdus Sattar's ministry on 8 November on the grounds of 'maladministration' and appointed Khuhro as Chief Minister. Pirzada Abdus Sattar said that his dismissal was due to his stand in the Constituent Assembly against the merging of the West Pakistan provinces into a single unit, and claimed that his view reflected the 'unanimous will' of the people of Sindh against the One Unit proposal.30

In Bahawalpur, the Amir dismissed the state ministry on 2 November, dissolved the state legislature, and entrusted the administration to an adviser appointed by the central government. Major-General Mirza stated that the Amir had acted with the central government's approval, and that the ministry had been dissolved because of ' maladministration'.

In Khairpur, the State Assembly unanimously adopted a resolution on 10 November favouring the merger of the state in a single unit embracing the whole of West Pakistan. The government's proposals were subsequently endorsed by the various provincial assemblies and were generally welcomed throughout West Pakistan, although some opposition was expressed in Sindh and Karachi where student demonstrations took place. Resolutions approving the scheme were adopted by the legislative assembly of the NWFP unanimously on 25 November 1954 by the Punjab Legislative Assembly by a large majority on 30 November, by the Sindh Legislative Assembly on
11 December, and by the Shahi Jirga of Balochistan on 29 November. The Khan of Kalat

expressed his support on 23 November and it was announced on 3 January 1955, that an agreement had been signed by the Khan and the other rulers of the states forming the Balochistan States Union for the merger of all these States (Kalat, Makran,

Las Bela, and Kharan) into a unified West Pakistan.

FRAMING THE CONSTITUTION

The second Constituent Assembly had also the advantage of profiting from the deliberations and work of its predecessor. It successfully utilized the groundwork done by the first Constituent Assembly and had no need to appoint various committees and sub-committees as had the first Constituent Assembly. Reports of committees and sub-committees were ready for the work of the second Constituent Assembly. In fact, most of 245 Articles in the draft Constitution reflected little change from those which had been rejected in October 1954 as coming from an Assembly ’unrepresentative of the people’.

But the difficulties of the second Constituent Assembly should not be ignored or minimized. Unlike the first Assembly, it had no party with an absolute majority. The ruling coalition party of the United Front and the Muslim League had within its fold several component groups holding diametrically opposite views on fundamental constitutional issues. The old issues of conflict such as the relation of the state and religion, a strong or weak centre; whether the electoral system should be joint or separate, and others were renewed and the various groups within the ruling party were sharply divided on these problems. The Hindu Congress and the United Progressive Party threatened to sit on the opposition benches if joint electorate were not conceded while the Nizam-iIslam and the Muslim League, two important groups of the coalition party, would have nothing to do with a joint electorate. Even as late as December 1955 there seemed to be little prospect of a compromise. During November and December, the Constituent Assembly was repeatedly adjourned because the coalition party could not resolve its differences, it seemed that the country had once again been brought to the verge of ruin. The different groups in the party resorted to pressure tactics to get their demands incorporated in the *Constitution. As a result of these internal conflicts, the constitution* which *finally emerged was a poor product, judged by*

any criteria, based on compromises and e rather than on sound principles.

The draft Constitution published on 8 /
1956 was the product of four months labour^ committee of the ruling coalition party,” consisted of thirteen parts, covering *2451* The Objectives Resolution which had beenji by the first Constituent Assembly in included in its preamble with one new clause

Whereas the founder of Pakistan, Quaid-e-t Muhammad All Jinnah, declared that Patent i’. be a democratic state based on Islamic pnncift, social justice...

Part I of the draft defined the temtonts Pakistan; Part II dealt with fundamental ngbsj

in with directive principles of state policy,

IV with the federal government and Part V with provinces and provincial gi Part VI with relations between the federaiioi provinces; Part VII with property, contracts suits, Part VIII with elections, part IX judiciary; Part X with the services of Part XI with emergency provisions; general provisions; and Part XIII with t and transitional provisions. The draft was in respects a replica of the draft Constitution by the first Constituent Assembly. Pakistan be a federal republic consisting of East ami Pakistan and would be called the ’Islamic of Pakistan’. It was based on tie Br parliamentary system. Though it provided President and a Vice President real pour vested in the parliament and its executiie Cabinet.31 But under the new draft, the pour the President were enlarged as compared* those proposed in the draft of the first Conste Assembly and it had subsequently to be *mast* The draft envisaged a Constitution much sin;* in structure, with a single chamber etju. representative of the two wings instead? complicated two-tier legislature with represrr based on two principles. The legislature, to be called the National -b.< would consist of three hundred *members* it *elected on the basis of parity between East West Pakistan.*

The draft provide framers were guid maximum autonomy provinces but this 5 national integrity and that a weak centre w I country and that while the centre must be suffi to guide and control pnnciple had been the *[* Constituent Assembly, the new draft was large Railways, residuary po vested with the provinc draft.

POLITICAL REAC DRAFT CONSTITL

The publication of the ne met with mixed politica League, the United Front other political parties reac there was a demand for th controversial Articles. It League and some Hindu at Pakistan that voiced an 01 the draft and demanded tt Awami League insisted tr any constitutional sche incorporate the famous programme made at the tinprovincial elections in 1954 United Front and the AA fundamental creed with the time which conferred only centre: defence, currency, an practical difficulties of resti the centre became immediat United Front Party under its c Haq. agreed to modify this urn
11 League, had it bee *r*.. ubly have come to the s, its exclusion from power madi and hence it continued to press /(organized a powerful campa *jainst the draft. There* wei

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3duct of four months labour by a ’ ruling coalition party. The draft een parts, covering 245 Articles esolution which had been passed stituent Assembly in 1949 was -amble with one new clause:

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iraft defined the territories of alt with fundamental rights; Part principles of state policy; Part il government and legislature, •es and provincial governments, >ns between the federation and t with property, contracts and

* elections, part IX with the *nth* the services of Pakistan; Mcy provisions; Part XII with and Part XIII with temporary ’isions. The draft was in many f the draft Constitution made ’« Assembly. Pakistan was to

consisting of East and West e called the’Islamic Republic ’as based on the British ’• Though it provided for a e President real power was nent and its executive, the the new draft, the powers of enlarged as compared with draft of the first Constituent ubsequently to be amended. Constitution much simpler single chamber equally two wings instead of a gislature with representation ciples. The unicameral •d the National Assembly,

- hundred members to be f parity between East and

The draft provided for a strong centre. Its framers were guided by the principle that maximum autonomy should be granted to the provinces but this should be consistent with national integrity and solidarity. They recognized that a weak centre would bring disaster to the country and that while it need not be all-embracing, the centre must be sufficiently strong and effective to guide and control the provinces. The same principle had been the guiding factor with the first Constituent Assembly. The provincial list under the new draft was larger, including Industries and Railways, residuary powers however were to be vested with the provinces, unlike in the previous

POLITICAL REACTION TO THE DRAFT CONSTITUTION

The publication of the new draft Constitution was met with mixed political reaction. The Muslim League, the United Front, the Nizam-i-Islam, and older political parties reacted favourably, although there was a demand for the amendment of several controversial Articles. It was only the Awami League and some Hindu and Leftist parties in East Pakistan that voiced an outright condemnation of tie draft and demanded that it be scrapped. The Awami League insisted that it could not accept any constitutional scheme which failed to incorporate the famous ’Twenty-one Point’ programme made at the time of the East Pakistan provincial elections in

1954. This manifesto of the United Front and the Awami League was a fundamental creed with the United Front at that tune which conferred only three subjects on the centre defence, currency, and foreign affairs. The practical difficulties of restricting the powers of trie centre became immediately apparent and the tated Front Party under its chief architect, Fazlul Haq, agreed to modify this unrealistic demand. The *\nrni* League, had it been in power, would probably have come to the same realization. But its exclusion from power made it uncompromising and hence it continued to press for this stipulation. ll organized a powerful campaign in East Pakistan gainst the draft. There were demonstrations, public meetings, a 'Resistance Day' strike and to

crown it all, the chief of the Awami League in East Pakistan, Maulana Bhashani, was reported to have threatened secession. At a public meeting held in Dhaka on 15 January he said that if the centre did not right the wrong East Pakistan would have to think in terms of secession. Yet in 1956 when Suhrawardy became the prime minister, he had no hesitation in describing the Constitution as guaranteeing provincial autonomy up to 98 per cent.

The economic discontent in East Pakistan, reflected in repeated political agitation, had important bearings on constitution-making in Pakistan. The consequent apprehensions and misgivings in the eastern wing probably provide the basic explanation of East Pakistan's opposition to a strong national government.32

FINAL APPROVAL BY THE CONSTITUENT ASSEMBLY

When the draft containing 245 Articles came up for detailed consideration by the Constituent Assembly, notices of as many as 670 amendments were given, mostly proposed by the members of the opposition party, the Awami League. The members of the ruling coalition party also brought a number of amendments. Out of 245 Articles of the draft, 179 were passed quickly; the remaining
66 Articles were regarded as being highly controversial, some of them being the subject of acute division within the ruling coalition party. Some of the important Articles in dispute related to: the powers of the President, particularly his right to dissolve the legislature at his discretion; emergency powers; the President's assent to Bills; the provision for a Vice-President; the relations between the Cabinet and the legislature; impeachment of the head of the state; the principle of the electorate; provisions relating to the Holy Quran and *sunnah;* the appointment of National Economic and Finance Commissions; the Federal Capital; the state language; and the title of the Constitution.

The coalition party arrived at a compromise over all these controversial issues except the principle of the electorate which it left to the decision of the National Assembly in consultation

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AN ERA OF LEGAL BATTLES

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30. Feldman, Herbert, *A Constitution for Pakistan,* Oxford University Press, 1955, p. 84.

31. The speech of Law Minister, Mr Chundngar, introducing the draft in the Constituent Assembly,
1 January 1956

32 Choudhry, G W., *Constitutional Developments in Pakistan, supra,* note 22, pp. 99-100.

8 The Constitution of 1956

After nine years of effort, Pakistan succeeded in framing a Constitution which became effective on
23 March 1956, proclaiming Pakistan as an Islamic Republic. In its general aspect, the 1956 Constitution was based on the pattern of the Government of India Act, 1935.

The 1956 Constitution was lengthy and detailed. It contained 234 Articles, divided into 13 parts and 6 schedules. On examination, we find several explanations for its length as stated below:

i. The Islamic character of the Consititution sought to base the Constitution on Islamic principles and provisions which occupied some length;

ii. It was a federal Constitution which is usually more complex, prescribing not only for the federation but also for the units; in. The relations between the federation and the provinces were complicated, necessitating considerable length; iv. Special provisions had to be made for tribal

areas and special areas;

v. Some matters which could have been dealt with by ordinary legislation, such as judicial organization, were included in the Constitution; the organization of the Federal Court and the judiciary of the provinces occupied as many as thirty-one Articles;

vi. There were other matters which the Constituent Assembly thought fit to include in the Constitution, relating to the public services, the languages of the federation, and the election commission, and others; vii. It was found necessary to include emergency provisions covering Part IX of the Constitution; and

viii. Lastly, it was thought fit to include not only a lengthy Bill of Rights but also directive principles of state policy.

Part I of the 1956 Constitution dealt will Republic and its territories, Part I Fundamental Rights; Part in with di principles of state policy; Part IV will federation; Part V with the provinces, Part VI the relations between the federation anil provinces; Part VII with property, contracts, suits; Part VIII with elections, Part IX judiciary; and Part X with the services of! Part XI dealt with emergency provisions, *fa'* ^ with general provisions; and Part XIII temporary and transitional provisions Ofih schedules, the first dealt with the election i President; the second with oaths and *affirms:* the third with powers of the Supreme Cour J the remuneration of judges; the fourth wtr -j remuneration and privileges of the President :j Speaker, the Deputy Speaker of the Assembly and provincial assemblies, the norr, of the National Assembly and prov assemblies, as well as the provincial the fifth with the lists of subjects for which (^ the federation or the provinces, or IT concurrently, would be competent to legislate *s* the sixth with the election of the first Preside! the Republic.

FUNDAMENTAL RIGHTS

There was no Bill of Rights under the Constitution. The British constitutional who drafted the Government of India Act, were against the incorporation of such a Bill al Act, but after independence, the prepondera" ; views in Pakistan as in other new dem in favour of a Bill of Rights being mu into the Constitution. Experience under the raki law during British rule was not alwavs because the British practice in their col differed from that in the United Kmgdoir

the movement for f Rights, as incorpora United States of *I* modern constitutio nationalist leaders. 1 the nature and conten have engaged the at Pakistan Constitutioi their assignment in fundamental rights o relating to minorities session of the first Co
1947. In fact, there favour of fundament inserted in the proposi such as Pakistan wh< democratic practices v opinion was not yet art for such a declaratio since Pakistan had n necessary to define individuals, irrespectivi The interim report Fundamental Rights v before the adoption < Constitution. The singli on Fundamental Rights Liaquat 'to respect tl Fundamental Rights, Constituent Assembly, such as equality of st before law; social, econ< and freedom of thought worship, and association mteed to Muslim *2* .../ens, without any dis concept of 'second in the list of thest forced by the law cour The second Constitue rights, liberties, ai behind them, but ' t of some. The 19f)hasis on fundamental ?Sf any existing law or cus **force** of law on Constitutj any provision of fum m'd to the extent of

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the movement for freedom, the idea of a Bill of Rights, as incorporated in the Constitution of the United States of America and in many other modern constitutions, appealed very much to nationalist leaders. It was, therefore, natural that the nature and content of fundamental rights should have engaged the attention of the framers of the Pakistan Constitution from the very beginning of their assignment in 1947. A committee on the fundamental rights of the citizens and on matters relating to minorities was set up at the inaugural session of the first Constituent Assembly in August
1947 In fact, there were weighty arguments in favour of fundamental rights being defined and inserted in the proposed Constitution. In a country such as Pakistan where the English tradition of democratic practices was lacking and where public opinion was not yet articulate or powerful, the need for such a declaration was imperative. Further, since Pakistan had religious minorities, it was necessary to define and protect the rights of individuals, irrespective of caste, creed, or religion. The interim report of the Committee of Fundamental Rights was accepted in 1950 long before the adoption of any other laws of the Constitution. The single idea, in the interim report on Fundamental Rights, was to quote the words of Liaquat ’to respect the dignity of man’. The Fundamental Rights, as adopted by the first Constituent Assembly, included familiar liberties such as equality of status, of opportunity and before law, social, economic, and political justice; and freedom of thought, expression, belief, faith, worship, and association. Fundamental Rights were guaranteed to Muslim as well as to non-Muslim citizens, without any discrimination or distinction. No concept of ’second class citizens’ could be found in the list of these rights which were to be enforced by the law courts.1

The second Constituent Assembly retained all these nghts, liberties, and liberal principles and ideals behind them, but with improvement in the content of some. The 1956 Constitution laid great emphasis on fundamental rights by asserting that if any existing law or custom or usage having the force of law on Constitution day was inconsistent *ith any provision of fundamental rights, it would IK void to the extent of such inconsistency and

similarly no authority in Pakistan whether the federal government, the National Assembly, a provisional government or legislature, or any local authority, was competent to make any law, regulation, or any order which might be repugnant to any of the provisions of the fundamental rights and if any such law, regulation or order was made, it would to the extent of repugnancy be void.2 Thus the democratic concept of limited government, that is, a government that rules by law is itself ruled by law, was established. The judiciary was given the power to enforce fundamental rights and the courts were to decide if a law was repugnant to any provisions of fundamental rights.

Familiar democratic rights and freedom such as freedom of speech and expression, of assembly and association, of movement and profession, were all provided for in the Constitution, with the usual qualifications. With regard to civil rights, familiar rights such as the right to life, liberty, and property were granted, again with the usual qualification and safeguards. Most of the constitutions which guaranteed such liberties have found it necessary to make qualifications

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regarding the exercise of such rights. An important provision from the standpoint of civil liberty was provided which laid down that a person arrested should not be detained in custody without being informed, 'as soon as may be' of the grounds for such arrest, and such person should not be denied the right of legal consultation and defence. Further, a person arrested or detained in custody was given the right to be produced before the nearest magistrate within a period of twenty-four hours and no further detention was allowed, except on the order of the magistrate.3

Such safeguards were, however, not applicable to an enemy alien, or anyone arrested or detained under a law providing for preventive detention. When the Constitution was in the process of being made, Security Acts regarding preventive detention were targets of severe criticism and attack from the opposition parties and also outside the legislature. The United Front in East Pakistan pledged itself to repeal any Security Act that may be in existence. The majority of the framers of the Constitution, including the members of the United Front felt that some safeguards against subversive,

anti-state, and anti-social actions should be retained in the Constitution. They took sufficient steps to lessen the risk of such provisions being misused by limiting the powers of preventive detention to not more than three months, unless an advisory board appointed by the Chief Justice of Pakistan in the case of persons detained under a central Act and by the Chief Justice of the province in the case of people detained under a provincial Act, could certify that there was sufficient cause for such detention. The provision for review by a judicial body was undoubtedly an improvement which would act as a healthy check against abuses.4

During an emergency the President could, by an order, suspend the enforcement of fundamental rights guaranteed to the citizens under the Constitution. It is the right to move any court for the enforcement of the fundamental rights that could be suspended. Such an order was required ’as soon as may be’ to be laid before the National Assembly.5

The principal fundamental rights guaranteed by the 1956 Constitution are briefly described below:

1. All citizens were equal before the law and entitled to equal protection of the law.6

2. No person could be deprived of life or liberty, save in accordance with the law.7

3. No person could be punished for an act which was not punishable when cornmitted.8

4. The right to apply for a writ of habeas corpus could not be suspended, except in the case of an external or internal threat to the security of the state or other grave emergency.9

5. There should be no discrimination on grounds of religion, race, caste, sex, or place of birth with regard to access to places of public entertainment, recreation, welfare, or utility.10

6. All forms of slavery, servitude, forced labour, torture, or cruel or inhuman treatment or punishment were declared illegal.”

7. All duly qualified citizens were made eligible for appointment to the service of the state, irrespective of religion, race, caste, sex, descent or place of birth,

provided that it should not be unlawful the state to reserve posts in favour of i minority or backward section.12

8. No person could be deprived of his propd without adequate compensation.”

9. All citizens were guaranteed (a) freeta of speech, expression, associate) occupation, acquisition and disposal property, and peaceful assembly; right to move freely throughout and to reside in any part of the county*

10. Freedom of conscience and the righ profess, practise, and propagate religion, subject to public order morality, were guaranteed.15

11. No one attending any educ; institution could be required to religious instruction or to attend religi worship other than that of his community or denomination. No religi community could be prevented providing religious instruction to pupflii that community in any educatii institution which it maintained. No could be compelled to pay any special the proceeds of which were specifica!j| appropriated for the propagation «j maintenance of any religion other than own.16

12. The notion of untouchability inconsistent with human dignity, il practice was declared unlawful."

These 'fundamental rights' contained a statement regarding the rights of individual' (whether *qua* individuals or members of a wt group like a community or a religious denom» tion), and these rights were fundamental not <*A* in the sense that they had been mentioned in an guaranteed by the Constitution but were suci s neither the legislature nor the executive could t any manner curtail or diminish. These ngte limited legislative and executive powers and wodf be a clog on the 'temporary' will of the 'simplt majority in the legislature. They embodied! permanent and paramount law which could not k disturbed by the will of the legislature or of tit executive. These fundamental rights would ope*

like a double-edged swor destroyed those portions of i were in conflict with these rig to render void any state act legislative or executive fieli coming into force of the C< effect of taking away or ab fundamental rights.18

DIRECTIVE PRINCIPL STATE POLICY

The Basic Principles Committe the inclusion of Directive 1 Policy. The following were ir Constitution:

1. Steps should be taken t< order their lives in a< Quran and the *sunnc* compulsory teaching of the prohibition of drinl prostitution, and the prc mosques.19

2. The provision of food, education, and medica made for citizens incapa livelihood owing to sickness, or similar reas

3. The improvement of li1 prevention of the conc(and means of productio few, and the prevention of the workers and peas

4. Abolition of illiterac possible.22

5. Training and education of different areas to participate fully in all activity and service.23

6. Discouragement of pan racial feelings among M

7. Strengthening of the between Muslim countrii

8. Promotion of ”peace anc the peoples of the world.

9. Separation of the jud executive, as soon as pra

ild not be unlawful for posts in favour of any •d section.12 leprived of his property mpensation.13 uaranteed (a) freedom ession, association, ition and disposal of ;ful assembly; (b) the y throughout Pakistan part of the country.14 ence and the right to

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ig any educational ie required to receive i or to attend religious an that of his own imination. No religious I be prevented from instruction to pupils of

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*hts’ contained a clear rights of individuals or members of a wider T a religious denomma”e fundamental not only been mentioned in and ution but were such as
• the executive could in diminish. These rights ;utive powers and would iry’ will of the ’simple’ are. They embodied a law which could not be ihe legislature or of the tital rights would operate

like a double-edged sword. They not only destroyed those portions of existing laws which were in conflict with these rights but also operated to render void any state action (whether in the legislative or executive field) which, after the coming into force of the Constitution, had the effect of taking away or abridging any of the fundamental nghts.18

DIRECTIVE PRINCIPLES OF STATE POLICY

The Basic Principles Committee had recommended the inclusion of Directive Principles of State Policy The following were included in the 1956 Constitution:

1 Steps should be taken to enable Muslims to order their lives in accordance with the Quran and the *sunnah, inter alia,* the compulsory teaching of the Quran, namely the prohibition of drinking, gambling, and prostitution, and the proper organization of mosques.”

The provision of food, clothing, housing, education, and medical relief should be made for citizens incapable of earning their livelihood owing to unemployment, sickness, or similar reasons.20 The improvement of living standards, the prevention of the concentration of wealth and means of production in the hands of a few, and the prevention of the exploitation of the workers and peasants.21 Abolition of illiteracy as rapidly as possible.22

Training and education for the population of different areas to enable them to participate fully in all forms of national activity and service.23

Discouragement of parochial, tribal, and racial feelings among Muslims.24 Strengthening of the bonds of unity between Muslim countries.25 Promotion of peace and goodwill among the peoples of the world.26 Separation of the judiciary from the executive, as soon as practicable.27

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10. Protection of all legitimate rights and interests of non-Muslim communities.28

11. Protection of children, young people, and women against exploitation and employment in unsuitable occupations.29

12. To achieve parity in the representation of East Pakistan and West Pakistan in all spheres of federal administration.30

13. To eliminate *riba* as early as possible.31

The state was to be guided by these Directive Principles of State Policy in the formulation of its policies, but they were not enforceable in any court of law.32 The provisions of the Constitution containing such principles constitute the manifesto of the policies and programmes of the state as they were to be administered and as they were visualized by the founding fathers and were required to be kept in view by subsequent generations so as to secure a continuity in the maintenance of a homogeneous and consistent policy in the matter of handling the affairs of the state.33

PARLIAMENTARY FORM OF GOVERNMENT

The first Constituent Assembly decided in favour of the parliamentary form of government, both at the centre and in the provinces.' There were some who believed that parliamentary democracy was not suited to Pakistan. Their argument was that in the absence of two strong, stable, and responsible political parties, the parliamentary form of government, wherein the real executive authority is vested in a Cabinet responsible to the legislature, would become a farce and stable government a forlorn hope. They pointed out difficulties in the emergence of strong political parties in Pakistan, a probability that the legislature might be divided into small groups separated one from the other for personal or political reasons, thus making stable government impossible. Their main contention was that a new country like Pakistan required, more than anything else, a stable and strong government. Those who favoured a full-fledged Islamic state in Pakistan also considered that parliamentary government was not in accordance with the system which existed in the early days of Islam. Thei

intention was that the head of the Islamic state of Pakistan should be a Muslim and responsibility for the administration of the state should primarily be vested in the head of the state, although he might delegate part of his powers to any individual or body. The first Constituent Assembly, however, expressed faith in a parliamentary form of government in the hope that it would ensure a better relationship between the executive and the legislature.34

The second Constituent Assembly, like its predecessor, decided in its favour, both at the centre and in the provinces.

When the second Constituent Assembly met in
1955, the relationship between the executive and the legislature, particularly the powers and position of the head of the state, assumed great importance in view of certain controversial and undemocratic actions of the head of the state under the interim Constitution. The framers of the Constitution had before them vivid examples in the dismissal of a Cabinet enjoying the confidence of the legislature in 1953 and the dissolution of a legislature in 1954 when it sought to curb the powers which the head of the state had tried to exercise in an authoritarian way. They wanted to ensure that such actions would not be repeated. Hence, we find that the draft presented to the second Constituent Assembly in January 1956 had to be modified considerably regarding provisions relating to the powers and position of the head of the state. A parliamentary system was sought where real executive authority vested in a Cabinet responsible to the legislature would be guaranteed within the Constitution and not, as in Britain and in some Commonwealth countries, based on conventions alone. Countries having a parliamentary system have found it necessary to provide for a separate head of state who normally exercises only ceremonial and formal functions. In most important matters he acts on the advice of the Cabinet. Still, a separate head of the state seems to be necessary in a parliamentary system because a neutral constitutional official is needed to bridge the gap between outgoing and incoming ministries, not in taking over the government but in providing the decisions evolved in bringing a new government into office.

THE PRESIDENT AND THE CAB

The executive authority of the federation in
1956 Constitution was vested in the Preside* was to be exercised by him in accordance that Constitution.35 The President was to Muslim of not less than 40 years of age qualified for election as a member of theNi Assembly. He was to be elected by an Elecr College comprising members of the Assembly and the Provincial Assemblies: accordance with provisions outlined in great do in the first schedule appended to the Constitute He was to hold office for five years and no 9 could hold the office for more than two ten The President might resign or might, on a cte of violating the Constitution or of pus misconduct, be impeached by the Nate Assembly by an absolute majority.38 He wouldir be allowed to hold any office of profit in it service of Pakistan but was not prevented fe holding or managing any private property.3’

The draft presented to the second Constitua Assembly originally provided for a Vice Prate but the proposal was not accepted and is Constitution provided that if the President u away from Pakistan or unable to perform b duties, the Speaker of the National Assemh would exercise the

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functions till the Preside resumed his duties or until a new President »ts elected.40

The Constitution provided for a Cabinet i ministers with the Prime Minister at its head 1 aid and advise' the President in the exerciseofb functions. The President was required by to Constitution 'to act in accordance with the adin of the Cabinet' except in those matters in wk he was empowered to act at his discretion. Ik Constitution strictly limited the discretions powers of the President to the making of a fei non-controversial appointments, such as tit chairman and members of the Federal Piibk Service Commission, the Chief Election cornmissioner, and other members of the Electa Commission and the Chairman and Members* the Delimitation Commission. But the DIM important discretionary power of the President to appoint from among the members of tin

National Assembly a Prime Mi opinion was most likely t< confidence of the majority of th Assembly. While this may be a] in a clear cut two-party syste function of great importance situation is not clear. This dis could very easily be misused. Il under the interim Constitution a had appointed somebody as Pri was not even a member of Par] was flown from Washington wi footing on the soil and planti Minister'.41 In the provinces too, occurred of chief ministers bei imposed from outside. To i discretionary power was nc Constitution provided a safeguz 50 regarding the discretionary President and enjoined a mini: power to call a session of the N within two months to demonstra the confidence of the legislature.

It was the duty of the Pri communicate to the President all Cabinet and proposals for legislat him with information as the Pre for.42 The question whether any tendered by the Cabinet or a min enquired into by any court of la any provision for countersignati Minister or any other minister of the President.43 This provision effective safeguard to ensure tl nature of the executive. There w the Constitution if the President advice of the Cabinet except that protest. But as the party systei developed, this remedy could no check on the powers of the Presic

'The Prime Minister shall ho the pleasure of the President' proposal in the provisional dn presented to the second Constito January 1956. But the propose criticism and fears were expressei lead to a repetition of the Cabii
1953. The second Constituent *A* amended this as follows:

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Constitution provided a safeguard under Article

ISO regarding the discretionary powers of the President and enjoined a ministry coming into pow to call a session of the National Assembly wtontwo months to demonstrate that it enjoyed tie confidence of the legislature. It was the duty of the Prime Minister to communicate to the President all decisions of the Cabinet and proposals for legislation and to furnish lim with information as the President might call The question whether any advice had been by the Cabinet or a minister could not be into by any court of law, nor was there provision for countersignature by the Prime or any other minister of an Act signed by President43 This provision might have an re safeguard to ensure the parliamentary of the executive There was no remedy in lie Constitution if the President disregarded the i of the Cabinet except that it might resign in jntet But as the party system was not well Moped, this remedy could not be an effective ’ ’; on the powers of the President. The Prime Minister shall hold office during it pleasure of the President’, such was the il in the provisional draft Constitution
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1956 But the proposal evoked great item and fears were expressed that this might ad to a repetition of the Cabinet dismissal of *StA* The second Constituent Assembly finally ’ 1 this as follows:

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exercise his powers unless he is satisfied that the Prime Minister does not command the confidence of the majority of the members of the National Assembly.

The Cabinet was collectively responsible to the National Assembly.45 Although the concept of collective responsibility of the Cabinet is based on convention under the British Constitution, yet it had been expressly included in the Constitutions of India, Sri Lanka, and the Irish Republic. The 1956 Constitution followed the example of these countries by expressly including it in the Constitution.

FUNCTIONS AND POWERS OF THE PRESIDENT

The President, on the advice of the Cabinet, was entrusted with multifarious functions. Some of the key appointments, such as those of the Chief Justice of the Supreme Court and judges of the Supreme and High Courts, the Governors of the provinces, the Attorney-General, and the principal military officers, were made by the President on the advice of the Cabinet. He would constitute the National Economic Council, the National Finance Commission, the Inter-Provincial Council, the Commission for bringing the existing laws into conformity with the injunctions of Islam, and the Organization for Islamic Research and Instruction. He also had the power to issue proclamations of political or financial emergency and could suspend a provincial government. The supreme command of the Armed Forces was vested in the President and he was conferred the power to raise and maintain the naval, military, and air forces of Pakistan. The administration of the federal capital was vested in the President. He was also given powers to grant pardon and to remit, suspend, or commute a sentence passed by any tribunal.

Similarly, the President was given certain legislative functions to be exercised on the advice of the Cabinet. Thus he could summon, prorogue, and dissolve the National Assembly on their advice. In the draft Constitution of the second Constituent Assembly there was a provision that

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the President might at his discretion dissolve the National Assembly if he were satisfied that it had ceased to command the confidence of the majority of the electorate. This proposal raised strong protests both inside and outside the Assembly and consequently, the Constitution provided that the dissolution should take place on the advice of the Cabinet. But what would happen if the President should dismiss a Prime Minister, appoint a new one, and dissolve the Assembly on his advice? Was the President bound to accept advice for a dissolution if a Prime Minister who had been defeated in the National Assembly should advise the President to dissolve the Assembly? It was difficult to conceive that the President would accept such advice. In such a case, he could surely dismiss the defeated Prime Minister and appoint a new one. So occasion might have arisen when, under the Constitution, the President could force a dissolution or refuse advice for dissolution.

The President could address the National Assembly and send messages to it.45 He would cause the budget to be laid before the National Assembly and no Bill imposing taxation or involving expenditure from the federal consolidated fund could be moved without the President's recommendation. He possessed a limited veto regarding laws made by the National Assembly.46 When a Bill was passed by the National Assembly he could either assent to it or withhold his assent. In the latter case, if the National Assembly again passed the Bill, with or without amendment, by a majority of two-thirds of those present and voting, the President was bound to assent to it. He could also send a Bill for reconsideration and if such a Bill were passed again by a majority of the total members of the Assembly, it had to receive his assent.

When the National Assembly was not in

session, the President possessed the positive power

of making laws by ordinances which were to be

laid before the National Assembly and would cease

to operate at the expiry of six weeks from the next

meeting of the National Assembly or at such time

as a resolution of disapproval should be passed by

the Assembly.47 Should the National Assembly

stand dissolved, Che President might by ordinance

authorize the expenditure from the federal

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consolidated fund (whether the exp charged upon that fund or not), but \ ordinance was to be laid before the \ Assembly ’as soon as may be’ after recoi of the Assembly and the normal fin procedure48 would have to be complied i later than six weeks from that date.

THE FEDERAL GOVERNMEM

Another basic feature was the federal fora Constitution, following the decision in Although the solitary voice of the indepi member, Fazlur Rahman, could be heard second Constituent Assembly in favour of am form of government, the 1956 Constffl embodied all the charactenstics of a federals written Constitution, dual polity, disrnbinn powers between the national and prora governments, and a Supreme Court

This federal structure was similar, in i respects, to that provided under the Govern of India Act, 1935 which introduced a fa Constitution in undivided India. Federals Pakistan had to make room for self-expression self-support for the units. The prow decentralization, therefore, was allowed unto
1956 Constitution to an extent which wasim with other new federal constitutions The fa Constitution of India, for instance, had a si tendency towards centralization of authors administration. A modern democratic govern can hardly fulfil the wider objectives of« welfare services or full employment unless! the power of legislation over the whole ecouc and fiscal field. Similarly, the nature of ma warfare is forcing a federal government to 0{ its sphere of operations.

In a complex modern society, the federal SB could hardly be expected to work satisfactonns smoothly without the process of centralia. Yet, the architects of the 1956 ConstiM provided maximum room for decentralizatic* view of the number of powerful factors, pi economic, psychological, working to*. *demands for regional autonomy Unless y demands were reasonably satisfied, tiiemok*

secession which subversi trying to create, might have be the other hand, the risk was thi structure of a weak federal footholds for foreign intrigue a Turning to the distribu powers between the centre anc powers were exhaustively en lists-federal, provincial and c Government of India Act, H federal laws was extended to tr of Pakistan, including the powe extra-territorial operations, provincial legislature extended province or any part thereof given exclusive power to ma thirty items in the federal list under the Government of In sixty-six in the draft Const Constituent Assembly. The si centre included foreign affa matters which would bring Pa with foreign countries; d citizenship; foreign and intercommerce; insurance and coi the federation; industries own* by the federation; posts telecommunications; and mini The provincial list was mos included ninety-four items, under the Government of Ii forty-eight in the draft Con Constituent Assembly, whicl towards decentralization reco Constituent Assembly. The pr amongst others, public ord(justice, police, land, agricultu education, public health, sani corporations subject to the fi regulations of mines and r subject to the federal and coi electricity, and other subjec The most important addition was railways which continue trol at the time of thi utution in 1958. The concurrent list *wt* included only nineteen, items

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ecession which subversive elements were trying to create, might have been encouraged. On the other hand, the risk was that the decentralized structure of a weak federation might afford footholds for foreign intrigue and attack.

Turning to the distribution of legislative powers between the centre and the provinces, the powers were exhaustively enumerated in three hts-federal, provincial and concurrent, as in the imminent of India Act, 1935. The extent of iederal laws was extended to the whole or any part ofPakistan, including the power to make laws with ntra-temtorial operations. The power of a .1 legislature extended to the whole of that province or any part thereof.49 Parliament was given exclusive power to make laws concerning fay items in the federal list as against sixty-one nderthe Government of India Act, 1935, and njty-six in the draft Constitution of the first Constituent Assembly. The subjects given to the Mitre included foreign affairs, comprising all utters which would bring Pakistan into relations tilt foreign countries; defence; currency; citizenship, foreign and inter-provincial trade and wnmerce, insurance and corporations set up by It federation, industries owned wholly or partially iv the federation; posts and all forms of ^communications; and minerals, oil, and gas.30 lie provincial list was most comprehensive and jchded ninety-four items, as against fifty-five aierthe Government of India Act, 1935, and ity-eight in the draft Constitution of the first Assembly, which indicated the trend wards decentralization recognized by the second it Assembly. The provincial list included, others, public order, administration of .police, land, agriculture, local government, ion, public health, sanitation, industries and ions subject to the federal lists, factories, is of mines and mineral development to the federal and concurrent lists, forests, , and other subjects of local interest.51 lost important addition to the provincial list railways which continued to be under central at the time of the abrogation of the

in 1958.

concurrent list was the smallest and only nineteen items and was justified on

the ground that there were certain matters which could not be given exclusively either to the centre or to the provinces since they might normally be dealt with by the provinces but occasions might arise when it would be desirable and necessary to deal with them on a national level. Again, the regulation of some matters by one unit might prejudice the interests of the other unit, or to secure legal and economic uniformity, federal jurisdiction might be necessary. The list dealt with such matters as civil and criminal law, scientific and industrial research, price control, economic and social planning, inter-provincial migration and quarantine, trade union, and other matters of common interest.52

With regard to subjects in the concurrent list, the precedence of federal legislation was guaranteed. So the Constitution had provided priority of federal legislative power over the provincial one applicable over the concurrent list, and the concurrent list had priority over the provincial, as had been provided for in the Government of India Act, 1935. In fact, the structure and content of Article 106 were identical with those of Section 100 of the Government of India Act, 1935.

The question whether residuary powers should be vested in the federal or in provincial authorities had produced lengthy discussions and controversies in the constituent Assemblies of Pakistan but under the 1956 Constitution residuary power was vested with the provincial legislatures which were to have exclusive power to make laws with respect to any matter not enumerated in the federal, provincial, or concurrent lists.53

The federal government was fully equipped for the conduct of international affairs. Parliament was authorized to implement treaties with laws which it might have no power otherwise to pass; a treaty could reach and control matters normally within the powers of the provinces. It was given power to make laws for implementing any treaty, agreement or convention or a decision taken by an international body even though it might deal with a matter enumerated in the provincial list, or a matter not enumerated in the provincial list, or a matter not enumerated in any of the three lists.54

The Chief Justice of Pakistan was assigned an important role in the settlement of disputes

between the federal government and one or both provincial governments, or between the two provincial governments. He was to appoint a tribunal to settle such a dispute. The report of the tribunal was to be submitted to the Chief Justice who would forward it to the President who could make such orders as might be necessary to give effect to the report. This order must be made effective by the provinces and any action of the provincial legislature which might be repugnant to the President's order would be void.55

There was also provision for an inter-provincial council which the President could set up for the purpose of investigating and discussing subjects of common interest between the federation and one or both the provinces.56 Neither a tribunal under Article 129 nor an inter-provincial council under Article 130 was set up in the duration of the 1956 Constitution.

There was no provision in the Constitution, as under the Indian Constitution, whereby the federal legislature could make laws in any provincial matters on the grounds of 'national interest'. There were, however, at least two processes which would enable the federal legislature to legislate even on a provincial subject. The first applied when a provincial legislature authorized parliament to make laws in any matter enumerated in the provincial list or any matter not enumerated in any of the three lists. An Act passed by the parliament in exercise of this power, in so far as it would affect a province could, however, be repealed by the provincial legislature.57

While legislation by the federal legislature under Article 107 was voluntary, the second process which would enable the federal government to intervene in provincial matters, was of far-reaching importance. This related to the power to issue a proclamation of emergency and while this was in operation, parliament was empowered to make laws for a province with respect to any matters not enumerated in the federal or concurrent lists.58

THE FEDERAL LEGISLATURE (THE PARLIAMENT)

Unlike other federal constitutions of the tail
1956 Constitution provided for a umcar system. The first conflict relating to the *foi* structure in Pakistan was over the quantir* representation for the two wings of the i After several years of acute controversy agreed that there should be parity of represent^ between East and West Pakistan. Under *the;* Constitution made by the first Cotii Assembly there was provision for a Chamber and parity of representation was for in the joint session of the two Houses. the provinces and states in West Pakistan amalgamated into a single unit by the Constituent Assembly, the problei representation in the federal legislature wasi much simpler and it was, therefore, the legislature should have only one which parity of representation between East; West Pakistan could be maintained

The parliament of Pakistan under the I! Constitution consisted of the President and House, the National Assembly.59 The Assembly was to consist of 300 members, elected by constituencies in East and constituencies in West Pakistan. Ten ai seats were provided for women, five fix and

five from West Pakistan, for a period ofl years.60 Hence, the female citizens of Pakistan' granted double franchise for at least ten Parliament might alter the numbers of the of the National Assembly provided that the of representation between East and West was maintained.

Members of the National Assembly were to! elected under an electoral system for which second Constituent Assembly did not legislate,^ left it to be decided by the National Asseti| after consulting the provincial assemblies October 1956, the National Assembly, passed; electoral law amidst scenes of riot and confail The Bill was passed in great haste without the National Assembly or the country opportunity to judge its merits. Debate overfcl system of electorate, whether it should be joint i

separate, had a long history behim debated at great length. The Bil joint electorate in East and a sepa West Pakistan.61 It was the most i ever to have been thought of and of party alliances and groupings time. It apparently sought to satis ~'">th joint and separate elector sly either. Subsequently, el changed to joint electorates for thi but the issue was alive till the 1956 Constitution and it had a lo politics in Pakistan. The A fcoalition with the Pakistan Nz (advocated joint electorates wl [Muslim parties were still oppose A person was entitled to voti • Assembly (as well as the provin I he were a citizen of Pakistan, not of age, not declared by a court mind, and had resided within th six months before the first day o the preparation of the roll si Parliament could impose other q respect.63

The candidate for electior Assembly was to be not less th and qualified to be a vote Commission, on reference from National Assembly, could de [disqualification of a member ai ' final. No one could to be a merr *;* Assembly for two or more con |a person could seek election fi 'Constituency. A member of the could lose his seat if he remair :utive sitting days. N< member simultaneously of the and of a Provincial Assembly.6 The President, as noted earli to summon, prorogue, and dii Assembly on the advice of the < be at least two session1 Assembly every year, and at k to take place in Dhaka, the cap] bis was done to remove the 1 'East Pakistan. The Assembly v within two months of the f

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•al constitutions of the time, the in provided for a unicameral conflict relating to the federal stan was over the quantum of r the two wings of the country. ars of acute controversy it was should be parity of representation d West Pakistan. Under the draft lade by the first Constituent e was provision for a second rity of representation was provided session of the two Houses. When ind states in West Pakistan were into a single unit by the second Assembly, the problem of in the federal legislature was made and it was, therefore, proposed that
5 should have only one House ID of representation between East and i could be maintained. iment of Pakistan under the 1956 consisted of the President and one National Assembly.59 The National as to consist of 300 members, half constituencies in East and half by es in West Pakistan. Ten additional provided for women, five from East, >m West Pakistan, for a period of tea ice, the female citizens of Pakistan we» uble franchise for at least ten years, might alter the numbers of the members onal Assembly provided that the panty itation between East and West PakiNi

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1956, the National Assembly, passed law amidst scenes of riot and confusi was passed in great haste without **gi** tional Assembly or the country aity to judge its merits. Debate over! of electorate, whether it should be join’

separate, had a long history behind it and had been debated at great length. The Bill provided for a icmt electorate in East and a separate electorate in ft est Pakistan.61 It was the most ridiculous system e\er to have been thought of and was the product of party alliances and groupings prevailing at the lime. It apparently sought to satisfy the exponents of both joint and separate electorates and failed to satisfy either. Subsequently, electoral law was changed to joint electorates for the whole country,62 but the issue was alive till the abrogation of the
1956 Constitution and it had a long-lasting impact on politics in Pakistan. The Awami League, in coalition with the Pakistan National Congress, advocated joint electorates while some of the Muslim parties were still opposed to it. A person was entitled to vote for the National Assembly (as well as the provincial assemblies) if be were a citizen of Pakistan, not less than 21 years of age, not declared by a court to be of unsound mind, and had resided within the constituency for su months before the first day of the year in which reparation of the roll should commence. lent could impose other qualifications in this

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The candidate for election to the National mbly was to be not less than 25 years of age ma qualified to be a voter. The Election i Commission, on reference from the Speaker of the National Assembly, could decide questions of

1 alification of a member and its decision was

No one could to be a member of the National nbly for two or more constituencies, though i person could seek election from more than one ! tonstituency. A member of the National Assembly i lose his seat if he remained absent for sixty icutive sitting days. No one could be a et simultaneously of the National Assembly Jof a Provincial Assembly.64 pie President, as noted earlier, was empowered i«nnmon, prorogue, and dissolve the National iblyonthe advice of the Cabinet. There were i at least two sessions of the National ibly every year, and at least one session was •e place in Dhaka, the capital of East Pakistan. **ivas** done to remove the feeling of neglect in Ihkistan. The Assembly was to be summoned o months of the formation of a new

Cabinet. Even a minister and the Attorney-General had the right to speak and take part in the proceedings of the National Assembly but not the right to vote unless he were a member. The President could address or send messages to the National Assembly.65

The National Assembly would choose the Speaker and Deputy Speaker from its own members. They could be removed by a resolution of the National Assembly, passed by a majority of the total membership. When the National Assembly stood dissolved, the Speaker wouid continue his office until the convening of the first meeting of the successor elected National

Assembly.66

The National Assembly was to frame its own rules of procedure and the validity of any proceedings in the National Assembly could not be questioned in any court. The rules of procedure were based on the spirit and substance of those at Westminster. The usual procedure in the National Assembly was that a decision would be made by a majority of votes of the members present but in some specific cases, such as the impeachment of the President, the removal of judges of the Supreme Court, the overriding of the President's suspensive veto, and amendments to the Constitution, an absolute majority of the total membership was required. No member of the National Assembly could be made liable in any proceedings in any court regarding anything said or any vote given by him in the National Assembly or its committees. The privileges of the National Assembly, committees, the members thereof, and people entitled to speak therein could be determined by an Act of parliament.67

The procedure in financial matters was also largely based on the system existing in England and in Commonwealth countries. The tradition of parliamentary control over public money was largely maintained. No tax, for instance, could be levied for federal purposes, except by or under the authority of an Act of parliament,78 custody of the federal consolidated fund including the payment of money into it and withdrawal of money from it and all matters connected with public money and public accounts, were to be regulated by an Act of parliament.69 No proposal for the

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taxation or for appropriation of public revenues or for borrowing of money and similar matters could be made except with the recommendation of the President, that is, it could be made only with the approval and responsibility of the Cabinet.70

In the budget, the financial statement was divided into two parts: one showing the expenditure charged upon the consolidated fundthe expenditure which the National Assembly could discuss but not vote upon; the other part showing the sums required for the estimated expenditures of the various departments for the financial year. Expenditures charged upon the consolidated fund included; (a) remuneration and pension of the President, salaries of judges of the Supreme Court, members of the Federal Public Service Commission, the Speaker and the Deputy Speaker, the Comptroller and Auditor-General, the Election Commissioners and members of the Delimitation Commission; (b) the administrative expenses of the Supreme Court, the Federal Public Service Commission, the department of the Comptroller and Auditor-General, the Election Commission; and (c) the debt charges binding on the federal government and sums required to satisfy any judgment, decree, or award against Pakistan by any court or tribunal and any other sum declared by the 1956 Constitution or by Act of Parliament.71 The National Assembly was given a normal life of five years but the President, on the advice of the Cabinet, could dissolve it earlier.72 In the case of dissolution, fresh elections were to take place within six months and no by-election could be delayed beyond three months. These were to be healthy democratic checks against prolonged rule without a parliament or any attempt to avoid the expression of public opinion through by-elections. By-elections had often been unduly delayed or evaded altogether under the interim Constitution.

PROVINCIAL GOVERNMENTS AND LEGISLATURES

The provincial legislatures and executives were small replicas of the national legislature. Provincial Assemblies, like the National Assembly, were unicameral and were to be directly elected by the

people through universal adult franchise under same electoral law. The relationship between provincial Governor, provincial Chief Minis and the Provincial Assembly closely resemlli that between the President, the Prime Minister the National Assembly. The Governor coi appoint and dismiss the provincial Cabinet throe a procedure similar to that of the President exercising his powers at the centre. The prow. Cabinet was also collectively responsible to i provincial legislature which could be dissolved the Governor on the advice of his Cabuf Contrary to section 51(5) of the inter:! Constitution which laid down that in the exerts of his functions with respect to the choosi! summoning, and dismissal of ministers, 4. Governor would be guided under the genn control and would comply with such parte directions as might be given, from time to tune, t the Governor-General, there was no sdrl provision in the 1956 Constitution. Yet, mpracta the position was not different from that under I interim Constitution. The Governor

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continued: be an agent of the central government which conk and did, exercise pressure in provincial p through the Governors.

DISTRIBUTION OF POWERS BETWEEN THE CENTRE AND THE PROVINCES

In the distribution of legislative powers betra the centre and the provinces the framersofk 1956 Constitution allowed a decentralization than under the Gover India Act, 1935. Administrative relations be»« the centre and the provinces, however, cl little. The federal system showed, a marls tendency towards unified control and was the constitutional duty of the government to protect each province external aggression and internal disturb* Although the maintenance of law and order ni| provincial subject, the federal government n vested with the ultimate responsibility of ensiid the peace and safety of the country, the pram duty which no national government can afford ij

neglect, be it under a unitary o The federal government was a the task of ensuring that the g< province was carried on in ac provisions of the Constitutio government would not be alh supreme law of the land, that is A provincial government was o its executive authority in *sue}* ensure compliance with the Acts existing laws applying to that prc government would make laws concurrent lists which wou provinces. Although these administered by the federal authc Constitution enjoined upon authorities the duty of giving i federal laws prevailing or applyin and not impeding or prejudicinj the executive authority of the federal government was entitled to a province with regard to t provincial authority and was furth directions to a province in the fol

(a) the construction and r communications declared or military importance;

(b) the measures to be taken f of railways within the pn railways were included unc list);

(c) the manner in which the exi of the province was to be < purpose of preventing any , the peace and tranquility c of Pakistan or any part thei

(d) the carrying into execution of any Act of parliament i concurrent list, such as mea corruption, or price control or social planning.

There was one important provis Constitution which would enab government to delegate a provinci as its agent. The President might, w of a provincial government, t conditionally or unconditionally t< ment, or to its officers, functions

•sal adult franchise under the Tie relationship between the ’ provincial Chief Minister, Assembly closely resembled ident, the Prime Minister, and ably. The Governor could tie provincial Cabinet through

to that of the President in s at the centre. The provincial)llectively responsible to the : which could be dissolved by the advice of his Cabinet, i ion 51(5) of the interim < laid down that in the exercise ith respect to the choosing, dismissal of ministers, the >e guided under the general

comply with such particular be given, from time to time, by aeral, there was no similar >6 Constitution. Yet, in practice,
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greater than under the Government of Administrative relations between e provinces, however, changed a ral system showed, a marked s unified control and authority, ft itutional duty of the federal protect each province against >sion and internal disturbance, lintenance of law and order was a jet, the federal government was ultimate responsibility of ensuring iafety of the country, the primary national government can afford to

neglect, be it under a unitary or a federal system.

The federal government was also entrusted with

the task of ensuring that the government of each

province was carried on in accordance with the

provisions of the Constitution.73 A provincial

government would not be allowed to flout the

supreme law of the land, that is, the Constitution.

A provincial government was obliged to exercise

its executive authority in such a manner as to

ensure compliance with the Acts of Parliament and existing laws applying to that province. The central government would make laws in the federal or concurrent lists which would apply to the provinces. Although these laws might be administered by the federal authority itself, yet the Constitution enjoined upon the provincial authorities the duty of giving due effect to the federal laws prevailing or applying to the provinces and not impeding or prejudicing the exercise of ihe executive authority of the federation. The federal government was entitled to give direction 10 a province with regard to the duties of the provincial authority and was further entitled to give directions to a province in the following matters:74

(a) the construction and maintenance of communications declared to be of national or military importance;

(b) the measures to be taken for the protection of railways within the province (although railways were included under the provincial list);

(c) the manner in which the executive authority of the province was to be exercised for the purpose of preventing any grave menace to the peace and tranquility or economic life of Pakistan or any part thereof;

(d) the carrying into execution in the provinces of any Act of parliament in Part II of the concurrent list, such as measures to combat corruption, or price control, and economic or social planning.

There was one important provision in the 1956 Constitution which would enable the federal

government to delegate a provincial government as its agent. The President might, with the consent of a provincial government, entrust either conditionally or unconditionally to that governnent, or to its officers, functions regarding any

matter to which the executive authority of the federation extended.75 The practice of delegation to a provincial government or their servants the duty of executing orders of the federal government had been exercised under the interim Constitution. The federal government did not have sufficient number of officers in the provinces to execute its laws or orders, hence the necessity of such delegation. The framers of the Constitution allowed this process of delegation to provincial governments to continue, thus permitting the federal government to utilize provincial executive machinery for the enforcement of federal laws.

THE JUDICIARY

Adequate provisions were made in the 1956 Constitution to ensure the independence of the judiciary so that 'justice could be dispensed in Pakistan in a real and unpolluted form'. The efficiency and independence of the judicial system depends to a great extent upon the method of appointment, tenure of service, and salary of the judges. The framers of the Constitution thought it desirable to include the organization of the judicial system and provisions relating to it were given in considerable length. The aim of such constitutional safeguards in the organization of the judiciary was to secure its independence as being fundamental to both the Islamic and the western concepts of justice.

Though the Supreme Court under the 1956 Constitution was the successor of the Federal Court, in the interim Constitution its jurisdiction was in some respects wider. Apart from expressed constitutional or statutory provisions there was no limit to its jurisdiction in matters decided by the High Courts.76 The law which it would lay down was binding on all courts in Pakistan. As supreme tribunal, it was the sole judge of its jurisdiction and there was no judicial means of challenging its exercise. A judgment of the Supreme Court was binding on all courts in Pakistan; all executive and judicial authorities throughout the country also had to act in the aid of the Supreme Court and all directions, orders, decrees, or writs issued by that court were to be executed as if they were issued by the High Courts of the appropriate province.77

Like its predecessor, the Federal Court, the Supreme Court was entrusted with the task of interpreting the Constitution. It was specifically given the power to adjudicate in any dispute between:78

(a) the federal government and the government of one or both provinces, or

(b) the federal government and the government of a province on the one side and the government of the other province, or

(c) the governments of the provinces, if and in so far as the dispute should involve any:

i. question of legal rights; ii. question relating to the interpretation of the Constitution.

The 1956 Constitution thus departed from the principle of parliamentary supremacy which exists in England and accepted the principle of judicial review found in the federal systems of Australia, Canada, and the United States of America. The Constitution was made the ’supreme law of the land’ and the ’judiciary was made the guardian of the Constitution’.

The writ jurisdiction of the superior courts which was introduced in July 1954, was retained under the 1956 Constitution. Each High Court had the power throughout its territories to exercise jurisdiction to issue to any person or authority orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quowarranto, and *certiorari* for the enforcement of any of the fundamental rights guaranteed under the Constitution or for any other purpose.79 The writ jurisdiction of the superior courts in Pakistan constitute a perpetual reminder to the executive to exercise restraint and caution as imposed under the laws of the land. The courts exercised this power in a beneficial and befitting manner and thus earned the confidence and trust of the people.

The provisions regarding judiciary in the 1956 Constitution followed the pattern set under the Second Report of the Basic Principles Committee,
1952 which was more or less included *in toto* in the draft Constitution adopted by the first Constituent Assembly in October 1954. The Supreme Court consisted of the Chief Justice and not more than six judges, a number that could, be

raised by the parliament under the Act80 TheC Justice was to be appointed by the Preside! other judges were to be appointed by thePra) in consultation with the Chief Justice1 qualification for appointment as a Judge of Supreme Court was either five years standing Judge of a High Court or fifteen years stamlq an advocate or pleader of a High Court’ retirement age of a Supreme court Judge wasi at sixty-five years and he was disqualified! pleading or acting before any Court orautno Pakistan.

The provision regarding the removal ofa of the Supreme Court was similar to one under the Constitution of India83 A Judge only be removed on the presentation of an by the National Assembly by not less ttao third of the total number of members ofl Assembly; by the President, if

after investigation and proof of misbeha1 infirmity of mind or body was established, the National Assembly votes for his two-thirds of its members present and vontjl not less than a majority of total members!^ the ground of misbehaviour, infirmity of HE: body.84 There was also provision for appointment of acting Chief Justice m the of the Chief Justice or when the office vacant.85 There were also provisions for judges and adhoc judges.86

The Constitution provided for two High Co: one for the province of East Pakistan, andtne for the province of West Pakistan. Each Higlfi was to consist of a Chief Justice and suchni of other judges that the President determine.87 The Chief Justice of a Hign was to be appointed by the President consultation with the Chief Justice of Pakista the Governor of the province concerned In of appointment of other judges of the High the President could appoint them in coi with the aforesaid constitutional functionansi well as the Chief Justice of the concerned Court.88 The retirement age was fixed years. The qualification for appointment as a of a High Court included ten years standing advocate or pleader of a High Court, ten standing as a member of the civil serv«’

Pakistan including at least tf judge, or holding of a judic for at least ten years.89 Memb in India were not qualified judges of High Courts.90

A High Court judge could his office except by an order (on the ground of misbehavioui or body, if the Supreme Cour made to it by the President, re ought to be removed on any There was provision for ap{ Chief Justice when the office became vacant or he was a perform his duties.92 However from one High Court to anothe to the consent of the judge be subject to the consultation wit of Pakistan and the Chief Justic of which he was a judge.93 transfer of a judge from one Hij could strengthen the judiciary ai and could pre-empt the int executive with the judiciary.

As discussed above, the High the power to issue writs of mandamus, prohibition, qu< *certiorari.* Similar powers we Supreme Court of Pakistan to is for the enforcement of the fu guaranteed under the Constitutior was apparently borrowed fr Constitution (enforced in 19f Supreme Court was empowered rite for the enforcement of fund

ISLAMIC PROVISIONS

ording to the Constitution, {^declared as an ’Islamic Republi
• principles of freedom, equality, locial justice as enunciated by I< fully observed.

The Islamic provisions were ci live principles of state policy ceable in the law courts but w< ve as a guide to state authorities i

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<*jef* Justice.81 The is a Judge *of* the years standing as a n. years standing as High Court.82 The urt Judge was fixed
3 disqualified from :ourt or authority in

removal of a Judg iilar to one provide lia.83 A Judge coulu ntation of an address *y* not less than oneof members of the lent, if after due f misbehaviour, or vas established, with *s* for his removal by •esent and voting (but total membership) on , infirmity of mind or

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ince concerned. In case idges of the High Court, int them in consultation itutional functionaries as
5 of the concerned High ”age was fixed at sixtee or appointment as a jud|6; i ten years standing as * a High Court, ten ye of the civil service

• ID India were not qualified for appointment as judges of High Courts.*”

A High Court judge could not be removed from Ins office except by an order of the President made on the ground of misbehaviour or infirmity of mind «body, if the Supreme Court, on reference being made to it by the President, reported that the judge ought to be removed on any of those grounds.91 •° was provision for appointment of acting Justice when the office of the Chief Justice le vacant or he was absent or unable to ,i .urm his duties.92 However, transfer of judges from one High Court to another was made subject to the consent of the judge being transferred and abject to the consultation with the Chief Justice of Pakistan and the Chief Justice of the High Court of which he was a judge.93 This procedure of transfer of a judge from one High Court to another could strengthen the judiciary and its independence ud could pre-empt the interference of the aecutive with the judiciary. As discussed above, the High Courts were given tie power to issue writs of habeas corpus, mndamus, prohibition, quo-warranto, and :eriioran Similar powers were vested in the Supreme Court of Pakistan to issue all such writs ’or the enforcement of the fundamental rights guaranteed under the Constitution.94 This provision us apparently borrowed from the Indian Constitution (enforced in 1950) wherein the Supreme Court was empowered to issue all such mis for the enforcement of fundamental rights.95

ISLAMIC **PROVISIONS**

to the Constitution, Pakistan was as an ’Islamic Republic’ wherein the I Dimples of freedom, equality, tolerance, and mil justice as enunciated by Islam should be | My observed

le Islamic provisions were contained in the I factive principles of state policy which were not liforceable in the law courts but were supposed to &iguide to state authorities in the formation

=5¥snr ”^jjj^pS^x ire in accordance with the H81y QflrSn Snu

sunnah.96

The head of the state, the President, was to be a Muslim. The original proposal provided for a Vice President who should also be a Muslim, but the provision was not accepted. The Speaker of the National Assembly would exercise the functions of the President if he was absent from Pakistan or was unable to discharge the duties of his office owing to illness or any other cause. The Speaker might be a non-Muslim, so occasion might arise when the temporary head of the state could be a non-Muslim.

The argument for reserving the presidency for a Muslim was that Pakistan was founded on the basis of Islamic philosophy and it was, therefore, logical that the President as a symbolic head should be amongst those believing in the Muslim faith. It was further stated that as real power was vested in the parliament, therefore, reservation of the presidency for a Muslim would not reduce the nonMuslims to the position of second-class citizens. With the exception of this solitary clause there was no discrimination against any citizen on the grounds of religion, colour, race, or nationality. Moreover, adequate and generous provisions were made in the Constitution to safeguard the interests of non-Muslim minorities. Hence, there was no basis for apprehension that the introduction of an Islamic state in Pakistan would per se relegate nonMuslim citizens to an inferior status.

A more important Islamic provision laid down that ’no law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Quran and the *sunnah’* and that existing laws ’shall be brought into conformity with such injunctions’.97 Whether a law was repugnant to Islam or not could only be decided by the National Assembly. Article 198 provided that the President should appoint within one year of the day of commencement of the Constitution a commission to make recommendations for bringing existing laws into conformity with the injunctions of Islam and to specify the stages by which the measures should be brought into effect. They were also to

compile in a suitable form for the guidance of the National and provincial assemblies such injunctions of Islam as could be given legislative effect. The Commission was to submit its final report within five years of its appointment and might submit an interim report earlier. The report, whether interim or final, was to be laid before the National Assembly, and within six months of its receipt, the Assembly was to enact laws in respect thereof. It was made clear that nothing in this Article should affect the personal laws of nonMuslims or their status as citizens or any provision of the Constitution.

EMERGENCY PROVISIONS

The description of the federal structure under the
1956 Constitution would not be complete without a reference to the emergency provisions that is provided for as they greatly affected relations between the centre and the provinces. The Government of India Act, 1935 which introduced federation in the subcontinent for the first time made elaborate provisions for dealing with an emergency. Following this model, the 1950 Indian Constitution contained elaborate emergency provisions. The framers of the Pakistan Constitution also felt the need for such provisions. The draft Constitution made by the first Constituent Assembly contained detailed provisions for dealing with different types of emergencies. These were, however, subject to severe criticism from those political parties and

groups which had described the first Constituent

Assembly as ’unrepresentative of the people’. Curiously enough, the second Constituent Assembly in which those political groups had the opportunity to redraft the Constitution in Part IX (Articles 191-196) retained all these emergency provisions, making them even stronger in some

under Article 191, *it* tne president was satisfied

that a grave emergency existed in which the

could issue a proclamation of emergency i might also be issued before the actual < of war or any such aggression if the Preside^ satisfied that there was imminent danger tl

While this Article was being debated i| second Constituent Assembly, some of its n opposed its application to internal distort wanted to restrict its application to war on rebellion. Another amendment sought tod words ’economic life of Pakistan’. The coi was that an emergency must be clearly *t* otherwise the powers would be misused, id stated that proclamation after proclamation been made in Pakistan without sufficients ’We understand threat of war, we: external aggression, but we do not understand is meant by internal disturbance. Anything r:j internal disturbance. A movement agai particular measure of the government for li being may be interpreted as internal dist Similarly, the term ’economic life off stated to be vague. ’Anything might bee as endangering the economic life of Pakistt^ While the allegations that emergency] under the interim Constitution had been i many occasions without sufficient cause c substantial

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truth, this does not prove| emergency provisions to deal with i disturbance are superfluous and a: democracy. Most existing federal systems« such power to the central authority Theefkj a proclamation of emergency under Attack | included:

(a) the power of the parliament to maktl(for a province in matters which v included in the federal or concutrrt| that is, it would have power to 1 even in provincial matters,

(b) during a proclamation of emergencjj federal executive authority had the pi to give direction to a province i the manner in which the executive *m*<\

or tne province was *to be* *exercise*^

or any organ of t except the pro judiciary. The empowered to su the operation o Constitution re authority in the Court.

While emergency discussed above are co systems, there was pro\ nergency, namely, istitutional machiner> uliar to the constituti Constitution, is unique feature had its 01 , India Act, 1935 whic ng to an emergent rtitutional machinery e provinces." There w, nstitution relating constitutional machiner provisions to meet a cc B provinces. Thus, unc istitution, if the Pre; port from the Gove ttisfied that a siruatioi vemment of the pro\ i in accordance wit Constitution, he could, t to himself, or direct th |his behalf, all or any of *t* provincial governme i provincial governrr legislature and judic lAssembly might be ai •powers of the provincia |could also suspend the c ' the Constitution i rauthoriry in the provjni The President, during i

(c) during a proc/amafibn *of emerge®]*

from the provincialanticipation of *approval* 1 ?Se net effect vrf" a pi

or any organ of the provincial government except the provincial legislature and judiciary. The President was also empowered to suspend in whole or in part the operation of any provision of the Constitution relating to any body or authority in the province except the High Court.

While emergency provisions of the type discussed above are common in existing federal systems, there was provision for another type of emergency, namely, the breakdown of constitutional machinery in a province, which was peculiar to the constitution of Pakistan. (The 1950 Indian Constitution, is also an exception). This unique feature had its origin in the Government of India Act, 1935 which elaborated provisions relating to an emergency due to a failure of the constitutional machinery, both at the centre and in lie provinces." There was no provision in the 1956 Constitution relating to the breakdown of constitutional machinery at the centre; it retained provisions to meet a constitutional crisis only in lie provinces. Thus, under Article 193 of the 1956 Constitution, if the President, on the receipt of a report from the Governor of a province, was satisfied that a situation had arisen in which the government of the province could not be carried on in accordance with the provisions of the Constitution, he could, by proclamation, assume to himself, or direct the Governor to assume on hs behalf, all or any of the functions or powers of tie provincial government or any organ or body of the provincial government except the provincial legislature and judiciary and the National Assembly might be authorized to exercise the powers of the provincial legislature. The President could also suspend the operation of any provisions of the Constitution relating to any body or nthonty in the province except the High Court. Hie President, during a proclamation under this Article, was empowered to authorize expenditure from the provincial consolidated fund in | inticipation of approval by the National Assembly.

The net effect of a proclamation under Article

I 193, as under 92A of the interim Constitution,

raid be to suspend parliamentary government in

a province. This power of the central government to suspend democratic process in a province was the subject of severe criticism in many quarters and it appeared to many people that this power had previously been exercised by the central government not always with sufficient cause or justification, and seemingly abused on more than one occasion for party or sectional interests. It was an excellent weapon in the hand of the central government to put pressure and exert influence on provincial politics. When this Article came before the second Constituent Assembly it was under heavy fire from the exponents of provincial autonomy and provincial rights: 'We had a bitter experience of section 92A in Pakistan in the different provinces of Pakistan. During the last eight years of independence we have seen how this provision has been misused most undemocratically and for political ends. A misuse is likely to creep in and such misuse may arise when the provinces and the central government are not governed by the same political party; if the central government is of the opinion that the political party which is running the government

in the province is to be suppressed it will not hesitate in the interest of good government to let it carry on purely for political motive, but it may bring about an influence to bear upon the President to suspend the democratic process in the province'.100 The type of emergency for which the 1956 Constitution made provisions related to the financial stability or credit of Pakistan. If the President were satisfied that a situation had arisen whereby the financial stability or credit of Pakistan or any part thereof was threatened, he could, after consultation with the provincial Governors or with the Governor of the province concerned, issue a proclamation of financial emergency. During the period of a financial emergency, the federal government could direct a province to observe such principles of financial propriety and any other direction required for restoring financial stability and credit, including a direction to reduce the salaries and allowances of government servants. Even the salaries of judges of the Supreme Court or the High Courts could be affected by such a regulation. A financial emergency could not extend for more than a total period of six months.

The salient features of the 1956 Constitution, along with their historical perspective, have been discussed above. Other features included the composition of the Election Commission of Pakistan for holding periodic elections to the National Assembly and the Provincial Assemblies;101 determination of conditions of service of persons in the service of Pakistan;102 formation of All-Pakistan Services;103 and establishment and composition of Public Service Commissions.104 Urdu and Bengali were declared as the state languages.105

The 1956 Constitution or any of its provision could be amended by an Act of Parliament provided it was passed by a majority of the total number of members of the National Assembly and by the votes *of* not less than two-thirds of the members of that National Assembly present and voting. However, no amendment of a constitutional provision affecting the interest or composition of provinces or any of the provinces could be made unless such an amendment had been approved by a resolution of each Provincial Assembly, or, if it applied to one province only, of the Provincial Assembly of that province.106 The condition of assent by the President appeared to be necessary for a constitutional amendment. However, no provision was made regarding the eventuality if the President withheld his assent or wanted the National Assembly to reconsider the amendment. It appears that the President could kill an Amendment Bill of the constitution by withholding his assent. This meant that the President had a veto power over Constitutional amendments and there was no way for the National Assembly to override it.

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Muhammad.

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Ibid., Article 52.

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46. Ibid., Article 57.

47. Ibid., Article 69.

48. Ibid., Articles 63, 65, and

49. Constitution of Islamic Re] Article 105.

50. Ibid., Article 106(1), Fifth

51. Ibid., Article 106(3), Fiftl List.

52. Ibid., Article 106(2), Fifth List.

53. Ibid., Article 109.

54. Ibid., Article 108.

55. Ibid., Article 129.

56. Ibid., Article 130.

57. Ibid., Article 107.

58. Ibid., Article 193.

59. Ibid., Article 43.

60. Ibid., Article 44.

61. Electorate Act, 1956 (Act PLD 1956 Central Acts an

62. Electorate (Amendment) ,
1957). See PLD 1957 Cem

63. Constitution of Islamic R Article 143.

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65. Ibid., Articles 50, 51, 52,2

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67. Ibid., Articles 55 & 56.

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73. Ibid., Article 125.

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47 Ibid,Article69

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49 Constitution of Islamic Republic of Pakistan, 1956, Article 105

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9 The First Martial Law

Unfortunately, the 1956 Constitution which was framed after nine years of effort did not last longer than two-and-a-half years. No general election was held under it.

Major-General Iskandar Mirza had taken over as Acting Governor-General in August 1955 when Ghulam Muhammad became too unwell to continue. Mirza was confirmed as GovernorGeneral in October 1955. On the adoption of the Constitution on 23 March 1956, he assumed the office of the President under the new Constitution. He had publically voiced his conviction that religion and politics ought to be kept quite separate, and that some sort of ’controlled’ democracy-an executive appointed for a fixed term and not dependent for its existence on a shifting and uncertain parliamentary majoritywas the best form of polity to aim at.1

Muhammad Ali Bogra resigned as Prime Minister when he lost the support of the Muslim League Parliamentary Party. The League elected Chaudhri Mohammad Ali, a civil servant, who had, after some hesitation, taken the plunge into political life. Suhrawardy, an experienced politician, expected that he would be invited to form a government pledged to carry through the final stages of the unification of West Pakistan, but the Governor-General preferred Chaudhri Mohammad Ali who became Prime Minister in August 1955. Although he was a man of integrity with a reputation of working very hard, he did not possess the resilience to hold his own in the cutthroat game of politics.2

END OF CHAUDHRI MOHAMMAD ALI’S MINISTRY

This was the political scenario at the time of the enforcement of the Constitution of 1956. The bargaining and the deals necessary to reconcile the various interest groups into an acceptance of One

Unit in *West* Pakistan and the adoption of Constitution wore down the Prime Chaudhri Mohammad Ali. He proved a politician and failed to control his own party led to his downfall. His greatest blunder wr selection of Dr Khan Sahib as Chief the unified province of West Pakistan agatsf: section of the Muslim League which oppcw: appointment.3 Dr Khan Sahib was an Congressman who had opposed the creator Pakistan. The Muslim League thus opposed: appointment but he enjoyed the support President Mirza. He cleverly manoeuveredtoib those Muslim Leaguers from his Cabinet *vU* opposed him and opted for those who suptt him. By including dissident Muslim Leaguers* other supporters and, of course, with the blew of President *Mirza,* he formed his OH party, the Republican Party.

Chaudhri Mohammad Ali, who was a Wuslil Leaguer, found himself in a difficult position ftj the one hand, he was the leader of a coata the centre of which the Republican Party part and, on the other hand, his own parliamentary committee in West Pakistan demanding Dr Khan Sahib’s removal as Minister. The Muslim League lost the gi sheer indiscipline. Had it been a m organization and had none of its followers desei it to join the Republican Party, Dr Khan would have been forced to resign and probably the Republican Party would not to1 come into existence.

Moreover, the entire cerr. government was working at this time against s Muslim League because Chaudhn MohammaiM| was a politically weak man and real power i with President Mirza who was an old friend o”* Khan Sahib.

The central government could m unaffected in this situation. The Musk shared power in the centre as a major conpa of the coalition without being in office in *m* K

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the provinces. The Repu *and* in June 1 956, it clai largest party in the A twenty-two members. Bi to declare his full suppc and similarly, the Prime A endorsement of the West pressed by Muslim Leagu Pakistan ministry, he took as Prime Minister were gi the country and not by political party and that he the Cabinet and the parl League took this as a beti accused him of doing disintegration in the Nation, called a meeting of the C< Party on 27 August 195< refused to attend, insisting tl joined the Republican Party not be allowed to attend th< with this snip-snap, Chaud resigned on 8 September, •nembership of the Muslim L< Chaudhri Mohammad All’s a time when he enjoyed the National Assembly and co majority in it. He had considere of the coalition party as a wh leader of the Muslim League aJ he had refused to side with one within the coalition party.6 His of his own accord while stil majority in the Assembly is a u political propriety in the history

SUHRAWARDY ’s MINISI SEPTEMBER **1956** TO OCTOBER **1957**

Suhrawardy was the one of the national stature from East Pakista experienced and qualified for the Minister. Iskandar Mirza had ag luhrawardy as Prime Minister si conditions; first, that there wou] change in pro-western foreign pol that army as an institution would

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not have ;. Moreover, the entire central orking at this time against the ause Chaudhri Mohammad Ali veak man and real power la za who was an old friend of Dr

wernment could not remain situation. The Muslim League ie centre as a major component ithout being in office in any i

\ provinces. The Republican Party kept growing

.”dm June 1956, it claimed itself to be the single

largest party in the National Assembly with

twenty-two members. But Khan Sahib continued

to declare his full support to the Prime Minister

and similarly, the Prime Minister persevered in his

endorsement of the West Pakistan ministry. When

pressed by Muslim League to act against the West

Pakistan ministry, he took the stand that his actions

as Prime Minister were governed by the good of

the country and not by the resolution of any

political party and that he was responsible only to

the Cabinet and the parliament.4 The Muslim

League took this as a betrayal of the party and

iccused him of doing nothing to stop its

disintegration in the National Assembly. When he

called a meeting of the Coalition Parliamentary

Party on 27 August 1956, Muslim Leaguers

refused to attend, insisting that members who had

joined the Republican Party at the centre should

not be allowed to attend the meeting. Disgusted

»ith this snip-snap, Chaudhri Mohammad Ali

resigned on 8 September, resigning from his

membership of the Muslim League as well.5

Chaudhri Mohammad Ali's resignation came at

a time when he enjoyed the confidence of the

National Assembly and commanded a clear

majority in it He had considered himself the leader

of the coalition party as a whole rather than the

leader of the Muslim League alone and, therefore,

ke had refused to side with one or the other group

nthin the coalition party.6 His decision to resign

of his own accord while still commanding a

majority in the Assembly is a unique example of

political propriety in the history of Pakistan.

SIHRAWARDY'S **MINISTRY:** SEPTEMBER **1956 TO** OCTOBER **1957**

ardy was the one of the few leaders of J stature from East Pakistan. He was most 'venced and qualified for the office of Prime Iskandar Mirza had agreed to having dy as Prime Minister subject to three itions, first, that there would not be any : in pro-western foreign policy; secondly, _ army as an institution would be left intact;

and thirdly, that he would keep the left leaning Maulana Bhashani in control. Suhrawardy accepted all the three conditions and was sworn in as Prime Minister.

Suhrawardy forged a coalition between his Awami League and the Republican Party consisting of feudals from West Pakistan who had no taste for his populist politics. He had thus to become the mouthpiece of the West Pakistan establishment. He immediately ran into difficulty on the issue of joint or separate electorate. West Pakistan Assembly passed a resolution in favour of separate electorate by an overwhelming majority. The separate electorates were supported in the name of Islam. On the other hand, majority opinion in East Pakistan supported joint electorate.

On 10 October 1956, Electorate Act, 1956 was passed by the National Assembly which provided for elections to the constituencies of National and Provincial Assemblies in East Pakistan on the principle of joint electorates and provided for elections to the constituencies of National and Provincial Assemblies in West Pakistan on the principle of separate electorate.7

This law, being contradictory and retrogressive, caused serious embarrassment to Suhrawardy, particularly in East Pakistan. He had to seek help from Iskandar Mirza who persuaded the members of the Republican Party in West Pakistan to decide in favour of joint electorate. Thus the Electorate Act was amended and it was provided that the elections to the National Assembly and Provincial Assemblies would be held on the principle of joint electorates.8 Suhrawardy took a sigh of relief and was beholden to President Mirza for this favour.

By early 1957, the politics of West Pakistan was dominated by the issue of One Unit-whether or not to dismember it. Even the Chief Minister, Dr Khan Sahib was affected by the issue. He was threatened with the prospect of no-confidence motion on the issue but he succeeded in postponing the meeting of Provincial Assembly until March
1957. On 20 March, before the budget was passed, thirty members of the Republican Party crossed over to the opposition benches. On that, Mirza imposed President's rule on the advice of Dr Khan Sahib. In these circumstances, constitutional propriety demanded that the leaders of the Muslim League should have been called to form a new

ministry. That would have marked the end of Suhrawardy's term in office. Mirza, using all means, fair and foul, was able to create a majority for the Republican Party in the Provincial Assembly and in this way, the Republican ministry was returned to office. All these political maneuverings, which temporarily saved Awami League-Republican coalition at the Centre, left Suhrawardy weak and vulnerable.

In East Pakistan, Suhrawardy was facing serious difficulties. In April 1957, the East Pakistan Assembly passed a resolution calling for full autonomy particularly in financial matters. This was followed by the demand of the left wing of Suhrawardy's own Awami League for autonomy in all spheres except foreign affairs, defence and currency. The left wing of Awami League was led by Bhashani who later formed National Awami Party in July 1957. It appeared that he would be leading a movement against One Unit in West Pakistan and for autonomy in East Pakistan.

The West Pakistan Assembly, on 17 September
1957, passed a resolution by 170 against 4 to abolish One Unit. Suhrawardy in order to gain favour from President Mirza publicly denounced the anti One Unit resolution. He had thus pushed himself into a very difficult corner. On the one hand, he was opposing the political demand of dismantling One Unit in West Pakistan and on the other hand, he was supporting the demand of his own party members for dispensing with the principle of parity so that they could seek larger representation for East Pakistan in the National Assembly on the basis of population. He was thus at the mercy of the establishment in West Pakistan which was fighting to save One unit. The Republicans in West Pakistan decided to withdraw their support for the coalition government in the Centre and informed Mirza accordingly. Mirza demanded resignation from Suhrawardy as Prime Minister. On 10 October 1957, after his request to seek a vote of confidence in the National Assembly was turned down and under threat of dismissal, Suhrawardy resigned.9 I

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CHUNDRIGAR'S MINISTRY: OCTOBER-DECEMBER 1957

Suhrawardy was replaced by I.I.Chundngar Prime Minister. His stay in office was very The politics in Pakistan at that time degenerated into a web of intrigues. He was of Muslim League in the National Assembly had previously served the country in vi capacities. When Mirza invited him to form government, the Republicans dropped their ck to the office of Prime Minister though theirs'» the largest single party in the National Assemkr They formed a coalition with the Muslim Leagu Chundrigar and his government fully suppoiw One Unit and separate electorate.

However, it was a mistake on the part n Chundrigar to revive the electorate controversy^ insisting on change of electoral law in order t introduce separate electorate in West Pakistan I(asked his coalition partners, Republicans, It support him on this issue, which requ«'"» turned down. So Chundrigar had d However, Mirza gave another chante it Chundrigar to form a

government but he failed So no major grouping in the National Assemblj u prepared to go along him on the issue of sepaut electorates.

Chundrigar's ministry proved to be the stats in the history of Pakistan lasting only two moA Since enforcement of constitution on 23 Mad
1956, three prime ministers had been forced« resign in a period of a year and half No wonda Nehru made his well known remark that he did mi know with whom to talk in Pakistan. He is reportd to have said, 'Pakistan changes its Prime minisin more frequently than I change ray pajamas'

NOON'S MINISTRY: DECEMBER 1957 TO OCTOBER 1958

Feroze Khan Noon replaced Chundrigar as Pnul Minister. He was the last amongst the pnr I ministers before the proclamation of first Many Law. He at that time was the leader of d *Republicans in the National Assembly. Hefomd*]

a coalition with five diffe Awami League, National Sramik Party, the Nat Scheduled Caste Feder, government thus consisted with obviously different pn be a very weak governmen I and National Awami Pan I Noon's cabinet. Thus his adequate representation fro Noon would remain vulner, the parties in East Pakistan, this situation by holding withdraw support from the i Centre. He could get whatf Noon Ministry and was able of Awami League Ministry ii Noon's ministry was in all threw his weight behind Arn campaign in East Pakistan but from East Pakistan forced j version of anti smuggling law I he Republican Party was full Pakistan who were totally o] reforms which would reduce On the other hand, Bhasln movement in support of e\ thousands of landless agriculti Republican party had little he West Pakistan. Therefore, thej chief minister in West Pakis strong enough to help them in tl by using the Administration di They demanded replacement Rashid by Muzaffar Ah Qa Minister. This annoyed the Mus led a campaign against Mirza ur of Qayyum Khan. President Mir; strong opposition in the building campaign.

"POLITICAL COMMOTIO

President Mirza sensing strong oj L convinced that the general elec oned on one pretext or thi F Pakistan there was frequent chan

N many as four ministries fell with

by I.I.Chundrigar as office was very brief. \ at that time had itrigues. He was leader lational Assembly and e country in various vited him to form the ns dropped their claim ,ster though theirs' was the National Assembly, ith the Muslim League, rnment fully supported ;torate.

ristake on the part of ectorate controversy and lectoral law in order to ate in West Pakistan. He •tners, Republicans, to ue, which request they ndrigar had to resign, e another chance to rernment but he failed. So
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f proved to be the shortest a lasting only two months, institution on 23 March isters had been forced to year and half. No wonder, own remark that he did not ; in Pakistan. He is reported changes its Prime ministers change my pajamas'.

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a coalition with five different political partiesAwami League, National Awami Party, Krishak Sramik Party, the National Congress and Scheduled Caste Federation. The coalition government thus consisted of six different parties with obviously different programs and would thus be a very weak government. The Awami League and National Awami Party did not even join Noon's cabinet. Thus his cabinet did not have adequate representation from East Pakistan and Noon would remain vulnerable to pressure from the parties in East Pakistan. Suhrawardy exploited this situation by holding a constant threat to withdraw support from the ruling coalition at the Centre. He could get whatever he wanted from \oon Ministry and was able to prolong the tenure of Awami League Ministry in East Pakistan. Noon's ministry was in all kinds of trouble. He tew his weight behind Army's Anti Smuggling [campaign in East Pakistan but his coalition partners East Pakistan forced him to accept mild I version of anti smuggling law in December 1'957.
1 le Republican Party was full of landlords in West I Pakistan who were totally opposed to any land liefomswhich would reduce their land holdings. iOi the other hand, Bhashani was leading a Jiovenient in support of evicted tenants and jknisands of landless agriculture labourers. Thus, ilican party had little hope at the polls in | *est Pakistan. Therefore, they sought change of i .".ef minister in West Pakistan who could be irag enough to help them in the general elections | ij using the Administration during the elections. "ley demanded replacement of Sardar Abdul | Mid by Muzaffar Ali Qazilbash as Chief i This annoyed the Muslim Leaguers who lUicampaign against Mirza under the leadership |%yum Khan. President Mirza was thus facing Ifctjj opposition in the building up to the election Iqugn.

placed Chundrigar as Prime ie last amongst the prime jroclamation of first Martial me was the leader of the ational Assembly. He formed

IkiTicAL **COMMOTION**

>lirza sensing strong opposition became I that the general elections should be I on one pretext or the other. In East : was frequent change of ministries. limy as four ministries fell within a period of

six months. In March 1958 there was reconciliation of two factions of the Krishak Sramik Party, as a result of which Awami League ministry headed by Ata-ur-Rehman ran into danger. Ata-ur-Rehman requested for prorogation of the provincial assembly to avoid a vote of no confidence. Governor Fazlul Haq used that as a pretext for dismissing his ministry and swore in Sarkar, Head of Krishak Sramik Party as the new Chief Minister. On this Suhrawardy threatened to withdraw support of Awami League from the coalition at the Center. On this the Central Government was forced to sack Fazlul Haq as a Governor and brought a new Governor, Hamid Ali, who dismissed the ministry of Sarkar and brought back Ata-urRehman.

In the meantime Bhashani drew up five point programme as manifesto of NAP. These Points included the demolition of One Unit in West Pakistan, independent policy for each wing of the country, early elections on the basis of joint electorate and complete autonomy for all the provinces.10 Since Suhrawardy refused to accept the stance of NAP on One Unit and foreign policy, Awami League ministry headed by Ata-ur-Rehman was defeated on 18 June 1958 due to the refusal of NAP Members to support it. Two days later once again Sarkar of Krishak Sramik Party was sworn as chief minister. His ministry did not last for more than three days. The provincial Awami League leaders came to terms with NAP and defeated Sarkar's ministry. These frequent changes in East Pakistan forced the Centre to proclaim emergency under Article 193 of the 1956 Constitution and the government of the province was taken over by the federal government. This lasted for about two months and on 25 August 1958 once again Awami League headed by Ata-ur-Rehman was able to form ministry in East Pakistan. Awami League wanted to curtail the powers of the Speaker and on
20 September 1958 Shahid Ali, the Deputy Speaker, made the announcement that a Awami League motion declaring the Speaker to be of 'unsound mind' had been carried. This led to pandemonium in the East Pakistan Assembly which turned into a battlefield. The members fought and grappled with one another and one of them hurled a paper weight which caught the poor Deputy Speaker Shahid Ali in the head. He was so

seriously wounded that he died a few days later as a result of the injury. This incident was subsequently used as one of the reasons by Mirza and Ayub to impose martial law and dismiss the Assemblies.

The Central Government was also in deep crises in the summer of 1958. There was drastic drop in industrial production. The problem of settlement of refugees in West Pakistan, which included allotment of agricultural lands and urban properties to the refugees, was becoming acute. There was also problem of food shortages due to hoarders and smugglers. The rising cost of living was causing havoc for the poor people particularly in East Pakistan where rice was selling at an unaffordable price. These situations had caused deep political commotion in both the wings of the country.

DELAY IN GENERAL ELECTIONS AND DECLARATION OF MARTIAL LAW

Due to the political and economic problems stated above, President Mirza was trying to avoid announcement of the date of the general elections. He kept postponing the elections on one pretext or the other. It was agreed that the general elections would be held in November 1958. However, with the help of the members of Republican Party and other parties favourable to him, he was able to have All Parties Conference to agree on postponement of elections from November 1958 to February 1959. Qayyum Khan, President of Muslim League, refused to participate in the Conference and threatened to launch direct action against the government if it did not announce a firm date for elections. *There were clashes between /* Muslim League workers and the policg jr] j^gJjjCJy I >

likely to fall. In order to avoid that km massive expansion of the central cabinet n to satisfy Suharwardy's Awami League b few days, Awami League ministers resigns Noon government fell into disarray OnJOc
1958 Khan of Kalat announced secession of i from Pakistan as his reaction to the establiif of the military bases in Balochistan HOWK Army put down this revolt and was prohimself itself as a saviour of the country k. morning hours of 8 October 1958 Mirza ami proclamation of martial law througta country. Before doing that he met the Anr, Ambassador and British High Commissioner some other envoys and informed them« intention. He assured them that the government would be even more pro-west i earlier ones." Mirza in his proclamation abrt the constitution, dismissed the centra provincial governments, dissolved the Mi Assembly and the Provincial Assemblies of u and West Pakistan, banned all political parties: postponed the general elections indefinitely *h* Minister Noon and members of his cabinet«: put under house arrest.

This was beginning of recurring periods;! martial law in Pakistan.

PART TH

The Ayul October

NOTES

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PART **THREE**

The Ayub Regime:

October 1958 to March 1969

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10 Ayut

The proclamation of m of the Constitution res the legal set-up. Thei imposition of martial 1, Laws (Continuance promulgated with a vi legal order. The gem validation of laws, othi that were in force fo
7 October. It also rest courts including the S Courts. The Order con the government of Pak might be in accordanci and that the law decl; should be binding on The Supreme Court an given the power to iss *mandamus, prohibit certiorari.* However, against the Chief Mai anyone exercising pow authority. It was made could call or permit to proclamation of 7 Oct< pursuance of the procl order or martial law n judgment or order of a Summary Military Coi that the powers of a pr those that the Presiden his behalf under £ Constitution. The Gov under directions given by the Chief Martial L or by a person having

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10 Ayub's Basic Democracies

The proclamation of martial law and the abrogation of the Constitution resulted in a complete void in the legal set-up. Therefore, three days after the imposition of martial law, on 10 October 1958, the Laws (Continuance in Force) Order was promulgated with a view to bringing about a new legal order The general effect of this was the validation of laws, other than the last Constitution, that were in force before the promulgation of
7 October It also restored the jurisdiction of all courts including the Supreme Court and the High Courts The Order contained further direction that j the government of Pakistan should act as nearly as | might be in accordance with the late Constitution, nd that the law declared by the Supreme Court Aould be binding on all the courts of Pakistan, j Be Supreme Court and the High Courts were also : power to issue writs of *habeas corpus, \miamus, prohibition, quo warranto,* and |«rtioran However, no writ could be issued pist the Chief Martial Law Administrator or I nyone exercising powers or jurisdiction under his JBlionry It was made clear that no court or person I mid call or permit to be called in question (i) the jpoclamation of 7 October, (ii) any order made in [issuance of the proclamation or any martial law **[ider** or martial law regulation, (in) any finding, ait or order of a Special Military Court or a *I* Military Court'. It was further provided (the powers of a provincial governor would be line that the President directed him to assume on i behalf under Article 193 of the late ition The Governor was required to act i directions given to him by the President or If the Chief Martial Law Administrator (CMLA) ^rby a person having authority from the Martial (Administrator.1 The Laws (Continuance in te) Order, 1958 seemed to have provided a il framework to the state for the continuity of t legal system after the abrogation of the tion The legal vacuum and the crisis II the country had faced after the dissolution

of the first Constituent Assembly in 1954 were thereby avoided.

The expression used in the Order 'the Republic shall be governed as nearly as may be in accordance with the late constitution', was open to manoeuvres by the martial law government.2 The government used it to mean those portions of the late Constitution which were necessary for the daily running of administration. Other provisions of the late constitution would apply according to the sweet will of the martial law regime to suit its convenience.

OUSTER OF

PRESIDENT ISKANDAR MIRZA

On the imposition of martial law, state power came into the hands of President Mirza and General Ayub Khan who had been appointed as Chief Martial Law Administrator (CMLA). The logical result of this sharing of power had to be a struggle between the two men, and it ensued soon thereafter. President Mirza tried to rationalize the power structure and the state framework by appointing Ayub Prime Minister on 24 October
1958. He formed a new Cabinet consisting entirely of non-political personalities.

This did not satisfy Ayub who had a stronger claim to power, being the Commander-in-Chief of the Army. President Mirza, nervous about his own future, tried to enlist the support of the Air

Force and Ayub's rivals within the army. He allegedly made an unsuccessful attempt to order Air Commodore Rabb, the Chief of Staff of the Pakistan Air Force, to arrest four Generals close to Ayub, including Major-General Yahya Khan.3

On 27 October 1958, at a meeting with his Generals (Azam Khan, Burki, and Sheikh, all members of the central Cabinet) Ayub decided to rid himself of Mirza and assume complete control over the affairs of the state. Mirza was arrested

T

and sent into exile to Great Britain where he later died, a sad end to an ambitious man who had ultimately fallen prey to his own intrigues. Ayub quickly set about proving to sceptics that he was not merely the army's 'front man' but 'absolute master' in Pakistan.

THE Dosso CASE

The validity of Laws (Continuance in Force) Order-in effect the validity and legitimacy of the imposition of martial law itself-was soon called into question before the Supreme Court of Pakistan. The question involved in this case was whether the writ issued by the Lahore High Court had abated under Clause (7) of Article I of the Laws (Continuance in Force) Order.

The Supreme Court, led once again by Chief Justice Munir, upheld the martial law and the Laws (Continuance in Force) Order.4 In the leading judgment, Chief Justice Munir held that a victorious revolution or a successful *coup d 'etat* is an internationally recognized legal method of changing a constitution. After a change of that character had taken place, the national legal order must for its validity depend upon the new lawcreating organ. Even courts would lose their existing jurisdictions, and could function only to the extent and in the manner determined by the new Constitution. If the territory and the people remain substantially the same, there would be under the modern juristic doctrine no change in the corpus or international entity of the state. The revolutionary government and the new Constitution are, according to international law, the legitimate government and the valid Constitution of the state. Relying upon Hans Kelsen's *General Theory of Law and State,* the Supreme Court held that:

Where a revolution is successful it satisfies the test of efficacy and becomes a basic law-creating fact. On that assumption the Laws (Continuance in Force) .

Chief Justice Munir also held that Article I; the Order provided that Pakistan waste; governed as nearly as might be in accordances the late Constitution. This provision did not fc the effect of restoring fundamental rights becaj reference to 'government' in this Article ws; the structure and outline of government and MI the laws of the late Constitution which hadtej expressly abrogated by Article IV.

Justice A.R. Cornelius, agreeing with resulting Order, did not accept the reasoning 2 prevailed with the majority. He did agree thai3] writs had abated and the *vires* of the laws had be tested by reference to the Laws (Continuance Force) Order, but regarding fundamental nghls differed from the majority. He held ij fundamental rights, as enumerated in Partllofi 1956 Constitution, did not derive their or validity from the fact of having been formulatedwords and enacted in that Constitution. A nn!t of these rights, being essential human n| inherently belonged to every citizen of a coir governed in a civilized mode and that the iw1 that they had ceased to exist involved a danger denial of these elementary rights at a time »ie they were

expressly assured by writing in At fundamental law of the country, merely beos that writing was no longer of any force

The judgment in Dosso's case, like thai Tamizuddin Khan's case, was a retrogressive a and set the clock back in the constitution! development and strengthening. The imp of a new and untried theory by an obscure schok to justify martial law and military dictatorship. beyond explanation. There was evident unnecessary haste on the part of the Supreme(k| to legitimize the imposition of martial law lij cases before it could have been decided entering into the question of the validity of IN (Continuance in Force) Order. The appeals be(r the Supreme Court had been pending since taj before the imposition of martial law a

validity of the Order was unnecessarily drags

Order, however transitory or imperfect, was a new / ^to the controversy. These *appeals* were hull *legal Order and it was in accordance with that Order* / ^ ^ *u* ^^ ^ ^^ ^ *that the validity of the laws and the correctness of I* ,,,,.,, . ,, . ,.

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j 1958, only a few days after the I martial law. Why <WJ ^ *t*

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vires of Laws (Continuance in F(validity of martial law? In then legitimize the martial law, the Judges not only undid the writ j High Courts but stripped the fundamental rights, only to a masters of the country.

Besides, Chief Justice Munir legal logic applicable to a popuh as the French, Russian, or Irani justify a *coup d'etat,* which can the imagination be described as < used the term 'revolution' even ir to defend his reasoning5 by pc 'Could any court having a discrei issue an enforceable writ on the 8 against the government that had existence by the Proclamatii Iskandar Mirza?'6 This argument verdict in Tamizuddin Khan's ca him to see if the verdict would sole duty was to stand for what decide each case on that basis al the enforceability of writs. A wr given only because a correct o enforced. Had he risen above irrelevant considerations, the con of Pakistan might have been ver

MEHDI ALI KHAN'S C

In the Mehdi Ali Khan case8 whi months later, the Supreme Court { to review its decision in Dosso's High Court had issued *writs ma* the provincial government t notifications by which they had < properties. The decision of the based on the fundamental right religious institutions. The provii appealed to the Supreme Court bu came up for hearing, the Laws Force) Order, 1958 was

in opera of which provided... ’no writ 01 issued or made after the Procla

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also held that Article II ot that Pakistan was to be light be in accordance with Tiis provision did not have fundamental rights because ent' in this Article was to le of government and not to onstitution which had been *i* Article IV.

lelius, agreeing with the ot accept the reasoning that jority. He did agree that the the *vires* of the laws had to to the Laws (Continuance in irding fundamental rights, he majority. He held that i enumerated in Part II of the did not derive their entire of having been formulated in that Constitution. A number ng essential human rights, to every citizen of a country zed mode and that the view to exist involved a danger of entary rights at a time when *f* assured by writing in the the country, merely because longer of any force, i Dosso's case, like that in case, was a retrogressive one back in the constitutional rengthening. The importation i theory by an obscure scholar w and military dictatorship ion. There was evidentl n the part of the Supreme Coir nposition of martial law. The Id have been decided wil" lestion of the validity of rce) Order. The appeals befc had been pending since long ition of martial law and the ier was unnecessarily dragged y. These appeals were heard on ;r and decided on 27 October days after the imposition of could the Supreme Court not dy had directly challenged the

M of Laws (Continuance in Force) Order or the validity of martial law? In their unholy haste to legitimize the martial law, the Supreme Court Judges not only undid the writ jurisdiction of the High Courts but stripped the citizens of their fundamental rights, only to appease the new masters of the country.

Besides, Chief Justice Munir had adopted the

legal logic applicable to a popular revolution such

is the French, Russian, or Iranian revolutions to

[justify a *coup d'etat,* which can by no stretch of

the imagination be described as a 'revolution'. He

used the term 'revolution' even in his later writings

10 defend his reasoning5 by posing a question:

'Could any court having a discretion in the matter,

issue an enforceable writ on the 8, 9, or 10 October

against the government that had been brought into

existence by the Proclamation of President

Iskandar Mirza?’6 This argument also justified his

\erdictinTamizuddin Khan’s case. It was not for

him to see if the verdict would be accepted. His

sole duty was to stand for what was right and to

We each case on that basis alone, regardless of

the enforceability of writs. A wrong verdict is not

given only because a correct one might not be

nforced. Had he risen above these evidently

devant considerations, the constitutional history

[(Pakistan might have been very different.7

IMEHDiAn KHAN’S CASE

iulieMehdi Ali Khan case8 which came up a few I ante later, the Supreme Court got an opportunity i its decision in Dosso’s case. The Dhaka urt had issued *writs mandamus* directing vincial government to withdraw the | locations by which they had acquired the *waqf s.* The decision of the High Court was i the fundamental right to manage one’s i institutions. The provincial government d to the Supreme Court but when the appeal e up for hearing, the Laws (Continuance in I kj) Order, 1958 was in operation, Article 2(7) I Mich provided... ’no writ or order for a writ I Hid or made after the Proclamation shall have I Act unless it is provided for by this Order and N implications and proceedings in respect of any

writ which is not so provided for shall abate forthwith’. The Supreme Court was faced with its previous decisions in Dosso’s case wherein it had declared that fundamental rights ’are not a part of the law of the land and no writ can issue on their basis’.

It was, however, contended that by reason of Article 4 of the late Constitution, all laws inconsistent with the fundamental rights stood struck down when the Constitution came into force on 23 March 1956 and thus were not in force at the time of Proclamation of the Laws (Continuance in Force) Order, 1958. The Supreme Court followed its previous decision in Dosso’s case and, by majority judgment, allowed the appeal. It held that the writ petitions giving rise to the appeals had all abated under Article 2(7) of the Laws (Continuance in Force) Order, 1958. In keeping with Dosso’s judgment, the Supreme Court reiterated that after the abrogation of the Constitution, no law could be declared to be void merely because it came into conflict with a fundamental right and that all pending applications for writs in which a law by reason of

fundamental rights had to be found to be void had abated. The laws which were in conflict with the fundamental rights but were ’in force’ immediately and had not been struck down before being taken away, regained full efficiency.

Justice A.R. Cornelius wrote a dissenting opinion in which he held that the proceedings in the writs did not abate by the operation of Article
2(7) of the Laws (Continuance in Force) Order,
1958. The basic rights, according to him, remain valid not only within the framework of natural justice but also because they existed in the current legal order-modifying but not necessarily cancelling the 1956 Constitution. The difference was one of justiciability, not existence.

Justice Cornelius once again tried to secure fundamental rights in the military state to demonstrate the close relationship between justiciable rights and judicial powers.9 The Supreme Court, led by Chief Justice Munir, let go the opportunity to undo or even modify its judgment in Dosso’s case.

ACTION AGAINST GOVERNMENT SERVANTS

Pakistan had always suffered at the hands of corrupt and incompetent public servants. Ayub's government embarked upon a drive against inefficiency and corruption. A thorough screening process was adopted against all government servants by conducting a close scrutiny of their service records. 'Misconduct' included bribery, corruption, jobbery, favouritism, nepotism, wilful maladministration, and wilful misapplication or diversion of public funds. Tribunals consisting of incumbent or retired judges of the Supreme Court or High Courts were created to try cases of misconduct against public servants.10 The enquiries under this law were wide enough to include public servants or holders of public office on or after
15 August 1947. In addition to disciplinary actions such as dismissal, compulsory retirement, or reduction in rank, a public servant could be disqualified from holding any public office for up to fifteen years and could be made liable to make , good any loss to the public revenue or property and to forfeit any gain for himself or another, found by the tribunal to have been caused by or to have resulted from his misconduct. The provisions of this law were in addition to and not in derogation of any law for the time being in force on the subject.

As a result, disciplinary action was taken by way of dismissal, compulsory retirement, and reduction in grade against about three thousand government servants, including 138 first class civil officers, 221 officers of the second class, and 1303 third class employees." This shake-up immensely improved the morale of the hardworking officers who found themselves now empowered to set the tone for their departments.

ACTION AGAINST POLITICIANS

As discussed above, the declaration of martial law had banned all political parties. A law was promulgated for disqualification of the politicians who, like public servants, had to be subjected to enquiry by tribunals to be appointed by the President or a Governor.12 This law, Elective

Bodies (Disqualification) Order, 1959 (pop known as EBDO) defined misconducl politician as meaning any subversive a preaching of any doctrine or committing which contributed to political instability, corruption, or if he had a general or jx reputation for favouritism, nepotism, **fl** maladministration, wilful misapplication diversion of public money and any other atai power or position. The reach of the law was wide because elective bodies included assembly, board, or committee of wind constituent members were chosen by means election and included legislatures, munKf bodies, cantonment boards, district boards, anli on. Each tribunal to be formed for enquiry this law had to be composed of three menii with the presiding officer being an mcumtai retired judge of the Supreme Court, the Fall Court, or a High Court. A district and sessu judge, who was qualified for appointment *i* High Court judge could also be appointed as t presiding officer of such a tribunal. A person COB be disqualified for being a member of any eta body until 31 December 1966. An offer coil made to a politician to voluntarily retire It public life until 31 December 1966. i

Under this evidently harsh law, seven politicians like Suhrawardy, Qayyum Khan, a Ayub Khuhro were disqualified, or EBDO'd ft| law, particularly its application, was seveidij criticized in legal and political circles througtaj Pakistan. There is little doubt that in the applicant of the law and the proceedings of the tnbiuk politicians of national standing and sondi reputation were deliberately humiliated ft application of the law was not above person^ grudges, score setting, and victimizatia Suhrawardy and Qayyum Khan were trend shabbily in the proceedings before the tnbuak Ayub Khuhro suffered due to Ayub's persd dislike of him because it is said that Khuhro, i Defence Minister, used to make Ayub wait mi cool his heels before seeing him. In any case, Ik date given for disqualification, 31 December 19ty was arbitrary and particularly unfair to politua who were in their sixties or even late fifties t deprived them of their rights and the country *i* their valuable experience and skill.

REFORMS, **1959**

on after taking over the affairs lyub devoted his attention to th question of land reforms in ^ ^Reforms had long been held as lengthening democracy. Om obstacles to the working of fre(Pakistan had been the prevalence Mnd rotten system of land ten ' thousand landlords owned immen ind thus exercised great politica domination. Ayub's land reforms p ceiling on land holding at 500 ir one thousand unirrigated acres.] of the ceiling were to be take government for distribution an tenants, all *jagirs* were to be ah compensation (a *jagir* was the n certain landlords in the Punjab to tax on commission); tenants wer full ownership rights; and landlords to increase rents without the p revenue court.13

Ayub announced the reforms ir
24 January 1 959. Apart from the c justice, he described the reforms necessity for the survival of the sy which we cherish'. As a result prestige which landlords enjoyed < political power was concentrated i privileged few, hampering the f political rights by the people a growth of free institutions. Tht measures, he claimed, would g towards breaking the monopoly o in the hands of the landlords of narrow down the existing ii opportunity, and encourage a moi productive use of the land by its a However, regardless of the sinci these land reforms have been sevei 'window dressing' or 'cosmetic 'inadequate' at best. Critics regard on ownership as very high. Th stretched by using a measure det basis of produce index units.15 Infli who had been in the government

AYUB'S BASIC DEMOCRACIES

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trder, 1959 (populu ed misconduct o. *r* subversive activity, 'or committing an act cal instability, bribery, i general or persistent .m, nepotism, wilful nl misapplication **ot** and any other abuse **of** ch of the law was very bodies included any nmittee of which the *z* chosen by means of ;gislatures, municipal ,, district boards, and so rmed for enquiry under osed of three members

being an incumbent or erne Court, the Federal

A district and sessions d for appointment as a ilso be appointed as the

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rights and the country of :e and skill.

\ND REFORMS, **1959**

Soon after taking over the affairs of the country, Ayub devoted his attention to the long standing question of land reforms in West Pakistan. Reforms had long been held as imperative for strengthening democracy. One of the chief obstacles to the working of free institutions in Pakistan had been the prevalence of an out-dated and rotten system of land tenure. About six thousand landlords owned immense tracts of land and thus exercised great political and economic domination. Ayub's land reforms put the maximum ceiling on land holding at 500 irrigated acres or one thousand unirrigated acres. Lands in excess of the celling were to be taken over by the government for distribution among deserving tenants, all *jagirs* were to be abolished without compensation (a *jagir* was the right enjoyed by certain landlords in the Punjab to collect the land tax on commission); tenants were to be granted full ownership rights; and landlords were forbidden to increase rents without the permission of a

revenue court."

Ayub announced the reforms in a broadcast on
24 January 1959. Apart from the dictates of social justice, he described the reforms as 'an absolute necessity for the survival of the system and values »tuch we cherish'. As a result of the special prestige which landlords enjoyed over large areas, political power was concentrated in the hands of a privileged few, hampering the free exercise of political nghts by the people and stifling the growth of free institutions. The government's measures, he claimed, would go a long way towards breaking the monopoly of landed wealth i the hands of the landlords of West Pakistan, narrow down the existing inequalities of opportunity, and encourage a more intensive and productive use of the land by its actual tillers.14

However, regardless of the sincerity of purpose, these land reforms have been severely criticized as 'window dressing' or 'cosmetic', at worst, or 'inadequate' at best. Critics regard the limits fixed on ownership as very high. This was further stretched by using a measure determined on the basis of produce index units.15 Influential landlords who had been in the government had their lands

assessed at very low produce index units with the result that in certain areas, various land owners retained two to three thousand acres of cultivated land per head. Another lacuna left, maybe deliberately, was that the limit of land holding was fixed on an individual basis. Thus a family of six could easily retain from three to six thousand acres. In addition to holding of 500 acres of irrigated land, 1000 acres of unirrigated or 36,000 produce index units, a land owner was allowed one hundred and fifty acres as land under orchards.16 Only those transfers of land that had taken place on or after
8 October 1958, which were in excess of the permissible limit of land, were declared void. Influential landlords, in connivance with the revenue staff, had their land holdings transferred ante-dated, to members of their family and, in this manner, most of these land holdings were saved. It is also alleged that the important land owners had been tipped in advance about the nature and extent of the land reforms and they had made adjustments to circumvent them. In fact, the land actually surrendered by the landlords or taken over at the conclusion of the operation was very little and mostly useless and barren. The land reforms, thus, did not create the socio-politico-economic impact that was intended and big landlords in West Pakistan continued to wield political influence.

These land reforms and subsequent land reforms in 1972 failed to break the hold of feudals over rural politics. They continue to be very powerful and generally win the rural constituencies particularly in interior Sindh, and in southern and western Punjab. About eighty feudal families in Pakistan have representation in the central or provincial legislatures where they have worked to protect their own interests in conflict with the national interest. These families have generally kept their area deprived of education so as to keep the people under their control. While several of the scions of these feudal families are well educated and have been to educational institutions of high repute in England and the United States, only a few have achieved the enlightenment to treat others as fellow humans. Their political machinations are as primitive, cruel, and offensive as those of their forebearers.

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The fifth and last tier ’ powered Development Advisi and West Pakistan. These j Councils, ceased to function i of the 1962 Constitution legislatures elected by the p« Democracies came into existei The role of Basic Democra local self-government. It was extended to constituting an elect the President -J -

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reas and a Town Committee *I* maintenance and *improvement ofjnadij Jmj* •« electoral college, holding

1 and bridges, and so on. Options] Anaw a, * to seek a mandate from ther

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education, social and economic welfare, and public *and health. The Council was free to underwy extension of the above listed services.* ’The next tier was the Divisional Council. Its functions included the co-ordination of the work of local councils, municipal bodies, cantonment boards and the formulation of development nes of importance to the Division; the review progress and consideration of problems of ice to the Division in all branches of ion and the making of suggestions for it, improvement, and general advance-

\ fifth and last tier were the two highi Development Advisory Councils for East Pakistan. These provincial Advisory , ceased to function with the introduction fthe 1962 Constitution when provincial •es elected by the people through Basic icies came into existence. |lk role of Basic Democracies did not stop at
1 self-government. It was later widened and ; to constituting an electoral college to President and members of the National ncial Assemblies. This system was to ichize directly the common citizen from
5 their representatives to the legislatures and *[tt* universally accepted principle of adult tose was rejected on the pretext of being ble to the conditions in the country and the s of the people’. For conditions suitable for i style democracy, Ayub said, we would tto wait for God knows how long.

REFERENDUM/PRESIDENTIAL

[[LECTIONS

4’s Basic Democracies can be seen as the need |i martial law regime and its leader to find icy since martial law is incompatible with Jncogmzed form of modern governance. Such nent could not be subjected to universal ige, national mandate, or contentious The Basic Democrats were turned into ioral college, holding a referendum in order k a mandate from them to the effect that they I full confidence in Ayub not only to

continue in office as President but also to authorize *him to frame a Constitution for the country.19 However, referendum of even a limited electoral college* has its risks. Given a chance, politicians, may even turn this into a political movement. Manzoor Qadir, Ayub’s principal legal brain, was aware of this. He cleverly avoided collecting a large number of members of the electoral college at one place and ensured that voting remained a strictly localized affair.20

Under the President’s Order 3 of 1960, Basic Democrats were required to vote by secret ballot on the question: ’Have you confidence in President Field Marshal Muhammad Ayub Khan, *Hilal-iJuratT* If a majority of votes were in favour of the President, then Ayub would be deemed to have been given the authority to make a Constitution. He would also have been elected President of Pakistan to hold office for the first term under the Constitution to be drafted by him. The election/ referendum was held on 14 February 1960 and naturally, in the absence of any alternative, 75283 Basic Democrats representing 95.6 per cent of the total, replied in the affirmative.21 Thus, Ayub was not only elected President for five years but also got a mandate to give Pakistan a Constitution of his own choice.22

NOTES

1. President’s Order (Post-Proclamation) No. I of
1958, Laws (Continuance in Force) Order, 1958. PLD 1958 Central Statutes 497.

2. There is an interesting story about the use of such vague expression in the Laws (Continuance in Force) Order. Both President Mirza and General Ayub, on being pointed out that the country was without any legal structure, summoned Mr Snelson, Federal Law Secretary, to the President House on
9 October 1958 and ordered him to produce some legal document reviving the legal structure in the country. He had not come prepared for the purpose and requested for time to draft a comprehensive document, which request was denied to him. He was not even allowed to go back to his office to draft such a document with the help of the books. He was asked to shut himself into a room in President House and to produce such a document forthwith. Mr Snelson is reported to have said that

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different context. ^^ ^ ^.^ pflkis£an

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12. Elective Bodies (Disqualification) Order *President's Order No. 13 of)959* enforced 7 August *1959. PLD 1959 Centra)* Statutes/"

13. West Pakistan Land Reforms Regulation, Martial Law Regulation No. 64. PLD WK< Statutes 101.

14. *Speeches and Statements by Field* Mohammad *Ayub Khan,* Volume

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7. /usfice *Cornelius, long after his retysmsati,* commented that Justice Munir lacked conviction and was very fond of saying that 'the law is an

Statutes J&f
18. President *Ayub's speech of*

the Scheme of Basic Democracies. See

do so in order to *achieve the result that he intends* to. Give me any case and I can write two judgments, one of conviction and the other of acquittal, and they will be equally convincing and legally correct.' No doubt, he had the ability to fiddle with the reasoning but the same ought to have been applied for achieving the results most beneficial for the country. Unfortunately, it was not to be. The author heard this from late Justice Cornelius himself.

8. Province of East Pakistan v Md. Mehdi Ali Khan, PLD 1959 S.C. 387.

9. Newberg, Paula R, *Judging the State-Courts and Constitutional Politics in Pakistan,* 1995, Cambridge University Press, Cambridge, p. 88. Public Officers (Disqualification) Order, 1959. President's Order No. 3 of 1959 enforced from 25 March 1959. See PLD 1959 Central

Statutes 152. Williams, L.F. Rushbrook, *The State of Pakistan,*
1962. Faber and Faber, London, p. 189.

19.

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22.

Compilation by G. W. CnouoHry. Creei

House, Dhaka, 1967. pp. 559-60.

Presidential (Election and Constitution)

1960. President's Order No. 3 of 1960 PLD

Central Statutes 30.

Gauhar, Altaf, *Ayub Khan-Pakistan's*

Military Ruler, 1994. Sang-e-Meel PuH

Lahore, p. 169.

Ibid., pp. 169-70.

In the Preamble of the Constitution of 1962,

stated as under:

'Now, therefore, I, Field Marshal Mohammad

Khan, Hilal-i-Pakistan, Hilal-i-Jura'at, Presidai

Pakistan, in exercise of the Mandate given to

on the Fourteenth day of February, one

nine hundred and sixty, by the people of

do hereby enact this Constitution.'

ucracy would be involved so tl mJ have the opportunity to comi pwu not been consulted.1 It was
a find desirable, to establish that

nocracy had irretrievably failed i n* Constitution of 1956 was unwi s Ayub could introduce a preside *I* government under a new Constitut a prestigious and respected body nrive at this conclusion in a repor nibmitted to him.

On 17 February 1960, Ayu

Constitution Commission with th

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2. To consider how best the may be identified and prevented;

No. 13 of 1959 enforced from D 1959 Central Statutes 288. and Reforms Regulation, 1959 nation No. 64. PLD 1959 Centra,

Statements by Field Marshu ,Khan, Volume 1, October 1958ech broadcast from Karachi on

) pp. 47-51.

andlord was allowed to retain upto

rndex units or 500 acres of irrigated f unirrigated land.

nocracies Order, 1959. President's of 1959. See PLD 1959 Central

3'8 speech of 2 September 1959 on Basic Democracies. See Documents

on the Constitution of Pakistan by G.W. Choudhry. Green Book

1967. pp. 559-60.

(Election and Constitution 0 to nfs Order No. 3 of 1960. PLD 1960

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fore I, Field Marshal Mohammad Ay* -i-Pakistan, Hilal-i-Jura'at, Presidentflf .exercise of the Mandate given to-

rteenth day of February, one ft-- ed and sixty, by the people of Pi enact this Constitution.'

11 The Constitution Commission and its Report

Ayub wanted to enlist as broad a support for the Constitution as possible. Ostensibly at least, the masses would be invited to participate in the process and this was deemed to have been accomplished by the referendum of Basic [Democrats on 14 February 1960. In addition, imminent citizens, political groups, and the weaucracy would be involved so that few people »o»ld have the opportunity to complain that they lad not been consulted.1 It was also necessary, ind desirable, to establish that parliamentary democracy had irretrievably failed in Pakistan and Ae Constitution of 1956 was unworkable so that \yub could introduce a presidential form of government under a new Constitution. He wanted
11 prestigious and respected body of persons to IBM at this conclusion in a report formally to be Ilbtted to him.

On 17 February 1960, Ayub appointed a I Constitution Commission with the former Chief [kbce of Pakistan, Justice Shahabuddin, as its I (toman to examine the causes of the failure of iliamentary government in Pakistan. The ision was also to submit constitutional s aimed at giving the country a firm and : government, effectively preventing undue
6 or party consideration in the administral md the arbitrary exercise of power by the tive. items of reference of the Commission were

[I To examine the progressive failure of parliamentary government in Pakistan leading to the abrogation of the 1956 Constitution and o determine the cause and nature of the failure,

1 To consider how best the said or like causes may be identified and their recurrence prevented;

3. And, having further taken account of the genius of the people, the general standard of education, and of political judgment in the country, the existing state of a sense of nationhood, the prime need for sustained development, and the effect of the constitutional and administrative changes brought into being in the previous months, to submit constitutional proposals in the form of a report advising how best the following ends might be secured:

- a democracy adaptable to changing circumstances and based on the Islamic principles of justice, equality, and tolerance;

- the consolidation of national unity; and a firm and stable system of government.2

During the course of the enquiry, the Commission received the following additional term of reference:

In the light of the social, economic, administrative, and political reforms which are being carried out by the present regime, particularly the introduction of the Basic Democracies, what would be the most appropriate timetable for the implementation of the proposals to be made by the Constitution Commission?3

FAILURE OF THE PARLIAMENTARY SYSTEM

The Constitution Commission of 1960 made a detailed study of the parliamentary system in Pakistan upto the time that martial law was imposed.

The terms of reference of the Commission included, among others, the obligation ’to examine

the progressive failure of parliamentary government in Pakistan leading to the abrogation of the Constitution of 1956 and to determine the cause and nature of the failure; to consider how best the said or like causes may be identified and their recurrence prevented'. The Commission came to the conclusion that the parliamentary form of government had proved a failure4 and noted the following causes:

1. Lack of proper election procedure and defects in the late Constitution;

2. Undue interference by the head of the state in the ministries and political parties, and meddling by the central government in the functioning of the government of the provinces; and

3. Lack of of well-organized and disciplined parties and the general lack of character in the politicians.

While the Constitution Commission blamed the politicians and the political parties, the politicians blamed Governors-General Ghulam Muhammad and Iskandar Mirza and a section of the permanent civil servants. But both the Commission and the politicians seem to agree on one thing: that the country suffered from extreme political instability, that parliamentary government in Pakistan had not worked as it does in Britain and other parts of the Commonwealth. If Governor-General Ghulam Muhammad was guilty of subverting the democratic process in 1953, no less guilty was the party which endorsed his actions. Similarly, if Iskandar Mirza was successful in ousting one Cabinet after another in order to perpetuate his position and in flouting constitutional provisions in July 1957 to bring his favourite party (Republican) in power, it was due to the support he received from the politicians and parties for such manoeuvring. As stated by the Constitution Commission, it could not have been possible for anyone to create a split unless the party in which the split was created was vulnerable and did not have the real interest of the country at heart.5

Despite the grim situation that presented itself,

tKe Commission did "°^«^^^^>^'^Jj;\=^5^>,';iiS2'_

are no doubt distressing, but they can hardly be

said to justify the view that we are not fit k representative form of government i therefore need a benevolent head of stffil unlimited powers'.

PRESIDENTIAL FORM OF GOVERNMENT RECOMMENDED I

Having come to the conclusion ill parliamentary system of government had failure, the Commission inquired whelk' modified form could be suitable for the The modifications suggested befoit Commission were as follows:

(a) Control of political parties by ran their numbers and requinng regisM

(b) Restriction on change of party by imposing an obligation to reap stand for re-election;

(c) Incorporation in the constilnu conventions obtained in the II Kingdom;

(d) Statutory prohibition of mterferai ministers and politicians in administration and stringent punishing them for misconduct, d

(e) Provision against interference ty President except during an

for a few months preceding the when he should have the power II over.6

The Commission examined each ofi proposals and found that it was neither nor desirable to introduce them by statutes! Constitution itself. For instance, the parties by law might not serve the which it would be intended. Similarl) prohibition of ministerial interference witks;f to-day administration would cres difficulties than it would solve, no' Commission favour the idea of incorporate! conventions observed in England on tbefr that these conventions were liable to *drngi*

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ibers of the legislatures, and mere ibition in the Constitution, the Co would not solve the problems fi itry.

The Commission recommended a fovernment where there would be only o
* the helm of affairs, but with an effectivi on him by an independent le ibers of which should not be in a pi with administration by exercisinj ire for personal ends. The Con iluded that such a system was availal '•presidential form of government as foui United States of America. The Comr preference for the presidential syst influenced by the following factors operat the presidential system.7 i. First, there is only one person at of affairs and not two (president a minister) and the collision of pen that had marred Pakistan's politics death of Jinnah and Liaquat *v»* averted;

Secondly, the opportunities and te open to an average member legislature to exploit his positio advantage would be so restric persons who in the past had treated to parliament as an investment w discouraged from standing for elec Thirdly, there would be greater which was Pakistan's prime need; Fourthly, administrators could be from among the ablest men avail; not necessarily from among membe Parliament.

LEGISLATURES:

UMC\MERAL OR BICAMERAL

lummg to the details of the syste Commission favoured a bicameral leg consisting of a Lower House to be knowi

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instance, the control of)t serve the purpose to Kted. Similarly, statutory interference with the day! would create mor mld solve, nor did the idea of incorporating the ft England on the ground^ vere liable to change porationintheconstiti

Kiculties. Ultimately the aocratic system depend on

rility of ministers and the

members of the legislatures, and mere statutory prohibition in the Constitution, the Commission felt, would not solve the problems facing the" country.

"he Commission recommended a form of

government where there would be only one person

at the helm of affairs, but with an effective restraint

exercised on him by an independent legislature,

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ere with administration by exercising political

>ure for personal ends. The Commission

concluded that such a system was available in the

presidential form of government as found in the

Inited States of America. The Commission's

preference for the presidential system was

influenced by the following factors operating under

tie presidential system.7

i First, there is only one person at the head of affairs and not two (president and prime minister) and the collision of personalities that had marred Pakistan's politics since the death of Jinnah and Liaquat would be averted,

u Secondly, the opportunities and temptation open to an average member of the legislature to exploit his position to his advantage would be so restricted that persons who m the past had treated election to parliament as an investment would be discouraged from standing for election; a Thirdly, there would be greater stability

which was Pakistan's prime need; and iv Fourthly, administrators could be selected from among the ablest men available and not necessarily from among members of the Parliament.

I LEGISLATURES: Iw\MERAL **OR BICAMERAL?**

Aiming to the details of the system, the ision favoured a bicameral legislature ! of a Lower House to be known as the e of the People and an Upper House to be n as the Senate The Commission emphasized I led of an upper Chamber which would be) check impetuosity of legislation by the

Lower House and which would also exercise a healthy influence through its utterances, both on the legislature and the public. The Commission envisaged an Upper House as a body of elder statesmen selected from categories of people rather than of members elected on a territorial basis as in the American Senate.

This Senate would consist of forty-eight

members; forty elected by an electoral college

consisting of the Lower House at the centre and

the two Provincial Houses on the basis of parity,

that is, twenty from each province, from among

meritorious personalities over fifty years of age,

who were not members of any of the said

legislatures. The remaining eight were to be

nominated by the President. The Senators should

be selected from among the following categories:8

i. Former presidents, governors, prime

ministers, chief ministers and ministers of

central or provincial governments;

ii. Retired judges of the Supreme Court and

of the High Courts;

in. Members of the recognized professions having a minimum standing of fifteen years;

iv. Retired government officers, not below the rank of secretaries or heads of departments of the central or provincial governments; v. People who had made a notable contribution to any branch of learning or research; and

vi. Prominent citizens who had contributed to social welfare.

THE PRESIDENT AND HIS POWERS

As regards the proposed powers and duties of the President, the Commission enumerated them broadly as follows:9

1. Execution of laws;

2. Appointments of governors, central ministers, Auditor-General, Chief Election Commissioner, and ambassadors other than career diplomats with the consent of the Senate;

3. Appointments of judges of the Supreme Court and of the High Courts, Chairman

and Members of the Public Service Commissions according to a procedure to be incorporated in the constitution;

4. Removal of governors, central ministers, and ambassadors (acting at his discretion) and of judges of the High Courts and other officers according to the rules and procedures elaborately provided in the report;

5. Receiving foreign envoys and ministers;

6. Making treaties subject to ratification by a majority of the members of the parliament attending a joint session;

7. Holding supreme command of the Army, Navy, and Air Forces;

8. Proclamations of emergency and calling for special sessions of the Parliament or of either House and issuing ordinances subject to certain conditions prescribed in the report;

9. Giving or withholding of assent in respect of Bills passed by the Parliament;

10. Granting of reprieves and pardons and

11. Nominating eight members to the Senate.

FEDERAL FORM OF GOVERNMENT RECOMMENDED

The Commission discussed whether the form of government should be unitary or federal. It acknowledged the difficulties involved in arriving at an agreed solution to this problem affecting relations between East and West Pakistan. ’There is no part of the subject of our inquiry which seems to us to present greater difficulties than the question whether the form of government should be unitary or federal, as in the controversy feelings

appear to run high'.10 The Commission referred to

the feeling at the time in East Pakistan 'of being

treated as a colony'. It recorded that the people of

East Pakistan who had worked wholeheartedly for

the achievement of Pakistan felt betrayed 'as a

result of neglect by the *central government, their*

province, in spite of its superiority in numbers as

well as its capacity to earn more foreign exchange,

was far behind the other part of the country in the

field of development'." The Commission

recognized the disparity in the inc.* development between the two wing- • independence, but contended that in Wesifj-f industrial progress had been quicker thar j East where they had to make a start for, 3 time. The Commission gave figures of the sj grants to East Pakistan over the years andpj| out that the amounts allocated to East 1 had not always been utilized. The i explanation was the delay in prepai schemes coupled with the fact that the p ministers had not considered these *m* promptly. But the Commission also referred! feeling in East Pakistan that the centre hadd the financial sanction of these schemes in o prevent the province's utilizing *the,* fully.

Having taken note of the prevalent letup the country, the Commission concluded: 'Iti(considered opinion that if we impose a mi form, ignoring the state of feeling in East and! Pakistan, we would be driving the avq Muslims of East Pakistan into the araij extremists and disruptive elements which aren in that province'.12 This was wise counsel,a Commission should be given credit for < the correct conclusion.

RECOMMENDATIONS RELATING wl THE ELECTORATES

Problems connected to the electoral system i debated at great length in both the first ands Constituent Assemblies of Pakistan. To organ an electorate on a sound basis is by no means i easy task, particularly in a country like Paid* where the masses are illiterate and the means* communication are not yet properly develop^ with a consequent lack of contact between vob and their representatives. While making tie It Constitution (1947-56), the main probla considered by the Constituent Assembly regan% *the electorate was whether it should be joint* or *separate. Under a separate electorates* system. voters *were to be divided on* a *religious* basis *separate constituencies* were to be carved out for Hindus and Muslims, andth^o-'v?1--- • ^ .

votes belonging io|

either of these communities could vot constituency reserved for thei community. The system was the subj' acute controversy between the Hin Muslims of undivided India. I considerable impact on the contempc of Pakistan.

The framers of the new Constitui other important problems to consider: election of the President and the me legislature should be on a universal c franchise; and, two, whether it shouli indirect through an electoral college 1 Democracies.

The Constitution Commission dii

three issues in detail. Regarding the

universal or a restricted franchise, th<

began with an analysis of theories ab

of suffrage and reached the conch

right to vote is not inherent like the n

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The second issue, whether t election should be direct or indin special significance in Pakistan wit! in power in 1958. As early as Oc was thinking of possibilities of an e where five hundred peopfe rm'gnf who in turn would choose an offii

THE CONSTITUTION COMMISSION AND ITS REPORT

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VTIONS RELATING TO IATES

d to the electoral system were Lgth in both the first and second blies of Pakistan. To organize sound basis is by no means an arly in a country like Pakistan are illiterate and the means of e not yet properly developed, lack of contact between voters tatives. While making the late >47-56), the main problem Constituent Assembly regarding ; whether it should be joint or a separate electorates system, ; divided on a religious basis, ncies were to be carved out for ms, and the voters belonging to

either of these communities could vote only m the tuency reserved for their religious

numty The system was the subject matter of

acute controversy between the Hindus and the

Muslims of undivided *India, It also had*

considerable impact on the contemporary politics of Pakistan.

The framers of the new Constitution had two

other important problems to consider: one, whether

election of the President and the members of the

.egislature should be on a universal or a restricted

hise; and, two, whether it should be direct or

^t through an electoral college like the Basic Democracies.

The Constitution Commission discussed these three issues in detail. Regarding the question of a universal or a restricted franchise, the Commission began with an analysis of theories about the nature of suffrage and reached the conclusion that the tight to vote is not inherent like the right to liberty, hut is an office or function conferred only on those who are able to discharge its obligations. It further pointed out that in democratic countries like England and the United States of America, the existence of the franchise went hand in hand with education, with the result that the universal franchise followed universal education. But in Pakistan, the Commission pointed out, the percentage of literacy according to the census of 1961 was only 15 per cent. The Commission rached the conclusion that ’we would be taking a grave risk if, in the matter of election of the President, the Vice-President, the House of the People, and Provincial Assemblies we adopt iiiversal franchise in our present state of

nlespread illiteracy amongst the people whose

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to immediate appointment of a Franchise

Committee to submit its report within one year to

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The second issue, whether the system of

fetion should be direct or indirect, acquired a

wcial significance in Pakistan with General Ayub

-i power in 1958. As early as October 1958, he

»asthmking of possibilities of an electoral college

«tm five hundred people might elect a person

»ho in turn would choose an official. That was,

wording to him, one way to spread democracy in

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Pakislaxv. W\\.\\ \tae vcvVi oAutXi on o? Democracies, the suggestion was made that an electoral college should be developed for the election of the President and members of the

legislature and the question continued to be

debated widely.

The Constitution Commission examined the problem wtfv referensx to Ras\t Democracies sni came to the conclusion that in view of the wide responsibilities conferred on the President under the proposed Constitution, it was desirable that he should be elected by the people directly, on the basis of a restricted franchise. Similarly, the Commission recommended that members of the legislatures, both provincial and central, should be elected directly by the people. The Commission opined, that the Basic Democracies scheme was very useful as far as local government was concerned. The system, in its opinion, would be of great help in educating the general mass of the people in the art of managing their own affairs by coordinated efforts.

The last issue, whether the system of electorate should be joint or separate, was examined thoroughly by the Commission. It had started the discussion by pointing out that Islam was the main bond between the two wings of Pakistan. It raised the question of why religious minorities in Pakistan should want a joint electorate. In a country where people are basically religious, it argued, one would normally expect the minorities to ask for separate electorates, as had the Muslims in undivided India. When Pakistan was established, the minorities in West Pakistan asked for separate electorates and in East Pakistan too, a section of the scheduled caste favoured the system of separate electorates. Prime Minister Suhrawardy, when he introduced a joint electorate in Pakistan, explained the desire by the Hindus for a joint electorate 'due to a high sense of citizenship' and a 'keen desire to merge themselves in the majority'. The Commission, however, pointed out that the behaviour and the policies of caste Hindus in Pakistan had not proved any high sense of citizenship or any desire to merge with the majority. Rather, many of the upper class Hindus in East Pakistan preferred to keep their families in India and sent earnings to that country. They, therefore, could not dismiss the

apprehension, stated by some witnesses before the Commission, that the demand of caste Hindus for a joint electorate might be based on a desire to influence the elections against the ideology of Pakistan. Given the political situation, the Commission stated, 'we are not prepared to say that this view is not amply justified. Their demand for a joint electorate seems clearly to be for some ulterior purpose other than the welfare of Pakistan'.13 The Commission, therefore, recommended separate electorates for all of Pakistan.

RECOMMENDATIONS REGARDING REVIVAL OF POLITICAL PARTIES

Another important issue closely connected with electoral politics was whether political parties were necessary and if they should be allowed to function.

The Commission referred to the role of parties in the process of discovering, sifting, testing, and choosing candidates and it admitted that in a country like Pakistan where a sense of political responsibility had yet to be fully developed, parties were formed not on principle but after a known personality. The Commission rightly pointed out that as long as a representative form of government had to be worked out, 'we fail to see how political parties can be avoided'. The Commission reached the conclusion, 'if we want to have a democratic form of government our endeavour should be to create conditions in which a party based on principle can emerge'.14

RECOMMENDATIONS RELATING TO ISLAMIC PROVISIONS

The Commission specifically raised the question of whether the preamble to the last Constitution, which declares the sovereignty of God and other provisions relating to the Islamic character of the Constitution, should be retained in the proposed constitution. It favoured the retention of the preamble and other Islamic provisions but

Suggested Certain Ohanses *l^nft* irr,l^rt*vrr>«^«'^ *v^,f **

regard to the Islamic Research Instill recommended the retention of the Islamic Ra Institute as provided under Article 197 oik Constitution.15 The Constitution Conunij recommended the appointment of Islamic Id Commission and suggested that CO-OJK should be sought through diplomatic chat other Muslim countries so that the proB commission might work in collaboration wil similar commission in other Muslim countnttj proposed commission would advise i instructions given by the Prophet (pBbi reference to local conditions should be foil literally, regardless of the local customs to i the people of various countries was accusta or whether only the principles should be adopu:[

RECOMMENDATIONS REGARDING THE JUDICIARY

The Constitution Commission, headed as it *m* a former Chief Justice of Pakistan, reaffirm! i importance of the judiciary and suggested detain provisions to secure its independence. It madnj

detailed examination of requirements for en the independence of the judiciary and disci salaries, tenure of office, method ofappomOu and powers of the judges. As regards salary, ii Commission noted that the existing scale forjudn of the Supreme Court and High Courts was k| adequate, the pension, particularly, beqj unsatisfactory.

The second inducement for the right typed man to accept judgeship was considered to i permanence of office. For this, the late ConsnW had provided adequate safeguards. Undent ajii of the High Court, once appointed, would It entitled to continue in office till he reached i sixtieth year and he could be removed from ofin only by an order of the President issued on i adverse finding given by the Supreme Court ih judicial investigation of the application tut against him in a reference received from Ik President. As regards the Supreme Court, *k* provision in the late Constitution wasthatajuiji

Would not be removed except by an *order oft fr*~-*'*J*=r*r jttafi^ &z* &n a<fdr-i?ss fn-es&ntea to baat*

s National Assembly, supported by tl fthe total number of members of that the votes of not less than two-thi ibers present, voting for the remc on the grounds of proven misb'e lity of mind or body. These prov lission pointed out, aimed at main sndence of the judiciary by gi1 rity of tenure so that they did not charge their duties without fear or fa .The Commission preferred a s :hment to remove the Chief Justice of the Supreme Court. The resc :hment were to be signed by not -fourth of the total number of rnernt House of the People. Fourteen days' noti should be given before its being moved, resolution were passed by a majority o number of that House, trial on the charg in the resolution should be held by the S(impeached would then have to ' should he be found guilty by two total number of the members of th Commission prescribed the same] for impeachment of the President, Vicejrs, and ministers (central and pr for the removal of High Court ju lission favoured the procedure adop last Constitution under Article 169. Regarding the appointment of Judg< ic Court, the Commission agreed Commission that the recommendat hip of the Supreme Court should the Chief Justice after consultation agues and, as a matter of conven it should accept his recommend, the Chief Justice, the Law Cor that a recommendation should r the retiring Chief Justice and if, on ac sn circumstances, no such recor i could be made, the President should s Justice from among the Suprem . While the Constitution Commissio a recommendation should be made jtitiring Chief Justice, it added that the I ' 'i exercise his discretion in case the

' Justice should not *recommend*

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THE CONSTITUTION

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Vational Assembly, supported by the majority to^ number of members of that Assembly uy the votes of not less than two-thirds of the present, voting for the removal of the judge on the grounds of proven misbehaviour or infirmity of mind or body. These provisions, the Commission pointed out, aimed at maintaining the ”dependence of the judiciary by giving them •*OSN!J ^ VOSCK, -afc fejti ’tnej &h Titiirhesi\a\e \o asiharge their duties without fear or favour.

The Commission preferred a system of rapeachment to remove the Chief Justice and other judges of the Supreme Court. The resolution for impeachment were to be signed by not less than me fourth of the total number of members of the Hojseofthe People. Fourteen days’ notice thereof should be given before its being moved, and if the ilution were passed by a majority of the total of that House, trial on the charges alleged Bite resolution should be held by the Senate. The person impeached would then have to vacate his office should he be found guilty by two-thirds of Ike total number of the members of the Senate, Tic Commission prescribed the same procedure for impeachment of the President, Vice-President, Governors, and ministers (central and provincial). As for the removal of High Court judges, the Commission favoured the procedure adopted in the {list Constitution under Article 169. Regarding the appointment of Judges of the Supreme Court, the Commission agreed with the Ln Commission that the recommendation for a jiidgeship of the Supreme Court should emanate bm the Chief Justice after consultation with his colleagues and, as a matter of convention, the President should accept his recommendation. As itjards the Chief Justice, the Law Commission iggested that a recommendation should be made ty the retiring Chief Justice and if, on account of •foreseen circumstances, no such recommendatoowuldbemade, the President should select the (kef Justice from among the Supreme Court [rips While the Constitution Commission agreed a recommendation should be made by the Chief Justice, it added that the President exercise his discretion in case the retiring Justice should not recommend the next judge The Commission noted that although

seniority should not be the only consideration in making the appointment to the office of the Chief Justice, normally one would expect the senior judge to be appointed unless there were very strong reasons to the contrary, because if he were overlooked, the atmosphere of the court might be affected.

Regarding recruitment of judges of the High

Courts, fhe Commission recommended that a provincial Chief Justice should, in consultation with his permanent judges, send his recommendation to the Governor and to the Chief Justice of Pakistan at the same time and they should express their opinion to the President. If the Chief Justice of Pakistan agreed with the provincial Chief Justice, the recommendation should be accepted unless the President, in consultation with the Governor of the province, should raise objections and give an opportunity to the justices to meet them. If the Chief Justices concerned should disagree in the matter, the case would be placed before the Supreme Court and the view of the majority should prevail unless the President and the Governor raised serious objections to the proposed appointment, in which case the Supreme Court should be given an opportunity to meet those objections.

As to the powers of the superior courts, the Commission favoured retention of the provisions of the last Constitution. It only referred to a proposal made by the official delegation with respect to the writ jurisdiction of the High Courts. The official delegation suggested that writs should not be issued against the government but could be issued against Secretaries to the government. The Commission did not favour this proposal. It observed, 'if it is to be laid down that writs can issue only against the Secretaries or the heads of the departments, those functionaries can successfully plead that the order by which the applicant is aggrieved was passed not by them but by the government and therefore, they could not possibly carry out the directions of the court. In other words, if the writs are to be confined to the Secretaries to the government, there could be no redress available to a party in respect of an order passed by the Cabinet'.16

FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES OF POLICY

The last Constitution, following the models of others, included a long list of fundamental rights and directive principles of state policy. The Commission inquired whether the provisions of the last Constitution regardng fundamental rights should be incorporated in the new one or if the assurance of such rights could safely be left, as in the United Kingdom, to the fundamental good sense of the legislature and operation of recognized principles through the wisdom and experience of the courts. The Commission noted that the preponderance of opinion expressed before it (98 to 39) was in favour of the first alternative and agreed that fundamental rights should be incorporated in the new Constitution and be enforceable by the courts. The power of the legislature has to be restricted as was done by Article 4 of the last Constitution to the effect that any law passed by it which would contravene any of the provisions enumerating fundamental rights, as well as any existing law which would be inconsistent with those provisions, could be declared void to the extent of inconsistency. The Commission favoured the retention of this provision. Similarly, it favoured the retention of the directive principles of state policy as laid down in the last Constitution.

NOTE OF DISSENT

One of the members of the Constitution Commission, Sardar Habibullah, gave a note of dissent on certain points.17 He was opposed to exonerating the services from their role in destabilizing parliamentary democracy in Pakistan. He disagreed with the recommendation for a federal form of government, and favoured the unitary form. He opposed the recommendation of qualified franchise based on literacy and property as it would deprive a large number of important sections of the population of their votes, *particularly industrial and agricultural labour. He* disagreed on the recommendation of direct

elections ana favoured indirect election byBasic

Democrats elected on universal adult franck also opposed a bicameral legislature at tie and thought that the Upper House by the Commission would be unnecessary a presidential form of government. He was if the office of Vice-President recommended In Commission because two elected people or would soon develop rivalries and try to pdi another down. He opposed the recommend* separate electorates because, according to k was the right of the minorities to ask for it ami: for the majority to force it upon them

CONCLUSION

The Commission was headed by the formerd Justice of Pakistan, Justice Shahabuddin, a man of integrity and honesty,y in high esteem and respected both in East **anil** West Pakistan.18 He had been the Chief JusteJ the Dhaka High Court and also Governor of El Pakistan. He was reluctant to accept I Chairmanship of the Commission but did soil the condition that the

Commission would • unfettered in the due discharge of its functions! that its report would be published whether a or not. These terms were accepted; personnel of the Commission were announced^ before the Commission could meet, Ayuki some of the ministers indicated Constitution would be. This resulted in a gon| impression that the Commission appointed only to endorse a plan already d upon. At the first meeting, he made a; clearly dispelling the impression. Ayub t stated in a speech that it was the height ^ foolishness to suspect that the Commission n be used as a signing machine. Shahabuddin *t* in a speech in the presence of some of then that if he came across any pronouncements 6 them regarding the Constitution, he would n Thereafter, till the submission of the report, tl I were no further declarations regard^ / Constitution.19 *G.W. Choudhry, who* was < / associated with the Commission as an I I adviser,, has said thai. & <3N^<yi.Mv fes \ TOWers m makings tecQmmexvdaS\offiM

I here were problems and i Constitution Commission whi(faced by the framers of the last instance, whether the system of e direct or indirect; if political parti or should be banned; whether ft should be enforceable by the la

’• these issues, the recommen Commission were welcomed in recommendation for restrictec criticized, though it should be m; Commission wanted not a perrm franchise but a gradual and conti along with improvement in edui socio-economic reforms. There ’ said in favour of such an approa idea of a restricted franchise mi

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THE CONSTITUTION COMMISSION AND ITS REPORT

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lere were problems and issues before the Dilution Commission which had not been 1 by the framers of the last Constitution. For ice, whether the system of election should be . v4 or indirect; if political parties were necessary or should be banned; whether fundamental rights should be enforceable by the law courts. On all these issues, the recommendations of the Commission were welcomed in the country; its recommendation for restricted franchise was criticized, though it should be made clear that the Commission wanted not a permanently restricted franchise but a gradual and continuous extension, ilong with improvement in education

and other socio-economic reforms. There was much to be ad in favour of such an approach although any ib of a restricted franchise might be regarded nt of tune with modern notions of a democratic lira of government.21

In a nutshell, the Constitution Commission had a commendable task of producing and :mg a comprehensive report on 29 April Stil, encompassing various important issues of .institutional importance.

The recommendations of the Commission were perally balanced and well considered except for, the adoption of separate electorates, in case, the will of the majority of the ”omission appears to have been carried. The tyirt still remains a document of considerable jportance. Justice Shahabuddin did a great mice to the nation by forcing the government to ffltt it, otherwise it might have gone the way reports of commissions have gone over the unpublished and unheard of.22

NOTES

1. Karl von Vorys, *Political Development }n Pakistan,*
1965, Princeton University Press, Princeton, New Jersey, p. 209.

2. Report of the Constitution Commission, 1961, Government of Pakistan, p. 1.

3. Ibid.

4. Ibid., Chapters I and II.

5. Ibid, p. 12-13.

6. Ibid., pp. 23-4.

7. Ibid, pp. 28-31.

8. Ibid., p. 47.

9. Ibid, p. 85.

10. Ibid, p. 34.

11. Ibid, p. 35.

12. Ibid, p. 37.

13. Ibid, p. 76.

14. Ibid., p. 80.

15. Ibid, p. 121.

16. Ibid, p. 96.

17. Ibid, pp. 140-2.

18. The members of the Commission were Azizuddin Ahmad, Muhammad Sharif, D.M. Barori, Tufailali A. Rahman, Abu Sayeed Chowdhary, Arbab Ahmad Ali Jan, Aftabuddin Ahmad, Sardar Habibullah, Obeidur Rahman Nizam, and Naseer A. Sheikh.

19. Shahabuddin, Late Mr Justice Muhammad, *Recollections and Reflections*, 1972. Published by the Supreme Court of Pakistan and printed by P.L.D. Publishers, Church Road, Lahore.

20. Choudhry, G.W, *Constitutional Development in Pakistan, supra,* note 8, p. 150.

21. Ibid, pp. 175-7.

22. Reference is made to Hamoodur Rahman Commission Report on the breakup of Pakistan.

12 The Constitution of 1962

The report of the Constitution Commission was presented to Ayub on 6 May 1961.1 It was examined by him and his Cabinet. A subcommittee of the Cabinet was appointed, with Manzoor Qadir, the Foreign Minister, as its chairman and Mohammad Shoaib, Zulfiqar AH Bhutto, A.K. Khan, and Muhammad Ibrahim as its members. The sub-committee examined the report of the Constitution Commission and prepared a report of its own. It is alleged that the subcommittee was appointed and a report was *”£”. ”J”^ &*”” ;t only’”* order to frustrate the report Of the Constitution Commission, *fa this manner,* Ayub could obtain alternate *recommendations from*

two reports ^^<*&<&fa$J$MS?jfiM®* which were to his liking and *inclination.2* The 1962 Constitution was very different from the recommendations made by the Constitution rornm^gsiom Ayub favoured a presidential form of government which allowed the President \.o choose his own Cabinet, and also gave him the right to nominate provincial Governors.3 Ayub disagreed with the recommendations of the Constitution Commission regarding restricted adult franchise; bicameral legislatures; creation of the , N\ce-?x<ss\A<sTvV, and procedure for

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as the first monarch. Ayub was obviously pled I with such support.5

The two reports and their findings»« examined by the Cabinet. The constitution proposals were finally discussed at the Governs Conference held in Rawalpindi from 24 to i! October 1961. The Governors’ Conference n attended by the provincial governors, cram ministers, and senior officers. It was decided to the President would announce the outline of! constitution soon after the governors’ Conferee but subsequently it was announced in its enw *in Afarc/i Jf>&2. WAi/e tAe Governors’’c ’* ”

/ was *under way, Ayub declared ;„*

’ $>£&)?& .anniversary of ’Revolution i Constitution would” 6e capaffre strong and stable government, with an on a strong executive.

The Governors’ conference had teSCffllg, Committee With Manzoor Qadir and! Law Secretary, Abdul Hamid, as members * drafting committee was authorized to enlist,! necessary, the services of experts on conshtntnu law.6 It took about four months to finally dram Constitution which was announced in a broad*’ to the nation by Ayub on 1 March 1962. to!

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PRESIDENTIAL FORM OF GOVERNMENT

The main emphasis of the 1962 C was a strong executive, expressei office of the President. The fundai system are enunciated below:

1. The President was elected in< the legislature and had a direct the electors to perform t

functions of government;

2. He was to hold office for a l could not be removed from adverse vote in the legislature his policies, but only by a spe impeachment;

3. The legislature was elected and had a fixed term;

4. The legislature functioned in the executive and cou\d not 1

5, The (egisfature *was SicltuptS*^

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THE CONSTITUTION OF 1962

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and their findings were ibinet. The constitutional discussed at the Governors' Rawalpindi from 24 to 31 aovernors' Conference was mncial governors, central officers. It was decided that announce the outline of the er the governors' Conference, was announced in its entirety ile the Governors' conference rab declared in his speech on y of 'Revolution Day' that the d be capable of producing a government, with an emphasis

ive.

,' conference had appointed a e with Manzoor Qadir and the kbdul Hamid, as members. The ee was authorized to enlist, if vices of experts on constitutional it four months to finally draft the ch was announced in a broadcast

Ayub on 1 March 1962. In his •eferred to the pledge given on , to restore democracy in Pakistan t the new Constitution represented f that pledge.

onstitution contained 250 velve parts and three schedules. *(* preamble, similar to the 19!

based on the language of t ^solution. Significantly, the ni i to Pakistan was 'The Republic uch was a clear departure from t ution wherein Pakistan was named

Republic of Pakistan'.9 This fact instates Ayub's secular mindset. Its lished feature was the introduction of Aal system of government.

PRESIDENTIAL **FORM OF** GOVERNMENT

The main emphasis of the 1962 Constitution of was a strong executive, expressed through the office of the President. The fundamentals of the system are enunciated below:

1 The President was elected independently of the legislature and had a direct mandate from the electors to perform the executive functions of government;

2 He was to hold office for a fixed term and could not be removed from office by an adverse vote in the legislature against any of his policies, but only by a special process of impeachment;

3 The legislature was elected independently

and had a fixed term;
4. The legislature functioned independently of

the executive and could not be dissolved by

the executive or the President;
5 The legislature was the supreme law-making

body of the country and no proposal could

become law unless voted by this body;
6. The judiciary was responsible for the

interpretation of laws and executive orders

in the light of the principles embodied in the

Constitution.

The Ayub government gave the following arguments in support of the presidential system: one, the presidential system had special advantages to offer to a nation which had recently emerged out of a colonial past and was embarking upon an ambitious programme of social reform and economic development political unity. Two, the presidential system, by giving executive authority to one •dividual with a mandate from the entire nation, could facilitate the growth of unity in the country.9

h introducing the 1962 Constitution, Ayub stated:

’”: have adopted the presidential system as it is pier to work, more akin to our genius and history, and less liable to lead to instability, a luxury that a developing country like ours cannot afford.10

Political leaders, however, continued to press fa a parliamentary system. In a joint statement

made by political leaders of different shades of opinion in East Pakistan including Husain Shaheed Suhrawardy, they reaffirmed their preference for the parliamentary system.

POWERS OF THE PRESIDENT

Under the 1962 Constitution, the President was the repository of all powers. It was commonly said that the President under the Constitution was like the clock-tower of Faisalabad where all the bazaars

converged.

The Constitution provided that there would be a President elected in accordance with the Constitution and the law.” The President was required be a Muslim, not less than 35 years of age, and qualified for election as a member of the National Assembly.12 He was to be elected indirectly by an electoral college in accordance with the provisions outlined in the Constitution. The lower age limit for the President under the
1956 Constitution was 40 years, as against 35 years under the 1962 Constitution.

The system of election, that is, whether the President should be elected directly or indirectly, was discussed and examined in great detail by the Constitution Commission as well as by the people in general. The Constitution Commission favoured direct election on the basis of a restricted franchise. Ultimately, the system of indirect election through local government institutions was adopted. The President was to be elected by an electoral college formed by not less than 80,000 electors, equally distributed between the two provinces (East and West Pakistan). Each province was to be divided into not less than 40,000 territorial units to be known as electoral units.13 Any citizen who was at least 21 years of age, of sound mind, and was a resident of or was deemed by law to be resident of an electoral unit would have the right to be enrolled. Those enrolled for an electoral unit would elect from amongst themselves a person of at least
25 years of age who would be an elector for that unit.14 The electors thus elected in both the provinces formed the electoral college of Pakistan and this electoral college elected the President by a majority vote.15

The electoral college was to have other functions conferred upon them by law, particularly in relation to matters of local government. Thus, the electoral college was elected not simply for the election of the President and the legislatures but was also to act as the institution of local government. Critics of the system pointed out that, apart from the disadvantages of indirect election, it would wreck local government institutions by involving them in party politics. The argument put forward by the government was that if the electoral college was divorced from affairs of local government it would become a political forum and there was no means, specially for an unsophisticated electorate, to judge the members of the electoral college on the basis of their concern for public interest.16

When the constitution was implemented in
1962, Ayub became the first President of Pakistan in accordance with the result of the referendum held in February 1960. His term of office was three years,17 since he had already served two years of his term from 1960.

Selection of Candidates for Election to the

Office of President

If the number of candidates for election to the office of President exceeded three, the Speaker of the National Assembly was to convene a joint session of the members of the national and provincial assemblies to select three of the candidates for election, the remaining candidates thus becoming ineligible. This screening was not applicable to a person who was holding the office of the President, that is, if the incumbent President was also a candidate, the number of candidates could be four."

The term of the President was fixed for five years. A person was not eligible for re-election if he had held the office of the President for a continuous period of more than eight years. However, with the approval of a joint sitting of *the members of the national and provincial* assemblies, such a person could be eligible for election of the President for more than two terms. In fact, with the approval of the legislatures there seemed to be no limit to the number of terms for

which a person might be eligible for r President.19

Impeachment and Removal of the President

The President could be impeached by the Assembly on a charge of violating the 0 or for gross misconduct, in accordance wi following procedure:

One-third of the total members of the Assembly had to give written notice to the for the removal of the President. The notice U set out particulars of the charge and itwaslol transmitted to the President by the Speaker. resolution for removal of the President was mil be moved in the

National Assembly earlier fourteen days or later than thirty days afta notice of the resolution. The President had the to appear or be represented before the Assembly when it discussed the motion impeachment. The President was to be from office if the resolution for impeachment passed by votes of not less than three-fourths the total members of the Assembly.20

A significant feature of the

procedure was that if the resolution for remo\t(

the President failed to obtain one-half of the

number of members of the National Assembly,

movers of the resoJutJao wouJd *cease le^*

members of the National Assembly. A skill

procedure had been provided for the removal *4*

the President on the grounds of his physical i

mental incapacity.21

The President was not allowed to office of profit in the service of Pakistan tera not prevented from holding or managing pnv* property. Protection of the President from Itji proceedings while he was in office was provided1 Similar protection was provided in the 19i(Constitution.

_._ the laws.23 The President was res regulating the allocation and transai business of the central governme establishing divisions of the governrr had to specify the manner in which th instruments made in pursuance of t vested in him should be exp authenticated.24 The Constitution had the President adequate powers not carrying out, or administration of law the legislature but also for the condi affairs and of war; he had military ai powers and the limited judicial granting pardons and reprieves.25 ceremonial head of state, chief of t and also retained substantial power it The President had the power to appointments. He appointed the Govi ministers, Auditor-General, judges o Court and the High Courts, 1 Commissioner, the Central Pu Commission, the Council on Islamic National Finance Commission, Economic Council, the Attorney-G others.26 The supreme command c services was also vested in the Pre the power (a) to raise and maintai Services of Pakistan, and (b) to gran and to appoint chief commanders of and to determine their salaries and *i* The list of powers granted to the I the 1956 Constitution were also corn that constitution provided a parlian in which the President was expect his extensive executive powers on the Prime Minister and the Cabi responsible to the legislature. Ui Constitution, the President could powers independently. There wa: council of ministers, but their a binding on the President, nor wer responsible to the legislature.

Independence of the Executive Authority I The President and his Cabine

The executive authority of the Republic was vested I in the President to be exercised accordance wittv tKe tjtcwxsvMvs.

The President could appoint a coui to assist him in the performance o Constitution did ncrt. e\aV>oT,aX<

t be eligible for re-election as

Removal of the

be impeached by the National e of violating the Constitution, duct, in accordance with the_

total members of the Natio e written notice to the Speaks _ ic President. The notice had *(* f the charge and it was to 1 ’resident by the Speaker. The ral of the President was not to ational Assembly earlier than ter than thirty days after the on. The President had the right >resented before the National t discussed the motion for President was to be removed solution for impeachment was not less than three-fourths of f the Assembly.20 eature of the impeachment f the resolution for removal of to obtain one-half of the total of the National Assembly, the iolution would cease to be ational Assembly. A similar i provided for the removal of ie grounds of his physical or

/as not allowed to hold any ie service of Pakistan but was

holding or managing private i of the President from legal e was in office was provided.22

was provided in the 1956

nd the laws.23 The President was responsible for i regulating the allocation and transaction of the [business of the central government, and for Ktablishmg divisions of the government, he also y to specify the manner in which the orders and instruments made in pursuance of the authority vested in him should be expressed and
1 -rated.24 The Constitution had conferred on adequate powers not only for the I anying out, or administration of laws, enacted by (legislature but also for the conduct of foreign s and of war; he had military and legislative [powers and the limited judicial functions of pardons and reprieves.25 He was the head of state, chief of the executive, [ndalso retained substantial power in law-making. The President had the power to make all key I fpomtments. He appointed the Governors, central misters, Auditor-General, judges of the Supreme Court and the High Courts, the Election Commissioner, the Central Public Service Commission, the Council on Islamic Ideology, the Finance Commission, the National : Council, the Attorney-General, among I (hers.26 The supreme command of the defence I unices was also vested in the President. He had lie power (a) to raise and maintain the Defence I Semces of Pakistan, and (b) to grant commissions ml to appoint chief commanders of those services | mi to determine their salaries and allowances.27

Hie list of powers granted to the President under I it 1956 Constitution were also comprehensive but I ta constitution provided a parliamentary system inhichthe President was expected to exercise I is extensive executive powers on the advice of lie Prime Minister and the Cabinet who were liisponsible to the legislature. Under the 1962 I Constitution, the President could exercise

these **I piers** independently. There was, no doubt, a Israeli of ministers, but their advice was not lining on the President, nor were his ministers leponsible to the legislature.

the Executive Authority ***V**** **President and his Cabinet**

rity of the Republic was vested

to be exercised by him in

provisions of the Constitution

I lit President could appoint a council of ministers Imssisthim in the performance of his duties. The Ifastitution did not elaborate on the exact

relationship between the President and his council of ministers. He was not bound by the advice of his ministers and the ministers held office at the pleasure of the President and could be removed from office any time, without the President having to assign any reason therefor.28

The President was empowered not only to dismiss a minister or a Governor, but also to disqualify him from public office for a period of five years on a charge of gross misconduct in relation to his duties. The Governors or ministers would have the option of agreeing to the disqualification or of having the matter referred to a tribunal for inquiry. In the case of a central minister, the tribunal was to consist of a Judge of the Supreme Court appointed by the President after consultation with the Chief Justice.29 The Constitution provided that if a member of the National Assembly should be appointed as a member of the President's council of ministers, he would lose his seat in the National Assembly,30 but this provision was amended by the President within the first three months of the enforcement of the constitution.31 The amendment would have greatly altered the character of the council of ministers. The ministers as members of the legislature would have some followers in the legislature and as such would exercise an influence unusual in a Presidential Cabinet. The strong sentiment among the politicians in favour of some form of parliamentary system in Pakistan would also consolidate and strengthen their position. As the President had to depend on the support of the legislature, it was not conceivable that a minister with a powerful backing in the legislature would be treated as a mere adviser.

It is generally believed that the need for the Presidential Order, enabling the ministers to retain their seats in the National Assembly, arose because of Muhammad Ali Bogra, who had been offered the office of Foreign Minister. Bogra had also been elected to the National Assembly from East Pakistan and he was not willing to lose his seat in the National Assembly on becoming a minister. The Presidential Order was declared by the Supreme Court of Pakistan as *ultra vires* upholding the earlier decision of the Dhaka High Court in this matter.32 It was held that the amendment of Article 104(1) of the constitution by the

Presidential Order so as to omit the word ’minister’ from clause (1) of Article 104, with a view to enable ministers appointed from amongst members of the Assembly to retain their seats in the National Assembly after appointment was inoperative, because the Presidential Order was itself void and *ultra vires* the Constitution. The Supreme Court interpreted Article 224(3) of the constitution, which enabled the President to pass Orders for removing any difficulty that might arise within three months after the commencing day, so as to mean that the principal duty laid upon the President and those working with him was to bring the constitution and all its provisions into operation as an integral whole, without variation whatsoever. The responsibility, under Article 224(3), at the highest level was given to vary provisions in the constitution, not for the purpose of altering the constitution itself, but in order that the constitution as a whole should be brought into force. The provision of the constitution debarring the members of the council of ministers from continuing as members of the National Assembly had a very important purpose, namely, to bring into operation a Presidential form of government, in which the executive was to be completely separated from the legislature. The Court observed that instead of performing the major duty enjoined upon the President to bring these fundamental provisions into operation, they were altered in a fundamental way so as to change the form of government from the purely Presidential form to an anomalous parliamentary form.

PRESIDENTIAL POWERS AND THE LEGISLATURE

The Presidential system is based on the theory of the separation of powers between the legislature and the executive. The executive usually not being an integral part of the legislature though retaining considerable power and influence in the legislative organ. Under the Parliamentary system, the executive and the legislature are united and the head of the state is an integral part of the Parliament. However, in the Presidential system adopted under the 1962 Constitution, the President

was made an integral part of the central legist which consisted of the President and one 1 known as the National Assembly of Pakistan,’1

The President could summon the legislature! prorogue it. The Speaker of the National *t* could also summon the National Assembly ilk request of not less than one-third of the t number of members of the National Assemblyi when the Speaker had summoned the lq it was he who could prorogue it and not »| President.34

The President was also empowered to dissdi| the National Assembly at any time subject to a condition that in case of dissolution the Presto! also had to quit office and there were to be Ml elections for both the President and the Nadtdl Assembly.35 This, no doubt, was a healthy dual against arbitrary dissolutions of the Naliou Assembly as the President himself would iavtlf face the hazards of an election, and it was i likely that the President would exercise thep frequently or lightly. The idea of sun proroguing, and dissolving the legislature by il President seems again more in accord Parliamentary, rather than a Presidential foraj government. As a further

safeguard, the I was not given power to dissolve the Natin Assembly when it was to consider a resolutioi^ impeachment against him under Article 13 or II , In case of a difference of opinion between »J President and the National Assembly, thePresidmJ could call for a referendum on the matter toll conducted among the members of the electm'| college. The matter to be referred to a referent would be put in the form of a question capable :| being answered either yes or no.37

The President had the right to National Assembly and to send messages to it 11 members of the President's council of minislal and the Attorney-General had the right to s and otherwise take part in the proceedings of 4 National Assembly or of any of its Coir but were not entitled to vote.38

Certain categories of Bills *could not* ^ introduced or moved in the National without the previous consent of the President A J example, a Bill relating to preventive detentk The President bad the right to veto Bills r"Jt'

the National Assembly. The A also has veto power though no since the Congress can override is passed again by a two-third vo The 1962 Constitution gave a me and effective veto power. Whei passed by the National Assernl could do one of the following:

(a) give assent to the Bill;

(b) withhold assent from the

(c) return the Bill to the N£ with a message requesting particular provision o reconsidered and amendm his message be considered

If the President did not take ai steps, the Bill would be deemed 1 his assent after the expiry of thirty

If the President withheld assent National Assembly could reconsic Bill was passed again by the votes two-thirds of the total number of National Assembly, the Bill w presented to the President for President returned the Bill for reco if the Bill was again passed b) Assembly, without amendment or w as suggested by the President in his simple majority vote, or if the Bill the National Assembly with am suggested by the President by vote: of the total members of the Natio the Bill would be presented to the assent.

When the Bill was sent to the Pn second time for consideration, the P do either of the following:

(a) give assent to the Bill;

(b) refer the Bill to a referendum
24 in the form of a question Bill should or should not reci

If the Bill received majority votet number of members of the electoral *President would be* deemed to have ass

1 part of the central legislature the President and one Howftj nal Assembly of Pakistan.31 uld summon the legislature **anil** eaker of the National AssembW i the National Assembly at 1 ss than one-third of the tc rs of the National Assembly and had summoned the legislature, ;ould prorogue it and not the

was also empowered to dissolve embly at any time subject to the case of dissolution the President office and there were to be fresh ih the President and the National s, no doubt, was a healthy check ry dissolutions of the National e President himself would have to Is of an election, and it was not ’resident would exercise the power lightly. The idea of summoning, id dissolving the legislature by the ms again more in accord w’th i , rather than a Presidential *is a further safeguard, the P

-* H

the National Assembly. The American President also has veto power though not an absolute one jnce the Congress can override his veto if the Bill ispassed again by a two-third vote in both ”Houses. The 1962 Constitution gave a more comprehensive and effective veto power. When a Bill had been passed by the National Assembly, the President mold do one of the following: I give assent to the Bill;) withhold assent from the Bill; or) return the Bill to the National Assembly with a message requesting that the Bill or a particular provision of the Bill be reconsidered and amendments suggested in his message be considered.

moan i;Tmembers of the * ”att’ertobereferredtoare^

lt in the form of a question

send messages to ill

entitled to vote.

If the President did not take any of these three

iieps, the Bill would be deemed to have received

iisassent after the expiry of thirty days.40

If the President withheld assent from a Bill, the

\aional Assembly could reconsider it and if the

Ml was passed again by the votes of not less than

no-thirds of the total number of members of the

\tonal Assembly, the Bill would again be

to the President for assent. If the

I Went returned the Bill for reconsideration and **li** to Bill was again passed by the National |tambly, without amendment or with amendment x-..lby the President in his message, by a It majority vote, or if the Bill was passed by al Assembly with amendments not ^...d by the President by votes of two-thirds (lie total members of the National Assembly, kBill would be presented to the President for

-Qthe Bill was sent to the President for the id time for consideration, the President could i of the folio wing:

1|a) give assent to the Bill; (k) refer the Bill to a referendum under Article
24 in the form of a question whether the Bill should or should not receive assent.

J Ilk Bill received majority votes of the total [ate of members of the electoral college, the it would be deemed to have assented to the

tie previous cous^nv v~ ..__ a Bill relating to preventive detention* ident had the right to veto Bills passed by

Legislative Powe'rs of the President

The President had the power to make and promulgate ordinances which had the same force of law as Acts of the central legislature. The President could promulgate an ordinance when the National Assembly stood dissolved or was in session and he was satisfied that circumstances existed which necessitated immediate legislation. Such an ordinance, however, had to be laid before the National Assembly as soon as practicable. If the ordinance was approved by the National Assembly, it was deemed to have become an Act of the central legislature. In case of disapproval by the National Assembly, the ordinance ceased to have any effect after the expiry of the prescribed period. The power of the President to make laws by ordinance was restricted to matters with respect to which the central legislature had competence.42 The power to legislate by ordinance was provided under both the interim and the 1956 Constitutions.

Presidential Control over the Budget

Critics of the Presidential system in Pakistan stressed again and again the possibilities of deadlocks between the President and the legislature over the budget in the absence of democratic traditions and conventions similar to those which have grown in the United States of America. Nobody could deny or dismiss altogether the validity of this apprehension. The Constitution Commission examined this issue in great detail and suggested a procedure by which the ultimate control of the public purse by the legislature was retained by providing the President with a limited power of certification for a period not exceeding one year. But if the deadlock continued

for more than one year, both the President and the legislature would have to face election. When the proposals of the Constitution Commission were reviewed by the Cabinet sub-committee, the recommendation of the Constitution Commission in respect of budgetary matters was not accepted. The Cabinet sub-committee was supposed to have evolved a new formula under which no new taxation or increase in the existing taxation or in existing

expenditure could take place unless the National Assembly approved.43 Ayub while introducing the
1962 Constitution stated that in order to reduce the chances of conflict between the National Assembly and the President, and to prevent paralysis of the administration, and to ensure continuance of ongoing schemes, the constitution provided that a previously passed budget would not be altered without the permission of the President and new taxation would not be levied without the consent of the National Assembly. This, according to Ayub, was based on the theory that the President was finally responsible to the country for administration and members of the National Assembly represented the feeling of the people who had to pay taxes.44

The 1962 Constitution drew a distinction between recurring expenditure and non-recurring expenditure. While the National Assembly had the power to discuss, debate, and pass opinion on nonrecurring expenditure, it would have no power to reject this item of the budget. It was only with regard to new expenditure and new taxation that the legislature had been given unqualified power.

Custody of the central consolidated fund, including payment of money into, and withdrawal of money from, that fund, and all matters connected with public money and public accounts were to be regulated by an Act of the central legislature or, subject to any such Act, by rules made by the President.45 The President was to present the budget, and the annual financial statement before the National Assembly. The financial statement was divided into two parts. Part one showing the expenditures charged upon the consolidated fund, the expenditure which the National Assembly could discuss, but not vote upon.46

As a safeguard for continuation of the economic development projects it was provided that the financial statement might specify in relation to a project the sum required not for the current year but also for the subsequent years of the project. Once the National Assembly had approved the project, the expenditures for the subsequent years could be placed before the National Assembly, but it would have no right to reject them.47 This particular provision regarding the development

projects was suggested by the Administrate Committee which examined proposals before to 1962 Constitution was finally drafted. Tie argument in favour of this restriction on the pew of the legislature was that these projects were vital to the economic development of the country an as such they should not be left to the whims oftk legislature. Once the National Assembly y approved them, it should be bound to grant rime) for the subsequent years. It was pointed outthatii the past development projects were often subjected to partisan or sectional considerations ail consequently had been hampered.48

After consideration of the annual budget estimate by the National Assembly, the Preside! had the responsibility of causing the schedule of authorized expenditures to be prepared showing (i) the sums to meet expenditures upon the central consolidated fund, (ii) sums granted or deemed to have been granted by the National Assembly undo Article 41. No money was to be withdrawn

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fed the central consolidated fund unless provided foi in the schedule of authorized expenditures is authenticated by the President and laid before tit National Assembly for information.49

Provisions for supplementary and excess budget estimates as well as provisions for unexpected expenditure had been provided in the 19C Constitution.50 If for any reason the schedule of authorized expenditure for a financial year coi not be authenticated before the commencement ol that year, the President could authorize withdrawl from the central consolidated fund of amounts to meet expenditures provided for in the annual budget estimates, but this was restricted to expenditures charged upon the central consolidated fund and recurring expenditures.51

No proposal relating to Money Bills, namely, no proposal for imposition of taxation, or for the appropriation of public revenues, or for borroinj of money and similar matters, could be made except with the recommendation of the President' As regards taxation, Article 48 provided thatm tax could be levied except by or under the au1 of an Act of the central legislature.53

Emergency Powers of the President

If the President was satisfied that a g emergency existed in which Pakistan or any of Pakistan was threatened by war or ext aggression or in which the security or econ life of Pakistan was threatened by inti disturbances beyond the power of a prov1 government to control, the President could is proclamation of emergency. The proclamati emergency had to be laid before the Na Assembly 'as soon as it was practicable', being no fixed time-limit. The President revoke a proclamation when satisfied th grounds on which it was issued had cea exist.54

During a time of emergency, the Preside authorized to make and promulgate ordinances as might appear to him to be nei to meet the emergency. The President exercise this extraordinary legislative pow when the National Assembly was in sessio

With the revocation of the proclama emergency the ordinances made by the P ceased to have effect unless such ordinan been approved by the National Assemb significant aspect of the emergency powei President was that the President's power laws by ordinance was again restricted w legislative competence of the central legi;

Although the constitution did not pres< time-limit, yet there was a safeguard undf
109 which laid down that there should b two sessions of the National Assembly and not more than 180 days should between the last sitting of the National; in one session and its first sitting in session. Since there was no provision tl an emergency the President would have; to suspend any clause of the constit National Assembly had to be summor
180 days of its last session, and this gave a time-limit during which President uthout the aid of the National Assemb

ggested by the Administrative h examined proposals before the tion was finally drafted. The mr of this restriction on the powers *i* was that these projects were vital : development of the country and juld not be left to the whims of the nee the National Assembly had , it should be bound to grant money lent years. It was pointed out that in ipment projects were often subjected or sectional considerations and had been hampered.48 sideration of the annual budget he National Assembly, the President msibilvty of causing the schedule of xpenditures to be prepared showing to meet expenditures upon the central fund, (ii) sums granted or deemed to ranted by the National Assembly undo No money was to be withdrawn from consolidated fund unless provided for edule of authorized expenditures as ed by the President and laid before the .ssembly for information.49 HIS for supplementary and excess budget as well as provisions for unexpected ire had *'"*~A* in the 1962

Emergency **Powers of the President**

If the President was satisfied that a grave emergency existed in which Pakistan or any part of Pakistan was threatened by war or external aggression or in which the security or economic life of Pakistan was threatened by internal disturbances beyond the power of a provincial government to control, the President could issue a proclamation of emergency. The proclamation of emergency had to be laid before the National Assembly 'as soon as it was practicable', there king no fixed time-limit. The President could tevoke a proclamation when satisfied that the {rounds on which it was issued had ceased to

exist54

During a time of emergency, the President was authorized to make and promulgate such ordinances as might appear to him to be necessary to meet the emergency. The President could exercise this extraordinary legislative power even when the National Assembly was in session. With the revocation of the proclamation of emergency the ordinances made by the President ceased to have effect unless such ordinances had Ken approved by the National Assembly. One sjnificant aspect of the emergency powers of the President was that the President's power to make is by ordinance was again restricted within the jislatwe competence of the central legislature. Although the constitution did not prescribe any (•limit, yet there was a safeguard under Article w, which laid down that there should be at least tio sessions of the National Assembly in a year not more than 180 days should intervene jieen the last sitting of the National Assembly *\VK* session and its first sitting in the next *m.* Since there was no provision that during (emergency the President would have any power nd any clause of the constitution, the ui Assembly had to be summoned within im days of its last session, and this indirectly pve a time-limit during which President could rule itot the aid of the National Assembly.

A CENTRALIZED FEDERAL SYSTEM

After independence, a highly centralized federal system was established in Pakistan under the interim constitution. There were a number of factors responsible for the dominance of the centre over the provinces. The Government of India Act,

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1935 as well as the 1956 Constitution provided for the centre's dominance over the provinces and most importantly political and financial controls of the centre over the provinces. If the centre had exercised this power in a broad national perspective, the dominance of the centre might have been an asset. Unfortunately, however, in the formative stages of Pakistan's nationalism, those in power at the centre during the political turmoil and instability in Pakistan of the 1950s could not inspire confidence among the people of East Pakistan and the result was a great sense of frustration and bitterness in East Pakistan against the centre. This is the reason why when the 1956 Constitution was framed, there were repeated demands for a weak centre in the second Constituent Assembly.

The political parties with predominant following in East Pakistan did not accept the 1956 Constitution as containing sufficient provincial autonomy. The fact was that even under the 1962 Constitution, the central government continued to dominate, and the provincial and regional feelings continued to grow, particularly over the economic development of the country.

The distribution of legislative powers under the Government of India Act, 1935 was unique in its character. It had three lists of powers. Following the model of the Government of India Act, all the constitutional drafts made in Pakistan and the 1956 Constitution also divided the lists of subjects into central, concurrent, and provincial. Similarly, in India, the same method of distribution on the basis of three lists had been followed. The 1962 Constitution, however, provided for a much simpler method of distribution of powers, under which there was only one list of subjects of national importance, all other subjects were left to the provinces.55 The central government, however, was given overriding powers in matters concerning the security of the country, coordination between

the provinces, and economic development. It was provided that the central legislature would have exclusive power to make laws (including laws having extra-territorial operation) for the whole or any part of Pakistan with respect to any matter enumerated in the third schedule of the constitution.56 The subjects given to the centre included defence, external affairs, inter-provincial trade and commerce, national economic planning and national economic coordination, currency, foreign exchange, central banking, insurance, nuclear energy, mineral oil and natural gas, industry owned wholly or partly by the central government or by a corporation set up by the centre, preventive detention for reasons connected with defence, external affairs, and the security of Pakistan. There were in all forty-nine items in the central list as against thirty in the 1956 Constitution, sixty-one under the Government of India Act, 1935, and sixty-six under the draft constitution of the first Constituent Assembly.

A UNICAMERAL CENTRAL LEGISLATURE

The 1962 Constitution, like the 1956 Constitution, provided for a unicameral system though most of the federal systems in the world have a bicameral system. The central legislature consisted of the President and one House known as the National Assembly of Pakistan.57 It had 156 members on the basis of parity of representation between East and West Pakistan. There were 150 elected constituencies, half elected by constituencies in East and the other half by constituencies in West Pakistan. Six seats were reserved for womenthree from East Pakistan, and three from West Pakistan.58 Whereas, under the 1956 Constitution, the seats reserved for women were for a period of ten years, there was no such time-limit under the 1962 Constitution. Women could also contest general seats in the National Assembly. Thus, female citizens in Pakistan enjoyed a double franchise. The term of the National Assembly was fixed for five years unless it was sooner dissolved by the President.59

The members of the National Assembly be elected under the same system as was for election of the President, that is, indued) jj the members of the electoral college A for election to the National Assembly had to k| least 25 years of age and his name had to the electoral roll for any electoral i constitution specified the disqualification could prevent a person from being electa member of the National Assembly.60 A personi not, at the same time, be a candidate forelectMi more than one seat in any Assembly ortoasai more than one Assembly. If a person who n member of one Assembly was elected to Assembly, then he would lose his seat u I previous Assembly, of which he was a member’

The President could summon and prorogue! National Assembly. The Speaker could the National Assembly on the requisition of*| third of the members and when the Sp summoned the National Assembly, only he **aril** prorogue it. If the offices of the President, Speak and Deputy Speaker, were vacant at any time *m* Chief Justice of the Supreme Court could summ) the National Assembly.62

No member of the National Assembly H| liable to any proceedings in any court in respeatf anything said or any vote given by him in dr National Assembly or any of its committees Ik privileges of the National Assembly, it committees, the members thereof and a pern entitled to

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speak therein could be determined If law.63 It was provided that if a member of I National Assembly was elected as President n appointed as a Governor or minister or to anyone office of profit in the services of Pakistan, k| would cease to be a member of the Assembly”

There were two interesting and novelprovismj under the 1962 Constitution with regard a ’instruction in law-making’ and ’conductin members’. The Speaker of an Assembly ml expected to make such arrangements as west necessary to ensure that the members offc] Assembly understood the functions of the Asseofy <’ as an organ of the state and of their responsibility as its members.65 Similarly, it was provided ite when the Speaker of an Assembly was that a member of the Assembly had committed)’

breach of the rules framed bj relating to the conduct of the me way as to have been guilty of gi **he** would refer the matter for Supreme Court (in case of the Nat **or** to the High Court (in the case Assembly) and if the court was s
• member had been guilty of gross ceased to be a member of the Assi

GOVERNORS AND PROVI LEGISLATURES

Ihc Provincial Legislatures and e smaller replicas of the national 1 executives, subject to overridin supervision of the President over executives. The provincial execut constitution were directly suboi President inasmuch as the provinci the head of the provincial executive by and held office during the pi President. The Governor was i figurehead but the holder of the authority in the province. The prov was responsible to the Governor v could not appoint or remove a Provi without the concurrence of the Pres further provided that Governor c should, in the performance of his subject to the direction of the Presid Relations between the provincial the Governor and the provincial e legislature were more or less the SE central government. The procec dissolution of a Provincial Ass however, different. In cases of con the provincial government and th Assembly, the conflict could be re National Assembly and if the Natior decided in favour of the Governoi President concurred, the Governor cc the Provincial Assembly.69

The financial procedure in the legislature resembled that of the centn and the powers of the provincial 1< respect of money matters were similai

embers of the National Assembly were to,

1 under the same system as was

3n of the President, that is, indirectly 1

>ers of the electoral college. A

m to the National Assembly had to

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oral roll for any electoral unit.

Dn specified the disqualification which

vent a person from being elected as a

f the National Assembly.60 A person could

same time, be a candidate for election to

one seat in any Assembly or to a seat in

i one Assembly. If a person who was a

if one Assembly was elected to another

, then he would lose his seat in thij

Assembly, of which he was a member.11

esident could summon and prorogue the

Assembly. The Speaker could summon

lal Assembly on the requisition of one-

the members and when the Speaker

I the National Assembly, only he could

t. If the offices of the President, Speaker,

y Speaker, were vacant at any time, the

ice of the Supreme Court could summon

ial Assembly.62

mber of the National Assembly was

ly proceedings in any court in respect of

said or any vote given by him in the

Assembly or any of its committees. The

i of the National Assembly, its

s, the members thereof and a person

speak therein could be determined by

vas provided that if a member of the

Assembly was elected as President or

is a Governor or minister or to any other

profit in the services of Pakistan, he

ie to be a member of the Assembly.64

ere two interesting and novel provisions

1962 Constitution with regard to

in in law-making' and 'conduct of

The Speaker of an Assembly was

o make such arrangements as were

to ensure that the members of the

mderstood the functions of the Assembly

of the state and of their responsibilities

bers.65 Similarly, it was provided that

speaker of an Assembly was satisfied

iber of the Assembly had committed a

breach of the rules framed by the Assembly § relating to the conduct of the members in such a *!* as to have been guilty of gross misconduct, i would refer the matter for ”inquiry to the ISupreme Court (in case of the National Assembly) icr to the High Court (in the case of a Provincial I Assembly) and if the court was satisfied that the f member had been guilty of gross misconduct, he ceased to be a member of the Assembly.66

GOVERNORS **AND PROVINCIAL** LEGISLATURES

The Provincial Legislatures and executives were mailer replicas of the national legislatures and executives, subject to overriding control and supervision of the President over the provincial executives. The provincial executives under the constitution were directly subordinate to the President inasmuch as the provincial government, the head of the provincial executive was appointed by and held office during the pleasure of the President. The Governor was not merely a figurehead but the holder of the real executive authority in the province. The provincial Cabinet »as responsible to the Governor who, however, could not appoint or remove a Provincial Minister without the concurrence of the President.67 It was further provided that Governor of a province should, in the performance of his functions, be subject to the direction of the President.68

Relations between the provincial Cabinet and the Governor and the provincial executive and lature were more or less the same as in the tentral government. The procedure for the dissolution of a Provincial Assembly was, however, different. In cases of conflict between provincial government and the Provincial Assembly, the conflict could be referred to the National Assembly and if the National Assembly decided in favour of the Governor and if the President concurred, the Governor could dissolve ihe Provincial Assembly.69

The financial procedure in the provincial legislature resembled that of the central legislature Bd the powers of the provincial legislature in ttspect of money matters were similarly curtailed.

The provincial governments were structured in a manner similar to the central government. The Governor, like the President, was the chief executive of a Province and selected his council of ministers.70 He could appoint Parliamentary Secretaries and the Advocate-General.71 However, the Governor, being an appointee of the President, had to work under the direction and supervision of the President. Although several ideas under the
1962 Constitution were borrowed from the Constitution of the United States of America, yet there was major digression in the matter of appointment of Governors. The Governors of the states in the United States are elected like the President, for a fixed term and enjoy autonomy within their own sphere.

The provisions regarding Provincial Consolidated Funds and Public Moneys of provincial governments were similar to the provisions regarding Central Consolidated Fund and Public Moneys of the central government respectively. Financial procedure of the provinces was similar

to the financial procedure of the centre.72

RELATIONS BETWEEN THE CENTRE AND THE PROVINCES

A provincial legislature was given more power to make laws for the province or any part of the province with respect to any matter other than those enumerated in the central list.73 The central legislature, however, could legislate on any matter connected with a provincial subject on the grounds of national interest in relation to the security of Pakistan, including the economic and financial stability of Pakistan, planning, co-ordination, or the achievement of uniformity in respect of any matters in different parts of Pakistan.74 The central legislature could also legislate on a provincial subject when the provincial legislature authorized the central parliament to make any laws in a matter not enumerated in the third schedule. If a resolution to that effect was passed by the provincial legislature, the central legislature had the power to make laws in provincial matters but any law made in pursuance of this power could be amended or repealed by an Act of the provincial legislature.75

In case of conflict between the central and provincial laws the latter had to give way to the former to the extent of such repugnancy.76 The
1962 Constitution, like the 1956 Constitution, had provided predominance of the central legislative powers over provincial powers. Such was the provision also under the Government of India Act,
1935 and the same is the case with the Indian Constitution.

Residuary power had been vested in the provincial legislatures which had an undefined residuum of power to make laws with respect to any matter not enumerated in the third schedule. The question whether residuary powers should be vested in the federal or provincial authorities produced lengthy discussion and controversy in the Constituent Assemblies of Pakistan. Those who wanted to make the centre strong naturally wanted this power to remain with the central authority, arguing that it should have as free a hand as possible to meet the changing needs and requirements of society. In the Indian Constitution, the residuary subjects are with the centre. The supporters of provincial autonomy in Pakistan were equally firm in demanding residuary powers for the provinces and ultimately the 1956 Constitution vested the residuary power in the provinces; this practice was retained under the 1962 Constitution. Both the Government of India Act, 1935 and the 1956 Constitution contained detailed provisions relating to the administrative relation between the centre and the provinces. The 1962 Constitution, however, contained hardly any provision in this respect. It was provided that executive authority of the central government extended in all matters with respect to which the central legislature had exclusive power to make laws under clause (1) of Article 131,77 Where a law was made by the central legislature on a provincial subject and if the law provided that such law was to be administered by the central government, the central executive authority might be extended to the execution of such law. The extent of the executive authority of the province was defined to include *all matters over whJeh the Jt&tfte/z/si? tzSdfe pronnce Aa* power to make laws.78 Other than *these two Articles* there is no further provision as to the *$flfRM?fl$fae r.»}°t>01°* A”-
’ *mUtmmt* KfefcaR tafrHmtofc mure ana the provinces. *The Presidext could delegate with (fie*

consent of a provincial government function relation to any matter in which the execto authority of the central government extended1

DISTRIBUTION OF FINANCIAL RESOURCES BETWEEN THE CENTRE AND THE PROVINCES

Under the 1962 Constitution, the allocation of proceeds of the taxes and duties collected* administered by the central government to ki provinces were as follows:

i. 50 per cent of the income tax includu corporation tax, as compared to 50 per ta of income tax excluding corporation ft! and taxes collected in Karachi under ij previous arrangement, ii. 60 per cent of the sales tax as against il per cent in the previous arrangement
60 per cent of the excise duties on toL, tea, and betel nuts were allocated to Ik provinces as against 50 per cent under! previous arrangement.
100 per cent of the export duties on j* and cotton would go to the provinces! compared to 62.5

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per cent of the expjt duties on jute allotted to East Pakisto under the previous arrangement. Under It new arrangement both East and West Pakistan would receive 100 per cent ska from the joint pool of export duties on jilt and cotton on the basis of population

lii.

IV.

The basis of allocation had also been changed According to the previous arrangement, income ta and excise duties were distributed broadly in tit ratio of 55 per cent to West Pakistan and 45 ps cent to East Pakistan and sales tax was distributed on the basis of collection. The new basis of allocation as regards sales tax was 70 per cent to be allocated on the basis of population and 30 pa cent on the basis of incidence, that is, the point of collection, and as *regards the remaining taxes, fix]*

were distributed on the basis of population.*1 *Asfegards the distribution of the* power to tax

between the *SsntK 9J)d tpa *>””•: •* ’

evfttGGH (lie cci/ire ana me atavkcss,, ti» *m*

Constitution did not alter the *scheme of distribution* as given under the interim and the 1956

Constitution. The President, hov constitute a National Finance consisting of the central Finance provincial Finance Ministers ar persons as the President might consultation with the Governors oft The Commission was to make rec to the President as to the distribute central and the provincial goven proceeds of the central taxes.

The National Economic Coun appointed by the President by r members.82 The functions of Economic Council were to revie economic development of Pakistan, that in formulating the plans, Economic Council was to ensure between the provinces, and between within a province, in relation to inc should be removed and the resourc including resources in foreign excl and allocated in such a manner 1 between the provinces should be i shortest possible time. It was furth the duty of each government shov the utmost endeavour to achieve removing economic disparity provinces.

AN INDEPENDENT JUDIC

When Ayub decided to restore government and the 1962 Const process of being drafted, there i universal demand for restoratic jurisdiction and powers of the c incorporation of a Bill of Rights constitution. The Shahabuddin stressed and emphasized the independence of the judiciary shoulc as had been the practice for a lonj inroad into it, which had been fc during the martial law period, shoul as a precedent. The Sbahabuddi

recommended all the safeguards

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independence of the judiciary as rec the 1956 Constitution. The recomi the Sfeahabuddin Commission re

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ETWEEN THE THE PROVINCES

istitution, the allocation of the xes and duties collected and ic central government to the bllows:

of the income tax including tax, as compared to 50 per cent tax excluding corporation tax ollected in Karachi under the angement.

of the sales tax as against 50 he previous arrangement, of the excise duties on tobacco, tel nuts were allocated to the
5 against 50 per cent under the angement.

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0 62.5 per cent of the export ute allotted to East Pakistan ’evious arrangement. Under the Cement both East and West >uld receive 100 per cent share nt pool of export duties on jute an the basis of population.

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1 the basis of population.10 distribution of the power to tax e and the provinces, the 1962 it alter the scheme of distribution

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ion with the Governors of the provinces.” Commission was to make recommendations to (he President as to the distribution between the central and the provincial governments of the proceeds of the central taxes. The National Economic Council was to be ippomted by the President by nominating its members.82 The functions of the National Economic Council were to review the overall economic development of Pakistan. It was stressed fat in formulating the plans, the National Economic Council was to ensure that disparities teeen the provinces, and

between different areas whin a province, in relation to income per capita staid be removed and the resources of Pakistan, icluding resources in foreign exchange, be used md allocated in such a manner that disparities toeen the provinces should be removed in the iortest possible time. It was further stressed that It duty of each government should be to make it utmost endeavour to achieve this object of moving economic disparity between the (minces

\ INDEPENDENT **JUDICIARY**

ira Ayub decided to restore constitutional jpveninient and the 1962 Constitution was in FUKS of being drafted, there was an almost nersal demand for restoration of the full Motion and powers of the courts and the wporation of a Bill of Rights under the new •titution. The Shahabuddin Commission ted and emphasized the fact that the Wtodence of the judiciary should be maintained lU been the practice for a long time and any *m* into it, which had been found necessary P^lhe martial law period, should not be treated iiprecedent The Shahabuddin Commission ninmH all the safeguards to ensure the of the judiciary as recognized under

1)56 Constitution. The recommendations of iStohabuddm Commission relating to the

powers of *the judiciary and fundamental rights were.* howey~~ --•>•-*• •

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committee when giving final1

^^”””^SSr^vocm} ol tenure of office and other conditions which give trust and confidence to the judiciary were guaranteed in the 1962 Constitution. The method of removal of judges of the superior courts was, however, made different from that of the 1956 Constitution. Under that constitution, judges of the Supreme Court would hold office till the age of 65 years unless, of course, they were removed from office on the ground of misbehaviour or infirmity of mind or body by an Order of the President, following an address by the National Assembly praying for such a removal. Under the 1962 Constitution, the President was to appoint a council to be known as the Supreme Judicial Council, consisting of the Chief Justice and the two next senior judges of the Supreme Court, and the Chief Justice of each High Court.83 If, on information received from the Supreme Judicial Council, or from other sources, the President was of the opinion that a judge of the Supreme Court or of a High Court might be incapable of performing the duties of his office by reason of physical or mental incapacity or might have been guilty of gross misconduct, he was to direct the Supreme Judicial Council to enquire further into the matter and remove the judge from office if need be. The method of removal of the judges under the 1962 Constitution was on the same lines as that recommended by the first Constituent Assembly in its draft constitution of
1954. The idea behind the new method was that legislatures in the country were not yet mature and competent enough to decide the issues relating to the removal of judges. It had indeed been suggested in some quarters that for some time to come, legislatures might not have the requisite integrity and competence to sit in judgment over a superior court judge.

It would be incorrect to say that the judiciary had no part in interpreting the constitution. The

original power under the 1962 Constitution of the Supreme Court included jurisdiction in any dispute between the central government and a provincial government, or between two provincial governments. Similarly, the appellate jurisdiction of the

Supreme Court provided that an appeal from a judgment, decree, order or a sentence, would lie as of right if the High Court should certify that the case involves a substantial question of law as to the interpretation of the constitution.84 Thus, Articles 57 and 58 appeared to be in conflict with Article 133 which laid down that responsibility for deciding whether a legislature had power under the constitution to make a law was that of the legislature itself, and that the validity of a law would not be called in question on the ground that the legislature by which it was made had no power to make the law. How could the judiciary settle disputes between the central and a provincial government, or interpret the constitution, if it had no power to decide the constitutionality of enactments passed by any legislature?

The first amendment of the 1962 Constitution, made in 1963, however, greatly changed this position.85 The judiciary was vested with full power to pass judgment over the *vires* of the legislature. Judicial control over the executive from the inception of the 1962 Constitution had been fully maintained. As to the judicial review of executive action, the 1962 Constitution had faithfully preserved the jurisdiction of the courts, on the lines of the common law of England. The substance of the former writ jurisdiction which were greatly valued and cherished in Pakistan had been preserved under the Constitution of 1962 though the latin names of *habeas corpus, mandamus, certiorari,* and *quo-warranto* had not been mentioned.86

Other provisions relating to the Judiciary regarding appointment of the Chief Justice and judges of the Supreme Court; the Chief justices and judges of the High Courts; their retirement age; appointment of acting Chief Justice, acting judges and ad hoc judges of the Supreme Court; appointment of acting Chief Justice and Additional judges of the High Courts; transfer of judges; and their remuneration were identical or similar to the provisions of the 1956 Constitution.87

ELECTIONS THROUGH THE ELECTORAL COLLEGE

As discussed above, the Constitution of 1962 introduced indirect elections not only for the

President but also for the National as well Provincial Assemblies. The Basic Democrats were elected, constituted the electoral college the election of the President and the Asseml The Basic Democrat, who was elected for the self government, was called elector and the in both provinces constituted the electoral for five years. On the expiry of five years J electoral college stood dissolved. However a functions performed by these electors in relata to matters of local government would disturbed by the dissolution of the college.88 An electoral roll had to be nic, for each electoral unit.8’ The qualification forta) elected as an elector was that he had nottobels than 25 years of age.90

The system of indirect election to fc Assemblies, in particular, was quite unusual foil democratic constitution and created a stioij possibility of political corruption and purchased sale of votes. After all a member of the Nation! Assembly was elected by about 500 to 550 elect* on the average and a member of a Provincn Assembly was elected by half as many electors Hence, the

inherent possibility of purchase of vets in such a set-up. Furthermore, the members oftB legislatures are representatives of the people large in a democratic system and ought to It elected by the people through universal su: In this system, as given by the new constitution the representatives of the people were not elected by the people themselves.

Indirect election to the office of the President n not unusual in other countries. The constitutions of India, Germany, Italy and quite a few othei countries provide for indirect elections for the Presidency based on an electoral college consisting of the central and provincial legislatures Butt must be borne in mind that in these countries, that is parliamentary form of government and the President is only a figure head. The real power rests with the Prime Minister and the cabinet In the presidential system of government, the President has dual capacity of the head of states well as the head of government. Thus, most of the constitutions providing for the presidential system require the President to be elected by the people of the country directly on the basis of adult franchise

ISLAMIC CHARACTER OF CONSTITUTION

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Further, it was laid down in Policy that (i) teaching of the Q to the Muslims of Pakistan compulsory-the word Islamiat in the relevant Article of the fo (ii) unity and observances o standards would be promoted ar of Pakistan; (in) proper orgar *waqfs,* and *mosques* should be provided that the bonds of uni countnes should be preserved ai The head of the state, the Pr as in the 1956 Constitution, a V
1956 Constitution also the Presi< for the Muslims and the Consti favoured the retention of this cl Article 1 of the 1956 Cons Pakistan an ’Islamic Republic’ that ’Pakistan shall be a fedc known as Islamic Republic rele\ ant clause of the new con simply that the ’state of Pakista under the name, the ”Republic word ’Islamic’ was dropped. Assembly met in 1962, there the word ’Islamic’ should be was justification for this d provisions were to be mainte

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ISLAMIC **CHARACTER OF THE**

CONSTITUTION

itreamble, so far as the Islamic character of •”e constitution was concerned, was almost identical with that of the 1956 Constitution. The
- amble followed the Objectives Resolution in

i emphasis on the principles of democracy, teedom, equality, tolerance, and social justice, nth the qualification that these principles should tie observed as enunciated by Islam.

Islamic provisions were continued, as in the
1956 Constitution, in the Directive Principles where according to the constitution, ’the Muslims of Pakistan should be enabled individually and collectively to order their lives in accordance with Ike fundamental principles and basic concepts of Islam and should be provided with the facilities thereby they may be able to understand the meaning of life according to those principles and concepts.”

Further, it was laid down in the Principles of Policy that (i) teaching of the Quran and Islamiat to the Muslims of Pakistan should be made compulsory-the word Islamiat was not included in the relevant Article of the former constitution; In) unity and observances of Islamic moral standards would be promoted among the Muslims of Pakistan; (in) proper organization of *zakat,* wqfs, and *mosques* should be ensured.92 It was provided that the bonds of unity among Muslim countries should be preserved and strengthened.93 The head of the state, the President, was to be, Kin the 1956 Constitution, a Muslim.94 Under the
1956 Constitution also the Presidency was reserved

•*L*- Muslims and the Constitution Commission j the retention of this clause. Je 1 of the 1956 Constitution designated radian an ’Islamic Republic’. It was laid down fa ’Pakistan shall be a federal republic to be town as Islamic Republic of Pakistan’. The ttkvant clause of the new constitution laid down amply that the ’state of Pakistan shall be a republic under the name, the ”Republic of Pakistan”.’95 The rad Islamic’ was dropped. When the National Assembly met in 1962, there was a demand that it word ’Islamic’ should be reintroduced. There re justification for this demand. If Islamic ^visions were to be maintained, there was no

reason why the republic should not be designated an Islamic Republic. The first amendment, therefore, rectified the anomalous position.

The most important Islamic provision in the
1956 Constitution was Article 198 which laid down that no law should be enacted which would be repugnant to the injunctions of Islam as laid down in the Holy Quran and *sunnah* and that existing laws should be brought into conformity with such injunctions. This Article 198 provided that the President would appoint a commission to make recommendations as to the measures for bringing existing laws into conformity with the injunctions of Islam and as to the stages by which measures should be brought into effect and to compile in a suitable form for the guidance of National and Provincial Assemblies such injunctions of Islam as could be given legislative effect. But it was the legislature which was given the final authority to accept or reject the recommendations of the Islamic Commission. So, ultimately it was the National Assembly which would decide whether a particular law would be repugnant to the injunctions of Islam and would also decide how far and which or what existing laws should be brought into conformity with the Islamic injunctions.

The 1962 Constitution substituted Article 198 of the 1956 Constitution with a simple clause on the ’principles of law making’ to the effect that ’no law should be repugnant to Islam’.96 The responsibility of deciding whether a proposed law disregarded or violated Islam or was otherwise in accordance with the principles of law making was that of the legislature concerned. This provision was not enforceable in the law courts and it was one of the principles which the law makers had to bear in mind.

The 1962 Constitution provided for an Advisory Council of Islamic Ideology to be appointed by the President. It was to consist of not less than five or not more than twelve members who would be appointed on such terms and conditions as the President might determine. In selecting the members of the council, the President was to have regard to the persons’ understanding and appreciation of Islam and of the economic, political, legal, and administrative problems of Pakistan. The members were to hold office for a period of three years. The President might remove

a member from office if a resolution recommending his removal was passed by a majority of the total members of the council.97

The function of the council was to make recommendations to the governments, both central and provincial, as to the steps and means which would enable and encourage the Muslims of Pakistan to order their lives in accordance with the principles and concepts of Islam. A more important function of the council, however, was to advise the National Assembly, a Provincial Assembly, the President or a Governor, on any question referred to the council for advice as to whether a proposed law disregarded or violated or was otherwise not in accordance with the principles of law-making enumerated under Article 6 of the constitution.98

The advice of the council was not binding on the legislature or the President or the Governor. The responsibility of deciding whether a proposed law did or did not disregard any of the principles of law-making was that of the legislature concerned. The council was given only an advisory power and the legislature itself was the final arbitrator.

The Islamic Research Institute which was provided for under Article 197 of the late constitution, was retained under the new constitution. It was provided that there would be an institution to be known as the Islamic Research Institute which was to be established by the President.99

CONCLUSION

The principal objections to the 1962 Constitution were the Presidential system, the indirect franchise, and the non-justiciability of fundamental rights. Ayub was not willing to consider the preference of the East Pakistanis for parliamentary form of government. He felt very strongly about the state structure he had created under the 1962 Constitution and removal of any vital element from the constitution, in his opinion, would cause the whole edifice to collapse. He was convinced that only a Presidential form of government could ensure Pakistan's unity and hence, there could be no tempering with this feature of the constitution.

He felt that all the powers of state shot,,,, concentrated in the hands of the Prest alone could guarantee unity, integrity,^ solidarity of the state of Pakistan.

NOTES

1. President Ayub's Broadcast of 1 March *Speeches and Statements of P.M. MohammH Khan,Vol* IV, p. 170.

2. Ayub was well aware of the views of Qadir and Bhutto who had already written I in support of Ayub's ideas on future cor A document drafted by Manzoor Qadir on 261
1960 and the other titled "Thoughts on

by Bhutto on 10 October 1959 had already what Ayub desired in the future ConstitutMl way of limited and indirect franchise, structure and very powerful presidency, Gauhar in his biography

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of Ayub, at page Ityl referred to his Personal Papers in regard to I documents.

3. Ayub Khan, Mohammad, *Friends, Not*
1967, pp. 205-206, Oxford University London.

4. Ibid., pp. 212-16.

5. Gauhar, Altaf, *Ayub Khan-Pakistan's Military Ruler,* 1994, Sang-e-Meel Public pp. 179-81 and 184-6.

6. Choudhry, G.W., *Constitutional Developmll Pakistan,* 1969, p. 178, Longman Group London.

7. The Constitution of the Republic of Pakistan, 1 Article 1. PLD 1962 Central Statutes 143.

8. The Constitution of the Islamic Republic Pakistan, Part I, Article 1. PLD 1956 Central, and Notifications 54.

9. A Pledge Redeemed-a pamphlet circulated by Ik Government of Pakistan in March 1962, explain) and justifying the Constitution. Quoted by Of Choudhry, *Constitutional Development in Pnhsta, \ supra,* note 7, p. 190.

10. *Speeches and Statements of P.M. MohammiAji Khan,* Volume IV, p. 170.

11. The Constitution of 1962, Article 9.

12. Ibid., Article 10.

13. Ibid., Article 155.

14. Ibid., Articles 156, 157, and 158.

15. Ibid., Article 165.

16. A Pledge Redeemed, *supra,* note 9.

17. The Constitution of 1962, Article 226.

18. Ibid., Article 167. .19. Ibid., Articles 165 and 166.

Ibid., Article 13.
21. Ibid., Article 14.

Ibid., Article 116.
123. Ibid., Article 31.

Ibid., Article 32.

Ibid., Article 18.

Ibid., Articles 33, 36, 50, 66, 92, 14

182, 191, and 201. f?7. Ibid., Article 17.

Ibid., Article 118.

Ibid., Article 121. f30. Ibid., Articles 103 and 104.
31. Removal of Difficulties (Appointment

Order, 1962. President's Order No.

PLD 1962 Central Statutes 647. [32. Fazlul Quadir Chowdhry v Mohan

Haque, PLD 1963 S.C. 486, up

Judgment of the Dhaka High Court ir

Abdul Haque v Fazlul Quadir Chowdri

1963 Dhaka 669.

33. The Constitution of 1962, Article 19.

34. Ibid., Article 22.

35. Ibid., Article 23.

36. Ibid.

37. Ibid., Article 24.

38. Ibid., Article 25.

39. Ibid., Article 26. ;40. Ibid., Article 27. II. Ibid., Article 29.

f 42. Ibid., Article 29.

i 43. Choudhury, G.W., *Constitutional De*

Pakistan, supra, note 6, p. 203. \ 44. *Speeches and Statements of P.M. Moh*

Khan, Vol. IV, p. 173. I 45. The Constitution of Pakistan, 1962, A j 46. Ibid., Article 41. \ 47.

Ibid., Article 42.

i 38. Choudhry, G.W., *Constitutional Dei Pakistan, supra,* note 6, pp. 204-205. I 49. The Constitution of 1962, Article 43.
50. Ibid., Articles 44 and 45. | 51. Ibid., Article 46. ” 52. Ibid., Article 47.

53. Ibid., Article 48.

54. Ibid., Article 30.

55 Ibid., Third Schedule to the Constituti

11 the powers of state should be i the hands of the President who guarantee unity, integrity, and e state of Pakistan.

NOTES

\yub's Broadcast of 1 March 1962, *id Statements of P.M. Mohammad Ayut* IV, p. 170.

well aware of the views of Manzoi Bhutto who had already written articli of Ayub's ideas on future constitutio1 it drafted by Manzoor Qadir on 26 MJ le other titled 'Thoughts on constitutioi on 10 October 1959 had already voiced) desired in the future Constitution by lited and indirect franchise, centralized and very powerful presidency. Al1 his biography of Ayub, at page 176, i his Personal Papers in regard to these

ii, Mohammad, *Friends, Not Mastei*
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88. Ibid., Article 158.

89. Ibid., Article 156.

90. Ibid., Article 158(1).

91. Ibid., Principles of Policy, Para 1.

92. Ibid.

93. Ibid., Para 21.

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97. Ibid., Articles 199, 200, 201, 202, and 203.

98. Ibid., Article 204.

99. Ibid., Article 207.

13 Ayub's Civilian Face

On the promulgation of the 1962 Constitution, the three-and-a-half year martial law era of Ayub came to an end and a civilian constitutional government under Ayub replaced his previous military regime. Under Article 225 of the 1962 Constitution, the Presidential Proclamation made on 7 October 1958, imposing martial law throughout the country, was revoked with effect from the convening day. The Laws (Continuance in Force) Order, 1958 and certain other President's Orders were also replaced. All martial law regulations, except five, including the West Pakistan Land Reforms Regulation and Scrutiny of Claims (Evacuee Property) Regulation, were replaced. The saved martial law regulations were to become Acts of the central legislature from the dates given against them.' All the laws existing on the commencing day continued to remain in force so far as applicable and with necessary adaptations until altered, repealed, or amended by the appropriate legislature. The President was, however, empowered to make, by order, such adaptations which he deemed necessary or expedient, in any provision of the existing laws in order to bring it in accord with the provisions of the Constitution. This power could be exercised by the President within two years of the commencing day. The President could also authorize a Governor to exercise such power in relation to his province. The day when the Constitution was to come into force was also when the first meeting of the National Assembly was be to held.2 However, for the purpose of holding elections to the assemblies, the constitution was to be deemed to have taken effect from the date of its election.3 The President was given the power to make an Order for the removal of difficulties within three months of the commencing day by which the constitution would be subject to such adaptations, whether by way of modification, addition, or omission, as may be deemed necessary or expedient for the removal of difficulties.4 When in exercise of such power, Ayub made the Removal

of Difficulties (Appointment of Ministers)
1962 by which members of the National were made eligible for appointment as without losing their seats in the Assam Supreme Court, upholding the judgment ofll High Court, declared the President's Order* *vires* being in excess of his power under tie
224(3).5

The pending proceedings before any sp military court or a summary military court i commencing day stood transferred to the courts which had the jurisdiction to try thi constituted by the facts of that case under law.6 The pending petitions for review of awarded by military courts were to be dispo by the Commander-in-Chief of the Pakistan A or Commander of Corps, depending upon length and gravity of the sentences.7 SunJi these authorities could entertain petitions annulment and commutation of sentences awarded by the military courts.8 All sent passed during martial law by a martial authority were deemed to have been lawfully and would be carried into execii according to their tenure.9 Complete protection given to all actions done and proceedings ti during the period by any martial law authority none of these actions or proceedings coul called into question.10 Complete indemnity! also provided to all actions and proceedings connection with the administration of martial In All martial law orders made or issued by *a* martial law authority stood repealed on iin commencing day.12

POLITICAL SITUATION AT THE TIME OF THE 1962 CONSTITUTE

As discussed earlier, Ayub was personally opposu to political parties and accused them of causing instability and uncertainty in the country. Hewei

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I ordinance on 10 May 1962, banning 1 organizations for political purposes ^National Assembly had had time to ex i question of political parties ’after full *i* .discussion’, and had legislated upon it.’ hibited the setting up of political orgj I well as the collection of funds for thei quisition or ownership of property janizations. It was also providec sociation of persons, with or wi nizational structure, could call itself i former party names.13 When the new National Assembly m : time on 8 June 1962, Ayub (who v during the session as the first Pre tistan under the new Constitution), a j the session, stressed that martial law f lifted with the enforcement of the Constii Flbat the country was governed by the m of the land.

The National Assembly met on 8 Jun Jpindi. The Constitution came into date.14 Ayub addressed the asser •mounced that martial law had been ti aod after forty-four months, a civilian go had been restored. He emphasized that .Wpport all efforts aimed at ensuring the ,md development of the country but that [deal harshly with those who sought to d polity by undermining the people’s conf the government. In order to facilitate the of the National Assembly, seventeen Parli Secretaries (drawn from the membership Chief Parliamentary Secretary and Chi were appointed who were to maintain liaison between all members of the Assembly (MNAs), the Minister-in-C Divisions, and their administrative se< Essentially, they were to assist the mir parliamentary activities. The Parlia Secretaries were also entrusted wit! relations duties for their respective divisio like the basic democracies which were 1 and dominated by the bureaucracy, the le were brought under administrative influel The central and provincial gov< secretariats were reorganized in this pi addition, many of the heretofore centrally

AYUB'S CIVILIAN FACE

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5 (Appointment of Ministers)' h members of the National As ligible for appointment as mil g their seats in the Assembly,! rt, upholding the judgment of " leclared the President's Order as t excess of his power under the)

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:AL SITUATION AT THE ? THE **1962** CONSTITUTION

:d earlier, Ayub was personally opposed I parties and accused them of causing md uncertainty in the country. He issued

an ordinance on 10 May 1962, banning the revival of organizations for political purposes until the National Assembly had had time to examine the ion of political parties 'after full and public non', and had legislated upon it. The Order inhibited the setting up of political organizations, inwell as the collection of funds for them, and the usition or ownership of property by such Kganizations. It was also provided that no :iation of persons, with or without an izational structure, could call itself by any of jk former party names.13

When the new National Assembly met for the time on 8 June 1962, Ayub (who was sworn king the session as the first President of under the new Constitution), addressing session, stressed that martial law had been with the enforcement of the Constitution and the country was governed by the normal law land.

National Assembly met on 8 June 1962 in The Constitution came into effect on
14 Ayub addressed the assembly and that martial law had been terminated liter forty-four months, a civilian government been restored. He emphasized that he would all efforts aimed at

ensuring the stability development of the country but that he would harshly with those who sought to disrupt the by undermining the people's confidence in government In order to facilitate the operation iie National Assembly, seventeen Parliamentary les (drawn from the membership) and one Parliamentary Secretary and Chief Whip appointed who were to maintain a close between all members of the National Jy (MNAs), the Minister-in-Charge of and their administrative secretaries. ', they were to assist the ministers in activities. The Parliamentary ,es were also entrusted with public duties for their respective divisions. Thus, tie basic democracies which were linked to Etanmatedby the bureaucracy, the legislators w brought under administrative influence. Ike central and provincial government ettanats were reorganized in this period. In jam, many of the heretofore centrally directed

activities were provincialized. The railways15 and the Industrial Development Corporation16 were bifurcated, and agricultural development corporations were established in each province. Each provincial government was given its own Planning and Development and Basic Democracies departments while the central government promised funds for new projects.

The President's Cabinet underwent some major changes in this period. The new advisory group reflected the political climate which suddenly enveloped the country. Manzoor Qadir retired from public life and resumed legal practice in Lahore. Some people believe he was simply exhausted and had requested the President to relieve him. Others thought his role as chief draftsman of the Constitution made it necessary for him to step down. Rumours circulated that he disagreed with the President's intention to politicize the administration and yield to pressure to reinstate the political parties.17 The Cabinet included a number of politicians. The former prime minister, Muhammad Ali (Bogra), succeeded Manzoor Qadir as Foreign Minister. Similarly, Abdul Monem Khan (replaced Ghulam Faruque as Governor of East Pakistan), Wahiduzzaman, Abdul Sobur Khan, A.K.M. Fazlul Quadir Chowdhry, Shaikh Khurshid Ahmad, Abdullah-al-Mahmood, Abdul Waheed Khan, and Al Haj Abd-Allah Zaheer-ud-Din (Lai Mia) were selected from among the victorious members of the National Assembly to fill the ministerial positions.

The President's tactics were obvious but unconstitutional. Article 104 of the new Constitution specifically prevented a minister from serving in the National Assembly. The President ignored this section and proceeded to issue Order 37 which allowed the ministers to keep their legislative positions. When the President's action was challenged in the High Court of East Pakistan, it was ruled unconstitutional and the ruling was later sustained by the Supreme Court.18

The inability of the President to modify the Constitution was partly due to the expanding influence of the political opposition, and partly due to the judiciary under the leadership of Chief Justice A.R. Cornelius. The judiciary enjoyed a high level of independence during the period and

the Court owed much to the integrity, independence, learning, and leadership of the late Justice Cornelius.

The ban on political parties continued by proscribing anyone from holding out as a member of a political party and by making such conduct punishable by law.'9 This condition was later relaxed in an election to the electoral college.20 This prohibition was virtually removed by the Political Parties Act, 1962 and anyone could hold out at an election as a member of, or candidate having the support of, a political party.

The political activity that followed the enforcement of the Constitution focused on the Constitution. Those in the opposition condemned it as autocratic and undemocratic. The banning of political parties, the continuation of restrictions on the EBDO'd politicians and those convicted under the Security of Pakistan Act, the forced detention of other political figures, the indirect process of elections, and the non-justiciability of fundamental rights were offered as grounds. The silence of the President on these expressions of political disfavour encouraged some of the more vocal members to seek legislation in the Assembly for the legalization of political parties. In point of fact, the National Awami Party (NAP), Muslim League, Jamaat-i-Islami, Awami League, and Krishak Sramik Party were already operating with impunity outside the legislatures. On 4 July 1962, a bill providing for the formation and regulation of political parties was drafted by the government and referred to a select committee of the Assembly.

The select committee was composed of people representing different shades of opinion, and three days Iot':" *u~- -~' 1 •••••-

difficult for the opposition in the to Assembly to associate itself with the new li the law prevented the disqualified iind Elective Bodies Disqualification Order, 19! participating in political activities, and it j government authority to declare others i should they engage in activities cobdetrimental to the health and secunlyi(| nation],22 political parties were quick to leg their operations after its enactment

REVIVAL OF THE POLITICAL i PARTIES AND POLITICAL ACTIIH)

POLITICAL PARTIES ACT, **1962**

Within a few days, the Jamaat-i-Islami alul« that it was back in business. In August, the%i i-Islam Party revealed its intention to enja political activity. Although Ayub acknowL that he was a prisoner of events and henctq forced to accept the reinstatement of pol parties, he was convinced that the country <. be better off without them. Nonetheless,^
20 July, accepting the *fait accompli,* he i fervent plea for a broad-based nationalist piparty which could unify the nation and diffll energies towards constructive endeavours Ailj time, it did not seem that he would consider^ any political party. He emphasized his conceal! a party organized

and led by him would ram the opprobrium of the people in that it wooUlj considered a ’King’s Party’.23 HoweverJ urged his followers to get on with the ji building a party that would represent I government in the assemblies, and it was km that he urged government members to tali I name of the defunct Muslim League Theft was criticized for using the name of the J League, but no one disputed the fact t *& ([[naarfatf as a* po/iticaf symbol to the r , *)* - / -- ” *”’fa*

„ *i’ty’6) agree* on a *mo Jus I* power which still sought to legitimize itself

operandi. Nevertheless, on 14 July the draft bill The Muslim League, on its revival, wasspllj

was *put up to a* vote and passed virtually into three factions. The *’conventionists’,2’* win

unmodified. The next day, the National Assembly favoured the party’s revival on a broad basis

passed another bill liberalizing the Preventive supported Ayuk’s Sov,=mmOTt, *^h,,&«,^<,a,,r<~<,*

r-> +- r_»-’«. TI.- j>«,,rf«»,« j!«,~.» *,.« »-=m = *»>•= -ouu«c_.i Ki-oup.- and tUc ”non-revivallsts , wto

’i?yt,*V’?,*J..a S,^»-oi»eio^i f-anacs, Bill became law.’1 maintained that the party couJd nor *be re*

Despite many controversial features making it CStabhShed pending the restoration flf full

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landing the democratization Constitution.

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Meanwhile, the formation of the Group had been announced in June’ the East Pakistan members of 1 Assembly claiming the support of m out of the seventy-eight member Pakistan. The formation of an oppos East Pakistani members in the Natioi under the name of the People’s Demc was announced in August.

In October 1962, the ’National Front’ was formed to press for, *ir* introduction of adult franchise, the ju fundamental rights, and a parliament government. The Front was supp ’Council’ Muslim League, the Awarr |. National Awami Party, the Krishak ! and the Nizam-i-Islam Party, as well the Republican Party and the JamaatEBDO’d politicians were too shrewd i so easily. Since they could not becc or hold office of any political party, 1 rallied around the National Demo which

was termed a movement, n< party.25 A demand that the President round-table conference with promine to discuss amendments to the Con rejected by the President on the grou a procedure would be unconstitutiom All the resources of the governmen at the disposal of pro-government the legislatures. In effect, a politi formed m reverse order. On 4 Se] the Muslim League (Conventionisl

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democracy, allied with other opposition parties in demanding the democratization of the new Constitution.

Two leaders of the former Awami League Uta-ur-Rahman Khan and Sheikh Mujibur Redman) said likewise that the question of a revival of that party did not arise. A similar statement was issued by the leaders of the former knshak Sramik Party. Both statements alleged that ike political climate in Pakistan was still unsuitable fer the working of democratic organizations. Meanwhile, the formation of the ’Democratic Croup had been announced in June’, a section of Ike East Pakistan members of the National Assembly claiming the support of more than forty out of the seventy-eight members from East Pakistan The formation of an opposition group of East Pakistani members in the National Assembly, uderthe name of the People’s Democratic Group, w announced in August.

In October 1962, the ’National Democratic Front’ was formed to press for, *inter alia,* the introduction of adult franchise, the justiciability of fcdairiental rights, and a parliamentary system of government. The Front was supported by the ’Council’ Muslim League, the Awami League, the National Awami Party, the Krishak Sramik Party, ndtheNizam-i-Islam Party, as well as sections of ieRepublican Party and the Jamaat-i-Islami. The mn”’d politicians were too shrewd to be defeated y Since they could not become members « hold office of any political party, they

therefore ’ around the National Democratic Front, i as termed a movement, not a political \ demand that the President should hold a ble conference with prominent politicians ^s amendments to the Constitution was by the President on the grounds that such ure would be unconstitutional.26 e resources of the government were placed iposal of pro-government politicians in *s* legislatures. In effect, a political party was taned in reverse order. On 4 September 1962, ’k Muslim League (Conventionists) became the Icial government party. The Conventionists aipnsed the ministers, a majority of members of ile Assembly, and other followers of the wmrnent. Almost all of then were relatively new

to politics and had not held posts in the pre-1958 Muslim League. Of the older, more seasoned Muslim Leaguers, those who were allowed to participate in politics formed their own Muslim League, which was distinguished by the term ’Councillors’. The Councillors derived their name from the Muslim League Council, which refused to accept the Conventionists as genuine Muslim Leaguers.

The Conventionists had as their chief organizer, Chaudhri Khaliquzzaman, president of the Muslim League after the death of Muhammad Ali Jinnah, but he was too old and weak a figure to lead the party. On 15 December 1962, the only obvious choice for a leader was identified, and Ayub was requested to assume the post. In being asked to take the assignment he was reminded that not only Jinnah but Liaquat, the first Prime Minister, had held the presidency of the party while simultaneously administering the affairs of state. The President agreed to consider the proposal but laid stress on the need for the party to restructure itself; to lay down the guidelines that it intended to follow.

He finally joined the Conventionists in May
1963 and seven months later on 24 December
1963, Ayub accepted the unanimous vote of the Pakistan Muslim League and became its President. Despite his aversion to politics, particularly party politics, he had to become a part of it.

FRANCHISE COMMISSION AND ITS REPORT

Despite his firm conviction that the process of indirect elections was the only one presently suited to Pakistani society, Ayub gave in to the pressure of the intelligentsia. On 30 July 1962, he appointed a five-member Franchise Commission to investigate alternative propositions.

Akhtar Husain, the Chairman of the Commission, and his associates, were requested to address themselves to two principal questions:

1. Whether the system of election of the President and members of the assemblies through Basic Democracies was [an] efficacious and appropriate instrument for a realistic representation of the people; and

2. If the Commission recommended universal suffrage, whether any qualifications should be imposed upon the electors.

The Commission submitted its report on
12 February 1963, with two members, including the Chairman, dissenting. It was an embarrassing moment for Ayub. The majority report, like the Constitution Commission before it, ruled against indirect elections and insisted that only universal adult franchise should be the basis of election for the President and members of the assemblies. The minority report was in keeping with Ayub's ideas, however. With opinions of the members of the Commission divided (three to two), the Law Ministry was ordered by Ayub to appoint a special committee to examine all recommendations dispassionately 'keeping in view the socioeconomic and administrative requirements of the country'.27 Later, when the special committee submitted its report, no one was surprised to find it in favour of the minority view that the system of indirect elections should continue. 'Until such time as a majority of the people become literate, any election based on direct voting would be an unreliable index of responsible public opinion and will provide an opportunity to unpatriotic and hostile elements to create confusion and arrest the progress of the country'.28

To this, five opposition members on the special committee courageously contributed a note of dissent which read in part: 'We are finally of the opinion that the present system is a denial of the rights of the people and that it would only perpetuate a thinly veiled dictatorship in the country'.29 If anything was gained from the episode it was that the President was successful in having things done his way; but opposition to his ideas and policies was clearly on the upswing.

THE FIRST AMENDMENT

Fundamental Rights in the Constitution made Justiciable

As soon as the Constitution was published, there was vehement criticism of the curtailment of the

powers of courts in protecting the fundara rights of citizens. The issue created a stora controversy and insistent demands were made behalf of the people to make these 'principal law-making' enforceable by courts.

The elections to the National Assembly in Ij brought in a large number of politicians fin] amongst opposition parties which apparent forced Ayub to accept Moulvi Tamizuddin Kli as Speaker of the National Assembly *a* Muhammad Ali Bogra, a former prime minisli as his foreign minister. The elections tin strengthened the democratic forces in the coiimj, demanding the introduction of fundamental ngbj in the Constitution.

Ayub responded to the people's wishes and (k changes were made. A Bill on fundamental rigid was introduced in the National Assembly din its Dhaka session in March 1963 which made to] rights justiciable. The effect of the propwcfj amendment was to convert the 'principles of 1»

making’ in the Constitution into constitution!! restrictions on the power of a legislature, so t the decision of whether the legislature safeguards fundamental rights would be vested in law *cm* If any legislature should pass a law repugnant; or inconsistent with any of the fundamental njii enumerated in ’principles of law-making’, the COB would have the power to declare any such law This would give the courts the same power *n* Article 4 of the 1956 Constitution which put ai embargo on the legislature against passing any M violating fundamental rights. Thus the amendma sought to make the courts rather than the legislate the custodian of fundamental rights. The LSI Minister claimed that it would virtually incorpoit a Bill of Rights into the Constitution and enlaijt the jurisdiction of the courts which would k entrusted with the task of enforcement of rights * By the First Amendment,31 the Constitution was greatly democratized and liberalized. The law was fully restored in Pakistan. While . .,
98 of the Constitution gave power to the judiciary to act as guardian over executive actions a Pakistan, the new amendment made the judicial review over the legislative Acts competent No legislature in Pakistan could pass a Bill which *n* inconsistent with the fundamental rights as laid

down in the Constitution and *th* ’empowered to scrutinize and pass the validity of any enactment, executive or of the legislature. \ the head of the state could be decl by the judiciary in Pakistan.

The first amendment was pn ’qualifying clause’ with the aim of j of the laws and reforms made dur law regime as also a number of c regulations through which socio-eco, such as land reforms and family 1 were made.

The fundamental rights enumen first amendment were nearly the i embodied in Chapter 1 of Part II of tion originally as Principles of Lawchapter was completely substituted i amendment. The fundamental essentially the same as enumerated ui Constitution which included equality freedom of speech and expression, association, freedom of movement, acquire property, freedom of professi< freedom of religion, safeguards again detention, protection against re punishment, protection against for access to public places, protection c and cultures, protection against slav practice of untouchability. The first added to these fundamental rights the security of person, safeguards against purposes of any particular religion, sa to educational institutions in respect and safeguards against discrimination i Another significant change brought a first amendment was the renaming of tt as the ’Islamic Republic of Pakistan’. A; actions signify secular tendencies, wi under pressure by the religious parties,] itherwise. He succumbed to this de jgreed to introduce the word ’Islam ’Republic of Pakistan’. The opposition f also joined into the demand because it aj them as a rallying point to embarrass his political party.

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The fundamental rights enumerated under the fa amendment were nearly the same as were mbodied in Chapter 1 of Part II of the Constituta ongmally as Principles of Law-Making. This dupter was completely substituted under the first ttendment. The fundamental rights were sentially the same as enumerated under the 1956 Constitution which included equality before law, ’eedom of speech and expression, freedom of ssociation, freedom of movement, freedom to Kfiire property, freedom of profession and trade, ”tedom of religion, safeguards against arrest and Mention, protection against retrospective Jimshment, protection against forced labour, rass to public places, protection of languages ri cultures, protection against slavery and the pence of untouchability. The first amendment *M* to these fundamental rights the right to the ranty of person, safeguards against taxation for Jiposes of any particular religion, safeguards as «educational institutions in respect of religion, alsafeguards against discrimination in services. Another significant change brought about by the is amendment was the renaming of the Republic ’ ’amic Republic of Pakistan’. Ayub, whose gmfy secular tendencies, was brought sure by the religious parties, political or ,w»ise. He succumbed to this demand and to introduce the word ’Islamic’ before of Pakistan’. The opposition parties had tped into the demand because it appeared to |ta as a rallying point to embarrass Ayub and Ifolitical party.

THE SECOND AMENDMENT

The Second Amendment to the Constitution was quite a comprehensive one.32 It added or amended ten Articles. Important changes or modifications brought about by this amendment included the extension of the period to hold office by the President beyond the expiry of his term until his successor entered upon office; modification of the provision that the President would cease to hold office until his successor entered upon office if he dissolved the National Assembly prior to the expiry of its full term of five years; elections to the National Assembly to be held within 120 days of its dissolution by the President before the expiry of its term; the election to the office of the President to be held in 120 days in case he dies before the expiry of his term of office; and conferring of power in the President to make special provision for representation of tribal areas in the electoral college.

This amendment was primarily designed to remove the difficulties felt during the first two years of the enforcement of the Constitution. The amendment came into effect on 8 July 1964. Its most creditable act was the curtailment of the discretionary power of the President to dissolve the National Assembly who would lose office if he dissolved the Assembly before the expiry of its term. This provision was a serious check on the President against using such power arbitrarily, wantonly, or capriciously. Nevertheless, correspondingly with this provision, the President was allowed to continue in office until his successor entered upon office despite the expiry of his term. This meant that if he dissolved the National Assembly prematurely, he would continue in office till his successor was elected. The process of the election of the successor was spread over 120 days and so was the process of the election to the National Assembly after its dissolution. So, he exercised the powers of his office despite having ceased to hold office during the period when the election to the new National Assembly was to take place. He could continue to

command influence and power while new elections to the National Assembly were taking place. Coupled with this was the provision that the dissolution of the

National Assembly did not prevent the President from seeking re-election as President.33 All these provisions read together made the position of the President far more powerful as compared to the National Assembly.

SUPREME COURT'S JUDGMENT IN MAUDOODI'S CASE: JAMAAT-I-ISLAMI BANNED

Although the Constitution had been enforced in June 1962 and a civilian government had been installed, military dictatorship did not change. Opposition parties were looked at with great suspicion and their meetings were monitored by the intelligence agencies. Eight leading opposition leaders, Z.H. Lari, Mahmoodul Haq Usmani, Sheikh Abdul Majeed, Mian Mahmood Ali Kasuri, Tufail Muhammad, Maulana Abdus Sattar Niazi, Khwaja Muhammad Rafiq, and Nawabzada Nasrullah Khan, were arrested on charges of sedition for holding a meeting at the Karachi residence of Suhrawardy in May 1963 and for passing a resolution criticizing the prevailing political situation, Ayub's methods of administration, and calling for a united opposition against his government. This resolution was officially interpreted as an attempt to provoke contempt for the government and was, therefore, regarded as seditious.34

Another attack on the opposition was directed against the Jamaat-i-Islami. The Home Minister accused the Jamaat of creating a sense of frustration and despondency by unwarranted criticism of government policies. He also attacked one of its members, Amir Maulana Abul Ala Maudoodi, as a foreign agent. There were student disturbances in November 1963, primarily directed against an ordinance that restricted student union activities and gave unbridled power to the authorities to expel students or even annul degrees awarded to them.35 Student unrest spread to the cities of Lahore, Rawalpindi, and Faisalabad. Ayub blamed the Jamaat for fomenting trouble against him and the obvious reason for such an accusation was that the leaders of the student unrest were mostly drawn from Islami Jamiat-e-Tulaba, the

student wing of the Jamaat. There is little that the Jamaat was pursuing an active of criticism against the Ayub government government thus struck on 6 January 1964. the provincial governments, on the same to declared the Jamaat-i-Islami to be an 'unlant association' under section 16 of the Criminal Amendment Act, 1908 as amended by XXI of 1960.

These notifications were challenged before I West Pakistan High Court by Maudoodi and ik Dhaka High Court in exercise of writ junsdicte The petition filed before the High Court iri Late was dismissed, but the one presented to the Hijl Court in Dhaka succeeded and it was held that 1 notifications issued by the East government had no binding effect and rescinded, cancelled, or withdrawn.36 Appeal against both decisions were made to the Supra* Court and were heard together.

The Supreme Court, by a unanimous vente accepted the appeal of Maudoodi and dismiss^ that appeal of the government of East Pakistan" The Court held that the declaration by tk provincial

governments of the association« unlawful would be an administrative act open I • judicial review by the courts. The pnncip'H natural justice (show cause notice, and op of hearing) were applicable to all adm proceedings including the proceedings t any association of people 'unlawful'. ^ action taken against the Jamaat was withoumiw and without affording the opportunity of a before or after taking action, it therefore, it unlawful and void. The Criminal Law AmerL"" Act of 1908 was held repugnant to the v . fundamental right of 'freedom of association'ml its provisions were held not to fall within the sop of 'reasonable restrictions' contemplated b) tkt right. The provision of the Act of 1908 giva; provincial governments arbitrary and unqualii power to declare an association unlawful n! found to be an unconstitutional interference ml the right of 'freedom of association' because! making of such declaration depended upon Ik subjective satisfaction of such governments Ik notifications of 6 January 1964 of oothik provincial governments were thus held illegal ai

void for violation of the fun 'freedom of association' under tl for other reasons set out in the governments were directed to ca these notifications.

This judgment is one of the m in the constitutional law of Paki; fane/amenta/ right of 'freedom < gave protection to the political r. government that was using its pc ban them and to stifle their activ

NOTES

1 The 1962 Constitution, Article 2 Regulation was deemed tobe a from 7 February 1959 and Sc Regulation with effect from 23 *A*

2 The Constitution of 1962, Article The first meeting of the Nation held on 8 June 1962, which was day.

3. Ibid., Article 224(2). The date o
1 March 1962.

4 Ibid., Article 224(3).

5. See Fazlul Quadir Chowdhry v M Haque PLD 1963 S.C. 486 and M Haque v Fazlul Quadir Chowdhry 1
669.

"> Martial Law (Pending Proceedings Order, 1962. President's Order N Art. 3. PLD 1962 Central Statutes

7. Ibid., Article 4.

8. Ibid , Article 5.

9. Ibid., Article 6.
10 Ibid., Article 7.

11. Ibid., Article 8.

12. The commencing day of the Co
8 June 1962, the day on which the i the National Assembly was held. On Law Regulations including *Li* Regulations, were saved under Artii Constitution. Martial Law Orders (j
1962. President's Order No. 29 of 19 Central Statutes 627.

13. Political Organizations (Prohibition o Activity) Ordinance, 1962. Ordinar
1962. PLD 1962 Central Statutes 228

ing an active campaign \.*yub* government. *The* \ 6 January 1964. Both tits, on the same day,

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;re challenged before tflr

rt by Maudoodi and the xcise of writ jurisdiction, the High Court in Lahore ne presented to the High d and it was held that the jy the East Pakistan ing effect and should be r withdrawn.36 Appeals ere made to the Supreme ;ether.

by a unanimous verdict, vlaudoodi and dismissed iment of East Pakistan.”’ he declaration by the i of the association Iministrative act open to courts. The principle of ,e notice, and opportunity ble to all administrative e proceedings to declan le ’unlawful’. Since the imaat was without notice

opportunity of a hearing ction, it therefore, was riminal Law Amendment spugnant to the seventh ;dom of association’ and at to fall within the scopi s’ contemplated by thai the Act of 1908 giving irbitrary and unqualified sociation unlawful wa^ ational interference with association’ because tin. ion depended upon the

such governments. Tin. ary 1964 of Doth the ere thus held illegal and

i violation of the fundamental right of freedom of association’ under the Constitution and fat otter reasons set out in the judgment, and the governments were directed to cancel and withdraw these notifications.

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NOTES

I I The 1962 Constitution, Article 225. Land Reforms
• Regulation was deemed tobe an Act with effect from 7 February 1959 and Scrutiny of Claims Regulation with effect from 23 August 1961. *I* The Constitution of 1962, Articles 224(i) and 242. The first meeting of the National Assembly was held on 8 June 1962, which was the commencing day

! Ibid, Article 224(2). The date of enactment was I March 1962.

Ilfoid, Article 224(3). i See Fazlul Quadir Chowdhry v Muhammad Abdul Haque PLD 1963 S.C. 486 and Muhammad Abdul Haquev Fazlul Quadir Chowdhry PLD 1963 Dhaka *m*

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il Law (Pending Proceedings and Protection)

Uider, 1962 President's Order No. 26 of 1962,

Art 3 PLD 1962 Central Statutes 623.

fcid, Article 4.

Ibid, Article 5.

Ibid Article 6. Article 7 \rticle 8.

iramencmg day of the Constitution was
1962, the day on which the first meeting of lonal Assembly was held. Only five Martial Regulations including Land Reforms nons, were saved under Article 225 of the ution. Martial Law Orders (Repeal) Order 'resident's Order No. 29 of 1962. PLD 1962 Statutes 627.

i Organizations (Prohibition of Unregulated) Ordinance, 1962. Ordinance XVIII of LD 1962 Central Statutes 228.

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14. The Constitution of 1962, Articles 224 and 242.

15. Transfer of Railways Order, 1962. President's Order No. 33 of 1962. PLD 1962 Central Statutes
641.

16. Industrial Corporations (TJissaV\it\orv> Ordinance,

\962 (Ordinance XXXVI of 1962). PLD 1962 Central Statutes 551. Provincial

Industrial

Development Corporation (East Pakistan)

Ordinance, 1962 (Ordinance XXXVII of 1962). PLD 1962 Central Statutes 553. Provincial Industrial Development Corporation (West Pakistan) Ordinance, 1962 (Ordinance XXXVIII of
1962). PLD 1962 Central Statutes 581. Ziring, Lawrence, *The Ayub Khan Era.* 1971, Syracuse University Press, p. 31. PLD 1963 S.C. 486 and PLD 1963 Dhaka 669. The Constitution of 1962, Article 173. Ibid., explanation to Article 173. This explanation was added by the Constitution (Second Amendment) Act, 1964 (Act VI of 1964), Section 10. PLD
1964 Central Statutes 195.

Political Parties Act, 1962 (Act in of 1962). PLD
1962 Central Statutes 698. Ibid., Section 5.

23. *Dawn,* 31 July 1962.

24. It is interesting to note that 'Convention Muslim League' got its name from a convention of Muslim Leaguers called by some minor and obscure leaders. This Convention was not attended by any Muslim League leader of standing or fame.

25. Afzal, M. Rafique, *Political Parties in Pakistan*
1958-69, Vol. II, 1987, p. 39. Published by National Institute of Historical and Cultural Research, Islamabad.

26. Keesing's Research Report, *Pakistan-From 1947 to the Creation of Bangla Desk,* 1973, Keesings' Publications, Longman Group Ltd., New York, pp. 81-2.

Mahajan, V.D, *The Constitution of Pakistan,* 1965, Munawar Book Depot, Lahore, p. 113. Ibid., p. 115. Ibid., p. 116.

At the time of introduction of the Bill for the amendment of the Constitution in order to make the fundamental rights thereunder justiciable, retired Chief Justice Muhammad Munir was the Law Minister. He, in his later writings, had greatly credited himself for piloting this Bill and, for this reason, he claimed that he had joined the Cabinet of Ayub.

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CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN

. Constitution (First Amendment) Act, 1963. Act I of 1964. PLD 1964 Central Statutes 33. Constitution (Second Amendment) Act, 1964. (Act VI of 1964). PLD 1964 Central Statutes 195. The Constitution of 1962, Article 23(5). Feldman, Herbert, *From Crisis to Crisis: Pakistan 1962-1969*, 1972, Oxford University Press, London, pp. 63-4.

35. West Pakistan Universities (Amendnj Ordinance, 1962. (Ordinance XL of 1962), J| 1962 West Pakistan Statutes 354.

36. Tamizuddin Ahmad v The Government ofj Pakistan. PLD 1964 Dhaka 795.

37. Abul Ala Maudoodi v Government of I Pakistan, PLD 1964 Supreme Court 673

14 Presiden

Under the constitution, a Preside to be held within 120 days befon incumbent's term of five years. S of Ayub as President was to expi
1965 (having been deemed to
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THE OPPOSITION ANNC CANDIDATE

The principal opposition parties Assembly had already joined fon from power, under the banner c Opposition Parties (COP). This gi Council Muslim League, le Nazimuddin and Mian Mumtaz Kl Awami League, led by Sheikh N the National Awami Party, le Bhashani; the North-West Fronti National Awami Party, led by W, the famous Abdul Ghaffar Khai Islam Party, led by Chaudhri Mol Farid Ahmed; and the Jamaat-i Maudoodi. To these were added political personalities including Azam Khan, a former Governor o who were determined to oust Ayul On 16 September 1964, it was a much confabulation, that the Comb Parties had invited Miss Fatima Jim sister, to be their candidate, an accepted although she had been vi in. (joAitics since her bt«^fcsx'% *nevertheless, weM-knowa (da(M.* to ^\vul>. In *published* on occ,

kistan Universities (Amendment) , 1962. (Ordinance XL of 1962). PLD

Pakistan Statutes 354. n Ahmad v The Government of East ’LD 1964 Dhaka 795.

Maudoodi v Government of West ’LD 1964 Supreme Court 673.

14 Presidential Elections, 1965

Under the constitution, a Presidential election was to be held within 120 days before the expiry of the incumbent’s term of five years. Since the first term of Ayub as President was to expire on 14 February
1965 (having been deemed to have begun on
14 February 1960), the presidential election was fixed for 2 January 1965. Ayub was adopted as Presidential candidate for re-election by the Convention Muslim League. He was, however, anxious to know whom the opposition would bring forward to oppose him.

THE OPPOSITION ANNOUNCES ITS CANDIDATE

The pnncipal opposition parties in the National Assembly had already joined forces to oust Ayub from power, under the banner of the Combined Opposition Parties (COP). This group included the Council Muslim League, led by Khwaja Nazimuddm and Mian Mumtaz Khan Daultana; the Awami League, led by Sheikh Mujibur Rehman; the National Awami Party, led by Maulana Bhashani; the North-West Frontier group of the National Awami Party, led by Wali Khan, son of the famous Abdul Ghaffar Khan; the Nizam-iIslam Party, led by Chaudhri Mohammad Ali and Fand Ahmed; and the Jamaat-i-Islami, led by Maudoodi. To these were added other prominent political personalities including Lt. Gen. (Rtd) Azam Khan, a former Governor of East Pakistan, who were determined to oust Ayub.

On 16 September 1964, it was announced, after

much confabulation, that the Combined Opposition

Parties had invited Miss Fatima Jinnah, the Quaid’s

sister, to be their candidate, an invitation she

raepted although she had been virtually inactive

11 politics since her brother’s death. It was,

I nevertheless, well-known that Miss Jinnah was

I decidedly opposed to Ayub. In regular public

I pronouncements published on occasions such as

Eid-ul-Fitr, the anniversary of her distinguished brother's death or his birthday, the undertone of criticism was notably indignant even in the days when Ayub was treated, or treated himself, as beyond criticism. Of course, as sister of Jinnah and one who had stood firmly by his side during all the years of endeavour to win Pakistan, Miss Jinnah was in a special position. There was not a great deal that Ayub could do to her.1

At that time, the selection of Miss Jinnah was generally interpreted as having been more or less forced upon the COP among whom diversity of feeling and purpose prevented agreement on a mutually acceptable candidate. The selection was also interpreted as an attempt to influence the electorate simply by evoking the magic of Pakistan's most famous name and there were many who considered that Miss Jinnah should not have allowed herself to be made a party to such exploitation.

Even the proposal to invite Miss Jinnah, with its obvious advantages, had equally obvious dangers of which the first one was the problem of her own personality. She was, a difficult person to deal with, having a powerful will and a sharp, imperious temper. After her brother's death, her own political hopes were disappointed and she had pursued a life of retirement, a blighting experience after the activity and prominence she had known for many years. None of this had done anything to sweeten or appease her nature and were she to have been elected President, those who served under her as ministers might well have found life difficult.

She was not equally acceptable to all the parties and groups which formed the combined opposition. There were some, particularly from East Pakistan, who had resented Miss Jinnah's attitude to Suhrawardy, particularly at the time of his death. On a rather different plane, there was the difficulty that others felt about a woman candidate and a woman President, were she to have been elected.

For those who belonged to parties wedded to religious orthodoxy, for instance the Jamaat-iIslami, this prospect raised grave questions of law and conscience. In fact, this point became an issue. A gathering of *ulema* produced a *fatwa* declaring that in Islam a woman could not be a head of state. In reply to this, Maudoodi, the head of the Jamaati-Islami, announced that Islam permitted a woman to be a head of state though it was not desirable.2 The *Pir* of Dewal Sharif went considerably further. He claimed that in the course of meditation, the Almighty had favoured him with a communication which indicated divine displeasure with the COP. An indignant public, which had shown no great concern with the question of the legality in Islam of Miss Jinnah's candidature, claimed that the *Pir* was criticizing Miss Jinnah, the sister of the Quaide-Azam and this the *Pir* promptly denied.3 It is clear that such renderings of the so-called *ulema* and *Pirs* had no substantial influence on the candidature of Miss Jinnah, who enjoyed wide public support throughout Pakistan during her election campaign.

The announcement of Miss Jinnah as the candidate came as a shock for the Ayub government. The two provincial Governors, who had maintained law and order with an iron hand and snuffed out all dissent, were bewildered by the ecstatic manner in which the people celebrated Miss Jinnah's decision to fight their hero, the soldier statesman Ayub. She had no experience of government, no knowledge of administration, and no contact with world leaders. Nevertheless, she was the idol of the people and thousands of people would gather only to catch a glimpse of her. She could hardly speak any of the national languages, but her charisma was irresistible. She was seen by the crowds as the only person who could bring down Ayub's authoritarian rule and restore the democratic rights of the people.4

ELECTIONS TO THE ELECTORAL COLLEGE

It should be remembered *that before there could be* an e/ection of a new President, the constitution "required the election of *members for* a new

electoral college, comprising 8U,l)Ulll Democrats to be chosen, in equal numbers, of the two provinces. Thus the programme. that elections to the electoral college wo place in November 1964. The Presidential etai would follow and after that elections for r Assemblies, National and Provincial, woiib held. In all this, the key election was for the of. of President.

The electoral college that came to be foa as a result of elections in 1964, was evidcir favourable to the Ayub regime. Of the total mlt of 80,000 voters, 3282 (about 4.5%) werehtej and about 32,000 (about 40%) were sitting fit Democrats.5 Both these categories were favori' disposed to the ruling party. The tnbals w selected by the political agents of the governm For the old Basic Democrats, it would suffice i say that they, already having enjoyed a ten r power and prestige, had developed a stake in ii continuance of the Basic Democrats system n therefore, of the Ayub regime.

The electoral college, moreover, *n* considerably susceptible to manoeuvrability Id was not

so much because of its limited numberi/
80,000 members as due to lack of any fast« binding political commitments on their pin Although the elections to the electoral college wa contested very keenly, these contests did not tab place on rigid party lines. The PML had i officially sponsored its candidates but had baifa upon the course of ’owning’ the victorious ones The COP, on the one hand, due to its intern. contradictions, was compelled to propose moit than one candidate for a single electoral unit i many places, and on the other hand, because of its fragile organizational base, it was unable to put up any candidate at other places. Hence, tit overwhelmingly large number of contests in tit elections to the electoral college were manplar’ and the majority of candidates elected were independent. That the parties in the election arena did not have a firm grip over the candidate participating in the above elections is further revealed by the fact that a *large number of setts went* uncontested due to behind-the-scenes bargaining between the nvaJ candidates 7 It is *indeed surprising to* discover *that there should)snt*

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Occurred as many as over 6 elections in West Pakistan8 ar Pakistan9 at the fundamental 1< college polls.

The behaviour of an elector; above type, which lacks in commitments, is liable to be m pressures, propaganda, and indu the ruling party’s claim of not h practices like intimidation and votes in the Presidential electior fact remains that even with o electoral college of fluid loyalti* remunerative to the Ayub reg resources at its command, it was ii to influence the electoral choice analysis of the respective funds power and the COP shows that w the former was able to collect from the industrialists and busine of rupees in a few weeks time from time to time to issue appeal large to contribute whatever littk

OPPOSITION’S CRISIS < CONFIDENCE

The opposition parties from the been apprehensive that the gener not be fair and free. They alleged few by-elections had been mam official interference and hence ti for them to believe that this in not be resorted to by the ruling pz elections. They, therefore, dema measures of political control lil Publications Ordinance, thi Ordinance, and the Public Safet withdrawn, all political prise released, steps be taken to ensun of the Penal Code would not be the election campaign to curb thei and that the official machiner misused to their detriment.12

At one stage of the electioi

Jinnah went to the extent of *installation cfa. caretaker* govern

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in the above elections is e fact that a large number ot. ested due to behind-the-sc, !tween the rival candidates. ing to discover that there should I

The behaviour of an electoral college of the i above type, which lacks in strong political (ommitments, is liable to be more amenable to pressures, propaganda, and inducements. Even if I Ike ruling party's claim of not having resorted to jjnctices like intimidation and bribery to fetch I Wes in the Presidential elections was true,10 the IM remains that even with other means, the fatal college of fluid loyalties could be more frounerative to the Ayub regime. With more 'sources at its command, it was in a better position
13 influence the electoral choice. A comparative i of the respective funds of the party in I me: and the COP shows that while, for example,
1 *"x* former was able to collect in Karachi alone bmthe industrialists and businessmen five crores

h’nipees in a few weeks time,11 the latter had I fan tune to time to issue appeals to the masses at I k(t to contribute whatever little they could.

POSITION’S **CRISIS OF**
1 CONFIDENCE

lit opposition parties from the very outset had •apprehensive that the general election would abefairand free. They alleged that the previous
1 sky-elections had been marred by uninhibited I foal interference and hence there was no basis I*them to believe that this interference would [ale resorted to by the ruling party in the coming They, therefore, demanded that various of political control like the Press and Ordinance, the Loudspeaker and the Public Safety Acts should be awn, all political prisoners should be , steps be taken to ensure that section 144 ^fc Penal Code would not be enforced during ton campaign to curb their political activity official machinery would not be
1 to their detriment.12

stage of the election campaign Miss .xent to the extent of demanding the I of a caretaker government to supervise ito ensure its free character.13 Though

most of these demands were rejected by the ruling party, it instructed all the government servants to refrain from misusing their influence in favour of any candidate in the election.14 It also time and again, reiterated its intention to hold an impartial and fair election. Despite such instructions, the bureaucracy throughout the country interfered with the electoral process with predisposition to help Ayub win the elections. But for such interference, the results of the elections might have been different.

But the opposition parties could not be assured by these promises. In fact, as the election campaign gathered momentum, charges of various kinds were levelled by them against the government. In retrospect, the opposition’s fears, allegations, and insinuations regarding the malafide intentions and actions of the ruling party in the general election, look very formidable. When considered cumulatively, these apprehensions amounted to a virtual distrust on its part in the elections as a mechanism of constitutional change of government. It was believed that it was difficult to dislodge an unconstitutional government by constitutional means.

Gerrymandering of Constituencies

To begin with, the COP charged that the delimitation of constituencies for elections to the electoral college had not always been done on the basis of the provisions laid down in the Electoral College Act, 1964. It was alleged that principles like ’territorial contiguity’ and the population limit of 1072 voters for each unit were often flouted by the Election Commission authorities in order to bestow special advantages to some persons with utter disregard to the convenience of people. Constitutional petitions were filed in the High Courts and statements were issued to the Press in which specific instances of breach of the provisions of the Electoral College Act were cited.15

Faulty Voters’ Lists

The opposition was of the view that the registration of voters had also been done with malafide

considerations. It charged that the names of persons who had been thought to be antagonistic to the party in power had been omitted from the voters' lists whereas fictitious names had been included in them to enable bogus voting in favour of the ruling party.16

It was also alleged in East Pakistan that many intending voters, who went to the registration office in Dhaka during the week following the day the Electoral College Act, 1964 was amended, were told that no instruction had been received by the East Pakistan Election Authority for further inclusion of names in the electoral rolls from the Chief Election Commission. The officials concerned, therefore, refused to register their names. The more hard hit among the sufferers were those who wanted to file their nominations for the elections to the electoral college but could not do so since their names had been omitted from the voters' lists.17

Bogus Voting

Yet another source of grievance to the opposition parties was the practice of bogus voting during the electoral college polls. It was alleged that the procedure laid down for the electoral college elections was not fool-proof. The procedure suffered from certain built-in loopholes permitting large scale bogus voting and all manners of corrupt practices.18 Firstly, it was not required of the voter to sign his name or give his thumb impression before receiving his ballot paper from the presiding officer; and secondly, the identity of the voter was testified by a polling agent of any of the candidates after which he was accepted as a prima-facie voter in the unit. Although the identity of a voter could be challenged by another agent, the challenged vote, however, was taken into account for the purpose of counting.

immediate judicial inquiry conducted by i of the Supreme Court to investigate into Believing that these did not speak well of i of things to come in the Presidential eles became frantic in demanding rectification errors of omission and commission in the the Presidential polls. First, to safeguard bogus voting, it demanded that instead ofi one attested photograph of the holder of tki his photograph should also be kept by tier* officer so that at the time of polling normleft for impersonation. Moreover, since thai rumours that in certain cases duplicate canki being issued, the COP demanded that they! be issued by the District Judges." It was;' necessary to ensure against the polling ofi ballot papers, the COP said, to allow pollingi to sign or affix their seal on the back of papers in the morning of the polling day"

Secondly, to ensure freedom from olFJ pressure at the polling stations, the COP ic| that the presiding officers should invanah drawn from the civil judges who were linden control of provincial High Courts instead of p| the broad spectrum of what were called jit officers which normally included even tekifei and magistrates and, therefore, liable to be *ml* official pressure of the executive directly2

Thirdly, taking exception to the Electa Commission's decision to arrange polling ink and East Pakistan on two different days, theOj| urged that the same day should be fixed forpoli throughout the country lest the party in poweraltj knowing the election results in one wine of country try to influence polling in the ot

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Unfair Rules for *Presidential Poll*

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racwces prevalent in the electoral college lOnS, the COP lost no time in

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number of polling stations (certain statio units of just 50 and at some places even' it demanded that the number of polling siaaul should be reduced so that each of them cafnritf at least 200 voters.23

Only one of the above demands, name of one date for *polling in both the* w% *accepted by the Election Commission.*

TAe tyyxzsf/i'aier forties ftfus *alleged* thai lit Election Commission was working in clox complicity with the

The COP further char machinery was being empl for furtherance of its elect Jinnah in her message to on the eve of the elect remarked: "The most uni present conditions is th machinery of the country i Mr Ayub Khan's election < It was pointed out that \ other government-controlh as a propaganda media campaign. Radio Pakistan mouthpiece of the party in p out the opposition's viewpo behest of the party in powe indulged in nefarious ac indoctrination, coercion victimization of the suppor candidate in order to wear influence. In fact, the real party in keeping a gap o between the elections to the that to the Presidency was to time to influence voters in it of the official machinery.25

ELECTION CAMPAIG

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time of polling no room was m. Moreover, since there were am cases duplicate cards were)P demanded that they should [strict Judges.19 It was further

against the polling of forged)P said, to allow polling agents •ir seal on the back of ballot ig of the polling day.20 isure freedom from official ling stations, the COP urged officers should invariably be il judges who were under the
1 High Courts instead of from

of what were called judici/ lally included even tehsildai I, therefore, liable to be undt the executive directly.21

exception to the Electioi ;ion to arrange polling in West n two different days, the COP day should be fixed for polling try lest the party in power after ?n results in one wing of the nee polling in the other wing a *I* to the provision of a large tations (certain stations served at some places even 18 voters), he number of polling stations so that each of them catered to

3

above demands, namely, fixing >lling in both the wings, was ction Commission.

parties thus alleged that the sion was working in close

party in power.

Misuse of Official Machinery and Public

Money

The COP further charged that the official machinery was being employed by the ruling party for furtherance of its election campaign. As Miss ih in her message to voters of East Pakistan on the eve of the electoral college elections rked: ”The most unfortunate aspect of the present conditions is that the administrative machinery of the country is being identified with MrAyub Khan’s election campaign.”24

was pointed out that radio, television, and other government-controlled agencies were used
8 a propaganda media of the ruling party’s ampaign Radio Pakistan was functioning as a mouthpiece of the party in power and was blocking withe opposition’s viewpoint. The officials at the test of the party in power, continued the COP, indulged in nefarious acts like intimidation, indoctrination, coercion, harassment, and tttimization of the supporters of the opposition

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andidate in order to wean them away from its nfluence. In fact, the real motive of the ruling - n keeping a gap of about two months the elections to the electoral college and ne Presidency was to provide it with ample influence voters in its favour with the help tficial machinery.25

ELECTION **CAMPAIGN AND RESULTS**

Ike was an intense election campaign throughout it country in which the people of Pakistan fully Wicipated Miss Jinnah addressed large (•kings and rallies. Ayub's supporters, with the Wp of the government machinery and huge funds Reeled particularly from business interests, also imaged to have large gatherings for him to diress Bamng a few instances, the election mpaign was largely peaceful. Both the major •didates and their principal supporters made pis through the press and otherwise, for Ikance, for law and order, and an abstention | in mud-slinging.

Clear-cut issues were presented to the electorate as the campaigning went on, it became

more and more evident that the dominating issue was Ayub's own personality and conduct. The general attack on his record was focused on the form of the constitution he had given to the nation. It was considered dictatorial, having concentrated unlimited and uncontrolled power in his hands. The system of indirect election was severely criticized and resented. The Basic Democracies system was described as corrupt. His economic policies were criticized and he was accused of having loaded Pakistan with foreign debt that would burden the country for years to come. The Indus Waters Treaty, signed with India, was the subject of a heavy onslaught and the exchange of polemics on this became acrimonious.

Ayub's reply was that he had given the country some seven years of stable and orderly government. Pakistan's economic progress had been the object of much praise in many parts of the world and, for the first time in the country's history, planning had not only been explicit, but had been implemented. The social and economic benefits of the land reforms were emphasized and also the social reforms brought by his family laws legislation. He claimed that since his coming to office, Pakistan's stature had been raised in the eyes of the world. He accused those who criticized him and desired his fall as enemies of Pakistan who, for their own interests, sought a return to the bad old days. Above all, with the threat from India hanging over them, an India armed to the teeth by the Soviet Union, the United Kingdom, and the United States, the country required a firm hand at the helm and a person capable of understanding what was involved in the problems of defence. This was one reason why his constitution provided that the Minister of Defence must be a person holding, or who at least had held, the rank of Lieutenant-General (or the equivalent in the Navy or Air Force).26

But, as has so often and so unfortunately been the case in Pakistan, the election was fought less with reference to the political and economic programmes offered by the contending parties, than with personalities, and in particular that of Ayub. Was he corrupt? Was he a dictator? Was he guilty of nepotism and favouritism? Had he teamed up with the nation's great capitalists? These were the

questions that almost exclusively preoccupied most electors' minds. In saying this, we must remember that the electors comprised 80,000 Basic Democrats, not the mass of the people, but the interest of the masses was reflected in the part they could play in influencing the men they had voted for the Basic Democrats themselves.

In relation to Ayub's personality and conduct, one of the most publicized questions was that of the considerable fortune said to have been accumulated by his son, Captain Gohar Ayub, who had retired from the army after a few years' service and had entered the world of business in a very substantial way. The issue was not that Gohar Ayub had gone into business and had made money, but that he had used his father's position and influence to do so. He had obtained access to financial resources which no young man, army officer or other, without substantial property or business experience, could ever hope to secure. The question was not whether the business had been acquired (substantially it consisted of the General Motors Corporation assembly plant located at Karachi) through wealth corruptly gained or whether the business itself was being badly or dishonestly conducted. The question was that of improper use of influence to which Ayub had lent himself or, at any rate, had done nothing to prevent. His reply was not satisfactory and the case of Gohar Ayub continued to be pressed against him.

The election was held on 2 January 1965 and the result of the election announced on 3 January. Ayub had polled 49,951 votes and Miss Fatima Jinnah 28,691. The minor candidates, K. M. Kamal and Mian Bashir Ahmad, had polled 183 and 65 votes respectively. In West Pakistan, Ayub's votes were 28,939 against Miss Jinnah's 10,257 and in East Pakistan, Ayub had obtained 21,012 against Miss Jinnah's 18,434. Miss Jinnah had a lead over Ayub in Dhaka Division (5986 against 5861), Chittagong Division (5779 against 4794) and Karachi Division (1061 against 907). In all, over the administrative divisions, Ayub Khan had a huge lead over Miss Jinnah.

Apart from allegations of massive ngginjj which there was strong evidence, there were: real factors that could be attributed to the i of Ayub. There was always a widespread throughout the campaign that Miss Jinnah's under the existing electoral system was afouj conclusion. The system worked agaiwt opposition in a number of ways.

In the first place, the COP's campaign fori restoration of the parliamentary font government based upon direct elections universal franchise amounted to demanding Si the Basic Democrats to give up their exdus electoral rights, which had bestowed upon tk, power, privilege, and status in the society IL they had a vested interest in perpetuating s, existing electoral system and the COP was vutoi asking them to sign their own death warrants fr the other hand, the prospects of the Bis. Democrats system was linked up closely»: Ayub's success.

Secondly, Ayub had an initial advantage i more than 3000 votes from the tribal areas »t were nominees of the administration. Out of 31 members of the electoral college from the *A* areas,

Ayub secured 92.5 per cent, while k' support from the tribal areas of the former NUT! was 95 per cent.

The third and very important factor was tk weakness of the COP itself, which was a roixtut of strange political bedfellows. There was lad d discipline among its ranks. Its unity was a mat hotch potch of antagonistic ideologies andpolito programmes beneath which was the surging wavs of inter-party ambitions, suspicions, and misgivings. These parties quarrelled *inter sen* the allocation of tickets for the elections to tin electoral college. The acrimonious bickerings between them sometimes characterized even ttar election campaign. While in West Pakistan, *k* Council Muslim League complained that tit National Awami Party did not share the platfon with it during Miss Jinnah's tour of the fonner North-West Frontier Province, in East Pakistan tie *National* Awami Part-" *"~A* *u~ *

two traditional rivals, could jostling with each other on thi scat or an earlier say at the mil Fourthly, Miss Jinnah lost v the North-West Frontier, on Ghaffar Khan whose attitude t question of a separate Pakhtooi well-known. His son Wali Kh, section of the National Aw prominent member of the COP The next factor was the s available with Ayub being an in There was no doubt that Ayub's full. It soon became known that ministers, those whose portfoli contact with the business corn charged with the collection of that a regular tariff was fixed, b of the business. Traders who h quotas contributed proportionat value of the quota. In the case c wool textile mills, the levy v number of looms and spindle: afterwards, in 1969, the *Weekly* published facsimiles of the two s
6 and 12 November 1964 circ Pakistan Textile Mills Associati< asking them to pay their contribi of the Pakistan (Convention) fy the basis of Rs 2 per installed s per installed loom. On the basis i looms and 2,952,580 spindles v time, the contribution to Ayub's this source alone would have be Rs 15 million.

Another factor that had been victory of Ayub was the strange a dubious role of Maulana Bha Bhashani was one of the staunc the candidacy of Miss Jinnah, he i in East Pakistan and did nothinj prospects of success. There was circulating in the last days before Bhashani had been won over by had been worked out between the One more factor contributing Miss Hnnah was the refusal of CC *'*

r *was the reftisaj ofCOP i* of Khawaja Nazimuddin, second Go^

3ns of massive rigging, lor rig evidence, there were some d be attributed to the success always a widespread feeling aign that Miss Jinnah's defeat ectoral system was a foregone ystem worked against the ber of ways.

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ambitions, suspicions, and se parties quarrelled *inter se* over f tickets for the elections to the ;e. The acrimonious bickerings jmetimes characterized even their gn. While in West Pakistan, the tn League complained that the i Party did not share the platform Miss Jinnah's tour of the former ntier Province, in East Pakistan the i Party and the Awami League, the

two traditional rivals, could at times be seen jostling with each other on the stage for a better seat or an earlier say at the mike.

Fourthly, Miss Jinnah lost votes, particularly in Ike North-West Frontier, on account of Abdul Ghaffar Khan whose attitude to Pakistan and the question of a separate Pakhtoonistan was only too »ell-known. His son Wali Khan was leader of a ration of the National Awami Party and a prominent member of the COP high command. The next factor was the superior resources milable with Ayub being an incumbent President. Here was no doubt that Ayub's party coffers were fell It soon became known that at least two of his misters, those whose portfolios brought greater iontact with the business community, had been iarged with the collection of funds. It appears tat a regular tariff was fixed, based on the nature if the business. Traders who held import licence (Was contnbuted proportionately to the nominal "lie of the quota. In the case of jute, cotton, and tool textile mills, the levy was based on the |»ber of looms and spindles installed. Years ' i, in 1969, the *Weekly Mail of Karachi,21* facsimiles of the two secret letters dated nd 12 November 1964 circulated by the All Textile Mills Association to its members, ;them to pay their contributions to the funds lit Pakistan (Convention) Muslim League on [basis of Rs 2 per installed spindle and Rs 25 installed loom. On the basis that 37,340 cotton and 2,952,580 spindles were in use at the ,4e contribution to Ayub's party chest from iwirce alone would have been in the order of h million.

toother factor that had been attributed to the 'My of Ayub was the strange and to some extent jaons role of Maulana Bhashani. Although was one of the staunch supporters for ladikyofMiss Jinnah, he remained inactive 'ia Pakistan and did nothing to advance her THIS of success. There was a strong rumour in the last days before the election that lad been won over by Ayub and a

deal |»i«i worked out between them. Out more factor contributing to the defeat of ”ifimah was the refusal of COP to let the death jaNazimuddin, second Governor General

and second Prime Minister of Pakistan, to disturb their schedule. Miss Jinnah and COP leaders did not stay on in Dhaka for his funeral while Ayub and his party issued profuse condolence messages. This caused resentment in East Pakistan against Miss Jinnah. Ayub and his party fully exploited such sentiments.

ELECTION RESULTS DISPUTED

The magnitude and gravity of the allegations levelled by the COP against the manner in which the elections had been conducted created an impression that it suffered from a lack of faith in the entire election process. This crisis of confidence was amply reflected in the COP’s instantaneous refusal to accept the poll results. While the steering committee of the COP branded the elections as a farce, Miss Jinnah charged that ’these elections have been rigged. I am sure that the so-called victory of Mr Ayub Khan is his greatest defeat’.28

More than anything else, the indirect system of electing the President was responsible for the COP’s crisis of confidence in the electoral process. It pointed out that it was in fact this system which permitted all sorts of malpractices to occur. It allowed the manipulation of voters because their numbers were small. The use of official machinery in the elections, the corruption of voters by bribery and their intimidation, became easier and uninhibited. And during this process, the COP charged, the popular will became distorted and the electoral system produced a result which was ’directly contrary to the will of the people’.29 The government based upon the consensus achieved

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through these processes, the COP reasoned, could neither be democratic, nor entitled to claim any legitimacy. The outcome of these elections, the COP further maintained, was incapable of conferring legitimacy to the constitution, as was claimed by Ayub, its architect.

The election results have remained disputed ever since which affected the legitimacy of the government of Ayub from January 1965 onwards. When the public finally turned against him, after November 1968, this question was often voiced.

AFTERMATH OF THE PRESIDENTIAL ELECTION

On the evening of 2 January 1965, Ayub broadcast his thanks to the nation. There were the customary assurances of fresh dedication to the service of Pakistan and he did not fail to observe that the nation had given him a clear mandate to pursue ’my internal and external policies’. He made a call for national unity and expressed goodwill to all, including Miss Jinnah, and he urged that ’no trace of malice, nor of revenge should inhibit us from rejoicing in the glory of the people’. He added: ’Together let us build, together let us accomplish; so that Pakistan may endure and prosper.’ Unfortunately, things did not work out that way.

The morning of 4 January revealed Captain Gohar Ayub, standing in a jeep, apparently firing pistols into the air in unrestrained paroxyms of delight, and leading a procession of trucks through the streets of Karachi. These were all driven by Pakhtoons since most of Karachi’s trucking business was in their hands. It seemed as if every three-tonner in the city had been mobilized for what appeared to be a show of force and a reminder to Karachi that although it had voted for Miss Jinnah and not for Ayub, there need be no doubt as to the outcome of the election. The procession not only caused a great deal of inconvenience but also raised the question of whether this was a breach of section 144 which was in force in Karachi at that time, and if so, whether an exemption from the effect of the order had been granted by the Commissioner, Roedad Khan, who happened to be a Peshawar man. Further, people were asking themselves whether the exemption, if any, had been granted before or after the procession. It appeared improbable that Gohar Ayub would be troubled by such niceties and it did not seem that the Commissioner was the kind of man to insist on their observance.

In the circumstances, it may not appear that any of this was of much importance, and certainly nothing more would have been heard of it had not worse soon followed. That night, the Pakhtoon henchmen went down into those areas, including Liaquatabad, known to have been solidly opposed to Ayub and there wrought vengeance. Huts and

dwelling-places were burnt down and people fired upon. Those attacked promptly deft themselves and a night-long battle ensued injured were taken to hospitals with bulletand when order was restored the visible t indicated the anger and determination with the contending factions had fought and detail themselves.30 The army was called outandi|
5 January was patrolling the streets in tie which had been a witness to these grim scenaj such circumstances, there was little prosped renewed fighting but there was danger tat attacked might sally out during the night loota for revenge.

According to the newspapers that appeared!

following day, six people died in the affair. L*

a figure of twenty was mentioned, but it n

generally believed that the number of lives la

was much greater than the official admission, la

of lives and property were not the oil)

consequences; Karachi became irrevocaUt

opposed to Ayub and the ground was laid ftti

feud between Pathans and the refugee commuiiiij

from India which endured for a very long time«

in the months that followed January 1965sporak

acts of vengeance occurred. This feud has ori

aggravated over a period of time and tk

unfortunate clashes between Muhajirs IK

Pakhtoons in Karachi in the late eighties a i

continuation of this feud, claiming thousands^

lives and billions of rupees worth of property

The government covered up the inci dropped the inquiry ordered in this behal

NOTES

igaimtAjiti merimifP

1. Miss Jinnah died on 1 1 July 1967. She u at Karachi and the crowd that followed was estimated at about half a mill opportunity was taken to raise slogans against Ajit and there was some rioting in which me the Jamaat-i-Islami and left-wing grot involved.

2 . The word used was *'bid' at' ,* which can be t as bad innovation.

3. The Pir of Dewal Sharif, at that time comparatively youthful man. He was welU and made a great impression on many pcut

West Pakistan. At one time that Ayub was one of his remained uncertain. He, ho influence on account of tl during the Ayub era.

4. Gauhar, Altaf, *Ayub Kh Military Ruler*. 1993. San Lahore, p. 275.

5. Misra, K.P. *Pakistan's Sec Consensus,* 1967, Impex In< citing Sharif-al-Mujahi(Presidential Elections', *Asi* Vol. 5, No. 6, p. 293.

6. While in West Pakistan, it hundred thousand candidati thirty thousand contested se Pakistan showed that about thousand candidates were seven thousand contested average three candidates wi unit, in some cases the numt from four to seven. *The P* November 1964

7. The extent of this bargaininj large number of withdrawal East Pakistan, for example withdrawals the number increased from 626 as on 24 on 25 October 1964 *The Pa*
26 October 1964. By 10 Nov touched the mark of 2462. number of withdrawals we seats in that wing went
11 November 1964.

8. *The Pakistan Times*, 2 Nove

9. *Dawn*, 11 November 1964.
10. There were some independi

who alleged that Ayub regin practices. For example, F *Telegraph* said that many pl< Jinnah were scared because o that Government would punii her. Quoted in *Pakistan Obse*

burnt down and people were ittacked promptly defended ight-long battle ensued. The > hospitals with bullet-wounds s restored the visible damage and determination with which tons had fought and defended army was called out and on oiling the streets in the areas vitness to these grim scenes. In s, there was little prospect of but there was danger that the ly out during the night looking

tie newspapers that appeared the *i* people died in the affair. Later, ity was mentioned, but it was :d that the number of lives lost
• than the official admission. Loss property were not the only Karachi became irrevocably b and the ground was laid for a thans and the refugee communities h endured for a very long time and lat followed January 1965 sporadic nee occurred. This feud has only ver a period of time and the ;lashes between Muhajirs and Karachi in the late eighties are I f this feud, claiming thousands of ms of rupees worth of property, unent covered up the incident an iquiry ordered in this behalf.

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r of Dewal Sharif, at that time, was i atively youthful man. He was well-educatt ide a great impression on many people i

west Pakistan. At one time it was widely believed that Ayub was one of his devotees but this has remained uncertain. He, however, wielded a lot of influence on account of this general impression during the Ayub era.

4 Gauhar, Altaf, *Ayub Khan-Pakistan's First Military Ruler.* 1993. Sang-e-Meel Publications, Lahore p 275.

5 Misra, K.P. *Pakistan's Search for Constitutional Consensus,* 1967, Impex India, New Delhi, p. 194, citing Sharif-al-Mujahid, 'Pakistan's First Presidential Elections', *Asian Survey,* June 1965, Vol 5, No. 6, p. 293.

While in West Pakistan, it was estimated that one hundred thousand candidates were in the run for thirty thousand contested seats, the figures' of East Pakistan showed that about one hundred and thirty thousand candidates were in the field for thirty seven thousand contested seats. Whereas on an average three candidates were contesting for each unit, in some cases the number of candidates varied from four to seven. *The Pakistan Times,* 1 & 8 November 1964

1 The extent of this bargaining can be gauged by the large number of withdrawals from the

contest. In East Pakistan, for example, as a result of these withdrawals the number of uncontested seats increased from 626 as on 24 October 1964 to 1073 n 25 October 1964 *The Pakistan Observer, 25 &*
260ctober 1964. By 10 November 1964 this figure touched the mark of 2462. In West Pakistan, the number of withdrawals were higher since more seats in that wing went unopposed. *Dawn,* \ember 1964.

ahstan Times, 2 November 1964.
11 November 1964.

mere were some independent political observers f ko alleged that Ayub regime had resorted to such practices For example, Rawl Knox of *Daily Uegmph* said that many pledged to vote for Miss taahwere scared because of whispering campaign that Government would punish those who voted for IB Quoted in *Pakistan Observer,* 14 January 1965.

11. Ralph Joseph, 'Pakistan's First General Elections', *Eastern World,* February 1965, Vol. XIX No. 2, p. 10.

12. 'The resolution of the Working Committee of the Pakistan Council Muslim League', *The Pakistan Times, 6* June 1964.

13. Ibid., 22 October 1964.

14. *Dawn,* 28 June 1964.

15. For some interesting examples, see *Pakistan Observer,* 13 and 18 August 1964.

16. *The Pakistan Times,* 21 November 1964.

17. *Pakistan Observer,* 21 October 1964.

18. Ibid., 7 November 1964.

19. See the statement of Mahmoodul Haq Usmani, a member of the COP Steering Committee, *Dawn,*
9 December 1964.

20. See the statement of Mian Mahmud Ali Kasuri, a COP leader, ibid., 11 December 1964 and also the statement of the COP Steering Committee, *Dawn,*
28 December 1964.

21. *Pakistan Observer,* 21 December 1964.

22. See the statement of Mian Tufail Mohammad, Secretary-General of the Jamaat-i-Islami, *Pakistan Times,* 26 November 1964.

23. *Pakistan Times,* 19 December 1964 and Pakistan Observer, 21 December 1964.

24. See Miss Jinnah's statement, *Dawn, 1* December 1964.

25. The statements of Khwaja Mohammad Safdar and Lt-General Azam Khan appearing in *Dawn,* 30 July 1964 and *Pakistan Observer,* 16 November 1964 respectively.

26. The Constitution of 1962, Article 238.

27. 5 December 1969.

28. *The Pakistan Times,* 4 January 1965.

29. The Press Release of the COP, *Dawn,* 5 January 1965.

30. Herbert Feldman claimed to have visited the area shortly afterwards and found it extremely devastated. See his book titled *From Crisis to Crisis: Pakistan 1962-1969,* 1972, Oxford University Press, London, p. 81.

The elections to the national and provincial assemblies that followed, on 21 March 1965 and 16 May 1965 respectively, were clearly lopsided and in favour of the Convention Muslim League. The COP which was in great disarray and demoralized after losing the presidential elections, did not contest the elections seriously and vigorously, which were again indirect, voting being confined to the Basic Democrats. Knowing that Ayub had returned to power for five more years, there was little reason for Basic Democrats to annoy him and his political party. Miss Jinnah, after losing the presidential election, did not take part in active politics again. The result was that the Convention Muslim League won hands down in the elections to the national and provincial Assemblies. The defeat of opposition parties in the elections to the Provincial Assembly of West Pakistan was so complete that only one candidate from the opposition was returned and that too from Karachi.1 Ultimately, the strength of the opposition in the West Pakistan Assembly (of 156 members) grew to five. The results of the National Assembly elections were as under:

Muslim League (Conventionist) 126 Combined Opposition Parties 13

Independent Group 10

Other Independents 6

The National Assembly elected in 1965 was very different from the one elected in 1962 which had a large number of members from the opposition. The results of the 1965 election are also indicative of massive interference by the administration with the electoral process, thus ensuring that the party in power was returned with an overwhelming majority.

THIRD, FOURTH, AND FIFTH AMENDMENTS TO THE CONSTITUTION

With the political party of Ayub having won overwhelming majority in the new Natural Assembly, it was no problem for him to have tit Constitution amended the way he desired, forwto only a majority of two-thirds of the total numW members of the National Assembly was requraf and Convention Muslim League had many *m* than that number. The Constitution Amendment) Act, 19653 added the Fifth to the Constitution in which a number of offal appointments were mentioned which did w disqualify a person from being elected as a mente of the National and the Provincial Assemblies.

The Constitution (Fourth Amendment) Act
19654 empowered the government, after consulting the Public Service Commission, to retire is tk public interest any person below 55 years of ajt who had completed 25 years of qualifying semct or, subject to rules, any person who had reacted the age of 55.

The Constitution (Fifth Amendment) Act 1%!’ empowered the President, during a Proclamation of Emergency, to suspend a number of fundamental rights, namely freedom of movement, freedom of assembly, freedom of association freedom of trade and business, freedom of speed and provisions as to property. The President uas also empowered to suspend the right to move

an; court for the enforcement of any of tkt fundamental rights and to suspend any pendiij proceedings before a court regarding ttt enforcement of fundamental rights during the Proclamation of Emergency. This amendment further enlarged the powers of the President to restrict the liberties of the citizens and curtailed the powers, of the courts.

The root of the objection to the Fiftk Amendment was not that it had withdrawn anj

fundamental rights, but that it had ineffectual and enabled the g< contravene them as it chose wi challenge. Furthermore, this remain for more than three years.

It was the continuance of the stat and the power that it placed in Ayub created much discontent, and in followed he was frequently taxe attempt was made in the Nations withdraw the declaration of emerg rate, to strongly condemn, but this successfully resisted.

INDO-PAKISTAN WAR, 1

. number of clashes between r_;istani forces on the cease-fire had greatly increased during 196^ during the first half of 1965. In
1965, there were serious skirmisl armed forces of India and Pakist known as the Rann of Kutch. F forces gave a good account of tr might have given rise to misplaci the mind of the military leaders! take on India militarily.

Finally, a serious crisis in relations precipitated on 5 AUJ armed freedom fighters from Aza entering Indian occupied *]f* unsuccessful attempt to fomen parties of freedom fighters enten India protested against what it ca but such protestations were rejec The number of skirmishes on in Kashmir increased in May an this number declined after the si] of Kutch cease-fire agreement, all along the line once again em and on 16 August Indian troops < and occupied Pakistani borde September, Pakistani forces a Indian sector, capturing a key po On the same day, the Indian accused a Pakistani aircraft of a Air Force ground unit near *L*

WAR WITH INDIA AND RIFTS WITHIN

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party of Ayub having won an ajority in the new National
10 problem for him to have the led the way he desired, for which two-thirds of the total number of ational Assembly was required2 luslim League had many more :r. The Constitution (Third 19653 added the Fifth Schedule in which a number of offices or re mentioned which did not from being elected as a member

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fundamental rights, but that it had rendered them ineffectual and enabled the government to contravene them as it chose without risk of challenge. Furthermore, this remained the position for more than three years.

It was the continuance of the state of emergency aid the power that it placed in Ayub's hands which created much discontent, and in the years that followed he was frequently taxed with it. An attempt was made in the National Assembly to withdraw the declaration of emergency or, at any rate, to strongly condemn, but this was easily and successfully resisted.

INDO-PAKISTAN WAR, 1965

The number of clashes between the Indian and Pakistani forces on the cease-fire line in Kashmir y greatly increased during 1964, and increased fang the first half of 1965. In April and May 1965, there were serious skirmishes between the armed forces of India and Pakistan in the region known as the Rann of Kutch. Pakistan's armed forces gave a good account of themselves which

might have given rise to misplaced confidence in the mind of the military leadership that it could lake on India militarily.

Finally, a serious crisis in Indo-Pakistani relations precipitated on 5 August 1965 when araied freedom fighters from Azad Kashmir began entering Indian occupied Kashmir in an unsuccessful attempt to foment revolt. Further parties of freedom fighters entered on 18 August. India protested against what it called ’infiltration’, but such protestations were rejected by Pakistan.

The number of skirmishes on the cease-fire line i Kashmir increased in May and June. However, fas number declined after the signing of the Rann of Kutch cease-fire agreement. Exchanges of fire ill along the line once again erupted on 8 August ml on 16 August Indian troops crossed the border nd occupied Pakistani border posts. In early September, Pakistani forces advanced into the Indian sector, capturing a key post on 5 September. On the same day, the Indian Defence Ministry

noised a Pakistani aircraft of attacking an Indian

to Force ground unit near Amritsar, without

causing any damage. This was the first incident reported outside Kashmir. On the following day Indian troops launched an offensive across the Punjab frontier into West Pakistan. The Indian Defence Minister claimed as justification for crossing international borders that the Indian attack had been launched in order to pre-empt an attack by Pakistan on Indian Punjab.

When India attacked Pakistan, the man most surprised was Ayub. His surprise was shared by the Commander-in-Chief of the Pakistan Army. They had been assured by Bhutto, Foreign Minister, and Aziz Ahmad, Foreign Secretary, that India would not cross international borders to attack Pakistan. They had even suppressed a message from the Pakistan High Commissioner in New Delhi sent through the Turkish Embassy to the Foreign Office in Islamabad, that India was planning to launch an attack on Pakistani territory on 6 September. Ayub was woken up at four o’clock in the morning on 6 September and given the news of the Indian advance towards Lahore. He telephoned General Musa, Commander-inChief of the Pakistan Army, who said he had also heard the news but was waiting for confirmation.6 All this badly exposed the military genius of Ayub and his army chief.

In a broadcast on 6 September, Ayub declared ’We are at war’, and proclaimed a state of emergency, although an Indian government spokesman commented: ’India is not at war with Pakistan or the Pakistani people. India’s operations are intended to destroy Pakistan military bases from where they attacked India.’ On 11 September, the Khem Karan counter-offensive ran aground and with that collapsed Pakistan’s entire military strategy. For Pakistan, the war was over.7

Fighting continued on all fronts until
23 September. The UN Security Council adopted a resolution which stated *inter alia:*

The Security Council... demands that a cease-fire should take effect on Wednesday, 22

September 1965 at 0700 hours GMT, and calls upon both governments to issue orders for a cease-fire at that moment and a subsequent withdrawal of all armed personnel back to the positions held by them before 5 August 1965.

At Pakistan's request, a special meeting of the Security Council was held in the early hours of 22 September at which Bhutto announced Pakistan's decision to order a cease-fire but warned the Council that if it did not bring about a settlement of the Kashmir question within a limited period of time, Pakistan would quit the United Nations.

The cease-fire came into effect as ordered, but was jeopardized by a series of violations by both sides and by their refusal to withdraw from the positions they held in each other's territories. The Indian government alleged that after the cease-fire, Pakistani forces had intruded into the Fazilka area and many border areas of Rajasthan which they had not previously occupied, and a number of engagements took place in both sectors.

The tone of the Security Council proceedings was characteristic of most, if not all, debates on the Kashmir question. The parties to the dispute came with different premises, to which they resolutely adhered. The Indians said that, in conformity with the Security Council resolution, Pakistan must vacate Azad Kashmir first. Thereafter, the question of the plebiscite could be considered. Pakistan said that all this was unsatisfactory, in that it offered no assurance that India would not then occupy Azad Kashmir and retain its grip permanently. All that was necessary, according to Pakistan, was a plebiscite by the Kashmiris to decide what they wanted to do with their future.

Not until 6 December 1965 did General Marambio, U Thant's representative, arrive in Pakistan to arrange troop withdrawals, by which time Ayub and Lai Bahadur Shastri had agreed to meet at Tashkent in the Soviet Union.

THE TASHKENT DECLARATION AND STUDENT PROTESTS

The President of Pakistan and the Prime Minister *of India began discussions on 4 January 1966, in* Tashkent, following the Soviet government's offer in November 1965 of its good offices in helping to *resolve the dispute. The* Soviet Prime Minister, Alexei Kosygin, was in Tashkent throughout the

six day negotiations and played a vital pan eventual successful termination, after it had1 at one point that they would end in Largely as a result of Kosygin's mediatory talks ended on 10 January with the signing > Tashkent Declaration, under which Indu Pakistan agreed to renounce the use of forai settlement of their disputes and to withta troops to the position existing on 5 August 1! before the outbreak of hostilities between the countries. The main provisions were:

1. The Prime Minister of India and President of Pakistan agree that both will exert all efforts to create \ neighbourly relations between India Pakistan in accordance with the L They reaffirm their obligation Charter not to have recourse to force aril settle their disputes through peaceful They considered that the interests of in their region and particularly in the Mtl Pakistan subcontinent and, indeed, I interests of the peoples of India and Pakistn were not served by the

continuance o1 tension between the two countries

It was against this background that Jam and Kashmir was discussed, and each of I sides set forth its respective position.

2. All armed personnel of the two countes would be withdrawn not later tka
25 Febuary 1966, to the positions they kek prior to 5 August 1965, and both sides woiik observe the cease-fire terms on the cease fire line.

3. Relations between India and Pakistan would be based on the principle of non-interferenct in the internal affairs of each other.

4. Both sides would discourage any propaganii directed against the other country

5. The normal functioning of diplomatic missions of both countries would be restored, and the High Commissioners of botk countries would return to their posts.

6. Measures towards the restoration of economic and trade relations, communications, and cultural exchanges would be considered, and steps taken to impleme

, , /.

existing agreements between Uidva.

7 Prisoners of war would be repa •.Hussions would conquer

problems of refugees and evic* Migrants. Both sides wiU ere.

which will prevent the exodus ,,

9 The Prime Minister of In President of Pakistan have ag sides will continue meetings highest and at other levels < direct concern to both countn have recognized the need to se Pakistan bodies which wiUi governments in order to done steps should be taken.

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Indian government continued to ^ Kashmir was an integral pa* ”” phoria built up during

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>ns between India and Pakistan would ed on the principle of non-interference internal affairs of each other, ides would discourage any propaganda :d against the other country, lormal functioning of diplomatic ms of both countries would be restored, he High Commissioners of both ies would return to their posts, ures towards the restoration **of** mic and trade relations, communica-

and cultural exchanges would b« iered, and steps taken to implement the ing agreements between India and tan.

7. Prisoners of war would be repatriated.

8. Discussions would continue relating to the problems of refugees and evictions of illegal immigrants. Both sides will create conditions which will prevent the exodus of the people.

9. The Prime Minister of India and the President of Pakistan have agreed that the sides will continue meetings both at the highest and at other levels on matters of direct concern to both countries. Both sides have recognized the need to setup joint IndoPakistan bodies which will report to their governments in order to decide what further steps should be taken.

Within a few hours of the signing of the IndoPi Declaration, Shastri, who was sixty-one, died suddenly in the early hours of 11 January 1966.

Following unsuccessful talks at the ministerial

level (in accordance with the Tashkent

Declaration) held in Rawalpindi on 1 and 2 March,

diplomatic exchanges continued throughout the

spring and summer. These led to no result, as

Pakistan maintained that the most important issue

I to be discussed was that of Kashmir, whereas the

f Man government continued to uphold its view

Mt Kashmir was an integral part of India.

Tie euphoria built up during the 1965 war had

f ltd to public perception in West Pakistan, nurtured

3) the government, that Pakistan was winning the

w The government propaganda machinery made I wple believe that Pakistan could have taken I Kashmir by force while defending its international Itaders, had it not been forced to accept the ceasefire. This belief was misconceived. In fact, the war IW resulted in a stalemate. Pakistan had to accept I It cease-fire as it was running out of ammunition I ml supplies and was in no position to continue or to take on India again in a second

News of the agreement in Tashkent shocked Ihkstanis who had expected something quite Ittmnt. Virtually everyone believed the talks Iraki fail, and preparations were underway to |Kkoine Ayub back to Pakistan as a hero of the le, but when the news was relayed in the

tning over Radio Pakistan there was only lipise and dismay. The following morning, when

it was learnt that'the Indian Prime Minister had suffered a heart attack and died shortly after the signing ceremony, public attention was still riveted on the agreement. Had Pakistan made so great a sacrifice only to accept the restoration of the *status quo ante"?* When Ayub finally returned to Rawalpindi there were no celebrations, no press conferences, and no high-level meetings. Ayub did not seem inclined to explain why he chose to sign the agreement and went into immediate seclusion. Ayub's reluctance to explain his reasons for accepting the Tashkent Declaration was more than what the aroused Pakistanis could tolerate. Hence, after an impatient pause of almost forty-eight hours, demonstrations erupted in several areas of West Pakistan. Not unexpectedly, the student community stood in the forefront of this activity and public peace was shattered.

The most serious riots occurred in Lahore, the celebrated city of the seventeen-day war. Section 144 of the Code of Criminal Procedure was in force in Lahore as in other parts of West Pakistan, making it a violation to take out processions or hold public meetings of more than five people. Nevertheless, students from Punjab University and other local colleges moved out of their campuses defying the order, and proceeded to march on the downtown area. Earlier a band of students, dressed in black and carrying banners calling upon the government to reconsider the position taken at Tashkent, camped outside the main gate leading to the Governor's residence. Efforts to persuade the students to leave proved futile and police reinforcements arrived to bolster the detachment already on the scene.

Rioting began some time after noon. The police ordered a halt to the marchers converging on the city, many of whom were joined by veiled women who carried children alleged to be the dependents of men killed in the war. Rioting in Lahore continued into the night and when it was finally brought under control, four people were dead, many were injured, and several hundred were in jail. Punjab University, local colleges, and schools were ordered to be closed for an indefinite period. Many people were outraged, more were quietly bitter, but hardly a person could be found who was not prepared to voice his displeasure with the

unexpected turn of events in Tashkent. Popular sympathy was with the students, who reflected the feelings of West Pakistan's urban population.8

Concerned with the violent reaction to the Tashkent Declaration and urged by his advisers to lay the matter before the people, Ayub broke his self-imposed silence with a mid-day radio address to the nation on 14 January. Speaking in Urdu, he explained that the Tashkent Declaration had in no way detracted from or damaged the country's position on Kashmir. 'The Kashmiris' right to choose their future remained inviolable', he reiterated.9 Ayub declared that once the withdrawal of the armed forces had taken place, Pakistan would be in a position to request the Security Council to mediate the dispute. This was in keeping with the resolution of 20 September 1965, he explained. But no matter what happens in the future, he continued, Pakistan would never abandon the Kashmiris and the country would never enter a no-war pact with India 'unless the Jammu and Kashmir dispute was settled honourably and equitably'.

Taking note of the sentiment aroused against his policies, Ayub remarked: 'There may be some amongst us who will take advantage of your feelings and will try to mislead you. They are not more patriotic, perhaps, than you or me. The ordeal is not yet over'. Clearly, Ayub held to the view that the demonstrations were the work of his political antagonists. It was the judgment of most impartial observers, however, that he had failed to gauge the temper of the population that, in fact, violent reaction was a predictable response and was absolutely spontaneous. Politicians had reacted much more slowly to Tashkent and, though they had not created the disturbances, they sought to reap some advantages from them.

The injury caused to Ayub's image by the Tashkent Declaration cannot be doubted. He was obliged to launch a special, countrywide campaign in order to exonerate himself, although it is unlikely that he ever gave the real reasons for signing it. Zulfikar Ali Bhutto, who must have known a good deal of the actual situation even if his military judgment was untutored, was opposed to the Tashkent Declaration, and a few months later he quarrelled with Ayub over it and was

dropped from the government. Bhutto had aim claimed that the whole truth about Tashkent l(never been stated and, at various times, H threatened to expose everything. Whether« related to the possibility of carrying on then with prospects of success, or to the course ofl negotiations has never been made clear.

REACTION OF POLITICIANS TO **THE TASHKENT** DECLARATION

The reaction of political parties to the Taskla Declaration was edifying. There were those it Chaudhri Mohammad Ali (Nizam-i-Islam), u Shaukat Hayat Khan (Council Muslim Leagit who condemned every feature of the agreemet there were others like Mujib (East Pakistan A»a League), and Bhashani (National Awami Pars) who refrained from criticism. Bhasham's NAI seldom argued the cause of Kashmir.... consistent with its previous stand, avoided takiij sides in this clash. Maudoodi's Jamaat-i-Islai vehemently criticized the Tashkent Agreement Although his party was extremely well-organra. it never captured the popular imagination n» harnessed the

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sentiments of importar articulate interest groups. Whereas Ik conservative West Pakistani opp emphasized the limited objective of rei Ayub, it remained divided on questi organization and programme. The forces Bhashani, like those which rallied around Mupb; L East Pakistan, were represented by contrastr; f radical interests. For them, Ayub was preliminary target.

Both the NAP and Awami League >. , comprehensive changes in Pakistan's poluiu I organization. They refused to be associated " the anti-Tashkent agitation since it was too li an objective. I

Undaunted by dissension in their ranks, n political parties refused to alter their cc Tashkent seemed to' be an issue worth exploiting and they diligently set about their task. Their tactics were simple and conventional. In spite of government directives imposing section 144 in all the major urban centres of West Pakistan

politicians held public meeting themselves for arrest when the pol is doubtful whether this tactic 1 symbolic or sentimental importanci members of the Council Muslim L< Islam, Jamaat-i-Islami, and West P League pursued their original violated section 144, they went to one.

In Dhaka, Nurul Amin, a modera minister of East Pakistan, convener Democratic Front (NDF), and opposition in the National Assemt the authorities to end the state proclaimed during the war under w in West Pakistan were being a seeking the release of all politica the rescinding of section 144 condoning the anti-Tashkent agitati intimated that the Tashkent Declari best interest of the country but h government's action denying the i to those who opposed it. Farid *A* Secretary of the Nizam-i-Islam, car of the agreement, but agreed with > the government should avoid us actics.10

Frustrated by the government aability to agree on important 'akistani leaders announced tl onference would be held in La
- February 1966 to thrash out d before the conference convened it that the central issue would be Jeclaration. On learning this, East he exception of a small contingen declined the invitation. The NAP ir were never invited, but the Vi iresident of the Awami League (w, i'akistan in an effort to gather s meeting) said they had flatly refu act, the working committee of tl Punjab and Bahawalpur passec condemning the Lahore meeting, only would it disrupt the solidarity but that it would also 'further the s of the imperialists'. The clash betv and left-wing parties was clear!}

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POLITICIANS TO DECLARATION

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2 Mujib (East Pakistan Awami lani (National Awami Party), i criticism. Bhashani's NAP ic cause of Kashmir, and >revious stand, avoided taking . Maudoodi's Jamaat-i-Islami :ed the Tashkent Agreement, was extremely well-organized, the popular imagination nor :ntiments of important and

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WAR WITH INDIA AND RIFTS WITHIN 183

politicians held public meetings and offered themselves for arrest when the police appeared. It is doubtful whether this tactic had more than symbolic or sentimental importance. All the same, members of the Council Muslim League, Nizam-iIslam, Jamaat-i-Islami, and West Pakistan Awami League pursued their original plans. Having violated section 144, they went to prison one by one.

In Dhaka, Nurul Amin, a moderate, former chief minister of East Pakistan, convener of the National Democratic Front (NDF), and leader of the opposition in the National Assembly, called upon Ike authorities to end the state of emergency proclaimed during the war under which politicians in West Pakistan were being arrested. While leeking the release of all political prisoners and Ike rescinding of section 144, he avoided condoning the anti-Tashkent agitation. Nurul Amin intimated that the Tashkent Declaration was in the best interest of the country but he deplored the government's action denying the right of dissent to those who opposed it. Farid Ahmad, General Secretary of the Nizam-i-Islam, came out in favour of the agreement, but agreed with Nurul Amin that government should avoid using repressive | »cs.10

Frustrated by the government and their own liability to agree on important issues, West hkistani leaders announced that a national conference would be held in Lahore on 5 and (February 1966

to thrash out differences. But Jtfore the conference convened it was announced lit the central issue would be the Tashkent ration. On learning this, East Pakistanis, with

[exception of a small contingent led by Mujib, timed the invitation. The NAP insisted that they ’tie never invited, but the West Pakistani radent of the Awami League (who went to East ’ilustan in an effort to gather support for the wing) said they had flatly refused to join. In », the working committee of the NAP in the ’i and Bahawalpur passed a resolution Ivtaning the Lahore meeting, noting that not I Ai would it disrupt the solidarity of the country Mtkat it would also ’further the sinister interests Trteimperialists’. The clash between right-wing

i left-wing parties was clearly defined. The

moderate East Pakistani opposition may have declined the invitation to join in the protest movement because the Kashmir issue was too remote. They did not want to risk going to prison for a cause they could not fully support.

The Jamaat-i-Islami, Nizam-i-Islam, Council Muslim League of West Pakistan, and Awami League of West Pakistan sponsored the meeting, maintaining their individual identities throughout the proceedings. As anticipated, Nurul Amin’s NDF and the NAP boycotted the conference. Even Chaudhri Mohammad Ali’s request that they send observers went unheeded. With the absence of these ’antagonists’ it would have been expected that the convention would agree on a common programme but this was not the case. The only East Pakistanis to turn up in Lahore were those led by Mujib, and their demands were enough to fracture what little unity the conference could muster. Mujib made a lengthy speech in which he highlighted the manner in which the defence of East Pakistan had been ignored. He said that there was less than one military division of troops11 in all of East Pakistan, and that was inadequately equipped. According to him, there were only six aircrafts and four tanks with the Pakistan Army in East Pakistan and if India had chosen to attack, East Pakistan was a sitting duck for them. During the course of his speech, he gave detailed proposals for the autonomy and defence of East Pakistan, which included separate foreign trade, foreign exchange reserves, and an East Pakistan militia. These proposals later attained great notoriety as the ’Six Points Programme’ of Mujib.12 When the meeting was finally called to order, more than 700 delegates were present with only twenty-one from East Pakistan.

The national conference ended in two days. From most standpoints, it failed to attain any of the objectives for which it had been organized. A proposal for launching a civil disobedience movement aimed at gaining the revocation of the Tashkent Declaration was presented by some members of the West Pakistan Council Muslim League and West Pakistan Awami League, but it was not taken up for want of consensus. Some young firebrands held the view that the matter should be pressed with deliberate force, but senior

politicians were unimpressed and indicated a desire to pursue their objectives through constitutional means. Later, the conference passed resolutions condemning the Tashkent Agreement and urged the government to abrogate it. Mujib, having met with stiff opposition on his own proposals demanding more autonomy for East Pakistan, not only rejected these resolutions but marched his small delegation out of the conference and returned to his native province. For all intents and purposes, the meeting was a dismal failure. Its historical significance lies in the launching of the Six Point Programme by Mujib and the beginning of the end of Pakistan's unity.

THE SIXTH AND SEVENTH AMENDMENTS **or 1966**

The Sixth Amendment13 to the Constitution was an extension of the Fourth Amendment. A government servant could be retired, in the public interest, on completion of twenty-five years of service. The retirement age was fixed at fifty-five years. The requirement to consult the Public Service Commission could be dispensed with in specific cases or the matter could be referred to some other authority for consultation.

The Constitution (Seventh Amendment) Act,
196614 amended the provisions relating to the ordinance-making powers of the President and the Governors, and the ordinance-making power of the President during emergency. The amendment did not make any significant change in these provisions which were already very stringent. However, the method of converting an ordinance into an Act of the central legislature or a provincial legislature was further simplified. An ordinance could become an Act on the passing of a resolution by the concerned legislature. Even if the resolution had modified the ordinance, it could still become an Act if assented to by the President or a Governor, as the case may be. The ordinance-making power of the President during an emergency was unfettered under the Constitution and it could not be disapproved by the National Assembly. However, the Seventh Amendment allowed the National Assembly to convert such an ordinance

into an Act of the central legislature by F»oo.

resolution of approval. Even if a resolution.

made an amendment in the ordinance, it con

become an Act if assented to by the Presided

It is noticeable that through various amendta

to the Constitution, the powers of the Preside*!

his nominated Governors, which were alrdj

enormous, were further expanded and extenW

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particularly as far as the control on bureaucracy!
law-making institutions were concerned. A W
legislation was done through ordinance-Baku
which was later rubber stamped by the assemble
This was the beginning of the tendency on the put
of the legislatures to abdicate the law-mahij
functions in favour of the executive, and tit
ordinances framed by the law ministries of Ik
central and provincial governments eventual;
became Acts of legislature without going throng
the requirements of successive readings of the Bilk
and without the benefit of meaningful discussm
in the legislatures. When ordinances were placed
before the assemblies, their approval without *m*
amendment by the concerned legislature *n*
deemed to be a matter of prestige for the
government and was hustled through the legislate
with the help of brute majorities commanded h
the government. Any objection or suggestion by
an individual member, particularly if he was fin
the opposition, was brushed aside with contempt
regardless of how useful or weighty it might be
These amendments made the following changes

a. Terms and conditions of public servants »at changed with special reference to the age of retirement and the discretionary power of the President to direct the retirement of mil servants was further extended.

b. Other minor changes in terms and conditions of service were changed including change in the definition of certain categories of public servants.

c. Changes were made in Articles 29 and 30 with respect to the President's power of legislation by ordinance during emergency and otherwise.

Of all these, the most important group, as fa- • its practical effect and the power it gave Ayi manipulate the public administration

concerned, belonged to the first above. Ayub's intention was to g officials whom he did not like an< whom he liked long after the pr retirement. It may be said that thes< powers. It should be possible administration to disembarrass its tent or otherwise undesirable publ issue was the undermining of all governance and the overbearing President.

The Sixth Amendment, enacte
1966, was an elaboration o Amendment, enacted on 11 Augi months earlier. The Fourth Amer possible to direct the retirement c in the central and provincial gover five instead of at the age of sixt established by Ayub in Decem reasons for adopting a retirement a been explained, but thirty-four mor effect to this policy, Ayub evidently fifty-five was the right age after Amendment gave effect to this coi manner in which it did so apparentl; and, seven months later, it was di arrangement required elaboratic President (or a Governor) could retirement at the age of fiftycompletion of twenty-five year qualifying service, but could i extension of service beyond the off age, at his discretion, on such ten decide.

Ayub could not totally ignon opposition to the continued applies
30." It was, therefore, changed i Amendment, dated 20 December extend, very slightly, the power c Assembly to participate in legislatic which was part of the presidenti Thus this amendment was princip with clause (6) of Article 30.

As originally drafted, clause (6'

the National Assembly had no powe

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1. Even if a resolution had in the ordinance, it could nted to by the President, through various amendment ie powers of the President or •rnors, which were already tier expanded and extended, the control on bureaucracy or >ns were concerned. A lot of e through ordinance-making er stamped by the assemblies, ng of the tendency on the part to abdicate the law-making r of the executive, and the by the law ministries of the icial governments eventually islature without going through successive readings of the Bills nefit of meaningful discussion When ordinances were placed ies, their approval without any ie concerned legislature was

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concerned, belonged to the first category listed above Ayub's intention was to get rid of public oicials whom he did not like and to retain those whom he liked long after the prescribed age of retirement. It may be said that these were necessary powers. It should be possible for any public administration to disembarrass itself of incompettnt or otherwise undesirable public servants. The issue was the undermining of all institutions of governance and the overbearing powers of the President.

The Sixth Amendment, enacted on 31 March l%6, was an elaboration of the Fourth tendment, enacted on 11 August 1965, seven nonths earlier. The Fourth Amendment made it Ie to direct the retirement of civil servants ik central and provincial governments at fiftybe instead of at the age of sixty, as had been [tdblished by Ayub in December 1962. The |n»ns for adopting a retirement age of sixty have |ta explained, but thirty-four months after giving to this policy, Ayub evidently concluded that •five was the right age after all. The Fourth 'moment gave effect to this conclusion but the in which it did so apparently did not suffice «ven months later, it was decided that this |Mjement required elaboration so that the isident (or a Governor) could not only direct niement at the age of fifty-five, or after ipletion of twenty-five years of pensionig service, but could also allow an |Bnsion of service beyond the official retirement at his discretion, on such terms as he might

I Jyub could not totally ignore the growing i to the continued application of Article .' It»as, therefore, changed in the Seventh :nt, dated 20 December 1966, so as to I, very slightly, the power of the National bly to participate in legislation by ordinance k was part of the presidential prerogative, i amendment was principally concerned

f clause (6) of Article 30. s originally drafted, clause (6) provided that d Assembly had no power to disapprove ijordmance promulgated under Article 30 but ktcnild, by resolution, approve of it, in which (ie ordinance would be deemed to have

become an Act of the National Assembly. If the Assembly did not confer its formal approval in this way, the ordinance would cease to have effect if and when the state of emergency ended. This arrangement was changed by the Seventh Amendment which replaced the existing clause (6) by clauses (6) and (6A). While disapproval of an ordinance promulgated under Article 30 would still remain outside the authority of the National Assembly, it could, by resolution, approve of the ordinance with or without amendment. The power to amend was thus introduced and under the new arrangement an ordinance approved by the Assembly would become an act of the central legislature provided the amendments it had proposed received presidential assent. This extension of the Assembly's authority was clearly minimal and did nothing to moderate or clip the powers which Ayub exercised for so long after the emergency was first proclaimed. Nevertheless, a chorus of acclaim came from his supporters to these changes as a great and important addition to the National Assembly's powers.

Whatever else may be said of these amendments, they certainly concentrated all power in the President. They indicated that Ayub had no intention of withdrawing the state of emergency, and so long as that continued such legislative powers as the national and provincial assemblies possessed were-nullified. Therefore, dissatisfaction remained and this group of amendments laid the foundation for fresh discontent. A number of senior and, in some cases, very capable civil servants were compulsorily retired from service and a number of others were rapidly advanced to high places in the bureaucracy.

POLITICAL DEVELOPMENTS IN

EAST PAKISTAN:

FEBRUARY 1966-NovEMBER **1968**

Following the partition of Bengal in 1947, Nazimuddin was elected leader of the Parliamentary Party and took over as Chief Minister of East Pakistan. In the contest, Nazimuddin was supported against Suhrawardy by the Central Muslim League, which distrusted the latter because

I

of his involvement with the independent Bengal movement, and his association with Gandhi to bring about communal harmony in India. Suhrawardy was not treated well by the government of East Pakistan, not allowed to address public meetings, and was externed from the province in June 1948.16 Earlier, on 18 May, he was deprived of his membership of the Constituent Assembly because the Assembly amended its Rules of Procedure whereby a person not resident in Pakistan ceased to be a member of the Assembly.17 Suhrawardy was hit very hard by this because he had stayed back in Calcutta for some time after independence.

In February 1948, the restructuring of the Pakistan Muslim League was undertaken which proved divisive and led to widespread splits in all the provinces. In East Pakistan, the appointment of Maulana Akram Khan as the provincial organizer led Bhashani and his supporters to break away from the Muslim League. In a convention of political workers on 24 June 1949, attended by Bhashani, Fazlul Haq, and other League leaders, a new party called East Pakistan Awami Muslim League was formed, with Bhashani as President. So important was the support of students even to veteran political leaders that Mujib, a student leader at that time in jail, was appointed Joint Secretary of the party. Suhrawardy, whose supporters had joined the Awami Muslim League, tried to bring it within the framework of a national party. In March 1950, he called a convention of political workers at which a new party called the All Pakistan Awami Muslim League was formed with himself as the President and chief organizer.18 The manifesto of the party included provincial issues like nationalization of the jute trade, Bengali as the state language, and the holding of general elections on the basis of adult franchise. The differences within this national organization arose because the conditions in the two wings were completely different. Suhrawardy's attempt to synthesize the politics of the two wings through an indigenous national organization reflecting postindependence realities, failed.

In East Pakistan, the Awami League had emerged as a well organized and disciplined opposition party. In 1953, its council approved the

party manifesto and unanimously elected BhxhB as President and Mujib as General Secretary W top of the list in the manifesto was pro\nn» autonomy, leaving only defence, foreign aiful and currency to the centre, and Bengali as the snl language.19 I

During the first decade of independence te| were three main areas of conflict in the East-til relationship. They were the status of Benpi.1 constitution-making, and economic centralism ftl status of Bengali was resolved in the first 19ilH Constitution but, in the process, the controvqB left permanent scars on the national polity Soil understanding was reached on constitutional issvl like joint electorate and parity of represents • between the two wings in the central legislate I but no consensus could ever be reached M| economic issues which led to the demand fa I complete provincial autonomy. The undemocrati I regime of Ayub only aggravated the grievances ill East Pakistanis who felt more and more negatid I particularly in economic activities. I

There was also a hue and cry from various I sections of East Pakistan's population about I inequities and disparities they were alleged I suffering from at the hands of the central I bureaucracy and military. They alleged that there I was dominance of West Pakistan in these

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services I It was one of the avowed objects of the 1956 and
1962 Constitutions to bring about parity between the two provinces in economy and in the services Despite this, the gulf only kept widening Some efforts were made in Ayub's period to bridge the gap, particularly in the economic sphere But the gulf between the two provinces in the field of economics was not being abridged to the satisfaction of the people of East Pakistan In the central services, the gulf was widening and East Pakistan was seriously under-represented.

The extent of this influence can be judged from the prominent place of West Pakistani personnel among class I civil servants in the various ministries and departments of the central government. In 1966, the position was as follows.21

Ea! Pakista

President's Secretariat

President's Personal Section

Commerce Ministry

Defence Ministry

Industries Division.

National Resources Divsion

Rehabilitation and Works Divsion

Home and Kashmir Affairs Divsion

Education

Health, Labour, and Social Welfare

Foreign Ministry

Law and Parliamentary

Communications

Finance

1

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36

8

25
24
17
22
33
15
21

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The numerical distribution of all empl< central government was:

East Pakistan

West

Non Gazetted Gazetted

Gazetted

1338 26,310

3708

These and other inequities to whicl

charges such as under-recruitnu

Pakistanis into the public services and

into the armed forces, had been Ic

grievances and by the time Ayub

office in 1969, it was maintained thai

been done to address these. It was po

the economic gap between the two p

far from closed, although the counti

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earner of foreign exchange since l<i

East Pakistan. It was all very well

boast of the rapid advance in ti

manufactured goods, thus vindicating

planning, but the value of exported ju

East Pakistan was greater than tha

manufactured goods put together. It

that the total value of raw ju

manufactures exported from East

I equal to about half of the cour

(earnings, but did this money benefit

I The East Pakistanis did not think so

nanimously elected Bhashani lib as General Secretary. On e manifesto was provincial nly defence, foreign affairs, :ntre, and Bengali as the state

:cade of independence, there : of conflict in the East-West ^ere the status of Bengali, md economic centralism. The s resolved in the first 1956 he process, the controversy in the national polity. Some ched on constitutional issues uid parity of representation gs in the central legislature, ould ever be reached on ich led to the demand for utonomy. The undemocratic aggravated the grievances of ~elt more and more negated lie activities.

hue and cry from various kistan's population about rities they were allegedly he hands of the central ary. They alleged that there st Pakistan in these services, ved objects of the 1956 and bring about parity between conomy and in the services, only kept widening. Some \yub's period to bridge the *s* economic sphere. But the

provinces in the field of

being abridged to the pie of East Pakistan. In the ulf was widening and East

under-represented, ifluence can be judged from f West Pakistani personnel

servants in the various irtments of the central ic position was as follows:20

WAR WITH INDIA AND RIFTS WITHIN

187

East West Pakistan Pakistan

President's Secretariat 19 81

President's Personal Section nil 100

Commerce Ministry 36.4 63.6

Defence Ministry 8.4 91.6

Industries Division. 25.6 74.4

National Resources Divsion 24.7 75.3

Rehabilitation and Works Divsion 17.4 82.6

Home and Kashmir Affairs Divsion 22.5 77.5

Education 33.3 66.7

Health, Labour, and Social Welfare 19.0 81.0

Foreign Ministry 22.2 77.8

Law and Parliamentary 35.0 65.0

Communications 17.8 82.2

Finance 24.4 75.6

Tie numerical distribution of all employees of the central government was:

East Pakistan

Non Gazetted

Gazetted

West Pakistan

Non Gazetted Gazetted

1338

26,310

3708

82,944

These and other inequities to which were added charges such as under-recruitment of East Pakistanis into the public services and, particularly, into the armed forces, had been long standing grievances and by the time Ayub relinquished office in 1969, it was maintained that nothing had keen done to address these. It was pointed out that the economic gap between the two provinces was fir from closed, although the country's principal earner of foreign exchange since 1947 had been East Pakistan. It was all very well for Ayub to boast of the rapid advance in the export of manufactured goods, thus vindicating his economic planning, but the value of exported jute goods from East Pakistan was greater than that of all other manufactured goods put together. It was probable that the total value of raw jute and jute manufactures exported from East Pakistan was equal to about half of the country's export earnings, but did this money benefit East Pakistan? Hie East Pakistanis did not think so.

There were several factors that caused the widening of the gulf between East and West Pakistan and all of it was not attributable to Ayub, but their aggravation during his regime cannot be ignored. These factors included the death in 1963 of Suhrawardy. It robbed the eastern province, as well as the entire country, of one of its ablest men. Despite some flaws of character injurious

to his personal image and despite a much-thwarted political career in Pakistan, Suhrawardy was a man of undoubted capability and, notwithstanding his advancing years and his opposition to Ayub, he might well have made an important contribution to the solution of the political impasse between the two wings. His death left Khwaja Nazimuddin in charge, a man respected more for the piety of his character than for his political ability. He however, also passed away in September 1964. His brother, Khwaja Shahabuddin, was not really a part of the political scene and Nurul Amin, also in opposition, had evidently lost much of his former vigour. Thus, in East Pakistan, political leadership fell more and more into the hands of men such as Bhashani, also in advancing years but with extraordinary vitality, and Mujib, one of Suhrawardy's lieutenants.

It was during Ayub's administration that East Pakistan's movement towards autonomy acquired a more definite form. It was during his administration that the word secession became not only utterable but printable. Eventually, it was Ayub who expressed the liberal view that the only link between the two provinces lay in the fact that the Governor of each of them was appointed by the centre. 'Remove him (the Governor) and you have two countries straight away.'21 He was deeply worried about relations between East and West Pakistan. What disturbed him most was that Bengali Muslims saw little benefit in living together with West Pakistanis. He sensed separation to be inevitable.22

Ayub failed as much in East Pakistan, as in West Pakistan, because his regime became more oppressive and more corrupt without providing any material benefits to the deprived masses. It is quite possible that these evils were felt more in East Pakistan than in West Pakistan, not only because of the existence of greater poverty but by reason

of the methods adopted by Monem Khan, Governor of East Pakistan. He enlisted the support of the Basic Democrats by entrusting them with such functions as the distribution of food grains, clothing, and other necessities in times of shortage or disaster. The management of the Rural Works Programme was largely in their hands and many other forms of patronage allied to the exercise of minor administrative functions, enabled these people to oppress the poor, to secure all kinds of unfair advantage, and, of course, to enrich themselves. It is for this reason that when trouble became rife in the cold weather of 1968-9, violence took a specific turn in East Pakistan against these village masters, some of whom were brutally murdered.

MUJIB'S Six POINTS

As discussed earlier, opposition parties saw the Tashkent Declaration as a chance to embarrass Ayub and a conference was called at the house of Chaudhri Mohammad Ali to which Mujib was invited. Ostensibly, the purpose was to pressure Ayub. Mujib went to Lahore with the intention of collaborating but he also raised the question of East Pakistan's grievances and produced the Six Points Programme as they had been originally drafted. This was waived aside on the ground that the only purpose of the conference was to discuss Tashkent and Mujib's proposals could be discussed on another occasion. Sensing in this a repetition of the indifferent attitude towards East Pakistan, Mujib went back to his province, announced his support for the Tashkent Declaration, and proceeded to publish the Six Points which, he said, were essential if East Pakistan was to survive and prosper.

As originally drafted, this *(four-point) programme* said:

/. /ne Constitution *should* provide for a *federation of Pakistan in its true sense on the* basis of the

2. The federal government should deal witim subjects-defence and foreign affairs, *i* other residuary subjects should vestal federating states.

3. Regarding currency, either of the* following suggestions should be considart

(a) Two separate, freely convert* currencies or

(b) One currency for the whole country rt effective constitutional provisions I stop the flight of capital from Eastl West Pakistan. A separate banloij reserve was also to be made for El Pakistan.

4. Separate fiscal and monetary policies *is* to be adopted for East Pakistan.

Mujib was no profound political theorenoi His ability and skills lay in political organiatn! for which talent Suhrawardy often spoke wanrf about Mujib.23 Mujib also possessed a gift fa powerful oratory, with an appeal to emoboi unfortunately with an undertone of viotoct Armed with this programme, he now began* stump the countryside, preaching a new gospel *i* autonomy

within the parameters of the Lalon (Pakistan) Resolution and through the Six Poim The original draft which was the work ofi group of East Pakistani intellectuals who IB dissatisfied with the attitude of the centnl government, and with the evident advantages th West Pakistan, justly or unjustly, enjoyed Ik draft was first presented to Nurul Aram wit realized that a demand for secession could be mi into it. He delayed his reply and the authon showed the draft to Mujib, who was about to attd the conference on the Tashkent Declaration i Lahore. Seeing in the draft a crystallization of wot he wanted but had not been able to enunciate» *precisely, Mujib seized it and carried the* pro/wail to Lahore. After their adoption by Muiib's raft

the draft was amended and clarified to present sii *clear issues. They read* as follows:

V,

the movement of capit province to the other.

4. All taxes to vest in the pr

5. All foreign exchange ear to be at the disposal of I

6. An East Pakistan militia

The movement gathered ii and Bhashani, sensing the *chi* decided to jump aboard the aui Following the example of M speeches declaring that full p was the only means of ensurir united Pakistan. However, hi favour of the Six Point significantly enough, incurred displeasure. So far as Ayub's Bhashani stayed out of troub his contribution was negligibl West Pakistan, in line with the of ignoring or omitting to repo unpleasant or uncongenial situation in East Pakistan wa and details of the Six Points newspaper columns. Instead writing about secession and in made reference to the danger autonomy. At about the same Ayub's Foreign Minister, cha public debate on the Six Foil dialectics never took place disputant adroitly sidestepping actually appearing to do so. Th as fortunate since, had then meeting for this purpose, the re have been uproar and possibly Instead, in April Mujib dem referendum on the Six Point is the campaign with virulent a power and on those who had claimed that East Pakistan w

and robbed of its due share in product in order to feed W

voting.

"Wversal *adm^£pJ?^/<?//%#* 7

currencies or, alternatively, restncbtw ® t

government. On 23 *Apt* under the Defence *of Pak*

rnment should deal with two ce and foreign affairs; all subjects should vest in the

rency, either of the two stions should be considered; irate, freely convertible

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cy for the whole country with zonstitutional provisions to ight of capital from East to istan. A separate banking is also to be made for East

1 and monetary policies were for East Pakistan.

rofound political theoretician. Is lay in political organization hrawardy often spoke warmly ijib also possessed a gift for with an appeal to emotions b. an undertone of violence, programme, he now began to iide, preaching a new gospel of the parameters of the Lahore ion and through the Six Points, raft which was the work of a kistani intellectuals who were L the attitude of the central with the evident advantages that istly or unjustly, enjoyed. The >resented to Nurul Amin who nand for secession could be read yed his reply and the authors

0 Mujib, who was about to attend)n the Tashkent Declaration in

1 the draft a crystallization of what ad not been able to enunciate so seized it and carried the proposals

their adoption by Mujib's party, tended and clarified to present six :y read as follows:
Constitution for Pakistan, ivernment portfolios to be limited
5 and Foreign Affairs only.

provinces to have separata i or, alternatively, restrictions **on**

the movement of capital funds from one

province to the other.

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.

The movement -gathered in pace and strength aid Bhashani, sensing the change of atmosphere, faded to jump aboard the autonomy bandwagon. Following the example of Mujib he, too, made speeches declaring that full provincial autonomy »is the only means of ensuring a viable, durable, •ted Pakistan. However, he did not speak in favour of the Six Point Programme and, fiificantly enough, incurred no visible, official i fcpleasure. So far as Ayub's government

went, fcsham stayed out of trouble. For that matter, ’us contribution was negligible and enigmatic. In j Vest Pakistan, in line with the customary practice ((ignoring or omitting to report anything that had [•pleasant or uncongenial implications, the in East Pakistan was vaguely reported it details of the Six Points were kept out of !0spaper columns. Instead, there was some wing about secession and in March 1966, Ayub dereference to the dangers of slogans about aonomy. At about the same time, Bhutto, still tab’s Foreign Minister, challenged Mujib to a sic debate on the Six Points. This contest in ulectics never took place, each intending sputant adroitly sidestepping the other without flilly appearing to do so. This must be regarded j i fortunate since, had there been any public Wing for this purpose, the result would certainly lebeen uproar and possibly bloodshed. Instead, in April Mujib demanded a nationwide Sradum on the Six Point issue and stepped up it campaign with virulent attacks on those in per and on those who had been in power. He araed that East Pakistan was being despoiled U robbed of its due share in the gross national ”feet in order to feed West Pakistan. On IB was arrested in Jessore under the of Pakistan Rules and was promptly on bail, which did not suit the lent. On 23 April, he was again arrested ie Defence of Pakistan Rules and under the

East Pakistan Safety Ordinance, but this time on a non-bailable warrant. He was removed to Sylhet, conveniently distant from Dhaka by train and on the way he was greeted by demonstrators at various stations. His trial began on 7 May, in Sylhet Jail, for making seditious speeches and other such offences. Thus began his two-year odyssey from one prison to another, terminating at the cantonment where, in 1968, he was among the accused of the Agartala Conspiracy Trial.

For some time, negotiations were held between the representatives of Ayub and Mujib and his lieutenants but the attempt did not succeed. Ayub concluded that the arrest of Mujib, an energetic and aggressive personality, had blunted the edge of the movement. In December 1966, he again visited East Pakistan where, it is said, he succeeded in weaning away some of Mujib’s supporters and in cutting the Six Point movement down to manageable proportions by a lavish distribution of import licences and other money-spinning favours. Despite this, the movement continued and on New Year’s Day, 1967, it was announced that on
13 February, a Six Point Programme Day would be observed. The event was significant enough to take Ayub to East Pakistan yet again, in the month of March. During this visit, Ayub said that demands for autonomy would divide the country, involving dangers for East Pakistan. Later, on his return to Lahore, he also said that the demand for automony was a ’camouflage for separation’. It was evident at the time that his visit had not been as successful as the earlier one, but the official view claimed that the Six Point Movement was losing its appeal. Meanwhile, more and more East Pakistanis were accepting this programme as minimal. So the word warfare went on until, some months later, events took another and much more dramatic turn.

THE AGARTALA CONSPIRACY CASE

On 7 January, it was made public that twentyeight people had been taken into custody on serious charges. All of them belonged to the eastern province and included officers and men of the armed forces as well as three members of the civil

service of Pakistan.24 It was also stated that the office of the Deputy High Commissioner for India was implicated and that the Pakistan government had asked for P.N. Ojha, a First Secretary, to be withdrawn. This request was complied with and the Indian government retaliated by expelling M.M. Ahmad, Counsellor at the Pakistan High Commission in Delhi, alleging that he had distributed arms and money to subversive groups in India. A few days later, it was announced that Mujib, at that time in jail, was involved and would stand trial along with those already under arrest. Excitement rose steadily with the news that some of the conspirators had visited Agartala in India to make plans by which, with Indian help, an independent East Bengal could be established. Hence the Agartala conspiracy case.

After the arrests and the excitement associated therewith, little was heard of the matter until 22 April 1968, when an ordinance appeared by which a Special Tribunal could be set up to try the conspirators. Entitled the Criminal Law Amendment (Special Tribunals) Ordinance 1968,25 it was promulgated by Ayub under Article 30 of the Constitution, relating to the President's powers in an emergency (which had been declared in September 1965) and other provisions. The ordinance is an interesting piece of legislation because it did not purport to set up a single, special tribunal to deal with the Agartala case, but made it possible for a special tribunal, at any time, to try any case relating to offences concerned with conspiracy, mutiny in the armed forces, or inciting or seducing a member of the armed forces against or from his allegiance or duty. Thus, under this ordinance, the government could, whenever it chose, put together a special tribunal to deal with the alleged offences. The ordinance contained a section which overrode all laws for the time being including the Evidence Act 1872, and the provisions of the ordinance could not be questioned in any court including the Supreme Court.

The intention of the government was clear that if Mujib was convicted and sentenced to a substantial term of imprisonment, he could be safely silenced for a long time without the constitutional complications inherent in any sole reliance upon the Defence of Pakistan Rules and

without the legal difficulties involved in sedm cases before the ordinary courts.

On 19 June 1968, the trial opened and n conducted in Dhaka cantonment where the aeon were kept in custody. Eleven peoeple assooa with the affair had made full confessions and <w pardoned. Four of the accused made judia confessions. All these confessions formeds course, the testimony of accomplices andeieii they corroborated one another, as accompb testimony this evidence was clearly tainted li amount of direct evidence, as it came out in t Court, was limited. During the proceedings te was some confusion over identification and« prosecution witness was declared hostile as: therefore, made liable to cross-examination b\ a prosecution. The evidence was exteibut reported and provided people with plenty to li about and discuss, especially in East Pakisa where, in offices and factories, the day's «at started with a thorough discussion of themomuj'i newspaper report.

On behalf of Mujib, a British lawytt, T. Williams, QC, appeared before the Dhaka H$ Court with a petition that raised a number o! weighty and pertinent constitutional issues relatnj to the

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validity of the ordinance under which ill trial was proceeding. The High Court heard Williams, but the petition was adjourned for furtho hearing, subject to the condition that the tnal woi go on. As it turned out, the petition was rendered infructuous by the government's own action u withdrawing the Agartala case and nothing mm was heard of Williams' legal ingenuity.26

The accused elected not to give sworn evidence in the witness-box. Instead, each of them submitted a written and signed statement to the Court Ik burden of all these statements, taken together, was that:27

(a) None of them had conspired against tie state.

(b) During interrogation, they had been subjected to inhuman treatment, including various specified forms of physical torture,

" in order to extract a confession

(c) Those accused who were members of the armed forces or the civil services had taken no part in politics and did not know the political people implicated in the case

(d) At least one of the accu Rahman, said he h implicated out of sp Secretary in the Ministi central government, hi business to conduct h between the two provim measures which wei Pakistan or wastefu resources. For these r that he had incurred superiors who happene Pakistan.

(e) Mujib made a statemei details of the precedin which he had been mo another, the inference jail ought to find it (with others outside i insurrection. He declari mentioned that he 1 Tashkent Declaration.

And so the trial wore (outcome, it was overtaken b' the country. Demonstrate otherwise, paralyzed the adm was forced into a total withdr case. The proceedings came 1 all the accused were releas< This outcome was marred *by* the accused when he was 'attempting to escape', as the it. Apart from this tragic in< forces personnel were reinst pay

The withdrawal of the *t* political event of great sigi reversals that Ayub suffered ten years' administration, this and the most humiliating. It Pakistan and it was the outc Mujib. The fact of withdra stances which compelled it t most serious nature. Either th that there was a true bill ag case Ayub was evidently be skin irrespective of the natn

ies involved in sedition ;ourts.

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were members of the vil services had taken tid did not know the cated in the case.

i least one of the accused, Ahmed Fazlur Rahman, said he had been falsely implicated out of spite. As a Deput-y Secretary in the Ministry of Finance of the central government, he had made it his business to conduct his work equitably between the two provinces and had opposed measures which were unfair to East Pakistan or wasteful of the nation’s resources. For these reasons, he claimed that he had incurred the dislike of his superiors who happened to belong to West Pakistan.

(e) Mujib made a statement in writing giving details of the preceding two years during which he had been moved from one jail to another, the inference being that a man in jail ought to find it difficult to conspire with others outside in order to plan an insurrection. He declared his innocence and mentioned that he had supported the Tashkent Declaration.

And so the trial wore on and before any mtcome, it was overtaken by political events in ie country Demonstrations, political and demise, paralyzed the administration and Ayub ns forced into a total withdrawal of the Agartala M The proceedings came to an abrupt end and ill the accused were released unconditionally.28 His outcome was marred by the death of one of ie accused when he was shot and bayoneted tempting to escape', as the official version had tyart from this tragic incident, all the armed jces personnel were reinstated with arrears of *s*<

He withdrawal of the Agartala case was a tlitical event of great significance. Of all the nasals that Ayub suffered in the course of his ayears' administration, this was the most serious ai tie most humiliating. It was inflicted by East Man and it was the outcome of his duel with The fact of withdrawal and the circumwhich compelled it bear implications of a serious nature. Either the accused were guilty, ,3 there was a true bill against them, in which #Ayub was evidently bent on saving his own cirrespective of the nation's interests, or they

were not guilty in which case the prosecution should never have been instituted.

POLITICAL DEVELOPMENTS IN

WEST PAKISTAN:

FEBRUARY 1966-NovEMBER 1968

It may be said in defence of Ayub that his political failure in East Pakistan was due to some extenuating circumstances not of his making. But there is little to offer in his defence for his political failures in West Pakistan, the languages, culture, and way of life of the people he largely knew. Ayub and his Governor, the Nawab of Kalabagh, had adopted a policy of violence or conniving at violence, as a method of government. They sought to keep together the constituent parts of the province which formed the One Unit in West Pakistan. The creation of One Unit in 1955 and its political fall-out until October 1958 has already been discussed. Some factors that caused political complications in West Pakistan later due to the One Unit are discussed below.

The people of the projected new province were not homogeneous in language, culture, or way of life. They were all Muslim and, for the most part, of the Sunni section, but the language of the NorthWest Frontier, Pashto, is as different from Punjabi as the language of East Pakistan, Bengali. Punjabispeaking people would experience real difficulty in understanding a Sindhi or a Baloch and might well not understand him at all. Theoretically, of course, everyone in West Pakistan had to learn Urdu at school but this assumed that everyone would be going to school and that ideal was far from achieved.

A more significant objection in the minds of those who opposed the One Unit was that more than half the population of the projected One Unit would be Punjabi-speaking and this group might well exercise major influence in the new province. Punjabis were not only more numerous but could reasonably claim to be better educated, harder working, and more enterprising than their provincial compatriots, apart from some small, well-known commercial communities (Memons, Khojas, Bohris, Hindus, and Parsis) which are

numerically tiny but politically insignificant. Again, by reason of numbers and a generally higher educational standard, Punjabi-speaking people dominated the armed forces and the public services, although in the professions and in business they were fewer. The Punjabis, particularly those from Chiniot, were also well represented in industry and trade.

The Punjabi-speaking community claimed that in so far as they bore this responsibility, they had discharged it. They pointed out that in the newly created National Assembly, after the 1956 Constitution, they had given up some seats to which they were otherwise entitled on the basis of linguistic representation. This had been done partly in pursuance of the principle of parity as between the two provinces of East and West Pakistan and partly as a concession to their other partners in the western province. Clearly enough, the Punjabispeaking community was guilty of a shortsightedness which, as the years went by, became more and more apparent. In particular, those in the public administration did not display impartiality, and as time went on the very evils that the minority communities feared became more and more apparent. They affected the choice of personnel for desirable appointments, promotion, and seniority, the allotment of permits to establish industries, and the award of valuable contracts. Ultimately, this gave rise to sinister intrigues.

These things had taken root before Ayub assumed power in 1958 and for this reason he cannot be entirely blamed for the eventual decision to dissolve the One Unit and revert to separate linguistic administrative units in West Pakistan. Ayub's particular failure lies in the fact that, armed as he was with exceptional powers, he did nothing to ameliorate a situation of whose existence he must certainly have been aware, in particular the sense of injustice that existed and was finding expression. He adopted methods more repressive than his predecessors by hounding political rivals from one jail to another; closing all newspapers opposed to him and suppressing public discussion by the abuse of section 144; and police excesses which were never subject to enquiry. He appeared unable or unwilling to recognize that there might be a case for administrative reform which, while

retaining the advantages that the One UmtofW would redress the grievances of the people liii in non-Punjabi speaking areas which had he merged into the province of West Pakistan

In Balochistan there was more actual, phyu resistance to the integration than anywhere 4 and, at one time, it almost appeared!!"' Balochistan had seceded *de facto ifnotdejurtk* the open defiance of authority which prevails there. But Sindh, with which Karachi is for to present purpose included, was the greater probta and the government was more concerned wttfcj growth of opposition and unrest in Simffilli elsewhere. There were three reasons for this Sal was much more politically sophisticated, amfi Karachi Ayub lost the election of 1965. Itn economically more important, and its terntorylt astride the vital communications, road and rail, tk connected Karachi with the north.

By the middle of 1967, it was made public M in Balochistan the state of law and order a

degenerated to the level where recourse to lit armed forces was necessary and aenal ixnlq was resorted to. In some areas, the writ of Ik government no longer ran but rather that ofij local *sardar* who, as likely as not, was detaidi jail, thus confounding the confusion. In partial^ the method of distribution of Guddu Barrage guided as it was by political motives ul bureaucratic greed, caused much ill-feeling r only against the government but also between i; Baloch tribes. It was possibly a goverment tar. to break their unity.

Until November 1968, when all reste disappeared, debate on One Unit tended to \ reserved. The topic was still sacrosanct and» adverse mention of it could carry a charge t sedition. After November 1968, however, all >k disliked One Unit cast aside their reserve and am out openly in its condemnation. Among those »it had much to say on this topic were leaders *bt* East Pakistan, notably Mujib, who declared One Unit had to go. Since the people of Erf Pakistan had not endured any of the misery t oppression which had fallen upon people in Ii Pakistan as a result of this consolidation, it is considering why Mujib and other East PaJasti leaders were so emphatic about its disappears

Out of the dissolution political advantages could •<. The reappearance of the ol up West Pakistan would possibility of forming some for example, Sindhi-speaJ National Assembly. Sucl certainly make it possible dominate that chamber. The fact is incontestable and h powerful element in the tl concerned with One Unit am

Apart from the factors di were others that added to the widening of the gulf between country. These factors inclu< few families at the expense < dominance of the bureauc marriages between leading i and bureaucrats' families bee being mutually enriching.

THE POWER OF TWENTY-TWO FAMILI

Unequal distribution of we consequence of the process of any country. So it was in Pakis era. This concentration was industrialization alone and had government patronage which wa cronies by granting licences ti lucrative areas or sectors of th< granting permits to install indusfj yield guaranteed profits.

To cap it all was the all enrichment of Ayub's own fam turned-industrialist-cum busin Ayub, was benefitting enormously patronage. Ayub appeared to be olved or passively condoning sons who appeared to be do commerce and industry.29 There was another political sided enrichment. It was seen i | lithe machination of West Pakista j wealth of the country. Nearl]

ages that the One Unit offered, ;rievances of the people livinc ;aking areas which had bei vince of West Pakistan, icre was more actual, physi. itegration than anywhere el , it almost appeared as eded *de facto* if not *dejure* b> of authority which prevailed vith which Karachi is for th luded, was the greater problei
1 was more concerned with th on and unrest in Sindh than :re three reasons for this. Sindh jlitically sophisticated, and i the election of 1965. It vw important, and its territory la imunications, road and rail, th with the north. f 1967, it was made public th state of law and order h, level where recourse to tht necessary and aerial bombing i some areas, the writ of the ger ran but rather that of the s likely as not, was detained in ng the confusion. In particular, ibution of Guddu Barrage lam1 i by political motives ariL , caused much ill-feeling not vernment but also between th as possibly a goverment tacti..

sr 1968, when all restraint e on One Unit tended to be : was still sacrosanct and any if it could carry a charge of ember 1968, however, all who ast aside their reserve and came ndemnation. Among those who n this topic were leaders from ibly Mujib, who declared that go. Since the people of East sndured any of the misery or lad fallen upon people in West of this consolidation, it is worthy lujib and other East Pakis phatic about its disappearance.

4

Out of the dissolution of One Unit, valuable n' 'ical advantages could accrue to East Pakistan. reappearance of the old provinces that made Vest Pakistan would greatly simplify the bility of forming some kind of alliance with, vxample, Sindhi-speaking members of the mal Assembly. Such an alliance would .uidinly make it possible for East Pakistan to dominate that chamber. The weight of this political •> incontestable and had all along been a rful element in the thinking of everyone ,med with One Unit and its future. Apart from the factors discussed above, there "•"• others that added to the political turmoil and ing of the gulf between the two wings of the •v These factors included enrichment of a imilies at the expense of all others and the ance of the bureaucracy. Even interges between leading industrialist families jeaucrats' families became commonplace, iiutually enriching.

THE POWER OF TWENTY-TWO **FAMILIES**

Unequal distribution of wealth is a natural lence of the process of industrialization in . Dmitry. So it was in Pakistan during Ayub's n This concentration was not the result of ahzation alone and had much to do with r .ujnent patronage which was favouring a few Miies by granting licences to do business in kntive areas or sectors of the economy or by 'puling permits to install industrial units likely to raid guaranteed profits.

To cap it all was the allegation of the Knment of Ayub's own family. The soldierimed-industrialist-cum businessman, Gohar lijit), was benefitting enormously by government jptege Ayub appeared to be either actively nohed or passively condoning the activities of is sons who appeared to be doing wonders in amerce and industry.29

Here was another political angle to this *mU* enrichment. It was seen in East Pakistan lie machination of West Pakistan to control the Lc wealth of the country. Nearly all the twenty

or twenty-two families belonged to West Pakistan, whatever scarce industry was installed in East Pakistan, particularly the jute mills, was mostly owned by industrialist families from West Pakistan like the Adamjee's and the Dawood's.

This unjust distribution of wealth also helped the politicians to play on the sentiments of the common man, who felt ignored and alienated, and to make leftist and socialist programmes. It was in these circumstances that the semi-socialist manifestos of Bhutto's Peoples Party, which called for the nationalization of major industries and banks, caught the imagination of the people of West Pakistan.

THE DOMINANCE OF BUREAUCRATS

Ayub's term of office was the golden era for the bureaucracy which exercised its powers unbridled by any political interference. Ayub, had a great mistrust of politicians and felt at home with servile bureaucrats. CSP officers were having the time of their life. They were the true bosses and the dominant class in the country who held all the key positions and jealously guarded their powers and privilege. They would not let any other person rise to the position of the central secretaries or even deputy secretaries. Commissioners and Deputy Commissioners in the administrative divisions and districts were the real power yielders and reported directly to the Governor from whom they took instructions. They cared little for the ministers or members of the National and Provincial Assemblies. They had become so drunk with power that in 1967, Ghulam Yazdani Malik, Commissioner of Bahawalpur Division, openly abused and slapped a member of the West Pakistan Assembly from Bahawalpur who had circulated a pamphlet against him for his excesses and injustices, in the premises of the West Pakistan Assembly. It is of importance to note that despite his outrageous conduct, he was shielded by his fellow CSP officers for quite some time.

There was another unfortunate angle to this preponderance of the bureaucracy. Since most of the members of the CSP were drawn from West Pakistan, particularly from the Punjab, their acts

and conduct created a further wedge between East and West Pakistan and between various areas within West Pakistan, particularly in Sindh. The officers continued to be trained on the pattern of colonial civil servants of British times. They were instructed to stay away from the common people, live like rulers, and shirk the ruled. They were fully trained in snobbery and in the concept of the colonial administrative class of British colonialists. They were given senior administrative appointments soon after completion of their training at the administrative academy in their middle or late twenties. With little experience in life and faulty training, they became a class unto themselves without the faintest idea of the public service they were required to render for the country. They were as patrician and obnoxious in their behaviour in the former areas of Punjab as they were in other parts of the country, but since they were mostly Punjabis, their attitude and conduct was seen with hatred in the areas outside Punjab. So much was their conceit and false sense of superiority that officers who were posted to East Pakistan did not bother to learn Bengali, which was a national language anyway.

It was in East Pakistan that these officers did the most damage. They were seen by the people of East Pakistan as vintages of colonial British rulers who cared little for the people.

LEADING CONSTITUTIONAL CASES

During this period, there were a number of constitutional cases of significance. None of these were of the importance of cases like those of Abul Ala Maudoodi or Fazlul Quadir Chowdhry, where basic constitutional and political issues had to be addressed. However, under the able leadership of Chief Justice A.R. Cornelius, the judiciary continued to liberalize the law in favour of the citizens through its judgments. Jurisdiction of the courts was extended, the expression ’without lawful authority’, used in Article 98 was given a wide meaning to signify more than ’jurisdiction’.30 It has been discussed *above that after the Tashkent Declaration, a number of political leaders including* Malik Ghulam Jilacd,

Nasrullah Khan, and Sardar Shaukat Hayatu were placed under detention under the Defem Pakistan Rules and Defence of Pakistan
1965. All of them filed writ petitions Kim: West Pakistan High Court in Lahore andi keeping with its dubious tradition of upiofc most of the actions of the government, the Ua High Court dismissed their petitions, holdup detention orders passed against them as bnfa The High Court judgment was challenged a! appeal before the Supreme Court which accept the appeals of Nawabzada Nasrullah Khan a declared his detention as void *ab mttio,k* dismissed appeals of Sardar Shaukat Hayal fin! and Malik Ghulam Jilani.31 The Supreme Coiitij its detailed judgment, laid down some broad a! liberal principles and guidelines for the cases f political detenus. The Court held that ’reason* belief did not mean ’suspicion’. The ’satisfactn of the detaining authority about the acts IK activities of the detenus should be based ft reasonable grounds and objective criteria di considerations. The Court held that all orders *i* preventive detention passed by execiilnt authorities were open to judicial review

Shorish Kashmiri, a political journalist am public orator, was detained under the Defence d Pakistan Rules, 1965. The High Court of Us Pakistan accepted the writ petition against k detention. In appeal, the Supreme Court, uphold^ the judgment of the High Court, gave the finduj that Article 2 of the 1962 Constitution requira; ’every person to be dealt with in accordance wil law’ was as comprehensive as the American *’it* process’ clause. In exercise of judicial review, tk High Court could decide whether there wm reasonable grounds upon which a reasonable person would have formed the same opinion n that framed by the detaining authority. It was held that the High Court had all the power to go mo the reasonableness and sufficiency of grounds eva if the statute did not require the authority to act upon reasonable grounds and the authority was led to act uporr his own subjective satisfaction.32 He Supreme Court thus introduced *the* test of *reasonableness in the cases of preventive* detenu *while adjudicating upon* the grounds aEto&m

• Mir Abdul Baqi Baloch, a Balochistan, was active in opposi was placed under preventive del order dated 11 August 1966 Commissioner, Karachi, allegi inciting people in Karachi 1 disaffection, and violence, thus endangering public peace. His \ dismissed by the Karachi Ben Pakistan High Court and he filed the Supreme Court. The Suprem his appeal and remanded the wr High Court to decide it afresh in the principles enunciated in Ghula It was held by the Supreme Cot Court, in exercise of their jurisdiction of judicial review c acts, could insist on disclosure which executive authority had aci jurisdiction of executive author order of detention, but the manr jurisdiction could be subject to jud High Court, it was held, should hz grounds of detention in orde reasonableness. However, the Su not go into the pleas that the groui President proclaimed an emergen exist and the Constitution required This was held to be a purely p outside the competence of the c The Court could not substitute it! the satisfaction of the President.

When some students of Dhaka expelled by its syndicate without notice, the Dhaka High Court aci petitions. The Supreme Court, judgment of the Dhaka High Coi expelled students had the right to the passing of the expulsion order of alleged misconduct and indi proceedings held by whomsoever, or administrative, the principles c I have to be observed if the proci result in consequences affecting property or other right of the pai In order to ensure the elemental

implication, tlae person to be al

Sardar Shaukat Hayat Khan, tention under the Defence of :fence of Pakistan Ordinance, led writ petitions before the i Court in Lahore and, in)ious tradition of upholding f the government, the Lahore d their petitions, holding the ed against them as bonafide. gment was challenged in an preme Court which accepted abzada Nasrullah Khan and ion as void *ab initio,* but ” Sardar Shaukat Hayat Khan ilani.31 The Supreme Court, in t, laid down some broad and d guidelines for the cases of e Court held that ’reasonable ’suspicion’. The ’satisfaction’ athority about the acts and tenus should be based upon , and objective criteria and Court held that all orders of ion passed by executive n to judicial review. ri, a political journalist and letained under the Defence of

55. The High Court of West the writ petition against his the Supreme Court, upholding High Court, gave the finding e 1962 Constitution requiring dealt with in accordance with shensive as the American ’due exercise of judicial review, the decide whether there were s upon which a reasonable formed the same opinion as ietaining authority. It was held t had all the power to go into md sufficiency of grounds even ot require the authority to act mnds and the authority was left n subjective satisfaction.32 The hus introduced the test of ic cases of preventive detention upon the grounds of detention.

^ kl^TOfr TKPiA AND RIFTS WITHIN

Mir Abdul Baqi Baloch, a politician from Balochistan, was active in opposition to Ayub. He was placed under preventive detention under the order dated 11 August 1966 of the Deputy Commissioner, Karachi, alleging that he was inciting people in Karachi to lawlessness, disaffection, and violence, thus disturbing and endangering public peace. His writ petition was dismissed by the Karachi Bench of the West Pakistan High Court and he filed an appeal before the Supreme Court. The Supreme Court allowed his appeal and remanded the writ petition to the High Court to decide it afresh in accordance with the pnnciples enunciated in Ghulam Jilani’s case.33 It was held by the Supreme Court that the High Court, in exercise of their constitutional jurisdiction of judicial review of administrative acts, could insist on disclosure of materials on which executive authority had acted. Not only the junsdiction of executive authority to make the order of detention, but the manner of exercising jmsdiction could be subject to judicial review. The High Court, it was held, should have examined the pounds of detention in order to test their reasonableness. However, the Supreme Court did not go into the pleas that the grounds on which the President proclaimed an emergency had ceased to exist and the Constitution required it to be revoked. His was held to be a purely political question Mtside the competence of the courts to decide. He Court could not substitute its satisfaction for fc satisfaction of the President. When some students of Dhaka University were opelled by its syndicate without any show cause •dee, the Dhaka High Court accepted their writ petitions The Supreme Court, upholding the lodgment of the Dhaka High Court, held that the spelled students had the right to be heard before (passing of the expulsion orders on the grounds (f alleged misconduct and indiscipline. In all Headings held by whomsoever, whether judicial udmimstrative, the principles of natural justice ^ to be observed if the proceedings were to i in consequences affecting ’the person or

rty or other right of the parties concerned.’ under to ensure the elementary and essential •odes of justice as a matter of necessary

ion, the person to be affected should be

made aware of the nature of allegations against him (or her) and should be given a fair opportunity to defend himself (or herself) against such allegations.34

Similar decisions were made in other cases, holding the principle that ’no one can be condemned unheard’ should be read into every law unless its application was excluded by express words and that every administrative tribunal is under a duty to act fairly and justly and with due regard to the principles of natural justice.35

When a member of the National Assembly resigned in a letter addressed to the President, he wrote a letter to the Speaker of the National Assembly stating that he had resigned from the membership of the Muslim League Assembly (Party) and not from the membership of the Assembly. He also sent telegrams to the Speaker in which he strongly repudiated any intention to resign from the Assembly. However, the Speaker notified that he had resigned his seat in the National Assembly within the meaning of Article
107 of the Constitution. The High Court of West Pakistan accepted his writ petition and held that his resignation had not taken effect. The Speaker went in appeal before the Supreme Court which was dismissed. The Court rejected the plea of the Speaker that the matter was not justiciable in view of the bar of jurisdiction under Article 111 of the Constitution on the ground that the matter did not concern the proceedings of the National Assembly and that the jurisdiction of the High Court was not barred to determine any matter relating to the Constitution of the National Assembly. It was held that the communication of resignation to the Speaker was necessary and since the resignation was not addressed to the Speaker, therefore, it did not take effect. It was observed that even if the member had addressed the letter of resignation to the Speaker, he had the right to withdraw it before it was brought to the notice of the Speaker and the latter had taken the decisive step to notify it.36

Where a preventive detention law did not provide for communication of grounds of detention to the detenue, the Supreme Court held it to be repugnant to Para 5 of fundamental rights granted to the citizens as its provisions amounted to unreasonable restriction on the right of freedom of

movement of a citizen inside Pakistan. It was also held that the detaining authority should particularize the nature of activities prejudicial to the stability or integrity of the country in the grounds of detention. Vague and indefinite grounds were held to be unconstitutional. The detaining authority was also required to specify the period of detention and the order of detention ’till further orders’ was held defective and illegal.37

It is noticeable that the Supreme Court under the leadership of Chief Justice A.R. Cornelius, established its independence and gave landmark rulings which gave meaning to the fundamental rights and civil liberties of citizens. These rulings set in motion the trend towards judicial activism which was later checked by dictatorial regimes and pliable judges. Nevertheless, a sound foundation was laid for liberal constitutional interpretation, particularly by promoting and strengthening concepts like ’judicial review’ and ’due process of law’.

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NOTES

1. He was M. H. Sayyid, a former Secretary to the Quaid-i-Azam and was closely associated with Ms Jinnah during the election of 1965. Article 209.

Act IV of 1965, PLD 1965 Central Statutes 165. Act XV of 1965. PLD 1966 Central Statutes 5. Act XVII of 1965. PLD 1966 Central Statutes 76.

6. Gauhar, Altaf, *Ayub Khan-Pakistan’s First Military Ruler,* 1993, Sang-e-Meel Publications, Lahore, pp. 335-6.

7. Ibid., p. 343.

8. Author participated in these students’ demonstrations being the Secretary of the Punjab University Students’ Union at that time.

). All the President’s speeches were now delivered in Urdu. On the day the Indians attacked West Pakistan, the President spoke to the nation in English, but a few days later the government decided that all future addresses would be in Urdu. It is also noteworthy that English-language news reports were eliminated from television programming and a few weeks later Radio Pakistan announced that English news programmes would be reduced to two each day. By contrast, at the beginning of the hostilities there were English news programmes almost every two hours.

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11.

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13.

10. Ziring, Lawrence, *The Ayub Khan Era-n Pakistan 1958-1969,* 1971, pp 75, 771 Syracuse University Press, New York ; A military division in Pakistan consist! j approximately 15,000 troops and is < a Major-General.

In fact, Mujib did not announce any six i programme while addressing the Conference 1 the government and its minions and goveim sponsored press in West Pakistan that named i speech as his six point programme All fa i done with the purpose to discredit the poft opposition in the country as disloyal i unpatriotic. Little did they realize that theyi doing incalculable harm to the polity in I and in the process, built Mujib into I nationalist leader with a nationalist pragma which historical opportunity he fully availed uk destruction of the unity and integrity of Pahs* Constitution (Sixth Amendment) Act, 1966 Ad| of 1966. PLD 1966 Central Statutes 147

14. Act XXI of 1966. PLD 1967 Central Statutes!!

15. Ordinance-making power of the President 4m the currency of proclamation of emergency

16. Zaheer, Hassan, *The Separation of East PahM,*
1994. Oxford University Press, Karachi, pp 13,11

17. Constituent Assembly of Pakistan Debates VolU No. 2 (18 May 1948).

18. Ibid, p. 19.

19. *Dawn,* 10 July 1953.

20. Information supplied by the Government in rqfj to a question in the National Assembly Natal Assembly Debates, 23 June 1966.

21. Television interview in Rawalpindi on 14A«j*
1967, reported in *Dawn,* 16 August 1967

22. Ayub said to Altaf Gauhar in 1968 ’Listen, if dear fellow, I gave them the second capital beast they are going to need it one day They are M going to remain with us’! See Altaf Gauhar’s^ *Khan-Pakistan’s First Military Ruler,* pp 410-11.

23. An interesting instance of this gift occurred wta Martial Law was declared in 1958 and wheiil political parties were abolished. At that time, Miijl was chief executive, in East Pakistan, oftheAlpta Insurance Co. Ltd. He, therefore, recruited into Ita Company as many of his partymen as possible h this way he not only provided them with *wcm,* but kept them together and provided a convemffl cover for such meetings as they desired to tali The trick is not new but it takes an

organizer to think of it and execute it. One of them, Ahmed Fazlur Rahman, had ben known to Herbert Feldman, when he was stationed

in Karachi, and was very 01 of East Pakistan's grievance bearing on the question of, respect to the Agartala Tria have contributed to his arres *From Crisis to Crisis,* 19 Press, London, pp. 184.

25. Ordinance VI of 1968. PLE
96.

26. Feldman, Herbert, *From C* Oxford University Press, Lc

27. Ibid, p. 188.

28. The Court was mobbed by tl the presiding Officer, Mr Rahman, a former Chief Jus escaped the mob from the b said to be without his shoes

29. At the end of July 1968, Goh of three companies, namel Limited, Arusa Industries Company Ltd; he was M Gandhara Industries Ltd. and Director in two other bi§ estimated that the total wealtl

24.

The Ayub Khan Era-Politics in
59, 1971, pp. 75, 77 and 78, *f* Press, New York. ion in Pakistan consists of

00 troops and is commanded b)

not announce any six point [dressing the Conference. It was

1 its minions and government West Pakistan that named his loint programme. All this was x>se to discredit the political : country as disloyal and id they realize that they were larm to the polity in Pakistan s, built Mujib into Bengali vim a nationalist programme ortunity he fully availed to the lity and integrity of Pakistan. Amendment) Act, 1966. Act II ”entral Statutes 147.

.D 1967 Central Statutes 65. ower of the President during amation of emergency. *Separation of East Pakistan,* sity Press, Karachi, pp. 13,18. *r* of Pakistan Debates. Vol. Ill,

by the Government in reply National Assembly. National
3 June 1966.

in Rawalpindi on 14 August *m,* 16 August 1967.
3auhar in 1968: ’Listen, my :m the second capital because *sd* it one day. They are not us’! See Altaf Gauhar’s *Ayub ft Military Ruler,* pp. 410-11. e of this gift occurred when lared in 1958 and when all bolished. At that time, Mujib i East Pakistan, of the Alpha

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Fazlur Rahman, had been

man, when he was stationed

in Karachi, and was very outspoken on the subject of East Pakistan’s grievances. Although this has no bearing on the question of guilt or innocence with respect to the Agartala Trial, his indiscretions may have contributed to his arrest. See Herbert Feldman, *From Crisis to Crisis,* 1972, Oxford University Press, London, pp. 184.

Ordinance VI of 1968. PLD 1968 Central Statutes
96

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Feldman, Herbert, *From Crisis to Crisis,* 1972, Oxford University Press, London, pp. 187-8. Ibid.p 188.

The Court was mobbed by the people in Dhaka and the presiding Officer, Mr Justice (Retd.) S. A. Rahman, a former Chief Justice of Pakistan, barely escaped the mob from the back door and that also said to be without his shoes on. At the end of July 1968, Gohar Ayub was Chairman of three companies, namely Arusa Investments Limited, Arusa Industries Ltd., Hashimi Can Company Ltd; he was Managing Director of Gandhara Industries Ltd. and Gohar Habib Ltd. and Director in two other big companies. It was estimated that the total wealth of the family of Ayub

was between US $ 10 million and $ 20 million around 1969 which, during the ten years of Ayub in power the Gandhara Industries Ltd. (incorporated in 1963) and other companies or business in which the family of Ayub had interest, were the creation of 1960s. See book of Herbet Feldman *From Crisis to Crisis, supra,* note 26, pp. 305-306.

30. Jamal Shah v Member Election Commission, PLD
1966 S.C. 1.

31. Malik Ghulam Jilani v The Government of West Pakistan, PLD 1967 S.C. 373.

32. Government of West Pakistan v Begam Shorish Kashmiri, PLD 1969 S.C. 14.

33. Abdul Baqi Baloch v The Government of Pakistan, PLD 1968 S.C. 313.

34. University of Dhaka v Zakir Ahmad, PLD 1965 S.C. 90.

35. Abdus Saboor Khan v Karachi University, -PLD
1966 S.C. 536. See also Murlidar v University of Karachi, PLD 1966 S.C. 841.

36. A.K. Fazlul Quadir Chowdhry v Shah Nawaz, PLD
1966 S.C. 105.

37. Government of East Pakistan v Rowshan Bijia Shaukat, PLD 1966 S.C. 286.

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16 The Fall of Ayub

In 1968, Ayub's government decided to celebrate a decade of progress, designed to highlight the achievements of Ayub's regime over the previous ten years and to prepare the people of Pakistan for another five-year presidency in 1969. This was to prove counterproductive and became one of the immediate causes of Ayub's fall. Nevertheless, the achievements of his government in agriculture and the industry were substantial.

Ayub's creative emphasis lay in economic development. Agriculture, along with industry and commerce, made significant strides during his tenure. A traditional subsistence *agrarian* economy was restructured during the Second Five-Year Plan (1960-65). The 3.4 per cent annual growth rate for agriculture over the plan period compared favourably with the annual rate of 1.3 per cent in the *earlier period* following independence. Foodgrain output increased 27 per cent and per capita income was up 14 per cent. The Third FiveYear Plan (1965-70) sought to sustain this momentum and aimed at five per cent growth rate. Although the Indo-Pak war and major droughts in
1965 and 1966 threatened agricultural objectives, the introduction of new wheat and rice varieties brought crop yields almost in line with projected goals. Statistically, the country was making progress, and the administration was not modest about its achievements.'

While referring to accomplishments and identifying agricultural breakthroughs, it may be mentioned that there were shortcomings too. Though agriculture accounted for 48.2 percent of the GNP (1964-65) and carried the burden of the nation's foreign exchange earnings, yields remained among the lowest in the world.

Manufacturing accelerated during the Ayub decade. Liberal tax concessions were granted, and credit facilities were extended through the establishment of the Industrial Development Bank and the Pakistan Industrial Credit and Investment 'Corporation (PICIC). In general, the government

permitted greater freedom for private investol shifting from direct to indirect controls. *k* consequence of the stress on industrialization! the apparent ease with which profits couMl made, landlords, professionals, traders, en servants, and retired military officers 'increase clamoured for permits that would let them u *an* obviously good thing'.2 Thus, as Pap» relates, the growing ranks of prestigious pmc industrial entrepreneurs was exceptionally rap and the result of deliberate government poliq Pakistan was making significant gains in *i* economic sectors, but precious little advantage is filtering down to poor urban and rural peopk Concentration of capital was justified on *it* grounds that profits were being plowed back is the economy;4 but only twenty-four economic *m* controlled almost half of all private industra) assets. In addition, the resources, experienc" » contacts of the leading private families mai strong contenders for ownership when seagovernmental corporations put their plants on *it open* market. It is estimated that over two-thirds of the assets thus sold were bought by the leadu; families.5 This accumulation of wealth and pow was naturally viewed with rising indignation

Amid the squalor and wretched poverty of tit Pakistani masses, a new elite now flaunted its prowess and privilege. Those who possessed wealth were perceived as having gotten it illegally, and Ayub was accused of filling his personal coffers. In contrast with the situation of tie

privileged few, the knowledge that industnal wages were stationary or declining, per capita income among the lowest in *th*° - - ”

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Latent dissatisfaction wit increased from 1966 tc 1968, democratic rights in West Pakis for East Pakistan led to a grac law and order. In a matter of (from November 1968 to Marc wide agitation brought down the regime built over a period of ter

STUDENT PROTESTS A> POLITICAL AGITATION WEST PAKISTAN

A major political crisis developed in October 1968 when students be educational reforms, demanding University Ordinance, which, *inte.* student political activity and p forfeiture of the degrees of gradi subversive activities, the reductioi and changes in the examination agitation,

which began with spo Karachi University, was at firs became increasingly violent as it propaganda campaign against the Zulfiqar Ali Bhutto, who was ma West Pakistan at the time. Bhutto hi Minister since 1963 but had disagr and subsequently left the governi denouncing Ayub's rule as 'a diet the label of democracy'. Bhutto

edom for private investors by t to indirect controls. As a stress on industrialization and vith which profits could be irofessionals, traders, civil military officers ’increasingly its that would let them in on thing’.2 Thus, as Papanek ranks of prestigious private :urs was exceptionally rapid berate government policy.3 king significant gains in all t precious little advantage was oor urban and rural people, apital was justified on the were being plowed back into ly twenty-four economic units alf of all private industrial ic resources, experience, and ig private families made them for ownership when semiations put their plants on the imated that over two-thirds of were bought by the leading lulation of wealth and power with rising indignation, and wretched poverty of the new elite now flaunted its jge. Those who possessed d as having gotten it illegally, ised of filling his personal with the situation of the owledge that industrial wages leclining, per capita income in the world, food prices ttle being done to provide using, health, or welfare the situation.

:d that the publicity was not le remarked on 16 December an Secretary: ’Is the *tamasha*

about the decade of reforms still going on? They tell me it is not doing us much good’.6.

If the campaign failed there could be two causes. The first was that actual grievances could not be removed by a public relations effort. Pangs of hunger are not assuaged by widely circulated reports of a breakthrough in agriculture.

The second cause was that those who planned and executed the campaign had no realization of the depth of public discontent, for they, like Ayub, bad come to believe in the publicity in which the country was drowned. It is certain, that not until the very last moment did it occur to them that dislike for Ayub might be smouldering beneath an apparent acquiescence. When rebellion finally surged forth, their startled surprise was perfectly genuine, but much too late.

Latent dissatisfaction with Ayub’s regime increased from 1966 to 1968, when demands for democratic rights in West Pakistan and autonomy for East Pakistan led to a gradual breakdown of law and order. In a matter of only five months (Irom November 1968 to March 1969), countrywide agitation brought down the edifice of Ayub’s regime built over a period of ten years.

STUDENT **PROTESTS AND** POLITICAL **AGITATION IN** WEST **PAKISTAN**

A major political crisis developed in West Pakistan m October 1968 when students began agitating for tducational reforms, demanding the repeal of the University Ordinance, which, *inter alia*, restricted student political activity and provided for the forfeiture of the degrees of graduates accused of subversive activities, the reduction of tuition fees, od changes in the examination system. Their igitation, which began with sporadic strikes at Karachi University, was at first peaceful but

| tome increasingly violent as it merged with a Bganda campaign against the regime led by

Zilfiqar AH Bhutto, who was making a tour of

j lest Pakistan at the time. Bhutto had been Foreign

j Minister since 1963 but had disagreed with Ayub od subsequently left the government in 1966, toouncing Ayub's rule as 'a dictatorship under

Ite label of democracy'. Bhutto consequently

formed his own party, the left-wing Pakistan People's Party. When Ayub arrived for a visit to Peshawar on 9 November 1968, police had to use strong measures to disperse students demonstrating against him and at a public meeting on the following day, a young student (Hashim) fired two shots close to the platform on which Ayub was sitting, but no one was hit.

Bhutto was arrested under the emergency regulations on 13 November 1968 on a charge of inciting the students to violence but rioting broke out in many cities of West Pakistan following this arrest. Fourteen others were arrested at the same time, including seven members of the People's Party and five members of the left-wing National Awami Party. More clashes between police and students ensued but, by 15 November, the trouble had temporarily subsided, a number of student and opposition leaders were arrested and all colleges and schools were temporarily closed.

The anti-government agitation revived on
25 November 1968, when protests and demonstrations against the arrests of the opposition leaders took place in Karachi, Lahore, Rawalpindi, and Peshawar, organized by the Pakistan Democratic Movement (PDM), an alliance of five opposition parties, the Awami League (which was moderately socialist in outlook), the Council Muslim League (the faction of the Muslim League which had gone into opposition after the revival of political parties in 1962), the Nizam-i-Islam (the liberal Islamic party), the ultra-orthodox Jamaat-i-Islami, and the East Pakistan National Democratic Front.

REPRESSION AND BREAKDOWN

By 15 November 1968, forty-five politicians had been incarcerated. Unlike 1966, those seized represented Pakistan's leftist parties, particularly People's Party and the National Awami Party (NAP). According to the government, these groups pursued policies detrimental to the unity of the country. The NAP, for example, had resurrected its old demand that West Pakistan be broken up into its pre-1955 provinces.

With many of the prominent politicians in government custody, a new personality now entered the arena. On 17 November 1968, the

former Chief of the Pakistan Air Force, Air Marshal Muhammad Asghar Khan, announced that he would actively support the political opposition. Charging the Ayub regime with corruption, nepotism, graft, and administrative incompetence, the airman said he would begin a nation-wide tour ’to mobilize public opinion for the solution of problems facing the country’. With Asghar in the field, student ranks were swelled by other groups previously uncommitted but sympathetic to the cause. The jailing of political leaders was a last desperate act of a quickly declining administration, but it did more to accelerate the movement than to slow it down.

In the agony of a country no longer governable it is impossible to distinguish the guilty from the innocent who usually perish together. Throughout Pakistan, property was damaged and the semblance of whatever civilized order was left was rapidly deteriorating. While the PDM was considering a boycott of the 1969-70 elections in order to dramatize their dissatisfaction with the government’s repressive tactics, Pakistani society appeared to be coming apart. No one led the urban crowds and certainly no one controlled them. Hence, no one could really speak for them either. The explosive fury of the people had reached a point of spontaneous destruction.

Some preferred to interpret the chaos in a favourable light; the country was passing through a catharsis; after the storm, a new beginning could be anticipated. It is possible that this view was what compelled S.M. Murshed, a former Chief Justice of the East Pakistan High Court, to enter politics. East Pakistan needed political representation in this uncertain period. Murshed reflected the pious belief that the prevailing anarchy would somehow cleanse Pakistani society. He declared that the time was at hand for the creation of ’a truly advanced society’.7

Ayub made some low-key attempts to put his house in order. Early in December, he offered the olive branch to the rampaging students. Major concessions were announced in an effort to redress long standing grievances. A seven-year-old ordinance which permitted the government to withdraw college degrees from students engaged in actions determined to be anti-administration was

repealed. Minimum qualification grades weit lowered and students in the lowest acadeii ranking were to given another chance to impro« their standing.

Ayub’s sense of frustration was at its peak Hi was convinced that Pakistan had rnadi considerable progress during his ten years in offict It was impossible for him to understand the depk of popular dissatisfaction. ’If in the face of evidence anyone shuts his eyes and says that It sees no progress at all; that no development to taken place; that, in fact, conditions are worsening. then there is no cure for the malady’.8 Ayub pulled out all the stops. He made references to tit external threat and how Pakistan’s enemies could make capital of Pakistan’s disunity, but he sounded unconvincing. Even his defiant response that he would not stand by idly and watch the efforts of the preceding ten years be destroyed sounded hollow.

In December, the demonstrations which were a first confined to West Pakistan spread to the eastern province. Precipitated by the appearance of Asghar, they were soon exploited by NAP and NDF members. Speaking in Dhaka’s central mosque, Asghar called upon Ayub to resign

and his audience responded with wild cries of ’Down with Ayub’. But East Pakistan politicians did not want Asghar leading their movement. Neither he nor Bhutto were acceptable substitutes for Ayuh Ayub was in East Pakistan at that time. He seldoi ventured forth from Government House, and there were rumours that he was seriously contemplating retirement. His problem essentially revolved around the choice of a successor. Ayub trusted no one in the opposition. His contempt for the politicians was undiminished. Their activities n the previous few months confirmed his worst fears concerning their destructive propensities. The more he pondered the consequences of his retirement, the more his mind turned towards a military solution.

The violence that erupted in West Pakistan in late October 1968, continued into 1969. In midJanuary, it spread and intensified. Student demonstrations resulted in numerous deaths in Dhaka and a general strike paralyzed the city Angry young people dominated the streets; their

battle cry demanded Ayub’ Karachi, Lahore, Rawalpindi elsewhere, the story was the s running excitedly through th< burning, and destroying, effigies that blazed in the battered citi often fed by gleeful students delight in destroying the P published autobiography, *Frien*

Curfews were imposed metropolitan areas in an effort tide of death and destruction, 1 this time, law enforcement wi collapse. The administrators an that the government had lo situation and they began retrea effort to preserve themselves. T the part of local officials to responsibilities.

Toward the end of January,] Army moved into Karachi, 1 Dhaka, and Khulna, which we serious disturbances. More nev been damaged and foreign inst The authorities by this time had of people and while no accun given for the number of dead, ranged in hundreds. The mo Ayub’s supporters with the Mus being prime targets. A numbe were slain and* others seriously law was put into effect in the regions. Not since October 19f been asked to pacify so many time.

THE OPPOSITION OR< ITSELF

With the rioting unabated, the oj an ad hoc coalition called the 1 Committee (DAC), comprising DAC quickly drafted a pro demands and presented then Mujib’s East Pakistan Awami Li declined to cooperate with *DA* parties did not disagree with t

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battle cry demanded Ayub’s resignation. *In* Karachi, Lahore, Rawalpindi, Chittagong, and elsewhere, the story was the same. Crowds were running excitedly through the streets, taunting, burning, and destroying, effigies of Ayub. The fires that blazed in the battered cities and towns were often fed by gleeful students who took special delight in destroying the President’s newly published autobiography, *Friends, Not Masters.*

Curfews were imposed in the major metropolitan areas in an effort to stem the rising tide of death and destruction, but to no avail. By this time, law enforcement was on the verge of collapse The administrators and the police sensed that the government had lost control of the situation and they began retreating in a desperate effort to preserve themselves. There was failure on the part of local officials to face up to their responsibilities.

Toward the end of January, part of the Pakistan Army moved into Karachi, Lahore, Peshawar, Dhaka, and Khulna, which were scenes of more senous disturbances. More newspaper offices had been damaged and foreign installations assaulted. Die authorities by this time had arrested thousands of people and while no accurate figure could be given for the number of dead, the estimated toll ranged in hundreds. The mobs had turned on Ayub’s supporters with the Muslim League offices big prime targets. A number of party workers were slam and others seriously wounded. Martial law was put into effect in the heavily populated regions Not since October 1958 had the military keen asked to pacify so many areas at the same tone

APPOSITION ORGANIZES

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programme. Above all, the DAC insisted on the restitution of the federal parliamentary system

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and direct adult franchise. Under pressure from his advisers Ayub agreed, if reluctantly, to examine the committee's proposals. His reply, however, was indirect and came in the form of an editorial in the daily *The Pakistan Times.* In it, Ayub said he was willing to meet with the politicians but hedged where the specific proposals were concerned. Pakistan required a stable political system and to Ayub, anything less than a strong Presidency would mean anarchy, not democracy. The DAC had no need to compromise, however. They had already announced publicly that their demands were non-negotiable. Hence Ayub's apparent willingness to discuss 'constitutional issues' was interpreted as a tactic to buy time and possibly get the opposition leaders to reduce the level of hostility. But they certainly had no intention of playing into Ayub's hands and repeated their allor-nothing proposals.

The new found semi-unity and determination of the opposition paid quick dividends. In another broadcast to the nation on 1 February Ayub stated he would put aside his 'personal pride' and meet with his political detractors on their terms. In a letter sent to Nawabzada Nasrullah Khan, convener of the DAC, all political leaders were invited to a meeting to be held in Rawalpindi on 17 February. The tone of this letter was in sharp contrast to Ayub's earlier remarks condemning the same individuals for their anti-social and anti-state activities.

As a precondition for the talks the opposition now insisted that the state of emergency be lifted and all political leaders be released from custody. This was necessary in order to clear the atmosphere, to make it more conducive to what was expected to be hard bargaining. At this point, Ayub again pulled up short. He was convinced that many of those detained were guilty of criminal acts. In disgust he exclaimed: 'How can you release them in a hurry?' But there was also little reason to believe he could long refuse to satisfy these demands.

With the invitations extended, Ayub flew to East Pakistan for a meeting of his Muslim League Party. Seeking to restore confidence and calm the

fears of the membership he said he would not remove himself from the political wars, and thus allowed himself to be re-elected for another term as president of the organization. It was a last symbolic gesture at maintaining the solidarity of his political following and it appeared to be ample proof that he had not yet decided to step down.

AYUB DECIDES TO RETIRE

On 18 February the Ayub government capitulated and lifted the three year old state of emergency. The announcement came one hour before Bhutto was scheduled to begin a hunger strike in protest against the same regulation. With the termination of the emergency, a ludicrous act in view of the turmoil that was tearing society apart, Bhutto and other political detainees were set free. It was hoped these leaders, especially Bhutto, would now take advantage of Ayub's invitation for a round-table conference.

But even these developments did not end the civil disobedience. The Democratic Action Committee (DAC), with some members pushing for and others opposing the conference, was forced to compromise. It was finally agreed that only Nasrullah Khan would attend. As for Bhutto, he and six other opposition leaders declared they wanted no part of any negotiations and would boycott the talks. Bhutto was quoted as saying Ayub could not be trusted. He was playing 'a yes-and-no game, a cat-and-mouse game'. Bhutto refused to give Ayub the satisfaction of outfoxing his antagonists. Nothing was to be done which would enable Ayub to regain his respectability. Ayub was still a power to be reckoned with, and only by sustaining societal turmoil would the opposition politicians be in a position to loosen his grip. Bhutto knew exactly what he wanted. Once committed to demolishing Ayub, he could not relent. Reforms were totally unacceptable. In this he shared a common bond with the demonstrators who had already gone beyond the point of no return.

On 21 February the first significant impact of the disturbances rolled over a dazed Pakistani nation. Ayub dramatically and without prior warning spoke to his disenchanted and frightened

people. In a calm voice but betraying anguish be declared: 'I shall not be a candidate in the KB election. This decision is final and irrevocable All doubts, suspicions, and misgivings must end with this announcement'.9 But he obviously was not yd about to bow out of the picture. Again he was attempting to buy time.

PARLEYS WITH THE OPPOSITION **FAIL**

Ayub's decision to retire with the expiration of his term in January 1970 galvanized the opposition into a feverish activity. It was now agreed tta nothing would be lost by meeting Ayub Not only had he agreed to step aside in the forthcommt elections but he had also ordered the rek Mujib and the other defendants of the A trial. The release of Mujib however added i. dimension to the political confusion Wh rioting in the streets continued, the k politicians scurried around

trying to shore *i*, ruptured organizations. None among them commanded a national following. Each suspected the other of deviousness. Hence an acceptable replacement for Ayub would not be a simple matter.

Nasrullah Khan had minimum support in ftat Pakistan and none in East Bengal Daultaai Chaudhri Mohammad Ali, and Maudoodi, thougi different, had something in common. Each had passed that moment in time when they could have commanded a wide following. None »ere acceptable to the Bengalis. While Bhutto aid Asghar attracted much public attention, and perhaps were instrumental in forcing Ayub to retire, their capacity for leading a coalition government was questionable. Among the East Pakistani politicians, Bhashani was too old and certainly too radical for the more orthodox leaders. This left only Mujib, and his protestations don through the years made his name anathema u many circles. The exit of Ayub was about to leave a political vacuum which would heighten the emphasis given to vice-regal politics m Pakistan It also explains why the military-bureaucratic nexus succeeded in perpetuating itself.

The postponed round-table t< held in Rawalpindi toward the After four days of deliberation, and agreed to dispense with the (the electoral college of Basic D< election based on universal fran written into law and put into forthcoming campaign. Moreover system would be modified and tl institution resurrected. Mu dissatisfaction with the outcorr however. The question of autc Pakistan remained unanswered. I new federal structure failed to spe the One Unit. Was West Pakist single administrative province o divided into its pre-1955 componei it clear where he stood while the ’eadership vacillated. As a result, N *ie was removing his party from the mother of his celebrated withdraw

Bhutto had boycotted the talks.) crmmated, he lost no time in displeasure. He called upon Ayub resignation and allow for the imme of a national caretaker government government would arrange to holi and also guide the elected represe drafting of a new constitution, absented himself from the Rawalpin He indicated relative satisfaction but ’political freedom is meaning economic independence’. The NAP end to alliance commitments and tl tion of all private business, botr domestic.

Ayub was left with two bitter alt< to stay in office and observe his erst fight over the carcass of his defuni two, to resign and give the militar> Only the latter option promised hii stable rule. It was also the only way continuity and preserve a semblanc order. Enervated and disillusioned, A the latter alternative.

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The postponed round-table talks were finally held in Rawalpindi toward the end of February. After four days of deliberation, Ayub capitulated and agreed to dispense with the indirect elections (the electoral college of Basic Democrats). Direct election based on universal franchise was to be written into law and put into practice in the forthcoming campaign. Moreover, the Presidential system would be modified and the parliamentary institution resurrected. Mujib expressed dissatisfaction with the outcome of the talks, however. The question of autonomy for East Pakistan remained unanswered. Furthermore, the new federal structure failed to spell out the fact of le One Unit. Was West Pakistan to remain a single administrative province or was it to be divided into its pre-1955 components? Mujib made it clear where he stood while the West Pakistani leadership vacillated. As a result, Mujib announced he was removing his party from the DAC and made mother of his celebrated withdrawals.

Bhutto had boycotted the talks. When they were terminated, he lost no time in registering his displeasure. He called upon Ayub to submit his resignation and allow for the immediate formation of a national caretaker government. The caretaker jovemment would arrange to hold the elections ml also guide the elected representatives in the Ming of a new constitution. Bhashani also Asented himself from the Rawalpindi discussions. He indicated relative satisfaction but cautioned that ’political freedom is meaningless without economic independence’. The NAP still wanted an ad to alliance commitments and the nationalization of all private business, both foreign and domestic.

Ayub was left with two bitter alternatives: one, It stay in office and observe his erstwhile enemies ighl over the carcass of his defunct system, or, Ho, to resign and give the military a free hand. Only the latter option promised him a return to rtlerule. It was also the only way to provide for Mteiity and preserve a semblance of the old rier. Enervated and disillusioned, Ayub opted for fc latter alternative.

Ik DAC was dissolved with the conclusion of fcround-table conference. Nasrullah Khan, Nurul lin, Daultana, Chaudhri Mohammad Ali,

Maudoodi, Khwaja Khairuddin, and Hamidul Haq Chowdhury met with the President before returning to their homes. Representing the moderates and determined to bring peace to their ruptured country, they believed Ayub when he told them every effort would be made to hold the elections on schedule. Ayub noted that once the new parliament had been organized the remaining demands could be thrashed out. While the politicians appeared satisfied with Ayub's assurance, they were apprehensive over the intransigence shown by Mujib, Bhutto, and Bhashani. The situation in East Pakistan was deteriorating steadily and none of these politicos seemed concerned with the consequences. The moderates wanted to consolidate their newfound gains and this meant restoring the social order. If they did not concentrate on the latter they knew the military would have to, but the extremists were blinded by their success and their attitude remained defiant.

On 21 March in a surprise manoeuvre, Ayub replaced General Musa with Yusuf Haroon as Governor of West Pakistan. Almost simultaneously, he selected M. N. Huda to succeed Monem Khan. Haroon, a leading industrialist, and Huda a professor of economics and East Pakistan Minister of Finance, represented different philosophies and backgrounds and in a more settled time might have made successful administrators in their respective provinces. In the given circumstances, however, neither had a chance, nor were they to be given one. Their selection at this late hour merely stands as evidence of Ayub's desire to cling to power.

East Pakistan was now in chaos. Train service in Chittagong, Khulna, Mymensingh, and Dhaka districts was suspended as a result of a continuing strike. Student delegations besieged the provincial government with demands. Gazetted and nongazetted staff of the East Pakistan Cooperative Directorate left their posts to march in the streets. *Mujahids* organized as militia were in armed revolt, and rumours circulated that they had linked forces with the National Awami Party. Factory workers had seized their managerial staffs and in numerous instances forced them to increase their salaries. One of Pakistan's leading industrialists,

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G. M. Adamjee, was coerced into increasing the wages of mill workers by a total of approximately six million rupees after his executive officer (Zakaria Shakoor) had been threatened with bodily harm. As a consequence of the strike, jute production was cut almost in half and industry throughout the province was coming to a standstill. Still another dimension of the struggle in East Pakistan lay in the conflict between the NAP and the Jamaat-i-Islami. With the future uncertain, the Jamaat feared a communist take-over in East Pakistan. Processions taken out in Kushtia, Barisal, Jessore, Chittagong, and several rural areas by the Jamaat attempted to warn the populace about the threat. In this conflict, Mujib was cast in the role of a moderate. Though outwardly neutral, he appeared to favour the Jamaat rather than the NAP. Maudoodi was no threat and with the NAP in difficulty, Mujib's Awami League could be expected to carry the field. But Mujib had misread Ayub's intentions.

Ayub had studied the Awami Leaguer's draft of amendments to reform the constitution and was convinced that he should not be given an opportunity to gain political office. He concluded that Mujib would eventually win control of the province and with such leverage perhaps the country as well. Mujib wanted to shift the capital to East Pakistan, give East Pakistan a majority in the parliament, and establish a separate and independent budget. Denied these changes, he might well be inclined to mobilize Bengali sentiment behind a movement to create an independent state.

The outnumbered, poorly trained and equipped police detachments were in no position to restore equilibrium. In most instances, they chose not to interfere and desertions were commonplace. Left to defend themselves from known and unknown enemies, many preferred to flee from their homes. Governor Monem Khan remained secluded in his residence until 19 March when he flew secretly to West Pakistan. With the government's power gone, strikes paralysed the economy, murder and arson went unchecked, prices for scarce food-stuffs soared, and administrative services were at a standstill. East Pakistan had been brought to the

brink of anarchy. Even the events of 1958wai eclipsed by those now convulsing the province. On 25 March 1969, Ayub, frustrated by tie politicians, abandoned by the bureaucrats anil police, and no longer commanding the loyally of the armed forces, resigned the office he had add for ten years and five months. Army Commanderin-Chief General Agha Muhammad Yahya Kla took up the reins and immediately reimposed martial law throughout the country. As in 19" the constitution was abrogated, the nation provincial legislatures dissolved, and all poin.u, parties banned. Members of the President's Cabinet and the two newly appointed provincial Governors ceased to hold their offices under the proclarnatioi *Yahya* announced that his first objective was tie restoration of'sanity' in the country. The air would be cleansed, authority re-established, and political stability guaranteed before making any attempt to redress societal grievances.

In the circumstances, it is remarkable tot I smoothly the transfer of power was accomplish Ayub had justified his rule on the need for political stability. When it became clear he could no longer perform his task, he was compelled to pass ta responsibility to those who could. From lis

vantage point, the politicians were in no position to govern the country. In his last address to tie nation, he commented that to accept the opposition programmes would spell ’the liquidation of Pakistan’.

In a letter to Yahya, A} contempt for the politicians wr had placed their individual desi the national interest:

It is most tragic that while we w

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I have always told you that Pakistan’s salvation In in a strong centre. I accepted the parliament system because in this way also there possibility of preserving a strong centre i

But now it is being said that the country k/j divided into two parts. The centre should berenderai ineffective and a powerless institution The defena services should be crippled, and the political emu of West Pakistan be done away with

It is impossible for me to preside over tit destruction of our country. It hurts me deeply Way that the situation now is no longer under the contra! of the Government. All government institutions tat become victims of coercion, fear, and intimidation.,, Except for the Armed Forces there is M I constitutional and effective way to meet lit situation.’10

Having provided the politic considered ample opportunity to restructuring the political system, A

had evaporated. Humiliated by the now took his revenge. Ayub transfe to his brother-in-arms and the poj more retired to their individual i demonstrations and rioting, which he foundations of the state for more than suddenly ceased. Once more, an ar covered the land.

Thus ended the decaSe of Ayub’s Pakistan more divided and chaotic thai in October 1958.

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In a letter to Yahya, Ayub expressed his contempt for the politicians who, in his judgment, tod placed their individual desire for power above

the national interest:

It is most tragic that while we were well on our way

to a happy and prosperous future, we were plunged

into an abyss of senseless agitation. Whatever name

may have been used to glorify it, time will show that

this turmoil was deliberately created ... I have

exhausted all possible civil and constitutional means

to resolve the present crisis. I offered to meet all

those regarded as the leaders of the people. Many of

them came to a conference recently but only after

I had fulfilled all preconditions. Some declined to

come for reasons best known to them. I asked these

people to evolve an agreed formula. They failed to

do so in spite of days of deliberations.''

Having provided the politicians what he I considered ample opportunity to help him in ! restructuring the political system, Ayub's patience lad evaporated. Humiliated by the politicians, he now took his revenge. Ayub transferred authority | to his brother-in-arms and the politicians once we retired to their individual retreats. The I demonstrations and rioting, which had rocked the | foundations of the state for more than four months, .y ceased. Once more, an artificial calm layered the land.

Thus ended the decade of Ayub's rule. He left iNnstanmore divided and chaotic than he found it ^October 1958.

[THE **'BENEVOLENT DICTATOR'**

i RETROSPECT

IN

ib's ten years in power are regarded by many i a period of stability in the history of L Nobody can dispute his role as a dictator i apologists would like to call him a :nt dictator'. His assumption of power was iilly welcomed by a large segment of [wJation as the only way out of the mess created
1 the politicians in the first eleven years of ffi's existence. In retrospect, his accession ' through force appears to be totally He left the country in a greater mess

than he found it in and only aggravated the divisions within the country by adopting a dismissive attitude towards the real problems facing the polity.

It can be said to his credit that he was a modern leader who wanted to take Pakistan into an era of development. He focussed on policies that made an impact on improvement in agriculture and industry. His thinking was progressive and he had the courage to stand up to obscurantist forces in the country. Ayub's Muslim Family Laws Ordinance 1961 was indeed one of the most progressive legislation attempted in Pakistan. Other progressive measures like land and bureaucratic reforms were also greatly welcomed. Ayub pursued an independent foreign policy by moving out of the shadow of the United States and building a lasting relationship with China,

and by normalizing Pakistan's relationship with the Soviet Union.

All these steps, although in the right direction, were destined to fail because his state structure was a castle built on sand and fell when put to the test in the popular discontent of 1968-69. He failed to realize that real progress could not be achieved without the participation of people, based on the principles of equality and interdependence. Under his highly centralized system, people in the provinces never had the feeling of equality nor were they bound together in a network of collective self-reliance.12

Ayub was an epitome of self-righteousness and self-indulgence. He lived in the delusion of being a saviour and the content, tenor, and style of his political autobiography *Friends, Not Masters* amply depict his frame of mind. He ignored the reports of constitution and franchise commissions in favour of his own ideas. Those who differed with him were, in his estimation, miscreants, trouble makers, and traitors. He, therefore, snuffed out all criticism and dissent and was ultimately surrounded by sycophants and courtiers. Ayub was so isolated and divorced from reality that when it dawned upon him, he was left wondering: 'How did it all go wrong?13

Ayub allowed his sons to become industrial tycoons overnight, of course under government patronage. His family became rich during the course of his regime. He refused to submit to any.

system of accountability and used corrupt and coercive means through the bureaucracy to get himself re-elected as President in 1965.

Even his economic policies were not as resounding a success as claimed by him and his supporters. His politics were lopsided and benefitted only those whom he favoured through government patronage of licences and permits. They led to the concentration of wealth in very few hands, some say twenty or twenty-two families, which caused widespread despondency in the populace, thus opening ways for demagogues like Bhutto and Mujib. Industrialization was concentrated towards common goods and basic industries like steel mills and chemicals were ignored. The obvious result was that industrialization was without sound foundation.

Whatever achievements had been made in the economic field were largely nullified by his own misadventure of the war with India in 1965. It was a disaster in the military, economic, and in the diplomatic sense. It exposed his poor military acumen. He misread the sentiments of Kashmiris and launched an ill-thought, half-baked, and misadvised adventure for the liberation of Kashmir which backfired. This further widened the gulf between the two wings of the country and deepened the feelings amongst the people of East Pakistan that they had been abandoned and neglected.

Even his much trumpeted land reforms proved to be only a window dressing. These were so loose ended and full of loopholes that they did not make any real impact on land distribution in the country. The ceiling on the individual land holding was so high and flexible that the land reforms failed to accomplish their primary purpose of liquidation of feudalism and feudal structure which continue unabated to dominate the politics of Pakistan.

At the end, one is forced to conclude that his regime proved to be ’much ado about nothing’. Its facade was big but its content was little. Its claims were high sounding but its achievements were modest. Ayub impressed the world but failed to impress his own people. Ayub was so right when he said towards the end ’We managed to bluff the world but our own people called the bluff.14

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PART **FOUR**

The Yahya Regime: I March 1969 to December 1971

17 Yahya's

When Ayub stepped down as Pr< on 25 March 1969, he handed power to Army Chief General T the country under martial law effect. He announced the al Constitution and the dissolutioi Assembly and the two provii Members of the President's Coi and the two provincial Governc their offices under the prod assumed the office of Chii Administrator (CMLA) and appo chief, air force chief, and nava CMLAs. Twenty-five martial lav issued on the same day lj punishments, and trial procedure

In his broadcast to the nation c Yahya called for the return of san conducive to Constitutional promised direct elections based < franchise and a Constitution that by the elected representatives o the question of administrative shi had figured so prominently dui months of agitation, he took a have had enough administrative and I shall see to it that this is nc form or manner'. He continued v students, labourers, and peasants

In both provinces, the declarato was received by most people demur, although in Dhaka th demonstration. A common feelin very moment when East Pakis threshold of securing the accep constitutional and economic cla thwarted them. The resentment th no way assuaged by arrests but it s and maintain order. What was to no one ventured to guess.

On 1 April, Yahya assume President of Pakistan. On 4 Apr

17 Yahya's Martial Law

When Ayub stepped down as President of Pakistan on 25 March 1969, he handed over the reins of power to Army Chief General Yahya who placed the country under martial law with immediate effect He announced the abrogation of the Constitution and the dissolution of the National Assembly and the two provincial assemblies. Members of the President's Council of Ministers and the two provincial Governors ceased to hold their offices under the proclamation. Yahya assumed the office of Chief Martial Law Umimstrator (CMLA) and appointed deputy army i chef, air force chief, and naval chief as Deputy j CMLAs. Twenty-five martial law regulations were issued on the same day listing offences,] punishments, and trial procedures.

In his broadcast to the nation on 26 March 1969, I Yahya called for the return of sanity and conditions [conducive to Constitutional government. He I (remised direct elections based on universal adult itadiise and a Constitution that would be framed I If the elected representatives of the people. On lie question of administrative shortcomings which IU figured so prominently during the previous lintns of agitation, he took a firm stand: 'We |l»e y enough administrative laxity and chaos lid I shall see to it that this is not repeated in any Itaiormanner'. He continued with assurances to |tdats, labourers, and peasants. In both provinces, the declaration of martial law i received by most people without serious IB, although in Dhaka there were street tion. A common feeling was that at the ! moment when East Pakistan was on the I of securing the acceptance of its just tutorial and economic claims, martial law d them The resentment thus created was in ^ny assuaged by arrests but it sufficed to restore rinntam order. What was to come thereafter June ventured to guess.

April, Yahya assumed the office of t of Pakistan. On 4 April, an order was

issued that, with immediate effect, photographs of Ayub in government offices were to be taken down and replaced by those of Yahya. It could thus be said that Ayub's disappearance from public life was complete. Shortly after he relinquished the office of President, it was announced that Ayub would proceed to Swat, there to spend some time with the ruler of that state' to whose son Ayub's daughter was married. With an escort of a single jeep, he travelled north, crossing almost unnoticed the boundary that divided Swat from Pakistan's settled areas.

In his broadcast of 26 March 1969, Yahya had denied any personal ambition and said that he wanted to create conditions conducive to the establishment of constitutional government. The sole aim of martial law, according to him, was to protect the life and property of the people and to put the administration back on track.

The proclamation of martial law, notwithstanding the abrogation of the Constitution and subject to regulations and orders made by the CMLA, allowed all laws (including Acts, ordinances, notifications) in force immediately before the abrogation of the Constitution to continue in force and all courts and tribunals were allowed to continue and exercise all their powers and jurisdiction which they exercised before the abrogation. However, no court could call in question any martial law regulation or order or any judgment of a military court. No writ or any other order could issue against the CMLA and anyone exercising power under his authority. All the judges of the Supreme Court and the High Courts, and other constitutional office holders like the

Comptroller and Auditor-General, the Attorney-General, and Advocates-General and those in the service of Pakistan, were to continue in office. All other officers and authorities under the Constitution were to continue. However, this was subject to .the discretion of the CMLA.2

PROVISIONAL CONSTITUTION ORDER

On 4 April 1969, a Provisional Constitution Order was promulgated by the CMLA wherein it was provided that, notwithstanding the abrogation of the Constitution, the state of Pakistan would be governed as nearly as may be possible with the last Constitution. The CMLA was to be the President of Pakistan and would perform all functions assigned to the President under the last Constitution or any other law. However, all fundamental rights, except for security of person, prohibition against slavery, and forced labour, freedom of religion, access to public places, and abolition of untouchability, were abrogated and all pending proceedings in regard to their enforcement abated.

No judgment, decree, writ, order, or process could be made or issued by any court or tribunal against the CMLA or a Deputy CMLA or any authority exercising powers or jurisdiction under them. Ordinances by the President or a Governor were not subjecLto time limits. No court or tribunal could call or permit to be called in question the proclamation, any order in pursuance of the proclamation, or any martial law regulation or order, or any sentence or order of special or summary military courts. Appeals to the Supreme Court could only lie against any judgment, final order, or sentence of a High Court that had awarded death sentence or transportation for life, reviewing an order of acquittal, or had convicted a person after holding trial, or had certified a case for involving substantial questions of law, or had imposed punishment for contempt of court. Subject to this, the jurisdiction of the Supreme Court, a High Court, and all other courts and tribunals were allowed the powers and jurisdiction they had before the proclamation. The President, by order, could make such provisions, including constitutional provisions, as he deemed fit for the administration of the affairs of the state.3 Yahya assumed the office of President with effect from
25 March 1969 through a notification dated
31 March 1969 gazetted on 4 April 1969."

ACTION AGAINST SENIOR CIVIL SERVANTS

The hold on power and consequential arrogaw senior civil servants increased manifold during Ayub regime as they had been given a freeUi the administration of the country. There waste considerable resentment against them and it n demanded at various public forums that action k taken against them. General Yahya, obvioushi order to gain popularity, made a move aga senior civil servants under the Martial LJI Regulation No. 585 under which regulation, ik President or a Governor could dismiss, iwt reduce in rank or prematurely retire any person the civil service of the centre or a province, astfc case may be, if in his opinion, such a person w inefficient, guilty of misconduct, or could IK considered corrupt. A person could be deemed K be corrupt if he or his dependents had property i pecuniary resources which he could not accon for, or had a style of living beyond his ostensit means, or had persistent reputation of being corrupt. However, a tribunal was to be appointed for giving show cause notice and opportunity of hearing to the person concerned before any firal order was passed against him. Action under tb regulation did

not protect a government servant from any action under any other law and his illgotten property and wealth could also be forfeited Action was initiated against a large number of people, notoriously known by the number 303, and orders of dismissal, removal, and premature retirement were made against them. Action agaias most of them was acclaimed by the public as comet and well deserved. Mr Altaf Gauhar, who was vert close to Ayub throughout his regime and »as considered his favourite, was also removed from service though he was not known to be either corrupt or inefficient. He was indeed oneofthefe* men reputed for their intellect in the civil service.

CURTAILMENT OF JURISDICTION OF COURTS

The judiciary is often the most likely institution to run afoul of martial law regimes because the orders and regulations of martial law authonties are at

times challenged before the su if there is an embargo on their j situation led Yahya to make a removing doubts about the j Supreme Court and High Coui or summary military courts.6 T what was stated in the Provi; Order about the jurisdiction of in relation to special or summ< It was clarified that any cou judgment passed, writ ordered issued or made in such case w< matters of correctness, legality, exercise of any powers or jurisd court or a martial law authority to the CMLA whose decision final. All questions regarding tl any martial law regulation or had to be referred to the ma issuing it and its decision coulc before any court or tribunal i Court or the Supreme Court.

As if to cut the judiciary to order was passed for the judg courts, requiring them to dec Every judge was to submit to th Council a statement of his propi a prescribed form. Such a stater the properties and. assets that st the judge's parents, wife, or ch person. Upon receiving the si from a judge, the Council was about the correctness of the state of acquisition of the assets dec report to the President setting c recommendations. It was und« order that enquiries were held affairs of the judges by the Council and some judges were One of them resigned wl proceedings for misconduct i another who was found guilt} from office was recommended.'

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JT OF JURISDICTION

ften the most likely institution to al law regimes because the orders >f martial law authorities are at

times challenged before the superior courts, even if there is an embargo on their jurisdiction. Such a situation led Yahya to make a presidential order removing doubts about the jurisdiction of the Supreme Court and High Courts *vis-a-vis* special or summary military courts.6 This order

reiterated itat was stated in the Provisional Constitution Order about the jurisdiction of the superior courts in relation to special or summary military courts. It was clarified that any court decision given, judgment passed, writ ordered, notice or process issued or made in such case were ineffective. All matters of correctness, legality, or propriety of the exercise of any powers or jurisdiction by a military court or a martial law authority were to be referred to the CMLA whose decision thereon had to be y All questions regarding the interpretation of my martial law regulation or martial law order U to be referred to the martial law authority issuing it and its decision could not be challenged Wore any court or tribunal including the High Court or the Supreme Court. As if to cut the judiciary to size, a presidential trier was passed for the judges of the superior emits, requiring them to declare their assets.7 Every judge was to submit to the Supreme Judicial Council a statement of his properties and assets on iprescnbed form. Such a statement had to include :he properties and assets that stood in the name of to judge's parents, wife, or children or any other ran Upon receiving the statement of assets torn a judge, the Council was to make enquiries Ant the correctness of the statement and propriety if acquisition of the assets declared and submit a tport to the President setting out its findings and iranmendations. It was under this presidential enquiries were held into the financial of the judges by the Supreme Judicial and some judges were found delinquent.

1 One of them resigned while full-fledged

1 proceedings for misconduct were held against

• iiother who was found guilty and his removal jBkn office was recommended.8

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THE MIR **HASSAN** CASE

Wat appears to have prompted the CMLA to like Jurisdiction of Courts (Removal of Doubts)

Order, 1969 was the case of Mir Hassan. Malik Mir Hassan and others were summoned to stand trial before the special judge (central), Rawalpindi. They filed petitions for quashment before the West Pakistan High Court on the ground that allegations against them did not constitute an offence. While the matter was pending before a single judge, orders were passed by the martial law administrator transferring these cases from the special judge to a special military court. It was urged before the High Court that the cases could not be transferred to the special military court. The single judge requested the Chief Justice to refer the case to a larger bench. A full bench of three judges of the High Court, in one of the most courageous judgments, upheld the contention of the petitioners by giving the ruling that the order of transfer of the cases was defective and without jurisdiction.9 It was also held that the promulgation of Martial Law Regulation No. 42 had not in any manner whittled down the power or curbed the jurisdiction of the High Court, as the provisional Constitution Order could not be subjected to martial law regulations or orders, and the jurisdiction of the superior courts of the country had been recognized by Article 6 of the Provisional Constitution Order. It was further held that as Article 2 of the 1962 Constitution still held therefore, any direction or order of any authority including a martial law authority, would be invalid if it did not have the backing of a constitutional provision. A few passages from the judgment deserve mention verbatim:

Martial law arises from State necessity, and is justified as the common law by necessity, and by

necessity alone, *quod necessit as cogit, defendit,* (what necessity forces, it justifies), where the case is a case of riot rather than a case of rebellion, as the necessity is less, so the discretion of these concerned is limited.

Where the courts are sitting, there is no doubt that (i) it is a time of peace, (li) they are sitting in their own right, and (lii) not merely as licensees of the military power. The jurisdiction of the ordinary courts, therefore, continues to vest in them and the same cannot and has not been taken away by the proclamation of martial law.

The Provisional Constitution Order is in addition to the provisions of the proclamation and neither in derogation of it nor subject to it. It can, therefore, be

amended not by a martial law regulation or order but by amendment of Provisional Constitution Order itself. Whether the President and Chief Martial Law Administrator, who is himself not above the law, can now at all amend it is a question which will be answered when the time comes to do so.

A general and recognized rule of law is ’the jurisdiction of superior courts is not taken away except by express words or necessary implication and that such jurisdiction cannot be excluded unless there is clear language in the statute which is said to have that effect’. It is, therefore, not open to anyone to argue that such jurisdiction can be affected as if it were by a side wind, by a statute containing no express words to that effect in it. Unless, therefore, it could be shown that a martial law regulation exists which deprives the ordinary courts of jurisdiction to try offences under the ordinary law, such jurisdiction would exist in its full force.

It was no coincidence that the judgment in Mir Hassan’s case and Jurisdiction of Courts (Removal of Doubts) Order 1969 came on the same date,
30 June 1969.

CONSTITUTIONAL CHANGES: DISSOLUTION OF ONE UNIT

In a nation-wide broadcast on 28 November 1969, Yahya announced far-reaching constitutional developments, outlining the legal framework for the restoration of a federal parliamentary system; the holding of general elections on 5 October 1970 on the basis of ’one man, one vote’; the task of framing the Constitutions for the newly elected National Assembly which would have to be completed within 120 days, failing which the Assembly would be dissolved and a new National Assembly elected; the conferment of maximum autonomy on the provinces, consistent with the maintenance of a strong federation; the dissolution of the One Unit in West Pakistan and the restoration of its separate provinces; and permission for the resumption of unrestricted political activity from 1 January 1970.

In preparation for the resumption of political activities, a regulation was promulgated in December 1969 by the CMLA laying down rules and guidance for the conduct of political

campaigning.10 According to this regulation, ’M political party shall propagate opinions or act in i manner prejudicial to the ideology, integrity, 01 security of Pakistan’; the interests of the common man would be protected against the acquisition of political power through the use of money, fora, or coercion; freedom of the Press would be foil; protected; and any action which might amount to causing obstruction in the way of holding general elections would constitute an offence under the regulation.

In conformity with the reforms announced n November 1969, full-scale political activity u Pakistan, including the lifting of all restrictions on public meetings and processions, resumed iron
1 January 1970, but general elections had to be postponed to December because of the disruption caused by exceptionally severe floods in East Pakistan, which had claimed about a hundred lives

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and rendered hundreds of thousands of people homeless.

The two decisions taken by Yahya of dispensation with the principle of parity between the two wings of the country ending One Unit in West Pakistan were hurried and unilateral. He had no mandate to make these basic constitutional changes which went to the roots of the understanding between the two wings of the county were made by one of the wings of the country, West Pakistan. The principle of parity in representation in the central legislature was the result of a protracted and exhaustive constitutional debate in the first Constituent Assembly and had been duly incorporated in both the 1956 and the
1962 Constitutions. It was a sacred pact between the two parts of the country which no General, no matter how powerful could undo. No less than a new Constituent Assembly or a Constitution Convention could change this pact. This step was certainly a factor that contributed to the countrv disintegration. Had the parity in representation the two wings been maintained, Mujib and n party would not have had an absolute majority in the new National Assembly with the unfortunate consequences that followed.

Much could be said against the creation of One Unit in West Pakistan by an unpopular GovernorGeneral in 1955, yet this was adopted as a

constitutional measure by the second Con Assembly" and was incorporated in the fir Constitution of Pakistan. In fact, One U parity between the two wings of Pakistan v basic cornerstones of constitution-making ai more or less wedded to one another. West P as one province with 46 per cent of the po] and 85 per cent of the land area, and East P with 54 per cent of the population and 15] of the land area, somehow balanced one and parity between the two provinces a and reasonable arrangement. It is true 1 principle of parity was accepted in an sense; not only in representation but als< economy, services, military, and so on, wl not been not been adhered to. The answer in dispensing with the principle but ir affirmative steps to achieve true and e parity. In any case, the fate of One Unit wa by a military dictator, Yahya, whose r purely transitional. He had no mandate wh to tinker with the One Unit, leave a dissolving it altogether.

After the announcement, Yahya

presidential order for the dissolution

province of West Pakistan.12 Four pr<

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After the announcement, Yahya made a presidential order for the dissolution of the province of West Pakistan.12 Four provinces: namely Balochistan, the NWFP, the Punjab, and *> ndh, were carved out of West Pakistan, keeping
1 lamabad capital territory and the centrally btered tribal areas out of these reconstituted provinces. Pakistan Western Railway, running through all four provinces, was vested in the President. West Pakistan Water and Power Development Authority (WAPDA) continued as Wore Certain corporations set up under the West Pakistan laws and administered by the West Pakistan government were not divided and were lowed to continue, with the President exercising *k* powers of the provincial government in relation tolkse corporations. However, the High Court of lest Pakistan had to be split into separate High Owns, one each for the four provinces, leaving lore than one province sharing a common High Court By another presidential order, separate High s for the provinces of the Punjab and the |WFP and a common High Court for the [Winces of Sindh and Balochistan were jBtabhshed.13 A separate Public Service

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Commission for each province was to be established. Civil servants belonging to provincial services were to be allocated to the new provinces. The existing laws of the West Pakistan province were to continue and duly adapted by the new provinces. Territories assigned to each new reconstituted province were described in the schedule to the dissolution order.

LEGAL FRAMEWORK ORDER, **1970**

In a broadcast on 28 March 1970, Yahya announced that the Legal Framework Order, 1970, gazetted on 30 March, would lay down the basic principles for the future Constitution of Pakistan; that the One Unit system would end by 1 July in West Pakistan; that the National Assembly would consist of 313 members, of which 13 seats would be reserved for women; and the provincial elections would be held not later than 22 October
1970. 'The main objective that I have placed before myself, Yahya declared, 'is the peaceful transfer of power to the people.'

The Legal Framework Order, 1970, in laying down the fundamental principles which would be incorporated in the new Constitution, stated *inter alia:14*

1. The National Assembly would consist of
313 members, of whom 300 would be elected to fill general seats and 13 to fill seats reserved for women. East Pakistan was allocated 162 general seats and 7 women seats. The Punjab was allocated 82 general seats and 3 women seats, Sindh 27 general seats and 1 women seat, the NWFP
18 general seats and 1 women seat, and Balochistan 4 general seats and 1 women seat. The tribal areas were allocated 7 general seats.15

2. There would be a Provincial Assembly for each province, consisting of a number of members elected to fill general seats and a number to fill seats reserved for women. East Pakistan would again hold the largest number of seats. The seats were allocated as under:16

East Pakistan The Punjab Sindh

Balochistan The NWFP

in

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3. Polling for election to the National Assembly would commence on 5 October 1970, and for the Provincial Assemblies not later than
22 October 1970.

4. The Constitution would be so framed as to embody the following fundamental principles:

i. Pakistan should be a federal republic to be known as the Islamic Republic of Pakistan.

ii. (a) Islamic theology, which is the basis for the creation of Pakistan, would be preserved.

(b) The head of state would be a Muslim.

(a) Adherence to fundamental principles of democracy would be ensured by providing direct and free periodical elections to the federal and provincial legislatures on the basis of population and adult franchise, (b) The fundamental rights of the citizens would be laid down and guaranteed. /

(c) The independence of the *judiciary*

would be secured.

All powers, including legislative, administrative and financial, would be so distributed between the federal government and the provinces that the provinces would have maximum autonomy, with maximum legislative, administrative and financial powers; but the federal government would also have adequate powers, including legislative, administrative and financial powers, to discharge its responsibilities in relation to external and internal affairs and to preserve the independence and territorial integrity of the country.

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It would be ensured that: (a) people of all areas in Pakistan be enabled to participate *fa* forms of national activities, (b) within a specified period, and all other disparities r* provinces and between (areas in a province would bero by the adoption of statutory other measures. The Constitution would contain n preamble an affirmation that I (a) The Muslims of Pakistan would k| enabled, individually and coll tively, to order their lives accordance with the teachu Islam as set out in the Holy and *Sunnah;* and (b) The minorities would be free profess their religions freely, mil enjoy all rights, privileges, a protection due to them as cinzemi Pakistan.

vii. The Constitution would provide tk (a) The National Assembly, constitMf under the order, would (1) be the first legislature of tit federation for the full term if & legislature of the federate consisted of one House, and (2) be the first Lower House of lit legislature of the federation fe the full term ifthelegtslatoec' the federation consisted of iw Houses.

(b) the provincial assemblies elected i accordance with this order should In the first legislatures of therespectm \provinces for the full term viii. The National Assembly would fr Constitution in the form of a Bill loot called the Constitution Bill witiu i period of 120 days from the date of is first meeting, and on its failure to do so would stand dissolved. Provisions were made regarding tit summoning of the National Assembly *its* elections, its Speaker and Deputy Speak, privileges of its members were also made

6. Provisions regardir disqualifications for 1 National Assembly hi

Political parties coming elections were elections within the Framework Order, conditions laid down followed that such p< make their manifestos' of this law and not in political party that did outlines, structure, and had to stay out of the which would be held u

Mr Justice Abdus Sattar c was appointed Chief Electii prepare for and hold election the Provincial Assemblies.

POLITICAL ALLIANCI FREE ELECTIONEERI

As discussed above, political a
1 January 1970, and all the p electioneering. Around twentyor groups were in the contest, knew about voters' prefere believed that it had a chanc persuade some of the small together but the advice fell on It was, however, discernable Pakistan and Bhutto in Wes emerge as leading political 1(good orators and took full adv« and television to put forward They were both vocal about th wealth in a few hands and i nationalization of basic industri Bhutto laid considerable stress uj in his speeches. He was criti friendly towards China, and esj cause of self determination. H orderly and was conducted with s semi-socialist reforms. Both lead respective wings, numerous po

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all rights, privileges, and ion due to them as citizens of

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titution would provide that: tational Assembly, constituted the order, would: e the first legislature of the ederation for the full term if the egislature of the federation ;onsisted of one House; and 3e the first Lower House of the legislature of the federation for the full term if the legislature of the federation consisted of two

Houses.

provincial assemblies elected in srdance with this order should be first legislatures of the respective vinces for the full term, itional Assembly would frame the tution in the form of a Bill to be the Constitution Bill within a of 120 days from the date of its iceting, and on its failure to do so i stand dissolved, is were made regarding the ig of the National Assembly after its Speaker and Deputy Speaker, , of its members were also made.

6. Provisions regarding qualifications and disqualifications for being a member of the National Assembly had also been made.

Political parties contesting the forthcoming elections were required to contest the elections within the limits of the Legal Framework Order, accepting the preconditions laid down in it. It necessarily followed that such political parties had to make their manifestos within thevfour corners of this law and not in contravention of it. A political party that did not accept the broad outlines, structure, and conditions of this law had to stay out of the forthcoming elections which would be held under this law.

Mr Justice Abdus Sattar of the Supreme Court was appointed Chief Election Commissioner to

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prepare for and hold elections to the National and the Provincial Assemblies.

POLITICAL ALLIANCES AND FREE ELECTIONEERING

As discussed above, political activity was free from
1 January 1970, and all the parties were allowed electioneering. Around twenty-four political parties or groups were in the contest. Since no one quite knew about voters' preferences, each group believed that it had a chance. Yahya tried to persuade some of the smaller groups to join together but the advice fell on deaf ears. It was, however, discemable that Mujib in East Pakistan and Bhutto in West Pakistan would merge as leading political leaders. Both were ,.J orators and took full advantage of the radio rnd television to put forward their programmes. Hey were both vocal about the concentration of wealth in a few hands and in advocating the nationalization of basic industries. Unlike Mujib, Bhutto laid considerable stress upon foreign policy in his speeches. He was critical of the USA, friendly towards China, and espoused Kashmir's cause of self determination. His campaign was orderly and was conducted with skill. He promised semi-socialist reforms. Both leaders faced, in their respective wings, numerous political opponents

who had small political parties, confused programmes, and were utterly divided. This gave them greater advantage over their opponents. Unfortunately, neither one of them took any interest in the elections in the other wing. Bhutto's Peoples Party did not nominate a single candidate in East Pakistan. Mujib's Awami League did nominate seven candidates (out of 138 constituencies) in West Pakistan but they were wholly on their own. This was an omen of the widening political gulf between the two wings.

Mujib's platform was his indictment of West Pakistan for everything that was wrong in East Pakistan. In his first election speech, he declared that the Bengalis had made a mistake in accepting parity in the 1956 Constitution.17 The central government, he thundered, was a mere tool in the hands of West Pakistani exploiters who had robbed East Pakistan of her capital, her economic potential, her foreign exchange, her sons' right to job in the administrative and defence services, and of participation in the conduct of national and local affairs and in the profitable industries built up in West Pakistan on the fruits of this colonial style spoliation. He had collected around himself a band of able academicians who supplied him with carefully selected facts and figures to support his contentions. After the flood and cyclone disasters of 1970, his rhetoric sank to the level of a vitriolic smear campaign against West Pakistan. He campaigned on the basis of his Six Points which he called the charter which would secure the rights of East Pakistanis.

Critics of the Awami League and its political opponents found it impossible to voice their views in public because the Awami League supporters or their hired hoodlums broke up the meetings of other parties, particularly Council Muslim League and the Jamaat-i-Islami, and their workers were beaten up. All potential political rivals were silenced and terrorized by these strong-arm tactics of the Awami League who had a campaign of intimidation in full swing by the time elections were announced. When the Jamaat-i-Islami held its first election rally at the Paltan Maidan, Dhaka, it turned into a melee. Bloody clashes took place and the Jamaat blamed the Awami League for them because the battlefield was resounding with *Joi*

Bangla (Long Live Bangla) slogans. Two people were killed and fifty injured, twenty-five of them seriously. The party Amir, Maulana Maudoodi, who had flown from Lahore specially to address the meeting had to return from the venue of the meeting. The Jamaat emerged from the skirmish not only as the aggrieved but also as a disabled party.18

It is beyond comprehension why the martial law administration remained a silent and helpless spectator in the face of this grave situation where one political party used the most reprehensible intimidatory tactics to drive out and demoralize their political opponents. Furthermore, the Six Point Programme was anathema to the principles and guidelines laid down in the Legal Framework Order, under which the elections were being held. Why did the martial law administration not take timely action to enforce its own law?

It should not be lost sight of that in his preelection pronouncements, Mujib did not, at any occasion, demand or even hint at secession. One of his main appeals to moderate voters was that the Six Points would strengthen Pakistan by bringing the western and eastern regions to a new understanding with each other. He became a popular hero, a position which should have made him a responsible statesman, but he lost balance and restraint in his utterances.

There was, however, a militant element in the Awami League which believed in socialism as the solution to the poverty in East Pakistan and which argued that only in an independent East Bengal or Bangladesh would it be possible to set up a socialist order. The nucleus of this group was formed in 1962 in Dhaka University and it obtained control of the East Pakistan Students League (EPSL) which, along with the pro-Beijing East Pakistan Students Union (EPSU), played a leading role in the presidential elections of 1965 and in the agitation against Ayub in 1969. Until the emergence of Bangladesh, it posed as an integral, though radical, part of the Awami League. Other leftists gave priority to a revolutionary class struggle of the masses whose interests, they argued, were being jeopardized by promoting the secession *of East Pakistan under bourgeois leadfyyjyp, ffrf* eventually chose to boycott *the poles but the*

radicals in the Awami League regarded as a step towards the final goal of mdei and threw themselves wholeheartedly campaign under a bourgeois leaders? election campaign enabled them to organi/ cadre of thousands of urban educated youtn ,j L mass contact in the villages. By 6 June 1970 fte F group had drafted a declaration of mdep and prepared the design for a new natio On 12 August, six months prior to the en the Central Committee of the EPSL adopted i resolution for a *Swadhin Samajtantnk* Bangladesh (Independent Socialist Bangladesh).”

GENERAL ELECTIONS, DECEMBER **1970,** AND THEIR RESULTS

The general elections held on 7 December 1971, were the first ever throughout Pakistan held on the basis of ’one man, one vote’ and resulted in a overwhelming victory for Mujib’s Awami League in East Pakistan and a large majority for Bhutto’s Pakistan People’s Party in West Pakistan Outofi total of 291 seats, the Awami League gained 151 and the Pakistan People’s Party 81. In all, twentythree parties put forward 1237 candidates for the

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291 seats, and there were also 391 independent candidates. Over 60 candidates in East Pakistan withdrew on the eve of the elections, ostensibly as a protest against the government's handling of relief operations in the Ganges Delta after tk cyclone disaster of November 1970. They were generally believed to have done in order to avoid a /humiliating defeat^ at the hands of the Awaai League.

In a broadcast before the elections on
3 December 1970, Yahya had reminded the electorate that Martial Law was still in force and that the army would ensure that order was maintained. Apart from a few incidents, however, the election campaign«and the voting took place in a peaceful atmosphere and all parties, including those that were defeated, agreed that the elections were both free and fair. In nine constituencies in East Pakistan, voting had been postponed until ^/yfeW/frW/ *dtieto* trie effects of"th'e cyclone, *and all of these* were taken *by the* Awami

In hast Pakistan, only 57 per cen voters cast their votes as against Punjab, 60 per cent in Sindh, 4 NWFP, and 40 per cent in Bah
57 per cent of the electorate w Pakistan, the Awami League ga so that in fact it owed its massi eventually gave it 167 out of 169 the East Pakistan in a National , to only 41 per cent of the East Pi Why the turnout was so poor ir not clear, but it is conjectured th the strong-arm tactics of the hirei Awami League.

The results of 1970 general National Assembly held on 7 D tabulated form, are given below:

East

15

Awami League Pakistan People's Party Council Muslim League Able Sunnaf Jamaat-i-Islami Qayyum Muslim League Convention Muslim League Pakistan Democratic Party Nationa lAwami Party (Wall Group) Jamiatul Ulema-i-Pakistan (Hazarvi Group) Independents

Note The figures in parentheses indicate

Mujib thanked the people, h students, labourers, and other ac to see him. The poll results were favour of his party's programrr out.21 Bhutto said that his part; help in framing a Constitution conceatrate wealth in the hanc families alone but would guara basic rights for the twelve cro country.22

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imi League regarded elections he final goal of independence Ives wholeheartedly into the i bourgeois leadership. The nabled them to organize a party of urban educated youth for villages. By 6 June 1970, their a declaration of independence esign for a new national flag, months prior to the elections, ittee of the EPSL adopted a *idhin Samajtantrik* Bangladesh list Bangladesh).19

ECTIONS, DECEMBER 1 IEIR RESULTS J

ins held on 7 December 1970, hroughout Pakistan held on the , one vote' and resulted in an jry for Mujib's Awami League d a large majority for Bhutto's 'arty in West Pakistan. Out of a the Awami League gained 151 ;ople's Party 81. In all, twenty>rward 1237 candidates for the re were also 391 independent iO candidates in East Pakistan e of the elections, ostensibly as the government's handling of n the Ganges Delta after the f November 1970. They were to have done in order to avoid a at the hands of the Awami

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YAHYA'S MARTIAL LAW

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In East Pakistan, only 57 per cent of the registered voters cast their votes as against 69 per cent in the Punjab, 60 per cent in Sindh, 48 per cent in the NWFP, and 40 per cent in Balochistan.20 Of the
57 per cent of the electorate who voted in East Pakistan, the Awami League gained 75 per cent; so that in fact it owed its massive victory, which eventually gave it 167 out of 169 seats allocated te^ the East Pakistan in a National Assembly of 313, to only 41 per cent of the East Pakistan electorate. Why the turnout was so poor in East Pakistan is not clear, but it is conjectured that this was due to the strong-arm tactics of the hired hoodlums of the Awami League.

The results of 1970 general elections for the National Assembly held on 7 December 1970, in i tabulated form, are given below:

bagged 266 of the 279 contested seats. Elections to 21 remaining seats were scheduled for
17 January 1971 due to the cyclone.23 These seats were also won later on by the Awami League. In the Punjab, the People's Party (PPP) won 113 seats out of 180; the remainder divided between no fewer than eight splinter groups, with 28 independents. In Sindh, the PPP had a bare majority, 32 seats out of 60; again the remaining seats fell to splinter groups. In the NWFP, the PPP could secure only 3 out of 40 seats; the largest group, the Wali Khan section of the National Awami Party (NAP) won 12 seats, followed closely by the Qayyum Muslim League with 10 seats. In Balochistan, the Wali Khan section of the NAP led with 8 seats out of 20, splinter groups and

independents shared the remainder.24 A high

I East Pakistan Punjab Sindh NWFP Balochistan Total

tamiLeague 151(153) -(2) -(2) -(2) -(1) 151(160)

Pakistan People's Party - (-) 62(77) 18(25) 1(16) -(1) 81(119)

Council Muslim League -(50) 7(50) -(12) -(5) -(2) 7(119)

AhleSunnat - (-) 4(39) 3(8) - (-) -(1) 7(48)

Jamaat-i-Islami - (69) 1 (43) 2 (19) 1 (15) - (2) 4 (148)

IJayyum Muslim League -(65) 1(34) 1(12) 7(17) -(4) 9(132)

Convention Muslim League -(93) 2(24) -(6) -(1) - (-) 2(124)

Pakistan Democratic Party 1(81) -(21) -(3) -(2) -(1) 1(108) Vioona lAwami

P«y (Wah Group) -(39) - (-) -(6) 3(16) 3(3) 6(64) Imuatul Ulema-i-Pakistan

Itarvi Group) -(13) -(47) -(20) 6(19) 1(4) 7(103)

Independents 1(109) 5(114) 3(46) 7(45) -(5) l^i^l9!

1 *J*^ 82 27 25 4 291

V* The figures in parentheses indicate the number of candidati

Mujib thanked the people, his party workers, idents, labourers, and other admirers who went »see him. The poll results were a clear verdict in ivoiir of his party's programme, as he pointed «t!l Bhutto said that his party would give all Kip in framing a Constitution which would not wentrate wealth in the hands of twenty-two miles alone but would guarantee fundamental me nghts for the twelve crore people of the •try22

Elections to the provincial assemblies were held *i\l* December 1970. As expected, Mujib's tmn League swept the polls in East Pakistan. It

ss put up by the party

proportion of the newly-elected members, both of the National and the provincial assemblies entered politics for the first time, and it was notable that unknown candidates bearing party endorsements of the PPP defeated the 'Old Guard', men who had taken part in politics from the time that Pakistan came into existence. It was clear that in the western wing, as in the eastern wing, electors were seeking a 'new deal'.

NOTES

1. Swat was later merged into NWFP and became a district of the Malakand Division.

2. Proclamation of Martial Law, Paragraph 5. PLD
1969 Central Statutes 42.

3. Provisional Constitution Order. PLD 1969 Central Statutes 41.

4. PLD 1969 Central Statutes 41.

5. Removal from Service (Special Provisions) Regulation, 1969. PLD 1970 Central Statutes 170.

6. Jurisdiction of Courts (Removal of Doubts) Order,
1969. President's Order 3 of 1969. PLD 1969 Central Statutes 119.

7. Judges (Declaration of Assets) Order, 1969. President's Order 4 of 1969. PLD 1969 Central Statutes 120.

8. Mr Justice Fazle Ghani Khan of Lahore High Court resigned and started his law practice in Karachi. Mr Justice Shaukat Ali was held guilty of misconduct and was removed on the recommendation of the Council. President v Justice Shaukat Ali, PLD 1971 S.C. 585.

9. Mir Hassan v The State. PLD 1969 Lahore 786.
10. Political Activities Regulation, Martial Law Regulation No. 60, PLD 1970 Central Statutes 173.

14.

11. Establishment of West Pakistan Act, 19i
1955 Central Acts and Notifications 273

12. Province of West Pakistan (Dissolution) 0
1970. President's Order 1 of 1970 PLD1 Central Statutes 218.

13. High Courts (Establishment) Order, President's Order 8 of 1970 PLD 1970(Statutes 250.

Legal Framework Order, 1970. President's ft No. 2 of 1970. PLD 1970 Central Statutes 2»

15. Ibid., Schedule I.

16. Ibid., Schedule II.

1 7. *The Pakistan Observer,* Dhaka, 12 January 1)1 j

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18. Salik, Siddique, *Witness to Surrender,* 1977,1 University Press, Karachi, p. 5. Zaheer, Hassan, *The Separation of East Pn The Rise and Realization of Bengal] i Nationalism,* 1994. Oxford University nou Karachi, p. 126. He has quoted Lamm" Lifschultz, *Bangladesh • The Unfinished Revolwi* (London: Zed Press, 1979), 27-9.

20. Williams, L.F. Rushbrook, *The East Pahtm Tragedy,* 1972, torn Stacey Ltd., London, p *M.*

21. *Dawn, 9* December 1970.

22. Ibid.

23. *Dawn,* 19 December 1970.

24. Ibid.

19.

In the new circumstances creai the elections, the danger o between the Eastern and the ty National Assembly was obvio which all patriotic Pakistanis \ East Pakistan, the Awami Lea were all-powerful. They comrm the National Assembly, apart frc they might expect to receive i opposed to the PPP. How did tl their newly-acquired power? ' hopefiil signs. Mujib had won I platform where the main plan provincial autonomy. He had re that this autonomy, would streng the country as a whole. He had a Six Points were negotiable It Bhutto also favoured maxin autonomy and was ready to discu Now that Mujib was assured the pi of Pakistan, along with control government, would his intentioi position of the Centre to the b, remain as strong as ever? Like al leaders, he had accepted the Le Order as the basis of the electior down clearly that the central go enjoy the powers necessary for the the integrity of Pakistan

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Pakistan Act, 1955 PLD vfotifications 273. istan (Dissolution) Order, er 1 of 1970. PLD 1970

18 Constitutional Breakdown

r, 1970. President's Order
70 Central Statutes 229.

Dhaka, 12 January 1970. *to Surrender,* 1977, Oxford hi, p. 5.

•*yaration of East Pakistanitwn of Bengali Muslim*)xford University Press, : has quoted
Lawrence *The Unfinished Revolution*
79), 27-9.

rook, *The East Pakistan* jcey Ltd., London, p. 44.
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In the new circumstances created by the results of the elections, the danger of a confrontation j between the Eastern and the Western wings in the National Assembly was obvious, and it was one j winch all patriotic Pakistanis wished to avoid. In I East Pakistan, the Awami League and its leader were all-powerful. They commanded a majority in te National Assembly, apart from any support that they might expect to receive from small groups opposed to the PPP. How did they propose to use I their newly-acquired power? There were some I topefiil signs. Mujib had won the elections on a tform where the main plank was maximum I provincial autonomy. He had repeatedly declared j tot this autonomy, would strengthen, not weaken, Ifc country as a whole. He had also stated that his I in Points were negotiable. It was known that IBkutto also favoured maximum provincial Intonomy and was ready to discuss the Six Points. Mow that Mujib was assured the prime ministership H Pakistan, along with control over the central Ijpvemment, would his intention to reduce the of the Centre to the barest minimum, i as strong as ever? Like all other political , he had accepted the Legal Framework r as the basis of the elections and this laid i clearly that the central government must y the powers necessary for the preservation of It integrity of Pakistan.

(Yahya had high hopes that an agreement ien the main parties over the general iples under which the National Assembly I operate could be achieved and for this : he strongly advised the respective party s to use the interval between the elections *i* the meeting of the Assembly for preliminary isions which could result in a working ding between them.1 In order to give time lute, he thought it wiser to allow a couple of is before the session opened. He was steering ! course which he hoped would strike e as fair. Mujib was pressing for an early

meeting, while Bhutto and most of the West wing political leaders thought that more time should be allowed for preliminary consultations and exchange of views if the National Assembly was not to find itself stultified by sterile debates on points which ought to have been agreed before it met upon. Mujib began the New Year with a speech in Dhaka on 3 January in which he showed not the slightest spirit of accommodation. Indeed, all Awami League members of the National and provincial assemblies were required to take an oath that they would support the party programme for provincial autonomy, although the terms of the oath did not actually mention the

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Six Points.2

The post-election scene witnessed the accentuation of nationalist fervour in East Pakistan. Election results were seen not as the success of a single party but as the victory of Bengali nationalism. Bhashani, who seemed to have been bypassed by the overwhelming success of the Awami League and the segmentation of NAP, raised the demand for a sovereign independent East Pakistan in January 1971. He regarded the Awami League victory as the people's verdict for a separate East Pakistan and threatened to start a mass movement if the Awami League resiled from it.3

The centre of political interest shifted to Dhaka, where the western party leaders were meeting Mujib and his colleagues. In the course of these exchanges, Yahya acclaimed Mujib as the future prime minister of Pakistan, a title which the Awami League leader did not disavow.4

In his meetings with Mujib in January 1971, Yahya tried to persuade him to meet Bhutto who had won a majority of seats in the National Assembly in West Pakistan. Mujib refused to do so saying that just as other West Pakistani leaders had come to see him so could Bhutto. Yahya advised Mujib to modify his Six Point Programme so that he could carry the West Pakistani leaders with him. Mujib asked Yahya to call the meeting of the National Assembly on 15 February and

claimed that he would not only obtain a simple majority but a two-thirds majority. He, promised that he would not ignore the interests of West Pakistan and that he would seek the co-operation of the Peoples' Party as well as the other parties of West Pakistan. These meetings did not resolve the differences. Mujib was non-committal about any compromise on the Six Points and only talked in general terms, and insisted on calling the Assembly session.5

The Awami League, flushed by its electoral triumph, was in a militant mood. Whether this mood affected the leader or whether it was inspired by him, remains uncertain. What is on record is that the tone and temper of his public pronouncements over the six points completely changed. Instead of repeating that they were negotiable, now that the interests of East Pakistan were adequately protected by the dominant position which the Awami League had won in the National Assembly, he asserted that each point must be embodied in the new Constitution, and these who did not agree with him could do what they liked.6 Instead of repeating that he stood not for secession but for regional autonomy, he said that the majority of Pakistanis living as they did in *'Bangladesh'* could not 'secede', but that they had the right to autonomy and economic and social freedom. There was no more talk about strengthening and preserving the state's unity.

Yahya also held discussions with Bhutto in Larkana who cleverly tried to drag the army into the situation as the third party in addition to the Awami League and the Peoples' Party. Bhutto raised his concern about the implication of the six points. He indicated the possibility of an agreement if Mujib compromised on two points, foreign trade and foreign aid as well as taxation. As they stood, he thought the Six Points were bound to lead to secession. Bhutto's articulation of the dangers arising from them to the country and to army must have created a deep impression on the Generals. _He gave an impression to Yahya that the army was with him on this issue. This meeting between Bhutto and Yahya and his Generals, particularly in the hometown of Bhutto in a relaxed atmosphere, must have created suspicions in Bengali minds of the army and Bhutto trying to deprive East

Pakistanis of their electoral victory. Bhutto i his delegation did visit Dhaka at the end of Jf and held a series of meetings with conveyed to Mujib that the general impressioil the people of West Pakistan was that the Six Po spelt the end of Pakistan. He offered togoasa as possible to meet the essential demands Oni date of summoning the meeting of the Assent I the two of them differed. Mujib wanted the oik | possible session of the National Assembly *t* later than 15 February, Bhutto wanted more tint I On his return, Bhutto informed Yahya that *it* \ Awami League had already prepared its draft t the Constitution which it would no doubt gr | passed by the Assembly. He assumed, sufficient evidence, that the Awami League souji I to impose constitutional obligations ofmtoleraWt financial burdens on the West Pakistan provmcs to compensate East Pakistan for past inequalities [He advised Yahya not to call the Assembly sessia j until he had made one more attempt to negotiatei settlement with Mujib.7

POSTPONEMENT OF THE NATIONAL ASSEMBLY SESSION

Mujib grew more and more adamant over the SH Points, and it became painfully clear that he tad lost interest in anything but the fiiture of East Pakistan. He consistently referred to the East Wmt as ’Bangladesh’ and refused to visit WestP or to meet Yahya for further talks, sending message to the effect that if the Six Point* not accepted in their entirety, ’rivers of bid flow’. Meanwhile, the political leaders o, , western wing who had been elected to the National Assembly became more and more uneasy at tie uncompromising attitude of Mujib. Yahya finally decided on 13 February to summon the National Assembly to meet in Dhaka on 3 March to whicli Bhutto announced on 15 February that the PPP would not attend the National Assembly session1 if Awami League was not flexible He demanded an adjustment on the Six Points. Mujib again reiterated that the Constitution would be based on the Six Points because such a mandate was given to him by the people.9 Wali Khan announced the

participation of NAP i session because, he s should be above party p conciliatory overtures ar was to be no adjustment possible. He said that tl not impose the Six Poin additional powers to the the units so desired.10 A’ draft Constitution incor; which was adopted by the of the Awami League on West wing was left to (autonomy.” The salient constitutional principles w i. The country woulc Republic of Pakistz ii. East Pakistan wouL and NWFP would I in. There would be government, a wint summer seat in Islai iv. War or emergency without the consi Assembly.

v. Either the army hea

Bangladesh or the N

vi. Foreign Affairs, Df

would be central sub

vii. Two Reserve Bank;

would be provided, viii. Foreign loans won provinces according utilization.

ix. The centre would hav x. The federal goverr revenues through *levy* basis of per capita inco according to the follov Bangladesh Punjab Sindh

Balochistan Pakhtoonistan

After a meeting between Ya latter turned bellicose. Bh postponement of the sessior

ictory. Bhutto and tthe end of January ,s with Mujib. He neral impression of s that the Six Points offered to go as far al demands. On the ig of the Assembly, b wanted the earliest onal Assembly, not
3 wanted more time, ned Yahya that the prepared its draft of vould no doubt get [e assumed, without wami League sought gations of intolerable st Pakistan provinces t for past inequalities, the Assembly session attempt to negotiate a

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LY SESSION

CONSTITUTIONAL BREAKDOWN

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e adamant over the Six ifully clear that he had but the future of East eferred to the East Wing jd to visit West Pakistan her talks, sending him a t if the Six Points were ety ’rivers of blood will political leaders of the Delected to the National

and more uneasy at the of Mujib. Yahya finally to summon the National aka on 3 March to which

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3Uch a mandate was given Wali Khan announced the

participation of NAP in the National Assembly

session because, he said, constitution-making

should be above party politics. Mujib made some

oncihatory overtures and said that although there

•as to be no adjustment, some ’arrangement’ was

possible He said that the Awami League would

not impose the Six Points on the West wing and

additional powers to the centre could Be given if

the units so desired.10 Awami League prepared a

draft Constitution incorporating the Six Points

which was adopted by the parliamentary committee

of the Awami League on 27 February 1971. The

West wing was left to choose its own kind of

autonomy." The salient features of the draft

constitutional principles were as under:12

i The country would be named the Federal

Republic of Pakistan.

11 East Pakistan would be named Bangladesh and NWFP would be called Pakhtoonistan. in There would be two seats of federal government, a winter seat in Dhaka and a summer seat in Islamabad. w War or emergency would not be declared without the consent of the National Assembly.

v Either the army headquarters would be in Bangladesh or the Navy and the Air Force. vi Foreign Affairs, Defence, and Currency

would be central subjects. MI Two Reserve Banks for the two wings

would be provided.

vm Foreign loans would be paid by the provinces according to the proportion of utilization.

a The centre would have no taxation power, i The federal government would raise revenues through levy on the units on the basis of per capita income, expenditure, and according to the following percentage: Bangladesh ... 27

Punjab ... 37

Smdh ... 21

Balochistan ... 8

Pakhtoonistan ... 7

Wer a meeting between Yahya and Bhutto, the |str turned bellicose. Bhutto demanded a nent of the session of the National

Assembly. He threatened a mass movement from 'Khyber to Karachi' and called for a general strike on 2 March. He threatened to take action against those members of the National Assembly

(not from the PPP) from West Pakistan who went to attend the session of National Assembly in Dhaka. He said that if any member of his party attended the session, he would liquidate him.13 The actual words he is said to have used were: 'If any member of his party attended the session of National Assembly in Dhaka, his legs will be broken'. These words were ominous and set the stage for the breakup of Pakistan. In response to this demand, Yahya made the fateful mistake on 1 March 1971, of postponing the National Assembly session giving more time to the parties to reach a consensus on Constitution-making. Mujib deplored the postponement and called for a strike throughout East Pakistan on 3 March 1971.14

THE AWAMI LEAGUE IN REVOLT

The announcement of the postponement of the National Assembly session was received in East Pakistan with fierce resentment. The conclusions formed in East Pakistan were (a) the army was determined to frustrate all effective moves towards a democratic transfer of power, and (b) there was collusion between Yahya and Bhutto.15 In West Pakistan, public reactions were mainly gloomy. It was said openly that each time the military interfered in politics, the result was worse.

On 1 March, Awami League militants looted and burned many shops and houses and raided the Narayanganj Rifle Club for arms. Almost all the students of Dhaka University, except committed militants, went home. Iqbal Hall and Jagannath Hall were used as centres from which armed gangs went out to collect arms, vehicles, and money. On
2 March, two firearms shops were looted and taken to an arsenal in Jagannath Hall. Practice firing was heard all day in the University grounds. On the previous night, there had been looting and arson. Encouraged by the fact that the troops were confined to the barracks on the orders of the Governor, mobs armed with firearms, staves, and iron bars raided business premises in Jinnah

Avenue and Baitul Mukarram. The Shalimar Hotel and Gulistan Cinema were attacked and set on fire. Police officers reported that they could no longer trust their rank and file to deal with the mobs and asked for the assistance of the military. This was granted, and a curfew was imposed. An army unit was attacked at Sadarghat and six rioters were killed in the firing. There was extensive defiance of the curfew, and inspite of the efforts of the military, arson and looting continued throughout the night. On 3 March, mob violence spread to other parts of Dhaka, particularly Islampur, Patnakhali *Bazar,* and Nawabpur. Shops, private houses belonging to non-supporters of the Awami League, and business premises were looted and set on fire. In the disturbances, five people were killed and sixty-two wounded. Mujib announced the launching of a campaign of complete civil disobedience and ordered the closing of schools and colleges so that all students, except hard-core militants who had not yet left for home, proceeded to do so. Violent intimidation continued against all these who were not active supporters of the Awami League. Radio and TV stations in Dhaka were compelled to play the new national anthem of ’Bangladesh’. Raiding of arms’ shops and looting continued to take place. On 5 March, telephone and telegraph employees ceased work and ordinary communications between East Pakistan and the outside world and between Dhaka and other parts of East Pakistan came to an end. On 6 March, there was a jail-break of 341 prisoners from Central Prison. During the escape, seven prisoners were killed when the wardens opened fire. A sergeant and six wardens were wounded. The escaped prisoners joined Awami Leaguers and activist students and paraded through the streets of Dhaka shouting anti-Pakistan slogans. The Government Science Laboratory in Dhaka was seized and all available explosive chemicals were taken, but a raid on the Polytechnic was foiled when troops arrived to disperse the mob.

Whenever the troops went into action, a minimum of force was used. They did not interfere with peaceful processions or political meetings but only with mobs engaged in looting and arson. The fact is that there were far too few of them to maintain order effectively in an enormous city like

Dhaka with the virtual breakdown of the macho of civil government because of the campa non-co-operation. The situation, both in the and in many other parts of East Pakistan, been completely chaotic. It was widely believed nothing could break the hold of Mujib and a Awami League over the country and that the an scattered as it was in small groups except for tar bodies stationed clear of the Indian frontier, »ou be helpless in the face of the Awami League determination to take full control Moreover. was pointed out by responsible foreign correi pendents, the army’s Eastern Command consist of only one division of fifteen battalions of »k nine were from West Pakistan. The remaining u were sections of the East Bengal Regiment »k were almost exclusively Bengali by race in raci and file. Also, in the commissioned ranks, excep for a sprinkling of West Pakistanis mostly injinr positions, the majority were Bengalis

By 5 March, Mujib was effectively running *t* parallel government and life in the province *w* ordered in compliance with his directives1^ much so, that the banks opened and operate according to Mujib’s diretives, as did the markets All activity in East Pakistan was organized u accordance with Mujib’s orders. He was firmly 11 the saddle and the army had been withdrawn

K the barracks.

Mujib must thus have felt completely secmt even if it came to a clash of arms, with thesuppon of the pojice, most of whom were with him So Mujib Could count on some 176,000 armed Bengalis as against only 10,000 soldiers from Wes Pakistan. Moreover with the ban on over-flying Mujib was confident that, there would be DO reinforcements coming from West Pakistan Accordingly on 7 March he announced plans for setting up a parallel government of his own These included the complete closure of all educational institutions, government offices and courts, IDC stoppage of any remittances to West Pakistan, and the organization of revolutionary councils in eva) union, *mohalla, thana,* sub-division and distnfl who were to take over the administration under the direction of local Awami League units Latethe original directive to pay no taxes to the ue\ --wing was modified to ensure that taxes

collected but paid into tw directives were issued to 1 and TV stations ensuring which did not conform to League. There seems to I religious intolerance aboi and burnings. The critei Muslims suffered as n Particularly serious ri Chittagong on 3 March ani resulting in hundreds of c, growing anarchy, the Easl East Pakistan Rifles, and military frontier security j their strength to restore lai their sympathy with the loc Nothing seemed to coo situation in East Pakistan. I by Yahya Khan on 6 Marcl National Assembly on 2 unheeded by East Pakistan late. The situation had , everybody's hand, even pe hands. The extremists in th< having a field day. It mus Mujib that contrary to exp make a unilateral declaratioi refused to unfurl the nation: 'Bangladesh' when he addi meeting at the Race Course Bhutto for ending the diah Awami League would a Assembly session if his den which were:

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(f) Non-interference by the in the different branc functioning in Banglac from the Centre to desis of government officers

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CONSTITUTIONAL BREAKDOWN

i but paid into two private banks. Detailed swere issued to the Press and to the radio

’stations ensurin^that

(g) Maintenance of law and order to be left

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f/Sere seems fo dave deen fittfe trace of ^intolerance about the killings, beatings, Bings. The criterion was political, and ilks suffered as much as Hindus. The irly serious rioting took place in *I* on 3 March and in Khulna on 5 March
5 in hundreds of casualties. To add to the ; anarchy, the East Bengal Regiment, the jl Pakistan Rifles, and the bulk of the parai frontier security guards, far from using i to restore law and order, expressed athy with the local Awami League.17 ; seemed to cool down or reverse the i in East Pakistan. Even the announcement a Khan on 6 March to hold the session of t Assembly on 25 March 1971, went fby East Pakistan l8 It was too little too The situation had already gone out of idy’s hand, even perhaps, out of Mujib’s ! The extremists in the Awami League were ! a field day. It must go to the credit of contrary to expectations, he did not it a unilateral declaration of independence and d to unfurl the national flag of independent idesh’ when he addressed a large public tog at the Race Course Maidan.19 He blamed i for ending the dialogue. He stated that |tam League would attend the National ’ session if his demands were accepted, Iwere

I Immediate withdrawal of martial law. |(bj Transfer of power to the elected

representatives of the people. | (t) Immediate withdrawal of all military

personnel to the barracks. [(i) Immediate cessation of the military build up and the heavy inflow of military personnel from the western wing. fjt) Immediate cessation of firing upon civilians.

I Non-interference by the military authorities m the different branches of government functioning in Bangladesh and directions from the Centre to desist from victimization of government officers and employees.

/ // *appears that Mujib ’s strategy was to put I* forward demands which, would either make the central government lose face by yielding to them, or to take the blame for forcing him into unilateral action. He continued to rule East Pakistan by decrees that he issued from time to time.

HIJACKING OF AN INDIAN AIRCRAFT

Another very important incident that took place around this time, was the hijacking of an Indian aircraft. Seen in the perspective of the political situation at the time, this incident clearly points to

a conspiracy to break up Pakistan.

On 30 January, a Fokker aircraft of the Indian Airlines Corporation made an unscheduled landing at Lahore Airport. Enquiries revealed that two of the passengers, claiming to be ’Kashmiri Freedom Fighters’, had hijacked the plane as a protest against the externment of opposition leaders by the Indian-supported Kashmir government prior to the Indian general elections. Feelings against the Indian government were already running strong in the Punjab, and when news of the hijacking became known, there was great public enthusiasm. The Pakistan government was in an awkward situation. Under international convention, the hijackers had to be arrested, but they refused to leave the plane. With great difficulty, they were persuaded to release the passengers and the crew, who were taken to the best hotel in Lahore, provided with clothing and other necessities, and given full VIP treatment before being taken to the Indian frontier. Several of them later thanked the Pakistan authorities for the care and consideration which had been shown to them. The Indian High Commission was informed and assured of the efforts of the Pakistan government to return the plane safely. The High Commission was also invited to send a representative to the spot if it so wished. Meanwhile, the two hijackers were acclaimed as popular heroes. They addressed a

press conference, one of them remained on the plane and asked for political asylum. Since the Pakistan government has consistently refused to acknowledge India's occupation of part of Kashmir holding that Kashmiris are not Indian nationals, the request was granted.

This action, and the reasons for taking it, hit India on a sensitive spot. The reaction by the Indian press and public opinion was immediate and bitter. Pakistan was accused of engineering the incident. Threats were made to the lives of the Pakistani High Commissioner and his staff in New Delhi, and there were ugly mob demonstrations against Pakistan. The excitement in India increased when, in the middle of the efforts of the Pakistan authorities to persuade the two hijackers to leave the plane so that it could be returned to India, it blew up. The Indian government announced that it held Pakistan responsible for the blowing up of the plane, neglecting the contention that the hijackers were neither Indian nor Pakistan nationals and thus not Pakistan's responsibility, and demanded compensation for the plane. Without giving the Pakistan government time to reply, India unilaterally suspended all flights by Pakistani aircrafts, civil and military, across Indian territory between East and West Pakistan. The Pakistan government protested strongly at what it regarded as a serious breach of international convention, and declined to give up the two hijackers to a country to which, in their view, the two men did not belong. They offered to settle the incident in a reasonable spirit of compromise. India did not agree. Hostile demonstrations against Pakistani nationals persisted, and the ban on over-flying was not lifted. Anti-Muslim riots broke out in Allahabad and Baroda, and relations between the two countries became very strained.

Nothing could have suited Mujib better than the imposition of this embargo upon the communication line between West and East Pakistan when the Awami League was working for a drastic reduction in the power of the central government. The journey between Karachi and Dhaka, customarily taking less than three hours, stretched to nearly seven hours, making it one of the longest non-stop flights anywhere in the world. It was well within the capacity of the long range

high-ceiling Boeings which PIA possessed, to!1 strain upon both cockpit and cabin crewi enormous.

Public opinion in West Pakistan began l! speculate whether the hijacking of the plane« the ban on over-flying which followed were. 'spontaneous' as they seemed. Weight was toil these rumours by the publication of a letter frm Sheikh Abdullah, one of the externals andpernapi the best known of all Kashmiri leaders, lo UK Indian humanist Mr Jaya Prakash Narayai published by the *Indian Express* of New Dei on
15 February 1971. Sheikh Abdullah roun* accused the principal hijacker, Hashim, of bj an Indian agent whose plan to seize the plane aid create an international incident was known to tit authorities in Srinagar and New Delhi In order it ascertain if these statements were correct, Yah appointed a Judicial Enquiry Commission under Mr Justice Noorul Arfin of the High Court of Snd and Balochistan. The enquiry took considerable time as it had to examine the reports and

statement! of the hijackers and of a number of witnesses 111 report was presented on 15 April 1971, after tabj all the available evidence. The Commission concluded that the Pakistani authonties had done everything in their power to release the crew anil passengers of the aircraft and to secure the safet) of the aircraft in order to return it to India, but that when the hijackers realized that this would isolate them completely they blew up the aircraft Tie Commission found Hashim, the principal hijacker, in close contact with, and under the supervision of, Indian intelligence agencies, without whose cooperation he could not have entered the Moreover, the revolver and the hand carried by the hijackers were later found to be dummies, no doubt to ensure that the lives of tie Indian crew and passengers were never in anyral danger. The commission concluded that (lit incident had been engineered by India w objective of providing a pretext to ban flights Indian territory, disrupting communicate-* between the eastern and the western wing time when parleys between the Awami Leagu the Pakistan People's Party were being hi Dhaka.21

NEGOTIATION; POLITICAL SE

Despite the complet< East Pakistan, arm) minimum force, and obeyed that Mujib a the army was power point demand had lo sense that the milit occupy Dhaka and c emerged from then outbreak of arson an For the rest of the tir streets at all. Yahya meeting of the Nation to give Mujib any pi negotiations were beii of force.

Yahya made some i caused by Mujib's '1 Since Mujib would nc to Dhaka on 15 Marcl some ten days of corn{ Yahya tried to prev eastern and western po his advisers met an drafted a regulation to: drawn from the elect Governor of each provi law gradually. Further points was met by 1 commission to enquin which the army acted was to be headed by a East Pakistan to be sel Its members were to c the civil service, the po Pakistan Rifles. The n rejected the commissic appointment would be order and the report wo law authorities. In view had been under mart ibjection appeared 1 established Mujib's reh next step, on 19 March, martial law regulation fi

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NEGOTIATIONS FOR POLITICAL **SETTLEMENT**

Desnite the complete breakup of law and order in ’akistan, army units were ordered to use minimum force, and these orders were so strictly teed that Mujib and his followers thought that my was powerless. The second of his fourjoint demand had long been complied with in the sense that the military had never attempted to wciipy Dhaka and other cities. In fact they only from their barracks when .a serious of arson and looting had to be checked. For the rest of the time, they were not seen in the streets at all. Yahya was determined to arrange a meeting of the National Assembly and did not want D give Mujib any pretext to claim that political negotiations were being conducted under the threat offeree. ,--

Yahya made some efforts to resolve the impasse caused by Mujib’s ’take it or leave it’ attitude. Since Mujib would not come to see him, he went
10 Dhaka on 15 March to see him. There followed some ten days of complicated discussions in which Yahya tried to prevent a breach between the astern and western political leaders. On 17 March, lis advisers met an Awami League team and Wed a regulation to set up a Council of Ministers town from the elected members to advise the Governor of each province and to withdraw martial law gradually. Further, the third of Mujib’s four pouts was met by Yahya’s offer to set up a commission to enquire into the circumstances in finch the army acted in aid of civil power. This reto be headed by a judge of the High Court of East Pakistan to be selected by the Chief Justice. Its members were to consist of men drawn from Ike civil service, the police, the army, and the East Pakistan Rifles. The next day, 18 March, Mujib it]ected the commission on the grounds that the fporatment would be made under a martial law order and the report would be made to the martial bw authorities. In view of the fact that the country lad been under martial law since 1969, this objection appeared to lack substance, and stablished Mujib’s reluctance to co-operate. His text step, on 19 March, was to insist that the draft initial law regulation framed on 17 March should

invest the National and Provincial Assemblies with legislative powers, accompanied by representative government in both areas, and that there should be complete withdrawal of martial law.

Yahya and his advisers clung to the argument that if the proclamation of martial law on 25 March
1969 was revoked, there would be no validity to the central and provincial governments. Awami League representatives urged that the issues were really political, not legal, and should be resolved in a political manner. Yahya felt uneasy about this, but agreed that his advisers should draft another martial law regulation in an endeavour to meet the Awami League's wishes. This draft regulation provided for the setting up of central and provincial . Cabinets, for investing the National and Provincial Assemblies with the powers that they enjoyed under the dormant 1962 Constitution; abolishing martial law administrators and military courts, but retaining the presidential function of CMLA to avoid the risk of a legal vacuum. Yahya was hopeful that progress was being made, and asked three West Pakistan leaders representing the Council Muslim League and the Jamiat-i-Ulema-iIslam to meet him in Dhaka.

When Yahya met Mujib and his principal lieutenants on 20 March, he made it clear that his agreement to hand over power depended upon its acceptance by all political leaders. He further stated that the legal validity of the proposed proclamation would have to be examined by experts. Yahya's advisers were doubtful about this point, but the Awami League representatives promised to produce their own legal expert, Mr AK Brohi, in support of their views. This fundamental question was set aside for the moment; and a set of objectives was drawn up for examination by both sides. The first objective was the lifting of martial law; the second was the setting up of central and provincial Cabinets; the third, investing of Central and Provincial Assemblies with legislative powers; the fourth that East Pakistan, in view of its geographical situation, should enjoy a greater degree of provincial autonomy than other provinces; the fifth, that further discussions should take place about the exact way in which all these objectives could be achieved. It was pointed out to Mujib that until the

National Assembly, to be summoned on 25 March, ratified the proclamation for achieving them, martial law had to continue. He did not agree. But in order not to hold matters up, a number of salient points which the proposed proclamation would have to cover were drawn up. On 21 March, an ominous note was introduced into the discussions. In an unscheduled meeting with Yahya, Mujib stated that he no longer wanted the setting up of a central Cabinet. At this juncture, Bhutto reached Dhaka at Yahya's invitation. In spite of Mujib's publicly announced refusal to meet the PPP leader, Yahya persuaded the two men to hold a joint meeting with him on 22 March. At this meeting, according to the official record, another unexpected development occurred; Mujib requested the withdrawal of the presidential order summoning the National Assembly on 25 March. He refused a suggestion that it should be summoned on 2 April to give legal cover to the proposed proclamation. It seemed an appropriate sequel to his attitude that on that same evening the Central Students' Action Committee should announce that 23 March customarily celebrated as Pakistan Day throughout the country, would in East Pakistan be observed as 'Resistance *Day'.22*

The amended draft proclamation had been handed over to Bhutto and to Tajuddin Ahmad of the Awami League for discussion. The PPP held that after martial law was lifted and before it was ratified by the National Assembly, the proposed proclamation should either be endorsed by the National Assembly or, if published, it should not) take effect until after such endorsement. As an alternative, they thought Yahya might continue as CMLA to provide legal cover until the National Assembly acted so. They further suggested that a clause should be added providing that no law or Constitution could be presented to the National Assembly unless it was approved by a majority of members of each Wing. They were also anxious to know if the Legal Framework Order would be protected.

Although on 23 March there were armed rallies and demonstrations and the 'Bangladesh' flag was hoisted, the constitutional discussions continued. The Awami League refused to work on the draft proclamation which until then had been the

working-paper, and produced one of their this new draft, which did not seem to tale of the legal difficulties already under discus several novel proposals were put forward 1 proposed that members of the National Asa elected 'from the state of Bangladesh' aa) states of West Pakistan were to be sworn *n* up separately to frame Constitutions for the of Bangladesh' and for the states of West Pah There was an alteration in the oath of offict down in the Legal Framework Order revealing still, was the suggestion that the Assembly should proceed to frame a C of the 'Confederation of Pakistan', an applicable only to an agreement independent sovereign states to join to certain purposes. This, along with other proran which would have left the central govenrastii mere ghost without taxation-powers to raise W even for the shadowy functions allowed to it, clearly contrary both to the Legal Frame** Order and even to Mujib's own Six Points,ontd] which provided that Pakistan should be a fedol republic. The serious implication of aproclamalii of this kind which intended to serve the puiposerfj an interim Constitution, were pointed out botllf Yahya's advisers and by the representatives offc West wing political parties,

but the Awami lapr representatives refused to modify even a sinjlt point. Tajuddin Ahmad went so far as to sayta even this proclamation would be redundant if i was not issued within the following forty-eiglr hours. It was in vain that a number of distingiusta political leaders called upon Mujib in the bopt that he would adopt an attitude which would tot room for the views of other people. They fount him completely inflexible, elevated in spmtbyi vast procession of armed volunteers parading pa his house. It was on the evening of 24 March tin Yahya held his last meeting with the Awaai League leaders. They declined to alter their stand as set out in their own draft proclamation, and in i subsequent news conference Tajuddin Ahmad announced: ’From our side there is no need for further meetings’. In other words, their proclamation was their ultimatum.23

POLITICAL IMPASSE CENTRE AND THE E

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POLITICAL **IMPASSE BETWEEN THE** CENTRE **AND THE EASTERN WING**

While political negotiations were going on in Dhaka, the situation both in the capital and in the outlying cities and districts of East Pakistan was deteriorating rapidly because of the Awami League's persistent defiance of authority and determination to establish its own system of government. Supporters of'Bangladesh' were now claiming that Mujib's followers maintained perfect order, better order than was customary under Yahya's administration. The record does not support this claim. On the contrary, the most senous mob violence took place in Chittagong, Khulna, Jessore, Rangpur, Dinajpur, Comilla, Saidpur (where the mob was bold enough to fire upon troops in the cantonment), Bogra, Mymensmgh, and other places. Under Yahya's direct orders, the army was only permitted to intervene in extreme circumstances. This policy of restraint allowed the Awami League to take over the machinery of administration virtually unchallenged and to direct mob violence against its antagonists in an almost scientific manner. Moreover, the League came to believe that it was ill-powerful, that nothing could disturb its grip upon the province, and that it could act as it pleased, without any risk of its actions being challenged by any other authority. Mujib's aipporters announced that the National Liberation Movement was in progress and incited the people 'otake up arms, liquidate the 'enemy troops', arm lemselves with any weapon that they could find, totroy roads and bridges, and keep bombs and \tolotov cocktails in every house. If attacked, a iloody resistance was to be offered, and an armed Mggle of long duration was to be prepared for.24 On 24 and 25 March, circumstances were .ombimng to make Yahya's policy of cautious strain! in the face of intense provocation more ad more difficult. On 24 March, while the idostyled and printed incitements to violence w circulating, serious arson occurred at Golahat, Vrth Saidpur. Moreover, a mob armed with *lathis* sd lethal weapons, numbering around eight aisand, converged on Saidpur to attack non'igali residents, and fifty houses were set on The violence continued the next day as well.

GoLhat was attacked, Saidpur cantonment ransacked, and the troops were fired at. Systematic effort was made to block communication between the port and the city of Chittagong, important

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not only as East Pakistan's main deep-water port but as the headquarters of the East Bengal Regiment. Huge barricades were set up to prevent supplies reaching the cantonment where some West Pakistani troops were stationed. In Dhaka, barricades sprang up in many parts of the city, and, as it became clear later, Iqbal and Jagannath Halls of Dhaka University were put under seige.

In the light of the evidence which later became available, it seems impossible to doubt that a systematic armed uprising was planned. Mujib had begun to make military appointments. An exColonel, Usmani, was named as Commander-inChief of the Revolutionary Forces responsible directly to him, while Major-General (Retd.) Majeed and Lieutenant-Commander (Retd.) Moazzam were deputed to enlist ex-servicemen, lists of whom had been prepared in the Awami League headquarters. The acquisition of arms seems to have presented little difficulty. In addition to those which were coming in substantial quantities from across the Indian border, stocks had been piled up by looting arms shops. The Awami League knew that it could rely upon the bulk of the East Bengal Regiment, the East Pakistan Rifles, and many of the Border Guards, all of whom had their own weapons. So far as Dhaka itself was concerned, there would be little difficulty in obtaining the 15,000 rifles and ammunition kept at Police Headquarters. Further, the East Pakistan Rifles and the East Bengal Regiment had their service-type wireless transmitters, so that instructions could be passed quickly. In contrast, perhaps, to the expectation of the rank-and-file of 'Bangladesh' partisans who had been warned to prepare for a long-drawn out guerilla struggle it looked to the outside observer as though the Highcommand of the Awami League was banking upon a quick takeover which would confront the Pakistan government and the outside world with the *fait accompli* of a 'Bangladesh', independent, with its own government and its own armed forces capable of dealing with any internal resistance or with any attack from the outside.25

No information has so far been published about the precise moment when the plans for a *coup d'etat* based on armed violence came to the notice of the authorities, but it is evident that right up to the last moment, Yahya was hoping to arrive at an understanding with the Awami League which would stop the uprising before it began. He failed, and on 24 March, negotiations broke down and a political impasse was reached. Bhutto met Yahya the same day. Both of them agreed that the Awami League had progressively raised its stakes from provincial autonomy to the constitutional break up of Pakistan. Whatever course of action they might have contemplated or decided upon, it was announced that the talks were still continuing. Tajuddin Ahmad, General Secretary of the Awami League, declared in the evening, that his party 'had submitted its final proposals and had nothing to add or negotiate'.26

West Pakistani politicians, experts, and advisers, including Bhutto's aides, started flying back to Karachi, sensing what was coming. Some of the Awami League advisers were surprised at the breakdown of negotiations. On being asked if some hope was still left after the confederation proposal had been made, it was said that that was where the miscalculation was made only because the Awami League sources inside the government confirmed that the army was giving in and so they pressed on.27

On 26 March, in a nation-wide broadcast which echoed his own deep disappointment, Yahya gave an account of his efforts to transfer power by peaceful means and of the reasons why these efforts came to nothing. He assured the nation that his firm intention of transferring powers to constitutionally chosen governments, central and provincial, remained unaltered but that in view of the very grave situation that had developed, he had called upon the armed forces to restore order, banned political activity, and banned the Awami League as a political party, and had imposed Press censorship.

According to another viewpoint, the negotiations held by Yahya with Mujib were a farce and were never meant to succeed. The talks were just a stratagem to give Tikka Khan and the army additional time to bring in reinforcements

from the western wing. Mujib's last press release said 'we have reached agreement on the transfa of power and I hope the President will now mil the announcement'. A notable feature of the negotiations was that they never really broke dor and the end came with the military action on iht night of 25 March.28 The failure of the talks w due to the fast deteriorating political and law and order situation over which both of them seemed to have little control. They were both captives in Ik hands of their own hawks. Yahya was advisedby his Generals who wanted military solution, and Bhutto did not want the negotiations to succeed Mujib, meanwhile, was in the hands of his rabid, young lieutenants who, due to their extremist object of secession of East Pakistan, were making things difficult by the day.

While the happenings in East Pakistan were leading to deep political turmoil, Bhutto, the majority leader in West Pakistan, was doing nothing to help matters. He actually aggravated the

widening gulf between the two wings of the country when he voiced a strange and unreasonable demand for transfer of power to the Awami League in East Pakistan and to the People's Party in West Pakistan. His strange logic was that although he strongly advocated 'One Pakistan', his demand was in accord with the democratic principles applicable *AS~s:* country divided into two parts.29 No wonder that he made the statement on 26 March 1971 ID Karachi, after the military action had commenced on 25 March, that 'Pakistan has at last been saved'.30 This statement must have haunted him for the rest of his life.

It is obvious that during the negotiations Bhutto's role was anything but positive. He was applying all methods to stall a settlement He sent back his party leaders on 24 March.31 He and his remaining colleagues in the PPP booked their seats for the morning of 26 March without waiting fora meaningful settlement. He agreed with Yahya and Tikka Khan's 'final solution' to the Bangladesh 'problem', and like them, he obviously considered Mujib's Awami League demand and the hoisting of Bangladesh flags atop buildings all over Dhaka a 'nightmare-of fascism'.32

YAHYA-BHUTTO UNDEF

The decision to postpone the Na meeting was regretted in retn Pakistani intelligentsia as a tragii led to the break up of Pakistan, body of opinion holds Bhutto re Two aspects of the situation, as i the last week of February, need I to put the controversy in its prop may also be mentioned in passin] these momentous decisions were not criticized by the Press or the West Pakistan in the manner in now, with the acquired wisdom fact, most of the vocal class welcomed the army action taken of March. The opposition to Y Admiral Ahsan and the General Pakistan who were more realistic in Rawalpindi. In their courageov no support from any quarter and they were even condemned as tra peace and harmony between the country.

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CONSTITUTIONAL BREAKDOWN

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YAHYA-BHUTTO UNDERSTANDING

The decision to postpone the National Assembly meeting was regretted in retrospect by West Pakistani intelligentsia as a tragic decision which led to the break up of Pakistan. A considerable body of opinion holds Bhutto responsible for it. Two aspects of the situation, as it had emerged in the last week of February, need to be highlighted to put the controversy in its proper perspective. It may also be mentioned in passing that at the time these momentous decisions were taken they were not criticized by the Press or the intelligentsia of West Pakistan in the manner in which they are now, with the acquired wisdom of hindsight. In fact, most of the vocal classes and forums »elcomed the army action taken in the last week of March. The opposition to Yahya came from Admiral Ahsan and the Generals serving in East Pakistan who were more realistic than the Generals nRawalpindi. In their courageous stands they got
10 support from any quarter and in West Pakistan ky were even condemned as traitors for

pleading pee and harmony between the two wings of the wintry.

The first aspect relates to the consultative pcess by which Yahya arrived at the decision to jostpone the Assembly session *sine die.* Yahya ns initially dismayed at the election results and it post-election behaviour of Mujib, but after his kussion with the Awami League leader in Dhaka lite second week of January, he regained his aifidence. In a buoyant press conference I mediately after these meetings, he called |%t-the only time he did so-the future Prime faster of Pakistan. He saw no harm in the Six (tats, but in Larkana, Yahya faced the lion of the political and military leadership lest Pakistan who thought differently. Mujib's to tone down his public statements on the [Points, his rejection of the repeated invitations me to Rawalpindi, and the unwillingness to the Awami League draft Constitution which |U promised before the elections, weakened credibility. He could no longer overrule his advisers' latent suspicions. He spoke (frequently of 'saving' West Pakistan. The of events immediately before the decision

to postpone the Assembly indicates a pattern. In early February, after receiving a report of his meetings with Awami League leaders from Bhutto, Yahya invited Mujib to Rawalpindi. Mujib refused. Yahya was furious and asked Ahsan to read and then hand over the following message to Mujib in the presence of the MLA. 'Convey to Mujib that I am very dissatisfied with his refusal to accept my invitation^ to visit Rawalpindi. If he does not arrange to come to Rawalpindi as soon as possible, he will be entirely responsible for the serious consequences which will follow.' Although Yahya agreed to withdraw the message on Ahsan's persuasion, it does show the degree of estrangement between the principal spokesmen of the two wings.

On the other hand, there was complete harmony between Yahya and Bhutto. Bhutto checked with Yahya before demanding the postponement of the National Assembly session and raised such a demand after confirmation from Yahya. The link between the five-and-a-half hour Bhutto-Yahya meeting on 19 February and the amendment in the LFO33 on 20 February which enabled Bhutto to strengthen his control over his recalcitrant partymen, is too obvious to be missed. During the Governor's Conference two days later, Ahsan found the atmosphere in Rawalpindi one of crisis and imminent military intervention. Yahya's ideas had started changing after the Larkana meeting. The pressures exerted by Bhutto and the hawkish Generals and the continued truculence demonstrated by Mujib, led Yahya to seriously consider the re-imposition of martial law to regain control over the situation. It is alleged that there was an understanding between Bhutto and the central army leadership to prevent the Awami League from implementing the Six Points, which it would have done if the National Assembly had been allowed to meet. The course of political affairs after the Larkana meeting lends credence to the belief that the army's perceptions merged with Bhutto's.34

Six POINTS AND WEST PAKISTAN

The second aspect pertains to the substantive question whether the martial law regime was

prepared to accept the new financial, economic, and administrative structure envisaged by the Six Points. It may be assumed that the Constitution framed by the Assembly would have been based on the Six Points as far as East Pakistan was concerned. The Awami League's original manifesto had envisaged Pakistan 'as a federation granting full autonomy on the basis of the SixPoint formula to each of the federating units'. However, in the post-election discussions, it was conceded by the Awami League that West Pakistan provinces might follow different constitutional arrangements. The analysis of the Six Points that follows is, therefore, with reference to East-West relations.

Point number one, relating to the federal parliamentary system based on direct adult franchise and representation on population basis in the federal legislature, had already been conceded. The remaining five points envisaged a fundamental change in the centre-provinces relationship. Point number two restricted the federal government only to foreign affairs, defence, and currency; the latter two, in turn, were circumscribed by the conditions set forth in the other four points. Even under foreign affairs, foreign economic relations were sought to be provincialized. Point number three provided either separate currencies for the two wings or a single currency with separate federal reserve systems for each wing. The single currency under the proposed arrangements was only symbolic; the procedure in each case was to prevent free movement of capital between the two wings. The Bengali grievance that West Pakistani capitalists were taking the profits away to West Pakistan had a basis but for the enterprise of non-Bengalis, there would have been very little industrialization in East Pakistan, and internal and foreign trade would have continued to remain in the hands of Calcutta capitalists. In the industrial sector alone, six non-Bengali industrialists with assets in East Pakistan (Adamjee, Dawood, Bawany, Ispahani, Amin, and Karim) controlled over 40 per cent of the total assets, 32 per cent of the production in the large manufacturing sector, and 81.5 per cent of the jute industry of the country. Three houses (Adamjee, Ispahani, and Amin) accounted for 69.1 per cent

of the total jute manufacture, Adamjei

holding the major share of 49 per cent 0.

six industrial houses, four had their entire h

in East Pakistan in 1961. Each of the other»,

houses (Adamjee and Dawood) had about ^Or

cent of their total net assets located

Pakistan. A comparative study of 1961 a

shows that, except for a few changes in

rankings in terms of value of assets and disperal |

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of holdings, the top houses remained the same over the decade.35 Point number three only sought n regionalize monopoly capitalism by subjecting non-Bengali capitalists to such conditions as wm applicable to foreign investors. Point number fou entrusted all taxation powers to the provinces, tin federal government was to be provided will ’requisite revenue resources for meeting tkt requirements of defence and foreign affairs on the basis of a ratio to be determined by tht procedure laid down in the constitution’ This revenue assignment was to be consistent ’with the objective of ensuring control over the fiscal policv by the governments of the federating units’ The defence budget would thus be subject to the fiscal policy of East Pakistan, which was bound to be at variance with the security threat perceptions of the West-dominated army. Point number five sougfe separate accounts of the foreign exchange earnings of each federating unit under the control of tk respective province; the requirements of the federal government were to be met by the federating units on the basis of a formula incorporated in the

Constitution. This Point also gave powers to the regional government to negotiate foreign aid and trade within the framework of the foreign policj of the federal government. With no consensus on foreign policy, it was difficult to conceive a coherent foreign aid and trade approach by the two wings. The substantial defence requirements of foreign exchange were likely to be subjected to the same scrutiny by the East Pakistan government as the total budget before agreeing to any contribution. Point number six empowered East Pakistan to maintain a militia or para-military forces under the control of its government This provision would enable East Pakistan to become self-sufficient in defence in terms of its own perceptions of threats from across the borders The East Pakistan government
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enable East Pakistan to become n defence in terms of its own treats from across the borders. The

East Pakistan government was not, therefore, likely to be responsive in financial terms to the competitive state of preparedness with India that was always demanded by the Pakistan Army. The Bengalis, m general, were not deeply committed to the Kashmir problem and the Awami League was inclined towards good relations with India. They had always had serious reservations, particularly after the 1965 War, about the army's strategy of defending East Pakistan not on their own soil but by powerful thrusts on the western borders of India. Points three to six would have necessitated a fundamental restructuring of foreign and defence policies of a kind which no West Pakistani leadership drawing its strength from the Punjab, and least of all a Punjab-dominated military regime, could possibly accept.

The Six Points were never referred for official examination to bring out their full implications and to develop alternative proposals to accommodate Bengali demands within a viable federal structure. This had become necessary after the elections when they had become the official policy of the majonty party. Yahya did not clinch the issue when the Awami League leaders made a presentation of the Six Points to him in January. He had not been briefed to ask the Bengali leaders informed and intelligent questions about the shape of the federation that would emerge from the implementation of their formula. The Awami League, backed by professional economists, had ssued detailed explanations of its programme from time to time and made light of the dangers perceived in West Pakistan to the integrity of the itry through complete regional autonomy. In the party literature on the subject, Six-Point autonomy was justified with

reference to the concept of regional autonomy of the British Cabinet Mission Plan of 1946 and the autonomy envisaged in the Lahore Resolution of 1940. The te Pakistan media and academic circles regarded the Six Points as just a dangerous slogan. There appeared to be little realization of the emergence of new political forces which required ire-ordering of the established system and a new national compact among the major federating units. According to the rules of procedure, the Banning Commission or the Ministry of Finance

could initiate formal examination of a sensitive political issue like the Six Points only under instructions from the President, and not on their own. M.M. Ahmad confirms that the ’Six Points were never examined in depth at the official level. They were not taken seriously before the elections, as Mujijj had given an understanding to Yahya that they were merely bargaining points.’36

WHO LOST EAST PAKISTAN?

From the above analysis of the February situation, Bhutto, in opposing Mujib and the Six Points, emerges as a member of the West Pakistan’s establishment who was really articulating their stand. His refusal to go to the National Assembly had the full support of Yahya and the Rawalpindi Generals. However, it would not be fair to blame Bhutto alone for the postponement of the National Assembly session unless it is conceded that the Six Points were acceptable to the army, to the establishment, and to West Pakistan in general. If the Six Points were acceptable to Yahya, then he need not have postponed the Assembly session. The army could have easily ensured the security and attendance of such West Pakistani members as were willing to attend the session, Bhutto’s threat of dire consequences notwithstanding. But Yahya gave no assurance of security to the elected members of the National Assembly who intended to attend the session. In fact, Yahya seems to have used Bhutto to get out of the situation created by his thoughtless decisions. Bhutto, on the other hand, used Yahya to build himself up as the sole leader of West Pakistan and earned the permanent odium of forcing the postponement of the assembly, leading to the secession of East Pakistan. Bhutto could have as effectively adopted the democratic path of attending the session and using the Assembly floor for whatever he wanted to project. In the last resort, he could have walked out after showing that he had exhausted all constitutional means to maintain the integrity of Pakistan.37

Bhutto was an extremely ambitious politician. It was difficult for him to wait to get into power. Playing the opposition card in the National

Assembly was fraught with risk and uncertainties. It was only logical for him to force the issue, the outcome of which was the separation of the two wings. He had, after all, Yahya and the military leadership with him to achieve his purpose and used them to the maximum to achieve his ends, though at the cost of Pakistan.

Yahya and the military leadership at that time cannot escape the blame either. They deliberately let the situation drift out of their hands and allowed events to take their own course. They did nothing while East Pakistan slided into anarchy and chaos. Their last attempt at negotiations was ’too little too late’ and thus their acts and intentions are not above doubt and suspicion.

No doubt, that political situation in East Pakistan in 1970-71 was not due to Yahya and Bhutto only, it had its roots in 1947 when India was divided, but their acts and omissions only aggravated the process of estrangement between the two wings of the country.

The press and public opinion in West Pakistan in 1971 are also no less to blame for creating conditions that led to the break up of the country. There was such mass hysteria created in West Pakistan about the Six Points that there was nobody seriously ready to look at them and evolve an acceptable constitutional formula incorporating the Six Points. There was so much fervour against handing over power to the Awami League that the military action was met with support and enthusiasm in West Pakistan. Asghar Khan, who tried to make a tour of the Punjab to mould public opinion in favour of accommodation with the Awami League was attacked, brickbatted, and prevented from speaking.38 Such manifestation of public outrage against *tylujib* and East Pakistan ultimately led Yahya to take the fatal step of military action. Politicians in West Pakistan, too, were in no less degree responsible for the situation. They did not show courage and speak their mind. They were scared and over-awed by the hysteria worked up in West Pakistan by Bhutto and his minions and thus decided to bury their faces in the sand. They cannot escape the responsibility for their inaction particularly when they held more than fifty seats in the National Assembly elected in December 1970.

Thus the press, politicians, and public opim in West Pakistan are jointly responsible ft bitter harvest of the secession of East Pakistani, j they will always stand accountable to history B I failing to speak when the truth was necessaiy.il I failing to act when action was imperative.

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32. Ibid., p. 155.

33. Legal Framework (Amem President's Order 1 of 197 Statutes 118.

34. Zaheer, Hassan, *The Separa supra*, note 3, p. 143.

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19 The Birth of Bangladesh

Late on the evening of 25 March 1971, the voice of Mujibur Rehman came faintly on a wavelength close to that of the official Pakistan Radio. In what must have been a pre-recorded message, Mujib proclaimed East Pakistan to be the People's Republic of Bangladesh. The full text of the proclamation has been published in the Bangladesh documents released by the Indian Foreign Ministry. It said, 'This may be my last message. From today, Bangladesh is independent. I call upon the people of Bangladesh, wherever you are and with what you have, to resist the army of occupation to the last. Your fight must go on until the last soldier of the Pakistan occupation army is expelled from the soil of Bangladesh and final victory is achieved.'1

MILITARY ACTION IN

EAST PAKISTAN

With the final and irreversible breakdown of political negotiations on 25 March, Yahya ordered military action to suppress the revolt of the Awami League. Political activity was prohibited throughout the country and Awami League was banned as a political party. Censorship was clamped on the press. Yahya said, 'Let me assure you that my main aim remains the same, namely, transfer of power to the elected representatives of the people. As soon as the situation permits, I will take fresh steps towards the achievement of this objective'.2 In Dhaka, the headquarters of the rebellion, fighting was soon over. Attempts had been made to isolate the forces in the cantonment from the city by the erection of numerous barricades. No fewer than fifty barricades had been erected between the Intercontinental Hotel in the centre of the residential quarter and Dhaka airport. These barricades presented little difficulty to the highlytrained troops, whose main object was to remove them with minimum loss of life. Accurate gun fire soon drove off those who manned barricades and

snipers' nests in surrounding huts were cleared by the use of tracer bullets which set fire to inflammable materials and obliged the occupants to escape to safety. The main streets were thus quickly cleared. The only serious resistance which the army encountered was from the well-armed men of the East Bengal Regiment and the police, who manned a number of strong points. These were systematically reduced. The army never opened fire until it was first fired upon. When this happened, it reacted sharply. In an operation of this kind, some civilian casualties are inevitable as innocent people are caught in the cross-fire, but the army never fired upon civilians as such, only upon those who resisted it with arms. Many people of the middle and upper class families had already left the city to escape violence at the hands of the Awami League operatives; college and university students had gone home, partly because of the approaching vacation and partly because of the closure of educational institutions by Mujib's decree. Iqbal Hall and Jagannath Hall of Dhaka University which had been turned into an arsenal and strong-point manned by members of the students' branch of the Awami League, were razed to the ground during the military action. Iqbal Hall was hit by two rockets and Jagannath Hall by four The rooms were mostly charred but intact A few dozen half-burnt rifles and stray papers were still smouldering. The damage was grave There were mass graves in the university with three pits of five to fifteen metres diameter each. The foreign press alleged several thousand deaths (in the university area) while army officers placed the figure at around a hundred.

Officially, only forty deaths were admitted.3

Mujib was arrested at 1:30 a.m. on the morning of 26 March, but-a number of his lieutenants fled from Dhaka to those parts of East Pakistan which were under Awami League control. Mujib was kept overnight at the Adamjee School. Next day, he was shifted to Flag Staff House from where he

was flown to Karachi three < Hossain surrendered the followi these two, the entire Awami Lea for India, either from fear or b major failure of the military acti leaders, students, and political £ to India. It would have been diff leadership had remained availabl political freedom of action by i Within a few weeks, overt res overcome by the army. Howi members of the National Assen League were successful in annc ment in exile for Bangladesh in There are serious allegation; and men in Pakistan army that atrocities against the population The alleged excesses fall int

(a) excessive use of force 31 Dacca during the night of March 1971 when the *it* was launched.

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(c) killing of intellectuals ai like doctors, engineers, e them in mass graves not early phases of the militar during the critical days December 1971.

(d) killing of Bengali officers units of the East Bengal Pakistan Rifles, and the police force in the proces them, or on the pretence c rebellion.

(e) killing of East Pakistani c businessmen and industri mysterious disappearance fi by or at the instance of performing Martial Law dui

(f) raping of a large number ol women by the officers ar Pakistan army as a deli revenge, retaliation and torti

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»as flown to Karachi three days later. Kamal Hossam surrendered the following day. Except for ttesetwo, the entire Awami League leadership left for India, either from fear or by design. It was a major failure of the military action that the elected ;, students, and political activists went over It would have been different if the elected leadership had remained available and not lost their political freedom of action by escaping to India. Within a few weeks, overt resistance had been overcome by the army. However, the fleeing members of the National Assembly from Awami League were successful in announcing a government in exile for Bangladesh in India. There are serious allegations against officers ltd men in Pakistan army that they indulged in atrocities against the population in East Pakistan. He alleged excesses fall into the following categories"

(a) excessive use of force and fire power in Dacca during the night of the 25 and 26 of March 1971 when the military operation was launched.

(b) senseless and wanton arson and killings in the countryside during the course of 'sweep operation' following the military action.

(c) killing of intellectuals and professionals like doctors, engineers, etc. and burying them in mass graves not only during the early phases of the military action but also during the critical days of the war in December 1971.

killing of Bengali officers and men of the units of the East Bengal Regiment, East Pakistan Rifles, and the East Pakistan police force in the process of disarming them, or on the pretence of quelling their rebellion.

killing of East Pakistani civilian officers, businessmen and industrialists, or their mystenous disappearance from their homes by or at the instance of army officers performing Martial Law duties. raping of a large number of East Pakistani women by the officers and men of the Pakistan army as a deliberate act of revenge, retaliation and torture.

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(g) wanton destruction of bridges, rail and road communications and other vital installations, and

(h) deliberate killing of members of Hindu minority.

Nevertheless, it appears that, as long as General Tikka Khan was in command, the troops were kept under control and they did what was strictly necessary in the military sense. There might have been some instances of excesses but that was not the policy. General Tikka had strictly advised the army contingent to stay away from the local population and only to interfere when there was a serious breach of law and order or a threat to human life and property. When he was replaced by Lieutenant-General Niazi, things changed for the worse. The new General was known to be a debauch who indulged in wine and women. What was worse, he encouraged men under his command to indulge in excesses such as the rape of women and the theft of valuables. It was under him that -» certain shameful excesses took place which were magnified manifold by the Indian and other foreign media. These also brought a bad name to the Pakistan Army and its morale suffered. It made the army look like an occupation force and became the target of hatred by even those who otherwise did not support the Awami League.5

Meanwhile, a large number of people crossed over to India, first due to the atrocities of the Awami League operatives and later as a result of the military action. The estimate of refugees vary widely. The refugee problem provided India with a pretext to intervene in East Pakistan, an excuse they were looking for all the time. They were already training and arming the rebels who called themselves *'Mukti Bahni'.*

Reaction in West Pakistan

Unfortunately, political parties in West Pakistan actively or tacitly supported the military action in East Pakistan. The press in West Pakistan was jingoistic and supported statements of Yahya that aggravated the sad situation in East Pakistan. His bellicose statements directed against India and

other foreign powers did not help matters. The I' politicians and the press in West Pakistan tried to

(create war hysteria and certain impudent zealots

tried to launch what was called the 'Crush India' campaign. It was indeed a major failure on the part of political parties in West Pakistan because they failed to understand and appreciate the gravity of the situation and the consequences that were 'likely to follow. They meekly and willingly submitted to the short-sighted military solution being offered by the military government and made little effort to put their weight on the side of a political solution to solve the crises.

Only a handful of journalists and politicians in West Pakistan raised their voice against the military action. The daily *Azad* from Lahore persuaded about fifty prominent citizens of Lahore to sign a public statement opposing military operations in East Pakistan and called for a political settlement. No other newspaper except *Azad* dared to carry this statement. A public meeting was held at the premises owned by former Air Force Chief and former Punjab Governor, Air Marshal Nur Khan, where military operations were denounced. Abdullah Malik, one of the editors of *Azad*, had used the expression 'Bangladesh' in his speech at the Engineering University and had expressed sympathy for the people of East Pakistan. He was tried by a military court and sentenced to one year's imprisonment.6

ATTEMPTS AT RECONCILIATION

It was plain that after the pre-emptive military action on 25 and 26 March, contemporaneously with the neutralization of insurgents and the pacification of the countryside, Yahya's immediate tasks were to: (a) win back the confidence of East Pakistan; (b) revitalize belief in the prospect of an acceptable Constitution; (c) counter Indian propaganda and restore Pakistan's world image; (d) repair the damaged economy. To embark on these tasks implied, of course, that the old Pakistan could hold together, a belief flowing from the decision to pre-empt secession. Moreover, the doctrine that the Awami League (as distinguished from the people of East Pakistan) and India were in complicity was based on the idea that the people

of East Pakistan desired unity despite all thalU happened and was still happening. Criticism of India as a base for insurgents and rebels justified the doctrine that once these marauders had ben killed or captured, tranquility would return

Some people considered the pre-emptive strife unwise and the coup a failure which had left tin two wings irretrievably sundered. It is doubtfc I whether East and West Pakistan were indeed * irretrievably sundered, but the difficulty resolve the visible contradictions. Was it p to win back East Pakistan's confidence uf army was roving the countryside seeking to destro the self-proclaimed liberation forces, challenge the loyalty of any person it suspected, and malonj use of courts organized in terms of Martial La» Regulation No. 88? Was not the very scope of these military operations a measure of tit prevailing disaffection? Could confidence fct restored

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among a people, a million of whom lived in exile in India with scarcely a family where i death or destruction had not been recorded9 Had not Mujib, East Pakistan's hero, been removed to West Pakistan, there to stand trial in secret for being a traitor and rebel by the same presida who was now appealing for faith and goodwill1

Judged by any standards, the task of reconciliation was formidable, but Yahya believed it could be accomplished.

On 28 June, Yahya addressed the nation and

(a) re-affirmed his aim to restore democratic government;

(b) declared that East Pakistan had voted for provincial autonomy and not for secession.

(c) accused Sheikh Mujib and the Awami League of defiance, obduracy, and of seeking secession;

(d) declared his conclusion that the framing of a Constitution by an assembly was not feasible;

(e) considered that there was no alternative but to have a Constitution prepared by a 'group of experts' (afterwards spoken of 3 'Constitution Committee') whom he ., as it appeared, already selected;

(f) declared that the 'martial law cover' u remain 'for some time';

(g) desired that political parties must k 'national' and he had already recommended

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to fill vacant seat

In September, Yahya National Assembly woul receiving the draft Co propose amendments. Th however, require his asse Assembly could meet, necessary. In August, a I Pakistan Assembly meml that they were clear of all that they retained their s< nine East Pakistani membei to answer charges, failing to vacate their seats in the *t* the seats held by Mujib a were declared vacant altho knew, Mujib's trial, which not yet concluded and his £ still unpronounced. Shortly was informed that by-elec during the period 25 Novemt

It was said that the mini* in East Pakistan would aff (unities to create a National A fit in well with the policies group desired to promote, an to that end soon emerged. As out of seventy-nine seats dec 'iHstan, fifteen had already riisembly representation bec< were declared to have been

ihough elections were not du J November-9 December. ' plexion of these successful mistakable, comprising, as they

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THE BIRTH OF BANGLADESH

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to the Constitution Committee that" 'it would be a good thing if we ban any party which is not national in the practical sense' and that 'we must eschew the habit of subparties';

(h) announced that his proposed Constitution could be amended by the National Assembly by means of machinery to be provided by the Constitution itself;

(i) declared that the Legal Framework Order would be amended to suit the new arrangements; and

(j) announced that by-elections would be held to fill vacant seats in the assemblies.7

In September, Yahya made it known that the i'lonal Assembly would have ninety days after eiving the draft Constitution, in which to "opose amendments. These amendments would, owner, require his assent. Moreover, before the taibly could meet, by-elections would be Kessary In August, a list of eighty-eight East tan Assembly members was issued stating to they were clear of all adverse allegations and •i they retained their seats. This left seventy-

IJt East Pakistani members who were called upon s answer charges, failing which they would have j vacate their seats in the Assembly. In particular, *t* seats held by Mujib and Dr Kamal Hossain T declared vacant although, so far as anyone cw,Mujib's trial, which began in August, had »yet concluded and his guilt or innocence was iliinpronoiffleed. Shortly afterwards, the public IB informed that by-elections would be held mg the penod 25 November-9 December 1971. It was said that the miniature general election i East Pakistan would afford excellent opporutesto create a National Assembly which would i i well with the policies that Yahya and his pip desired to promote, and evidence of a plan lit end soon emerged. As early as 15 October, i of seventy-nine seats declared vacant in East ton, fifteen had already acquired National representation because the candidates «declared to have been elected unopposed, elections were not due until the fortnight November-9 December. The political cornof these successful members was unle, comprising, as they did:8

Pakistan Democratic Front Jamaat-i-Islami (Convention) Muslim League Qayum Muslim League Nizam-i-Islam Party

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These unopposed results disclosed several things. First of all, that there would again be a confusing multiplicity of parties in the House, creating plenty of room for contention although with a general drift as to outlook. Much more important was the fact that this number of unopposed returns so early in the day spoke of an indifference in East Pakistan to the by-elections.

It was said in Dhaka that some intending candidates were being warned by District Magistrates,

acting on the instructions of the martial law authorities, not to oppose certain candidates already nominated in some constituencies.9 It was further reported that others were being dissuaded from standing for election either by physical force at the hands of the military or by the threat of it, and it was significant that the Governor of East Pakistan, Dr A.M. Malik, made reference to ’not entirely satisfactory elections’.

This was a bold statement for Dr Malik to make seeing that he was the appointee of the martial law administration. His appointment was clearly intended to placate sentiment in East Pakistan by giving to that province a civilian Governor born on its own soil, but the idea was a nullity at the outset. Not only was the purpose as transparent as it was disingenuous, but Dr Malik’s past associations with the central government over the years robbed him of whatever credibility he might otherwise have had. Moreover, a martial law administrator remained, the only change being that General Tikka Khan returned to military duty and was replaced by Lieutenant-General A.A.K. Niazi.

The proposed elections were never held as they were overtaken by war with India.

THE DRAFT CONSTITUTION

It has been mentioned above that the elections in December 1970 were held to elect a Constituent Assembly which was required to frame a Constitution for Pakistan within 120 days. After

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having framed such a Constitution, the Assembly would have become the central legislature and would have transferred power to the elected Prime Minister and the Cabinet amongst them and would have acted as Parliament in a parliamentary form of government. Unfortunately, all this did not come about. While East Pakistan was in turmoil and under military action, Yahya promised a constitution in his address to the nation on 28 June
1971. A draft Constitution was already prepared and circulated.

The draft Constitution gave a presidential form of government. It was based on the 1962 Constitution with the following departures

i. The office of Vice-President for Pakistan

was provided for.

ii. There was to be a bicameral legislative at the Centre, two Houses to be called the Senate and the National Assembly, in. The Senate was to be the Upper House with fifteen members (out of a total membership of sixty-five) to be nominated by the President. The Senate was to be a permanent House not subject to dissolution. Half of its membership was to change every two years.

iv. The number of seats in the National Assembly was to be 313, with 264 as general seats, 13 seats reserved for women,
17 for the scheduled castes, 15 for caste Hindus, 1 for Buddhists, and 3 for Christians and others. East Pakistan was allocated 169 seats out of which 130 were to be general seats, the remaining seats being allocated to women and minorities, v. There were provisions for the joint sitting of the two Houses of the Parliament to iron out differences between the two Houses on legislation.

vi. The power of taxation and the subjects for taxation by the central legislature were specifically spelled out in the main body of the draft Constitution.

vii. A chapter of the draft Constitution was devoted to political parties. The aims and purposes that a political party could have were clearly laid down which included, amongst others, true faith and allegiance to Pakistan to preserve its integrity and

sovereignty as an Islamic Republic, ID observe the principles of democracy «ida its own organization; not to be a forap aided party; and to adopt exclusnd; constitutional methods to bring about i change in the Constitution or the law of Pakistan. There were also provisions forth: registration of the political parties Tte provisions were apparently necessitated h the experience with the Awami League viii. There was a provision for the imposition of martial law in whole or any part of Pakistan but only in compelling circumstances wU were defined as attack or invasion by i foreign power or its imminent danger, In and order within the country being ingraw jeopardy; and a serious problem affecting the whole, or any substantial part of tit country or any

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province. Martial law »as to be declared by the Commander-m-CM of the Pakistan Army at the request of the President or of his own motion Tie declaration of martial law could only tie _ revoked by the Commander-m-Chief after consultation with the President.

Except for these features and some other HUM ones, the draft Constitution was a reproduction of the 1962 Constitution. This draft Constitution *u* never promulgated. Nevertheless, it appears to have been used as a working paper for the intern Constitution of 1972 and, later, the permanent 197] Constitution, particularly the provision regarding the Senate and the joint sittings of the two Houses of Parliament.10

INTERNATIONAL RESPONSES

On 19 July, Yahya declared that Mujib would be tried by a military court in camera and the allegations were such that he could be awarded the death sentence. On 3 September, Dr A M Malik and General Niazi were appointed Governor and Martial -Law Administrator of East Pakistan, respectively.

The first step taken by Dr A.M. Malik's government was to announce general amnesty for those alleged to have committed cnmes in East

Pakistan since March. Thi the release of a large n Meanwhile, Dr Malik had e the Awami League leaders to the conclusion that the) the Indian government becz their movement out of sym Muslims, but was motiva dismember Pakistan. He, th< appeals to the refugees to c< did not have any impact League leaders were kept un by the Indian authorities" possible for them to return e The guerrilla activities and the *Mukti Bahini* had proportions and, by October, to be in the midst of civil w<

As for international devc government tried to put di] Islamabad for an immediate the government of Pakistan i that it was an internal matter her sovereignty and reft representatives of internatioi middle of April, Pakistan general approval of the inte regarding the political positi including China, extended i Pakistan in the campaigi international community that in East Pakistan was purely By the beginning of May, no to East Pakistan to a great ex situation permitted Islamabad Nations to begin relief and reh

Meanwhile, India beg Pakistan's position by exploit! were called freedom fighters *z* an organized propaganda ma becoming a party to the East The Indian government ref refugees and turned down tl offers for providing assistance was supported by the exiled Bi campaign to condemn the UN

In June, India launched a against Pakistan which was *i*

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t step taken by Dr A.M. Malik's was to announce general amnesty for :d to have committed crimes in East

Pakistan since March. This decision resulted in the release of a large number of prisoners. Meanwhile, Dr Malik had established contact with the Awami League leaders in exile and had come to the conclusion that they were frustrated with the Indian government because it did not support their movement out of sympathy for the Bengali Muslims, but was motivated by the desire to dismember Pakistan. He, therefore, made repeated appeals to the refugees to come back home, but it did not have any impact because the Awami League leaders were kept under constant vigilance by the Indian authorities" and it was no longer possible for them to return even if they so desired. The guerrilla activities and sabotage campaign of the *Mukti Bahini* had assumed alarming proportions and, by October, East Pakistan seemed lobe in the midst of civil war.

As for international developments, the Indian government tried to put diplomatic pressure on Islamabad for an immediate political solution, but the government of Pakistan resisted it on the plea that it was an internal matter. Pakistan insisted on ber sovereignty and refused to accept the representatives of international agencies. By the middle of April, Pakistan was able to secure general approval of the international community regarding the political position. Some countries, including China, extended complete support to Pakistan in the campaign to convince the international community that what had happened u East Pakistan was purely an internal problem. By the beginning of May, normalcy had returned to East Pakistan to a great extent and the general station permitted Islamabad to allow the United Nations to begin relief and rehabilitation

activities.

Meanwhile, India began to undermine Pakistan's position by exploiting the refugees who we called freedom fighters and, with the help of a organized propaganda machinery, insisted on rommg a party to the East Pakistan situation. lie Indian government refused to return the ;ees and turned down the United Nations' iffers for providing assistance at the borders. India a supported by the exiled Bengali leaders in her Jipaign to condemn the UN efforts.

In June, India launched a monsoon offensive pst Pakistan which was aimed at disrupting

communications by blasting bridges and terrorising the public. Yahya made half-hearted attempts to win over moderate Bengalis by promising the restoration of political life. Since he had no organized campaign or clear programme and also suffered from a credibility gap, these efforts were doomed to failure.

In July, U Thant proposed the appointment of UN representatives on both sides of the East Pakistan border to facilitate the return of refugees and placed this suggestion before the Security Council. Yahya immediately accepted the proposal but the Indian government rejected it. By then, a significant change in Sino-American relations was taking place as a result of Kissinger's visit to Peking, with the announcement by President Nixon in July to visit China the following year. This development led India to realize the difficulty of supporting the Bangladesh liberation movement without the support of a superpower. During this period, the USSR had decided, for various reasons, to establish closer relations with India.

After the signing of the Indo-Soviet Treaty in August 1971, the government of the USSR adopted a hostile attitude towards Pakistan and made it clear that it would frustrate every attempt to involve the US in the East Pakistan crisis. Soviet commitment also encouraged India to intensify the activities of the *Mukti Bahini*. During September and October, the Soviet Union tried, for the last time, for a political solution of the East Pakistan crisis and pressurized India to limit her commitment to the Bangladesh movement. However, Yahya's broadcast on 12 October convinced the Soviet Union that Pakistan was not yet prepared for any such settlement by accepting confederation between the two wings of Pakistan. After October, Soviet military assistance to India assumed larger proportions and war seemed imminent. Pakistan depended too much on the UN and the world powers for intervention in the prospective war. It was, perhaps, because of this that Pakistan decided to widen the circle of war by opening a front on the western border on
3 December. By then, it was too late.

By November, the Pakistani nation had been shaken and demoralized due to regional polarization. A majority of East Pakistanis had

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turned hostile towards the army because of the military action and the subsequent failure of the military authorities to restore the people's confidence in the government. The army's morale had also been affected because the *jawans* had been in the trenches for several months without rest and proper food.

Conditions within East Pakistan were depressing. The economic fabric had been shattered because of the virtual closure of industry since March. The monsoon offensive of the *Mukti Bahini* had not only done great damage to the communication system, roads, and bridges but had also created uncertainty and terror. The Indian propaganda presenting events in Bangladesh as a liberation movement and Pakistan as a colonial country had moulded international public opinion against the latter. Circumstances were thus favourable for an Indian offensive against Pakistan.

INDO-PAK WAR AND THE FALL OF DHAKA

Having realized that the *Mukti Bahini* could not achieve the objective, India decided to launch an attack on the eastern front. Although full-scale war started on 22 November, yet 'unimpeachable Indian military sources said that, in spite of official denials, Indian troops crossed the borders into East Pakistan' in the first week of November.12 This was the 'first confirmation that Indian soldiers had operated inside East Pakistan in the current crisis'.13 The *New York Times* also carried a similar report on 13 November 1971.

As soon as Dr Malik came to know about the Indian attack, he left for Islamabad on 26 November to advise the President to avert the war, either by seeking UN intervention or by making political settlement with the Awami League leaders. He knew that in case of an all-out war, East Pakistan would be lost. He returned to Dhaka on 1 December and expressed dissatisfaction about his talks with Yahya.

Although Jessore had been captured by the Indian Army on 6 December, Yahya was not conveyed this news till 8 December. Moreover, the unrealistic attitude adopted by Pakistan's

representative at the Security Council was a indication to Dr Malik that the correct mitt position of East Pakistan was not ben; communicated to Yahya. He, therefore, addressed a letter to Yahya appreciating the valour of tlf Pakistan Army and painting a discouraging hi realistic picture of the lack of military and civil supplies, breakdown of law and order, large scad murders of Pakistan supporters, and requested f» physical intervention within forty-eight hours flt made it clear that if no help came, the problm should be solved through negotiations so ik power was transferred peacefully and millions of human lives were were not put at stake Itu obvious that help from foreign friends was assured by Islamabad to Dr Malik and General Niazi As the situation became critical, both Niazi and Dr Malik badgered Islamabad for the promised help. General Niazi even went to the US ConsulGeneral in Dhaka to ask 'if US military assistance was to be provided'.14 Yahya's response to Dr Malik's letter was precise and self-explanatory He replied: 'we are praying for you'. It is difficult to say if the problem could have been settled

politically at this stage as proposed by Dr Malik when the Indian Army was racing towards Dhak However, there is no doubt that Yahya did not make any serious effort for political settlement before the war although he knew that Pakistan's position was weaker and India had made preparations for inflicting a military defeat Pakistan.

On 9 and 10 December, General Niazi messages to the Chief of General Staff infer him that a regrouping of troops and tru adjustment of battle positions was not possirA to intense enemy air activity and the hostili the local population. He stated that air ti bridges, and heavy weapons had been sent damaged. He requested for reinforcement by airborne troops to protect Dhaka. General Niazi's message clearly stated that the situation was critical and the resistance of the Pakistan Army was likely to last only a few more days.

On 10 December, Dr Malik sent another message to Yahya requesting him to arrange an immediate cease-fire and negotiate a political settlement. In response, Yahya authorized the

Governor of East Pak decisions as required by ti the East-West Pakistan li said that he would appro^ him. At the same time, Niazi to follow the d< Governor. After the rei Dr Malik contacted the As of the United Nations, ai demanding a peaceful tri people's representative Nations after the cease-fir the Indian Army. Facilitie the Pakistan Army and] Bengali population were message made it clear thai of surrender.

Yahya buried the mess£ to know of it and an officic despatch. On 11 Decembe understanding with friendl) assistance. Dhaka was told from friends, which never continued. By 15 Decemt reached the outskirts of Dh the Governor's House wa planes as a result of which Cabinet resigned and sougl Red Cross. General Niazi aj Consul-General and request an immediate cease-fire. C instrument of surrender w£ Niazi and General Jagjit Sing] in-Chief, Indian Army, and 1

ROLE OF THE UNITI

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Governor of East Pakistan to take suitable decisions as required by the circumstances because the East-West Pakistan link had been severed. He said that he would approve all measures taken by him. At the same time, Yahya directed General Niazi to follow the decisions taken by the Governor. After the receipt of this message, Dr Malik contacted the Assistant Secretary-General of the United Nations, and delivered a message demanding a peaceful transfer of power to the people's representatives through the United Nations after the cease-fire and the withdrawal of the Indian Army. Facilities for the repatriation of the Pakistan Army and protection of the nonBengali population were also demanded. The message made it clear that there was no question of surrender.

Yahya buried the message as soon as he came to know of it and an official spokesman denied its despatch. On 11 December, Pakistan invoked its understanding with friendly powers to come to its assistance. Dhaka was told that help was expected from friends, which never arrived, and the war continued. By 15 December, Indian forces had reached the outskirts of Dhaka. On 14 December, the Governor's House was rocketed by Indian planes as a result of which the Governor and his Cabinet resigned and sought protection from the Red Cross. General Niazi again met the American Consul-General and requested him to arrange for an immediate cease-fire. On 16 December, the instrument of surrender was signed by General Niazi and General Jagjit Singh Aurora, CommanderB-Chief, Indian Army, and Dhaka fell.

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ROLE OF THE UNITED NATIONS

Several attempts, most of them half-hearted, were Hade in the United Nations to stop the war between Pakistan and India. Full-fledged war Sailed on the eastern front on 22 November and ?rad to West Pakistan on 3 December, yet the United Nations remained unperturbed till (December 1971 when Argentina, supported by wen other members of the Security Council, uquested an emergency session of the Security Council At this session, the United States

sponsored a draft resolution calling for a ceasefire and for the withdrawal of troops. The resolution also proposed posting UN observers on the borders. It was vetoed by the USSR.15

On 4 December, the USSR sponsored a draft resolution calling for ’political settlement in East Pakistan which would inevitably result in cessation of hostilities’.16 The resolution was supported by Poland but the other twelve members of the Security Council abstained from voting. If accepted by Pakistan, this resolution would have led to a cease-fire and political settlement in East Pakistan which Pakistan needed desperately. After October 1971, Pakistan also favoured a political settlement or, at least, paid lip service to the idea under American pressure. Negotiations through American diplomats had started with the Bangladesh government in exile, so there was nothing objectionable from Pakistan’s point of view and the resolution, if accepted, would have saved Pakistan from unprecedented humiliation. But the resolution was vetoed by China, with of course, the prior approval of Islamabad. Pakistan, therefore, missed a good opportunity to achieve peace which was the greatest need of the hour.

One fails to understand why Pakistan did not approach the United Nations. It should be recalled that Bhutto had advised Pakistan not to approach the Security Council in case of war with India.17 He did not spell out the logic behind this advice. Later on, opposition parties in Pakistan criticized Bhutto’s statement and held him responsible for delayed action in the United Nations. After Bhutto’s removal from the prime ministership in 1977, Yahya also alleged that Bhutto acted against the advice of the government, but the question is who stopped Yahya from accepting the Russian resolution when he knew about Pakistan’s military position in East Pakistan better than anyone else. China had also sponsored a resolution which was subsequently withdrawn. Another resolution sponsored by Argentina and supported by seven other countries on the same day was vetoed by the USSR. The resolution contained proposals similar to the American one. Yet another resolution was submitted by the USSR calling ’for cease-fire and effective action by the Pakistan government towards a political settlement giving immediate

recognition to the will of the East Pakistan population as expressed in the December 1970 elections'.18 This presented a way of extricating the Pakistan Army but Pakistan did not show interest in it and consequently it was not voted upon. If Pakistan had pressed for its acceptance, there were chances that the resolution would have been passed and implemented under Soviet pressure.

Then the matter was transferred to the General Assembly under 'The Uniting for Peace Procedure'. A thirty-four member revised resolution on which debate began on 7 December, demanded a cease-fire immediately and 'withdrawal of forces on the territory of the other to their own side of the border'.19 The resolution was passed with an overwhelming majority of 104. Only eleven countries voted against it. Pakistan accepted the resolution, but India kept it pending for three days. Then India laid down Pakistan's withdrawal of forces from East Pakistan as a precondition for the acceptance. This was in fact a tactic to gain time. Yet another resolution was sponsored by the United States in the Security Council calling 'upon the government of India forthwith to accept a cease-fire and withdrawal of armed forces as set forth in the General Assembly Resolution'.20 The resolution was again vetoed by the USSR.

The second resolution, otherwise the eighth, was sponsored by Poland on 15 December, after the arrival of Z.A. Bhutto in the United Nations. The resolution called for the transfer of power 'to the lawfully elected representatives of the people' and with the beginning of this process 'military action in all the areas will be ceased and an initial ceasefire will start for a period of 72 hours'.21 The resolution also demanded the evacuation of armed forces, West Pakistani civilians, and other persons 'from the eastern theatre of conflict'. Although Indian forces were threatening to enter Dhaka, Pakistan did not show any interest in the draft resolution and preferred to negotiate for surrender with India. 'The resolution was never voted upon, but if Pakistan had shown any interest in having it passed, it could have been discussed and passed. '22 Bhutto, who knew that the war had been lost, made a lengthy speech in the Security Council on

15 December. He said; 'I find it disgraceful ton country and to my person to remain here legalia aggression, legalize occupation. I will not lie i party to.. .we will go back and fight. The objectof the UN had been to permit the fall of Dhaka Why should I waste my time here? I will go bad to my country and fight'. But he remained in Nei York until 18 December, when he was asked by Yahya to return to Pakistan to take over.2'

It is obvious that the Security Council had been dragging its feet till the fall of Dhaka It is also true that Pakistan neither evinced interest in lie proceedings of the United Nations nor made serious efforts for a cease-fire. In fact, Pakistan missed quite a few opportunities, without any cogent reason, of achieving peace and saving herself from humiliation. An impression is gained that *the junta's* plan was to surrender East and to continue army rule in West Pakistan. Perhaps, they did not fully visualize the consequences of surrender.

CONCLUSION

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Yahya is not to be blamed for all the ills that divided East from West Pakistan but certain steps taken by him accelerated the process of disintegration and escalated the differences between the two parts of Pakistan into an open confrontation. Those fatal steps can be descnbed as under:

(a) He should not have taken the unilateral decision of dissolving One Unit in West Pakistan and ought to have left it to the Constituent Assembly.

(b) He should not have dispensed with the

principle of parity between the two parts of

Pakistan in the matter of representation

This was a basic constitutional agreement

voluntarily arrived at by the Constituent

Assembly that made the 1956 Constitution

Such a constitutional understanding could

only be changed, modified, or vaned by

another Constituent Assembly. In any case,

Yahya had no mandate to make such

fundamental changes in the constitution. By

his own violation, he was a temporary

repository of power to restoi in the country, hold peacefi. hand over power to the elei lives. He could not extend make fundamental constitut

(c) He should not have allo campaign on the Six Point should have enforced the allowed them to do so, it \ and too late to stop M elections.

(d) He should have contained excesses against other pa1 election campaign in East his duty to protect other and to give them a fair cha voters with their programrr demand of fair and impa elections that all politics participate in them withi favour.

(e) He should not have been h and should, in no case, ha^ session of the National *i* triggered the unfortunate s

(f) He should not have taken military crackdown an followed the path of politi

The dismemberment of Pakista loyalists feel deep in their heart, ironic that Bengalis seceded frc Pakistan which they had done the Muslims in Bengal had participati movement far more actively than any part of the provinces thi Pakistan. They were indeed tnu arrogant military and bureaucrat in Pakistan, coupled with self-ci sighted politicians from West Pi them and ultimately pushed then a demagogue like Mujib.

Bhutto had a major role in Pakistan. As an extremely ambitii not wait any longer to take o\ power. He knew that in a united not become the head of governm means. His party had no preseno which held the majority of the si

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repository of power to restore law and order in the country, hold peaceful elections, and hand over power to the elected representatives. He could not extend his functions to make fundamental constitutional changes.

(c) He should not have allowed Mujib to campaign on the Six Point Programme and should have enforced the LFO. Having allowed them to do so, it was too difficult and too late to stop Mujib after the elections.

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(d) He should have contained Awami League excesses against other parties during the election campaign in East Pakistan. It was his duty to protect other political parties and to give them a fair chance to reach the voters with their programmes. It was also a demand of fair and impartial democratic elections that all political parties could participate in them without any fear or favour.

(e) He should not have been bullied by Bhutto and should, in no case, have postponed the session of the National Assembly which triggered the unfortunate situation.

(0 He should not have taken the decision of a military crackdown and should have followed the path of political settlement.

The dismemberment of Pakistan is a scar which loyalists feel deep in their heart. How tragic and ironic that Bengalis seceded from the union of Pakistan which they had done the most to achieve. Muslims in Bengal had participated in the freedom movement far more actively than any province or ray part of the provinces that formed West Pakistan. They were indeed true Pakistanis. The airogant military and bureaucratic establishments ID Pakistan, coupled with self-centred and shortsigited politicians from West Pakistan, alienated *toon* and ultimately pushed them into the arms of j demagogue like Mujib.

Bhutto had a major role in the break up of Pakistan. As an extremely ambitious man, he could not wait any longer to take over the reigns of power. He knew that in a united Pakistan he could not become the head of government by democratic ueans. His party had no presence in East Pakistan Hindi held the majority of the seats in the central

legislature. That is why he came up with the incongruous demand for transfer of power to Mujib in East Pakistan and to himself in West Pakistan. In one of his most often quoted remarks, addressing Mujib publicly soon after the elections of December 1970, he said *'Udhartum, Idharhum,* you there, me here'. He would rather have Pakistan dismantled than give Mujib power in a united Pakistan. He later tried to justify his role in the whole tragedy, but with little conviction.24 His role in the break up of Pakistan will always remain under a cloud.

NOTES

1. Salik, Siddique, *Witness to Surrender,* 1977, Oxford University Press, Karachi, p. 75.

2. *Dawn, 27* March 1971.

3. Salik, Siddique, *Witness to Surrender, supra,* No. 1, p. 77.

4. The Report of the Hamoodur Rehman Commission of Inquiry into the 1971 War (As declassified by the Government of Pakistan) published by Vanguard Books (Pvt) Limited, 45-The Mall, Lahore, p. 508.

5. Ibid. pp. 504-5. It was established in Hamoodur Rehman Commission Report that Lt. Gen. Niazi was a man of ill-repute before he was posted in East Pakistan in 1971. He was known to be

friendly with women who were running brothels in Lahore and Sialkot, where he was earlier posted. During his stay in East Pakistan he came to acquire a stinking reputation owing to his association with women of bad repute and his nocturnal visits to places also frequented by several junior officers under his command and that he indulged in the smuggling of Pan from East Pakistan to West Pakistan. For further details of killing of Bengali intellectuals and professionals, Bengali military and civilian officers, businessmen, industrialists; and rape of East Pakistani women, read pages 292-3 and pages 508-15 of the Report. The Report recommended trial by court martial of Lt. Gen. Niazi, Maj. Gen. Muhammad Jamshed, Maj. Gen. M. Rahim Khan and number of other army officers. None of these military officers were ever brought to justice for their misdeeds.

6. Author is grateful to Mr I. A. Rahman, Director, Human Rights Commission of Pakistan, for providing him with this information, which has not otherwise appeared anywhere else in print.

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7. Feldman, Herbert, *The End and the Beginning: Pakistan 1969-71,* 1975, Oxford University Press, London. P. 149.

8. Ibid., pp. 153-4.

9. Notably in the case of the Jamaat-i-Islami leader Chaudhry Ghulam Azam.

10. This draft Constitution was prepared by Chief Justice (Retired) A. R. Cornelius who was then in
1971, the Central Law Minister.

11. Article of Major-General Rao Farman Ali, *Jang,* Rawalpindi, 20 December 1977.

12. *The Times,* London, 8 November 1971.

13. Ibid.

14. Mahmood, Safdar, *Pakistan Divided.* 1984, Ferozsons Ltd., Lahore, p. 194. He cites Kuldip Nayyar's *Distant Neighbours,* Vikas Publishing House, Delhi, 1972, p. 189 and Wayne Wilcox's *The Emergence of Bangladesh,* American

Enterprise Institute for Public Policy Research, Washington, 1973, p. 50.

15. UN Security Council Draft Resolution (S/10416)

16. UN Security Council Draft Resolution (S/10418)

17. *Dawn,* 24 November 1971.

18. Security Council Resolution (S/10428).

19. UN General Assembly Resolution (2793 XXVI)

20. Security Council Draft Resolution (S/1044S, Rev. 1)

21. Security Council Draft Resolution (S/10453 Rev 1)

22. *The Outlook* (Weekly), Karachi, 25 November
1974, p. 10.

23. Mahmood, Safdar, *Pakistan Divided, supra,* note
14, p. 207.

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24. *The Great Tragedy* by Zulfiqar All Bhutto A Pakistan People's Party Publication, Vraor Publications Ltd., Karachi. 1971.

PART FIV

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gton, 1973, p. 50.

jnty *Council Draft Resolution (5/104 1*

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il Draft Resolution (S/10453 Rev. 1) (Weekly), Karachi, 25 November

’dar, *Pakistan Divided, supra,* note

•*agedy* by Zulfiqar Ali Bhutto. :ople’s Party Publication, Vision d., Karachi. 1971.

PART **FIVE**

The Bhutto Government: December 1971 to July 1977

20 Civili

In a broadcast on 16 De admitted defeat in East Pal declare war.

Shortly afterwards, Mrs < from the United States, *am* ordered a unilateral cease-fir from 8:00 p.m. on 17 Decem ’India has no territorial ambi add that since the Pakistani f and Bangladesh had gained ft in our view to continue the p this decision was communica the Swiss Embassy, he annou ordered a cease-fire to come i time.

A UN resolution put J Argentina, and other countri observance of the cease-fire conflict, and asked for the wit forces as soon as practicable territories and to positions w the cease-fire line in Kashmir, called on all countries to re which might complicate th subcontinent. It also called on to observe the Geneva Convenl protection of the wounded an war and the civilian popula international assistance in the and their return in safety to authorized the Secretary-Gem necessary, a special representati offices for the solution of hum: This resolution was adopted ty none, with Poland and the Soviel The Chinese delegation, whil resolution, expressed dissatisfac

Meanwhile, violent demons!
18 December, against the militai Pakistan, followed by a vocal officers in GHQ, Rawalpindi o which led to Yahya’s resignat

20 Civilian Martial Law

In a broadcast on 16 December 1971, Yahya admitted defeat in East Pakistan and went on to declare war

Shortly afterwards, Mrs Gandhi under pressure from the United States, announced that she had ordered a unilateral cease-fire on the western front from 8 00 p m. on 17 December. She declared that 'India has no territorial ambitions'. She went on to add that since the Pakistani forces had surrendered and Bangladesh had gained freedom, 'it is pointless in our view to continue the present conflict'. After this decision was communicated to Yahya through the Swiss Embassy, he announced that he had also ordered a cease-fire to come into force at the same time

A UN resolution put forward by Japan, Argentina, and other countries, called for strict observance of the cease-fire in all the areas of conflict, and asked for the withdrawal of all armed forces as soon as practicable to their respective territories and to positions which fully respected the cease-fire line in Kashmir. The resolution also called on all countries to refrain from actions which might complicate the situation in the subcontinent. It also called on all those concerned to observe the Geneva Conventions of 1949 on the protection of the wounded and sick prisoners of war and the civilian population. It called for international assistance in the relief of refugees and their return in safety to their homes, and authorized the Secretary-General to appoint, if necessary, a special representative to lend his good offices for the solution of humanitarian problems. This resolution was adopted by thirteen votes to uth Poland and the Soviet Union abstaining.

11 re Chinese delegation, while voting for the resolution, expressed dissatisfaction with it. Meanwhile, violent demonstrations began on
18 December, against the military regime in West Pakistan, followed by a vocal revolt by army jflicers in GHQ, Rawalpindi on 19 December,1 " led to Yahya's resignation. Bhutto was

subsequently sworn in as Pakistan's new President on 20 December 1971.

The United States had announced the cancellation of all outstanding licences of shipment of military equipment to India on 3 December
1971, and all US economic aid to India was suspended on 6 December. A State Department spokesman said that 'the United States will not make a contribution to the Indian economy which will make it easier for the Indian government to sustain its military effort', and that the question of similar action against Pakistan did not arise because all the aid in the pipeline was earmarked for humanitarian relief in East Pakistan.

BANGLADESH GOVERNMENT ESTABLISHED IN DHAKA

The city of Dhaka was in a state of virtual anarchy after the surrender of the Pakistan Army. Elements of the *Mukti Bahini* used the opportunity to take revenge on 'collaborators', especially the *razakars*. Violence was provoked by the massacres reported to have been carried out by Pakistani soldiers and the *razakars* from March 1971 till the time of surrender. The mutilated bodies of 20 leading Bengali intellectuals were found on 18 December, and over a hundred

others in the next three days. Subsequent investigation established that a massacre of intellectuals, technicians, and professionals had taken place during the last stages of the war. Evidence of other massacres involving many thousands of people was discovered in the next few weeks.

Members of the Bangladesh government in exile finally arrived in the city on 22 December 1977, the delay in their return being due to the Indian Army's wish to restore order before a civilian government took over. The Cabinet was reshuffled and a list of measures were drawn up to deal with immediate tasks.

II’

Mujib, who had been arrested on the night of
25-26 March 1971, and had been held ever since in West Pakistan, was released on 8 January 1972. He flew to London, where he revealed that he had been sentenced to death in West Pakistan. On his return to Dhaka on 10 January, he was given a tumultuous welcome. Two days later, he resigned the presidency and became Prime Minister whilst Justice Abu Sayeed Chowdhury was sworn in as the new President of Bangladesh.

BHUTTO TAKES OVER

Despite the political and military disaster in East Pakistan, Yahya was stuck with the notion that in spite of everything he could carry on as President. At the GHQ, a strong current of opinion was against him.

A faction favoured Bhutto as Yahya’s successor. His qualifications were that (a) he was not an armed forces man; (b) he was an elected member of the National Assembly; (c) his party had a majority in the assembly since Mujib’s Awami League had been unseated; (d) it was evident that Bhutto had emerged, in West Pakistan at least, as a popular leader; and (e) he was already Deputy Prime Minister. It is evident that before leaving New York, and perhaps in Rome too, Bhutto received information from his close political colleagues that events in Pakistan were taking an unpredictable course and that he should return as soon as possible.

There still remained the question of Yahya’s intentions and, on 17 December Gul Hasan, along with Rahim Khan, went to the President House to confront Yahya. On arrival, they found Yahya still busy with his radio address. At the meeting at which General Abdul Hameed Khan was present, Gul Hasan and Rahim Khan informed Yahya that nothing remained but for him to go. At first, Yahya resisted this suggestion, but when they pressed him more firmly, he agreed and added that he would then go back to the army as Commander-in-Chief. This, Gul Hasan and Rahim Khan treated as absurd and insisted that Yahya must go altogether. In the face of this pressure, it seems that Yahya obliquely suggested that Gul Hasan might become President

and, more explicitly perhaps, that Abdul Khan might become the Commander-m-Chief Ai about this time, or somewhat later, Gul Hasan realized that the broadcast of Yahya’s address W begun and, at once, ordered it to be stopped

To the proposal that he become Commanderin-Chief, Abdul Hameed Khan demurred and sd he would not accept any such proposal unless it first met the officers at the GHQ to obtain to reaction to the idea. He, therefore, called a meetiaj of senior officers which included those with raub of Lieutenant-Colonels and above, at the GHQ, n
20 December. Shortly afterwards, it was announced that all officers at the GHQ would attend and some thirty minutes before the meetnf was held all officers of the Rawalpindi gamsoi were

required to be present. The circumstances which led to this significant expansion of Abdul Hameed Khan's audience are unclear and it ma) have been Gul Hasan who, as Chief of the General Staff, had these orders issued through the Staff Duties Directorate. It is believed that Gul Hasan advised some officers who had consulted him, M to withhold their opinions or mince their wonls. The meeting was a stormy one in which strong language was used and Abdul Hameed Khan was unable to satisfy his audience.

From 18 to 20 December, the country was virtually without a government and Yahya was more or less a prisoner. His coterie of political Generals had been rendered impotent and the on); person exercising authority was Gul Hasan. On *k* arrival in Rawalpindi, Bhutto was met by Gul Hasan and Rahim Khan and, with them, he wen straight to the President's House where he tool over office from Yahya.

An impression may be formed here that Bhutto was simply a military nominee but this would DM do him justice. Bhutto had electoral success bey him which was very much a personal achievement Bhutto was as necessary to the army as (beam/) sanction was to him. It should be added tha/ffl* gave some account of these events in his adfa on 20 December 1971. The wot&s'neiis&w 'summoned by the nation'.2

Meanwhile, Pakistan's forces in the easle province had surrendered, the *independence/* Bangladesh had become a reality, and IndiaL

announced a unilateral < on the west front. In the only for Bhutto to enter the country's shattered i

Bhutto: His Backgro Ascendancy

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itan's forces in the eastern dered, the independence of ne a reality, and India, having

announced a unilateral ceasefire, held its positions on the west front. In the new Pakistan, it remained only for Bhutto to enter upon the task of restoring the country's shattered fortunes.3

Bhutto: **His Background to Political**

Ascendancy

After the fall of Dhaka and the emergence of Bangladesh, there was no justification left for Yahya to continue in power. His own military colleagues prevailed upon him to hand over power to Bhutto, whose party, the PPP, had emerged as the majority party in the erstwhile West Pakistan. Thus, Bhutto was summoned from the United States. Before leaving for Pakistan, he met President Nixon in Washington D.C. He reached Pakistan on 20 December 1971 and, as stated above, was handed over power as President and Chief Martial Law Administrator. He thus had the dubious distinction of being a civilian CMLA, a rare occurrence indeed. He decided to continue martial law because he wanted to implement some of the programmes promised in his 1970 election manifesto under the protection of martial law.

Delving into Zulfiqar Ali Bhutto's history and his rise in the political arena it can be said that he came into prominence when he was taken into the first Martial Law Cabinet on 8 October 1958. He was a recommendee of President Iskandar Mirza4 but was retained in the Cabinet by Ayub despite the ouster of Iskandar Mirza. He was a bright young man of about 31 years of age at that time, having studied in California and England where he had been called to the Bar. He had a strong political background, being the son of Sir Shahnawaz Bhutto of Larkana. His father had

been the President of the District Board of Larkana.

Bhutto inherited a large tract of land from his father. Before the 1959 Land Reforms, the Bhutto clan reportedly held around forty to sixty thousand acres of extremely productive land in Larkana, Jacobabad, Thatta, and Sukkur.5

Zulfiqar Ali Bhutto returned to Pakistan in 1954 after completing his education in the West and settled into a law practice in Karachi. He taught part time at the Sindh Muslim Law College as

well. In Ayub's Cabinet, he served for nearly eight years and was one of his most trusted lieutenants. He held various portfolios in Ayub's Cabinet', becoming Foreign Minister in 1963 on the demise of Mr Muhammad Ali Bogra. In this position, he got opportunities of national exposure which ultimately built him into a national leader. He ran into serious differences with Ayub on the Tashkent Declaration and finally left his Cabinet as a disillusioned young man. Initially, he maintained strict silence. Later, however, he voiced his opinion on various political issues.

On a visit to East Pakistan in November 1966, Bhutto openly attacked Ayub's policies and expressed his support for the Six Point Programme of Mujib. Only a few months earlier, as Foreign Minister, he had condemned Mujib and volunteered to debate the Six Point Programme with him. But soon after throwing this challenge, Bhutto excused himself saying that he had more pressing matters to attend to. Now that he was no longer a member of the Ayub Cabinet, Bhutto publicly defied Ayub by coming out in support of a programme which Ayub had labelled parochial, divisive, and aimed at the destruction of Pakistan. Returning to West Pakistan, Bhutto declared that he would reserve the option to join another party or form a new one if the Muslim League failed to fulfill its pledge to the people.

Bhutto chose to create his own political party. With a political organization in tow, Bhutto began looking for recruits over and above his eager student supporters. At a press conference in Karachi in October 1967, he said that he intended to develop a programme which would look like a socialist manifesto. Its main plank would be the nationalization of banks, insurance companies, heavy industry, and all public utilities. In the matter of foreign policy, Bhutto said his party would be independent and he would insist on Pakistan's withdrawal from both SEATO and CENTO. Moreover, closer links would be forged with Afro-Asia, especially with other Muslim states.

When Bhutto took over the affairs of Pakistan on 20 December 1971, all around him was defeat and despair. The country had been ripped apart. Six thousand square miles of territory was under

Indian occupation and nearly 90,000 prisoners of war were in Indian camps. The army was demoralized and disgraced and the economy was ravaged. It goes to Bhutto's credit that he took to the task of re-building Pakistan with courage and determination. He inspired confidence among those around him and among the people at large. He made an emotional appeal to the nation in his first address on radio and television and asked for help and co-operation. He said that the nation had repeatedly been failed by its leadership and that he wanted to put things right. He promised not to fail the people of Pakistan.

CIVILIAN MARTIAL LAW AND BHUTTO'S REFORMS

It has been discussed earlier that at the time of taking over power, Bhutto assumed unto himself the dual capacity of the President and the CMLA. Chief Justice Hamood-ur Rahman was appointed to probe into the military debacle in East Pakistan. As CMLA, Bhutto issued orders and pronouncements covering a whole range of subjects. The passports of Pakistan's leading industrialists and their families were seized and they were barred from going abroad. He began to set up paramilitary and intelligence organizations in order to monitor his opponents, ambitious army officers, and even his own party men. He appointed some notorious police officers to the Federal Intelligence Bureau. He started victimizing his old antagonists like industrialist Habibullah Khattak, banker S.U. Durrani, and ex-Naval Chief A.R. Khan, who were imprisoned without adequate reason. He had Altaf Gauhar, the editor of *Dawn,* arrested for criticizing him. He retired a number of military Generals and appointed General Gul Hasan as Army Chief. Whilst all this was happening, Yahya was put under house arrest.

RELEASE OF MUJIB

The manner in which Bhutto released Mujib speaks volumes for his style and intentions. While addressing a huge public meeting in Karachi on

3 January 1972, he asked about Mujib: 'Shall I Id him go? I want the people's will to prevail Shi I release him? If you say no, I won't, but if yoi want me to release him, I will. Raise your hands, all those who want me to release him' The hands shot up, and he thanked them 'for having given him permission to release Mujib.'6 Obviously, all this was a gimmick meant to befool the simple souls in the crowd. The decision had already been taken because Mujib's release was necessary foi him to bring the sad chapter of the dismemberment of Pakistan to its logical end and to establish the State of Bangladesh once and for all. Mujib, after many meetings with Bhutto, the details of whick were kept secret, was released on 8 January 1972 and was flown to London before he returned to Dhaka.

NATIONALIZATION OF BASIC INDUSTRIES: ECONOMIC REFORMS ORDER, 1972

Bhutto announced on 2 January 1972 that ten categories of basic industries were being taken over by the state ' for the benefit of the people of Pakistan'.7 The industries included iron and

steel foundries; basic metal, heavy engineenng, heavv electrical, assembly and manufacturing of motor vehicles; tractor plants, assembly and manufacture heavy and basic chemicals; petro chemicals cement; public utilities, like electricity generation. transmission and distribution; gas, and oil refineries. In pursuance of this announcement, the Economic Reforms Order, 19728 was issued as a President's Order on 3 January 1972 All establishments that fell under any of the abou categories were taken over by the central government by appointment of a Managing Director for each such establishment. Employees of these establishments were to continue m service No court, including the Supreme Court and the High Courts, could call in question any provision of this Order or of any rule or order made or anything done or any action taken or purporting to be made, done or taken thereunder. Similarly, no court could grant any injunction against anything done under this Order. The central government and

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20 December 1971 were de alienations made prior to favour of heirs including father, mother, and sons deceased son or daughter oi were declaied valid. Transa of the limit given betwee

72, he asked about Mujib: ’Shall I let ant the^peopJe’s *y))}Jip^my^)^) K* you say no, I won’t, but if you lease him, I will. Raise your hands, want me to release him.’ The hands ie thanked them ’for having given n to release Mujib.’6 Obviously, all trniick meant to befool the simple)wd. The decision had already been Mujib’s release was necessary for e sad chapter of the dismemberment its* logical end and to establish the adesh once and for all. Mujib, after s with Bhutto, the details of which st, was released on 8 January 1972 i to London before he returned to

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s: ECONOMIC REFORMS

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ced on 2 January 1972 that ten sic industries were being taken over for the benefit of the people of industries included iron and steel : metal, heavy engineering, heavy nbly and manufacturing of motor plants, assembly and manufacture; lie chemicals; petro chemicals, Jtilities, like electricity generation, ind distribution; gas, and oil rsuance of this announcement, the •ms Order, 19728 was issued as a rder on 3 January 1972. All hat fell under any of the above re taken over by the central ’ appointment of a Managing h such establishment. Employees iments were to continue in service, ling the Supreme Court and the ild call in question any provision r of any rule or order made or any action taken or purporting to r taken thereunder. Similarly, no t any injunction against anything)rder. The central government and

the managing directors of these establishments */wMsssiSed for anything done in good faith.*

It can be said in favour of this step that it was part of the manifesto of the People’s Party which it was duty bound to enforce: However, this step could have been taken in a more organized manner and national loss could have been avoided. There was unprecedented theft and pilferage in these establishments during the process of taking over by the managing directors. Raw materials worth millions of rupees just disappeared from inventories of the industrial units that were nationalized. The managing directors that were appointed were mostly bureaucrats with no practical experience of managing industrial units. They were generally corrupt and cared little about the health and profitability of these units. The cost of production in these units sky rocketed, with the result that most of the nationalized establishments suffered heavy losses. It is necessary before the nationalization of industries, to prepare a cadre which is duly trained and motivated and able to run them in the national interest. According to Wali Khan, ’it was not nationalization but bureaucratization of industry’. With the advantage of hindsight, it can be said that this nationalization, in fact, hampered the process of industrialization and resulted in the flight of capital and entrepreunial skill abroad.

LAND REFORMS

On 11 March 1972, the Land Reforms Regulation was introduced as an edict of martial law.9 The land reforms envisaged under it were an improvement over those of Ayub in 1959. The maximum ceiling of agricultural land was reduced from 500 to 150 acres for irrigated land, and from

36,000 to 15,000 produce index units. All transfers in excess of this limit made on or before 20 December 1971 were declared void. However, alienations made prior to 20 December 1971 in favour of heirs including wife, sons, daughters, father, mother, and sons and daughters of a deceased son or daughter of the owner of the land, were declared valid. Transactions of land in excess of the limit given between 1 March 1967 and

20 December 1971 were to be considered void *unless the Land* Commission that was to be constituted under the regulation found any such transaction to be valid. Another important step under this regulation was the grant of land vesting in government, as a result of surrender of land in excess of the maximum limit or through resumption, to the tenants tilling such land free of charge. A tenant was given the first right of preemption in respect of the land in his tenancy which was a progressive step long overdue.

The jurisdiction of courts was barred regarding challenge to the provisions of the regulation itself and no court could issue an injunction in relation to anything done or intended to be done by the Land Commission or any of its officers. The government or anyone else acting thereunder was indemnified regarding anything done or intended to be done under the regulation in good faith. Certain restrictions were placed on partition of joint holding or alienation of holdings with the objective that the land holdings should not be allowed to go down below economic or subsistence levels.

This regulation, though progressive in nature, did not really achieve the purpose for which it was ostensibly made. There were too many loopholes which were made use of by influential and powerful land owners, including the Bhuttos, to defeat and frustrate the land reforms. Some of the common methods used were:

(a) Since the regulation exempted the transactions in excess of the permissible limits before 20 December 1971 if made in favour of kin, powerful landlords, in connivance with corrupt land revenue administration officials, got fake sales entered into the records prior to
20 December 1971 in favour of their heirs. Entire land revenue registers of old estates were replaced with new and fake ones showing oral sales or gifts by the land owners in favour of their sons, daughters, mothers, and fathers.

(b) Where, despite fake transfers to the heirs, the entire land holding had not been saved, then similar fake oral sale transactions by the land owners in favour of their other

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SCREENING OF GOVERNMENT SEB

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turn pay scales prescribed by the the teachers, both in the private >rs, were being defeated. In many sceiving low salaries were forced tool owners receipts for larger iwners of private schools were reasury by evading income tax. ivever was not all that pervasive, a number of high quality educa-

run by credible and prestigious Ajijuman-e-Himayat-ul-IsIam, rch, Catholic Church, and so on *ing their educational institutions e paying their teaching staff and ^cording to pay scales prescribed t, if not better.

ng to the above-mentioned nanagement of all privately was taken over by the central r were situated in the Islamabad d by a provincial government if in a province, with effect from The central government, in the iituated in Islamabad, and the ent in any other case, could by fter 1 October 1972 take over ' such schools. All teachers of

colleges and schools which *f* the government were made ne scales of pay and other ice as had been allowed to and schools maintained by the jurisdiction of the courts, ic Court and a High Court, to tion or any rule, order, or or issued thereunder, was and courts could issue no half. Central government or ts and persons acting on their iplete indemnity if they acted

id a lot of damage to the the country. Certain leading >ns like Forman Christian •liege for Women, Gordon md Islamia Colleges run by at-ul-Islam were taken over i virtually destroyed. Their

reputation for imparting high quality education and for maintaining high standards was ruined. Educational institutions run by missionary organizations provided opportunities for education and employment to the native Christians who were otherwise a depressed minority. They were deprived of this opportunity. The employees of institutions, in their greed to take over the property of the owners'under these institutions, misconstrued the regulation to mean that the title of properties thereunder had also been transferred to the government. The Supreme Court ultimately put an end to this controversy by holding that taking over of educational institutions did not mean transfer of ownership of the properties under these institutions to the government."

The net result of this exercise was that the taken over colleges and schools suffered a decline in their standards and reputation. Instead of establishing new institutions of excellence', the government got bogged down in the management of the colleges and schools taken over by it with obviously negative results.

SCREENING OF GOVERNMENT **SERVANTS**

Bhutto also moved against corrupt and inefficient

government servants to secure their removal.

Under a martial law regulation12 that came into

force on 10 March 1972, the competent authority

(as defined in the regulation) 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. The competent authority, even without giving any show cause notice, could dismiss, remove, reduce in rank, or retire prematurely any such person. No action taken, order passed, thing done, or power exercised under the regulation could be called into question by or before any court including the Supreme Court or a High Court.

The central and the provincial governments carried out extensive scrutiny under this regulation and disciplinary action resulting in any one of the above penalties was taken against as many as 1300 government servants. It was a major shake-up in the services, especially amongst the senior ranks.

POLITICAL MANOEUVRES TILL THE INTERIM CONSTITUTION

The continuation of martial law, even though it had a civilian face, was disturbing to the political and democratic forces in Pakistan. The matter of framing a Constitution was also in limbo. Initially, the government announced that there would be no interim Constitution because, in the words of the then Law Minister, Mian Mahmood Ali Kasuri, 'it would amount to giving a Constitution by one man. The country had very unpleasant experience of a one man Constitution and, therefore, it would not be proper to repeat it'.13 Wali Khan, President of the National Awami Party (NAP), criticized Bhutto for continuing martial law and opposed the plan for 'phased democracy'.14 On 30 January, Bhutto took the decision of Pakistan's withdrawal from the Commonwealth. It was an unjustified and impulsive decision. The reason given was that Britain joined the European Common Market,15 but it makes no sense. It caused enormous inconvenience to a large number of Pakistanis living in the United Kingdom who were suddenly deprived of the status of belonging to a Commonwealth country and were left high and dry. There was no benefit occurring to Pakistan in any way from this irresponsible decision.

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The Governor of Sindh, Mr Mumtaz Ali Bhutto, a cousin of Bhutto, and the Governor of Punjab, Mr Ghulam Mustafa Khar, appointed Advisers to run the provincial governments of Sindh and Punjab. On 6 February 1972, Wali Khan gave the ultimatum to lift martial law or lose the cooperation of NAP. He even threatened to launch a mass movement for the restoration of democracy.16 The demand was soon joined in by other political parties. Bhutto promised to announce a time table to lift martial law and return to democracy 'for all times to come', once certain basic reforms had been introduced."

On 3 March, Bhutto suddenly announced a shake-up of the Command of the Armed Forces. He sacked Lieutenant-General Gul Hasan as Commander-in-Chief of the Pakistan Army and replaced him with General Tikka Khan. Air Marshal A. Rahim Khan was replaced by Air Marshal Zafar Chaudhry as Chief of Pakistan Air Force. The reason he gave for these sudden

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removals was to wipe out the Bonapartist influence on the Armed Forces which had resulted in turning professional army commanders into professional political leaders.18 By moving swiftly, Bhutto removed the threat, if any, brewing in the armed forces against him.

Ultimately, Bhutto reached an accord with Wali Khan and Jamiat-i-Ulema-i-Islam led by Mufti Mahmood. It was agreed that martial law be lifted on 14 August 1972, and that majority parties in NWFP and Balochistan would be allowed to form governments and an interim Constitution would be given by 17 April 1972.19 The National Assembly session was called on 14 April 1972. Bhutto received a unanimous vote of confidence and was elected as the National Assembly President. He made a dramatic announcement in the National Assembly that martial law would be lifted on
21 April, instead of 14 August, if the Interim Constitution was passed by 17 April.20 On 21 April
1972, martial law came to an end, the interim Constitution having been adopted by the National Assembly a day earlier. Bhutto was sworn in as President under the Interim Constitution on
21 April 1972. After some further negotiations on the PPP and NAP/JUI accord of 6 March (certain difficulties had arisen in the meantime), the nominees of NAP/JUI, namely Mir Ghaus Bakhsh Bizenjo, and Arbab Sikandar Khan Khalil, were appointed Governors of Balochistan and NWFP respectively on 29 April 1972.

THE ASMA JILANI CASE

Malik Ghulam Jilani, a politician from Lahore, and Altaf Husain Gauhar, Editor-in-Chief, *Dawn,* Karachi were arrested and placed under preventive detention under the Defence of Pakistan Rules and Martial Law Regulation No. 78. The Constitution petition against the detention of Malik Ghulam Jilani was dismissed by the Lahore High Court, relying on the decision of the Supreme Court in *the case of State vJDafj-021 holding the Jurisdiction*

of Courts (Removal of Doubts) Order 1969 as

valid, and ousting the jurisdiction *of the courts.*

The Constitution petition against the detentiorj j

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Court held that it had no jurisdiction to grant relief against martial law orders for substantially tie same reasons as given by the Lahore High corn in the case of Malik Ghulam Jilani. Both appealed to the Supreme Court.

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The precise question before the Supreme *(* was whether the High Courts had jurisdiction under the 1962 Constitution to enquire into the validity of detention under Martial Law Regulation No 7J of 1971 in view of the bar created by the provisions of the Jurisdiction of Courts (Removal of Doubts) Order, 1969. Another question was whether the doctrine enunciated in the case of *State* v *Dow* was correct and applicable. The Supreme Court observed that in laying down a novel juristic principle of such far-reaching importance, the Chief Justice in Dosso's case proceeded on certain assumptions, namely:

1. That the basic doctrines of legal positivism, which he was accepting, were such firmly and universally accepted doctrines that the whole science of modern jurisprudence rested upon them;

2. that any 'abrupt political change not within the contemplation of the Constitution' constitutes a revolution, no matter ho* temporary or transitory the change, if no one has taken any step to oppose it; and

3. that the rule of international law with regard to the recognition of states can determine the validity also of the states' internal sovereignty.

The Supreme Court held that these assumptions were not justified. Kelsen's theory was by no means a universally accepted one, nor was it a theory that could claim to have become a basic doctrine of the science of modern jurisprudence, nor did Kelsen even attempt to formulate any theory which 'favours totalitarianism'.22 The Court further held that the observation in Dosso's case, that if the territory and the people remain *substantially the same, there is 'no change in the* corpus qr international entity of the state and the revolutionary government and the new state are, according to international law, the legitimate

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The Court held Pakistan was cont Resolution which pos belongs to Almighty *i* exercisable by the prescribed by Him is i system that the func chosen by the commi by a council which mu view and remain ace only then would tli government of laws principle enunciated ii treated as good law ei otherwise.

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The Court held that the *grund-norm23* of Pakistan was contained in the .Objectives Resolution which postulates that legal sovereignty belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. It is under this system that the functional head of the state is chosen by the community and has to be assisted by a council which must hold its meetings in public view and remain accountable to the public and only then would the government become a government of laws and not of men. Thus, the principle enunciated in Dosso's case could not be treated as good law either as a precedent or even otherwise.

The Supreme Court traced the history of events from 24 March 1969, and observed that Ayub had no power under the Constitution of 1962 to hand over power to anybody. He could have resigned and the Speaker of the National Assembly could have taken over as acting President. After a thorough discussion on the legal interpretation of martial law, the Court came to the conclusion that tt is not correct to say that the proclamation of martial law must necessarily give the commander of the armed forces the power to abrogate the Constitution, which he is bound by oath to defend.

After making a detailed examination of the events and circumstances leading to the handing over of power to Yahya, the Court came to the conclusion that Yahya did not allow the constitutional machinery to come into effect.
1, he usurped the functions of government

started issuing all kinds of martial law regulations, presidential orders and even ordinances.

There was thus no question that the military rule sought to be imposed upon the country by Yahya was entirely illegal. The presidential order barring the jurisdiction of the courts, being sub-constitutional legislation, could lot curtail the jurisdiction given to the High Courts ffid the Supreme Court under the Constitution of *"},* for that jurisdiction was preserved even by lie Provisional Constitution Order. Martial Law Regulation No. 78 was struck down as having been nade by an incompetent authority and, therefore, kted the attribute of legitimacy.

After having held Yahya as an usurper and all laws enacted during his regime as illegal, the Supreme Court took recourse to the doctrine of necessity because ignoring it would result in disastrous consequences to the body politic and upset the social order. After having come to the conclusion that the acts of the usurper were illegal and illegitimate, the question arose as to how many of his acts, legislative or otherwise, should be condoned or maintained, notwithstanding their illegality, in the wider public interest. Applying this test, the Court condoned,

1. All transactions which were past and closed, (for no useful purpose could be served by re-opening them);

2. All acts and legislative measures which were in accordance with, or could have been made under, the abrogated Constitution or previous legal orders;

3. All acts which tended to advance or promote the good of the people; and

4. All acts required to be done for the ordinary orderly running of the state and all such measures as would establish or lead to the establishment of the objectives mentioned in the Objectives Resolution of 1949.

The judgment in Asma Jilani'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 overthrow of the usurper. The real test of independence of the Supreme Court would have been if the judgment had been made while Yahya was still in power. However, Asma Jilani's case was an important milestone in the judicial history of Pakistan.

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NOTES

1. Khan, Lt.-Gen. GuI Hasan, *Memoirs,* 1993, Oxford University Press, Karachi, pp. 339-40. He describes the meetings of army officers which the COS General Hamid addressed on 19 December. He was continuously interrupted by a near-rebellious audience. Once or twice, the COS left the stage and went out to collect himself, and then resumed his talk. Such performance by a disciplined body of men had never been seen before, Lt.-Gen. Gul Hasan states.

2. Feldman, Herbert, *The End and the BeginningPakistan 1969-1971,* 1975. Oxford University Press, London, pp. 187-9.

3. The removal of Yahya has been described as a 'mini-coup' and the part played by Gul Hasan and Rahim Khan as king-breakers and king-makers is not easy to assess. It is noteworthy that about three months after Bhutto became President, both these men resigned and afterwards went abroad in ambassadorial appointments. Gul Hasan in his book *Memoirs* denies any direct role in inducting Bhutto as President, writes that it was Bhutto who summoned and prevailed upon him to become Commander-in-Chief of Army which he accepted subject to certain conditions. See pp. 346-50.

4. President Mirza and Bhutto had wives of Iranian origin which appears to be common ground between the two.

5. Ibid., p. 13.

6. *Dawn,* 3 January 1972.

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7. *Dawn, 4* January 1972.

8. President's Order I of 1972 PLD 1972 Cati Statutes 86.

9. Martial Law Regulation No. 115 PLD 1972 Cad Statutes 388.

Martial Law Regulation No. 118. PLD 1972 Caul Statutes 441.

11. Board of Foreign Missions of Presbyterian CM v Government of the Punjab, PLJ 1987 SC tit

12. Removal from Service (Special Provision] Regulation, 1972. Martial Law Regulation No in PLD 1972 Central Statutes 387.

13. *Dawn,* 16 January 1972.

14. *Dawn, 25* January 1972.

15. *Dawn,* 31 January 1972.

16. *Dawn, 7* February 1972 and 12 February 1972.

17. *Dawn,* 19 February 1972.

18. *Dawn, 4* March 1972. Gul Hasan writes in his book *Memoirs* that he voluntarily offered to resign because he no longer could work with Bhutto However, the resignations from him and At Marshal Rahim were presented with separate fila, in which their respective resignations had already been typed out, to sign. See pp. 367-9 *Dawn, 7* March 1972.

Dawn, 15 April 1972. PLD 1958 S.C. 533.

22. Asma Jilani v Government of the Punjab, PLD 1972 S.C. 139.

23. *Grund-norm* is a German expression which meats ’basic principle’.

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21 The Interim Constitution of 1972

The Interim Constitution that came into force on
21 April 1972 on the withdrawal of martial law, was adopted by the National Assembly that had been elected in December 1970 on an all-Pakistan basis. It is true that this was to be a Constituent Assembly and enjoyed a mandate to give a new Constitution to what remained of Pakistan after Die war in December 1971. Due to the formation of Bangladesh, this Assembly lost its efficacy and mandate and the members elected from West Pakistan could not act and form a Constituent Assembly of their own. It would have been appropriate to hold fresh elections in West Pakistan for a Constituent Assembly on the basis of the changed constitutional and political realities so that this assembly could have had a fresh mandate to give a new Constitution to the remainder of the country.

It is, indeed, strange why new elections were not called for immediately after December 1971 and why a truncated assembly was rejuvenated into lie role of a Constituent Assembly. In former East Pakistan (now Bangladesh), fresh elections were kid soon after December 1971 and a Constituent Assembly was elected under the new political circumstances. Why was this not done in Pakistan? Perhaps Bhutto, head of the majority party in the truncated National Assembly, did not wish to face elections in which his role in the East ’akistan crisis would have certainly been uestioned and he was by no means certain that us party would have been returned in the same strength in a new National Assembly. Political parties in the opposition were equally responsible for not unitedly demanding fresh dectoons. Perhaps they were not sure of themselves iferthe drubbing they had received in the general dections of December 1970 from the People’s farty. They were demoralized and thus contented tenselves with the seats they had obtained. In order to assemble the members of the Wonal Assembly elected in December 1970 from

West Pakistan and two members1 elected from the East Pakistan, on the ticket of parties other than the Awami League, Bhutto issued a presidential order, National Assembly (Short Session) Order
19722 on 23 March 1972. Under this order, the National Assembly was to be the one provided for in the Legal Framework Order, 1970. The business of the assembly was restricted to a vote of confidence in the President of Pakistan; continuance of martial law till 14 August 1972; framing of the Interim Constitution of Pakistan; and appointment of a committee of the assembly to prepare a draft of the permanent Constitution of Pakistan not later than 1 August 1972 for submission to the National Assembly. It was under this order that the remnants of the assembly elected in December 1970 (being 146 in all, 144 from West Pakistan and two from East Pakistan) were assembled in the name of the National Assembly of Pakistan with the power to adopt an Interim Constitution, to draft a permanent Constitution, and to prolong its own life. It was this assembly that adopted the Interim Constitution of Pakistan in April 1972.

SALIENT FEATURES

It has been discussed above that for detailed provisions of the Constitutions, particularly pertaining to financial procedures, the procedure for passing of bills in assemblies and the

structuring of Courts, the Government of India Act,
1935 has been used as a model. The 1956 Constitution became a working paper for future constitutional documents such as the 1962 Constitution, the Interim Constitution of 1972 and the permanent Constitution of 1973. These Constitutions have differed on basic provisions like the form of government, distribution of subjects, relations between the centre and the provinces, and other subjects. The fundamental rights and the

principles of policies, as written down in, the 1956 Constitution, were reproduced more or less in the same form and language in the 1962 Constitution, the Interim Constitution of 1972, and the 1973 Constitution. Provisions regarding Chief Election Commissioner, electoral laws, the conduct of elections, Islamic institutions like the Advisory Council of Islamic Ideology, the Islamic Research Institute, the Auditor-General of Pakistan, the Service of Pakistan, and so on, were the same as those in the 1962 Constitution. The distinguishing features of the Interim Constitution are discussed below:

The Interim Constitution provided for a presidential form of government. The President was to be the head of the state as well as the head of government. The President had to be a Muslim, at least 40 years of age, and otherwise qualified to be elected as a member of the National Assembly.3 Under the 1962 Constitution, the age requirement for the President was only 35 years.4 Under the
1956 Constitution, the minimum age for the v" President was fixed at 40 years.5 (Subsequently, in the 1973 Constitution, the minimum age for the President was fixed at 45 years.6) Although the minimum age of 40 appears to be appropriate for the office of President, yet it could not be fortyfive under the 1972 Interim Constitution because Bhutto was 44 years of age at that time. He turned
45 when the Constitution of 1973 was enacted. The President's term of office was fixed at five years. The Constitution was silent about the mode of election to the office of the President. However, in the case of a vacancy in the office of the President, the successor was to be elected by the National Assembly in the manner provided under the third schedule to the Interim Constitution. Thus, the person elected as President by the National Assembly under the National Assembly (Short Session) Order 1972 was deemed to be the President of Pakistan under the Interim Constitution7

To avoid controversy, it was clarified that the President was the Supreme Commander of the Defence Services of Pakistan and had the authority to appoint Chiefs of Staff of the three Armed Forces namely, the Army, the Navy, and the Air Force.8 The President also had the legislative

power to make and promulgate ordinances *ha the National Assembly was not in session or U been dissolved.9

The Interim Constitution provided for the office of a Vice-President with the same qualifications as for the President. The Vice-President was to IK elected by the National Assembly according to tie procedure provided under the'third schedule "His term of office was fixed at five years He was to act as President in the absence of the President and, in the event of the death of the President, he was to take over his functions until a new President was elected and had entered office." The VicePresident was a member of the President's council of ministers though he took precedence over other members.12 Otherwise, his functions were such as might be assigned to him by the President from time to time.13 The Office of Vice-President finds mention only in the Interim Constitution of 1972 All other constitutions, including the later one of

1973, did not provide for this office.

The Interim Constitution provided for a unicameral legislature, that is, one House consisting of the National Assembly as the federal legislature. The National Assembly had the power to legislate on all subjects mentioned in the Federal and Concurrent Legislative lists given under the fourth schedule. The National Assembly could also legislate for a province on the subjects enumerated in the Provincial Legislative List during the Proclamation of Emergency by the President.14 The President could withold assent from any Bill passed by the National Assembly and could return it for reconsideration with his recommendations for amendments. The National Assembly, after reconsideration, could pass the Bill once again without any amendment and the President was bound to give his assent, provided the number of members voting for such a Bill, on reconsideration was not less than seventy-five15 which meant an absolute majority of the assembly at that time. The procedure for financial matters was the same as provided under the previous Constitutions.

The President was the head of government and he worked with the aid and advice of a council of ministers.16 A minister had to be a member of the National Assembly and if he ceased to be so for a period of twelve consecutive months, then he

ceased to be a minister.17

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ceased to be a minister.17 It was in this manner that certain aspects of the parliamentary form of government were included in the interim constitution. All orders and other instruments made and executed in the name of the President had to be authenticated in the matter provided by him.18 The parliamentary form of government was introduced under the Interim Constitution at the provincial level. Governors were appointees of the President and served at his pleasure.19 The executive authority in a province was to be exercised by the Governor, either directly or through officers subordinate to him.20 For the administration of provincial affairs, there was to be a council of ministers, headed by the Chief Minister, to aid and advise the governor in the exercise of his functions.21 The Governor was to appoint as chief minister a person who commanded the confidence of the majority of the total members of the Provincial Assembly. The council of ministers was collectively responsible to the Provincial Assembly and the ministers could be appointed and removed from office by the Governor on the advice of the Chief Minister.22 The Chief Minister held office during the pleasure of the Governor who could not remove him until he was satisfied that the Chief Minister did not command the majority of the total number of the members of the Provincial Assembly, to ascertain which, the Governor could ask the Chief Minister to obtain a vote of confidence from the Provincial Assembly.23 The Chief Minister could be removed by a vote of no confidence in the Provincial Assembly but it was required that in the motion tor a vote of no confidence, the name of another member of the Provincial Assembly had to be given as his successor so that when such a motion was passed, the Governor had to ask the successor named in the motion to take over as the Chief Minister.24

The provincial legislatures were also imicameral. The Provincial Assemblies, required to be summoned under the Provincial Assemblies (Summons and Powers) Order, 1972,25 were to be the first under the Interim Constitution. The President's order had already defined the Provincial Assemblies as provided for in the Legal Framework Order, 1970. These assemblies were

to meet on 21 April 1972. In this way, the Provincial Assemblies elected in December 1970 became the Provincial Assemblies under the interim constitution. This was the key to the compromise between the government and the opposition. The opposition had the majority in two Provincial Assemblies, those of NWFP and Balochistan, and was to be given power in these two provinces. In exchange, the opposition was not to demand fresh polls for the Constituent Assembly.

The Provincial Assembly had the power to make laws on subjects enumerated in the 'Provincial Legislative List' and the 'Concurrent Legislative List' under the fourth schedule. However, in case of repugnancy between a federal law and a provincial law on the same subject included in the 'Concurrent Legislative List', the federal law was to prevail.26 The provisions regarding assent of the Governor to the Bills passed by the Provincial Assembly were similar to those applicable to the Bills passed by the National Assembly.

Administrative relations between the centre and the provinces were regulated by provisions similar to those of the 1962 Constitution. A National Economic Council was to be constituted to review the overall economic position of Pakistan and formulate policies for its economic development.27 The President could appoint a commission to resolve a dispute over the

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distribution of water supplies between the provinces.28 He could also establish a council for inter-provincial coordination for resolving disputes between the federation and a province or between the provinces, to discuss subjects of common interest, and to make recommendations for the better coordination and uniformity of policy.29

The provisions regarding the judicature in the Interim Constitution were similar to the Constitution of 1962, except that all provisions regarding the Supreme Court and the High Courts were given together under one part of the Constitution. New provisions relating to the judicature in the Interim Constitution, as distinguished from the 1962 Constitution, were: i. the permanent seat of the Supreme Court was to be in Islamabad;

ii. a common High Court for Sindh and

Balochistan was to be established under the

Constitution; in. the minimum age for a judge of a High

Court was fixed at 40 years for the first

time; and

iv. the age of retirement for a judge of a High Court was raised from 60 to 62 years.

All other provisions relating to the judicature including those of the Supreme Judicial Council were the same as provided under the 1962 Constitution.

All existing laws were continued in force with necessary adaptations. All martial law regulations and martial law orders, except those specified in the seventh schedule, stood repealed with effect from the commencing day of the Interim Constitution.30 The specified martial law regulations and martial law orders were deemed to have become Acts of the appropriate legislature and with the necessary adaptations, had effect as such.31 All proclamations, President's orders, martial law regulations, martial law orders, and all other laws made as from the 25 March 1969, were declared valid notwithstanding any judgment of any court and were not called in question in any court. All orders made, proceedings taken, and acts done by any authority or persons under any of the above mentioned laws were deemed to have been validly made, taken, or done and no suit or other legal proceedings would lie in any court against any such authority or person.32

These provisions were challenged before the courts and the courts determined the parameters of the validation clause which are discussed later in this chapter.

THE SIMLA AGREEMENT

The opening of peace negotiations between India and Pakistan was delayed for some months partly because of difficulties arising from Pakistan's refusal to recognize Bangladesh and partly because the leaders of both countries made a number of visits to foreign countries in the first half of 1972 to obtain support for their respective positions.

Talks were held in the hill station Murree, neu Rawalpindi, from 26 to 29 April 1972, attended b) special emissaries from India and Pakistan, and i joint statement issued on 30 April said that they had settled the modalities for a meeting between Bhutto and Mrs Gandhi towards the end of Mayor the beginning of June.

The summit conference between Bhutto and Mrs Gandhi opened on 28 June 1972, in Simla. which was selected in preference to New Delhi because of a heatwave in the Indian capital. In the absence of an agreement (the main stumbling block being Kashmir) the talks, which had been due to end on 1 July were extended for another day. An agreement was finally arrived at on 2 July and was signed shortly after midnight.

The agreement contained the elements of earlier Indian drafts, but the wording was considerably modified to make it acceptable to Pakistan. In particular, the clause referring to the ceasefire line in Kashmir was rephrased to read: 'The line of control resulting from the cease-fire of 17 December 1971, shall be respected by both sides without prejudice to the recognized position of either side.'

The effect of the clauses of the Agreement

relating to the withdrawal of forces and the

ceasefire line in Kashmir was that Indian troops

would be withdrawn from 5139 square miles of

Pakistani territory in the Punjab and Sindh

occupied during the war, and Pakistani troops from

69 square miles of Indian territory in the Punjab

and Rajasthan. In Kashmir, India would retain 480

square miles of territory west and north of the

former ceasefire line in the Poonch, Tithwal, and

Kargil sectors, and Pakistan 52 square miles east

of the line in the Chhamb sector.

Following the ratification by Pakistan on 15 July and by India on 3 August, the agreement came into effect on 4 August 1972.

THE ZIAUR RAHMAN CASE

Soon after taking over power, Bhutto came down heavily on political opponents and the editors and journalists who wrote against him. Muhammad Mukhtar Rana, a member of the National assembly

from Faisalabad, who belonged

Party, fell out with Bhutto
assumption of power. He wa
criminal offences under martial 1
February 1972 and sent for trial
military court. Altaf Husain Qu
his brother Dr Ijaz Husain Qm
publisher of the monthly *Urdu L*
ur-Rahman Shami, editor of the
were arrested and detained ur
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their detention and subsequent <
writ petitions were allowed by a
Lahore High Court on 6 July 19'
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i RAHMAN CASE

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THE INTERIM CONSTITUTION OF 1972

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•lira Faisalabad, who belonged to the People’s rty, fell out with Bhutto soon after his assumption of power. He was charged with cnminal offences under martial law regulations in February 1972 and sent for trial before a special ’itary court. Altaf Husain Qureshi, editor, and 3 brother Dr Ijaz Husain Qureshi, printer and publisher of the monthly *Urdu Digest* and Mujibur-Rahman Shami, editor of the weekly *Zindagi* were arrested and detained under martial law regulations in April 1972 for writing against Bhutto and his policies. Similarly, Husain Naqi and Muzaffar Qadir, editor/publisher and the printer of the weekly *Punjab Punch* respectively,

were also arrested and detained under martial law regulations. All these men, were sentenced to various terms of imprisonment by special military courts under various martial law regulations. However, writ petitions filed by them or by their friends or relatives before the Lahore High Court challenged their detention and subsequent conviction. These writ petitions were allowed by a Full Bench of the Lahore High Court on 6 July 1972.

The judgment of the Lahore High Court in these cases was challenged by the government before the Supreme Court in various appeals which were all heard together and decided on 8 January 1973,33 It was argued by the Attorney-General on behalf of the government that the judiciary could, in no way.be concerned with the question of policy, nor could it exercise the power to strike down any provision of the Constitution on the basis of any other document, however important or sanctified it may be.34 The Constitution, he urged, being a fundamental and supreme organic law of the country from which all functionaries of the State derived their existence and powers, its substantive provisions could not be controlled by its preamble or even the Objectives Resolution. He argued that the position of the Objectives Resolution in a system in which a Constitution had been subsequently framed, was no more than what it described itself to be, namely, an enunciation or declaration of the goals sought to be attained by the people, an expression of their aspirations and the ideal sought to be achieved. Its position was no better than that of a preamble to a statute and that it could serve no higher purpose. He urged

that the Constitution once framed and adopted had become the organic law of the state and there was no power or authority that could exist outside the Constitution. The judiciary, like other organs of the state, was a creature of the Constitution and had to submit, like all other organs of the state, to the limitations placed upon its jurisdiction.

The Supreme Court accepted this contention and held that it never claimed to be above the Constitution or had the power to strike down any provision of the Constitution. The Court accepted its position that it derived its powers and jurisdiction from the Constitution and that it had to confine itself within the set limits by which it had taken oath to protect and preserve. It had, however, the right to interpret the Constitution and could declare any legislation as unconstitutional and void. This power did not mean that judicial power was superior in degree or dignity to legislative power but that the Constitution itself had vested it with this power. It was held that the judiciary could not claim to declare any provision of the Constitution as *ultra vires* or void under its power of interpretation.

The Supreme Court repelled the contention that it had already declared the Objectives Resolution as *'grund norm'* for Pakistan in Asma Jilani's case35 and in this way held that it stood above even the Interim Constitution or any Constitution that might be framed in the future. The Court observed that it did not say that the Objectives Resolution was the *'grund norm'* but that the *grund norm* being the doctrine of legal sovereignty accepted by the people of Pakistan, consequences would flow from it.

It was also argued before the High Court and the Supreme Court that the Interim Constitution itself was not a valid document because it had not been framed by a competent body as the majority of its members, 160 out of 300 elected from East Pakistan, had not participated in its proceedings. It was also contended that in view of the judgment in Asma Jilani's case, the 1962

Constitution still held the field. These contentions were considered untenable. It was held that the National Assembly had the framing of the Constitution as its first purpose and it had performed its first function in accordance with the mandate given to it by the

people. It was not for the courts to question the mandate of the people. The court held that the National Assembly was validly constituted and that it had ratified the Interim Constitution and the assumption of power by the President.

The Supreme Court also considered the effect of the Validation Clause under the Interim Constitution as laid down in Articles 280 and 281. The government had taken the position that these Articles of the Constitution had ousted the jurisdiction of the courts and they could not look into the orders made and proceedings taken that had been validated under those Articles of the Interim Constitution. The Court did not accept this blanket interpretation sought to be put on these provisions by the government and held that the validity given by clause (2) of Article 281 of the Interim Constitution to acts done or purported to be done in exercise of the powers given by martial law regulations and orders had since been repealed or that even in the purported exercise of those powers, their provisions did not have the effect of validating acts done *coram non judice* or without jurisdiction or malafide.

The State v Ziaur Rahman case brought rationalized some of the findings and observations made by the Supreme Court in Asma Jilani's case thus bringing the law within the limitations of the recognized legal and constitutional confines. The judgment put in place the role and the constitutional position of the Objectives Resolution and upheld the Interim Constitution, thus saving the country from constitutional anarchy. It also placed a progressive construction on the Validation Clause thus opening the way for the courts to examine and review those orders and proceedings which were malafide, *coram non judice,* or without jurisdiction and thus widened the scope of the judicial review.

DISMISSAL OF THE PROVINCIAL GOVERNMENT IN BALOCHISTAN AND RESIGNATION OF THE PROVINCIAL GOVERNMENT IN **NWFP**

It has been mentioned above that Bhutto reached an accord with the NAP-JUI leaders in February

1972 under which he agreed to appoint nominees, Arbab Sikandar Khahl and Gluij Bakhsh Bizenjo, as Governors of NWFP di Balochistan respectively. The accord also allowal NAP-JUI governments to be formed in tkprovinces. In return, NAP-JUI agreed not or the continuation of martial law until 14 AOL
1972 but also to vote in favour of a motion e confidence in Bhutto as President when then* came up in the National Assembly, and agreed n to oppose the central government's emerges powers.

This three-party agreement, as it was called, n into trouble within days of its conclusion. It see* that Wali Khan and his colleagues in the NAP developed serious misgivings about tit continuance of Martial Law when Bhutto removed hundreds of public officials without giving then access to courts. Martial law had been used to restrict fundamental rights, judicial authority, and the due process of law. In so far as many of tie dismissed civil servants belonged to the provincial governments, Bhutto's move could also be construed as an invasion of provincial authonty In view of these considerations, Wall Khan announced that his party would not vote for

tie continuance of martial law in the National Assembly and that the NAP-JUI government would review the cases of provincial civil servants removed under martial law regulation 11436

Wali Khan's change of stance, however wellintentioned, amounted to a violation of the threeparty agreement. Bhutto treated it accordingly and withheld the appointment of the NAP nominees as Governors of NWFP and Balochistan. Following an exchange of letters between him and Wall Khan in which suitable explanations were provided Bhutto and his colleagues went to Peshawar to confer with the NAP-JUI leaders on 8 Apnl 1972. After a morning session, with the understanding that they would meet again in the evening, Bhutto went to have lunch with Abdul Qayyum Khan and accepted his offer of an alliance as a result of which his party, the Qayyum Muslim League (QML), agreed to support the PPP in the National Assembly and the NWFP Assembly and, in return, Bhutto agreed to take Qayyum Khan as minister for interior in his Cabinet.37 Bhutto's meeting with the NAP-JUI leaders in the evening failed to

resolve their disagreement 1 already decided to withdraw National Assembly sessio announced this and, in r< assembly's approval of a pro md a unanimous vote of government. On 28 April 197 assumed office as Govern Balochistan and, on 1 May tl ments were sworn in.38

The NAP-JUI leaders s democratic values. They stability, tranquility, respect and the rule of law. They saic citizens equally well and harmony between the provin governments. Mufti Mahmc Minister of NWFP, appeale remain within the bounds of landlords to stop ejecting te asked the latter to pay the lam crop. The NAP-JUI go^ investment in their provi prospective investors that th< be fully protected. Ataullah Minister of Balochistan, told i his colleagues were working make his province a 'shinin government'. None of the NA held high public office befo upon their new careers ' enthusiasm but they were not for long.

Bhutto encouraged rival

NWFP and Balochistan to d

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the Qayyum Muslim League support the PPP in the National NWFP Assembly and, in return, take Qayyum Khan as minister Cabinet.37 Bhutto’s meeting with ders in the evening failed to

resolve their disagreement but it seems he had already decided to withdraw martial law. At the National Assembly session on 14 April, he announced this and, in return, received the assembly’s approval of a provisional Constitution and a unanimous vote of confidence in his government. On 28 April 1972, the NAP nominees assumed office as Governors in NWFP and Balochistan and, on 1 May the NAP-JUI governments were sworn in.38

The NAP-JUI leaders spoke of traditional democratic values. They were interested in stability, tranquility, respect for individual rights, and the rule of law. They said they would treat all citizens equally well and work for complete harmony between the provincial and the central governments. Mufti Mahmood, the new Chief Minister of NWFP, appealed to all citizens to remain within the bounds of law. He called upon landlords to stop ejecting tenants forthwith and asked the latter to pay the landlord his share of the crop. The NAP-JUI governments invited investment in their provinces and assured prospective investors that their properties would be fully protected. Ataullah Mengal, the Chief Minister of Balochistan, told newsmen that he and his colleagues were working ’day and night’ to make his province a ’shining example of good government’. None of the NAP or JUI leaders had held high public office before. They embarked upon their new careers with considerable enthusiasm but they were not allowed to continue for long.

Bhutto encouraged rival political forces in NWFP and Balochistan to disrupt the NAP-JUI

governments. He did not really need Qayyum Khan's support but took him as his Interior Minister probably because the latter had been a foe of the NAP leaders for twenty-five years and could be relied upon to use the resources of his office to harass the NAP-JUI governments. Hayat Mohammad Khan Sherpao, minister for water and power in the central government, became the leader of the opposition in the NWFP Assembly. As a central minister, he could deny the province fands and co-operation and, as leader of the opposition in the Provincial Assembly, he could denounce the NAP-JUI government for its failure

or tardiness in solving the people's problems.39 Militant socialists in the PPP camp were eager to create class conflict in NWFP and Balochistan and thus worked in aid of Qayyum Khan's mission to destabilize the NAP-JUI governments.

Within weeks of his return from Simla, Bhutto began accusing the NAP-JUI government in NWFP of seeking a confrontation with the central government. Qayyum Khan and other central ministers branded the NAP leaders as traitors, foreign agents, puppets of capitalists and industrialists, and exploiters of the Pakistani workers and peasants. Meraj Muhammad Khan urged the peasants in NWFP to spill the landlord's blood and seize his lands. In some instances federal ministers harboured individuals against whom the provincial governments in NWFP and Balochistan had issued warrants of arrest. At the same time, they condemned the NAP-JUI governments for failing to maintain public order.40

Some disruption of the public order also took place in Balochistan. First, the new NAP-JUI government resolved to return to the provinces of their origin several thousand non-Balochi public servants to make room for the local aspirants. The Bhutto regime denounced this plan as narrow parochialism that would set one Pakistani group against the other. Later, in 1972, Marri tribesmen raided Punjabi settlements in the Pat Feeder area and killed several men. The Balochistan Students Organization (BSO), an affiliate of the NAP at that time, kidnapped federal railway officials in Quetta and interfered with the movement of trains. Bhutto and his colleagues alleged that the Balochi NAP leaders, notably the Mengal and Marri *sardars,* opposed the central government's efforts to bring modernization to the province, roads, electricity, schools, clinics, irrigation, industry, rule of law, and impersonal administration, because they wanted to hold their tribesmen as serfs.41

In December 1972, the NAP-JUI government arrested the leaders of the Jamote tribe in Lasbela. The Jamotes, who had long been rivals of the Mengals, responded with an uprising. Pleading insufficiency of regular police forces in the province, Ataullah Mengal, the Chief Minister, raised a private force, *Ioshkar,* supplied it from government armouries, and despatched it to subdue

the Jamotes. In the central government's version, this *lashkar* killed 42 Jamotes, besieged 8000 of them in the adjoining hills, and proceeded to starve them by cutting off their supplies. On 31 January
1973, the central government called upon Mengal to halt his operation and, on 9 February it ordered federal troops into Lasbela to disarm his *lashkar* and to relieve the Jamotes. Governor Bizenjo and Chief Minister Mengal opposed the use of federal troops in their province and, on the night of
14 February, Bhutto dismissed them.42 The NAP-JUI government in NWFP resigned in protest. A few months later, on 16 August, the central government arrested Ghaus Bakhsh Bizenjo, Ataullah Mengal, and Khair Bakhsh Marri and sent them to jail. These events brought on a mini civil war in Balochistan which went on for more than four years and resulted in thousands of casualties.43

The NAP leaders disputed the central government's version. They claimed that they were patriotic Pakistanis and that they were wholly committed to the nation's territorial integrity. They disowned Sher Muhammad Marri and repudiated the suggestion that the arms found in the Iraqi embassy were destined for them. They pointed out that the BSO kidnappers and the Marri invaders of Punjabi villages had been arrested and jailed. They said that eight Jamotes, not forty-two, had been killed, and that no one had been besieged or starved. Above all, they charged that the Bhutto regime had engineered the Jamote rebellion and other acts of violence in the province to destabilize the NAP-JUI government. Khair Bakhsh Marri told a newsman in May 1973 that Bhutto wished to coerce the NAP leaders into obeying his 'commands', despite the fact that their coalition, and not his party, enjoyed majority support in the provincial legislature. He had sent the army into Balochistan to wipe out the support base of the unyielding Mengal and Marri tribal leaders.44

In November 1972, the NAP-JUI government issued a series of ordinances enabling it to cancel the leaseholders' mining concessions, and to operate the mines through a government agency or a public corporation. The ordinances, if j - - .

r ^ turporation. The ordinances, if

implemented, would have ruined the Zehris. On
4 December 1972, the government arrested Nabi

Bakhsh's son-in-law, Zafar Iqbal Zehri, on tk charge of killing a worker. The Zehris, thereupon joined forces with Bhutto in his developing conflict with the NAP leaders. They also sought Qayyrn Khan's protection. The NAP leaders later charged that the Zehris and their allies, the Zarakzais, U instigated and funded the afore mentioned Jamole uprising in Lasbela.45

Nawab Akbar Bugti did not belong to the NAP j but had supported its election campaign in 1970. He believed that, in proper gratitude for his earlier j assistance, the NAP leaders should have consulted him before making a settlement with Bhutto Instead, they drove a wedge between him and his younger brother, Ahmad Nawaz, by appointing him minister for finance and mineral

resources in their government. Nabi Bakhsh Zehri, whose daughter was married to Akbar's son, Salim, also visited the nawab in London. His plea, and Bhutto's reassurances, persuaded Bugti to return to Pakistan.46 He supported Bhutto allegations against the NAP leaders. He claimed that he, too, had been a party to their secessionist conspiracy but that he had learned better and abandoned it Thus, he strengthened Bhutto's case for dismissing the NAP-JUI government. In return, Bhutto appointed him to succeed Bizenjo as Governor of Balochistan.47 Bhutto stated that he knew Bugti and the NAP leaders had been 'birds of the same feather', that they had become opponents for tribal reasons and that he had taken advantage of their recent rivalry.48

Even after the formation of the NAP-JL1 government in the NWFP, Pakhtoon grievances relating to the pre-empting of all the lucrative sources of revenue by the central government and its alleged unwillingness to make amends for this through generous allocation of central revenues to the province continued. Regional disparities were further heightened by the way the central government had allowed industrialists to exploit the resources of Balochistan and the NWFP for the benefit of Punjab and Sindh.

The smaller provinces had certain legitimate grievances that were likely to be further accentuated by the fact that after February 1973, these provinces were no longer functioning under their own popularly elected governments.49

THE LANGUAGE Ci

When the PPP establishec Sindh headed by Mumtaz Bhutto's, the proponents of S to advance their case armec that a Sindhi prime ministei centre. In March 1972, a thousand men marched to the in Karachi demanding that S one of the national languages
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THE INTERIM *CONSTITUTION OF 1972*

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THE LANGIL4CJE *CRISIS uv Snvorr*

men the PPP established its goveraement in Swdh headed by Mumtaz Bhutto, a cousin of Bhutto’s, the proponents of Sindhi language moved to advance their case armed with the confidence that a Sindhi prime minister was in power at the centre. In March 1972, a procession of two thousand men marched to the Governor’s mansion in Karachi demanding that Sindhi be accepted as one of the national languages of Pakistan and that
90 per cent of the radio and television programmes broadcast in the province be in that language. Rasool Bakhsh Talpur, the Governor, assured the group that Sindhi would soon be declared the official language of the province50 even though the *muhajirs* were bound to resent this decision.

In a speech in Sanghar on 31 March, Bhutto

urged a ’logical and reasonable’ settlement. He

declared that the question of national language

would be decided by the National Assembly. He

deprecated the banning of Urdu newspapers and

assured the *muhajirs* that they were entitled to

equal rights and opportunities as citizens of

Pakistan. He asked the *muhajirs* to treat Sindh,

where they had been living for the last twenty-five years, as their homeland and to learn to live with Sindhis in a spirit of brotherly accommodation, but, at the same time, he regretted that there were places in Sindh where *muhajirs* had become the majority and had reduced the local population to a minority. He warned that the natives of Sindh must not be made to accept the fate that had befallen the ’Red Indians’ in America and that history had not forgiven America for doing that.51 This comparison encouraged the protagonists of Sindhi language to stand firm, and Mumtaz Bhutto, the Chief Minister of Sindh, declared that a Bill designating Sindhi as the official language would soon be moved in the assembly. By June, official forms were being printed in English and Sindhi but not in Urdu, and meetings in the government secretariat were conducted in Sindhi.52 Students at the Liaquat Medical College and Sindh University in Jamshoro harassed the *muhajir* members of faculty and, in some cases, assaulted them, invaded their homes and took their property. *Muhajir* students at a polytechnic institute treated the Sindhi

As the summer *of 1972* approached, the trend towards violence increased. In Bhutto's hometown, Larkana, young men armed with sticks, knives, and axes ordered shopkeepers to remove their Urdu nameplates, signboards, posters, and calendars. In other towns, *muhajir* stores and Urdu newspaper establishments were attacked. Bhutto condemned this behaviour as gangsterism and said it would be suppressed. He pleaded that the struggle in Pakistan must be one between the oppressor and the oppressed and not between the provinces and their cultures. *Muhajirs* and Sindhis were all Pakistanis, and they must all have justice. Turning then to the *muhajirs,* he told them that it would be the height of injustice if the Sindhis were reduced to the status of a minority in their own province.54

The central committee of the PPP counselled restraint to the provincial government but Mumtaz Bhutto, professing readiness to lay down his life rather than betray Sindhi interests, announced that a Language Bill would be presented to the Provincial Assembly on 7 July. Copies of the proposed bill were distributed to members on the morning of 5 July. The *muhajir* group submitted amendments later the same day, but it also called for a general strike in the province on 7 July to demonstrate its opposition to the Bill. As the assembly met for discussion on the Bill, the speaker disallowed the amendments. As the Speaker disallowed the amendments, the members of the assembly demanding Urdu as an official language along with Sindhi tore the Bill into bits, walked out and abstained from the rest of the proceedings while the Bill was put through the process of clause-wise reading and voting. Out of the eighteen members of the opposition, eleven walked out of the House, while seven (Sindhi speaking) voted for the Bill. Two members from the PPP, who were Urdu speaking, also joined the walk-out. A member, Haji Zahid Ali, proposed to refer the language issue to Bhutto for arbitration. His proposal was shot down by the Law Minister, Syed Qaim Ali Shah. In all, fifty members of the House (including seven from the opposition) passed the Bill.55

The Bill and its passage resulted in widepread agitation and protests in Karachi and other urban centres of Sindh. The agitation took on a violent turn and curfew had to be imposed in certain areas of Karachi like Liaqatabad, Nazimabad, and Pak Colony. Curfew was also imposed in Hyderabad, Tando Jam, Hala, and other urban centres in Sindh.56 Over the next few days of agitation, *muhajirs*, Sindhis, Jiye Sindh and Sindhu Desh militants, plain gangsters, and the police battled one another, burnt standing crops, plundered and destroyed homes and stores, stole cattle, and killed a large number of people.57

In a radio speech on *7* July Bhutto told the nation that he had instructed the Governor of Sindh to postpone the signing of the Bill that the assembly had passed. At the same time, he invited the two groups to talks in Rawalpindi, the *muhajir and Sindhi* delegations. After a preliminary meeting on 10 July at which the two sides set forth their respective positions, Bhutto appointed a committee to consult with the two delegations. The two delegations submitted their demands, and their accusations against each other, to the committee the next day. The *muhajir* delegation asked that:58
1 . Urdu and Sindhi, both be named the official

languages of Sindh;
2. Either the Governor or the Chief kaif ”<• «*~ - ”~ ” *”

(with the result that the more competitivt *muhajirs* may obtain jobs reserved for tie native Sindhis);
8. The city government of Karachi *be* given additional powers and functions, mad< autonomous, and placed under an etei mayor.

The old Sindhi’s demands, equally extravagar were as follows:59

1. Sindhi should not only be the officia language of Sindh but one of the natiom languages of Pakistan;

2. Sindhi inscriptions should appear on currency notes and coins, office buildings and street signs;

3. The peoples of the four provinces of Pakistan should be recognized as four nations living in a confederation;

4. A militia consisting only of the old Sindlus should be raised and maintained in tie province;

5. All secretaries to the government, deputy

secretaries, department heads, CO/MIS-

sioners, deputy commissioners, superintendents, and deputy *superintendents d* ^

police in the province should^’

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3f the Indus waters should be e level agreed to in an interpact in 1945; rom Bangladesh should be

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14 July, Pirzada proposed to •r sign the Bill that the Sindh and, at the same time, issue ating such *muhajir* demands : appropriate. The *muhajir* >n the acceptance of Urdu as long with Sindhi, and when

Dr IH Qureshi warned that the *muhajir* community would react most unfavourably to the exclusion of Urdu, Pirzada responded that his government was not without experience in handling strong reactions. He added that the old Sindhis, too, were ready to take on the *muhajirs.60*

On 15 July, student leaders affiliated with the Jamaat-i-Islami, organized a large procession and public meeting in Lahore to voice support for Urdu. There were signs of mounting resentment in other towns of the Punjab against the happenings in Sindh. Not only were the Punjabis strongly proUrdu, they were greatly disturbed by the news of attacks on Punjabi settlers, in interior Sindh. The Punjab was the bastion of the PPP's strength, and it was well understood that the party could ill afford to lose ground there. Malik Meraj Khalid, the Punjab Chief Minister, emphasized these considerations to his colleagues on the government team and pressed for some meaningful concession to the *muhajir* group.61

The government then softened its position and an agreement was reached. It provided that Sindhi would become the official language of Sindh, that Urdu would be honoured and promoted as the national language, and that for a period of twelve years no one would be disadvantaged in public employment or transactions on the ground that he did not know Sindhi. Bhutto called upon the Sindh government to take a lenient view of those detained during the language riots. He promised to compensate those who suffered during the disturbances.62

The struggle between the old and the new Sindhis was not a struggle between right and wrong. It was a contest between two sets of claims neither of which could be dismissed as unworthy. It was a contest between two rights, the kind that is often the most difficult to resolve.

It cannot be denied that the crisis in the growing estrangement between the ethnic communities living in Sindh, far from being resolved, was aggravated. It remained suppressed for a time but, fourteen years later, it would reappear with an incredible ferocity. Meanwhile, Bhutto and the PPP earned the *muhajirs'* abiding hostility. This explains the continuing crises between *muhajirs* and Sindhis throughout the province of Sindh, particularly after *muhajirs* formed a semi-militant

organization named the Muhajir Qaumi Movement (MQM) which has swept all polls in Karachi and Hyderabad, the stronghold of *muhajirs,* since the general elections of 1988.

BHUTTO'S REPRESSION OF OPPOSITION POLITICIANS

With the passage of time, Bhutto became more intolerant and the PPP regime became increasingly violent and repressive. Meetings of opposition politicians were broken up by hoodlums hired by the party in power. Asghar Khan, who was hounded the most, made a statement that the PPP government was a fascist regime. A large number of opponents in the political parties, amongst journalists, student leaders, and labour leaders were arrested and detained.

The public meeting organized and held by United Democratic Front (UDF) at the Liaquat Bagh, Rawalpindi, on 23 March 1973, was fired upon by the PPP operatives. At least nine people were killed in heavy firing and seventy-five were taken to hospital with serious injuries. Thirteen buses were also burnt.63 Most of the people who were killed belonged to the NAP from NWFP. It goes to the credit of Wali Khan that he did not make it a provincial or parochial issue. There was extreme tension in the air in Peshawar and in other places of NWFP amongst the Pakhtoons, particularly against the Punjabis, when the dead bodies were brought to Peshawar and the other cities of NWFP. Wali Khan went to all lengths to assuage the feelings of the people of the province by saying that it was not the work of the Punjabis but that of Bhutto and his political party. Anybody who harboured suspicions about the loyalty of Wali Khan to Pakistan should have rested his doubts after this incident. Nevertheless, this brutal and violent incident at the hands of PPP has always remained a blot on its name. It could have caused a civil war with all kinds of dangerous possibilities.

The opposition leaders, for their part, were no models of civility. They attempted to destabilize Bhutto's government by making accusations calculated to bring him into public contempt and hatred. There are a number of examples of their denunciations of Bhutto. Asghar Khan alleged that

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The Interim Constitution had vested powers in the President to make by order such provisions as appeared to him necessary or expedient to bring the Constitution into effective operation for meeting difficulties and for making omissions from, additions to, modification of, and amendments in the Constitution.65 This power could not be exercised after 31 March 1973. It was quite extraordinary to give the President the power to amend the Constitution. There was no provision otherwise for amendments. Perhaps the idea was that the Interim Constitution would not last for more than a year, therefore, instead of providing for an elaborate procedure to make these amendments, the President was empowered to make appropriate amendments in this interim period. Besides, the power was to come to an end within one year of the Interim Constitution becoming operational after which no amendments could be made, thus making it imperative to enact a permanent Constitution.

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N-MAKING: DIFFICULTIES

verthrow of Ayub and the to had imposed, a national :d in favour of a parliamentary

system of government, universal adult franchise, and direct elections to the central and provincial legislatures. Politicians in West Pakistan had come to recognize that the next Constitution would have to allow substantial autonomy to the provinces in a federal union. Determining the place of Islam in the Constitution had been a vexing issue since the founding of the state in 1947. The Islamist parties, and others friendly to their persuasion, had been insisting that since Pakistan was established in the name of Islam it could be preserved only if it became an Islamic state. Provincial autonomy, the role of Islam, and the enlargement of democratic principles were thus major issues the National Assembly had to address in framing a new Constitution.69

Bhutto had pledged to restore democracy but he now felt that the government should be able to restrain, even suppress, its opponents. He was a Muslim but he had no desire to allow the *ulema* an interventionist, much less directing, role in the affairs of state. He would, if he could, leave it to individuals to practise Islam according to their own convictions, schism, or school of jurisprudence. He had written against a strong centre and advocated provincial autonomy when he did not hold office. Now that he was head of the central government, he would rather enlarge than diminish its domain.

The more notable of the opposition groups in ilie National Assembly were the two Muslim League factions, the three Islamist parties, and the National Awami Party (NAP). The Muslim League had always favoured a reasonably strong central government and had been content with symbolic concessions to Islamic sentiment. The Islamic parties had lived on their advocacy of an Islamic state but they looked to an energetic central government to implement their goal. The NAP had been urging decentralization and provincial autonomy since the mid-1950s and it was secular in its outlook. These differences of orientation and emphasis within the opposition provided Bhutto ks opportunity to gain approval for a Constitution tot answered his needs and preferences to a considerable extent.

Bhutto's own party would follow his lead and so would others who had joined his camp. They we numerous enough, 110 in a house of 146 at

that time, to pass a Constitution with an impressive majority, but Bhutto wanted wider support. In his controversy with Mujib in early 1971, he had argued that a Constitution should be acceptable to all provinces and that it should not be imposed upon the country by the 'brute' majority in one of them. Others could make the same argument now. The PPP had lost the 1970 election in the NWFP and in Balochistan, the two provinces where the movement for provincial autonomy had been strong. A Constitution rejected by them would then not be satisfactory.

On 17 April 1972, Bhutto appointed a committee of twenty-five members of the National Assembly, including six from the opposition, to prepare a draft Constitution. After a few meetings during which the main directions to be taken were settled, the committee asked its chairman, Mahmood Ali Kasuri, to present a draft for discussion. In the meantime, some differences were brewing within the PPP on constitutional issues. Bhutto reiterated that he wanted a parliamentary system for the country not necessarily of the Westminster type but suited to Pakistan's peculiar conditions and in accord once with the people's aspirations.70 There were speculations in the press that Bhutto wanted the French system which had become predominantly presidential in 1958 on the adoption of the Constitution of the Fifth Republic. Under this system the president is all powerful particularly in matters of defence and foreign affairs, and the prime minister is in a subordinate capacity. Mahmood Ali Kasuri, the Law Minister, had submitted his resignation on some point of difference in September 1972 which had not been initially accepted by Bhutto. Bhutto stated that the PPP was irrevocably committed to giving the country a federal parliamentary Constitution enshrining two pivotal principles, first, that the provinces would enjoy autonomy consistent with the integrity and solidarity of Pakistan and, second, that the system would be parliamentary ensuring that the executive would be responsible to the legislature. However, ultimately Kasuri resigned as Law Minister, Deputy Leader of the PPP Assembly Party, and Chairman of the Constitution Committee. He retained his seat in the National Assembly.

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Constitutional Accord

Abdul Hafeez Pirzada succeeded Kasuri as the Law Minister and Chairman of the Constitution Committee. The members of the opposition in the Constitution Committee boycotted the meetings of the Committee. Bhutto invited leaders of parliamentary parties in the National Assembly for discussions on constitutional issues on
17 October.71 After four days of hard bargaining, an accord was reached on 20 October 1972 where the following decisions were taken unanimously:72

1. There would be a federal parliamentary system of government answerable to the National Assembly.

2. All actions would be taken in the name of the President but the chief executive would be the Prime Minister. The President would act on the advice of the Prime Minister on all matters which would be binding on him in all respects.

3. The National Assembly would elect one of its members to be the Prime Minister who would be called upon by the President to form the government.

4. It would be the right of the Prime Minister to seek the dissolution of the National Assembly at any time, even during the pendency of a motion for a vote of noconfidence against him.

5. In order to ensure stability in the country, the following provisions would be incorporated in the Constitution, and they should apply *mutatis mutandis* (with due alteration of details) to the provincial legislatures:

(a) A vote of no confidence could not be moved unless by the same resolution, the name of another member of the assembly was proposed as his successor.

(b) A vote of no-confidence could not be moved during the Budget Session.

(c) Once a vote of no-confidence was defeated, a subsequent vote of noconfidence could not be moved for a period of at least six months.

(d) For a period of fifteen years, or three general elections thereafter, whichever

was longer, a vote of no-confidant could be deemed to have failed linkspassed by a majority of not less tkr two-thirds of the total membership c the National Assembly. >

6. The Prime Minister should be a member the National Assembly. Other mimsir might be from either the National Assemk or the Senate, provided that the numkh ministers from the Senate did not excct. one-fourth of the total number of th members of the Cabinet.

7. The parliament would consist of t» Houses, namely, the National Asser (the Lower House) and the Senate i Upper House).

8. The National Assembly would consist
200 members elected on the basis of dire. adult franchise. In addition, for a period«' ten years, there would be ten seats reserved for women to be elected by the members of the National Assembly from then respective provinces.

9. Allocation of seats in the National Assembly to the provinces, the centrally administered tribal areas, and the federal capital area should be on population basis, and would regulated by an organic federal law.

10. (a) The Senate would consist of sixty

members. Each province should be allocated fourteen seats to the Senate Two seats should be allocated to the federal capital area and two seats to the centrally administered tnbal areas (b) The members of the Senate would be elected -

i. from the four provinces by the members of the provincial legislature of that province exercising a single transferable vote, so as to ensure proportionate representation in the Senate of the parties in the respective Provi Assemblies;

ii. from the centrally admmisu tribal areas by the members of the National Assembly from those areas; and

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11 There would be two legislative lists,73 namely the federal list and the concurrent list.

12 Residuary powers of legislation would, vest in the provinces.

13 The subjects to form part of the federal and the concurrent lists were finalized and listed

This accord was finalized by Bhutto and his important ministers, including the AttorneyGeneral, Yahya Bakhtiar, with Qayyum Khan of QML, Arbab Sikandar Khalil (NAP); Mir Ghaus Bakhsh Bizenjo (NAP), Ghulam Farooq (NAP); Mufti Mahmood (JUI); Sardar Sikandar Hayat (CML); Major-General (Retd.) Jamal Dar, MNA, Tribal Areas; Shah Ahmad Noorani (JUP); Professor Ghafoor Ahmad (JI); and Sher Baz Mazan, MNA (Independent).74

In addition to the main features of the Constitution above mentioned, Bhutto agreed to designate Islam as the state religion of Pakistan, something which had not been done before. In addition, he

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consented to the proposed oaths of office for the President and the Prime Minister («hich provided for them to be Muslim), the establishment of a council to propose the Islamization of laws, and the deletion of references lo Islamic socialism in the draft Constitution. As a concession to the provincial autonomists, he agreed lo the creation of a ’Council of Common Interests’ lo redress provincial grievances over the iistnbution of river waters, revenues from the sale of natural gas and electricity, and industrial development. In return, the opposition leaders iccepted a larger federal jurisdiction than the one allowed in the 1956 Constitution and about as large is that envisaged in the Government of India Act ol 1935 They also agreed that for the next fifteen (ears, a two-thirds majority vote in the National taibly would be required to pass a motion of loconfidence against the prime minister, and that K could dissolve the assembly even while such a notion was in debate. They accepted a Senate with nflially no powers of its own.

CONSTITUTION

The government moved a Constitution Bill in the National Assembly on 30 December 1972, and the opposition found that it did not fully correspond with the accord they had signed in October. They proposed amendments but these got nowhere because the PPP and its allies in the assembly would not accept them. On 13 March 1973, after two weeks of discussion, the opposition parties came together in an alliance called the United Democratic Front (UDF) to press for a more Islamic and democratic Constitution. They wanted to strengthen its Islamic provisions, reduce the government’s preventive detention and emergency powers, allow the superior courts to review the decisions of special tribunals, soften the requirements for passing a no-confidence motion against the Prime Minister, lower the voting age to
18 years, make the Election Commission autonomous, rationalize the constitutional protection to be given to laws made during the operation of martial law, and provide job security to civil servants.75 On 16 March, they sent their proposals to Bhutto and beginning 24 March they boycotted the National Assembly’s consideration of the draft Constitution.

Bhutto and his associates held meetings with the UDF leaders on 9 April, continued their negotiations the next morning, and reached agreement minutes before the National Assembly met on 1 0 April. The opposition members, led by Wali Khan, returned to the assembly, and Abdul Hafeez Pirzada moved to adopt the agreed changes in the provisions that had been in dispute. The assembly then passed the constitution without any dissenting votes and with only a few abstentions. It is interesting to note how major controversial issues were settled before interpreting how the accord on 20 October 1972 and the consensus on
10 April 1973 were obtained.

The Constitution did not concede much to the autonomists in the allocation of governmental powers and functions. In addition to defence, foreign affairs, currency, and communications, the functions they would assign the federal government, it placed more than sixty subjects on an exclusive federal list and fourty-seven on a

concurrent list with respect to which the federal law was to prevail over the provincial law. The residuary functions and powers were left to the provinces. The federal list included most revenue sources, banking and insurance, economic planning and co-ordination, air transport, regulation of corporations, industrial development, interprovincial trade, preventive detention in connection with national security, railways, oil and gas, nuclear energy, elections, and the higher judiciary among others. The concurrent list allowed the federal government overriding jurisdiction with regard to criminal law, criminal procedure, civil procedure, and labour relations along with numerous other subjects.

The Constitution provided potentially significant safeguards for provincial interests. Balochi politicians had laid claim to the revenues obtained from the extraction of minerals and the sale of natural gas piped out of their province; politicians in the NWFP had made a similar claim concerning the electricity generated there and distributed to other provinces. Sindh and the NWFP had worried over the distribution of the Indus waters. The Constitution called for a Council of Common Interests composed of the four provincial chief ministers and an equal number of federal officials to formulate policies regarding the industrial development, water, power, and the railways, and to supervize the related establishments. Its decisions were to be made by majority vote but a dissatisfied province could appeal to a joint session of parliament whose determination would be final. A National Economic Council, including provincial representatives, was appointed to make plans ’in respect of financial, commercial, social, and economic policies’, and a National Finance Commission, with provincial representation, was set up to make recommendations concerning federal grants-in-aid and sharing of the net proceeds of certain federal taxes between the federation and the provinces.

The framers of the new Constitution retained the Islamic provisions contained in the two previous Constitutions and added some of their own. Article 2 designated Islam as the state religion. The President and the Prime Minister had to be Muslim and their oath of office required them to affirm their belief in the unity of God, the

finality of prophethood of Muhammad *(r&w\k* Quran as the last of the holy books, and the dayof judgment. This oath had the effect of excludnj members of the Ahmedi sect from holding eitat one of these offices. Article 228 provided fort Council of Islamic Ideology and Article 21 required the legislature to consider the validity of any law that had been referred to the Council which it had found to be repugnant to Islam 1 also provided for the Council to submit, witta seven years of its appointment, its final report on the Islamization of existing laws and asked parliament and the provincial legislatures to consider the report and ’enact laws in respect thereof within a period of two years

These concessions to Islamic sentiment were matched by a touch of socialist flavour. Article! promised to create a polity that took ’from each according to his ability’ and gave to each ’according to his work’. Article 38 committed the state to promoting general welfare by preventing the concentration of the ’means of production and distribution in the hands of a few...

and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants'. More important, Article 253 authonzed parliament to limit private property of any and all kinds, and to designate businesses and industries that might be placed in the public sector to the partial or complete exclusion of private owners The *ulema* and their allies in the National Assembly accepted these provisions, even Article 34, which required the state to ensure the 'full participation' of women in all spheres of national life.

The Constitution appeared to guarantee fundamental rights to citizens but in several instances it made the right subject to 'reasonable restrictions' in the public interest. The power of preventive detention and the authority to declare a state of emergency, during which the fundamental rights could be suspended, were retained.

The passage of the 1973 Constitution is generally acknowledged to have been one of Bhutto's more significant accomplishments. In the years following his ouster from power, even some of his bitter opponents longed for the restoration of this Constitution. They considered it a great national asset because, unlike the two previous Constitutions, it represented a broad national

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18. Article 66.
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20- Article 102.

21- Article 103.

22- Article 104

23. Ibid

24. Ibid.

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Service Regulation, Schools and Colleges (Taking Over) Regulation.

32. Article 281.

33. The State v Ziaur Rahman. PLD 1973 Supreme Court 49.

34. This argument was probably necessitated because one of the Judges of the Lahore High Court sitting in Full Bench held the Objectives Resolution as 'supra-Constitutional Instrument which is unalterable and immutable and that the present National Assembly has no power to enact any Constitution or law which either directly or indirectly contravenes any of the provisions of the said Resolution', and further that 'the Courts in Pakistan being the repository of judicial power, as trustees of the people and the Almighty shall not, and have no jurisdiction to accept any tinkering with it by anybody including any Assembly'. Another Judge of the Lahore High Court, a member of the Full Bench, held it 'to be transcendental part of the Constitution'.

35. PLD 1972 S.C. 139.

36. *Outlook,* 8 April 1972 pp. 9-11 and *Outlook,*
13 May 1972 pp. 3-4.

37. Syed, Anwar H., *The Discourse and Politics of Zulfiqar All Bhutto,* first published in 1992. The Macmillan Press Ltd., Hong Kong. p. 182.

38. *Jang, 29* April and 2 May 1972.

39. Askar Ali Shah, 'The Coalition's Anxiety', *Outlook,* 19 August 1972, p. 5.

40. *Zindagi,* 14 September and 14 October 1972, Askar Ali Shah's report in *Outlook,* 1 July and 19 August
1972, *Outlook, 29* April 1972, p. 5; 16 September
1972, p. 7; and 4 June, and 6 and 23 May 1972. Government of Pakistan, White Paper on Balochistan (Rawalpindi October 1974), p. 5. Ibid., pp. 18-23.

Harrison, Selig, Nightmare in Balochistan, *Foreign Policy,* Fall 1978 p. 139.

44. Statements of Ataullah Mengal and Khair Bakhsh Marri, made in Lahore High Court, *The Pakistan Times,* 1 and 4 December 1974. Khair Bakhsh Marri's interview in *Zindagi,* 27 May 1973. Muslim Qureshi's report in *Zindagi,* 27 November
1972 and Aqil Khan's report in *Outlook,*
9 December 1972. Aqil Khan, ibid.

Zindagi, 1 January 1973, pp. 21-2. *Pakistan Times,* 15 February 1974. Sayeed, Khalid B., *Politics in Pakistan: The Nature and Direction of Change,* 1980, Praeger Publishers USA pp. 128-9.

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50. Jamil-ud-Din Aali's column in *Jang,* 29 Mart1
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51. *Dawn,* 1 April 1972.

52. *Outlook,* 15 July 1972, p. 4.

53. *Jang,* 8 May 1972 and *Zindagi,* 28 August 19": pp. 10, 20.

54. *Jang,* 3 April and 30 May 1972.

55. *Dawn,* 8 July 1972.

56. *Dawn,* 10 July 1972, 11 July 1972.

57. *Dawn,* 10 July 1972 reports that three-day dealt toll during the agitation reached 22 Zmrfaj, 24 July 1972, raised the figure to 55. Also see Hb. Tahir Sirhindi's report in the same journal data December 31, 1972. Sirhindi wrote that oftheii persons killed, most of them in police firing, IS were Sindhis and 40 were *muhajirs.*

58. *Zindagi,* 17 July 1972, p. 5.

59. Ibid.

60. *Zindagi,* 24 July 1972, pp. 10-11.

61. Regarding the Punjab factor, see Zafrullah Postal'! report in Outlook, August 12, 1972.

62. *Dawn,* 16 July 1972.

63. *Dawn, 25* March 1973.

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64. *Zindagi*, 17 December 1972.

65. Article 279 of the Interim Constitution.

66. Constitution Fourth Amendment Order, 1973 President's Order 1 of 1973, adding Article 157-A to the Interim Constitution. PLD 1973 Central Statutes 298.

67. Constitution Sixth Amendment Order, 1973. President's Order 3 of 1973. PLD 1973 Central Statutes 418.

68. Constitution Tenth Amendment Order, 1973 President's Order 14 of 1973. PLD 1973 Central Statutes 58.

69. Bhutto promised parliamentary set-up, fundamental rights, and maximum autonomy to the provinces while speaking at the annual dinner of the Higi Court Bar Association, Karachi, on 31 August 1972 *Dawn,* 1 September 1972.

70. *Dawn,* 16 September 1972.

71. *Dawn,* 15 October 1972.

72. *Dawn,* 21 October 1972.

73. Ibid.

74. Ibid.

75. Ghafoor Ahmad, *Phir Marshal Law Aa Gajt* (There comes the Martial Law again), Urdu, Lahore; Jang Publishers, 1988, pp. 37-8, 43

76. In re: Special Reference under Article 187 of the Interim Constitution of the Islamic Republic of Pakistan by President Zulfiqar Ali Bhutto, (Special Reference 1 of 1973), PLD 1973 S.C. 563.

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1, *Phir Marshal Law Act Gaya* he Martial Law again), Urdu, lishers, 1988, pp. 37-8,43. ference under Article 187 of the ion of the Islamic Republic of 'ent Zulfiqar Ali Bhutto, (Special
73), PLD 1973 S.C. 563.

It has been discussed earlier that the 1973 Constitution was adopted with the consensus of all the political parties in the National Assembly. Undoubtedly, no constitutional document can be described as perfect. It is always a product of compromises amongst various political parties and forces present within the constitution-making body. Nevertheless, the 1973 Constitution embodied the best possible arrangement to accommodate the various political parties, political issues and demands, economic interests, parties' manifestos, and so on. Pakistan People's Party (PPP), the majority party in the National Assembly, had promised in the general elections of 1970 to introduce an egalitarian set-up in Pakistan. The National Awami Party (NAP) was the main opposition party in the National Assembly, with a strong presence in the assemblies of the NWFP and Balochistan. It championed the cause of provincial autonomy. NAP also had the support of another party in these provinces, Jamiat-i-Ulemai-Islam (JUI). Hence a formula had to be devised which could strike a balance between the conflicting demands of provincial autonomy

and a strong centre.

It was also necessary to reach a compromise between the Islamic and the socialist concept. The PPP had landed itself in difficulty by raising three apparently irreconcilable slogans: Islam is our faith, democracy is our politics, and socialism is our economy. The Islamic and socialist ethos were satisfied through Articles 2 and 3 of the Constitution respectively. Article 2 declared Islam as the state religion of Pakistan and Article 3 provided for the elimination of all forms of exploitation and equitable distribution of economic resources in keeping with the ability and work put in by individuals.

Another sticky point was the distribution of powers between the president and the Prime Minister, since a national consensus had been arrived at (at least it was so perceived) on the

rejection of the presidential form of government (as introduced in the 1962 Constitution) and introduce a federal parliamentary form of government (as was done in the 1956 Constitution). There can be no cavil with the proposition that in a parliamentary set-up, real powers rest with the cabinet headed by the prime minister, and the president is only a figurehead. Nevertheless, the president does become, in certain parliamentary democracies, a repository of power in difficult emergency conditions and thus plays a vital role by exercising the real powers of the state. This issue was resolved in a lopsided manner, reducing the president to a rubber-stamp and making the prime minister all powerful. The orders of the President had to be counter-signed by the prime minister to be valid. An unusual expression, particularly in constitutional jargon, was used to describe the prime minister as the chief executive of the federation.1 Hence, it was made amply clear that the executive powers of the federation would vest in the prime minister.

But for a few Articles pertaining to constitutional matters, the framers of the 1973 Constitution followed the pattern of the earlier Constitutions of 1956 and 1962. Even the language used in the earlier Constitutions was retained in a majority of the Articles.

This Constitution, like the earlier ones, was lengthy and detailed. It contained 280 Articles divided into twelve parts and six schedules. Part I dealt with the Republic and its territories and other introductory matters; Part II with fundamental rights and directive principles of policy; Part in with the federation; Part IV with the provinces; Part V with relations between the federation and the provinces; Part VI with property, contracts, and suits; Part VII with judicature; Part VIII with elections; Part IX with the Islamic provisions; Part X with emergency provisions; Part XI with amendment of constitution; and Part XII with miscellaneous, temporary, and transitional

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caste, sex, descent, or place of birth, provided that for an initial period of ten years it would not be unlawful for the state to reserve posts in favour of members of any sex or class or residents of any area to secure their adequate representation in the service of Pakistan.10

7 Every person was guaranteed a right to acquire, hold and dispose of property in any part of Pakistan subject to reasonable restrictions and public interest under the law." No person should be deprived of his property save in accordance with the law. The right to property was subject to a number of constitutional restrictions including acquisition of enemy property; acquisition of property for providing housing, education; maintenance of sick, old, and infirm; acquisition of property acquired through unfair means and in an illegal manner; or acquisition of property in excess of the maximum limit provided under a law for land reforms. However, the new constitution did not specifically provide for fair compensation. Adequacy of compensation provided under any law relating to compensation for acquisition of property, could not be called in question in any court.12

8 All citizens were guaranteed (a) freedom of speech, expression, and press;

(b) freedom to assemble peacefully;

(c) freedom of association; and (d) the right to move freely throughout Pakistan and to reside in any part of the country.13

5 Freedom of conscience and the right to profess, practise, and propagate any religion, subject to public order and morality, were guaranteed. Every religious association and every sect thereof was guaranteed the right to establish, manage, and maintain its religious institutions.14

10. No person attending any educational institution should be required to receive religious instruction or to attend religious worship other than that of his own community or denomination. No religious community should be prevented from

providing religious instruction for pupils of that community in any educational institution which it maintained. No person should be compelled to pay any special taxes, the proceeds of which were specifically appropriated for the propagation or maintenance of any religion other than his own.15

11. The dignity of man and the privacy of home were declared inviolable. Procuring evidence through torture was prohibited.16

12. Protection was provided against double punishment and self incrimination.17

13. Every citizen was guaranteed the freedom to enter upon any lawful profession or occupation or to conduct any lawful trade or business. However, this freedom was subjected to such qualifications as might be prescribed by law.18

14. Other fundamental rights granted by the constitution included as under:

(a) Safeguards against discrimination in services on the ground only of race, religion, caste, sex, residence, or place of birth. This right was, however, subjected to regional quotas for some time.19

(b) Non-discrimination in respect of access to places of public entertainment or resort. However, special provisions could be made for women and children.20

(c) Right to preserve and promote distinct language, script, and culture.21

DIRECTIVE PRINCIPLES OF STATE POLICY

Like the earlier Constitutions, the new Constitution also included Directive Principles of Policy. It was made the responsibility of each organ and authority of the state and those performing functions under them to act in accordance with these principles.22 These principles are enumerated as under:

1. Steps to be taken to enable Muslims to order their lives in accordance with the Holy Quran and the *sunnah.* The state

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should endeavour to facilitate learning of Arabic, to promote observance of Islamic moral standards, and to secure the proper organization *ofzakat, auqafaad* mosques.23 Securing the well-being of the people, prevention of the concentration of wealth and means of production in the hands of a few, providing of basic necessities of life, reducing disparity of income, provision of food, clothing, housing, education, and medical relief for citizens incapable of earning their livelihood owing to unemployment, sickness, or similar reasons.24 Promotion of social justice by removing |J|| illiteracy; providing of free and compulsory

secondary education; ensuring inexpensive and expeditious justice; making provisions for securing just and humane conditions of work; enabling the people of different areas to participate fully in all forms of national activities; preventing prostitution, gambling, alcoholic liquors, drugs, etc.25 Discouragement of parochial, tribal, and racial feelings among Muslims.26 Strengthening of the bonds of unity between Muslim countries and promotion of peace and goodwill among the peoples of the world.27

Protection for all legitimate rights and interests of the non-Muslim minorities.28 Protection of marriage, the family, the mother, and the child.29 To ensure full participation of women in all spheres of law.30 To promote local government institutions.31

10. To eliminate *riba* as early as possible.32

11. To enable people from all parts of Pakistan to participate in the armed forces of Pakistan.33

It is interesting to note that in the new Constitution, separation of the judiciary from the executive was not relegated to the chapter of the principles of policy. This principle was, instead, included in the operative part of the Constitution. It became a dictate of the Constitution and the separation was required to take place within three years.34

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PARLIAMENTARY FORM OF GOVERNMENT

After the sad experience of the presidential foi of government under the 1962 Constitution Pakistan was ready to revert to the parliaments form on the pattern of the 1956 Constitution As discussed earlier, serious resistance had come bn Bhutto to the re-introduction of the parliament system, resulting in the resignation of a In minister. Nevertheless, Bhutto finally succumbed to the pressure in favour of the parliamentary corn primarily because his party had committed itself to it in the general elections of 1970. However, tit political happenings and bargainings pnor to tk adoption of the Constitution were not without impact on the ultimate shape of the parliament^ set-up under the new Constitution. Bhutto succeeded in introducing some basic changes n the parliamentary system as it had been known in the subcontinent. The changes thus introduced tned to address the following fears rooted in the constitutional and political experience in Pakistan i. The parliamentary system is vulnerable to frequent changes in government with the resultant instability, insecurity, and uncertainty.

ii. Presidents, under the parliamentary system, try to increase their powers and influence by indulging in partisan politics, thus weakening and undermining the governments.

in. The political oppositions act with irresponsibility and indulge in Byzantine intrigues, thus rendering the government in power weak and ineffective. Often, the opposition collaborates with the President or uses the provision for vote of noconfidence as a constant sword hanging over the head of the government in power A powerful bureaucracy in cohorts with the President, army, and/or the opposition could undermine a government. All these factors are aggravated especially when the party in power does not command a clear majority and is dependent upon smaller parties or groups to keep itself in power. This situation is ideal for

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manipulations and intrigues, whether they are launched by the President, army, opposition, bureaucracy, or-small political parties or groups.

In brief, the primary concern before Bhutto and other constitution-makers was: how to ensure a stable government under the parliamentary system? This concern was addressed in the new Constitution by introducing the following changes:

(a) The office of the Prime Minister was made extremely powerful and the office of the President was made correspondingly weak, ineffective, and dependent. The Prime Minister was more than the sum of the Cabinet put together and the President was less than a figurehead. The Prime Minister became the Chief Executive of the federation.35 The President could not exercise his option to appoint a member of the National Assembly as Prime Minister, of course subject to his obtaining a vote of confidence later on. The Prime Minister had to be elected immediately after the election of Speaker and Deputy Speaker by the National Assembly with the votes of the majority of its membership.36 The President’s veto over legislation was completely done away with. He had only seven days to give his assent to a Bill passed by the parliament and if he failed to do so within such a period, the Bill would become law.37 The President was

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required to act on the advice of the Prime Minister which was binding on him. Such advice was made non-justiciable.38 The President was also without power to dissolve the National Assembly which could only be dissolved on the advice of the Prime Minister. In case he failed to act on the advice, the National Assembly would automatically stand dissolved on the expiration of forty-eight hours from such advice.39

(b) The procedure for a vote of no-confidence against the Prime Minister was made difficult and cumbersome. A resolution for a vote of no-confidence could not be moved

in the National Assembly unless, in that very resolution, the name of another member of the assembly was put forward as the successor. If the resolution was by a majority of the total membership of the assembly, then the President had to call upon the person named in the resolution as successor to assume office as Prime Minister. However, for the first ten years, a provision was made in order to prevent floor crossing to the effect that the vote of a member, elected to the National Assembly as candidate or nominee of a political party, in favour of the resolution would be disregarded if the majority of the members of that political party in the National Assembly had cast its votes against such a resolution.40 However, on the failure of such a resolution, no further resolution for a vote of no-confidence could be moved in the National Assembly for a period of six months.

THE PRESIDENT AND THE CABINET

As discussed above, the President was reduced to merely a figurehead under the new Constitution. The executive authority of the federation was to be exercised in the name of the President by the federal government consisting of the Prime Minister and the federal ministers.41 The qualifications of being elected as President were that he was required to be a Muslim of not less than forty-five years of age and qualified to be elected as a member of the National Assembly.42 The President was to be elected by an electoral college comprising members of the parliament in joint sitting in accordance with provisions of the second schedule.43 His term of office was five years and no one could hold the office for more than two consecutive terms.44 The President could resign or might, on charges of violating the Constitution or gross misconduct or on the ground of physical or mental incapacity, be removed by the parliament in a joint sitting by a two-thirds majority of the total membership of the parliament.45 The President was required to act on

and in accordance with the advice of the Prime Minister which was binding on him.46 However, the Prime Minister was supposed to keep the President informed on matters of internal and foreign policy and on all legislative proposals that the federal government intended to bring before the parliament.47

The Prime Minister and the federal ministers were collectively responsible to the National Assembly.48 Federal ministers and ministers of state were to be taken from the parliament and were appointed by the Prime Minister. No more than one-fourth of such federal ministers and ministers of state could be taken from the upper House, the Senate.49 It is noticeable that in the new Constitution, the word ’Cabinet’ was carefully avoided. In its place, expressions like ’federal government’ or ’the Prime Minister and the federal ministers’ were used. Theoretically, the parliamentary system postulates Cabinet and the joint responsibility of the Cabinet. The Prime Minister is part and parcel of the Cabinet and not separate or different from it. He is regarded as first amongst equal members of the Cabinet. But in the new Constitution, the Prime Minister’s position, powers, and responsibilities were separately and expressly described. He was clearly the boss of the federal ministers and Chief Executive of the federal government. Another departure from the peculiarities of the parliamentary system was the appointment of the ministers by the Prime Minister and not by the President. Generally, in parliamentary democracies, ministers are appointed by the President though on the recommendation and nomination of the Prime Minister. These provisions, however, established the office of a super prime minister to befit the concept, personality, and the ambitions of Bhutto.

The President, subject to the advice of the Prime Minister, was entrusted with multifarious functions. Some of the key appointments, such as those of the Chief Justices and judges of the Supreme Court and the High Courts, the Governors of the provinces, the Attorney-General and the Chiefs of Staff of the Armed Forces, the Chief Election Commissioner, Auditor-General, and the Chairman and members of the Islamic Ideology

Council were to be made by the President* lit I could constitute the National Economic Council, 1 the National Finance Commission, the Council of | Common Interests, and the Islamic Idee Commission for bringing the existing laws do 1 conformity with the injunctions of Islam.51 Heals had the power to issue proclamations of political’ or financial emergency and could suspend 11 provincial government.52 The President wu empowered to raise and maintain the naval, military, and air forces of Pakistan.53 He was also given powers to grant pardon and reprieve, and to remit, suspend or commute a sentence passed by any court, tribunal, or any other authority.*4 All these powers were exercisable on the advice of the Prime Minister.

Similarly, the President was given certain legislative functions to be exercised on the advict of the Prime Minister. He could summon, prorogue, and dissolve the Parliament on his advice.55 The President could address the National Assembly and send messages to it.56 When a Bill was passed by the National Assembly, he could not withhold his assent for more than seven days After the expiry of seven days, the Bill would automatically become an Act of Parliament5’

When the National Assembly was not in session, the President possessed the positive power of making laws by ordinances which were to be laid before the National Assembly and would cease to operate at the expiration of four months from its promulgation, or at such time as a resolution of disapproval was passed by either House of the Parliament.58

THE FEDERAL GOVERNMENT

Another basic feature of the new Constitution was the federal form of the government like the previous Constitutions. A clear distribution of powers between the national and provincial governments was provided and the principle of decentralization was accepted.

As for the distribution of legislative powers between the centre and the provinces, the powers were enumerated in two lists, federal and concurrent.59 The extent of the federal laws was

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extended to the whole or any part of Pakistan, including the power to make laws having extraterritorial operations.66 The power of a provincial ’egislature extended to the whole of that province i any part thereof.61 The subjects given to the centre included foreign affairs comprising all matters which would bring Pakistan into relation with any foreign country, defence, currency, tizenship, foreign and inter-provincial trade and commerce, census, leisure, taxes and duties of excise and customs, copyright, trade mark, designs, maritime shipping and navigation, central bank, postal and all forms of telecommunications, minerals, oil and gas, and others. The federal legislative list consisted of two parts. Part I had fifty-nine items and Part II eight items.

The concurrent list comprised forty-seven items and was justified on the grounds that there were certain matters which could not be given exclusively either to the centre or to the provinces because, although such matters might normally be dealt with by the provinces, an occasion might arise when it would be desirable and necessary to deal with these matters on a national level. The list dealt with such matters as civil and criminal law, marriage and divorce, adoption, bankruptcy, arbitration, trusts, transfer of property and registration, preventive detention, arms and explosives, drugs, population planning, electricity, tourism, trade union, and other matters of common interest. With regard to subjects in the concurrent list, the precedence of federal

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legislation over the provincial legislation was guaranteed. A provincial law, to the extent of repugnancy with the federal law on the same subject, was to be void.62

The Constitution did not provide for a separate provincial legislative list and Provincial Assemblies were extended power to make laws on the residuary subjects, that is, matters not enumerated in either the federal or in the concurrent list.63

The Chief Justice of Pakistan was assigned an important role in the settlement of disputes between the federal government and a provincial government under a federal law conferring powers on provincial governments. He was to appoint an arbitrator to settle such a dispute64 and was empowered to appoint an arbitrator to settle

disputes between the federal government and a provincial government arising out of refusal by the federal government to entrust functions to a provincial government regarding broadcasting and telecasting or due to any conditions imposed by the federal government in this behalf.65

There was also provision for a Council of Common Interests which the President could set up in relation to matters enumerated in Part II of the Federal Legislative List or the Concurrent Legislative List or regarding exercise of supervision and control over related matters.66 This was meant to be an important body for the provinces to air their grievances against the federation or other provinces and for redressal of such grievances. If the federal government or a provincial government was dissatisfied with the decision of the Council, it could refer the matter to parliament in joint sitting, whose decision would be final.67

There was provision in the Constitution whereby the federal legislature could make laws on any provincial matter. There were, however, two processes which would enable the parliament to legislate on a provincial subject. The first applied when a provincial legislature would authorize parliament to make laws in any matter within its competence. An Act passed by the parliament in exercise of this power, in so far as it would affect a province could, however, be repealed by the provincial legislature.68 While legislation by the federal legislature under this provision was voluntary, the second process which would enable the federal government to intervene in provincial matters, was of far-reaching importance. While a proclamation of emergency was in operation, parliament was empowered to make laws for a province concerning any matter not enumerated in the federal or in the concurrent lists.69

THE FEDERAL LEGISLATURE (THE PARLIAMENT)

Unlike the Constitutions of 1956 and 1962, the
1973 Constitution provided for a bicameral system. As discussed earlier, under the draft constitution made by the first Constituent Assembly, there was

provision for a second chamber. The reasons for and the advantages of having a second chamber are, however, not confined to its utility as an instrument of representation of the units in a federation. From the standpoint of checks and balances, the second chamber is considered very useful and has a restraining as well as a sobering effect on the other chamber.

The 1973 Constitution is distinguishable from the earlier Constitutions particularly in two respects: the federation now had four provinces or federating units rather than the earlier two, and the principle of parity had ceased to be effective. Thus, in the chamber of the people (the National Assembly), where the representation is made on population basis, the small provinces like Balochistan would be meagrely represented. Therefore, the Upper House or House of States/ Provinces would be meant for checks and balances. By allowing equal representation to all the provinces in the Upper House, regardless of their size and population, the smaller provinces were given a greater voice and larger role in the national affairs. The Upper House thus becomes a bulwark for the protection of smaller provinces against the brute majority commanded by the larger provinces in the Lower House. This situation is all the more pronounced in Pakistan (or what is left of Pakistan) where one province, the Punjab, holds an absolute majority of the population and the other three provinces put together are in minority. Thus, the unicameral system would necessarily result in the dominance of the Punjab. The bicameral system had, therefore, become a necessity and the Upper House, called the Senate, was introduced in the Constitution of 1973.

Members of the National Assembly were to be elected under an electoral system to be provided for by the parliament. The matters to be decided regarding elections included allocation of seats, delimitation of constituencies, preparation of electoral rolls, the conduct of elections and election petitions, matters relating to corrupt practices in the elections, and so on.70 In the electoral laws that followed, the system of joint electorate was enforced.

A person was entitled to vote for the National Assembly (as well as a Provincial Assembly), if

he was a citizen of Pakistan, not less than 18 yen old, had not been declared by a court to be of unsound mind and his name had appeared in an electoral roll.71

A candidate for election to the National Assembly had to be at least 25 years of age and had to be qualified to vote. The Election Commission, on reference from the Speaker of the National Assembly, could decide questions of disqualification of a member and its decision was to be final.72 No one was to be allowed to be a member of the National Assembly from more than one constituency, though a person could seek election from as many seats as he wished" A member of the National Assembly could lose his seat if he remained absent for forty consecutive sitting days without leave of the House.74 No one was allowed to be a member simultaneously of the National Assembly and of the Senate (of a federal house) and a Provincial Assembly.75 The National Assembly would elect its Speaker and Deputy Speaker from amongst its members in its first meeting.76 The term of the National Assembly was fixed at five years, on the expiration of

which it would stand dissolved, if not dissolved earlier.

The Senate was to consist of sixty-three members, of whom fourteen were to be elected from each province by the members of the Provincial Assembly of that province in accordance with the system of proportional representation by means of a single transferable vote. Five members were to be elected by the National Assembly members from the Federally Administered Tribal Areas, and two were to be chosen from the Federal Capital in a manner prescribed by the President. The Senate was meant to be a permanent House not subject to dissolution The term of office of its members was to be four years, half of them retiring every two years. However, the term of office of a person elected or chosen to fill a casual vacancy was to be the unexpired term of the member whose vacancy he had filled.77 Like the National Assembly, the Senate also had to elect its Chairman and Deputy Chairman at its first session, from amongst its own members. However, the term of the office of Chairman or the Deputy Chairman was to be two years from the date of assumption of office.78

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As discussed above, the 1973 Constitution introduced bicameral legislation for the first time in Pakistan. The federal legislature was given the name of Parliament and its two Houses were to be known as the National Assembly and the Senate.79 The President was empowered to summon and prorogue the parliament.80 There were to be at least two sessions of the National Assembly each year and not more than one hundred-and-twenty days were to intervene between any two sessions.81 There was a similar provision for the Senate.82 Every federal minister and minister of state and the Attorney-General had the right to speak and take part in the proceedings of either House of the Parliament but not the right to vote unless he were a member of that House.83

Either House of the Parliament was empowered to frame its own rules of procedure and the conduct of its business.84 No member of the National Assembly could be made liable in any proceedings

ourt regarding anything said or any vote given b) him in the assembly or its committees.85 The privileges of the National Assembly, committees, the members thereof, and persons entitled to speak therein could be determined by an Act of Parliament.86 In keeping with the principle of separation of powers, no court could enquire into the proceedings of Parliament.87 Correspondingly, no discussion could take place in Parliament concerning the conduct of any judge of the Supreme Court or of a High Court in the discharge ofhis duties.88

The financial procedure provided by the Constitution was similar to that of the previous ones. No tax, for instance, could be levied for federal purposes except by or under the authority of an Act of Parliament.8’

In the budget, the financial statement was divided into two parts; one showing the expenditure charged upon the consolidated fund, the expenditure which the National Assembly could discuss but not vote upon; the other part sliowing the sums required for the estimated expenditures of the various departments for the ensuing financial year. Expenditures charged upon die consolidated fund included; (a) remuneration iid pension of the President, salaries of judges of lie Supreme Court, members of the Federal Public

Service Commission, the Speaker and the Deputy Speaker, the Attorney General, the Chief Election Commissioner, Chairman and Deputy Chairman of the Senate, and (b) the administrative expenses of the Supreme Court, the Federal Public Service Commission, the department of the AuditorGeneral, the office of the Election Commission, the Senate and the National Assembly; and (c) the debt charges binding on the federal government and sums

required to satisfy any judgment, decree, or award against Pakistan by any court or tribunal, and any other sum declared by the Constitution or by Act of Parliament.90

The introduction of bicameral legislature at the centre had its effect on the legislative procedure. It has been discussed earlier that the competence of the parliament to make laws was extended to the federal and concurrent legislative lists. The federal legislative list, as stated before, was divided into two parts: Part I and Part II. The scheme of this division appears to be that the subjects enumerated in Part I were purely federal subjects and the subjects enumerated in Part II were subjects in which the provinces had special interest like the railways; minerals, oil and natural gas; Council of Common Interests, and others. The subjects enumerated in the concurrent list were, of course, of common interest and importance for the federation and the provinces. This being the case, it became imperative that the Senate, being a House of provinces, should be given greater role and voice in legislation on the subjects enumerated in Part II of the federal legislative list and the concurrent legislative list. Thus, different legislative procedures were given in the constitution for legislation on the subjects enumerated in Part I of the federal legislative list on the one hand and the subjects enumerated in Part II of the federal legislative list on the other.

A Bill relating to matters in Part I of the federal list could only originate in the National Assembly and if it was passed, it was transmitted to the Senate for consideration. If the Senate passed it without amendment or did not reject it or amend it within ninety days of transmission to it, then it would be deemed to have been passed. However, if the Senate rejected the Bill or passed it with amendment, then it would be presented to the

National Assembly for reconsideration and if after such reconsideration, the National Assembly passed it again, with or without amendments proposed by the Senate, it would be deemed to have been passed and presented to the President for his assent." A Bill relating to matters in Part II of the federal list or the concurrent list could originate in either House and if it was passed by one House, it would be transmitted to the other House. If the Bill was passed by the other House without amendment, it was presented to the President for his assent. In case the other House rejected it or passed it with amendment, the Bill, at the request of the House where it originated, had to be considered in a joint sitting of the two Houses of the Parliament which the President would summon.92 If the Bill was passed by the votes of the majority of the total membership of the two Houses, then the same would be presented to the President for assent.

The purpose of different legislative procedures for the passing of the Bill relating to Part II of the federal list and the concurrent list was to give greater weightage to the Senate which could exercise a temporary veto against a Bill passed by the National Assembly on any such matters. Nevertheless, the National Assembly could override such a veto in a joint sitting because it initially had 210 members compared to sixty-three in the Senate and a majority in the joint sitting meant 137 votes which the National Assembly alone could procure.

The Money Bills could only originate in the National Assembly and, if passed, they would be presented to the President for assent, without transmission to the Senate. If a question arose as to whether a Bill was a Money Bill or not, the decision of the Speaker of the National Assembly thereon should be final.93

PROVINCIAL GOVERNMENTS AND LEGISLATURES

The provincial legislatures and executives were small replicas of the institutions at the national level. The provincial legislature remained unicameral and directly elected by the people

through universal adult franchise under the electoral laws common for the federal and provincial legislatures. The relationship between the provincial Governor, provincial Chief Minister and the Provincial Assembly closely resembled that between the President, the Prime Minister, and the Parliament. A Chief Minister was to be elected by the Provincial Assembly in the same manner in which the Prime Minister was to be elected by the National Assembly.94 The Chief Minister and the provincial ministers were to be collectively responsible to the Provincial Assembly concerned which could only be dissolved by the Governor on the advice of the Chief Minister. The procedure of vote of no-confidence against a Chief Minister was the same as that for the Prime Minister, meaning thereby that a successor had to be named in a resolution for a vote of no-confidence." The Governor did not have any power to veto any Bill passed by the Provincial Assembly and had to assent to it within seven days, otherwise it would be deemed to have been assented.'6 Governors could dissolve Provincial Assemblies but only on the advice of the Chief Ministers." Various provisions relating to the Parliament or a House thereof were to apply to the Provincial Assemblies with appropriate adjustment of reference to the relevant authorities.98 The Governor continued to be an appointee of the President and an agent of the central government which could exercise pressure in the provincial politics through the Governors.99

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DISTRIBUTION OF POWERS AND RELATIONS BETWEEN THE CENTRE AND THE PROVINCES

Administrative relations between the centre and the provinces were on the same lines as provided under the previous Constitutions. The federal system showed a marked tendency towards centralized control and authority. It was the constitutional duty of the federal government to protect each province against external aggression and internal disturbance and to ensure that the government of each province was carried on in accordance with the provisions of the

Constitution.100 A provinc obliged to exercise its exect a way as to ensure comphi Parliament and existing 1: province.10' The federal go1 to give direction to a provii duties of the provincial autl entitled to give directions following matters:102

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j) as to the construction and maintenance of communications declared to be of national or strategic importance;

i) as to the manner in which the executive authority of the province was to be exercised for the purpose of preventing any grave menace to the peace and tranquility or economic life of Pakistan or any part thereof.

There was one important provision in the Constitution which would enable the federal government to delegate power to the provincial governments as its agents. The federal government might, with the consent of a provincial government, entrust either conditionally or unconditionally to that government, or to its officers, functions relating to any matter to which the executive authority of the federation extended.103 Similarly, a provincial government, »ith the consent of the federal government, was also empowered to entrust, either conditionally or unconditionally, some of its executive functions to the federal government or to its officers.104

The new Constitution made no material changes regarding the distribution of financial resources between the centre and the provinces. The centre »as given the power to levy custom duties, export duties, excise duties, corporation tax, taxes on income other than agricultural income, estate and succession duties regarding property other than agricultural land, tax on capital value of the assets exclusive of agricultural land, taxes on goods or passengers, and taxes on mineral, oil, and natural gas. The principal source of income for the provinces were land revenue and taxes on igncultural income, the capital value of igncultural land, taxes on land and buildings, taxes nmineral rights subject to the federal list, excise

on alcohol and drugs, taxes on electricity, taxes on vehicles and advertisements, animals, boats, on professions and trades, and on luxuries.105

THE JUDICIARY

In the new Constitution provisions relating to the judiciary were on the same lines as those in the previous Constitution. However, an effort was made to regulate and confine the powers and jurisdiction of the superior courts. It was clearly stated that no court should have any jurisdiction except that which was conferred or would be conferred in future, on it by the Constitution or by or under any law.106 Thus, the courts could not assume unto themselves any jurisdiction or powers which were not expressly conferred on them by the Constitution or a law. This provision was clearly meant to whittle down the concept of inherent powers and jurisdiction of the superior courts.

The Supreme Court continued to be the apex court in the land. The law which it would lay down was binding on all courts in Pakistan.107 All executive and judicial authorities throughout the country would act in aid of the Supreme Court and all directions, orders, decrees or writs issued by that Court were to be executed as if they were issued by the High Courts of the appropriate province.108 The Supreme Court was entrusted with the task of interpreting the Constitution. It was specifically given the power to adjudicate in any dispute between any two or more

’governments’, which term included the federal government and the provincial government.109 The Supreme Court had appellate jurisdiction, both criminal as well as civil, over the judgments, decrees, final orders, and sentences passed by the High Courts. The Supreme Court could also hear an appeal from any judgment, decree, order, or sentence of a High Court on grant of leave.110 The Supreme Court also had advisory jurisdiction on any question of law that the President might consider of public importance and refer it to the Supreme Court.111 The Supreme Court was conferred with original jurisdiction to make orders on a question of public importance with reference to the enforcement of

any fundamental rights.112 The Constitution of 1973 for the first time provided for administrative courts and tribunals to be set up for the civil servants in relation to the matters of their terms and conditions including disciplinary matters. Appeals against the orders or judgments of such courts or tribunals would lie directly to the Supreme Court and that also on grant of leave to appeal on a substantial question of law of public importance.113

The writ jurisdiction of the superior courts which was conferred under the previous Constitutions was retained under the new Constitution. Each of the High Courts was conferred power throughout the territories regarding which it could exercise jurisdiction to issue to any person or authority, orders in the nature of *habeas corpus,* mandamus, prohibition, quo-warranto and *certiorari.* The High Courts were also empowered to issue orders for the enforcement of any of the fundamental rights guaranteed under the constitution."4

The Supreme Court was to consist of the Chief Justice and as many other judges as might be determined by an Act of Parliament or until so determined, as might be fixed by the President.115 The Chief Justice was to be appointed by the President and other judges were to be appointed by the President in consultation with the Chief Justice.116 The qualification for appointment as a judge of the Supreme Court was either five years standing as a judge of a High Court or fifteen years standing as an advocate of a High Court.117 The retirement age of a Supreme Court judge was fixed at 65 years and he was disqualified from pleading or acting before any court or authority in Pakistan.118 A judge could only be removed by the President on the report of the Supreme Judicial Council to the effect that he was incapable of performing the duties of his office or had been guilty of misconduct. Such a report could only be made after due inquiry and affording opportunity to the judge concerned to defend himself.119 The Supreme Judicial Council would consist of the Chief Justice of Pakistan, two next senior-most judges of the Supreme Court and the two most senior Chief Justices of the High Courts. There was also provision for the appointment of an Acting Chief Justice in the absence of the Chief Justice or when

the office of the Chief Justice had vacant.120 There were also provisions foracU(judges and adhoc judges for the Supreme Court.3 The seat of the Supreme Court was to be i Islamabad but until such time it was so establish^ it was to be at a place appointed by the President0 The Constitution provided for three Hiji Courts, initially, one for the province of the Punji one for the province of NWFP and a common *M* Court for the provinces of Smdh . Balochistan.123 Each High Court was to consist, a Chief Justice and such number of other judges that the President might determine.124 The Or Justice of a High Court was to be appointed by to President after consultation with the Chief Juste of Pakistan and the Governor of the prow! concerned. In case of appointment of other judge of a High Court, the President would appoint drain consultation with the aforesaid constitutioal functionaries as well as the Chief Justice of that High Court.125 The retirement age was fixed ai

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62 years.126 The qualification for appointment as i judge of a High Court included ten years standing as an advocate of a High Court, ten years service as a member of the civil service of Pakistan including at least three years as a district judge ot holding of a judicial office in Pakistan for at leaj ten years.127

A judge of a High Court could not be remo\ec

from his office except by an order of the Preside!

made on the grounds of misbehaviour or infimin

of mind or body, if the Supreme Judicial Counci

on reference being made to it by the Presideai

reported that the judge ought to be removed n

any of those grounds.128 There was provision for

the appointment of an Acting Chief Justice wk

the office of the Chief Justice became vacant orkt

was absent or unable to perform his dutiesIM Hit

President had no option in the matter of

appointment of Acting Chief Justice. He could on

appoint the most senior of the other judges of tie

High Court to act as Chief Justice. However,

transfer of judges from one High Court to another

was made subject to the consent of the judge being

transferred and subject to consultation with the

Chief Justice of Pakistan and both the Chief

Justices of the High Court of which he wasajudge

and to which he was being transferred”° The

decision of a High Cov would be binding on all i and which each High C supervise and

control.132

ISLAMIC PROVISI

Mam was declared the st he Islamic way of li including steps like thi *auqaf,* and the mosques.1 with the Muslim world policy under the Constit State, the President, wa Prime Minister was also member of the National An important Islamic ’no law shall be enacted injunctions of Islam as Quran and the *sunnah’* ai be brought into confer Islam as laid down i *sunnah’.ns* The Preside ninety days of the i Constitution a Council ol recommendations to Par! Assemblies for bringin conformity with the inju the stages by which si brought into effect.139 1 compile in a suitable f Parliament and the Prc injunctions of Islam as i effect. The Commissior report within seven yea might submit any interirr whether interim or final, Parliament and each Pn six months of its receipt considering the report, respect thereof within a final report.140

EMERGENCY PRC

Under Article 232, if tr that a grave emergenc

iief Justice had become also provisions for acting :s for the Supreme Court.121 reme Court was to be at h time it was so established, ppointed by the President.’22

provided for three High >r the province of the Punjab, F NWFP and a common High •evinces of Sindh and -ligh Court was to consist of ,uch number of other judges ight determine.124 The Chief irt was to be appointed by the Itation with the Chief Justice ; Governor of the province f appointment of other judges President would appoint them i the aforesaid constitutional 11 as the Chief Justice of that

retirement age was fixed at lification for appointment as a urt included ten years standing

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senior of the other judges of the act as Chief Justice. However, s from one High Court to another ;t to the consent of the judge being

subject to consultation with the sf Pakistan and both the Chief ligh Court of which he was a judge he was being transferred.130 Tht

decision of a High Court on a question of law would be binding on all courts subordinate to it,131 and which each High Court was empowered to supervise and control.132

ISLAMIC PROVISIONS

Islam was declared the state religion of Pakistan.133 The Islamic way of life was to be promoted including steps like the organization of *zakat, mqaf,* and the mosques.134 Strengthening of bonds with the Muslim world was another principle of policy under the Constitution.135 The Head of the State, the President, was to be a Muslim.136 The Pnme Minister was also required to be a Muslim member of the National Assembly.137

An important Islamic provision declared that ’no law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Quran and the *sunnah’* and that existing laws ’shall be brought into conformity with injunctions of Islam as laid down in the Holy Quran and *mmK1* ”8 The President would appoint within ninety days of the commencement of the Constitution a Council of Islamic Ideology to make recommendations to Parliament and the Provincial

Assemblies for bringing the existing laws into conformity with the injunctions of Islam and as to the stages by which such measures should be brought into effect.139 The Council was also to compile in a suitable form for the guidance of Parliament and the Provincial Assemblies such injunctions of Islam as could be given legislative effect The Commission was to submit its final report within seven years of its appointment and might submit any interim report earlier. The report, whether mtenm or final, was to be laid before the Parliament and each Provincial Assembly within ax months of its receipt and its legislatures, after considenng the report, were to enact laws in respect thereof within a period of two years of the final report.140

EMERGENCY **PROVISIONS**

- Article 232, if the President was satisfied *. grave emergency existed in which the

security of Pakistan or any part thereof was threatened by war or external aggression or by internal disturbances beyond the power of the provincial government to control, he could issue a proclamation of emergency. The effects of a proclamation of emergency under Article 232 are as under:

(a) the parliament has the power to make laws for a province on those subjects which were not included in the federal or concurrent lists, that is, the Parliament would have power to legislate even in provincial matters.

(b) the federal executive authority has power to give direction to a province as to the manner in which the executive authority of the province would be exercised.

(c) the federal government might issue an order assuming unto itself, or directing the Governor of a province to assume on its behalf, all or any powers of the provincial government or any function of the provincial government except that of the Provincial Assembly. The federal government is also empowered to suspend in whole or in part the operation of any provision of the Constitution relating to any body or authority in the Province.141

There was also provision for the proclamation of emergency due to the breakdown of constitutional machinery in a province. If the President, on receipt of a report from the Governor of a province, was satisfied that a situation had arisen in which the government of the province could not be carried on in accordance with the provisions of the Constitution he could, by proclamation, assume to himself, or direct the Governor to assume on his behalf, all or any of the functions or powers of the provincial government or any organ or body of the provincial government except the Provincial Assembly, and the Parliament might be authorized to exercise the powers of the Provincial Assembly. The President could also suspend the operation of any provisions of the Constitution relating to any body or authority in the province. The President, during a proclamation under this Article, was empowered to authorize expenditure from the provincial consolidated fund

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in anticipation of approval by the Parliament in the joint sitting.142 The President, on the advice of the Prime Minister, has the discretion to make such a proclamation but, on the resolution of the two Houses, is under compulsion to make such a proclamation.

Another type of emergency for which the Constitution made provisions related to the financial stability or credit of Pakistan. If the President was satisfied that a situation had arisen whereby the financial stability or credit of Pakistan or any part thereof was threatened, he could, after consultation with the provincial Governors or with the Governor of the province concerned, issue a proclamation of financial emergency. During the period of financial emergency the federal government could direct a province to observe such principles of financial propriety and any other direction required for restoring financial stability and credit, including a direction to reduce the salaries and allowances of government servants or any other class of people serving in connection with the affairs of the federation.143

During the period of emergency, the operation of certain fundamental rights like freedom of movement, freedom of assembly, freedom of association, freedom of trade and business, freedom of speech, and property rights, could be suspended. The President could declare by order that the enforcement of fundamental rights during the period of emergency would remain suspended.144 A proclamation of emergency could be varied or revoked by a subsequent proclamation.145 The Parliament could enact laws of indemnity for those people in government service or otherwise regarding any act done in connection with the maintenance or restoration of order in any area in Pakistan.14*

Other Features

Other features of the Constitution included the composition of the Election Commission of Pakistan for holding periodic elections to Parliament and the Provincial Assemblies,147 determination of the conditions of employment of people in the service of Pakistan,148 and the

establishment and composition of the Potlj Service Commission.149 The terms and condiim of service of civil servants were no 1 protected under the Constitution but were u| subject to ordinary law. Administrative courts n4 tribunals were to be set up under ordinary law Si adjudication of questions arising from the ten and conditions of government servants, mclufc disciplinary matters.150

The Constitution, or any of its provisions, cod be amended by an Act of Parliament provided i originated and was passed by the votes of nodes than two-thirds of the total number of membeno1 the National Assembly and by the votes of i majority of the total membership of the Seat However, no amendment of a constitution provision affecting the limits of a province could be made unless such amendment had keen approved by a resolution of its Provincial Assembly

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by not less than two-thirds of the tola! membership of that assembly.151 However, tit President can not withhold his assent to Ike amendment beyond seven days of the presentation of the Bill, after the expiry of which period, lie would be deemed to have assented. If tie Amendment Bill was not passed within ninety dajs of its receipt by the Senate, it would be deemed to have been rejected. An interesting aspect of dm provision was that the Senate had complete veto power over the amendment of the Constitution There was no provision for sending the Bill for consideration to the two Houses of the Parliament in the joint sitting. Thus, any two provinces could successfully thwart any effort to amend tie Constitution to their dislike or disadvantage.

Another important provision was the validation of all laws including all proclamations, President's orders, martial law regulations, and martial law orders during the civilian martial law of Bhutto All orders, proceedings taken, and acts done by any authority or person during the period of civilian martial law under the aforesaid laws were validated' and those passing such orders, holding such proceedings, and performing such acts were indemnified.152 All existing laws, subject to the Constitution, were continued in force so far as applicable and with necessary adaptations until altered, repealed, or amended by the appropriate legislature.153

Urdu was declared t Pakistan. Steps were to t as the official language \ commencement of the G time, the English langi official purposes.154 Tt Minister, governors, c ministers, ministers o ministers were granted in for any act done in exert performance of their funi

The Proclamation November 1971 was deei of Emergency under Artii or orders made in pursue would be deemed to havi

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1. Constitution of Islami Article 90.

2. Ibid., Article 8.

3. Ibid., Article 10.

4. Ibid., Article 233.

5. Ibid., Article 25.

6. Ibid., Article 9.

7. Ibid., Article 12.

8. Ibid., Article 26.

9. Ibid., Article 11.

10. Ibid., Article 27.

11. Ibid., Article 23.

12. Ibid., Article 24.

13. Ibid., Articles 15, 16, 1
14 Ibid., Article 20.

15. Ibid., Articles 21 and 2

16. Ibid., Article 14.

17. Ibid., Article 13.

18. Ibid., Article 18.

19. Ibid., Article 27.

20. Ibid., Article 26.

21. Ibid., Article 28.

22. Ibid., Articles 29 and 3

23. Ibid., Article 31.

24. Ibid., Article 38.

25. Ibid., Article 37.

26. Ibid., Article 33.

27. Ibid., Article 40.

28. Ibid., Article 36.

29. Ibid., Article 35.

30. Ibid., Article 34.

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any two provinces could ly effort to amend the ike or disadvantage. >vision was the validation jroclamations, President’s ilations, and martial law m martial law of Bhutto, taken, and acts done by n during the period of :r the aforesaid laws were iing such orders, holding erforming such acts were ing laws, subject to the mued in force so far **as** :essary adaptations until ended by the appropriate

83. Ibid.,

84. Ibid.,

85. Ibid.,

86. Ibid

87. Ibid.,

88. Ibid.,

89. Ibid.,

90. Ibid.,

91. Ibid.,

92. Ibid.,

93. Ibid.,

94. Ibid.,

95. Ibid.,

96. Ibid,

97. Ibid.,

98. Ibid.,

99. Ibid.,

100. Ibid.,

101. Ibid.

102. Ibid.,

103. Ibid.,

104. Ibid.,’

105. Ibid.,’

106. Ibid.,

107. Ibid., !08. Ibid.,

109. Ibid.'

110. Ibid., HI. Ibid.,'

112. Ibid,

113. Ibid,

114. Ibid,

115. Ibid,

116. Ibid, H 7. Ibid.
118. Ibid, H 9. Ibid,

Article 57. Article 67. Article 66.

Article 69. Article 68. Article 77. Article 81. Article 70. Article 71. Article 73. Article 131. Article 136. Article 116. Article 112. Article 127. Article 145. Article 148.

Article 149. Article 146. Article 147. Fourth Schedule. Article 175(2). Article 189.

Articles 187 and 190 Article 184.

Article 185.

Article 186.

Article 184(3). Article 212. Article 199. Article 176. Article 177.

Articles 179 and 207 Article 209.

120. Ibid
121

122 I23.1bid,'

124. Ibid.

125. Ibid,

126. Ibid,

127. Ibid,

128. Ibid,

129. Ibid,

130. Ibid,

131. Ibid,

132 Ibid,

133 Ibid,

134 Ibid,

135 Ibid,

136. Ibid,

137. Ibid,

138. Ibid,

139. Ibid,

140. Ibid. !41.Ibid,

142. Ibid,

143. Ibid,

144. Ibid,

145. Ibid,

146. Ibid
147.

148. Ibid,’

149. Ibid,

150. Ibid,

151. Ibid,

152. Ibid,

153. Ibid,

154. Ibid,’

155. Ibid,

156. Ibid,

Article 180 Articles 181 and 182 Article 183 Article 192

Article 193 Article 195

Article 193.

Article 209

Article 196’

Article 200

Article 201.

Article 203

Article 2

Article 31.

Article 40

Article 41.

Article 91.

Article 227

Articles 228 and 230.

Article 232. Article 234. Article 235. Article 233. Article 236. Article 237. Articles 2 13 215 218 Article 240. ’

Article 242. Article 212. Articles 238 and 239 Article 269. Article 268. Article 251. Article 248.

Article 280.

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16 April 1973, its c twenty-sixth annive Pakistan. However, taken before the Cc as the election to President, election i Chairman of the Se and Deputy Speake and, finally, the ele Once again, no new and the National Ass Interim Constitution was to be the first Pakistan and would ci 14 August 1977.’ Hei an all-Pakistan basis number had been redu continue for another fc for one-and-a-half yea because the assembly the Constitution. The also to continue till *141*

ELECTIONS TO *i* THE OFFICES OF AND THE PRIME

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215, 218, 219, and 220.

Although the Constitution Bill had been passed and authenticated by the National Assembly on 16 April 1973, its day of commencement was the twenty-sixth anniversary of the independence of Pakistan However, a number of steps had to be taken before the Constitution was enforced, such as the election to the Senate, election of the President, election of the Chairman and Deputy Chairman of the Senate, election of the Speaker and Deputy Speaker of the National Assembly, and, finally, the election of the Prime Minister. Once again, no new elections were to take place and the National Assembly in existence under the Interim Constitution (elected in December 1970), was to be the first under the Constitution of Pakistan and would continue, unless dissolved, till
14 August 1977.' Hence, the assembly elected on an all-Pakistan basis in December 1970, whose number had been reduced to 146 from 313, was to continue for another four years after having served for one-and-a-half year. This was inherently unfair because the assembly was extending its life under fte Constitution. The provincial assemblies were iko to continue till 14 August 1977 in like manner.2

ELECTIONS **TO THE SENATE AND** THE OFFICES **OF THE PRESIDENT** AND THE **PRIME MINISTER**

The number of seats in the Senate had been fixed £ sixty-three; fourteen from each province, five from the Federally Administered Tribal Areas (FATA), and two from the federal capital.3 However, for the first Senate, the total membership y been reduced to forty-five; ten from each jrovince, three from the FATA, and two from the federal capital4 The members elected to the first Senate had to be divided into two groups by fewmg of lots, the first group consisting of five imbers from each province, two members from

the FATA, one member from the federal capital, and the remaining were to fall in the second group. The term of office of the first group was to be two years and that of the second group four years. After the first elections to the National Assembly under the Constitution, additional eighteen members of the Senate were to be elected; four from each province and two from the FATA.

Elections to the Senate were completed in stages during July 1973 with each Provincial Assembly meeting to elect its ten members to the Senate on the basis of a single transferable vote. The National Assembly met to elect three members from FATA and two from the federal capital. The Senate held its inaugural session on 6 August 1973 and elected Khan Habibullah Khan as Chairman and Mirza Tahir Muhammad Khan as Deputy Chairman.5

The election to the office of the President was called for on 10 August 1973. On 9 August, the National Assembly elected Sahibzada Farooq Ali a PPP nominee, unopposed as Speaker of the National Assembly. On 10 August, Chaudhry Fazal Elahi, previous Speaker of the National

Assembly, was elected President under the new Constitution. He was a nominee of the PPP and defeated the candidate of the opposition parties, namely Amirzada Khan.6

On 12 August 1973, the National Assembly met to elect Bhutto as the Prime Minister. In a House of 146 members, Bhutto secured 108 votes and the joint opposition candidate, Maulana Shah Ahmad Noorani of JUP, received 28 votes.7 Upon his election, Bhutto reiterated his party's determination to establish democratic traditions and to see democracy function in the country for all times to come. Wali Khan, the leader of the opposition in the National Assembly, offered full co-operation for the rule of law.

CONSTITUTION ENFORCED ON
14 AUGUST **1973**

The Constitution formally came into force on
14 August 1973 which was referred to as the ’commencing day’.8 Chaudhry Fazal Elahi was sworn in as President and Bhutto was sworn in as Prime Minister. Thus came into existence and force, the third permanent Constitution of Pakistan within twenty-six years of its independence. If we add the provisional/interim constitutions of Pakistan, then it was the sixth document which served as the Constitution of the country. Speaking on the occasion, Bhutto said that the days of palace intrigues and coups were ended and that venom and violence in politics must stop.9 He, however, warned the opposition against confrontation.

Old habits die hard, and soon Bhutto was at his game *again.* Two days after the enforcement of the new Constitution, Bhutto flouted his own rules. Ghaus Bakhsh Bizenjo, former Governor of Balochistan, Sardar Khair Bakhsh Marri, former Chief Minister of Balochistan, and Sardar Ataullah Mengal, an MNA from Balochistan, were arrested on 16 August on various charges of corruption, malpractices, and seditious activities. The confrontation with the opposition was initiated in a big way. It would go on for many years, indeed till Bhutto’s ouster.

ADMINISTRATIVE REFORMS

Pakistan inherited its bureaucratic set-up from the British who ruled India with an iron hand through bureaucrats who were completely loyal to them, regardless of the political currents in the country or the sentiments of the people. This institution developed its own internal unity, fraternity, and coherence, often described as a steel frame. At times, it acted in concert against other institutions and people, including the politicians. It was due to its internal organization, cohesion and unity that Pakistan’s history was chequered by frequent interference from the bureaucrats in its early days when the bureaucracy became so powerful and confident that it completely undermined the political process in the country and took over the task of governing the country itself.10 Several

bureaucrats turned into successful politicians u from among their ranks emerged two of Pakistani Governors-General, Ghulam Muhammad am Iskandar Mirza (who also became the firs President of Pakistan under the 1956 Constitution) and one Prime Minister, Chaudhn Mohammad All Few people can dispute the incalculable hn done to the constitutional, legal, and political institutions and practices in Pakistan by tke aforesaid Governors-General. Ghulam Muhammad *created* the first constitutional crisis in Pakistan by dismissing the first Constituent Assembly in 19ft, thus leading to court battles which culminated u the judgments of the Federal Court in the cases of Moulvi Tamizuddin Khan, Usif Patel, and Governor-General’s reference. Iskandar Mirza freely meddled with parliamentary politics by getting involved in political intrigues, thus destabilizing successive governments to serve his own interest and position. As if all that was nol enough for him, he abrogated the first Constitution of Pakistan in October 1958 and imposed martial law throughout the country. This led to another court battle. The Supreme Court upheld the martial law in State v Dosso on the rationale that a victorious revolution or a successful *coup d’etat* was

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a recognized legal method of changing a constitution.

During the martial law years of 1958 to 1962, the bureaucracy gained further powers as it was not accountable to the people. The martial law administration was totally dependent upon the civil bureaucracy for its day-to-day business of running the country and the citizens fell completely into the merciless clutches of a bureaucracy unfettered by any political checks and balances. The 1962 Constitution hardly brought any change in the situation and the bureaucracy continued to grow more powerful, arrogant, and indifferent to the needs of the common man. It was only obvious that there would be an outcry from the people against this institution. The political agitation against Ayub's regime from November 1968 to March 1969 brought to the forefront public resentment against the bureaucrats.

In the general elections of December 1970 Bhutto, as leader of the People's Party, included in his election manifesto bureaucratic and administrative reforms, including measures to cut I

down the powers and pri\ In his first speech as Pi nation on 20 December bureaucracy as having b< up on the traditions and c He stressed the need foi liberal outlook, dynami motivated with a desire 1 high powered committee i itself to the task of overha The committee was requi existing position, to revie of various experts, comn made from time to tirr programme of administra of new requirements. Th its recommendations af issues, such as the revisioi the eradication of corrupt scientific and effectiv< establishment of sound programmes.12 The recom the government were: i. Constitutional saf< were to be abol conditions of servi were to be brougl legislatures througl ii. Administrative trib as fora where gov get their grievance; All the services z merged into a unifu equality of opportu the service at an; required professi competence necess. All 'classes' amonj were to be abolisl unified grading equivalent at the be departmental head classification of the Class IV would no 1 to the top would be The use of service etc. were to be disc The unified stru promotions to the r

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• Mirza (who also became the first of Pakistan under the 1956 Constitution), 'rime Minister, Chaudhri Mohammad All eople can dispute the incalculable haun the constitutional, legal, and political ns and practices in Pakistan by the Governors-General. Ghulam Muhammad e first constitutional crisis in Pakistan by g the first Constituent Assembly in 1954, ng to court battles which culminated n ents of the Federal Court in the cases of Famizuddin Khan, Usif Patel, and -General's reference. Iskandar Mirza :ddled with parliamentary politics by nvolved in political intrigues, thus ng successive governments to serve his sst and position. As if all that was not r him, he abrogated the first Constitution n in October 1958 and imposed martial ?hout the country. This led to another
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9 brought to the forefront public igainst the bureaucrats, eneral elections of December 1970, eader of the People's Party, included :tion manifesto bureaucratic and re reforms, including measures to cut

down the powers and privileges of the bureaucray.

In his first speech as President delivered to the

nation on 20 December 1971, he deprecated the

bureaucracy as having been 'nursed and brought

up on the traditions and concepts of colonialism'.

He stressed the need for a bureaucracy 'with a

liberal outlook, dynamic in its working, and

motivated with a desire to serve the nation'.11 A

high powered committee was appointed to address

itself to the task of overhauling the administration.

The committee was required to take stock of the

existing position, to review the recommendations

of various experts, commissions and committees

made from time to time and to chalk out a

programme of administrative reforms in the light

of new requirements. This committee submitted

its recommendations after examining various

issues, such as the revision of the service structure,

the eradication of corruption, creation of a more

scientific and effective machinery, and the

establishment of sound and rational training

programmes.12 The recommendations accepted by

the government were:

i Constitutional safeguards and guarantees were to be abolished and terms and conditions of service of the civil servants were to be brought under the control of legislatures through ordinary legislation; n Administrative tribunals were to be set up as fora where government officials could get their grievances redressed; in All the services and cadres were to be merged into a unified grading structure with equality of opportunity for all who entered the service at any stage, based on the required professional and specialized competence necessary for each job; iv All ’classes’ amongst government servants were to be abolished and replaced by a unified grading structure: a peon or equivalent at the bottom and a secretary or departmental head at the top. The existing classification of the services into Class I to Class IV would no longer operate. The road to the top would be open to all on merit; v. The use of service labels like CSP, PSP, etc. were to be discontinued immediately; vi The unified structure would enable promotions to the highest jobs throughout

the range of public service and for horizontal movements from one cadre to another including the movement of the technical personnel to the cadre of general management. There would also be scope for out-of-turn promotion to exceptionally able officers;

vii. The correct grading for each post would be determined by job evaluation;

viii. There would be provision for entry into government service for talented individuals from the private sector in fields such as banking, insurance, industry, and trade.

In keeping with the aforementioned recommendations of the Committee, the 1973 Constitution made a clear departure from all the previous constitutions in respect of the provisions regarding guarantees to the civil servants against arbitrary and wrongful dismissal or removal from service or reduction in rank. The Constitution made no mention of any guarantees extended to government servants under the previous constitutions and the matter of determination of their conditions of service was relegated to the realm of ordinary laws as enacted from time to time by the parliament or the provincial assemblies, as the case may be.13

The parliament and the provincial assemblies were empowered to enact laws for the establishment of one or more administrative courts or tribunals to exercise exclusive jurisdiction in respect of the following matters:14

(a) Terms and conditions of persons in the service of Pakistan, including disciplinary matters;

(b) Claims arising from tortious acts of government or its servants while acting in exercise of their duties, or of any local or other authority empowered to levy any tax

or cess; or

(c) the acquisition, administration, and disposal of enemy property under any law.

The jurisdiction of such administrative courts and tribunals was made entirely exclusive and, on their establishment, no other court could grant an injunction, make any order, or entertain any proceedings regarding matters within their jurisdiction. Provisions of clause (2) of Article 212

were not applicable to an administrative court and tribunal established under an Act of the Provincial Assembly unless at the request of that assembly made in the form of a resolution. Parliament by law extended these provisions to such a court or tribunal. On the request of the provincial assemblies of the North-West Frontier Province, the Punjab, and Sindh, the parliament, by statute, extended the provisions of Article 212(2) of the Constitution with effect from 6 May 1974, to the Service Tribunals established by the three provinces.'5 Similarly, on the request of the Provincial Assembly of Balochistan, the Parliament by statute extended the provisions of Article 212(2) of the constitution with effect from
19 May 1976 to the service tribunal established for Balochistan.16 Appeal was provided to the Supreme Court against the decisions of the administrative courts or tribunals only in case the Supreme Court grants leave to appeal on a substantial question of law of public importance.

The Bhutto regime initiated a programme of 'lateral entry' into the public service. Over a threeyear-period, 514 men and women holding midcareer positions in government, business, industry, universities, and the professions were appointed to middle management and higher positions in the central and provincial governments.17 Appointments were made upon a scrutiny of the candidates' credentials in the Establishment Division, a written examination, an oral examination, or a combination of all of them. Waqar Ahmad, the establishment secretary at the time, maintained that 95 per cent of the 'political element' had been eliminated in these appointments and that Bhutto himself had rejected the recommendations of some of his ministers because the persons concerned were not worthy enough. Even if Waqar Ahmad had understated the number of political appointees, it seems that most of the lateral entrants were professionally competent.

The new appointees filled the vacancies created by the departure of Bengali officials following the separation of East Pakistan, especially in the foreign office, and those created by the retirements and dismissals ordered under martial law regulation number 114. Bhutto maintained that, in the first place, these large number of vacancies could not have been promptly filled through the

usual entry level competitive examinations Secondly, these appointments served to break ops ' the CSP's fortress of special preserves A latm. entrant placed as a permanent secretary or additional secretary in a ministry could bt supervizing CSP officers who had already put it twenty years of service. Thirdly, the new entrant; were doubtless aware that they owed their positions to the Bhutto regime and had reason to be loyal to it. They could thus be counted upon to serve as i counterpoise to the conventionally established higher civil servants, particularly the CSP.

FIRST AMENDMENT: RECOGNITION **OF BANGLADESH**

Ever since the secession of East Pakistan in December 1971, the question of recognition of Bangladesh was a sensitive political issue in Pakistan. Opposition parties were resisting tie

recognition of Bangladesh. Although Bhutto appeared to be inclined towards recognition and perhaps had released Mujib for the purpose, he was not confident enough to take a definite step in this difficult and sensitive matter particularly when his own role in the breakup of Pakistan was far from clear. He was under constant accusation for masterminding the breakup of Pakistan. He was looking for ways and means to resolve this issue without appearing too keen to recognize Bangladesh. Bhutto referred the matter for the opinion of the Supreme Court and some heanngs were held but the matter was still pending when the 1973 Constitution was enforced.

The Constitution also kept the matter open. While describing the territories of Pakistan, East Pakistan was omitted, but it was laid down that the Constitution would be appropriately amended so as to enable the people of East Pakistan, as and when foreign aggression in that province and its effects were eliminated, to be represented in the affairs of the federation.18 Finally, the opportunity to recognize Bangladesh presented itself in February 1974. The Second Islamic Summit Conference was going to be held at Lahore. The absence of representation from Bangladesh, the second most populated Muslim country, would have been seriously felt. On this occasion, Bhutto,

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BHUTTO’S DEMOCRACY

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under the blessings of King Faisal of Saudi Arabia, Qaddafi of Libya, and others heads of state from Muslim countries attending the conference, invited Mujib to attend the conference. Mujib was not willing to come unless he was treated as head of the government of a Muslim country and that his country was recognized as a separate national entity. Keeping this difficulty in view, Pakistan recognized Bangladesh and this issue was put to an end once and for all. Whatever the role of Bhutto in the East Pakistan crisis, it can be said with all fairness to him that there was no ”Ktification to keep this matter pending endlessly, .iicularly when the creation of Bangladesh was a reality, howsoever bitter it might be. The recognition of Bangladesh was a recognition of reality.

Consequent to the recognition of Bangladesh, Article 1 of the Constitution was amended under the First Amendment, thus deleting Clause (2) from it which provided for representation of East Pakistan in the federation of Pakistan after the effect of foreign aggression over them were eliminated.”

Other important amendments to the Constitution brought about by the First Amendment were as under:

1. Article 17 pertaining to the freedom of association was amended providing for reasonable restriction on this freedom to form associations imposed by law in the interest of sovereignty or integrity of Pakistan. Such law was also to provide that where the federal government declared that any political party had been formed or was operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the federal government should, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference would be final. In keeping with this constitutional amendment, Political Parties Act, 1962 was also amended to the same effect and in addition to provide that on such declaration by the federal government, the political party, against which the declaration was made, would stand dissolved and all its properties and funds

forfeited to the federal government.20 It was under these provisions of the amended constitution and Political Parties Act that NAP was later dissolved in 1975 with the matter referred to the Supreme Court.

2. The maximum period intervening the two successive sessions of the Senate, the National Assembly, and the Provincial Assemblies, was reduced from 130 days to
90 days.

3. Chief Justice of a High Court could require a judge of another High Court to attend the sittings of his court provided the judge so asked consented to it and the President approved the same after consultation with the Chief Justice of Pakistan and the Chief Justice of the High Court of which he was the judge.

4. On the establishment of a service tribunal, all proceedings pending before any court, in relation to the terms and conditions of service of employees to which the jurisdiction of such tribunal extended, would abate.

SECOND AMENDMENT:

AHMEDIS DECLARED NON-MUSLIMS

It has been discussed above that an anti-Ahmediya movement in the early 1950s in Punjab turned into a rebellion against the state and martial law was imposed in the city of Lahore in March 1953 to control the riots. This anti-Ahmediya agitation brought down the government of Mian Mumtaz Muhammad Khan Daultana in the province and severely shook the government of Prime Minister Nazimuddin at the Centre. Another such agitation erupted in 1974 and seriously threatened the Bhutto regime.

On 22 May, a group of 160 students from Multan boarded a train to Peshawar. As the train stopped at Rabwah, a predominantly Ahmedi town that housed the community's spiritual and organizational headquarters, it was alleged that hundreds of them came out and shouted slurs and offensive slogans. Upon their return from Peshawar on 29 May, they stopped at Rabwah again. This time, the Ahmedis were ready. Hundreds of them,

armed with knives and sticks, fell upon the students and injured more than thirty of them. News of this event infuriated the Muslim community throughout the country. The Punjab government promptly arrested seventy-one men in Rabwah and appointed Mr Justice K.M.A. Samadani, a judge of the Lahore High Court, to investigate the incident and submit his findings. Hanif Ramay, the Chief Minister, appealed for calm and asked the people not to make this breach of public order into a sectarian issue.21

But calm was not to be had. Nor would the opposition parties and leaders forgo the opportunity of embarrassing Bhutto. Islamist parties, like the Jamaat-i-Islami, Majlis-e-Ahrar, the Khaksars, student groups, and prayer leaders in mosques demanded the dismissal of Ahmedis from key posts in government, the disarming of their youth organizations, and the making of Rabwah, which they alleged had become a 'state within a state', into an 'open city'. Violent demonstrations began and continued for a week in all major cities of the Punjab. Enraged crowds burnt down the houses of Ahmedis and their shops, gas stations, and factories. The leaders of the agitation called for a countrywide general strike on 14 June to protest the government's tardiness in meeting their demands which now included the designation of Ahmedis as a non-Muslim minority.22

The agitation slowed down and became essentially non-violent after a week. This improvement resulted partly from the way Bhutto reasoned out the issue with the people in his statements and speeches, and partly from the provincial government's readiness to use force to discourage violence. The government imposed partial censorship to prevent commentaries on the subject from becoming inflammatory and arrested hundreds of demonstrators (most of whom were subsequently released).

Bhutto and other official spokesmen stated repeatedly that the government would protect the life and property of all citizens regardless of their religious affiliation and, to this end, they would use the army if necessary. In addition, Bhutto suggested that an Indo-Soviet 'lobby' had inspired the anti-Ahmediya disturbances to weaken

Pakistan. In a statement to the press on 31 Mat Bhutto asked: 'Is our response to India's atomic blast to be that we shall quarrel among oursehes and attempt to tear ourselves apart?'23 Speakingit the National Assembly on 3 June, he opposed discussion of the Ahmediya question in the House until after public order had been restored. Thosea the opposition who wanted immediate discussion wished only to intensify the agitation and ruin (lit country, he declared.

Bhutto maintained that there was no need for an agitation because the government, tie opposition, and the people at large had the sane belief on the issues. He asked the nation to consider the Ahmediya question at the appropriate time and do so calmly and sensibly, without hatred and bigotry. Bhutto addressed the nation on radio and television on 13 June. He urged

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patience, peaceableness, and civility. The Ahmediya question, he said, had been in the public domain for ninety years and it could not be resolved in a day. It must be settled with due regard to the feelings of the people and considerations of national solidarity. He assured his listeners that lie would place the issue before the National Assembly which would then discuss it He maintained that the issue had *already* been settled in the 1973 Constitution but went on to suggest that the assembly might nevertheless refer it to the Advisory Council of Islamic Ideology. He added that the members of his own party in the assembly would be free to vote on the subject according to their conscience.24

As one might have expected, the *ulema* and their associates did not find Bhutto's assurances satisfactory. Mufti Mahmood, head of the JUI, suspected that Bhutto did not intend to honour the Muslim nation's demand and that he meant to put it in 'cold storage'. The 'Action Committee' of an organization dedicated to preserving the belief in the finality of prophethood of Muhammad (PBUH) *'Tahaffuz-e-Khatm-e-Nabuwat* asserted that it would not be enough for the assembly to pass a mere resolution or to refer the matter to the Advisory Council of Islamic Ideology; it must pass a Bill declaring the Ahmedis a non-Muslim minority. Leaders of the Islami Jamiat-e-Tulaba took the same position, demanded quick action,

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AN ABORTED COUP **F.B.** ALI'S CASE

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and warned that Bhutto would not remain in power if he continued his ’double talk’ on the Ahmediya question.25 Opposition *members in the Punjab* Assembly *spoke to the same* effect, and so did Mian Tufail, *’amir’ of the* Jamaat-i-Islami, and Nawabzada Nasrullah Khan, president of the Pakistan Democratic Party (PDF). It seemed the issue would not go away, and violence could begin again Finally, Bhutto relented and took the issue to the National Assembly which, after extended considerations, passed the Second Amendment to the Constitution in September 1974.26

Clause (3) was added to Article 260 explaining

thereunder who is a non-Muslim. This Article

pertains to definitions under the Constitution. The

new clause stated that ’a person who does not believe in the absolute and unqualified finality of the Prophethood of Muhammad (PBUH) as the last of the Prophets or claims to be a Prophet, in any sense of the word or of any description whatsoever, after Muhammad (PBUH), or recognizes such a claimant as a Prophet or a religious reformer, is not a Muslim for the purposes of the constitution or law’. Still this definition or explanation did not specifically refer to the Ahmedis, therefore, Article 106, which pertains to the formation of provincial assemblies and distribution of the seats within such assemblies was also amended to make mention of Ahmedis amongst the non-Muslim faiths described 11 the Article for the purpose of reservation of special seats for them. They were referred to as ’persons of the Quadiani group or the Lahori Group (who call themselves ’Ahmedis’)’.27

Bhutto and his government calmed the situation for the time being by acceding to the demand of ihe religious parties who had worked up a frenzy in the country but did not realize the long term implications, legal as well as constitutional, of this move.

AN ABORTED COUP ATTEMPT AND F.B. ALI’S CASE

On 30 March 1973, the ministry of defence nounced that a small group of military officers bad conspired to seize power. The alleged conspirators were tried before a special military court presided over by a little known Major-

General, Muhammad Ziaul Haq. Two of the persons being tried, Brigadier (Retd.) F.B. Ali and *Colonel (Retd.) Abdul Aleem Afridi, challenged their trial* before the military court in the Lahore High Court in writ jurisdiction. The Lahore High Court dismissed their petitions and the matter finally came up before the Supreme Court. The following points were raised by them before the Supreme Court:28

(a) Since they had been retired from the army, therefore, they were no longer subject to the Pakistan Army Act and they could not be tried by a general court martial.

(b) That the amendment of the Army Act by Ordinances in and IV of 1967, making persons other than serving personnel of armed forces as subject to the jurisdiction of the military courts, was unconstitutional being violative of the fundamental rights of security of person and equality of citizens before law under the 1962 Constitution.

(c) That the amendments in the Army Act, subjecting non-military or retired military personnel under its jurisdiction, were not laws because they purported to unreasonably deprive a citizen of even the norms of a judicial trial.

The Supreme Court repelled all these contentions. It held that the retired personnel from the armed forces and even civilians fell within the ambit of the Army Act if they were accused of seducing or attempting to seduce any person subject to the Act from his duty or allegiance to the government or had committed an offence under the Official Secrets Act in relation to the armed forces.

The Ordinances HI and IV of 1967, bringing about the aforesaid amendment in the Army Act, were held to be valid pieces of legislation particularly as they had subsequently been approved by the National Assembly. The Court observed that the prevention of the subversion of loyalty of a member of the defence services of Pakistan was as essential as the provision of arms and ammunition to the defence services or their training. It was held that the said ordinances fell within the meaning of law because, according to

majority of the bench of five, the ’law’ under the
1962 Constitution would, in its generally accepted connotation, mean positive law, that is to say, a formal pronouncement of the will of the competent lawgiver and that there was no condition that a law must, in order to qualify as such, also be based on reason or morality. Thus, it was observed, the Court could not strike down a law on any higher ethical notions nor could courts act on the basis of philosophical concepts of law. In the dissenting opinion on this point only, it was held that the term ’law’, in addition to positive law, must be construed to also include the judicial principles laid down from time to time by the superior courts and the accepted forms of legal process and juridical norms obtaining in Pakistan.29

The Supreme Court did not hold Ordinances in and IV *of 1967* as violative of the ’equality before Jaw’ and ’equal protection of laws’ clauses under the Fundamental Right Number 15 of the 1962 Constitution because the legislation in question, though it applied only to a certain group of people and not to others, had the effect of treating alike persons concerned under similar circumstances which was a constitutionally permissible classification. The Supreme Court held that the ordinary courts should not interfere with the court martial in the exercise of their power of judicial review merely on the ground that some rule of procedure was not followed but that there would be no bar of jurisdiction where action was without jurisdiction, *coram nonjudice* or malafide.

Hence the appeal of F.B. Ali and his coappellant failed before the Supreme Court. He, and other conspirators, were found guilty by the special military court and were sentenced to heavy terms of imprisonment. These trials afforded an opportunity to Ziaul Haq to attract the attention of Bhutto. He worked closely with Bhutto who personally examined the relevant trial papers and intelligence reports.30

THIRD AMENDMENT: VICTIMIZATION OF POLITICAL OPPONENTS

It has been discussed above that the Bhutto’s government was becoming increasingly intolerant

and repressive towards its political oppom were being arrested and detained. These opponents were forced to knock the door* „, ^ judiciary which did not have too high a moult The judgments were mostly in favour of tin government and, once in a while, some relief»« allowed to political opponents. Even this limited judicial interference in his dealing with polinal opponents was not seen with favour by Bhutto ami his colleagues. A policy for the curtailment of powers and jurisdiction of courts, including i general plan to demoralize the judiciary, *a adopted. An amendment was introduced in fe Code of Criminal Procedure prohibiting the cow from granting bail before arrest to a person unJes a case was registered and that an order of y would be effective only regarding the case tL stood registered against him and specified in tie order.31 Previously, the courts had allowed blank bail before arrest to political opponents in cases registered and to be registered as part of tie process of such victimization.32

A constitutional amendment was introduced to curtail the rights of a *detenu* detained under a la» for preventive detention, extending the powers of the detaining authority. Article 10 of tie Constitution which provided for certain safeguards against preventive detention was amended in February 1975 under the Constitution (Third Amendment) Act, 197533 to the following effect.

(a) The period of preventive detention for a *detenu* was originally fixed at one month. beyond which period no law for preventive detention could authorize preventive detention unless the appropriate Review Board,34 after affording the *detenu* an opportunity of being heard in person, reviewed his case and reported that, in its opinion, there was sufficient cause for continuation of detention beyond one month. This initial period of detention was extended from one month to three montns under the third amendment, (b) Under the constitution originally, it was required that a *detenu* held under a law for preventive detention should be cornmunicated the grounds of his detention not later than one week of such detention so that he could make representations against

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to fifteen days. (c) The constitution limited the total period of preventive detention to the maximum of twelve months within a period of twentyfour months. However, an exception to this limitation was for a person who was employed by, or worked for, or acted on instructions received from the enemy. Such person could be detained indefinitely. This exception was extended under the third amendment to include any person 'who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a federal law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity'.

It is obvious that the Third Amendment curtailed the rights of political *detenus* and correspondingly enhanced the powers of the government. It also enabled the government to put political opponents under detention for an indefinite period after accusing them of indulging in anti-State activities. By the time the Third Amendment was passed, action against the NAP had already been taken and this amendment enhance of the powers of the government to deal with a political opponent firmly and to put its leadership under indefinite detention.

The Third Amendment also extended the period of Emergency proclaimed by the President. Under the Constitution in its original form, the period of such Emergency could be six months at the most and that also by the resolution of a joint sitting of the two Houses of the Parliament.35 The Third Amendment provided that the Emergency would continue indefinitely until a resolution disapproving the proclamation was passed by the votes of the majority of the total membership of the Houses in joint sitting. This amendment was also retrogressive in nature, extending the powers and penod of emergency, particularly in view of the fact that Pakistan remained under Emergency

for more than twenty years, for political rather than national reasons.

FOURTH AMENDMENT: JURISDICTION OF COURTS CURTAILED

The Bhutto government's decision to curtail the powers and jurisdiction of the courts preventing them from granting relief to political opponents, particularly in exercise of constitutional jurisdiction under Article 199, came about under the Fourth Amendment to the Constitution.36 High Courts were forbidden from prohibiting the making of an order for preventive detention of a person or to grant bail to any one so detained. This was a major curtailment of constitutional jurisdiction of High Courts denying them jurisdiction to come to the aid of political victims or even to grant such people bail during their detention.

The constitutional jurisdiction of the High Courts was also curtailed in the matter of stay of recovery, assessment, or collection of public revenues. Any stay order granted in such a matter would cease to have effect on the expiry of sixty days unless the matter was finally decided by the Court within such time. All such interim orders made by a High Court before the fourth amendment would also cease to have effect on the expiry of sixty days.

The only redeeming feature of this amendment was the allocation of six special seats to the minorities in the National Assembly and an increase in the number of seats for the minorities in

the provincial assembly of the Punjab from three to five.

This amendment was passed in a very unfortunate manner. Members of the opposition in the National Assembly wanted to have a debate particularly regarding the curtailment of the powers of the High Courts. They were denied the opportunity to speak and were physically thrown out of the National Assembly by the security staff led by Sergeant-at-arms. A vote on this amendment was then rushed through in the absence of the opposition.37 It is indeed true that Bhutto had more than the requisite two-third majority in the National Assembly to push through any constitutional amendment but it was against all norms of decent

democratic behaviour to gag the voice of the opposition in the assembly and to subject the members of the opposition to the humiliation of being physically maltreated and pushed and thrown out of the assembly.

NATIONAL AWAMI PARTY (NAP) BANNED AND THE SUPREME COURT JUDGMENT

The Bhutto regime had projected the NAP-JUI governments as incapable of maintaining law and order, but the state of public order did not improve after their dismissal. An insurgency raged in Balochistan. In 1974 and later, several bomb explosions occurred in the NWFP. Bhutto, his ministers, and the pro-government media charged that the NAP leaders, had planned these explosions to spread chaos in the country and to damage its unity and integrity in collaboration with the government of Afghanistan. On 8 February 1975, an explosion killed Hayat Mohammad Sherpao38 as he rose to address a gathering of students at Peshawar University. A few days later, the central government declared the NAP to be an unlawful organization, closed down its offices, and arrested many of its leaders in the NWFP and in Balochistan, including Wali Khan. Members of the National Assembly and the provincial assemblies of NWFP and Balochistan belonging to the NAP and unwilling to change their affiliation were removed, enabling pro-Bhutto groups to establish secure legislative majorities in these provinces.

The background of this swift and sweeping action against NAP and Wali Khan was the continuing rivalry between the PPP and the NAP and the underlying conflict between the personalities of Bhutto and Wali Khan who had emerged as a principal opponent at the national level having been designated as leader of the opposition in the National Assembly. One could see that, during the 1970s, for any political party to capture power at the national level it had to build bases of support in more than one province. Just as Bhutto had built majority support in Sindh and Punjab and was planning to develop similar support in the NWFP and Balochistan, it seemed that the opposition leader, Wali Khan, had started

thinking along the same lines. Starting with b base in the NWFP, he wanted to mobilize polita support in the Punjab. In the beginning of 1W he toured Punjab and it seemed that his meetof were attracting large crowds. He felt that perhapi in another six months he would be able to take a Bhutto and the PPP in the Punjab. According It Wali Khan, Bhutto got so worried by suck developments that he had to imprison him unto some pretext.39

By a notification issued on 10 February 1975, the federal government declared that the NAP wa operating ’in a manner prejudicial to the sovereignty and integrity of Pakistan’ and by another notification of the same date, the federal government also declared that as a result of die first mentioned notification, the NAP ’stands dissolved, properties and funds are forfeited to the federal government’. Thereafter, as required by Section 4 of the Political Parties Act, 1962, the federal government made reference to the Supreme Court on 24 February 1975.

Notices were issued by the Supreme Court on the detained leaders of the NAP and on 24 May

1975, a consolidated written statement on behalf of the party was filed in the Court. Thereafter, on
14 June, Messrs Wali Khan, Arbab SikandarKnan Khalil, Sardar Khair Bakhsh Marri, Mir Ghaus Bakhsh Bizenjo, and Sardar Ataullah Mengal also filed separate written statements. Wall Khan appeared before the Supreme Court on 19 June
1975. He wanted to speak but was forbidden to do so, except through his counsel. He, therefore, discharged his counsel and claimed the right to appear in person. He objected to the presence of Justices Muhammad Gul and Muhammad Afzal Cheema on the Bench.'10 These judges were consulted and they both said that they were, in no way, embarrassed by sitting on the Bench as constituted for they had done nothing from which any inference of bias on their part could legitimately be drawn, nor were they in any way, biased or prejudiced against the dissolved party or any of .its leaders. The objection was, therefore, overruled. At this stage, Wali Khan announced that in the circumstances, he would not be prepared to participate in the proceedings and walked out of the court room.

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In the matter of the

Muhammad Gul, the Co

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However, the Chief Jus1

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ie same lines. Starting with his ’, he wanted to mobilize political njab. In the beginning of 1974, and it seemed that his meetings rge crowds. He felt that perhaps nths he would be able to take on PP in the Punjab. According to itto got so worried by such t he had to imprison him under

MI issued on 10 February 1975, ment declared that the NAP was manner prejudicial to the integrity of Pakistan’ and by in of the same date, the federal declared that as a result of the lotification, the NAP ’stands es and funds are forfeited to the it’. Thereafter, as required by Political Parties Act, 1962, the t made reference to the Supreme ary 1975.

sued by the Supreme Court on rs of the NAP and on 24 May ed written statement on behalf led in the Court. Thereafter, on ali Khan, Arbab Sikandar Khan air Bakhsh Marri, Mir Ghaus id Sardar Ataullah Mengal also itten statements. Wali Khan ie Supreme Court on 19 June > speak but was forbidden to do b. his counsel. He, therefore, nsel and claimed the right to le objected to the presence of d Gul and Muhammad Afzal Jench.40 These judges were both said that they were, in no by sitting on the Bench as had done nothing from which bias on their part could vn, nor were they in any way, I against the dissolved party or The objection was, therefore, ige, Wali Khan announced that
5, he would not be prepared to roceedings and walked out of

The Court considered the objection against the two judges in the absence of the defence and rejected it in categorical terms. Chief Justice Hamoodur Rahman authored the opinion of the Court and held on the point of bias that the mere fact that Mr Justice Cheema was Law Secretary at the time when the Law Minister had publicly stated that the question of banning the party was under examination for a period of two to three years, did not disqualify him or even form the basis of the objection which was rejected as vague and nebulous Mere suspicion of bias, even if it was not unreasonable, was not sufficient to disqualify a judge and held that in that case even the suspicion was unreasonable because it did not necessarily follow that it was the ministry of law which had examined the question of banning the party or that the secretary of the ministry had of necessity to deal with this question. The learned Chief Justice also relied on the affidavit of the witnesses of the government stating that the question of banning the party was done mainly by the ministry of interior and not by the ministry of law” With due respect to the learned judge, the reasoning on this point is not very convincing. Any reasonable and prudent man can infer that when •*k* question of banning a political party is under ntwderation by the government, its Law Secretary i certainly involved and his opinion must to have been sought.

In the matter of the other judge, Mr Justice

Muhammad Gul, the Court went even further. The

ed judge offered to withdraw from the case

~. ground that he had already dealt with the

al which formed the basis for banning the

pan) in his capacity as Chairman of the Advisory

Board,42 on the continuance of the detention of

Wall Khan, and some other leaders of the NAP.

However, the Chief Justice turned down this offer

ss untenable because, in the absence of any

national or statutory bar, a judge is not

hfied from sitting at a trial of a person

because he had previously participated in

egal proceedings against the same person,

^ciner in the capacity of a judge or of an

stamstrative tribunal or official. It was further

ed that the mere fact that the detention of

«of the persons concerned was extended on

the advice of a judge did not mean that he had also taken the decision regarding to the banning of the party. Such an inference could be neither factually nor legally correct. The opinion that Mr Justice Gul might have formed as the Chairman of the Advisory Board did not affect the case in hand because there was no allegation against him of any personal animosity, ill-will, or personal interest. The Chief Justice thus reduced the legal concept of bias to its bare minimum and his reasoning is not the least convincing.

The Court held that the NAP was acting in a manner prejudicial to the sovereignty and integrity of Pakistan. It adopted a novel reasoning under which a political party was held not to be a corporate body having separate corporate existence apart from its members. The Court elaborated that though the acts of one or two individual members of the party, however important they might be, can not necessarily be considered the acts of the party, when a fairly substantial segment of members were shown to be acting or behaving in a particular manner without any objection from any of the other members of the party or its controlling body, it might well be presumed that the individuals concerned were speaking for or acting on behalf of the party and to that extent, therefore, their acts would also be treated as the acts of the party. Hence, insofar as the party consistently failed to repudiate the utterances or actions of its leadership or failed to

dissociate itself from such actions or utterances, it must be held that the party itself subscribed to the same view.

The Court did not accept the source or intelligence reports to be admissible in evidence but allowed the referring authority to draw upon the source report only to the extent that it had received corroboration from the happening of the events mentioned in the report, if those events could be established independently by reliable evidence. Newspaper reports of contemporaneous events were held admissible, particularly when they happened to be events of local interest or of such public nature as would generally be known throughout the community and where testimony of an eye witness is not readily available. If a person did not avail the opportunity to contradict or question the truthfulness of the statement attributed

to him and duly published in newspapers, he could not complain if that publication was used against him. Such an issue would not be hit by the rule of hearsay/3 Transcripts of speeches personally made by officers of the Special Branch or the Intelligence Bureau were accepted as admissible evidence if proved by the person hearing the speech and making notes of it contemporaneously. Tape-records of speeches were admitted in evidence if the officers who recorded such speeches could identify the voice of person speaking. Reports of foreign broadcasts were also accepted as authentic if the officer monitoring such broadcasts described them in detail.

The Court observed that to say that Pakistan did not consist of one ’nation’ but several ’nationalities’ each having ethnic, cultural, social, and political differences, was to deny the very basis of Pakistan and if, along with it the right of self determination for each nationality was demanded, then it amounted a demand for the breakup of Pakistan, destroying its integrity and setting up several independent states within Pakistan. The concept of nationalities, it was observed, was opposed to the fundamentals of Islam which preached that the entire Muslim *Millat* was one nation under one *Khalifa.*

The Supreme Court held the following acts of the offending party (NAP) as prejudicial to the sovereignty and integrity of Pakistan:

(a) Contention of the NAP and its leaders that they were no longer bound by the constitution as the ruling party had itself violated the Tripartite Accord44 and the constitution both in its letter and spirit. This, according to the Court, was subversion of the constitution.

(b) The claim of the NAP and its leaders that the Pakhtoonistan movement was merely seeking renaming of two provinces was held to be wholly untenable. Actually, it was observed, they were demanding secession in the name of autonomy by carving out a new province and demanding complete self-government with only three subjects left to the centre.

(c) The sovereignty includes external sovereignty and a political party that talks of shifting international boundary from one

place to another vitally affects soveraftj of the country.

(d) When the tribal areas opted for Pakun the right of self determination *it* exercised and no such question coil further arise. Seeking the right of id determination in the existing circumstaoca would amount to a breakup of the existi structure of the country and achievema of this goal by force, if necessary amounted to operating in a manner prejudicial to the sovereignty and mtegra; of the country.

(e) That the characterization of the two-nation theory as a spurious slogan raised to seek partition

of India, and the suggestion thai once the objective had been attained, tk theory ceased to be of any validity, and tk standpoint that the founder of the country had recounted his views about polity m the country and desired it to be a secular state were all complete distortion of facts

The judgment of the Supreme Court in the NAP case suffers from several weaknesses:

It was an *ex-parte* judgment based on *aparte* proceedings.

The objection to the two judges on the Bench was not without force and substance and they should have voluntarily withdrawn from the case rather than create the unpleasant situation of forcing one-sided proceedings.

The manner in which the objection was disposed of and the reasoning adopted give the impression of an unfriendly, if not hostile, attitude of the Court towards the respondent party and its leaders. The conclusions reached by the Court against the NAP and its leadership were harsh and based upon inherently inadmissible evidence.

The applications of certain politicians and political parties for being impleaded in the proceedings were summarily dismissed

It was indeed the last major judgment given by Mr Justice Hamoodur Rahman who retired soon after its announcement. He had been a good judge

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and wrote some outstanding judgment and the proceedings i based were certainly a disappoint

FIFTH AMENDMENT: CHASTIZING THE JUDN

The State of the Judiciary ii

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BHUTTO'S DEMOCRACY

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wrote some outstanding *opinions. This :* and the proceedings on which it was based were certainly a disappointment.

FIFTH AMENDMENT: CHASTIZING THE **JUDICIARY**

The State **of the Judiciary in 1976**

Pakistan inherited a fairly good judicial structure with judges known for their competence and integrity The first Chief Justice of Pakistan, Mr Justice Abdur Rashid, was known to be extremely discreet. He strictly followed the tradition of remaining aloof and avoided going to public functions. He was a man of unimpeachable character and reputation. His successor, Mr Justice Muhammad Munir, though a learned and competent man, proved to be controversial. He was responsible for certain disastrous judgments, which have been discussed above, that rocked the boat of Constitution during Pakistan's formative years. He was also known for having favourites amongst judges and lawyers, one of whom was Sardar Muhammad Iqbal. Mr Justice Munir was succeeded by Mr Justice Shahabuddin and to Justice A R. Cornelius who were both men of character, integrity, and competence.

When Munir became Law Minister in 1962, he got Sardar Iqbal appointed as a judge of the West Pakistan High Court. Along with him was appointed Maulvi Mushtaq Husain. They soon became rivals and, in the process, extended their rivalry amongst judges in the West Pakistan High Court and amongst the members of the Bar. They caused the judges and the lawyers to be divided into factions led by either one of them.

Matters became worse when Sardar Iqbal was appointed as Chief Justice of the Lahore High Court in 1972 on the elevation of Chief Justice tararul Haq to the Supreme Court. It was a consistent practice and tradition of the court in Pakistan and India that Chief Justices of High Courts were elevated to the Supreme Court and liey accepted such elevation with grace and le In defiance of this practice, Sardar Iqbal to accept elevation as a judge of the

Supreme Court. He preferred as Chief Justice because he was administering huge judicial set-up in the province of Punjab with hundreds of civil judges and scores of district judges under him.

Maulvi Mushtaq also decided not to accept the elevation to the Supreme Court and stayed on as Senior Puisne Judge of the Lahore High Court, thus breathing down the neck of his opponent. They were wary of one another and the grouping and factionalism amongst judges and lawyers further intensified and polluted the environment at the Bench and the Bar. In the meantime, a number of judges of the Lahore High Court junior to both of them were elevated to the Supreme Court.45

The method and manner of appointment of judges were affected by considerations of political patronage, nepotism, and favouritism, particularly under Ayub. He appointed a brother of a politician from NWFP who had helped him in the Presidential election of 1965 as a judge of the West Pakistan High Court. He also held interviews for the recommendees and made appointments for political considerations or personal reasons which were highly subjective and whimsical.

Another unfortunate practice that developed amongst members of the judiciary was based on nepotism. The chief justices started promoting their own sons and sons-in-law or those of their

colleagues on the Bench obliging one another for mutual benefit of their kith and kin. Whenever a son returned from abroad, with or without a foreign law degree, or started law practice, he was widely introduced by his judge father to his uncle judges with the understanding that he should be looked after. Naturally, law practice of the sons and sonsin-law of the judges flourished overnight to the chagrin and frustration of the less privileged members of the Bar. They were engaged on fabulous fees with the expectation that they would obtain relief due to personal reasons, which they actually did in many cases. Besides, they carried awe for the members of subordinate judiciary whom they easily frightened with their overbearing attitudes and arrogance. Those who did not make it in the law practice despite all advantages and benefits got appointed as law officers and were eventually elevated to the Bench.

Such was the state of judiciary when the Constitution (Fifth Amendment) Bill was moved before the parliament.

Debate on the Fifth Amendment Bill

Constitution (Fifth Amendment) Bill was introduced in the National Assembly on
1 September 1976 providing for the establishment of separate High Courts for Balochistan and Sindh, extending the period of separation of judiciary from the executive, fixed terms of the Chief Justices of the Supreme Court and the High Courts, compulsory transfer of judges from one High Court to another, powers of punishment for contempt of court, and restriction of jurisdiction of the High Court to grant interim bail.46 During the debate on the amendment Bill in the National Assembly, the judiciary came under severe criticism. Federal Education Minister, Mr Abdul Hafeez Pirzada, in his speech on the Bill said that the judiciary had been trying to encroach upon the functions of the legislature and the executive. He said that if the judges were not happy with their positions, then they should quit their office and contest elections to occupy seats in the parliament.47 He said that the judiciary was the creation of the Constitution and drew powers from it to impart justice within the given jurisdiction. Any action outside the jurisdiction conferred by the Constitution would tantamount to subversion and high treason. He also said that there was an unfortunate confusion over the limits of the powers of the judiciary and it was the duty of the legislature to remove it. He defended the fixing of tenures of the Chief Justices of the Supreme Court and the High Courts because all other state positions like the President, the Prime Minister, and members of parliament had a fixed term of office. He said that in the present position, one could visualize the frustration of the other judges if the incumbent Chief Justice continued for fifteen years or more. According to him the appointment of a Supreme Court judge was given to the best talent and it was justified to retire a judge of the High Court if he did not accept appointment as Supreme Court judge.

Winding up the debate on the Fifth Amendment Bill, Bhutto said that his government wanted

’harmonious co-existence’ of all three organ* the state, legislature, executive, and the judicuwith none of them transgressing into the orbit the other. He stressed that independence of <•• judiciary did not mean the supremacj sovereignty of the judiciary. In a parliament! system, he said, sovereignty belonged to trt legislature elected by the people Bhti’ emphasized that the fundamentals of !’• Constitution were not being touched upon thou. the parliament was empowered to change tlr Constitution, amend it, or even scrap it if it x liked. He endorsed Pirzada’s speech and said tk the judiciary had to be subordinate to the to I could not become a parallel legislature oexecutive. He said that the Fifth Constitutiona Amendment had been necessitated by repeaitc decisions of the judiciary trespassing into thefieic of the executive.48

The Constitution (Fifth Amendment) Bill *w* passed by the National Assembly on 5 Septembti 1976 by 111 votes. The opposition staged a wall out during the second reading of the Bill49 Tlie

Bill was passed by the Senate on 8 September
1976 and became an Act on 15 September *in* on receiving the assent of the President.50

Constitution (Fifth Amendment) Act, *M*

The Fifth Amendment brought about the following major changes in the Constitution:

(a) The Governor of a province was not to be a permanent resident of that province.

(b) The period for separation of the judiciary from the executive was enhanced from three years to five years.

(c) The Chief Justice of the Supreme Court, unless he retired earlier on attaining the age of sixty-five, would hold office for a period of five years.

(d) In the same manner, the Chief Justice of a High Court would hold office for a period of four years.

(e) On the completion of the term of office as the Chief Justice of the Supreme Court or a High Court, as the case may be, he would have either of the two options, to retire from his office and receive the pension to

which he would retired from off retirement; or ti most senior of concerned and same salary whi holding the offi<

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have been entitled had he retired from office on attaining the age of retirement; or to assume the office of the most senior *of the judges of the court* concerned and to continue to receive the same salary which he was receiving while holding the office of Chief Justice.

(f) A Chief Justice, who continued after the completion of his term of office as senior most judge, could not even be appointed as acting Chief Justice in the absence of the Chief Justice or when vacancy occurs in the office of Chief Justice.

(g) The term of office of the Chief Justice was to apply to those Chief Justices too who were appointed prior to the enactment of the Fifth Amendment.

(h) The power of the Supreme Court to issue directions, orders, or decrees was made subject to the Article 175(2) of the constitution, which states that 'No court shall have any jurisdiction save as is or may be conferred on it by the constitution or by or under any law'. Thus the Supreme Court's jurisdiction was restricted to what was expressly granted under the constitution or a law.

(i) The common High Court of Sindh and Balochistan was dissolved and separate High Courts for these two provinces were to be established.

(j) The Supreme Court and the High Court were forbidden from making any order under Article 199 prohibiting the making, or suspending the operation, of an order for the detention of any person under any law providing for preventive detention; releasing on bail any person detained under any law providing for preventive detention; releasing on bail, or suspending the operation of an order for the custody, of any person against whom a report or complaint had been made before any court or tribunal, or against whom a case had been registered at any police station, in respect of any offence, or who had been convicted by any court of tribunal; prohibiting the registration of a case at a

police station, or the making of a report or complaint before any court or tribunal, in respect of an offence; or *granting interim relief to any person referred to above.*

(k) All the orders, whether made by the Supreme Court or a High Court, making of which was being forbidden under the Fifth Amendment, were to become ineffective after the commencement of the Fifth Amendment and all applications for such orders were to abate.

(1) A judge of a High Court could be transferred to another High Court for a period upto one year without his consent and without the consultation of the Chief Justices concerned.

(m) Article 204, regarding contempt of court, was amended and the power of the High Courts to punish a person for contempt of court was made subject to ordinary law.

(n) A judge of a High Court who refused to accept appointment as a judge of the Supreme Court would be deemed to have retired from his office.

It is obvious that the predominant focus of the Fifth Amendment was the judiciary whose powers and jurisdiction were curtailed and its members made insecure, having been exposed to the threat of transfer. It took away the option of the Chief Justice or other judges of High Courts to refuse elevation to the Supreme Court. One could only do so at the cost of immediate retirement. The judiciary was snubbed and its powers to punish for contempt of Court and constitutional provisions in this regard were withdrawn. The judiciary was thus fully chastized. One of the immediate consequences was that Sardar Iqbal was obliged to quit as Chief Justice of the Lahore High Court and to retire on completion of his term of four years in October 1976. Chief Justice Ghulam Safdar Shah of the Peshawar High Court was also forced into retirement as he had completed a period of four years in service.

New **Law for Contempt of Court**

A positive development of the lawyers' endeavours against the law of contempt was that a new law on the subject came at the end of 1976. The Contempt of Court Act, 197651 was progressive compared to the previous Act of 1926. The earlier law was rather stringent and was made all the more so by its liberal application by the judiciary.52 The law had been used by the judges as a shield against criticism and they had gone to the point of using it when they were not even acting in their judicial capacity. It was in this environment that malpractices by the relatives, friends, and proteges of judges were spreading and the name of the judiciary was being dragged in the mud. By the use of this law, the judges tried to gag the lawyers who spoke in criticism. Little did they realize that at least some of the criticism was genuine and they ought to have taken it constructively in order to review their attitudes.

The new law provided for criticism by way of fair comments about the general working of courts and the merits of a decision of a court. It also allowed the publication of a fair and accurate report of any judicial proceedings, of making true averments for initiation of action for, or in the

course of disciplinary proceedings, against a judge,

PPP had made a promise in its 1970 dec manifesto that it would nationalize the k industries. The measure was carried out i haphazard manner and with gross incom] and corruption, resulting in a heavy loss to fc' government and a serious setback to industrials tion. Within a short time, productive mdust units were turned into sick units by the bureaucn. installed to run them.

The process of nationalization did not iU| there. Next came the turn of the vegetable oi industry. The ownership and management)! hydrogenated vegetable oil mills were taken <w by the federal government through an ordinance! September 1973.53 The ordinance was followedbj an Act of parliament on the same terms * fin vegetable oil mills so nationalized were sial industrial units and not many workers weit employed in them. They were run by small u medium size entrepreneurs who were sudden!) deprived of their main assets and activity in lift These units had been generally run efficiently by their owners and were profitable. When thest industrial units fell into the hands of governmentpicked bureaucrats, they ran up high costs of operation due to inexperienced and bureaucratic management with several overheads. These industrial units also ran into heavy losses *aml*^

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guidelines for banks, evaluate their performance, determine the area of co-ordination between them, and to assist them in the management of banks. The timing of nationalization of banks could not be worse. It came at a time when the Arab countries were in confrontation with the West due to Arab-Israel war of October 1973 and had cut off or reduced the supply of oil to

western countries. This was an opportunity for Pakistan to encourage Arab countries to invest in banks in Pakistan or to establish their own banks. The Arab netro-dollars could have come in a big way into Pakistan which could have been made available for the development of the country.

Last in the series of nationalization was the most shocking of all. In July 1976, through three ordinances, flour mills, rice mills, and cotton ginning factories throughout the country were nationalized.56 These ordinances were followed by identical Acts of the parliament on these subjects in September 1976.57 The factories or nationalized units were generally very small, run by a few people or at times by the members of single family. Many of them were small businesses which could not even be described as industrial units. Many families were deprived of their only source of income and were even displaced and made homeless by the cruel and callous bureaucrats who took over these units, particularly where a family y its residential quarters within the premises of the unit. In the ultimate analysis, this nationalization caused colossal loss to the national treasury tnd the people of Pakistan.

The question is why did Bhutto do all this? The nationalization of banks and heavy industry could he justified on an ideological plane, the PPP had socialist pretensions, but the nationalization of small seasonal industrial units like vegetable oil nuts, rice mills, flour mills, and cotton ginning ktones could not be justified on any ground whatsoever. Whatever the reason this senseless nationalization did cost the country heavily and Bhutto and his party also paid dearly for it. These dtprived and dejected traders, businessmen, and industrialists became the standard bearers, facers, and front-liners of the PNA movement of 1977 because they were fighting for their nvival and wanted to settle the issue with Bhutto

and his party once and for all. They also became staunch supporters of the martial law regime of Ziaul Haq and co-operated with him in resisting the PPP's return to power.

SIXTH AMENDMENT TO THE CONSTITUTION

The Sixth Amendment to the Constitution was passed rather quickly and overnight. While the National Assembly was having its last session before its dissolution prior to fresh elections, the Constitution (Sixth Amendment) Bill was placed before the parliament and was passed. The main provision of the Sixth Amendment was extending the term of the Chief Justices of the Supreme Court and the High Courts beyond the age of retirement. It was provided that the Chief Justice of the Supreme Court who had attained the retirement age of sixty-five, and a Chief Justice of a High Court, who had attained the retirement age of sixtytwo and had not completed their term of office of five years and four years, respectively, would continue to hold office until the completion of their respective term of office, as the case may be.58 Other provisions of the Sixth Amendment were minor.

This amendment is another instance of the arbitrary style of working of the Bhutto government. On the one hand, by fixing a term of office for the Chief Justices, they were forced to retire before reaching the retirement age and, on the other hand, they were allowed to continue, under the Sixth Amendment, even after the age of retirement to complete their term of office. This Amendment was brought about in the Constitution to favour the then Chief Justice of the Supreme Court, Yakub Ali, who was due to retire in the middle of 1977 after serving for less

than two years as Chief Justice. He had been very close to Bhutto and prevailed over the latter by persistent requests to allow him to remain Chief Justice for more than three years after his retirement age, even if it meant an amendment to the Constitution. Bhutto thus had the Constitution amended to accommodate a friend.

I

FURTHER LAND REFORMS

Days before the dissolution of the National Assembly, another set of land reforms were introduced through an ordinance,59 soon followed by an Act of parliament in the same terms.60

The main features of these land reforms were as under:

(a) No person should own or possess more than one hundred acres of irrigated or two hundred acres of unirri gated land or an area equivalent to eight thousand produce index units of land, whichever would be greater. (b) Any transfers of land made by a person holding more than the ceiling fixed, before he had relinquished the excess land, should be void.

(c) Compensation was to be paid for the surrendered land at the rate of Rs 30 per produce index unit and that also through negotiable bonds, redeemable in ten years and carrying interest from July 1977. (d) Land resumed by the government, unless required for public purpose, would be granted free of charge to tenants in cultivating possession.

(e) Land not granted to the *tenants in* cultivating possession was *}[>be gf&tfed* ’to otner landless tenants or persons owning less than twelve acres.

These land reforms were never acted Upon due

to the political conditions that ensued, and even the operation of land reforms *of 1972* was not *completed.*

High Courts were not precluded from scnUun the orders, proceedings, and acts made, takqi done without jurisdiction, with malarideon were *coram non judice.* This principle was > again upheld and reiterated in another case coi before the Supreme Court after the enforcema the 1973 Constitution while discussing validation clause thereunder and the clause on the jurisdiction of the superior courts” Supreme Court elaborated the concep ’malafides’ in this judgment and held • ’malafides’ literally means ’in bad faith’ Ac”: taken in bad faith is usually action lap, maliciously, that is to say, m which the pe-v j taking the action does so out of personal motw either to hurt the person against whom theaciis taken or to benefit oneself. Action taker colourable exercise of powers, that is to sa) i • collateral purposes not authorized by the law unit j which the action is taken is a fraud on the law a i is also malafide. j

There was dispute over the genuineness i f voluntariness of a resignation of a member of. assembly submitted to its Speaker. The HighCour in writ jurisdiction, held that ’no duty is cast r the Speaker to satisfy himself about the genuir ness, proper execution, *or legal* effect ol resignation, or to *&&$& I $%&* concertB it’. The matter finally came up before the Suprci Court which held as under:63

1. It IS the duty Of the Speaker to de«fefe

genuineness or validity of a resignation fj resignation cannot be equated witi disqualification *suffered by a* member *wk Article 63 ofthr rnnnUt,-''*

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This appointment wa;

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Further, comity among judiciary is not a rule a

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igs, and acts made, taken, or :tion, with malafide or which *lice.* This principle was once erated in another case coming ^ourt after the enforcement of tion while discussing the •eunder and the clause ousting the superior courts.62 The laborated the concept of s judgment and held that means ’in bad faith’. Action i is usually action taken to say, in which the person :s so out of personal motives •son against whom the action fit oneself. Action taken in af powers, that is to say, for)t authorized by the law under iken is a fraud oh the law and

te over the genuineness or signation of a member of an D its Speaker. The High Court, held that ’no duty is cast on y himself about the genuineition, or legal effect of a termine a dispute concerning ’ came up before the Supreme under:63 sf the Speaker to decide the

validity of a resignation for :annot be equated with

suffered by a member under ic constitution, ider a duty to enquire into the :signation to take effect, for

giving automatic effect to ice it reaches the Speaker *s* resignation is genuine and

e Chief Justice of Sindh and ourt, Mr Justice Tufail Ali
16 January 1975, Mr Justice , a permanent judge of the appointed as Chief Justice of ided term and condition that) retain his lien on the office

uf. and

Ukis appointment was challenged by a member of

the Bar in Karachi by filing a *quo warranto* writ petition *requiring Mr Justice Abdul Kadir Shaikh* to snow under what authority of law he claimed to hold the office of Chief Justice. The plea taken *was that, as a permanent Chief Justice of a High* Court, he could not have retained lien and seniority as a judge of the Supreme Court. The Sindh High Court dismissed the writ petition holding that the petitioner as a member of the Bar had no *locus stundi* to challenge the seniority of the Supreme Court. The High Court also found the writ petition not maintainable as the High Court would not issue a wnt against one of its judges.

The Supreme Court on appeal held that the appointment as Chief Justice was unexceptional though he could not hold simultaneously the judgeship of the Supreme Court. On the question of maintainability of the writ petition against a judge of a superior court, the Bench of four judges was divided equally. Two judges, Chief Justice Yakub Ali and Mr Justice Anwarul Haq held the writ petition not maintainable because ’High Court’ is not a ’person’ within the meaning of Article 199 and that the Chief Justice (and for that natter, any judge) was a part of the High Court and not a separate entity from the High Court. Another reason given for non-maintainability was the ground of high degree of comity among the judges of the superior courts. The other judges, namely Mr Justice Salahuddin Ahmad and Mr Justice Muhammad Gul, held that such writ petition was maintainable. They held that a ’judge of a High Court’ and ’a High Court’ are not always synonymous, interchangeable, or convertible. Further, comity among the members of superior judiciary is not a rule of law and certainly cannot outweigh the imperative necessity of

correctly interpreting the constitution.64

Since the judges on the Bench were equally divided, the appeal was dismissed. The net gain of the judgment was the finding that a person cannot hold two permanent constitutional judicial appointments. Abdul Kadir Shaikh had to forego his lien and seniority on the Supreme Court. When he was again appointed to the Supreme Court, he became junior to so many other judges appointed

after ni's first stint as Supreme Court judge that he

did not become the Chief Justice of Pakistan.

As far as the finding on the maintainability of *writ petition against a judge is concerned, the latter* development of law in Pakistan, India and other countries clearly supports the view that such a writ *petition is maintainable.65*

PREVENTIVE DETENTIONS AND THE COURTS

Changing political winds were reflected in the breach of personal liberties of the citizen by the State. For the courts, this meant frequent habeas corpus petitions, challenges to preventive detention and censorship,66 resistance to the continued use of Ayub Khan's war-era laws, and accusations of official mistreatment and torture in prisons. As open fora, the courts were unwitting accomplices to these disputes when the government and its opponents brandished litigation as a weapon of politics. Government efforts to silence critics often provoked legal challenges which led to renewed repression and further litigation. Circularity did not mean substantive equality before the law, for the power of the state far exceeded that of the individual. By 1977, the government had lodged hundreds of cases against politicians and party members (as well as their families and other noncombatants) on matters sometimes only distantly related to politics.

As the law varied under which emergency detentions were enforced, so did the capacity of the courts to redress grievances. It was easier to uphold individual rights under the 1960 West Pakistan Maintenance of Public Order Ordinance than under the Defence of Pakistan Rules, which explicitly restricted available remedies. Nonetheless, in its 1973 cases, the Karachi High Court supported citizen's rights even when it could not offer relief. Taking up petitions filed after language riots in Sindh in 1972, the High Court reminded the government that 'an infringement of the rights of liberties of the citizens should be strictly construed,' and suggested that statutory interpretation should, whenever possible, favour the citizen.67 Judging a group of sixteen habeas

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’•Pakistan. As part propaganda battle cover books called ’ little red books of C distributed widely Rawalpindi. He enc population to join his his party had defeatei
1976 with a lot of far were full of names of thousands of their sup He even sought Islamists, both internal early months of *197(* standing central pillar Pakistan friendship, weapons programme, 1 about holding elections to be sure of winning a required for changing I Pakistan to a presiden having to appear befon every month or so to just took. He had hired a constitutional governmen Phillips of the London S Political Science, who wa; presidential constitution working for the Pakistan] his own ’secret codes’ ’appendices’ to draft a doci read or understand until *Bl to* spring it on his unsuspec It is, by all accounts, c< dissatisfied with the parlian in his words, was the syst privileges of the few at the of the many’. He was unf Constitution and the constrai the executive. He thought th, using its provisions and v Pakistan’s economic and soci made speeches to this effect various places in Pakistan. Hi and clear. Bhutto was going b seek a mandate for bringing al country’s political and constitu

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1 executive capacity in ions, he prompted frequent ons. Bars to civil court ence of Pakistan Ordinance tribunals established under usurped otherwise normal east, remedies provided by : exhausted before the civil

exercise any authority.76

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and later in Rabwah and established their

headquarters in Lahore.

F.B. Ali v The State, PLD 1975 S.C. 506.

29. The dissenting opinion was that of Mr Justice Anwar-ul-Haq.

30. Taseer, Salman, *Bhutto: A political biography,*
1980, Vikas Publishing House (Pvt) Ltd., New Delhi, p. 150.

31. Code of Criminal Procedure (Amendment) Ordinance, 1975, PLD 1976 Central Statutes
57. Code of Criminal Procedure (Amendment) Act
1976 (Act XIII of 1976) PLD 1976 Central Statutes

’ 175. Section 498-A was added to the Code of

Criminal Procedure.

32. In the mid-sixties, Chaudhry Zahur Ilahi, a politician from Gujrat, was under constant political victimization from the then Governor of West Pakistan, Nawab Amir Muhammad Khan of Kalabagh. The Lahore High Court granted him bail in all the cases registered and to be registered against him as part of such victimization.

33. Act XXII of 1975, PLD 1975 Central Statutes 109.

34. In case of detention under a federal law, the Review Board was to consist of three incumbent or former judges of Supreme Court or a High Court, and in case of detention under a Provincial Law, such Board was to consist of three incumbent or former judges of a High Court.

35. Article 232 of the Constitution.

36. Constitution (Fourth Amendment) Act, 1975. Act LXXI of 1975. PLD 1975 Central Statutes 337.

37. *Dawn,* 15 November 1975. The members of the opposition who were forcibly removed from

www.cssexampoint.com

the National Assembly by the security staff were Chaudhry Zahur Ilahi, Mahmood Ali Kasun, Malik Suleman, Mufti Mahmood, Professor Ghafoor Ahmad, Ahmad Raza Kasuri, Dr Ghulam Husain, and Zulfiqar Ali Bajwa.

Hayat *Mohammad Sherpao* was a *close* associate of Bhutto and ^*A °~-J

53.

cabinet At the time of the explosion, he was senior minister in the cabinet of NWFP. Sayeed, Khalid *B., Politics in Pakist*

Praeeer Putu«vi«T,». >J<»~- ’•’-•fc - • ”

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42. This Board is constituted under Article 1’ consider the continuation of preventive daw? of a person.

43. This is indeed a dangerous precedent set by t, Court. Newspaper reports are universally know be of doubtful veracity because of the views a partisan interests of the owners of such newspapr Wrong statements are attributed for their or reasons and denials are not correctly pnnted Ta onus should not be placed on persons to »te statements are attributed.

44. This refers to the Accord reached between the PC on the one hand and the NAP-JUI alliance on tls other hand before the Constitution *beaux* effective.

45. These included Mr Justice Muhammad Cm Mr Justice Muhammad Afzal Cheema ait Mr Justice Muhammad Akram

46. *Dawn, 2* September 1976.

47. *Dawn, 4* September 1976.

48. *Dawn, 5* September 1976.

49. *Dawn, 6* September 1976.

50. Constitution (Fifth Amendment) Act, 1976 Act LXII of 1976. PLD 1976 Central Statutes 538

51. Act LXIV of 1976. PLD 1977 Central Statutes 1!

52. The Supreme Court had previously taken very strict j

view of any shade of contempt by punishing even

bonafide comments made about functioning of tkt

judiciary, publication of articles, or comments

regarding a pending case or even making comment

on a question of law in such pending case Set

Sir Edward Snelson v The Judges of the High Couit

of West Pakistan, PLD 1961 S.C. 237. The judicial

philosophy in respect of the law of contempt of

court perhaps best reflected in the following

observation of Kaikaus, in M.H. Khondkar v The

State (PLD 1966 S.C. 140)

’It is *essential for the administration* of justice tk judges of superior *fffVfff)?” ’)” J ’*

ff ’ llllMM Ll/lffs oe aosolutefy protected from attack for *otherwise it them to* function at *all.’* Hydrogenated yeE«abi= 0,1 j

Development Ordinan
1976. PLD 1976 Ce Ginning Control and D Ordinance XXVI of Statutes 439.

57. Flour Milling Control (Act LVII of 1976).
489. Rice Milling Coi
1976 (Act LVIII of Statutes 497. Cottc Development Act, 1 PLD 1976 Central Stat

58. Constitution (Sixth Ai LXXXIV of 1976. PLI

59. Land Reforms Ordinal
1977) effective from f Central Statutes 101.

60. Land Reforms Act, 197 from 9th January 1977.
126.

61. PLD 1973 S.C. 49.

62. Federation of Pakistan i
1974 S.C. 151.

63. Tahir Beg v Kausar Ali

64. Abrar Hassan v Governr S.C. 315.

65. See Al-Jehad Trust v F<
1996 S.C.324. Also Sup Record Association v I S.C. 268.

66. For example, State v Peshawar 25, and Fakh; another, PLD 1973 Sup Musahib Ali v The State Kanayalal v The State, F

67. Liaqat Ali v Government Home Department, PLD

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Justice Muhammad Gul, mad Afzal Cheema and \ Akram
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Amendment) Act, 1976.) 1976 Central Statutes 538. D 1977 Central Statutes 18. *[* previously taken very strict :ontempt by punishing even ide about functioning of the of articles, or comments se or even making comment in such pending case. See Tie Judges of the High Court 1961 S.C. 237. The judicial of the law of contempt of eflected in the following >, in M.H. Khondkar v The
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ise it would be difficult for

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le Oil Industry (Control and :e, 1973. Ordinance XIX of il Statutes 635. le Oil Industry (Control and
973. Act LXV of 1973 utes 7.

i) Act, 1974. Act XIX of il Statutes 196. nd Development Ordinance.
1976. PLD 1976 Central Milling Control and

Development Ordinance, 1976. Ordinance XXV of
1976 PLD 1976 CentraJ *Statutes 431.* Cotton

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489 Rice Milling Control and Development Act, \916 (Act LVIII of 1976). PLD *1976 Central* Statutes 497. Cotton Ginning Control and

Development A^ct, **\Q1&** C^-c^ **Y\s>** wife **Central Statutes 5D5.**

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is Constitution (Sixth Amendment) Act, 1976. Act

Ayub and two others, PLD \913> Supreme. COAK!

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TO **Yiaa Muhammad v Province of *NWFP through***

Home Secretary, Peshawar, PI-D 1973 foshawar

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71. Begum Nazir Abdul Hamid v Pakistan (Federal Government) through Secretary Interior, PLD 1974

72. Maulana Abdus Sattar Khan Niazi v The State. PLD

..,..«« , xrs* octtcc; r rjD

1974 Lahore 324. Due process matters were also

W Land Reforms Ordinance, 1977 (Ordinance II of
1977) effective from *5 January* 1977. PLD 1977 Central Statutes 101.

« IMtoform kt\,\%T> \ktV*i &Wt) efiecWe from^tii January 1977. PLD 1977 Central Statutes *126*

(I PLD 1973 S.C. 49. (2 Federation of Pakistan v Saeed Ahmad Khan, PLD

1974 SC 151.

0 ra/iirfiegvKausar Ali Shah, PLD 1976 S.C. 504. M Abrar Hassan v Government of Pakistan, PLD 1976

SC 315 (5 See Al-Jehad Trust v Federation of Pakistan, PLD

1996 S C.324. Also Supreme Court Advocates-on-

Record Association v Union of India. AIR 1994

SC268 tf For example, State v Yusuf Lodhi, PLD 1973

Peshawar 25, and Fakhare Alam v The State and

another, PLD 1973 Supreme Court 525, Maulana

Musahib All v The State, PLD 1975 Karachi 909;

Kanayalal v The State, PLD 1977 Karachi 675. (I Liaqat Ah v Government of Sind through Secretary,

Home Department, PLD 1973 Karachi 78. S Zafar Iqbal v Province of Sindh and two others,

PLD 1973 Karachi 316. See Also Abdul Hamid

Government of Punjab, Lahore, PLD 1974 Lahore
344; Mrs Habiba Jilani v The Federation of Pakistan through Secretary, Interior Ministry, PLD 1974

”Lahore 153; Kh. Mohammad Safdar v The State and another, PLD 1974 Lahore 200

f 73. federation of Pakistan y Ch. Manzoor Elahi, PLD
1976 Supreme Court 430.

74. Muzaffar Qadir v The District Magistrate, Lahore, PLD 1975 Lahore 1198.

75. Chaudhry Zahur Ilahi v Secretary to Government of Pakistan, Ministry of Home and Kashmir Affairs, PLD 1975 Lahore 499.

76. For example, Indo-Pakistan Corporation Ltd., Lahore v Government of Pakistan through Secretary, Ministry of Political Affairs, PLD 1975 Lahore 1058.

77. Wolpert, Stanley, *Zulfi Bhutto of Pakistan-His Life and Times,* 1993, Oxford University Press, New York, p. 267.

78. Burki, Shahid Javed, *Pakistan under Bhutto,*
***1971-1977,* 1988, Macmillan Press, Hong Kong, pp. 182-3.**

24 General Elections, March 1977

On 7 January 1977, Bhutto announced that general elections would be held in March and assured the nation that they would be fair.1 The President of Pakistan then dissolved the assemblies, and the Election Commission appointed 7 and 10 March as the polling dates, respectively, for elections to the National Assembly and to the four provincial assemblies. On 21 January, nine opposition parties came together in an electoral coalition called the Pakistan National Alliance (PNA), to oppose the PPP. The PNA launched a vigorous campaign and its public meetings drew large crowds. It seemed that the contest would be lively, to say the least, and that the PPP would have to work hard to win.

Bhutto was still popular and many people thought he was the fittest person among the available politicians to ’hold the reins of government’, but his party was as sick with corruption and factional strife in 1976 as it had been during the preceding four years.2 Bhutto’s advisors told him that party workers were more despised than corrupt public officials and that party leaders were ineffective and colourless.3 Commenting on the state of the party in the Punjab, Rao Abdul Rashid, a police officer who worked as a ’special secretary’ in the Prime Minister’s secretariat, reported that the Chief Minister, Nawab Sadiq Hussain Qureshi, was not much of a politician, had no mass following, and had alienated his Cabinet colleagues and the PPP legislators; that the party lacked public speakers who could hold a crowd and sway the audience, and that neither the ministers nor the MPAs were thinking of the party and its interests.4 Writing again in February 1977, Rao Rashid stated that the party notables who had failed to get the nomination (’ticket’) for the coming election were ready to oppose party nominees, and that many of the latter believed it was now the provincial government’s task to help them win.5

It is not surprising then that the PPP as an organization played only a peripheral role in the

election. Its ’parliamentary boards’ did recomnr candidates for the award of party tickets but Bhmade the actual selection, considering assessments which district officers and mtellige\ agencies had submitted regarding each asprar financial position, local standing, *birau’* connections, character, and reputation. He tried strike a balance between the party faithful and *i*\, new entrants.6

The PPP won nearly four-fifths of theNatioAssembly seats. The PNA managed to win i, than one-fifth, while the remainder went to He independents. In fact, the PPP’s success was e\r more impressive than the table suggests, since iff eight independents from the ’tribal areas’ were, quasi-PPP candidates. Following a tradition tK went back to the British Raj when electoral polite was first introduced into this part of British Indi. tribal leaders, while not accepting party labels were expected to side with the ruling pam Counting the independents with the PPP gave *ft* party 81.5 per cent of the National Assembly sea

Party Positions in the 1977 Elections

Indepen-

PPP

PNA

dents

seats

seats

seats

Province

won

won

won

Total

Punjab

107

8

15

Sindh

32

11

43

NWFP

8

17

1

26

Balochistan

7

1

Islamabad

1

1

Tribal Areas

8

8

Total

155

36

The PPP's popular support, in terms of the total number of votes cast for its candidates was less overwhelming. It received 58 per cent of the vote against 35 per cent for the PNA. This was not as impressive as its *performance in the election of /*

1970 when, in a field c political parties, it obtai votes cast.7 But this > number of seats won a unusual in parliamentar survey carried out bj Associated Press of seventeen million peopl the registered voters, ca the PPP polled about PNA about six million cent respectively).8

The results surprised in three of the four prov seats in only one maji roundly beaten in Laho Multan, and Rawalpindi Punjab, where it won surprised even the party

ALLEGATIONS 01 POLLS

The PNA alleged that th on a massive scale, reje the Provincial Assembl
10 March, and launch secure Bhutto's resign under impartial auspices of the Army staff, ovei the morning of 5 July newly elected assembli< became infructuous, manifestos and the camj Instead, the accusati examination.

The PNA's allegatior that the Bhutto govern manners of malpractic coercion, violence, and indeed instances of be polling stations in Sindl had equalled, or even e of registered voters.9 Uj tion, the Election Cor election in at least a half constituencies in the Pur t PPP had won 15

seats u

SflP^?rr *2>^

Matck 193-3

’parliamentary *boards’* did recommend or the award of party tickets but Bhutto actual selection, considering the

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PPP PNA dents

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107

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^_-* .w/Murues, jt *obtained 39* per cent of the total wto cast.7 But th\s -wide margin between the number of seats won and popular support is not \fflusual in parliamentary elections, ^GSg^^^r | *Surrey carried* out by the government-owned I Associated Press of *Pakjstex (APP),* a6out I I seventeen million people, or *about* 55 per cent of / I tie registered voters, cast their ballot. Out of this, I I the PPP polled about ten million votes and the /

PNA about six milli

in tiiree of the four provinces. It won a majority of seats in only one major city, Karachi, but was roundly beaten in Lahore, Faisalabad, Hyderabad, Multan, and Rawalpindi. The PPP’s success in the Punjab, where it won 93 per cent of the seats, surprised even the party leader.

ALLEGATIONS **OF RIGGING THE**

POLLS

The PNA alleged that the election had been rigged on a massive scale, rejected the results, boycotted the Provincial Assembly elections scheduled for
10 March, and launched a mass movement to secure Bhutto’s resignation and new elections under impartial auspices. General Ziaul Haq, Chief of the Army staff, overthrew the government on the morning of 5 July 1977 and dissolved the newly elected assemblies. Since the election thus became infructuous, discussion of the party manifestos and the campaign may be unnecessary. Instead, the accusations of the PNA need examination.

lie PNA’s allegation, referred to above, meant

that the Bhutto governemnt had resorted to all

manners of malpractice, including corruption,

coercion, violence, and fraud, to win. There were

indeed instances of bogus voting at numerous

polling stations in Sindh where the voter turnout

iad equalled, or even exceeded, the total number

of registered voters.9 Upon preliminary investiga-

non, the Election Commission found that the

I (lection m at least a half-dozen National Assembly

I constituencies in the Punjab had been rigged.10 The

I PPP had won 15 seats unopposed in Sindh, and of

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GENERAL ELECTIONS, MARCS. <ftTi **”J>Ya**

^ *th&* .remaining 28 seats, the PNA. VTOTl \\. In ih< I NWFP, fee PNA won more than twice as *man,* I seats as the PPP and m Baiochistan it did no I contest. Its charge *of jggezg” j^ (tfea* m0re

f pertinent to the PPP’s lop-sided victory in the

I Punjab.

Zia’s regime *later published* a White Paper, consisting of 405 pages of text and 1032 pages of

’documents’, to establish that Bhutto hacI^i-iW»d

£ddjvssecftb him, official reports, and *miscellaneous material. It also included* statements of public servants who had a role in the conduct of the election which the martial law authorities obtained after Bhutto’s ouster. These officials, some of them in jail and others under suspension or threat of dismissal, were pressured to implicate Bhutto in wrongdoing, but the pressure did not work in all cases. The text in the White Paper is malevolent. The notes and memoranda addressed to the Prime Minister and his notations on the margins appear to be genuine, but selective faking cannot be ruled out, and its contents should be approached with considerable caution.11

The White Paper opens with an account of a master plan, called the ’Larkana Plan’, which Bhutto is alleged to have prepared in April 1976 as a model to be followed in all districts of the country. It would require the civil and police administration at all levels to monitor the election campaign in each constituency from day to day, mobilize the voters in favour of the PPP candidate, and deliver the vote for him on election day. In his rejoinder to the White Paper, written from his prison cell, Bhutto stated that a Sindhi politician had brought this plan to him and that he signed and sent it along to his officials without even reading it.12 The document is not written in Bhutto’s own style, but what is even more important is that it was never implemented. Rao Rashid claims, along with other district officials, that they had never even heard of it.13 The ’Larkana Plan’ may then be disregarded.

The campaign was ’rigged’ in other ways. Several high-ranking civil servants assisted with planning and executing the ruling party’s election strategy. Rao Rashid headed the election ’cell’ in

the Prime Minister's Secretariat. Correspondence regarding the election campaign addressed to the Prime Minister passed through his secretary, Afzal Said Khan. Vaqar Ahmad, the Cabinet Secretary, took it upon himself to give advice on matters relating to the election. Nasim Ahmad, Secretary to the Ministry of Information, guided the PPP's publicity campaign. Deputy Commissioners and superintendents of police in the field submitted data on the demographic composition, families and clans, alliances and rivalries, likely candidates and their reputations, in each constituency. The intelligence agencies assessed the relative strength and weakness of PPP candidates and suggested ways of maximizing the party's victories. One million rupees, taken from a secret fund in the Ministry of Information, were placed in a separate account and disbursed to party officials for helping needy candidates.14

But were field officers in the districts, from the Deputy Commissioners down to the *naib tehsildar*, and from the police superintendent to the subinspector in charge of a local police station, asked to employ unlawful means to enhance the PPP's vote on election day? The 'evidence' presented in the White Paper is problematic. Three provincial chief secretaries, Brigadier Muzaffar Ahmad in the Punjab, Syed Munir Hussain in NWFP, and Nasrum Minallah in Balochistan, asserted in their statements to the martial law authorities that their political superiors had not asked them, and they did not ask any of their subordinates, to rig the election. In the Punjab, where the PPP's victory was amazingly large and where rigging might have taken place more than in any other province, the statements of a few Punjabi field officers included in the White Paper may be considered.

The testimony in the White Paper is inconclusive. Some district officers allege that their superiors had asked them to rig the election but that they did not do so. Others say that they were not even asked. The Chief Secretary of the Punjab government, the district officers in Gujrat, and the Deputy Commissioner of Faisalabad, agree on one point: any rigging that actually took place was done by the candidates themselves, and they were *probably helped 'by those local officiate whose* postings they had been *able to arrange*

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That the elections held on 7 March 1977 wot rigged to some extent is beyond doubt, bui two aspects of the matter deserve further attention tie extent of rigging, and Bhutto's responsibility for it. It should first be noted that the PNA leaders, encouraged by large and apparently enthusiastic crowds at their meetings, had seen fit to declare that the election would be rigged if it did not produce a victory for them. Asghar Khan, the Tehrik-i-Istiqlal leader, got carried away. He not only predicted victory but vowed to hang Bhutto at the Kohala Bridge on the Jhelum River. Thus, even before the election was held, the PNA leaders had decided to allege rigging in case they did not win. The Zia regime subsequently charged thai more than a hundred contests had been rigged, but this statement can be dismissed as a self-serving exaggeration. Professor Ghafoor Ahmad, deputy chief of the Jamaat-i-Islami and a prominent PNA leader, has recently stated that the PPP would have won a 'clear majority' in a fair election.16 Many observers at the

time expected the PPP to win approximately 120 seats. The assessment provided by the Central Intelligence Bureau on 4 March, showed the PPP as a likely winner in ninety-nine constituencies and as a possible winner in another twenty-three. Even if one is cautious and allows the PPP victory in no more than one half of the twenty-three hard contests, it would still ha\e ended up with 110 seats nationwide. The PPP uas declared to have won 155 seats, thus it can be said that the election in perhaps as many as forty-file constituencies was rigged. In a conversation with Bhutto shortly after the election, his Finance Minister, Abdul Hafeez Pirzada, placed the number of such constituencies somewhere between thirrv to forty.17

In a rejoinder to the White Paper referred to earlier, Bhutto said that he had not rigged the election and that he could not be held responsible for the statements and actions of other people. This may be true, but only to an extent. He had assigned certain civil servants and government agencies roles and responsibilities connected to the election *He authorized the* disbursement of the government's 'secret *funds' to the PPP. these* particulars, *at least,*

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prevent them from filing but he knew of these happ to stop them. At the sanu evidence anywhere in th that he ordered the use of at polling stations.

Bhutto had a role in er mind. The district adminisl Larkana, arrested his opj Abbasi, on 18 January H undisclosed location until nomination papers (19 Jai Prime Minister was, thus, elected unopposed. He co allow Abbasi an opportunil papers, but he did not do ; this was a blunder. Bhutto in Larkana, and his victoi come to Abbasi's rescue, credibility would have be Bhutto did not order Abba: to believe that he did not kr his example, each one of tr ministers secured unopp Provincial Assembly. 1 strengthened the belief amoi the fear in other quarters, t be rigged.18

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Political Agitation and C Election Rigging

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prevent them from filing their nomination papers but he knew of these happenings and did not move to stop them. At the same time, there is no direct evidence anywhere in the White Paper to show that he ordered the use of violence or fraudulence at polling stations.

Bhutto had a role in encouraging this frame of mind. The district administration in his home town, Larkana, arrested his opponent, Jan Muhammad Abbasi, on 18 January 1977 and kept him at an undisclosed location until after the date for filing nomination papers (19 January) had passed. The Prime Minister was, thus, declared to have been elected unopposed. He could have intervened to allow Abbasi an opportunity to file his nomination papers, but he did not do so and, by all accounts, this was a blunder. Bhutto was immensely popular in Larkana, and his victory was certain. Had he come to Abbasi's rescue, his own standing and credibility would have been enhanced. Even if Bhutto did not order Abbasi's arrest, it is difficult lo believe that he did not know about it. Following his example, each one of the four provincial chief ministers secured unopposed election to the Provincial Assembly. These developments strengthened the belief among PPP candidates, and the fear in other quarters, that the election would be rigged.18

Before concluding, one cannot ignore a subsequent statement of Justice Sajjad Ahmad Jan, the Chief Election Commissioner, that the elections were a hoax. He said that there was no defect in the ground rules that were prepared by the Election Commission nor was any effort spared to conduct the election fairly and honestly. The failure of the electoral process was, by and large, due to the candidates of the ruling party who exploited their position and succeeded in hoaxing the officials in charge of the elections, thus destroying the sanctity of the ballot box.19

Political **Agitation and Cases Pertaining to** Election **Rigging**

As discussed above, the PNA refused to accept the results, charged that the elections were rigged by lie government, and boycotted the provincial assemblies election.20 The central council of the

PNA met on 9 March 1977, and made the following decisions:21

(a) The elections to the provincial assemblies were to be boycotted.

(b) PNA's nominees declared elected were to resign from the National Assembly.

(c) Immediate resignation of the Chief Election Commissioner was demanded.

(d) A call was given to the people to stage a peaceful country-wide strike on March 11.

(e) Fresh elections were demanded 'under the supervision of the judiciary and the army'.

The boycott of the PNA in the elections to the provincial assemblies on 10 March 1977 was effective and very few voters were seen at the polling stations. The PNA's strike call for 11 March produced a massive response in many of the major cities. In Karachi and Lahore, work stopped completely. Even taxis and privately owned public transport were off the road. Strikers also tried to obstruct rail traffic at many places and the army had to be called in to remove protesting squatters from the railway track.22

Encouraged by the response of the people during the Provincial Assembly elections and the strike, on 12 March 1977 the PNA council resolved to launch a mass movement to secure Bhutto's resignation, dismissal of the newly elected assemblies, and holding of new elections under the supervision of the judiciary and the army. Thousands of city-dwellers, spirited, determined, and incensed by the news of electoral fraud, answered the PNA's call. Neither the police *lathicharges* and tear gas, nor the imposition of martial law in the cities of Lahore, Hyderabad, and Karachi, could subdue the agitation. In April, it spread to smaller towns and by the time the PNA called it off in the first week of June, several hundred people had been killed, many more injured, and tens of thousands jailed. Property worth hundreds of millions of rupees was destroyed and businesses slumped.

Bhutto tried to enter into dialogue with the PNA leader. He wrote a letter to the PNA Chief, Mufti Mahmood, on 13 March in which he invited him for dialogue which would be 'open and sincere'.23

The PNA declined to enter into any dialogue with Bhutto. In his broadcast on 12 March 1977

over radio and television, Bhutto said that the National Assembly elections were a settled matter but that he was ready to talk about 'other things'. He said that not only was he prepared to listen to the complaints of the opposition but was also willing to find remedies.24 Thus, Bhutto was willing to hold the elections to the provincial assemblies again. Later, he indicated that he could negotiate on 24 seats to the National Assembly, in which he said that some of his ministers and partymen had indulged in malpractices during the elections.

In keeping with the above offer, the Election Commission was invested with powers to hold a summary inquiry into a contested election in any constituency if the Commission was satisfied on valid proof that such an election was vitiated by grave illegalities. An ordinance was accordingly promulgated amending the Representation of the Peoples Act, 1976.25 This remedy was in addition to those which could be obtained under the existing law by way of election petitions. The Election Commission commenced proceedings against a number of newly elected members of the National Assembly which included some former federal ministers, namely Hafizullah Cheema and Malik Akhtar. After summary proceedings, the Election Commission declared the election of a number of members of the National Assembly (belonging to the PPP) as void.26

Despite these proceedings before the Election Commission and the unseating of a number of members of the National Assembly, the leader of the PNA and its supporters were not appeased. They were not interested in the few seats in the National Assembly that Bhutto was offering them on a platter. The PNA knew that the PPP would still retain a two-thirds *majority after conceding*
20 to 24 seats and, knowing the vindicdveness of *Bhutto, they realized* that he would strike at them

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in a speech in the National Assembly on
28 April, Bhutto asserted that agencies of the United States government, presumably the CIA and the American Embassy in Islamabad, had instigated and funded ^

Mian Tufail Muhammad (head of the JamaaIslami) and General Ziaul Haq (Chief of Staff? the Pakistan Army) in a conspiracy to overtta his government. Bhutto revealed a plot bet»« the Americans, Mian Tufail, and General Zia tit in the event of losing the election, the PNA UOH accuse Bhutto of rigging it and launch a protts movement; Zia would then seize the govermM at an appropriate moment and remove Bhutto rk the PNA's path; and the succeeding regime woik abandon Bhutto's project of acquiring a nuctar reprocessing plant for Pakistan. He alleged tk Mian Tufail and even Zia had received mow from the Americans. Mian Tufail Muhammad Bhutto wrote, disbursed some of this money to tk heads of other parties in the PNA without giviij them a full account of his bargain with tit Americans. Similarly, Ziaul Haq did not tell tk other Generals all he knew.27 Bhutto wrote tk after taking over power and upon the urging of Mian

Tufail Muhammad, Ziaul Haq destroyed tk evidence of the American involvement which to government had collected and which Aziz AhM had presented to Cyrus Vance, the American Secretary of State, when the two men met in Pans in May 1977. He was, therefore, not able to substantiate his charge.

The door to negotiations remained shut dunni the month of April, but other noteworthy developments took place: seven members of tin National Assembly and six members of thePunjal Provincial Assembly, elected on the PPP ticket resigned from their seats; Dr Mubashir Hasan walked away from his post as the party's secretan general; Khurshid Hasan Meer, a former federal minister, and Taj Langah, once the depun secretary-general of the party in the Punjab supported the demand for new elections2! Seven *PPP members of the National* Assemofy M (

BhuttO On 16 April to urge a T\e-w eWxva,-^ "'As*

desertions made Bhutto appear weak.29

While the top, and even the second *ranking*

PNA leaders were in jail, their movement was guided by the *imams* in mosques and other spokesmen of the Islamist establishment, *t/s* added the demand to Islamize society to the WMJ

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clubs and race-courses, *and reconstituted the* Mamie Advisory *Council* with the mandate to propose measures for *Islamizing the country’s laws* within six months.30 But the mass movement

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already been imposed in the cities *of Karachi, Lahore, Faisalabad, and Hyderabad.*

PARTIAL MARTIAL LAW AND THE

LAHORE **HIGH COURT VERDICT**

On 26 April 1977, martial la-w -was imposed in

Karachi, Lahore, and Hyderabad, under Article 245 of the *Constitution. It was made clear that*

this martial law had no parallel with the two previous martial laws of Ayub and Yahya, and was imposed by the federal government under the powers it enjoyed under the Constitution.31 The imposition of martial law was challenged before the Lahore High Court and a full bench of the Court accepted ike writ petition and declared the martial law unconstitutional.32 The Court took notice of the fact that Article 196 ofthe 1956 Constitution, Article 223-A of the 1962 Constitution, Article
278 of the Interim Constitution of 1972, Article
231 of the 1973 Constitution and Article 34 ofthe Indian Constitution all related to the powers of the Parliament to make laws of indemnity. The Court loud it noteworthy that while the word ’martial *W* occurs in all the aforesaid relevant provisions of the previous constitutions of Pakistan and Article 34 of the Indian Constitution, it was tmspicuous in its absence in Articles 234 and 245 ofthe 1973 Constitution. This clearly showed, the Court held, that the framers of the 1973 Constitution intended to bury martial law as was nident in the speech of the Prime Minister on
21 April 1972. Apart from this, the Court noticed I to the Articles of other constitutions provided Ut only for passing laws indemnifying acts done !iy the concerned persons (including army officers) tog the period of martial law, but also provided **it** making laws validating any sentence passed, (mishment inflicted, and forfeiture ordered during It period. But Article 237 ofthe 1973 Constitute does not provide for making laws validating ly sentence passed, punishment inflicted, and ordered by them (the military courts).

This glaring difference clearly indicates, the Court held, that the 1973 Constitution neither *envisages the imposition* of martial law nor the exercise by the armed forces of any judicial functions. *The*

COUlt GOBGllMtetf *M* tfe operation being carried *out by the armed forces in the district of Lahore*

was not *’martial law’ in any of the recognized*

meanings of the term.

SEVENTH AMENDMENT TO THE CONSTITUTION

In the early days of May *1977, there were contacts* between *Bhutto and his assistants in the PPP with the* PNA leader which were mostly confined to Sihala near Rawalpindi. Bhutto’s offer of dialogue and settlement was discussed by PNA leaders and a comprehensive response was given to the offer. The PNA demanded the immediate lifting of emergency, martial law, and section 144 of the Code of Criminal Procedure, the release of all political prisoners, dissolution of special courts and tribunals, removal of Press curbs, dissolution of National and Provincial Assemblies not later than seven days after an agreement was reached, holding of general elections to the National and Provincial Assemblies simultaneously within a period of thirty days after their dissolution, the appointment of a new Chief Election Commissioner, and the constitution of a new Election Commission with mutual consent, appointments of Governors of all four provinces with mutual consent, and changes in certain key appointments with mutual agreement to ensure free and fair polls.33

It is noticeable that the PNA leader dropped the basic demand of Bhutto's resignation which shows a shift in their thinking and that they were disposed to dialogue and settlement. Bhutto asked the PNA leader to stop issuing calls for further demonstrations and to reduce their charter of demand if they were sincerely interested in a meaningful dialogue with the ruling party. He asked four or five of his ministers to have preliminary discussions with the PNA leader in Sihala.34 There was also Saudi Arabia's effort to mediate between the PPP and the PNA. Bhutto met the PNA Chief, Mufti Mahmood, in Sihala on

12 May and expressed the hope of a settlement. The PNA, in its press release on 12 May, said that it was sticking to its basic three demands and that there would be no compromise on them.35

At this point, contacts between the PPP and the PNA were temporarily suspended. Bhutto informed the National Assembly about the opposition's final 'no' to two months efforts to start a dialogue. He said that fresh elections to the National Assembly, in the conditions prevailing, would be disastrous for the nation because of the threat of foreign intervention36 and grave internal problems. He said that since he had been made the central figure of the opposition's campaign, he had decided to put the matter in the hands of the people through a referendum.37 He proposed that a joint session of Parliament would pass a temporary amendment to the Constitution to provide for a referendum. Accordingly, the Seventh Amendment to the Constitution was passed and became effective on
16 May 1977.

The Seventh Amendment provided for a referendum to demonstrate confidence in the Prime Minister.38 The referendum was to be held in accordance with a law made by Parliament. A Referendum Commission was set up to hold the referendum, count the votes, and declare its result. If, on the final count of the votes cast at the referendum, the Prime Minister failed to obtain a majority of the total votes cast, he would be deemed to have resigned from office. Another provision of the Seventh Amendment barred High Courts from exercising jurisdiction under Article
199 in relation to any area in which the armed forces were acting in aid of the civil power in pursuance of Article 245. However, the proceedings pending before the High Courts were saved. The Seventh Amendment was not only a novel but a rather unusual constitutional provision and was inherently repugnant to the parliamentary system. A vote of confidence is to be obtained from the Parliament in a parliamentary system and not through a referendum. If a prime minister is i obliged to go to the people for a vote of I confidence, then he owes nothing to the parliament I *and*

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winning any such referendum since referendum B conceptionally a part of the presidential system Why was the proposal of holding a referendn made and enacted? Why was it not pursued aftc the constitutional amendment? The answer to to first question is rather simple. At that point in tune the prospects of dialogue and settlement with to opposition had become more or less negligible Both the PPP and the PNA had taken an uncompromising stance on the three basic demands of the dissolution of the National Assembl; holding of new elections, and removal of the Chit1 Election Commissioner. The answer to the seconc question is rather difficult and complex. Nothing was heard of the referendum soon after the passing of the Seventh Amendment and no law was enacted by Parliament for the constitution of the Referendum Commission.

PARLEYS FOR POLITICAL SETTLEMENT

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On 18 May 1977, Bhutto visited Mufti Mahmood at the Sihala ’rest’ house (a jail for dignitaries near Rawalpindi), reiterated his willingness to hold a new election, and once again invited the PNA to talks. Negotiations began on 3 June. Abdul Hafeez Pirzada and Kausar Niazi, both federal ministers assisted Bhutto while Mufti Mahmood, Nawabzada Nasrullah Khan, and Professor Ghafoor Ahmad spoke for the PNA. The meetings took place in the Cabinet Room of the Prime Minister’s Secretariat. often in the evenings, and proceeded in a pleasant environment. Each time the PNA spokesmen arrived at the Secretariat, the Prime Minister came out and greeted them at the steps of the main building. On a few occasions at least, he entertained them to a meal and ordered special desserts for Mufti Mahmood who was known to have a weakness for sweets. There were times when the two sides appeared deadlocked, and Bhutto broke spells of awkward silence by engaging Mufti Mahmood in light *chit-chat. The* PNA representatives had withdrawn their demand *for anutto s* resignation and whi\e they were firm

Bhutto had a part, unwil encouraging the idea of mili involved the generals in devi the PNA agitation, discussed with them as it developed f next, invited them to Cabinet posted on the progress of his PNA, and solicited their reac Twice in these meetings military coup was mentioned Niazi referred to it as one of ending the current crisis, i lectured the Generals on the making the rather unconvi governing a country was ’r both occasions, General Zi loyalty to the Prime Minister he and his colleagues had power.39 In April, Zia had ai of martial law in certain ci corps commanders protested not be asked to shoot down p to be praying for the succes with the PNA, while erect success by vetoing two oi demands: the army’s rerun Balochistan, and the disba tribunal that was trying Wali leaders in Hyderabad jail. Khan and Sher Baz Mazai accept an agreement that dii conditions, and the Generals

What was the substance o their ninth meeting on 15 reached an agreement on all elections and the dates on v held, a new election comm authority, the release of polit establishment of an ’Impleri supervise the proposed elect and Pirzada were asked to fi without prior notice *to the PI* on a quick tour of neighbour *on) 7 June. Jn his absence, .*

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Biratto had a part, unwittingly, of course, in encouraging the idea *of military intervention. He involved the generals in devising his* responses to the PNA agitation, discussed the political situation with them as it developed from one week to the next, invited them to *Cabinet meetings, kept them* posted on the progress of his negotiations with the PNA, and solicited their reactions to its proposals. Twice in these meetings the possibility of a military coup was mentioned. On 31 May, Kausar Niazi referred to it as one of the possible ways of ending the current crisis. On 14

June, Bhutto lectured the Generals on the possibility of a coup, making the rather unconvincing argument that governing a country was ’no bed of roses’. On both occasions, General Zia stood up, pledged loyalty to the Prime Minister, and assured him that he and his colleagues had no thought of taking power.” In April, Zia had advised the imposition of martial law in certain cities, but in May the corps commanders protested that the army should not be asked to shoot down people. They professed to be praying for the success of the negotiations with the PNA, while erecting a barrier to that success by vetoing two of the PNA’s critical demands: the army’s return to the barracks in Balochistan, and the disbandment of a special tnbunal that was trying Wali Khan and other NAP leaders in Hyderabad jail. Begum Nasim Wali Khan and Sher Baz Mazari were not likely to accept an agreement that did not meet these two conditions, and the Generals knew it.

What was the substance of the negotiations? At their ninth meeting on 15 June, the two sides reached an agreement on all the basic issues, new elections and the dates on which these would be held, a new election commission with enhanced aithority, the release of political prisoners, and the establishment of an ’Implementation Council’ to sipervise the proposed elections. Ghafoor Ahmad mdPirzada were asked to fill in the details. Then, tithout prior notice to the PNA, Bhutto proceeded OB a quick tour of neighbouring Muslim countries <• 17 June. In his absence, Pirzada and Ghafoor Ahmad made no progress in their mission because fey could not work together. The PNA team now prepared a revised draft agreement, including additional specifics about the constitutional status,

composition, authority and powers of the /mp/ementation Council, and presented it to Bhutto upon his return to Pakistan on 23 June. At their eleventh meeting on 25 June, the two *teams examined each* clause in this revised draft. Bhutto accepted most of it, suggested minor changes of a scheduling nature, proposed to postpone consideration of a few items, and asked that the Implementation Council limit itself to matters relevant to the holding of new elections.

Instead of picking up the thread of negotiations where it had been left on 25 June, the PNA prepared still another, and this time ’final’ draft. The council approved it on 27 June and authorized Mufti Mahmood to sign an accord with the Prime Minister if he accepted the draft but insisted that any changes he might suggest, howsoever inconsequential, must be brought back to the council. The presentation of this draft as an ’ultimatum’ caused the government some irritation, but Mufti Mahmood and Bhutto were able to overcome it in talks on 29 June.

The two sides began their twelfth negotiating session at eight o’clock in the evening on 1 July and when they rose at 6:30 the next morning, ten-and-a-half hours later, they had reached agreement on all issues, large and small. Both sides made concessions and, as a result, the PNA’s ’final’ draft had undergone some change. The more important provisions of this agreement are reproduced below to have a measure of the concessions Bhutto made to his opponents:40

1. The assemblies elected on 7 and 10 March
1977 would be dissolved on 15 July; new elections to the National and Provincial Assemblies would be held on 8 and
10 October respectively, and ’President’s rule’ would prevail in the provinces until then.

2. An Implementation Council, composed equally of the government and of PNA representatives, chaired by the Prime Minister, and by Mufti Mahmood in his absence, would ensure the holding of free and fair elections, and to this end it would: (a) exercise the powers of the President of

Pakistan and those of the federal government in relation to the provincial governors and administrators;

(b) proceed against government officials accused or suspected of obstructing the holding of free and fair elections;

(c) approve appointments to all key posts in the central and provincial administrations;

(d) no law, ordinance, or regulation relating to elections or to the work of the Council, would be made without its prior authorization;

(e) in case of disagreement between the government and PNA representatives in the Council, the issue would be referred to the Supreme Court which must settle it within 72 hours;

(f) the Prime Minister would secure the implementation of the Council's decisions.

3. New provincial governors would be appointed with the PNA's approval.

4. The government would lift the ongoing state of emergency, restore fundamental rights, release all political prisoners, and disband all special tribunals except the one trying the NAP leaders in Hyderabad jail.

5. The chairman and members of a new Election Commission would be named with the PNA's approval, and the Commission would have the administrative and financial authority necessary for holding fair elections, including the authority to summon the armed forces for assistance.

6. The army would cease its operations in Balochistan within forty-five days of the signing of the accord.

7. All amendments to the 1973 Constitution which had the effect of limiting the rights of citizens or the authority of judges would be repealed.

8. The government would secure the passage of laws necessary for putting this accord into effect.

TH« IT-JA council had decided not to insist upon the dissolution of the Hyderabad tribunal and its negotiators withdrew the demand for *a temporary constitutional amendment that would protect the Implementation Council from legal challenges* to *its* existence and authority. It is clear that Bhutto

made far-reaching and, in some instances.« radical concessions. In agreeing to the Iqli mentation Council the PNA wanted, he acq* an authority that would override him a-i Cabinet.

This agreement *needed* the PNA con-, approval. Its negotiators had believed tL changes in their 'final' draft, which the, accepted, were minor and that the council \. not hesitate to approve them. But when the civ met on the evening of 2 July, Asghar Khan v Baz Mazari, and Begum Nasim

Wall Kcondemned the negotiators for entertar Bhutto's proposed changes. After fir , discussion, and consultation with its legal adu\" the council produced nine additional 'points » the instruction to Mufti Mahmood to sign • accord if the Prime Minister accepted them Tr more important of these points were as follou-

1. The Implementation Council must L. constitutional protection.

2. Provincial Governors would not be change*. without the PNA's consent.

3. The Federal Security Force would beplacei under the authority of the Army Gener* Headquarters (GHQ), and not under the Ministry of Defence as Bhutto had wanted

4. Special tribunals would follow the ordirar. courtroom procedure.

5. The President of Pakistan must sign and promulgate any ordinances the Implementa [tion Council might send him to remove sue11 ! difficulties as had arisen in the way of mission.

POLITICAL IMPASSE AND IMPOSITION OF MARTIAL LAW

these <points>

,, .,, iruc.ucc changes at this stage knew, their acceptance of his draft had been contingent upon the council's approval. Mufti Mahmood and Nawab/ada A/asruM *Khan* argued that their new points, bein^ *CSSffltjjjty<. technical nature, did not* materially affect the accord they had reached *th~ •'•-' "*

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tribunals would, in effe Hyderabad tribunal, whicl generals still opposed. Accc the Mufti and the Nawabz some members of their coui generals to intervene and Bhutto consulted his team Niazi favoured acceptance, I the talk of military interven that the generals were loyal PNA should be made to b Mufti Mahmood that he respond. Upon hearing representatives left visibly <

The dominant view at a the same evening, opposed the PNA. Zia, who was also again, both hands on his chi his 'complete support', add we are your strong arm newsmen that the PNA h agreement it had made, pr and that he would now associates. The newspapers report that the government again hit an impasse.

Bhutto held his last Ci evening of Monday, 4 July this meeting show that he during the day. He observ conflict with the PNA woul inner stability and interna PNA revived its agitati government were able to i with its leaders would have restoration of 'law and ord problem'. The armed fon government, he said, but '1 severe strain' in case of *ano* Niazi recalls that, when the

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1 consultation with its legal advisers, Jduced nine additional ’points’ with i to Mufti Mahmood to sign the Drime Minister accepted them. The t of these points were as follows:41 •lamentation Council must have onal protection.

J Governors would not be changed he PNA’s consent, ral Security Force would be placed : authority of the Army General ters (GHQ), and not under the
3f Defence as Bhutto had wanted, ibunals would follow the ordinary i procedure.

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IMPASSE AND OF MARTIAL LAW

men took these ’points’ to Bhutto
3 July 1977. They said that they to introduce changes at this stage their acceptance of his draft had pon the council’s approval. Mufti iwabzada Nasrullah Khan argued points, being essentially of a did not materially affect the cached the day before. That was for the demand regarding special

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• Hyderabad tribunal, which was something the i */enerdssJyJJqtjpayed AccardJjjg’Jo Kausar Niazi,* the Mufti and the Nawabzada also reported that some members of their council were expecting the generals to intervene and impose martial law. Bhutto consulted his team in an adjoining room. Niazi favoured acceptance, but Pirzada insisted that the talk of military intervention was a mere bluff, that the generals were loyal to Bhutto, and that the PNA should be made to bend. Bhutto then told Mufti Mahmood that he needed more time to respond. Upon hearing this, the three PNA representatives left visibly anguished.42

The dominant view at a Cabinet meeting later the same evening, opposed further concessions to the PNA. Zia, who was also present, stood up once again, both hands on his chest, to assure Bhutto of his ’complete support’, adding ’please rely on us, we are your strong arm.’43 Bhutto

then told newsmen that the PNA had gone back on the agreement it had made, presented new demands, and that he would now have to consult his associates. The newspapers on 4 July carried the report that the government and the PNA had once again hit an impasse.

Bhutto held his last Cabinet meeting on the evening of Monday, 4 July 1977. The minutes of this meeting show that he had second thoughts during the day. He observed that the continuing conflict with the PNA would damage the country's inner stability and international standing. If the PNA revived its agitation, and even if the government were able to control it, negotiations with its leaders would have to be held again. Mere restoration of 'law and order would not solve the problem'. The armed forces had stood by the government, he said, but 'they would be out to a severe strain' in case of another agitation.44 Kausar Niazi recalls that, when the Cabinet rose, Zia had a private meeting with Bhutto, after which the General left hurriedly, unsmiling.

It appears that on the evening of 4 July, apprehensive of a military coup, Bhutto was ready to make a settlement with the PNA. He consulted further with Abdul Hafeez Pirzada, Ghulam Mustafa Jatoi (the Chief Minister of Sindh), and Mumtaz Bhutto. Pirzada still opposed concessions to the PNA, but Jatoi and Mumtaz Bhutto

counselled acceptance of its latest demands At a press conference held at 11:30 p.m. Bhutto *announced his intention to accept the PNA 's terms,* saying; 'The PNA negotiating team had brought in ten new points; they did so apologetically, saying they were helpless; perhaps they were; but I am not helpless, and so I shall sign the accord tomorrow'.45 But before the 'tomorrow' of Bhutto's declared intention could dawn, Zia had struck and overthrown him and martial law was declared throughout the country on the night between 4 and 5 July.

The version of the evening of 4 July although given by Kausar Niazi, a close associate of Bhutto, is not free from doubt. If Bhutto was really keen to sign the accord, there was nothing to stop him from doing so on the evening of 4 July. All of the PNA leadership was available in Sihala.

FALL OF BHUTTO: AN ASSESSMENT

Elections in Pakistan had been rigged before, notably the presidential election in 1965 and the Provincial Assembly elections in the early 1950s, but rigging in these instances did not arouse the mass anger it did in 1977. The people of Pakistan were evidently not of the same mind now as they were in those earlier periods. Bhutto had changed them, polarized them. Those who disapproved of him did so with a passion. Perceiving his party's victory as dishonest, they were determined to undo it. His supporters, on the other hand, had become the 'silent majority'. The party that might have mobilized them on his behalf lacked the organizational capacity to undertake such a task. In June 1977 when Bhutto asked Ghulam Hussain, the PPP Secretary-General, to call party conventions presumably to make a show of strength, the one held in Multan disintegrated as rival factions threw furniture at one another.46 The cardinal fact about Bhutto's negotiations with the PNA, is that he bargained from a position of political weakness and the relevant forces in the country, including the generals, knew this to be the case.

Zia knew that Bhutto was about to make a settlement with the PNA.47 Yet he moved to forestall it. Why? An obvious explanation may be that, at this point, he simply did not want the

government-PNA negotiations to succeed. He saw that Bhutto had weakened. His own arrangements were all made, and the call to power, which had been ringing loud and insistent in his ear, had now become irresistible. But the preparations for a coup are not made in a day. It is probable that Zia had resolved to oust Bhutto as early as April 1977, when he and the corps commanders advised the imposition of martial law in Lahore, Hyderabad, and Karachi. The General was not only a ’pious’ man in terms of traditional Islamic observances, he was also favourably disposed toward the Jamaat-i-Islami. Bhutto was known to be ’sinful’, and his regime had not only persecuted but insulted the Jamaat-i-Islami leaders. It stands to reason, then, that Zia did not regard Bhutto as a fit ruler for Muslim Pakistan. His remarkable capacity for duplicity kept his disapproval of Bhutto, and his own design, hidden.

But had Bhutto promptly settled matters with ”v the PNA, Zia might not have found the opportunity to execute his plans. No regime in Pakistan, or perhaps even elsewhere, submits to an agitation as soon as it begins. Its first impulse is to exhaust or suppress the agitators. Bhutto should have known from his own experience of the mass movement which overthrew Ayub that concessions can come too late to save a regime. Negotiations with the PNA had been made by the end of April. Its demand for Bhutto’s resignation was admittedly irritating, but if instead of wielding the stick once again and sending the PNA leaders back to jail, he had offered to hold new elections under credible safeguards, the PNA would probably have withdrawn this demand as, indeed, it later did.

Bhutto was unusually forthcoming once he sat down with the PNA spokesmen at the conference table, but he was late in arriving there, having wasted the entire month of May, and he allowed a week in June to be frittered away after the negotiations had begun to move forward. He did sense a threat to his political survival but, deceived by Zia’s repeated professions of loyalty, he did not realize how imminent it was. He thought he had the time for a JittJe more of fhe *traditional*

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To the amazement of his opponents, DOB; retained an unswerving following among fc! Pakistani masses. The repeated attempts I discredit him by the army *junta,* the media, d his political opponents failed to dull his appal The embers of the fires he lit could not easily k extinguished. Throughout his political crusade, k appealed directly to the poor, reiterating that the) were the ’fountain of power’. His econonit policies although wasteful, were re-distnbuti^ and did to some extent improve the lot offc common man, at least to the extent of his sdf respect. During his tenure, Bhutto increasing toured the remotest corners of Pakistan carry^ his message: ’Zulfiqar Ali Bhutto is the friend ami saviour of the poor’. And in Pakistan, thatmessagt • was widely believed. r

Another interesting argument put forward i Shahid Javed Burki in his book *Pakistan mi< < Bhutto, 1971-1977* is that the election Bkr called in March 1977 could not have averted trc crises that developed in the spring of that yea- ! because by then Bhutto had lost the support of it bulk of the politically articulate electorate, ire middle class. It was the political know-how of thiclass, combined with the mass support that Bhutti had been able to build for himself, that had assure j him victory in the elections of 1970. Elections as. device for political selection are a device that the middle class use and understand. They are not si , used or understood by the large mass of people who are at the fringes of the political arena Elections can, therefore, lead to politics! succession only when the middle and the working j classes work together to achieve reconcilable goals But because of the fundamental changes thd had occurred in Pakistan's polity and econoim since the assumption of political control by Bhuttc and the PPP in 1971, elections could not k expected to produce the results that either Bhutti or his opponents hoped for. No matter what the results of the elections had been, political tensior was inevitable. The fact that the tension generated by the elections surprised Bhutto suggests that k

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1 Burki in his book *Pakistan under '-1977** is that the election Bhutto rch 1977 could not have averted the ^eloped in the spring of that year, ien Bhutto had lost the support of the politically articulate electorate, the It was the political know-how of this ed with the mass support that Bhutto to build for himself, that had assured the elections of 1970. Elections as a itical selection are a device that the ise and understand. They are not so •stood by the large mass of people he fringes of the political arena, n, therefore, lead to political y when the middle and the working 'gether to achieve reconcilable goals, s of the fundamental changes that in Pakistan's polity and economy iption of political control by Bhutto m 1971, elections could not be)duce the results that either Bhutto its hoped for. No matter what the lections had been, political tension The fact that the tension generated i surprised Bhutto suggests that he mderstood the political dynamics elped unleash. His continuing large segments of the population tes in the elections and win him

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""fltattodTd not fully anticipate the extent of the middle classes' disillusionment with the way his

economic and political programmes had evolved. He seems not to have comprehended their anger and their sense of humiliation at what they saw as a deliberate attack on their interests and system of values. What gave the middle classes tremendous political power was the remarkable change that had occurred in the social composition of the armed forces. He did not understand their value system, did not appreciate their economic interests, and did not comprehend the power they had begun to wield. He abandoned them and they allowed him to go to the gallows.

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44. Minutes of the meeting, prepared by the Cabe Deputy Secretary, may be seen in the White Pipt pp. A 1026-7.

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47. The minutes of the Cabinet meeting on 4 July 15f do not list General Ziaul Haq among those presar The minutes were prepared after his coup, and! omission of his name may have been delibcraii But as we have seen above, Kausar Niazi red* that the general was present.

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id, Professor Ghafoor, *Phir Marshal Law An*

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supra, note 7, pp. 200-201.

PART SIX

Zia Regime:

July 1977 to August 1988

25 Zia's 'C

During the night between 4 an forces led by Army Chief G Ziaul Haq, took over the ad country. Bhutto, his Cabinet i PNA leaders were placed custody'. The National and Prc were dissolved, and martial throughout the country. In hi nation over radio and television that he had faith in democracy would be held in ninety days ai transferred to the elected repi people. However, all politic, banned till further orders.

Having assumed the office of

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person exercising powers or jurisdiction under the authority of either.5

The fundamental rights under the 1973 Constitution and all proceedings pending in the courts regarding their enforcement were suspended. No court, tribunal, or other authority could call or permit to be called in question of the proclamation of martial law or any order, ordinance, martial law regulation, or martial law order made in pursuance thereof and no judgment, decree, writ, order, or process could be passed or issued in this behalf. Subject to the order or ordinances of the President and regulations by the CMLA, all laws, other than the Constitution, all ordinances, orders-in-council, orders made by the President, rules, by-laws, regulations, notifications, and other legal instruments in force in Pakistan or any part thereof were continued in force. Ordinances made by the President or b,y a Governor would not be subject to the limitation as to its duration prescribed in the Constitution. All persons who were in the service of Pakistan or were in office as judges of the Supreme Court or a High Court, Auditor-General or Advocate-General on the proclamation of martial law were allowed to continue on the same terms and conditions and to enjoy the same privileges, if any.

ZIA'S DIFFERENCES WITH BHUTTO

It appears that, in the beginning, Zia was not hostile towards Bhutto. In fact, was so closely associated with Bhutto that some leaders of the PNA suspected that the imposition of martial law might be Bhutto's move to frustrate the PNA movement and to back out of the settlement reached with them. After all, Zia had every reason to be beholden to Bhutto because he had been appointed Army Chief of Staff superseding seven or eight senior Lieutenant Generals. Earlier utterances by Zia soon after the imposition of martial law also reflected his respect and admiration for Bhutto. While addressing a press conference on 14 July 1977, he referred to his three telephonic conversations with Bhutto since 5 July and said that he was 'quite *happy and enjoyjfl life'6 He also said that* ne would be releasing Bhutto and other PPP leaders *soon and that he*

would meet him before then. He reiterated thatlt had limited aims before him and would stay fa ninety days of which eight had already p;*< The Military Council, he said, had decided take any action against politicians even if i was certainty about their misdeeds. He said i for the people's representatives to decide asuch action against anyone.

On 15 July, he visited Bhutto and \!i Mahmood in Murree.7 It seems that this meet' changed the relationship between the two. Notf -. is recorded about what transpired between trr during this meeting but there are sever speculations about the discussion between the i It is rumoured that Bhutto told Zia that he >• committed high treason by imposing martial *It* and that he could be tried under Article 6 of iK Constitution. It is also believed that Bhutto »crude and insulting in that meeting which shook the latter very much and he returned sour and women The murder of Nawab Muhammad Ahmad Khan happened on the night of 10 November 1974 In the First Information Report (FIR) to the police Mr Kasuri alleged that he was the target and hi« father

had been shot by mistake. When asked tie name of the accused, he said, ’Zulfiqar Ah Bhutto On his insistence, the police wrote Bhutto’s name as the accused in the FIR.8

On 28 July 1977, Bhutto, Mufti Mahmood, and other leaders in ’protective custody’ were released On 29 July, Bhutto addressing parry workers in Islamabad said that he would work within the bounds of the existing laws and martial law regulations in the larger interest of the country’ Limited political activity had been allowed from
1 August and on 2 August 1977, the date for elections to the national and provincial assemblies was announced to be 18 October. Bhutto launched the election campaign of the PPP and toured Multan, Lahore, Karachi, and Peshawar Everywhere, he was received by large enthusiastic crowds. His mass popularity was leading towards an inevitable showdown with the military junto With every passing day, and emboldened by swelling crowds *at his* receptions, he started making speeches confr^ *fag*^^ A® popularity coupled with his *bellicose speeches created panic in the members of the military junta who started planning* to contain him somehow

After the imposition i members of Ahmad R; case of Nawab Muhai lodged a criminal comp being held by an Ad(Lahore. The murder cc the Lahore High Court i was informed that th *challan* against Bhutto martial law regime hac Bhutto.

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• the imposition of martial law, the family

fflbers of Ahmad Raza *had* revived the murder

f case of Nawab Muhammad Ahmad Khan. They lodged a criminal complaint, hearing of which was *being held by an* Additional Sessions Judge in

Lahore. *The murder complaint* was transferred" fo

the Lahore High Court on 27 August and the Court *was informed that the State would present a Man* against Bhutto by 29 August.10 Now the martial law regime had come out openly against

On 3 September 1977, Bhutto was arrested from his residence in Karachi, flown to Lahore, and remanded to police custody in Lahore on charges relating to the murder of Ahmad Raza's father." His bail application was moved before the High Court which was admitted for regular hearing on
6 September. On 13 September, Bhutto was granted bail by the order of Justice K.M.A. Samdani of the Lahore High Court on the ground that from the material produced before the court, there was only circumstantial evidence indicating Impossible involvement and that further evidence was yet to be collected.12

After grant of bail Bhutto went to Leghari House" in Lahore, where he addressed party workers. He made an extremely belligerent and bellicose speech against the military *junta,* using threatening words against Zia and his military colleagues. It appears that his success in obtaining hail lured him into further confrontation with the military and he was clearly carried away by the favourable response from the crowd present at the occasion. His words intimidated and frightened the already scared members of the military *junta* who decided to get rid of him once and for all. Bhutto was arrested again on 17 September this time under i martial law order.14

ELECTION **CAMPAIGN AND**

POSTPONEMENT **OF ELECTIONS**

It has been mentioned earlier that political activities were allowed from 1 August 1977, after thick full fledged political activities and election tampaign started. The election campaigns intensified during the month of August and became kct contest between the PPP and the PNA,

largely on the pattern of the March elections. The

PNA. realized that BHutto -wa.*s not >-t=t- undone, t>ut_

was a potential danger as long as the elections Joomed *large on the horizon.* Meanwhile, the martial law government felt constrained to stop Bhutto's eventual return to power. It seemed that elections could only help Bhutto. The only way out *for the martial law regime was to bar the PPP* leader from participating in the elections.

The PNA was in disarray and was taking a long time in deciding and finalizing their list of candidates for the National and Provincial Assemblies. There were differences amongst the PNA leader about the organizational base of the PNA. Mufti Mahmood, Professor Ghafoor, and Haneef Ramay favoured a merger of the political parties in the PNA.15 Asghar Khan, on the

other hand, said that Tehrik-i-Istiqlal was not willing.16 No wonder, Bhutto made a statement that the PNA was a toy of clay which could be smashed with a blow.17

The division within the PNA further widened on the issue of holding elections on time. While Asghar Khan was ready to countenance the postponement of elections in the interest of accountability, and also in the hope that it might disqualify Bhutto from participation, Mufti Mahmood and the NWFP's PNA leader in general favoured the electoral path to defeat Bhutto.18 On
3 September, Zia declared that he would be willing to postpone the elections if the parties so desired; that the presidential system was in keeping with Islam's principles; that the Islamic Ideology Council would be reconstituted; that the flour mills and rice husking units previously taken over were to be de-nationalized, and that ex-servicemen were to be arrested only by the military authorities, unless permitted otherwise.19 These measures indicated that the contours of the martial law regime were being shaped around Islamic ideology as the source of legitimacy, concentration of power in the hands of the head of state with small businessmen as a social support group, and the military including its retired personnel, as the core constituency. Bhutto was arrested the same day. On 7 September, Martial Law Regulation 21 was issued for inquiry into the assets of the members of the National and Provincial Assemblies under the PPP regime, with the express purpose of

disqualifying them from participation in the elections.20

Thus, the stage was set for the postponement of general elections as the confrontation between Bhutto and *military junta* was coming to a head. Bhutto's habeas corpus petition was admitted by the Supreme Court as a result of which Chief Justice Yakub Ali had to lose office and was replaced by Justice Anwar-ul-Haq. On
29 September Zia announced that the decision on postponement of elections would be taken by 10 October and a White Paper on the PPP government would be published by the end of October.21 On 30 September, the PNA chief, Mufti Mahmood, also urged accountability before the polls.22 This meant that the PNA had become demoralized by seeing that the PPP, now led by Nusrat Bhutto, was attracting large crowds in their election rallies. The PNA leadership rushed into the arms *of Zia* and the *military junta* seeking the postponement of elections. The announcement thus was only a formality carried out by Zia on
1 October, banning all political activities.23

WITHDRAWAL OF THE FIFTH AND SIXTH AMENDMENTS

Since Zia and his *junta* had decided to stay in power and postpone elections by the third week of September, they needed to exercise wide and sweeping powers. Nusrat Bhutto had moved the Supreme Court against the detention of Bhutto in its original jurisdiction for enforcement of fundamental rights under the constitution.24 The matter came up for hearing for the first time on 20 September 1977, when Justice Muhammad Yakub Ali, as the Chief Justice, presided over the Court. Yahya Bakhtiar, former Attorney-General and now counsel for Bhutto, presented his petition. The Court ordered the admission of the petition and the immediate transfer of Bhutto and other accused to Rawalpindi and adjourned the case to
25 September 1977. The other judges of the Court obviously concurred with the decision. The military *junta* must have sensed that the Chief Justice was not going to play their game. Zia retaliated through CMLA's Order Number 6 of
1977 issued on 22 September, which amended

Article 2 of Laws (Continuance in Force)
1977, the effect of which was that the 'constitution' was to be construed as if Art
179, 195, and 199 of the Constitution had not i amended by any of the Acts amending it Jill also provided that an incumbent in any office id would have retired from office in the absence i an amendment to the Constitution, would ceaset hold office forthwith. In other words, hi CMLA's order, the Constitution was amended! that the Fifth and Sixth amendments mcorjxntl therein were withdrawn and the provision *m* Chief Justice to serve his term of office afcj reaching the age of retirement was set at a The net result of this amendment was that CM Justice Yakub Ali, who had crossed theagerfj retirement, ceased to hold office. Justice Anwj ul-Haq assumed office in his place.

This was the first act on the part of the (MA to amend the 1973 Constitution, while it was si being held in abeyance, to accomplish to, immediate objective. The effect was the remonlj of the Chief Justice of Pakistan and when In successor took office as a result of the CMLt order and the

Supreme Court accepted tta transition, not only was the immediate goal rf getting rid of Justice Yakub Ah achieved butflrj Supreme Court's submission to the power of tJcj CMLA was also established. How could a coortj which accepts such change and re-constitution *d* the law later turn around to state that the law maktr had no power to make such a law? The Supreme Court actually welcomed this step and stressed that Justice Anwar-ul-Haq had been arbitrarily demec office of the Chief Justice for six months alreadi The military *junta* now had a different Chief Justice to preside over the Supreme Court whicl was to commence the hearing of Nusrat Bhuttos case on 25 September.

The Supreme Court had landed itself in a predicament which found appropriate expression in an extract from the judgment of Justice Qaiser Khan in Begum Nusrat Bhutto's case.26 The extract is reproduced verbatim as under:

If we hold that on the basis of legality the legal order was no order, then this Court would be signing ils own death warrant for then there could be no government at all. For argument sake, if the Judges

do not rely on the nev available for them to pr situation like the preser or to accept the new nc

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1973 Constitution, while it was still n abeyance, to accomplish his jective. The effect was the removal Justice of Pakistan and when his k office as a result of the CMLA ie Supreme Court accepted this t only was the immediate goal of Justice Yakub Ali achieved but the it's submission to the power of the ilso established. How could a court s such change and re-constitution of urn around to state that the law maker r to make such a law? The Supreme *f* welcomed this step and stressed that ir-ul-Haq had been arbitrarily denied Chief Justice for six months already. *' junta* now had a different Chief
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0mi/ai>ie~Krttietti. to proceed with? In a revolutionary situation like the present one, they have either to quit *or to* accept the new norms.

USRAT BHUTTO CASE

When the Supreme Court re-assembled on
15 September, Justice Anwar-uI-Haq had taken <?rer as Chief Justice. The order passed on
20 September 1977, according to which Bhutto and others were to 6e transferred to Rawalpindi was, of course, never complied with. The case was heard by a fall Bench of the Supreme Court of Pakistan or, rather, a full court consisting of nine judges.27 The hearing ended on 1 November 1977. Yahya Bakhtiar, counsel for the petitioner, Begum Nusrat Bhutto, relied mainly on Asma Jilani's case and contended that Zia, Chief of the Army Staff, y no authority under the 1973 Constitution to impose martial law in the country; that this intervention amounted to an act of treason in terms of Article 6 of the Constitution; that as a consequence, the proclamation of martial law dated
5 July 1977 was without lawful authority, the Laws (Continuance in Force) Order 1977 as well as Martial Law Order Number 12 under which Bhutto and his colleagues were detained, were illegal and without lawful authority. He further argued that even if all or any of these acts or actions could be justified in the name of the 'doctrine of necessity', tie arrest and detention of the top leader of Pakistan People's Party was highly discriminatory aid malafide, intended solely for the purpose of keeping the PPP out of the forthcoming elections. It was also argued that the Chief of the Army Staff could not place himself beyond the reach of the courts by relying on an

order promulgated by taself because the 1973 Constitution continued lo be the supreme legal instrument of the country, specially when the Chief of the Army Staff had leclared that this Constitution was not being toogated but only certain parts of it were being Ud in abeyance for the time being in order to rate a peaceful atmosphere for the holding of dictions and restoration of democratic institutions. Mya Bakhtiar further argued that the orders of toon had resulted in flagrant violation of the

-e«em«- fundamental rights as enshrined in the Constitution.

A.K. Brohi, counsel for the federation of Pakistan, raised two preliminary objections to the maintainability of'jtjw *petition. He contended that*

the writ was directed against the *Chief of the Army &rff /K&yz&r /#<? oroizr <?So&teatioa Aacf deen* passed by the Chief Martial Law Administrator; and that the *petitioner was not an aggrieved person* in terms of Article 184 (3) of the Constitution read with Article 199 thereof, as she had not alleged *any violation of her own fundamental tights, but* only those of the *detenus.* He further submitted that the Supreme Court had no jurisdiction to grant any relief in the matter owing to the prohibition contained in the Laws (Continuance in Force) Order, 1977, which clearly contemplated that no court, including the High Court and the Supreme Court, could question the validity of any martial law order or regulation or any other order made thereunder by a martial law authority. He argued that under the Laws (Continuance in Force) Order, the right to enforce fundamental rights was suspended and for that reason too the petition was not maintainable.

Sharifuddin Pirzada, the newly appointed Attorney-General of the military regime, appearing as 'law officer' of the court had supported Brohi's submissions that the change which had taken place in Pakistan on 5 July 1977 did not amount to the usurpation of state power by the Chief of the Army Staff but was, in fact, intended to oust the usurper who had illegally assumed power as a result of massive rigging of election results on 7 March
1977. It was, he argued, also intended to displace the illegally constituted legislative assemblies, both at the centre and in the provinces, as a majority of the members had succeeded by corrupt and criminal practices and that the present situation was not covered by the dicta of the Supreme Court in the well known cases of Dosso and Asma Jilani, for the reasons that the circumstances were radically different where change brought about by military intervention was of a permanent nature, whereas the purpose of the present CMLA was to remain in power only for a limited period so as to hold fair election for the restoration of the democratic institutions.28

In response to Brohi's arguments, a detailed statement was submitted in the Supreme Court on behalf of Bhutto. It was alleged that the Chief of the Army Staff had conspired against him, that a foreign power was behind him, and that there was massive foreign interference in the internal affairs of the country. The CMLA was condemned for postponing the elections on the pretext of accountability. As far as the process of accountability was concerned, Bhutto asserted that only an accountable government answerable to the people, could hold accountability. He accused the CMLA of bad faith and of having reneged on his promise to the country and before the General Assembly of the United Nations on 28 September, to hold election on 18 October 1977 and to transfer power to the elected representatives. In reply to the allegation of malafide in prolonging the dialogue between the PPP and the PNA, Bhutto stated that the dialogue had come to a successful conclusion and a formal agreement would have » been released to the public on 5 July if the Chief of Army Staff had not intervened through 'Operation Fairplay', which was actually 'Operation Foulplay'. Bhutto also chided Brohi for relying upon Kelson and insisted that the people alone could take accountability and that the silence of the people should not be taken as their acquiesence.29

After considering the *arguments of the parties, the* Chief Justice delivwa. ti~ ^--^ - -

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how Brohi was now pleading that Dosso's a had laid the correct law and should be followed b the Court. The submissions of Brohi withreferen to Dosso's case were not accepted.

The Chief Justice held that the controversy g the case must proceed on the assumption that 4t 1973 Constitution had been validly framed and in force when the Chief of the Army Staff proclaimed martial law on 5 July 1977. TheChie Justice further observed that the theory of revolutionary legality as propounded by Brohi htj no application or relevance to a situation when the breach of legal continuity is admitted« declared to be of a purely temporary nature and for a specified limited purpose. Such i phenomenon could more appropriately he described as one of constitutional deviation rather than of revolution. It would indeed be highly inappropriate to apply Kelson's theory to suchi transient and limited change in the legal or constitutional continuity. Accordingly, no justification had been made for resurrectiDj Dosso's case in supersession ofthe view adopted by the Court in Asma Jilani's case regarding the application of Kelson's theory of revolutionary legality in the circumstances obtained in Pakistan. The Chief Justice went on to say that he would rather prefer the view advocated by Brohi in *Jilani's case to the* one *which WHS* by him in the. tsjsses4-««»ifc-:^**«*=»*--~ the present political chang,^ at \ts.

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2 That these allegations, to widespread belief generated a national v and gave birth to a pro soon spread from Kan assumed serious propoi

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3. That the disturbances movement were beyon civil armed forces;

4. That the disturbances re of life and property thrt

5. That even the calling under Article *245 of* 1 the federal government imposition of the lo< several important cities calling out of troops by under the provision; Criminal Procedure in towns did not have the the agitation continued

6. That the allegations of interference with elec candidates of the r established by judicial four cases which dii pattern of official interi *That public statements*

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DOSSO'S case and Asma *Jtiani's case. The ChJef Justice ao fed that in Asma Jilani's case,*

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A.K. Brohi, learned counsel for the Federation of Pakistan, had appeared as *amicus curiae31* and had vehemently opposed the decision of the Supreme Court in Dosso's case by contending that a system of government in which power was regulated and derived not from law but from force could not claim to be a legal system of government and that

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aTfegations made by the parties against each other The Court, according to him, was primarily • concerned with ascertaining the broad trends and circumstances which culminated in the overthrow of the government of Bhutto. The Chief Justice took judicial notice of the following facts:

1. That from the evening of 7 March 1977,

there *-were wide-spread allegations of* massive official *interference with the*

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Constitution but the off *^^m^^^i^f^-t^iKi* and the demand for his res fresh elections continued u result that the referendum cancelled;

That in spite of Bhutto's d leaders of the Pakistan N

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v pleading that Dosso's case aw and should be followed by issions of BrobA with reference e not accepted.

2 he\d that the controversy in ed on the assumption that the id been validly framed and was : Chief of the Army Staff aw on 5 July 1977. The Chief •served that the theory of y as propounded by Brohi had ;levance to a situation where il continuity is admitted or purely temporary nature and limited purpose. Such a Id more appropriately be constitutional deviation rather It Would indeed be highly)ly Kelson's theory to such a ted change in the legal or itinuity. Accordingly, no >een made for resurrecting ersession of the view adopted na Jilani's case regarding the on's theory of revolutionary nstances obtained in Pakistan. *fent* on to say that he would v advocated by Brohi in Asma lie which was being canvassed nt case, which sought to rob change of its moral content gal character uncertain and f Justice then took note of all aunter-statements made in the erved that the Court was not lish the factual correctness or reral allegations and counterthe parties against each other, ing to him, was primarily rtaining the broad trends and culminated in the overthrow)f Bhutto. The Chief Justice if the following facts: *s* evening of 7 March 1977, adde-spread allegations of cial interference with the ballot in favour of candidates n People's Party;

\s, amounting almost to widespread belief among *the people, generated a national wave of resentment*

soon spread *from Karachi to Khyber and* assumed serious proportions;

3 That the disturbances resulting from this movement were beyond the control of the civil armed forces;

4 That the disturbances resulted in heavy loss of life and property throughout the country;

5 That even the calling out of the troops under Article 245 of the Constitution by the federal government and the consequent imposition of the local martial law in several important cities of Pakistan and the calling out of troops by the local authorities under the provisions of the Code of Criminal Procedure in smaller cities and towns did not have the desired effect, and the agitation continued unabated;

6 That the allegations of rigging and official interference with elections in favour of candidates of the ruling party were established by judicial decisions in at least four cases which displayed a general pattern of official interference;

7 That public statements made by the then Chief Election Commissioner confirmed the widespread allegations made by the opposition regarding official interference with the elections and endorsed the demand for fresh elections;

8 That, in the circumstances, Bhutto felt compelled to offer himself to a referendum under the Seventh Amendment to the Constitution but the offer did not have any impact at all on the course

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of the agitation and the demand for his resignation and for fresh elections continued unabated with the result that the referendum plan had to be cancelled;

5 That in spite of Bhutto's dialogue with the leaders of the Pakistan National Alliance (PNA), and the temporary suspension of the movement against the government, officials charged with maintaining law and order were apprehensive that in the event of the failure of the talks there would be a terrible

cwYian authorities;

10. That although the talks between Bhutto and *^<?/*}V4J&aoir'rfad'commenced'on 3 Sune 1977 on the* basis of his offer for holding fresh elections to the National and Provincial Assemblies, they had dragged on for various reasons, and as late as 4 July
1977, PNA leader was insisting that nine or ten points remained to be resolved while Bhutto was also saying that his side would similarly put forward another ten points if the General Council of PNA did not ratify the accord on the morning of 3 July 1977.

11. That during the crucial days of the deadlock between Bhutto and the PNA leader the Punjab government sanctioned the distribution of fire-arm licences on a vast scale to its party members, and provocative statements were deliberately made by the prime minister's special assistant, G.M. Khar, who had patched up his differences with the prime minister and secured this appointment as late as 16 June 1977; and

12. That as a result of the agitation, all normal economic, social, and educational activities in the country stood seriously disrupted, with incalculable damage to the nation and the country.

The Chief Justice concluded that the extraconstitutional step taken by the armed forces of Pakistan was justified by requirements of State necessity and welfare of the people. The legal consequences and true legal position that emerged was stated as under:

i. That the 1973 Constitution still remained the supreme law of the land subject to the condition that certain parts thereof had been held in abeyance on account of state necessity;

ii. That the President of Pakistan and the superior courts continued to function under the Constitution. The mere fact that the judges of the Superior Courts had taken a new oath after the proclamation of martial law did not in any manner derogate from its position as the courts had been originally established under the 1973 Constitution and

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continued in their functions in spite of the proclamation of martial law; That the CMLA, having validly assumed power by means of an extra constitutional step, in the interest of the state and for the welfare of the people, was entitled to perform all such acts and promulgate all legislative instruments as falling within the scope of the law of necessity, namely:

(a) All acts or legislative measures which were in accordance with, or could have been made under the 1973 Constitution, including the power to amend it:32

(b) All acts which would advance or promote the good of the people;

(c) All acts required to be done for the ordinary orderly running of the State; and

(d) All such measures as would establish or lead to the establishment of the declared objectives of the proclamation of martial law, namely restoration of law and order, and normalcy in the country and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution;

That these acts, or any of them, may be performed or carried out by means of presidential orders, ordinances, martial law regulations, or orders as the occasion may require; and

That the superior courts continue to have the power of judicial review to judge the validity of any act or action of the martial law authorities, if challenged, in the light of the principles underlying the law of necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any martial law regulation or order, presidential order or ordinance.'

Before concluding, the Chief Justice referred to the assurance given to the Court by Brohi as well

as Sharifuddin Pirzada, the Attorney-General r,| regard to the elections. The Chief Justice obscn-r

Before parting with this judgment, it is necessr, refer to certain misgivings and apprelw. expressed by Mr Yahya Bakhtiar, learned coa for the petitioner, to the effect that the postpones of the elections scheduled to be held on 18 Ocu
1977, has cast a shadow on the declared ofc of the Chief Martial Law Administrator seeking instructions from his client, Mr A K B'1 has informed the Court that the Chief Martial b Administrator intends to hold elections as w:, the process of the accountability of the holto Ipublic offices is completed, and the time fa f depends upon the speed with which these c*

disposed of by the civil courts concerned The ta Attorney-General has stated at the Bar thai, m opinion, a period of about six months is needed» this purpose, and thereafter it will be possible to t, the elections within two months. j

The Chief Justice concluded by emphasizing ik

While the Court does not consider it appropnait issue any directions, as suggested by Mr Yit Bakhtiar, as to a definite time-table for the ML of elections, the Court would like to state nut terms that it has found it possible to validate ii extra-constitutional action of the Chief Martial In Administrator not only for the reason that he stepjei in to save the country at a time of grave natioiJ crisis and constitutional breakdown, but also becan of the solemn pledge given by him that the penal; constitutional deviation shall be of as short a (tatas possible, and that during this period all his enajs shall be directed towards creating conditio: i conducive to the holding of free and fair election j leading to the restoration of democratic rule. accordance with the dictates of the constitution Ik Court, therefore, expects the Chief Martial Ln Administrator to redeem this pledge, which must It construed in the nature of a mandate from thepeopt of Pakistan, who have by and large, willing! accepted his administration as the interim governnm of Pakistan.

Waheeduddin Ahmad, Dorab Patel, Muhamm Haleem, and G. Safdar Shah, concurred wdh tk Chief Justice. Muhammad Afzal Chenu Muhammad Akram Qaiser Khan and Nasim Hasi Shah while concurring with the Chief Justice alsi

wrote separate short ji Muhammad Afzal Cheema, s arguments of the Chief Justic the doctrine of necessity was i concept but was of Islamic based on and deduced from \ Holy Quran. He cited a num Holy Quran in support thereof \kram, discussed at length F of law and demolished it conclusion that the principles < the arguments of the maxim *'5 lex'* were fully attracted to th circumstances of the case, a Justice Qaiser Khan, ho\ straightforward and direct. Wh Chief Justice, he observed tha derived its jurisdiction (Continuance in Force) Order and enforce the laws of 'de fa the time being. According to to ensure that the conflict bet State was always avoided, eve was a de facto one.

As a consequence of this u the Supreme Court, the act *i* Army Staff, General Zia, 01 power was declared to be *vi* 'state necessity'. Begum ,Nusi challenging the detention of under Martial Law Order *11* incompetent. The judgment
10 November 1977.

There is controversy about I the power to amend it' in the the Chief Justice.33 It is beca that Zia was given a free hanc Constitution which he mostly i Constitution and introducing t had not the remotest connecti(of state necessity. There is a aforesaid words were not inc draft of the judgment circuli members of the Supreme Coi were later added by Justice Ar

The doctrine of necessity Supreme Court in Nusrat Bhu narrowly by the High Cou challenged before the Peshaw

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Ahmad, Dorab Patel, Muhammad Safdar Shah, concurred with the Muhammad Afzal Cheema, m Qaiser Khan and Nasim Hasan rring with the Chief Justice also

wrote *separate short judgments. Justice* Muhammad Afzal Cheema, supported the line of jraents of the Chief Justice and observed that He doctrine of necessity was not a western jurists' concept but was of Islamic origin having been based on and deduced from various verses of the Quran. He cited a number of verses of the Quran in support thereof. Justice Muhammad discussed at length Kelson's pure theory of law and demolished it. He came to the conclusion that the principles of state necessity and the arguments of the maxim *'Solus populi suprema ler'* were fully attracted to the peculiar facts and circumstances of the case, as validating factor. Justice Qaiser Khan, however, was fairly straightforward and direct. While agreeing with the Chief Justice, he observed that the Supreme Court derived its jurisdiction from the Laws (Continuance in Force) Order and it had to accept and enforce the laws of 'de facto government' for •re time being. According to him, the Courts had ensure that the conflict between the Court and e was always avoided, even if the government i de facto one.

^ a consequence of this unanimous verdict of supreme Court, the act of the Chief of the \rrny Staff, General Zia, ousting Bhutto from power was declared to be valid in the name of 'state necessity'. Begum Nusrat Bhutto's petition challenging the detention of Bhutto and others under Martial Law Order 12 was dismissed as incompetent. The judgment was delivered on 10 November 1977.

There is controversy about the words ’including ihe power to amend it’ in the leading judgment of Ik Chief Justice.33 It is because of these words tot Zia was given a free hand to amend the 1973 Constitution which he mostly abused, defacing the Constitution and introducing basic changes which y not the remotest connection with the doctrine necessity. There is a viewpoint that the words were not included in the typed draft of the judgment circulated amongst other members of the Supreme Court Bench and they fere later added by Justice Anwar-ul-Haq.34 Hie doctrine of necessity expounded by the Supreme Court in Nusrat Bhutto’s case was read narrowly by the High Courts. When it was before the Peshawar High Court that

military courts did not meet the criteria of necessity, the Court responded as under:35

To say that it is the duty of this Court to judge in exercise of its constitutional jurisdiction, the political implications of this or that action will be an argument to which we cannot subscribe. All that we have to ensure is whether an impugned action reasonably falls within any of the categories enunciated in Begam Nusrat Bhutto’s case.

However, the Sindh High Court, in a similar case, construed the Nusrat Bhutto case more liberally holding that detention without trial on the instructions of the executive would virtually be making the same authority both the prosecution as well as the judge, and such an anomalous state of affairs inherently tended to arbitrariness.36

The Sindh High Court entertained a petition challenging Zia’s constitutional amendments, restricting the powers and jurisdiction of the High Courts under Article 199 to pass orders, injunctions, and process against martial law regulations and orders of CMLA or MLA or anything done, or action taken, or intended to be taken, or done thereunder. Under this amendment, the High Courts were also prohibited from making any order relating to the validity or effect of any judgment or effect of any judgment or sentence passed by a military court or tribunal or pass any injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of a military court or tribunal extended or of which cognizance had been taken by a military court or tribunal.37

A majority of the Bench of five judges in the Sindh High Court upheld the constitutional amendment as valid. The dissenting judges found the amendment unreasonable and invalid, violating the power of judicial review vested in the superior courts in Nusrat Bhutto’s case. Justice Zafar Husain Mirza, a dissenting judge, observed that the majority misread Nusrat Bhutto’s case and on no principle of necessity could the power of judicial review vested in the superior courts under the 1973 Constitution be taken away. According to him, the martial law regime could not promulgate ’in the shape of constitutional amendment a permanent constitutional measure to

outlive itself resulting in perpetuation of military dispensation of justice after restoration of democracy'.38

NOTES

1. Dawn, 6 July 1977.

2. Ibid. The text of General Zia's address is on page 8.

3. Proclamation of Martial Law, 5 July 1977, PLD 1977 Central Statutes 326.

4. Chief Martial Law Administrator's Order 1 of 1977. PLD 1977 Central Statutes 327.

5. Laws (Continuance in Force) (Amendment) Order, 1977. PLD 1977 Central Statutes 325.

6. *Dawn,* 15 July 1977.

7. *Dawn,* 16 July 1977.

8. Taseer, Salmaan, *Bhutto: A political biography,* 1980, Vikas Publishing House, New Delhi, pp. 177-8.

9. *Dawn,* 30 July 1977.

10. *Dawn,* 28 August 1977. It may be explained that a complaint case is prosecuted by the complainant himself with the help of his witnesses. But a challan case is prosecuted by the prosecution branch of provincial government after investigation by the police. In such a case, it is State's responsibility to adduce the best evidence to obtain conviction of the accused.

11. Dawn, 4 September 1977.

12. Zulfiqar Ah Bhutto v State, PLJ 1978 Criminal Cases (Lahore) 9.

13. Leghari House belonged to Sardar Farooq Ahmad Khan Leghari who later became the President of Pakistan.

14. *Dawn,* 18 September 1977.

15. *Dawn,* 20 and 23 August 1977.

16. *Dawn,* 24 August 1977.

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17. *Dawn, 26* August 1977.

18. Waseem, Mohammad, *Politics and the State in Pakistan,* 1989, Progressive Publishers, Lahore, p. 367.

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19. *Pakistan Times,* 4 September 1977.

20. *The Pakistan Times,* 8 September 1977

21. *Dawn,* 30 September 1977.

22. *Dawn,* 1 October 1977.

23. *Dawn, 2* October 1977. Article 184(3).

Laws (Continuance in Force) (Fifth Ami_ Order, 1977. PLD 1977 Central Statutes 441 PLD 1977S.C. 657 at p. 746. The judges namely S. Anwar-ul-Haq _ Waheeduddin Ahmad, Muhammad Afzal Chen Muhammad Akram, Dorab Patel, QaiserKta, Muhammad Haleem, G. Safdar Shah and Na Hasan Shah, JJ.
28. It may be recalled that the military regime of Yikp did not last even for three years. The contents of Bhutto's statement have been ata from the book of M. Dilawar Mahmood, Ik *Judiciary and Politics in Pakistan* which to produced extracts from his statement on p 57.

Begum Nusrat Bhutto v Chief of Army Staff d Federation of Pakistan. PLD 1977 SC 657 He is a person, generally a member of the Bi present in Court and heard by leave of theCouiti assist it in the case already before it He is M engaged by any of the parties but may instiW, inform, or move the Court on the matter of whit the Court may take judicial cognizance Emphasis is supplied. PLD 1977 S.C. 657 at p. 716. One of the Judges on the Bench, Mr Justice Donk Patel told the author that he did not remembs reading these words in the draft circulated by tin Chief Justice.

Nasirullah Khan Babar v Chief of Army Staff, PLD
1979 Peshawar 23.

Mumtaz Ali Bhutto v The Deputy Martial Ln Administrator, PLD 1979 Karachi 307

37. Constitution (Amendment) Order, 1980 Presidents Order 1 of 1980, PLJ 1980 Federal Statutes 137

38. Yaqoob Ali v Presiding Officer, Summary Militai) Court, PLD 1985 Karachi 243.

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26 Bhutto’s Trial and Execution

The trial of Bhutto and the judgments of the Courts as a result are not, strictly speaking, a

constitutional case. Since the trial was held by the High Court, it was not supposed to be a political trial or a military verdict. Nevertheless, the trial, appeal, and eventual execution of Bhutto have left a deep and everlasting effect on the political scene of Pakistan The verdict has created international as well as political controversy, the judiciary has laboured under its cloud ever since. The trial and the appeal of Bhutto, therefore, deserve detailed narration and appreciation in the present work.

THE BACKGROUND

Justice Maulvi Mushtaq Husain has been discussed earlier mainly in the context of his strong rivalry with Chief Justice Sardar Muhammad Iqbal. Maulvi Mushtaq was known to be a man of strong likes and dislikes with a propensity towards vmdictiveness. But for these weaknesses, he was a learned man with a potential of being a good and courageous judge, attributes which he manifested in a number of cases, Mir Hassan's case1 was one which goes to his credit. His reputation of being strong-headed was known to all the governments under whom he served, a quality that did not endear him to them because governments in Pakistan generally looked for weak and pliable judges for appointment to key judicial offices like the Chief Justices of the Supreme Court and the High Courts so that the governments could manipulate political situations through them.

It has been mentioned above that Sardar Iqbal was prematurely retired as Chief Justice of the Lahore High Court in October 1976 as a result of the Fifth Amendment to the Constitution. Maulvi Mushtaq was next to him in the Lahore High Court and had been waiting for a long time for the coveted office of Chief Justice. He had previously declined elevation to the Supreme Court and

allowed his juniors to be so elevated. Now the moment had come for which he had been waiting for a long time, but the Bhutto government was silent about the successor to Sardar Iqbal, keeping everyone concerned in anxiety and suspense. Finally, the suspense was broken and Mr Justice Aslam Riaz Husain, eight years junior to Maulvi Mushtaq Husain in the Court, was appointed as the Chief justice. Justice Aslam had superseded as many as seven senior judges of the Lahore High Court. The considerations behind his appointment appear to be all negative. He was not known to be a bright judge and had no significant judgment to his credit. He was known to be weak and ineffectual, attributes that the PPP government was looking for. He was believed to be a friend of Yahya Bakhtiar, the Attorney-General at that time. They had studied together for the Bar examination in the United Kingdom and perhaps Bakhtiar had assured Bhutto of his dependability. The PPP government apparently did not want to risk a strong Chief Justice like Maulvi Mushtaq in the Lahore High Court for four years.

There was widespread resentment against this appointment and the injustice done to Maulvi Mushtaq amongst members of the judiciary and the Bar. The PPP government soon found to its disappointment that weak people are of little utility to the government and cannot be loyal to any one. For example, in the mini martial law case of 1977 when a full Bench of the Lahore High Court presided over by Chief Justice Aslam Riaz declared the mini martial law imposed by the PPP government was unconstitutional.2 Aslam Riaz CJ was the author of the judgment which although based on correct reasoning was poorly written. Maulvi Mushtaq was not going to forget

the way Bhutto slighted him. He did not resign but became disheartened and showed little interest in his work.

When Zia imposed martial law in July 1977, he knew that Maulvi Mushtaq was aggrieved and that he perhaps held a grudge against Bhutto. He started

favouring him. Maulvi Mushtaq was first appointed as Chief Election Commissioner and later as acting Chief Justice of the Lahore High Court, while he was also the acting Governor of the Punjab. Thus, he came in a position where he could get even with Bhutto.

DETENTION AND CANCELLATION OF BAIL FOR BHUTTO

An incomplete *challan* had been presented by the prosecution before a magistrate in Lahore against Bhutto on 11 September 1977, charging him of the murder of Nawab Muhammad Ahmad, father of Ahmad Raza Kasuri, in November 1974. The magistrate concerned sent this *challan* to the court of sessions. On that day, the state moved an application in the High Court the transfer of the case to the High Court. Maulvi Mushtaq, as acting Chief Justice, passed the order transferring the case to the Lahore High Court for trial, without any notice to Bhutto.3

It is mentioned earlier that Bhutto was allowed bail on 13 September 1977 under the order of Justice K.M.A. Samdani. The bail order had clearly displeased Zia and the military *junta* who arrested Bhutto again on 17 September from his residence in Karachi under Martial Law Order Number 12 which empowered the CMLA to order the detention of anyone preventing him from acting in any manner prejudicial to the purpose for which martial law had been proclaimed. Zia justified the detention of Bhutto and his ten colleagues by saying that enquiries had unearthed ’a plethora of evidence’ to show that during the Bhutto regime all civil institutions in the country were systematically destroyed, and that the civil services were politicized and rendered ineffective and insecure. It was alleged that the public funds were used for personal luxury and party benefits; the life, property, and honour of law-abiding citizens were made unsafe; and inhuman and barbaric methods were employed to crush all dissidents and political opponents. He also alleged the Bhutto’s government had rigged elections on a massive scale in March 1977 and government funds, transport, means of communications, and

government agencies were used in support of fe PPP’s candidates.4

It appears that after the High Court granted W to Bhutto, Zia lost faith in the High Court ami ordinary courts in handling Bhutto’s case *them* he wanted. Therefore, an announcement was madt that he would be tried by a special military COBI presided over by a Brigadier or a Major-Gend in Lahore.5 It is belived that Zia was advised than military trial would bring bad name aid international embarrassment to his government and he that should allow ordinary civilian courts to to) him. This explanation carried weight but Zia was not going to be dissuaded merely by the fear of international censure because, by that time, he tad already gone too far in his confrontation with Bhutto and could not take the risk of Bhutto being released. He needed iron-clad assurances and guarantees that this would not happen and these guarantees must have come from somewhere The object of speculation can only be Maulvi Mushtaq, especially in view of the events that unveiled soon thereafter.

Maulvi Mushtaq formed a full Bench of five judges for Bhutto’s trial with himself at the head of

the Bench. He took care that Justice KMA Samdani, who had granted bail to Bhutto, was kept out of the Bench. A petition for cancellation of the bail was entertained and admitted to regular hearing on 21 September by the same mil Bench of five judges. This was clearly against the established practice of the High Courts that the petition for cancellation of bail is fixed before the same judge who granted it in the first place or before a Bench of which he is a member The cancellation of bail, though academic because Bhutto was already under detention, was a clear harbinger of events to come at the trial. It was no surprise when the full Bench cancelled Bhutto's bail by its order dated 9 October 1977. In the detailed order, the full Bench held that on the basis of all the material produced before them, 'there appears reasonable ground for believing that the respondent has been guilty of an offence punishable with death or imprisonment for life' The judges also observed that there was evidence of motive on the part of Bhutto who had been threatening Ahmad Raza on the floor of the

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and must have satisfied Zia and his *junta* that things were on the right track. It was announced by the full Bench that trial proceedings would commence on io October. No wonder, the trial by

special military court was heard of no more.

THE TRIAL **OF BHUTTO**

Bhutto was tned before a full Bench of five judges consisting of the acting Chief Justice Maulvi Mushtaq Husain, Zakiuddin Pal, M.S.H. Qureshi, Aftab Husain, and Gulbaz Khan, JJ; Maulvi Mushtaq had made the selection of the Bench rather carefully. Zakiuddin Pal was an old Muslim Leaguer known to be hostile to Bhutto. Aftab Hasam was a protege of Maulvi Mushtaq and would go along with him! The other two were not known for writing dissenting judgments and were quite manageable. There were four others accused with Bhutto, Mian Muhammad Abbas, a senior official of the Federal Security Forces (FSF), and three junior officials of the FSF.

At the commencement of the trial, all the accused had pleaded not guilty but later on the three junior officials of the FSF, Ghulam Mustafa, Arshad Iqbal, and Rana Iftikhar Ahmad, made confessional statements saying that they acted under orders. Initially, trial proceedings were open to the public but after 25 January 1978, the proceedings were held in camera. Bhutto boycotted Ibe proceedings of the trial and withdrew the power of attorney of his counsel after his application dated 18 December 1977 for transfer of the case uid 22 December 1977 (requesting for hearing of lie application of 18 December 1977) were I dismissed by the Court in chambers. In his statement, recorded as an accused person he stated tot he would not be offering his defence as he ws boycotting the proceedings of the trial. He added further that he would confine his statement uamly to two issues, namely, his lack of confidence in the fairness of the trial and why this

naa been faoricated against him. The High Court *vide* its judging ^ jg j^]^

convicted all the accused for criminal conspiracy ancT murder and sentenced them to death.7 The accused were given seven days' mandatory period

for filing an appeal in the Supreme Court against their sentence and conviction The statement of Bhutto had not been reproduced in the judgment of the High Court.

WAS THE TRIAL FAIR?

It has been argued in the years after the trial that Bhutto never got a fair trial. If the apprehension and pleadings of the accused are any criterion, then Bhutto's transfer application moved in the High Court as well as in the Supreme Court bear ample testimony to the fact that he did not get a fair trial. In the application moved in the Lahore High Court, Bhutto levelled a number of allegations of substance with regard to the trial of the case by the Full Bench presided over by the acting Chief Justice (Mushtaq Husain). At that time, Maulvi Mushtaq was also functioning as the Chief Election Commissioner at the time. He was confirmed as the Chief Justice during the hearing of this case.

The application gives instances of uncalled for remarks by Maulvi Mushtaq about or against Bhutto during the proceedings which included reference to his supersession as Chief Justice and the civilian martial law. Several instances of the insulting attitude of the acting Chief Justice towards the defence counsel were also mentioned in the application at length. It was alleged that he frequently lost his temper at the defence counsel and instances were mentioned therein. It was alleged that the record of the proceedings was being incorrectly prepared deliberately. Several instances were mentioned which included:

- answers to relevant questions pertaining to the veracity of important witnesses were not recorded;

- many relevant questions put to prosecution witnesses by the defence counsel were disallowed and overruled;

- answers of the prosecution witnesses to the questions in the cross examination were

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ion was dismissed in Chambers er which Bhutto refused to offer a e proceedings and boycotted the tr, he trial proceedings, after a certain ordered to be held in camera. The vas that Bhutto refused to enter upon id tried to turn the Court into a political ie end of every day during the inedings, the Court released a summary dings for publication in the Press.' contents of the judgment, the tension Zourt and the accused and his counsel Whatever the justification offered by i its judgment, it is clear that the y had lost all faith in the Court and ig to co-operate. This situation, the environment of the Court, could idered conducive to dispensation of Court and the accused had become md the trial had become ineffectual,

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gorously challenged the trial by the n grounds of bias and pleaded that the ings were vitiated. While boycotting ngs, Bhutto confined his statement to idence in the fairness of the trial and why this case had been fabricated

nt dated 18 March 1978, authored by b Husain, was a lengthy and detailed sing various points and principles riminal law.9 However, the principles r laid down in the judgment have t been followed or even referred to by L Pakistan. Generally, the abettors to a not awarded capital punishment, and it stands out unique in this respect. All :used, including the three who had vere sentenced to death. Apart from i about criminal culpability, the Court iains to judge each man as a good utto's belief in Islam and commitment leology was questioned. He was held

ipable of being elected to the high office of the ne Minister nor was he considered true to his *n* because he had used the Constitution and the law as the handmaiden of his polity.

The remarks about his faith or his disrespectful attitude towards the Constitution had apparently no relevance to the offence he was charged with. They only reveal the m«idset of the judges and betray their innate dislike for Bhutto and his style of governance.

APPEAL **BEFORE THE** SUPREME **COURT**

Bhutto filed an appeal against his conviction before the Supreme Court which was argued for months before a Bench of nine judges presided over by the Chief Justice. Bhutto took the plea of bias and unfair trial before the Supreme Court. He filed a concise statement in the Supreme Court, the relevant extracts of which are reproduced as follows:

It is indeed a mockery for this regime to pontificate on the independent character of the Chief Election Commissioner when it has brazenly merged the office of the Chief Election Commissioner and the Chief Justice of Lahore High Court, under the control of the man who is known to be after my blood. The Chief Election Commissioner's prejudice against me is, by now, accepted internationally. It is an axiomatic fact beyond reach of denial.

Against a background of much hostility, Maulvi Mushtaq Husain was pleased to hear my detention petition virtually 'in camera' inside the prison walls of Lahore camp jail. This was in January 1969. However, it was not he who released me from detention, but the government which withdrew the detention order, in view of the prevailing circumstances.

With the change in the situation, Maulvi Mushtaq Husain met me in the Punjab House in Rawalpindi soon after I became President of Pakistan. He gave blatant indications of his ambitions, suggesting that, at this critical juncture in the history of Pakistan, the new President would need a trustworthy man in control of the judiciary. He was gravely dejected when his expectations were not met, when a few months later Sardar Muhammad Iqbal was appointed the Chief Justice of the Lahore High Court by my government.

He did not conceal his anger. He displayed his resentment in many ways, both in his official capacity and otherwise. In sheer desperation, he suggested to Ghulam Mustafa Khar, the former Governor and Chief Minister of the Punjab to have me 'shot through the head'. When, following the constitutional amendment, Mr Justice Aslam Riaz Husain was appointed the Chief Justice of Lahore High Court, he interpreted this second supersession to be an intolerable insult, to the extent that he gave vent to his pent up anger on the very first day of the murder trial, by pointedly referring to his supersession as 'a hypothetical case'.

Earlier, in the fall of 1975, he had an unpleasant and unmentionable altercation with Mr Abdul Hafeez Pirzada, a senior Federal Minister. After his second supersession he did not seriously attend to his official functions, spending most of his time brooding away in his Chamber. On the slightest pretext he would fly off to Europe to sublimate. He was in Europe when the *coup d'etat* of 5 July 1977, took place. He was summoned to Pakistan by the ringleaders of the coup to become a member of the inner circle. He responded to the invitation with the enthusiasm of a

fanatic.

In anticipation of the meritorious services he was to render, he was immediately rewarded with the office of the acting Chief Justice of Lahore High Court. He was confirmed as Chief Justice during the course of my trial for murder. Simultaneously with his appointment as Acting Chief Justice of Lahore High Court, he was appointed as Chief Election Commissioner. He baptised the appointment with a vicious attack on the Pakistan People's Party's government in an interview which was heard on the radio and television.10

An application alleging bias against the Chief Justice of Supreme Court, Justice S. Anwar-ulHaq, was also moved. The main contentions of this application have been reproduced in the following manner by the Chief Justice himself:11

"i. that I resented the constitution sixth amendment made by the parliament under the appellant's leadership of the House, whereby my predecessor got an extension in the term of his office, and my promotion to the office of Chief Justice of Pakistan got consequently delayed;

ii. that in the judgment of the Court in Begum Nusrat Bhutto's case, while holding that the

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Another judge on the B< Waheeduddin Ahmad, who wa of the Supreme Court at that tim ill around the end of the yea requested the Chief Justice to po of the appeal for four to six we to join the Bench after his rec< reasonable request was not ac< hearings of the appeal continued the remaining seven judges on 1 judgment is also against the estab the Supreme Court. If a judge, wh Bench, retires, dies, or is inci proceedings before the remaining Bench are not continued in a partChief Justice, in such a case, cor Bench which hears the case afres] beginning.

the allegation of bias against the ice of Lahore High Court, Chief -Haq observed:

sd the conclusion that although some lade by the trial Bench in the day to " the case may not have been correct ' of the law; and some others may not ully called for in the fact and of the case, yet these were all matters iretion of the Court, and mere error amount to proof of bias. The appellant .ely misled into thinking from the very « that the learned acting Chief Justice gainst him. There were, in fact, no or such an apprehension. In any case, such apprehension hi respect of any of iir learned Judges constituting the

, Bhutto's contention that the trial ' reason of bias on the part of the s of the Bench was rejected. " the learned Chief Justice was not i material was brought on the record ch legitimately laid the foundation DUS factual allegations made will were not controverted by the stati hief Justice. Bhutto succeeded r itial shadow of suspicion on the tna1

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ar, who was counsel for Bhutto i Dourt, took a long time arguing the al. He could have concluded the two to three weeks if he wanted to, an for months on end with a longoach full of repetition, irrelevant

and digressions like reference to iu. This approach proved to be fatal ue to the flux of time, two judges on eemingly favourable towards the •opped from the Bench of nine, strength to only seven. Mr Justice

from his remarks in the open court saring of the appeal, seemed inclined

towards acquittal, particularly on the point of bias and want of fair triai *against the accused. He* remarked at one stage that if any party before him *stated that he did not want him to hear his case, he* would throw the file on to his (objector's) face and would tell him to take it to some other Judge he had confidence in.13 This loud thinking on his part was a clear message to the two Chief Justices (of the Lahore High Court and the Supreme Court) against their insistence on holding the trial and hearing the appeal. He said in his address on his retirement: "~

Ii is common knowledge that people do not care much for the ability of a Judge but they care very much about his integrity. If people have confidence .n the integrity of a judge then they do not mind even if their cases are decided against them. But if they doubt the integrity of a judge then, however learned he may be, they are not satisfied with his judgment.14

It would have been only appropriate that Justice

ij ier Khan should have been allowed to continue

>’ as ad hoc judge for the hearing of this appeal

* he retired (on 30 July 1978) while the

was being heard. Since his remarks had

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us judgment.

Another judge on the Bench was Justice ”eeduddin Ahmad, who was an ad hoc judge Supreme Court at that time. He fell seriously und the end of the year 1978. He even oted the Chief Justice to postpone the hearing ie appeal for four to six weeks to enable him oin the Bench after his recovery, but such a nonable request was not acceded to and the .”ngs of the appeal continued in his absence by remaining seven judges on the Bench.15 This it is also against the established practice of EfcSupreme Court. If a judge, who is member of a Bench, retires, dies, or is incapacitated, then jioceedmgs before the remaining members of the thch are not continued in a part-heard case. The Justice, in such a case, constitutes another which hears the case afresh from the very

THE JUDGEMENT IN APPEAL

Lengthy arguments in appeal, spanning nearly a *year finally culminated into a lengthy judgment* dated 6 February 1979. Everyone was surprised to learn that it was a divided verdict: four to three, divided at the seams. Four judges, all hailing from Punjab, upholding the conviction and three judges, from other provinces, writing dissenting judgments in support of Bhutto’s acquittal.16 On the question of bias, the Supreme Court held that there was no factual basis for any apprehension of bias. The majority view held the statements of dead men admissible but the minority view was that such statements are hearsay and inadmissible. The majority considered the evidence on conspiracy admissible but the minority held it to be inadmissible. The majority view regarding approver was that even if he did not disclose all the facts before a magistrate his statement before the trial court containing more details could still be relied upon. The minority thought that such a statement could not be relied upon.

On the question of proceeding with the trial in the absence, due to illness, of the accused, the majority held that the Court could proceed in the absence of the accused by dispensing with his personal attendance so that the trial of the other co-accused was not delayed. The minority view was that the Court should exercise its discretion in such a matter judiciously because illness is beyond the control of the accused. The view of the majority on this point is clearly repugnant to the general principle and practice of law that a trial of a person should be held in his presence and trials in absentia have always been seen with disfavour under the recognized principles of criminal jurisprudence.

On the question of reliability and credibility of the statement of an approver/accomplice, the majority view was that he should be judged as any other witness without introducing an artificial requirement of corroboration of his evidence. The minority held that the evidence of an accomplice required corroboration without which it should not be accepted. The minority view is based upon the settled principle of law as applied for more than a century in the Indo-Pakistan subcontinent. The

majority held that motive is relevant as an aid in appreciation of evidence in criminal cases but the minority view was that evidence of motive is always a weak form of corroborative evidence. The majority view on motive was that Bhutto had strong motive to do away with the complainant but the minority firmly held that the prosecution had failed to establish its case on motive.

The majority held that the prosecution had fully established the existence of conspiracy, identity of the conspirators, and the death of the deceased being a probable consequence of such conspiracy and, therefore, the accused was rightly convicted. The minority, after an extensive and thorough appreciation of evidence, reached the conclusion that the prosecution failed to establish the case against Bhutto beyond doubt and, therefore, he should be acquitted. The appeals of Bhutto and Mian Abbas were dismissed by the majority of four to three, but the appeals of the confessing three appellants were dismissed unanimously.

CONTROVERSY OVER THE SUPREME COURT VERDICT

REVIEW APPLICATION AND ITS DISMISSAL

A petition was filed on behalf of Bhutto before the Supreme Court for review of the judgment. The review petition was dismissed on 24 March 1979 unanimously by all the seven judges.17 They all agreed that the sentence could not be altered in review, as prayed for by Yahya Bakhtiar in the alternative, from the death sentence to life imprisonment. However, all the seven judges felt that the grounds relied upon by Yahya Bakhtiar for mitigation of sentence were relevant for consideration by the executive authorities in the exercise of their prerogative of clemency. In this way, even the four judges, who up held the conviction and death sentence of Bhutto, seemed inclined to the commutation of death sentence to life imprisonment but it was too much to expect from the executive to commute Bhutto's sentence to life imprisonment. Zia and his military *junta* were keenly waiting for the verdict.

This Supreme Court judgment has also been i subject of controversy within and outside Pakistan The retirement of one judge during the course ol the hearing of the appeal and incapacitation of another, has given rise to debate, controversy and speculation. It has been said that Justice Qaiser Khan should have continued on the Bench as an ad hoc judge for the hearing of the case Tie constitution permitted this. The reason for no! doing so was because he had clearly expressed his view against the conduct of the trial while heannj the appeal. It is also alleged that Justice Waheeduddin was not allowed to continue to sit on the Bench after his illness despite his request because the Chief Justice sensed that he would vote in favour of Bhutto's acquittal. All this led to the speculation that if all the nine judges originally on the Bench were to decide the case, the verdict would have gone in Bhutto's favour by five to four.

Another unfortunate aspect was the division of

the judges on provincial lines, all four judges from

the Punjab standing in favour of the conviction

and the three judges from the other provinces

standing in favour of an acquittal. So, the

proponents of provincialism allege that it was a

conspiracy of the Punjabis against a Sindhi Prime

Minister, the High Court of the Punjab holding the

trial and sentencing him to death and the Punjabi

judges on the Supreme Court upholding the

verdict-. This further strengthens the speculation

that since the two judges who were prevented from

continuing the hearing of the appeal came from

outside the Punjab, the verdict would have gone in

favour of Bhutto's acquittal.

THE EXECUTION OF BHUTTO

Despite reference to clemency by the Supreme Court in its judgment on the review application, no mercy was shown by Zia or his military *junta.* Kurt Waldheim, Secretary-General of the United Nations, President Jimmy Carter of the USA,

Hebnat Schmidt, Chancellor of West Germany,

President Giscard d'Estange c Minister Trudeau of Canada, an James Callaghan of the Unitec amongst the western statesi clemency. Soviet and Chinese h requested for mercy. Every Musi without exception, pleaded for E

On 4 April 1979, Zulfiqar hanged at 2:00 a.m. in the morn Central Jail. Contrary to the hanging prisoners at dawn, the a it prudent to accomplish it in the so that his body could be flown buried by the time the news population. At 4:00 a.m., Bhutto from Chaklala airport to Larkar in his ancestral graveyard at Ga in the presence of his first v Bhutto's relatives and servants, of his father, Sir Shahnawaz Nusrat nor Benazir had been in fly down to witness the burial."

It is a pity that a man as brill wasted like this. He had gr< promise but unfortunately

impulsiveness, over-arching intolerance took the better of h world as an extremely coi passionately loved by some and others.

ZULFIQAR ALI BHUTT A POLITICAL LEGACY

The confluence of events that bi Bhutto to political power opportunity to reshape Pakista being a bureaucratic state int< common purpose. He could havi political institutions which it ha< In particular, a Constitution subverted to fit the aspirations c groups, and a political party tha of aggregating and synthesizir many diverse groups. Under Bh were favourable enough to hen,

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Jlmmv carter of the USA, Chanc^or of West Germany

j'dent Giscard *d'Estange of France, Prime Trudeau of Canada, and Prime Minister* Callaghan of the *United Kingdom,* were igst the western statesmen who urged . Soviet and Chinese heads of state also for mercy. Every Muslim and Arab state, it exception, pleaded for Bhutto's *life.18*
4 April 1979, Zulfiqar Ali Bhutto was at 2:00 a.m. in the morning at Rawalpindi il Jail. Contrary to the usual practice of ing prisoners at dawn, the authorities thought it prudent to accomplish it in the dead of the night so that his body could be flown to Larkana and be by the time the news broke among the lation. At 4:00 a.m., Bhutto's body was flown Chaklala airport to Larkana and was buried his ancestral graveyard at Garni Khuda Bakhsh
11 the presence of his first wife Sheerin, and i's relatives and servants, next to the grave Ms father, Sir Shahnawaz. Neither Begum nor Benazir had been informed in time to down to witness the burial.19 It is a pity that a man as brilliant as Bhutto was like this. He had great potential and ise but unfortunately his arrogance, ilsiveness, over-arching ambition, and ice took the better of him and he left the world as an extremely controversial man, passionately loved by some and intensely hated by otters.

ZULFIQAR **ALI BHUTTO:** APOLITICAL **LEGACY**

He confluence of events that brought Zulfiqar Ali Bhutto to political power offered him an prtunity to reshape Pakistan, to turn it from a bureaucratic state into a nation with a itommon purpose. He could have given the country (political institutions which it had failed to develop. !h particular, a Constitution that could not be subverted to fit the aspirations of powerful interest groups, and a political party that would be capable of aggregating and synthesizing the interests of unydiverse groups. Under Bhutto, circumstances we favourable enough to help Pakistan graduate fa the ranks of poor nations and move into those if middle income countries. Bhutto had the

mandate from the people to develop the mechanisms for ensuring that the under-privileged segments of the population gained access to basic human needs. Bhutto could have -evolved an administrative structure not beholden to a few interest groups but commited to achieving the nation's purpose.

The moment was right when Bhutto was put into office for achieving all this and much more. But Bhutto failed. His legacy was a country divided by provincialism, sectarianism, and growing ethnicity. The political institutions he helped create did not fulfil their early promise. The Pakistan People's Party, instead of housing a number of different groups, was able to accommodate only a few of the more powerful interest groups. The economy, instead of picking up the momentum of development generated during the years of Ayub Khan, faltered and went into a recession unprecedented in Pakistan's history. The administrative structure, shaped and reshaped many times, lost its sense of purpose. Bhutto, upon assuming power, had managed to rally behind him a nation that had been extremely demoralized by the events of 1969-71. In the summer of 1973, when he gave Pakistan its third Constitution, a confident nation looked to the future with considerable expectation. Much of that confidence was dissipated in the period following the promulgation of the Constitution on 14 August
1973. It appears that Bhutto could provide leadership only during periods of crisis and there were several of those between 1971 and 1973. But he did not prove himself to be a leader for all seasons. He lost control when the ship of state left turbulent waters and entered a placid stretch. He left the shipadrift.

With such an indifferent record of performance why does Bhutto remain important in Pakistan's politics? To answer this question, we must recall for a moment the analysis of social group dynamics presented earlier. It was argued that the PPP success in the elections of 1970 and the popularity of its chairman from 1969, when the party was founded, to 1974, when Bhutto brought about a fundamental reorientation in his programme, was the result of a remarkable coalition that represented all classes of the Pakistani society. From 1974 onwards the middle classes began to drift away

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least four 'Bhuttoisms', his legacy to y has not been an easy one.20

SHIP BETWEEN THE *V* AND THE

Y beginning, the militaiy *junta* that i 5 July 1977, involved the judiciary :t Chief Justice Yakub Ali on 5 July. ' Justices of the High Courts of the i were appointed acting Governor sctive provinces. The four chu ' accepted this appointment although sxecutive power which was actual!} .rtial law administrators of the shocking the way the judiciary fel d ultimately the trap of the martial t and accepted various assignments without demur. The military *junta* nediately sensed the weakness of f the judiciary for offices and thin eges from the manner and the haste r were accepted.

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Despite this order, the martial law regime was

cautious and did not immediately impose this oath

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Ittke the oath *immediately and it was left to the*

Governor of the province concerned to put a

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p-ovision and the fact *that Governors of provinces*

i were Chief Justices who could have stalled such

n taking, all the judges of the High Courts of

. Peshawar, and Balochistan took oath under

aid order. In the Lahore High Court, twenty-

mt of the thirty-two judges took oath.23 Thus

itood up to the test.

iwever, things came to a head on ^eptember 1977 when the petition of Begum
\^rat Bhutto against the detention of Bhutto was admitted directly by the Supreme Court in the exercise of its original jurisdiction. The military , *a* was rattled and its legitimacy was under cloud. The marriage between the military and the judiciary was on the rocks. *The junta* had to move quickly to remove the threat and bring the judiciary in Ime. It took the step of withdrawing the Fifth and Sixth Amendments to the Constitution on

22 September. The office of Chief Justice of the Supreme Court became vacant as a result and Justice Anwar-ul-Haq was appointed to the office who took over. The entire Supreme Court accepted it and the transition went smoothly. Having achieved this the martial law regime felt confidant that the judiciary could be made to fall in line. The order regarding oath of High Court judges was amended on 22 September, and High Court judges who had not already taken the oath were required to take it within twenty-four hours. It was provided tain case a judge failed to do so, he would cease to hold office.24 On the same day a similar president's order was passed for the Supreme Court judges to take the oath.25 It was similar to the one taken by the High Court judges. The requirement to discharge duties and perform functions according to the Constitution and the duty to preserve, protect, and defend the Constitution were all dispensed with.

The *junta* had the Constitution amended and the judiciary accepted it and made the transition under it. All the High Court judges of Sindh, Balochistan, and NWFP and a majority of the judges of the Lahore High Court had already taken *the oath. All the judges of the* Supreme Court took

oath on 22 September before the President *of*

Pakistan in Rawalpindi and the remaining ten judges of the Lahore High Court also took the *oath on the same day.*

The judiciary went along with the martial law in weeding out those judges who had been appointed after 1 January 1977 under the President's order for scrutiny of High Court judges who had been appointed between 1 January and
5 July 1977.26 The Supreme Judicial Council (which included Chief Justice Anwar-ul-Haq and acting Chief Justice Maulvi Mushtaq) was vested with the power to scrutinize the appointments. The Council started its proceedings and forced three judges of the Lahore High Court and two judges of the Sindh High Court to resign. One judge of the Lahore High Court was relegated to the position of a sessions judge.

The judges also suffered the ignominy of sitting on tribunals with Brigadiers for cases of disqualification of politicians. These disqualification tribunals were the most manifest demonstration of partnership between the military and the judiciary and their working in cohort.

AFTERMATH OF THE NUSRAT BHUTTO CASE

The judiciary did the ultimate favour to the martial law regime by legitimizing it in Nusrat Bhutto's case, giving power to the CMLA to amend the Constitution and without setting any date or deadline for holding the general elections. In return, the judiciary assumed to itself the power of judicial review over the acts and orders passed by the martial law authorities. By the verdict in Bhutto's case, the judiciary further obliged the regime and strengthened it by getting rid of its arch enemy.

The two chief justices, Anwar-ul-Haq and Maulvi Mushtaq, thought that they were the

benefactors of the regime and that they could get anything done. Maulvi Mushtaq, in association with Anwar-ul-Haq, made a number of appointments to the Lahore High Court, in two batches of nine each in 1978 and 1979. Most of these were unknown lawyers who had been favourites of Maulvi Mushtaq over the years. He started demanding more and more favours, which he and Anwar-ul-Haq thought were their exclusive right. Anwar-ul-Haq was obliged by being made acting President during the foreign trips of Zia, a favour he must have been very happy about. They did not realize that they had served out their utility for the martial law regime and that they could make demands up to a point. They learnt this the hard way. Regarding the exercise of power of judicial review, the judiciary was cautious. Martial law regulations and orders were not generally touched in exercise of judicial review. The judges did interfere with the sentence of the military courts, detention cases under the martial law regulations, or where military officers asserted their authority in matters of purely civil nature. Even here, the judges were extremely cautious. They did not strike down those sentences of the military courts where there was some inquiry made by the court, evidence of some independent witness was recorded, or some procedure was followed. Only in those cases where there was either no evidence or evidence of independent nature was not there, | that the judges interfered. Similarly, in detention cases, the courts only interfered where there was no material available for the order of detention or if it was totally extraneous. Where there was some material, however inadequate, the detention orders were not set aside. In a nutshell, the standards applied by the superior courts in reviewing the sentences and detention cases under martial law were not the same that they would have applied to the procedures adopted or sentences passed by the ordinary courts or in detention cases by civilian authorities. It is generally believed that relief was granted in about 10 per cent of the cases brought before the superior courts. The judges were careful not to annoy the military regime.

Even such limited and selective interference by the superior courts was an irritant for the martial law authorities who did not want any check on their powers. The military establishment wanted

to put to an end to this interference. Ultimate! the step was taken and the power of judicial rent of the acts and orders of the martial law author was put to an end by adding Article 212-Atoil constitution through an amendment!” 1 honeymoon between the judiciary and the mart! law government was finally over.

ALL POLITICAL ACTIVITY BAMEI

It has been mentioned above that general election scheduled for 18 October 1977 were postponed a
1 October. All political activities in the counn were banned. Zia announced that the process ol accountability would be completed first and them new date for polls would be fixed.28 Although tin PNA leaders accepted the postponement ol elections after having been shaken-up by tk popularity of Bhutto, they did not like the drastic step of a ban on all political activities. All thei wanted was that the PPP should be banned bin that they should be allowed to continue then

political activities. They voiced their concern ami Zia met the PNA leaders on 13 October Ht assured them that political activities would be restored at an early date. He pleaded for time to complete the process of accountability which, in his reckoning, could take not less than six months He thus made it clear that elections would not be held before the following year and, according to the official announcement, the PNA leaders agreed to postponement till March 1978. He offered the PNA to form a council for running the affairs of the country in which representatives of the PNA and the PPP could sit together. The PNA leaders also urged the CMLA for the withdrawal of cases against those facing trial before the Hyderabad Tribunal29 and, according to Mufti Mahmood, they were assured that the matter would receive due consideration.30

There were rumours circulating about disunity in the ranks of the PNA. Asghar Khan of Tehnk-iIstiqlal was getting impatient with other PNA leaders. He laboured under the illusion that he was the only one amongst the nine party leaders with the stature of a national lewder to challenge, Bhutto and the other PNA leaders were only a drag on him. He thought that the PNA's popularity and

appeal among the people was du< and charisma. Bickering amongs also convinced him that the al hold much longer and he must 1 The way he was overruled by th the matter of nomination of Z Lahore seat for opposing Bhutto, initially assigned to his party, lef bitter. He indicated that his pai the feasibility of maintaining the once the process of accountabilit Chairman and his party collea Hence, cracks in the PNA had public which strengthened the arg and its supporters that the PNA cards and that voting for it woi chaos.

It did not come as a surprise w announced on 11 November 1971 i-Istiqlal was withdrawing from tl faulty policies and indefinite accused the PNA of being a react also alleged that the PNA lacked fulfilling the aspirations of the pei a government that would be stable Other parties and their leade condemned Asghar Khan for des reiterated their resolve to stick toj PNA remained a political force.

Wali Khan and fourteen other 1< Marri and Bizenjo, were grant Hyderabad Special Tribunal,33 wl done on the direction of Zia who good relations with all anti-Bhut country. On his release, Wali Kha was no reason to doubt the sinceri in his resolve to hold elections. F and fair elections could only Bhuttoism was completely eli politics.34 He requested for a gen Balochistan so that a congenial at be created to let the people of participate in the elections witl Hyderabad Tribunal was finally cases against all fifty-two accusei withdrawn.35

The process of accountability ostensible beginning by appointing courts for the purpose, each headei

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to an end to this interference. Ultin

^was taken and the power of judicial, c s and orders of the martial law autk

t o an end by adding Article 212-3 ution through an amendment.^

loon between the judiciary and the i ^ernment was finally over.

POLITICAL ACTIVITY barn

lthat g^al deed, for 8 October 1977 were postponed r- All pohtical activities in the country »edZia announced that the process of bty would be completed first and thena polls would be fixed.2* Although the S \CcePted the postponement of after having been shaken-up by the ^of Bhutto, they did not likethPed;st. ban On n ^^ ^.^

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national leader to challenge, Bhutto PNA leaders were only a drag on ght that the PNA’s popularity and

among the people was due to his personality !ttd charisma. Bickering amongst the PNA parties convinced him that the alliance would not much longer and he must find his own way. way he was overruled by the PNA Council in matter of nomination of Zahur Ilahi to the seat for opposing Bhutto, a seat which was initially assigned to his party, left him feeling very bitter. He indicated that his party would review ;lke feasibility of maintaining the unity of the PNA once the process of accountability against the PPP Chairman and his party colleagues was over.31 Hence, cracks in the PNA had come out in the public which strengthened the argument of the PPP and its supporters that the PNA was a house of cards and that voting for it would be voting

for chaos.

It did not come as a surprise when Asghar Khan announced on 11 November 1977 that the Tehriki-Istiqlal was withdrawing from the PNA due to its faulty policies and indefinite programme. He accused the PNA of being a reactionary group. He also alleged that the PNA lacked the capability of Wiling the aspirations of the people and forming agovernment that would be stable and competent.32 Other parties and their leaders in the PNA condemned Asghar Khan for deserting them and reiterated their resolve to stick together so that the PNA remained a political force.

Wall Khan and fourteen other leaders, including Marri and Bizenjo, were granted bail by the Hyderabad Special Tribunal,33 which was clearly done on the direction of Zia who wanted to have good relations with all anti-Bhutto forces in the tountry. On his release, Wall Khan said that there tas no reason to doubt the sincerity of the CMLA ID his resolve to hold elections. He said that free ud fair elections could only be held when Bnuttoism was completely eliminated from politics.34 He requested for a general amnesty in Balochistan so that a congenial atmosphere could be created to let the people of that province participate in the elections without fear. The Hyderabad Tribunal was finally dissolved and uses against all fifty-two accused persons were ntndrawn.35

The process of accountability was given an sensible beginning by appointing twelve special arts for the purpose, each headed by a judge of

a High Court. These tribunals were assigned cases of various public functionaries like the president, prime minister, federal ministers, ministers of state, chief ministers, provincial ministers, parliamentary secretaries, members of National and Provincial Assemblies and others. A special court consisting of Justice Shafiur Rehman, was to hear cases against Bhutto.36 A number of cases were filed before it and the charges included rigging of polls, misuse of funds, evasion of Customs Duty and Sales Tax, and so on.37 Cases of eighty-nine other politicians were sent to the other tribunals. They included two former Governors, one former Speaker, ten former federal ministers, and nine former Sindh ministers. Begum Nusrat Bhutto was included in this list.38 These special courts got nowhere with the cases because the main purpose of the exercise was achieved by the execution of Bhutto. It is interesting to note that except for the special court for the cases against Bhutto consisting of Justice Shafiur Rehman, the other eleven Special Courts were changed and in their place, eleven disqualification tribunals were created each having a High Court judge and a Brigadier on it. Thus, Zia was not prepared to leave the process of accountability and disqualification to judges alone and ensured a watch on them by putting a Brigadier on each of the tribunals with them.39

ZIA BACKS OUT OF HOLDING ELECTIONS

By this time Zia had started reneging on his promise to hold elections without saying it in so many words. He said that before elections could be held, not only the process of accountability and purge of politicians had to be completed, but the country had also to be put on a sound

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economic base.40 He came out with his actual designs when he said in unequivocal terms that elections in the country would be held only when he and his colleagues were convinced of ’positive results’.41 The expression ’positive results’ was repeated by him several times in the years to come in order to justify the indefinite postponement of general elections. Later on, he retracted slightly and renewed his pledge to hold elections and transfer power to the elected representatives of the people,

subject to the condition that there would be no instability and negation of the objection for which martial law was imposed.42 He then turned around and said that the presidential form of government was more suitable for the country as it reflected the thinking and psyche of the Muslims.43 It was clear by February 1978 that Zia and his colleagues in the military *junta* had decided to continue their rule and avoid elections on one pretext or the other. They had also been legitimized by the Supreme Court. They had gone the whole hog against Bhutto and the PPP and had also found that the PNA was weak and divided and greatly dependent on them. Thus they saw no reason to give up power.

Internal dissensions started weakening the PNA further after the withdrawal of Tehrik-i-Istiqlal. More internal bickering was ’witnessed. Jamiatul Ulema-i-Pakistan was unhappy with the other parties in the alliance and its chief, Shah Ahmad Noorani, demanded the resignation of Mufti Mahmood as President of the PNA. The only thing that was keeping these parties together in a weak alliance was their collective fear of Bhutto. The leaders of the PNA were no longer interested in the elections as they thought they could not face Bhutto and the PPP at the polls. Their popular support had dwindled over only a few months because of their internal bickering and strife and

many *of their* erstwhile supporters now looked up to Zia to protect them from Bhutto and his party. In these circumstances, the PNA leadership was ready and willing to share whatever little power

the martial law government was ready to give them They jumped at the offer of negotiations for

the formation of a so called ’national government’ Qhafoor Ahmad, Secretary-General of the PNA said that their participation in the national government had been decided in the greater national interest.44 He, opposed the participation of those PPP leaders in the proposed *national who had taken undue advantage* of position while in r»ow^ H= ~_

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they could not see eye to eye on everything meeting Zia Asghar Khan, declared that his would not join the government with representatives of the PNA. However, the of the PNA negotiating team with the C remained inconclusive. Mufti Mahmood the PNA felt committed to extend co-operaM the martial law government either by proposed civilian government or by supporting from outside to enable it to discharge responsibilities it had undertaken on *5* Julv I1 for holding elections. Both these proposals placed by the PNA leaders before the However, Zia did not want any more and announced that a federal Cabinet formed on *5* July 1978 and the idea of a naiioiil government had been abandoned. He also indias] that provincial governments would be formed

Pakistan Muslim League, led by the Pn of! Pagaro, took the first step in agreeing to join hi new Cabinet proposed by Zia. This step wastaW on its own without consultation with the PM There

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were dissentions within the PML ranks li the majority favoured joining the civiln government.47 Kausar Niazi, Chairman of the PR splinter group, announced after meeting \uthtk CMLA that his men would also like to join h government. However; in the Cabjnef

by Zia on *5* July nobody was taken from fe splinter PPP group. Most of the ministers either bureaucrats or military Generals, and soi1 ministers were taken from Pagaro Muslim L

including CHaudh

Safdar.

y Zahur Ilahi

Another constituent party of the

Jamaat-i-Islami expressed its opinion in favour J joining the Cabinet and asked the PNA tonegot its inclusim in the government.4' Natioti Democratic Party, another constituent pan) demanded the ouster of Muslim League from 4

PNA for failure to follow the disdphn

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problems; and, initiate meas of *Nizam-e-Mustafa* (Islar country.50 However, this step < constituent party. The Natior (NDP) severed its ties with th major parties in the PNA Jamiatul Ulema-i-Pakistan (JI Democratic Party (NDP) br PNA, leaving it with six parti three, Jamiat-i-Ulema-i-Isla Islami, and Muslim League, and the remaining three were in name. Consequent to the PI* Zia to join the government, a sworn in consisting of twenty-c thirteen of whom were fron Restricted political activities the day the new federal Cabin In the meantime, the mart continued to tighten the screw PPP. A White Paper was i regarding the rigging of genei March 1977. The White Papi quoted above for instances oi constituencies. Another White on 27 August 1978 *regarding* the media and intolerance of t

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5 July nobody was taken from the P group. Most of the ministers were aucrats or military Generals, and some 'ere taken from Pagaro Muslim League, Chaudhry Zahur Ilahi and Khwaja jiother constituent party of the PNA, lami expressed its opinion in favour of Cabinet and asked the PNA to negotiate im in the government.49 National ic Party, another constituent party, the ouster of Muslim League from th lilure to follow the discipline. Detailed
3 and negotiations took place between Mufti Mahmood. Finally, the PN-\ i *6* August 1978 to join Zia's militan

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sfA claimed to have three avowei in participating in the government, first, neral elections in the country 'as early ;'; second, to maintain close contact wit id seek immediate solutions to the

problems; and, initiate measures for introduction of *Wzam-e-Mustafa* (Islamic system) in the countryso However, this step cost the PNA another constituent party. The National Democratic Party (NDP) severed its ties with the PNA.51 In all, three major parties in the PNA, Tehrik-i-Istiqlal, Jamiatul Ulema-i-Pakistan (JUP), and the National Democratic Party (NDP) broke away from the PNA, leaving it with six parties out of which only three, Jamiat-i-Ulema-i-Islam (JUI), Jamaat-iIslami, and Muslim League, had some following ad the remaining three were political parties only in name Consequent to the PNA's agreement with Zia to join the government, a federal Cabinet was sworn in consisting of twenty-one federal ministers, thirteen of whom were from the PNA parties. Restricted political activities were allowed from Ik day the new federal Cabinet was sworn in. In the meantime, the martial law government continued to tighten the screws on Bhutto and the PPP A White Paper was issued on 23 July, regarding the rigging of general elections held in March 1977. The White Paper has been widely fitted above for instances of rigging in various tonstituencies. Another White Paper was issued on27 August 1978 regarding Bhutto's misuse of Ie media and intolerance of the free press; tight control on press, radio and TV for government iropoganda; and misuse of public funds to project IBS personality cult.52 The opposition was totally pored by the state controlled media, and the Wio and Television were used to unleash a barrage ((propaganda against the

opposition parties. Another significant development was the iffirement of President Chaudhry Fazal Elahi on IS September 1978. President Chaudhry had Wy completed his five year term as President ••tie 14 August 1978. He is said to have ^ed office at his own request.53 Zia office as President of Pakistan in addition ’tone the CMLA and the Chief of Army Staff. sworn in as President on 14 September The whole thing was anomalous, rly the holding of the office of the and the Chief of Army Staff. The Minister is supposed to be superior of the Chief but a subordinate of the President. ess, Zia understood that his real base of

power was his being the Army Chief which he could not leave at any cost.

The partnership between PNA and Zia came to an end soon after the execution of Bhutto. The PNA decided to quit the government on 16 April
1979 and Zia, after some efforts to make the PNA change its mind, agreed to relieve the PNA ministers. A new federal Cabinet was sworn in on
21 April without the PNA ministers. This alliance of the PNA and Zia was a mutual need and a marriage of convenience. Zia needed PNA’s political support to do away with Bhutto. The PNA wanted Zia to execute Bhutto so that only nonPPP politicians could take part in the general elections to be held on 17 November 1979. As soon as Bhutto was executed, the PNA withdrew its ministers so that it could contest elections while being out of the government. The PNA leaders did not realize that Zia had little use for them now and could continue without them. The PNA had, in any case, lost its credibility by entering into a partnership with the martial law government.

CONSTITUTIONAL AMENDMENTS

Superior Courts Empowered to Declare Any Law Un-Islamic

On 7 February 1979, a constitutional amendment was made through a President’s order conferring jurisdiction on the High Courts to examine and decide the question whether or not any law or provision of law was repugnant to the injunctions of Islam as laid down in the Holy Quran and the *sunnah.55* If so, then it had to give reasons for such an opinion, state the extent to which such law or provision was so repugnant, and specify the day on which the decision should take effect. The President, in case of a federal law, and Governors in case of provincial laws, were to take steps to amend the law or to bring such law or provision into conformity with the injunctions of Islam according to the opinion of the High Court.

Every High Court was required to constitute a Bench of three Muslim judges, to be called the Shariat Bench for exercise of jurisdiction being conferred under this constitutional amendment.

Appeal would lie to the Supreme Court against decisions of the High Courts in exercise of this jurisdiction. For the purpose of hearing and deciding such appeals, the Supreme Court was to constitute a Bench of three Muslim judges of the Supreme Court, to be called the Shariat Appellate Bench. The pending proceedings under the law, which might be declared as repugnant to the injunctions of Islam were saved and allowed to continue.

This constitutional amendment was the first step taken by Zia towards his programme of Islamization.

Hudood Laws Introduced

Soon after the constitutional amendments mentioned above, another major step in the Islamization of laws was taken by Zia. On 9 February, three ordinances and one President's order56 were issued prescribing *hadd* punishments.57 These laws, according to Zia, formed a package introducing Islamic laws in Pakistan.

Under the prohibition law, manufacture, import, export, transport, bottling, selling, or serving of any intoxicant was made an offence punishable by whipping and imprisonment. Drinking of intoxicating liquor was made punishable by *hadd* punishment (eighty lashes). However, very strict proof of two male witnesses, who are credible according to the high standards of Islamic law of evidence, is required for administering the *hadd* punishment. Lighter punishment of up to three years imprisonment or whipping up to thirty stripes can be administered in case the quality of proof did not meet the requirement of *hadd.*

In case of theft or robbery, *hadd* punishment for amputation of the right hand from the joint of the wrist, for the first theft, and amputation of left foot up to the ankle for the second theft, was provided. In case of theft for the third time, life imprisonment was provided. However, for *hadd* punishment in case of theft, the same strict standard of proof was required as in the case of drinking. In case of theft not liable to *hadd,* lighter punishment of imprisonment was provided.

The third law pertained to the offence *ofzina.5** In case of adultery, the punishment provided was stoning to death and in case of fornication,59 to

whipping, at a public place, numbering ont hundred stripes. The proof for *hadd* in *zina* casts is extremely strict which is four adult IM'C witnesses, meeting the high standard of cret, under Islam, giving evidence as eye-witne* the act of copulation. In case such stanaa. proof was not available, then lighter punishment of imprisonment up to ten years and whipping numbering thirty stripes could be awarded. In» *bil-jabr* (rape), the same punishment and standard of proof was provided (the victim is not to be punished). However, for rape the lighter punishment is very severe, which is imprisonment for up to twenty-five years and thirty stripes.

The fourth law pertained to false testimony or false accusation of *zina.* The *hadd* punishment is

whipping eighty strips. This is subject to strict proof of two adult male witnesses. Lighter punishment could be imprisonment upto two years and whipping not exceeding forty stripes.

Another step in the process of Islamization by Zia was the setting up of an organization for tie assessment, collection, and disbursement of *ink* and *ushr.60* Under this law, *zakat* was made compulsory and was to be forcibly collected from the savings accounts of the people, something which is inherently opposed to the concept of *zahn* in Islam which is required to be a voluntary act of the Muslims.

NOTES

1. PLD 1969 Lahore 786.

2. PLD 1977 Lahore 846.

3. Mahmood, M. Dilawar, *The Judiciary and Politics in Pakistan.* 1992, Idra Mutalia-e-Tareekh, Lahore, p. 76.

4. *Dawn,* 18 September 1977. *Dawn,* 19 September 1977.

State v Zulfiqar Ali Bhutto, PLJ 1978 Cr.C

(Lahore) 1.

State v Zulfiqar Ali Bhutto and others. PLD 1978

Lahore 523.

(Bhutto-the truth about his rule and his trial),

p. 22. It is a booklet which does not mention the

name of author or publisher. It was apparently

published by the Zia government anonymously and

circulated to justify government's prosecution of

Bhutto and conduct of trial against him.

9. PLD 1978 Lahore 523.

10. This extract is taken from the Mahmood, *The Judiciary and supra,* note 3, pp. 117-19.

11. Zulfiqar Ali Bhutto v The S.C. 125 on p. 128.

12. Zulfiqar Ali Bhutto v State, 1 p. 387.

13. This remark was made by Jus open court which was heard present in the court and has bs amongst the lawyer circles.

14. Address of Mr Justice Qaiser K Reference on the eve of his r
1978 Journal 117.

15. Zulfiqar Ali Bhutto v The S.C. 38.

16. Zulfiqar Ali Bhutto v The S.C. 53.

17. Zulfiqar Ali Bhutto v State, PL

18. Salman, Taseer, *Bhutto: A P*
1980. Vikas Publishing He pp. 188-9.

19. Wolpert, Stanley, *Zulfiqar Ali I His life and times,* Edition 1993 Press, New York, p. 327.

20. Burki, Shahid Javed, *Pakistan I*
1977, 1988, Macmillan Press, I

21. The writ jurisdiction was rest< (Continuance in Force) (Amenc CMLA Order No. 2 of 1977. jurisdiction was available agai MLA or any person acting unde

22. High Court Judges (Oatlj of Ol

President's Order (Post Proclar PLD 1977 Central Statutes 325.

23. *Dawn,* 24 September 1977.

24. High Court Judges (Oath of Ofl Order, 1977. President's (Post Pi
10 of 1977. PLD 1977 Central S

25. Supreme Court Judges (Oath
1977. President's (Post Proclarr
1977. PLD 1977 Central Statutes

26. High Court Judges (Scrutiny Order, 1977. President's (Post Pr No. 13 of 1977. PLD 1977 Centi

27. Constitution (Second Amendmi President's Order 21 of 1979. I Statutes 567.

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BHUTTO'S TRIAL AND EXECUTION 3f

9. PLD 1978 Lahore 523.
10 This extract is taken from the book of M. Dilawar

Mahmood, *The Judiciary and Politics in Pakistan.*

supra, note 3, pp. 117-19.
11. Zulfiqar Ali Bhutto v The State. PLD 1978

S.C. 125 on p. 128.

12 Zulfiqar Ali Bhutto v State, PLD 1979 S.C.53 at p. 387.

13 This remark was made by Justice Qaiser Khan in open court which was heard by all the lawyers present in the court and has been widely discussed amongst the lawyer circles.

14 Address of Mr Justice Qaiser Khan at the Full Court Reference on the eve of his retirement. See PLD
1978 Journal 117.

5 Zulfiqar Ali Bhutto v The State. PLD 1979 S.C. 38.

16 Zulfiqar Ali Bhutto v The State. PLD 1979 S.C. 53.

17 Zulfiqar Ali Bhutto v State, PLD 1979 S.C. 741.

18 Salman, Taseer, *Bhutto: A Political Biography,*
1980. Vikas Publishing House, New Delhi, pp. 188-9.

19 Wolpert, Stanley, *Zulfiqar Ali Bhutto of PakistanHis life and times,* Edition 1993, Oxford University Press, New York, p. 327.

20 Burki, Shahid Javed, *Pakistan Under Bhutto, 1971-*
1977,1988, Macmillan Press, London, pp. 237-9.

21 The writ jurisdiction was restored through Laws (Continuance in Force) (Amendment) Order

1977. CMLA Order No. 2 of 1977. However, no writ jurisdiction was available against CMLA or any MLA or any person acting under their authority. High Court Judges (Oath of Office) Order, 1977. President's Order (Post Proclamation) 1 of 1977. PLD 1977 Central Statutes 325.

23 *Dawn,* 24 September 1977.

24 High Court Judges (Oath of Office) (Amendment) Order, 1977. President's (Post Proclamation) Order
10 of 1977. PLD 1977 Central Statutes 437.

25 Supreme Court Judges (Oath of Office) Order,
1977. President's (Post Proclamation) Order 9 of
1977. PLD 1977 Central Statutes 436.

Id. High Court Judges (Scrutiny of Appointment) Order, 1977. President's (Post Proclamation) Order No. 13 of 1977. PLD 1977 Central Statutes 455.

27. Constitution (Second Amendment) Order, 1979. President's Order 21 of 1979. PLD 1979 Central Statutes 567.

28. *Dawn, 2* October 1977.

29. Abdul Wali Khan and other leaders of the bann NAP.

30. *Dawn,* 14 October 1977.

31. *Dawn,* 15 October 1977.

32. *Dawn,* 12 November 1977.

33. *Dawn, 1* December 1977.

34. *Dawn,* 15 December 1977.

35. *Dawn, 2* January 1978.

36. *Dawn,* 17 January 1978.

37. *Dawn,* 3 February 1978 and 5 February 1978.

38. *Dawn, 4* February 1978.

39. Ibid.

40. *Dawn,* 17 February 1978.

41. *Dawn,* 24 February 1978.

42. *Dawn,* 15 March 1978.

43. *Dawn,* 28 March 1978.

44. *Dawn,* 25 April 1978.

45. *Dawn,* 23 June 1978.

46. *Dawn,* 26 June 1978.

47. *Dawn, 2* July 1978.

48. *Dawn,* 6 July 1978.

49. *Dawn,* 13 July 1978.

50. *Dawn, 1* August 1978.

51. *Dawn,* 17 August 1978.

52. *Dawn,* 28 August 1978.

53. *Dawn,* 15 September 1978.

54. *Dawn,* 17 September 1978.

55. Constitution (Amendment) Order, 1979. President Order 3 of 1979. PLD 1979 Central Statutes 31.

56. Offences against Property (Enforcement c Hudood) Ordinance 1979, Ordinance VI of 197! PLD 1979 Central Statutes 44. Offence of Zin (Enforcement of Hudood) Ordinance, 197$ Ordinance VII of 1979. PLD 1979 Central Statute
51. Offence of Qazf (Enforcement of Hadd Ordinance, 1979. Ordinance VIII of 1979. PLI 1979 Central Statutes 56. Prohibition (Enforcemer of Hadd) Order 1979. President's Order 4 of 197? PLD 1979 Central Statutes 33.

57. *Hadd* means punishment ordained by the Hoi; Quran or Sunnah.

58. *Zina* means wilful sexual intercourse between , man and a woman without being validly married t< each other.

59. Offenders being unmarried.

60. *Zakat* and *Ushr* (Organization) Ordinance, 1979 Ordinance XXIX of 1979. PLD 1979 Centra

Statutes 277.

27 Hounding the Judiciary

In February 1979, Zia announced general elections for 17 November 1979. This was apparently in keeping with the promise made with the PNA parties which were in government. After the execution of Bhutto in April, Zia and the PNA had gone their separate ways, the PNA having withdrawn from government. From the events that followed, it was obvious that Zia and his military coterie had no intention of giving up power, particularly after having removed the main hurdle in their way-Bhutto. It is understandable that the military government had not executed Bhutto to hand over power to the PNA-particularly after the PNA splintered into many groups and no longer enjoyed wide public support.

Zia decided to postpone the general elections fixed for 17 November 1979 by declaring that local bodies' elections would take place first. All preparations were made to hold these elections on 28 September 1979 which were held on non-party basis. The reason was that Zia did not want any party to show its strength in these elections and the people elected on non-party basis would be obliged to him. It was from amongst these people that he wanted to create a political cadre for himself. Local bodies elections were also likely reveal the strength and weakness of Zia's opponents. Regarding general elections, Zia had already made up his mind that these would not be held. He indicated that the method of elections was totally un-Islamic and that there was no concept of political parties in Islam. He also said that it was necessary to complete the introduction of *Nizam-e-Islam* before the elections. Some of the factors he indicated were:

(a) the bitter experience of the results of past elections; the tradition of negative politics in the

^^iint"" '

He made extensive amendments to the Political Parties Act, 1962 laying down stringent conditions for the political parties. This was done to makes difficult for them to participate in the elections. thus paving the way for him to postpone tat elections. These amendments included the requirements that:

(a) every political party should register wl the Election Commission;

(b) a party's registration might be cancelled if it acted in any manner prejudicial to the ideology of Pakistan, the maintenance of public order or the integrity or independence of the judiciary, or had spread disaffection against the Armed Forces;

(c) every political party would hold annual elections at every level; and all political parties would submit their accounts for audit, indicating their sources of income to the Election Commission which could declare any party ineligible for participating in the elections if it was found to have received foreign aid.

(d)

.(b)

country; and (c) the tendency agitation.1

towards violence and

In case a political party failed to meet any of these requirements, it could not participate in an election to a seat in a House of Parliament or a Provincial Assembly or to nominate or put up a candidate at any such election.2

The conditions laid for registration or for cancellation were reasonable except for condition (b) which was amenable to all kinds of mischievous interpretation and could be used to keep any political party from participating in the elections. The political parties could not meet the other conditions either, since the structure had always remained weak in Pakistan. Some of the parties were small and could hardly maintain accounts or afford an establishment of any kind' Even the larger parties at the national level like the PPP had either very poor internal structures or none at all. Generally, no internal elections we

held and persons were nominated offices from the party leadership, which talked so much about den have a democratic internal set-u dissatisfaction amongst party work that Zia understood very well and i disqualify all major political partie PPP, from participating in the ge Political parties also did not rr accounts which could be used •<. disqualify them.

The major political parties, th PNA, did not apply for registration limit but both of them applied for el Other parties like Tehrik-i-Isti Jamiatul. Ulema-i-Pakistan (JUP registration in time. The Jamiat-< component of the PNA, violated decision of the PNA to keep out of the registration clause was withdra formally for registration and the election symbol.3 Thus JI opted 01 leaving it virtually ineffective witho party of consequence except JUI sixteen parties including JI, TI ; registered and others including the and the NDP (National Democratic out.4 Thus, the main purpose of 2 exercise was accomplished. Despite did not ask for the postponement o urged Zia to hold elections as
17 November.5 However, after lengtl between Zia and Mufti Mahm amendments were made in the Politi to the effect that those political part submitted their accounts but had n registration could still partici forthcoming elections if they n questionnaire to be published by Commission.6 This was a compromi to satisfy the PNA which was aversi the word 'registration'. Nomination be submitted by 13 October 1979 b polling was placed under doubt beca to the official press note: 'The poll have to be re-adjusted to hold ele
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(beld and persons were nominated to various party ^ces from the party leadership. Thus the parties ich talked so much about democracy did not have a democratic internal set-up. This created L dissatisfaction amongst party workers, a weakness I ftat Zia understood very well and wanted to use to [disqualify all major political parties, especially the 'P, from participating in the general elections. jtical parties also did not maintain proper which could be used as a ground to ilify them.

i major political parties, the PPP and the PNA, did not apply for registration within the time limit but both of them applied for election symbols. Other parties like Tehrik-i-Istiqlal (TI) and , Iaimatul,Ulema-i-Pakistan (JUP), applied for registration in time. The Jamiat-e-Islami (JI), a component of the PNA, violated the unanimous decision of the PNA to keep out of the polls unless te registration clause was withdrawn and applied formally for registration and the award of an election symbol.3 Thus JI opted out of the PNA, laving it virtually ineffective without any political < of consequence except JUI. In this way, I jiteen parties including JI, TI and JUP were I uttered and others including the PNA, the PPP, lidtheNDP (National Democratic Party) stayed I nut* Thus, the main purpose of Zia behind this jaercisewas accomplished. Despite this, the PNA I id not ask for the postponement of the polls and luged Zia to hold elections as promised on JliN'ovember.5 However, after lengthy negotiations Iletween Zia and Mufti Mahmood, further laendments were made in the Political Parties Act pie effect that those political parties which had Bitted their accounts but had not applied for pstration could still participate in the looming elections if they replied to the Sionnaire to be published by the Election mission.6 This was a compromise worked out risfy the PNA which was averse to the use of luord 'registration'.

Nomination papers could jiabmitted by 13 October 1979 but the date of g was placed under doubt because according jilt official press note: 'The polling date may (to be re-adjusted to hold elections within I" Silence was maintained by the government liEstrictions on political activities continued

despite repeated demands of the political parties to lift them.

This silence was finally broken on 16 October
1979 by Zia and the ambitions he had been nurturing for a long time came out in the open. He was not to give up power in any event. In his address to the nation8 he announced the postponement of elections indefinitely; all political parties were dissolved and all political activities banned, newspapers and journals said to be involved in anti-national activities were closed; press censorship was imposed; the right to strike by workers and the right to lock out by factory owners was rescinded; criminal cases being heard in Martial Law courts could not be challenged in civil courts; and the process of Islamisation was to be speeded up. He blamed the PNA for putting party interest above national interest and not filing nomination papers by the fixed date. He said that these parties were fighting shy of the elections but wanted to shift the responsibility for the postponement of elections to the government.

He also came down heavily on the courts in the country calling the structure of civil laws and judicial procedures complex and prone to delays. The result, he said, was that judgments given by military courts were rendered ineffective by challenging them in civil courts. While announcing the draconian measures of a ban on all political activity and press censorship, he said that 'martial law will now be run like martial law'.

This was the end to the acts of political jugglery that the nation had witnessed for more than two years. Zia continued in power on one pretext or the other but kept promising elections. It was also an end to his courtship with the PNA which he used to his own benefit. This sordid affair was a time-proven reminder that democratic parties cannot share power with dictators. If they do so, they only strengthen the dictators and lose their own political capital and are left high and dry.

INTRODUCTION OF SEPARATE ELECTORATES

It has been discussed above that Muslims in India during the British Raj demanded separate

electorates in order to ensure adequate representation in the legislature. Separate electorates enabled the Muslim League to make a strong showing in the constituencies for Muslim seats in the general elections of 1946, which ultimately paved the way for the creation of Pakistan.

After independence, the Muslims now in a predominant majority, no longer needed separate electorates. It could only be the minorities that could now demand separate electorates for their own protection, but no such demand was ever made. Thus, all the Constitutions and election laws made thereunder provided for joint electorates.

However, the politics of electorate came to a head in 1977 when the opposition PNA composed of some religious parties felt that it was at a disadvantage in the system of joint electorate. It was felt that the voters belonging to the minorities generally sided with the PPP, primarily because of its liberal views and stance. The PPP candidate received votes from the minorities which was at times a deciding factor in very close races. Religious parties like Jamaat-i-Islami, Jamiatul Ulema-i-Pakistan, and Jamiat-i-Ulema-i-Islam, felt that disenfranchising members of the minorities from the general seats would go to their advantage and, correspondingly, to the detriment of the PPP. Ziaul Haq, who feared the resurgence of the PPP and would take any step to undermine its power and popularity, bought the idea. He introduced separate electorates through an amendment in the Representation of the Peoples Act 1976.9 Election to the seats reserved for nonMuslims was made through a direct vote by electors enrolled on the electoral rolls for nonMuslims. Consequently, provisions were made for separate electoral rolls for non-Muslims for national and provincial assemblies and for carving out new constituencies for the non-Muslims in these Assemblies. Consequently, the electoral rolls for general seats in the national and provincial assemblies would only bear the names of Muslims. Ultimately, separate electorates also found their way into the Constitution through Revival of the Constitution of 1973 Order, 1985 Clause (4-A) of Article 51 and Clause (5) of Article 106 were substituted providing for election of members of the national and provincial assemblies respectively

belonging to minorities on the basis of separat electorate. This was indeed unfortunatt particularly in view of the fact that there was M demand by the minorities in Pakistan for sepaat electorates and the decision was imposed by h majority on an unwilling minority.

MILITARY COURTS ESTABLISHED UNDER THE CONSTITUTION

It has been mentioned above that martial law wu re-invigorated in full force on 16 October 197! political activity was banned, and the press muzzled. It was also announced that the decisions of the military courts could not be challenged 01 reviewed by the civil courts which was clearlv against the dictum of the Supreme Court in Nusrai Bhutto’s case. During the period when superior courts actively exercised judicial review of the acts and orders of military courts in contests between the state and civil society, the burden of proof w on the citizen rather than the state. When the courts questioned military judgments and occasional!) overturned military convictions, that is, when the) acted like real courts rather than puppet tribunals, the regime

reacted by severely restricting then purview to only the most neutral cases.10

Consequent to this announcement, a constitutional amendment was made adding Article 212-A to the Constitution establishing military courts or tribunals in the country.11 The CMLA could, by a martial law order, establish military courts or tribunals for trial of offences punishable under the martial law regulations or martial law orders or any other law, including a special law. Any case could be transferred from a civilian court to any military court. Once any military court or tribunal was established, no other court, including a High Court, could grant an injunction, make an order, or entertain any proceedings in respect of any matter to which the jurisdiction of the military court or tribunal extended or where a case had been transferred to such court or tribunal or that such court or tribunal had taken cognizance of any matter. By this amendment, the military courts or tribunals which existed and functioned under the Army Act had suddenly been clothed with constitutional recognition.

In pursuance of this amendmei hundred military courts and tribu in all the four provinces of the coi also large-scale arrests and deten workers and journalists und regulation. Hundreds of people v\ imprisonment and flogging merel) in normal political activity bann law. By this amendment, the pc review, reserved for the superk Supreme Court in the judgment oi case, were completely nullified, was a challenge to the Courts wh legitimacy to the martial law regi this step by saying that this *i* introduced after consultation with judiciary. He obviously referred Anwar-ul-Haq and Maulvi Musht

CHALLENGE TO THE An

This constitutional amendment , regulation number 48 banning all were challenged before the Suprer by the Tehrik-i-Istiqlal under Arti Consitition, urging that it w fundamental right of freedom of i petition came up for hearing befoi judges of the Supreme Court on 4 Before the case could be(heard applications were filled by the petititoners, Mr Mahmood AH K£ following points:13

(a) that the matter should be h< Bench which had decid Begum Nusrat Bhutto v 1 Army Staff, PLD 1977 ! petition in effect sought judgment;

(b) that even otherwise it appropriate for the Bench hear the petition as all of tl from one province (the P matter in issue concert federation; and

(c) that Mr Sharifuddin Pirzad General, had disqualifiec

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fn pursuance of tnis ameacfaxeat, mow <&3R <M& *j kndred military courts and tribunals were set up in all the fo\K provinces of the country. There were also large-scale arrests and detentions of political WlYm and journalists under martial law regulation. Hundreds of people were sentenced to imprisonment and flogging merely for participating in normal political activity banned under martial law. By this amendment, the powers of judicial fwwr, reserved for the superior courts by the ^Bsa&Court in the judgment of Nusrat Bhutto's

''«£%; acre completely nullified. This, of course, *as* a challenge to the Courts which had extended legitimacy to the martial *law regime. Zia justified 'itsstep* <\/r *saying (da((Ai's amendment was*

iroduced after consu/tation with the heads of the '. He obviously referred to Chief Justices *and Maulvi Mushtaq.n*

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CHALLENGE **TO THE AMENDMENT**

His constitutional amendment and martial law relation number 48 banning all political parties tere challenged before the Supreme Court directly tytkeTehrik-i-Istiqlal under Article 184(3) of the Consitition, urging that it was against the iidamental right of freedom of association. This potion came up for hearing before a Bench of six judges of the Supreme Court on 4 November

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1979. the case could be heard on merit, two lications were filled by the counsel for the jMntoners, Mr Mahmood Ali Kasuri, raising the following points:13

(a) that the matter should be heard by the same Bench which had decided the case of Begum Nusrat Bhutto v The Chief of the Army Staff, PLD 1977 S.C.657, as the petition in effect sought review of that judgment;

(b) that even otherwise it would be inappropriate for the Bench of six judges to hear the petition as all of them were drawn from one province (the Punjab), and the matter in issue concerned the entire federation; and

(c) that Mr Sharifuddin Pirzada, the AttorneyGeneral, had disqualified himself from

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behalf of the federal government or even in his capacity as Attorney-General because; i. he was holding another political office under the government, namely, Minister for Law and Parliamentary Affairs, in which capacity he could not appear before the courts of law; ii. three of the judges on the Bench were appointed to the Supreme Court during his tenure as Law Minister and, therefore, it was not appropriate that he should appear before them as an *Advocate; and*

in his capacity as Law Minister, he was in a position to initiate disciplinary proceedings against the judges of the *Supreme Court, and for this reason* as well, it was not proper for him to appear in the case before the Court.

All these valid objections were rejected in the strongest terms with Chief Justice Anwar-ul-Haq writing the judgment. Very strong words like 'regrettable', 'mischievous', 'condemned' and 'deprecated' were unnecessarily used, betraying his temper. At the end, he passed strictures on Qasuri for having cast unwarranted reflections on the independence, impartiality, and competence of the Bench and the competence of Pirzada to appear as Attorney-General. In fact, it was the Chief Justice himself who became very upset and rude with Qasuri during the course of the arguments on these applications. Instead of dealing with the objections in right earnest, he took them as an affront to himself and conducted himself in the Court as if he had been insulted.

However, at the end of the arguments, Qasuri withdrew the main petition to pursue similar petitions before the High Courts. A full Bench of the Lahore High Court, presided over by Chief Justice Maulvi Mushtaq, admitted to regular hearing of the writ petition filed by Asghar Khan challenging the dissolution of his party, Tehrik-iIstiqlal.14 This writ petition was argued before a full Bench of the Lahore High Court at length. The proceedings went on for months together and were studded with Maulvi Mushtaq's tantrums and

demands for various explanations from the federal government which only delayed the proceedings. He also made some unwarranted and threatening remarks against the federal government. These remarks must have raised alarm in high government circles. It is difficult to understand what he wanted to accomplish by such remarks. Even after the conclusion of the arguments, he sat on the judgment for quite some time for some inexplicable reason.

EXORCIZING THE JUDICIARY

The martial law government reacted quickly and strongly to the rumour that the Lahore High Court was going to pronounce a verdict against it in Asghar Khan's case and before the Full Bench headed by Chief Justice Maulvi Mushtaq could deliver a judgment, a constitutional amendment was promulgated on 27 May 1980 barring the High Courts from making any Order relating to the validity of martial law regulations.15 It restricted the 'writ jurisidiction' of the 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 thereunder. It also prohibited the High Courts from reviewing the judgments or sentences passed by military courts or tribunals, or from taking any action against anyone acting with the authority of the Martial Law administrators. It also stated that the superior Courts' jurisdiction had been curtailed retrospectively. It then went on to declare the 1977 military takeover to be legal, with all subsequent orders passed by the military authorities as valid. These included President's Orders and CMLA Orders and Regulations.

The purpose of this constitutional amendment was to deprive the superior judiciary of its powers to review the decisions of military courts, the legality of martial law or any orders issued by any Martial Law authority. The High Courts could no longer grant relief by way of grant of bail or review any sentence unjustly awarded by a military court to a political person. Martial Law Order 72,16 setting out the jurisdiction of military courts was

substituted by Martial Law Order 77, finite extending the jurisdiction of the military courts I the expense of civilian courts.17 Military coins were given exclusive jurisdiction over cases of treason subversion, sedition, sabotage, actmtj prejudicial to martial law, and seducing of the members of the Armed Forces. These courts were also empowered to try any 'contravention of any martial law order or martial law regulation', aid all offences under the Pakistan Penal Code.

Along with this amendment, very severe action was taken against Chief Justice Maulvi Mushtai] on 26 May 1980. He was summarily removed and despatched to the Supreme Court as an Acting Judge. His chamber and office in the Lahore High Court were locked up by Army personnel and he was virtually locked out. To add insult to injury, his arch rival, Mr Justice Shamim Hussain Qadn, was appointed Acting Chief Justice of the Lahore High Court in his place. A member of the full Bench that had tried and sentenced Bhutto, Mr Justice Aftab Husain was banished to the newly created Federal Shariat Court.

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The martial law government had reached the

conclusion that it had had enough of these judges

and that they should be cut down to size. Although

they had served the regime exceptionally well by

legitimizing it and by getting rid of Bhutto by a

judicial verdict, Zia had little use for them now.

The judges, particularly those who were making

demands on him because of their past services,

were a source of irritation to him and *his junta.*

He, therefore, decided that he should rule with the

help of military justice alone. It was also decided

that any order of injunction passed by a civilian

court against the execution of a military court order

should be ignored.

THE HAMID BALOCH CASE

The case of Hamid Baloch was one of several instances in which superior courts were by-passed. The Balochistan High Court had stayed death sentences handed down by martial law tribunals (manned by military officers) operating in this huge, remote province of Pakistan. The questions which were being debated in the High Court in

Quetta were of a most ser fundamental importance, and re and prerogatives of the superio country, seeking to define the rel the Constitution and the existen The provincial military govei General Rahimuddin Khan, state that the sentences awarded by m cases of murder would soon 1 constitution of these military o been assailed before the High C of grounds. It was alleged that these tribunals was without adi for a fair trial and that the themselves had no authority ii Court thus stayed the execution
25 October 1979, a day aftei statement, the lawyers of those c in jail following conviction b; appeared before the High Court £ their clients were about to be repeated High Court orders execution. The Chief Justice o High Court, Mir Khuda immediately issued fresh stay or prison authorities to desist from sentences and to obey all previi High Court passsed in this regari

According to the legal circli provincial militiary authorities o authorities to carry out the <
However, the High Court remindi that any execution would be illeg amount to contempt of Court. Ofi reportedly, informed the provir authorities that if the military v anyone, they should come to the themselves, but that the jail autho to attract the charge of violating High Court nor would they like being arrested for having hange lawful authority.

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ignored.

Quetta were of a most serious nature, of fundamental importance, and related to the rights and prerogatives of the superior judiciary in the country, seeking to define the relationship between the Constitution and the existence of martial law. The provincial military governor, LieutenantGeneral Rahimuddin Khan, stated in October 1979 that the sentences awarded by military tribunals in cases of murder would soon be executed. The constitution of these military courts had already been assailed before the High Court on a number of grounds. It was alleged that the procedure of these tribunals was without adequate safeguards for a fair trial and that the military courts themselves had no authority in law. The High Court thus stayed the execution of sentences. On
25 October 1979, a day after the governor's statement, the lawyers of those convicts who were in jail following conviction by military courts appeared before the High Court and submitted that their clients were about to be hanged despite repeated High Court orders forbidding the execution. The Chief Justice of the Balochistan High Court, Mir Khuda Bakhsh Marri, immediately issued fresh stay orders commanding pnson authorities to desist from carrying out the sentences and to obey all previous orders of the High Court passsed in this regard.

According to the legal circles in Quetta, the provincial militiary authorities ordered the prison authorities to carry out the death sentences. However, the High Court reminded the jail officers that any execution would be illegal and would also amount to contempt of Court. Officials in jail

then, reportedly, informed the provincial martial law authorities that if the military wished to execute anyone, they should come to the prison and do so themselves, but that the jail authorities did not wish to attract the charge of violating the order of the High Court nor would they like to risk eventually king arrested for having hanged a man without lawful authority.

Military officers in the province were also told

that if any army officer or soldier carried out the

sentence against the order of the High Court, all

those who carried out the sentence and those who

j the orders would not only be held guilty of

vinpt of Court but at a subsequent date all

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those concerned could be arrested on charge: pre-meditated murder. The Chief Justice Balochistan High Court and his colleagues st firm. Militiary authorities did not move to c£ out the sentences.18

It goes to the credit of the Balochistan H Court that despite the constitutional amendment May 1980, it continued to hear cases in which t *vires of* Articles *212-A* had been challenge A full Bench of the Balochistan High Cot formulated the following questions:

1. whether Article 212-A is *intra vires;*

2. if the above question is answered in tf affirmative, then what is the effect of:

(a) Article 212-A and MLO-4, as amende by MLO-72, on the powers of judicu review under Article 199; and

(b) of Article 212-A on cases finally decidei by military courts and tribunals anc cases pending before them.

The full Bench decided in its judgment dated
12 July 1980, that the amendments of the Constitution by way of introduction of Article 212-A and Clauses 3-A, 3-B and 3-C in Article
199 were *ultra vires* of the powers of the Chief Martial Law Administrator, though he acted as President while promulgating such amendments. These amendments were held to have failed to come up to the test of necessity laid down in Nusrat Bhutto's case. As the first question had been answered in the negative, the second question was not required to be answered.19

The Balochistan High Court had earlier been showing courage in the face of martial law. A

divisional Bench of the Court held that an ordinary citizen could not be tried by a military court for offences created by ordinary laws, provided such offence was not committed by way of resistance to martial law itself.20 The government went in appeal against the said judgment before the Supreme Court of Pakistan. The Supreme Court, however, did not answer the question. It merely observed that the proposition and observations made by the High Court of Balochistan were too wide and open to exception and would require careful examination in a proper case. No decision on merit was given because the

provincial government had decided to try the respondent under ordinary law applicable to the case and the appeal had been rendered infructuous. This judgment was delivered by the Supreme Court on 24 June 1979. Unfortunately, however, the proposition laid down by the High Court had not been examined in the case nor in any of the large number of other cases involving similar questions of law which were pending in the Supreme Court. Decisions on these questions was tactfully avoided.21

But for the Balochistan High Court, the rest of the judiciary was put under a leash after the amendment of May 1980. Nothing more was heard of the case of Asghar Khan challenging Article
212-A or MLR-48. The new Acting Chief Justice of the Lahore High Court had made sure that it was not re-listed or re-heard. Perhaps that was important for his own survival.

THE FEDERAL SHARIAT COURT

Hard times for the judiciary were not yet over. Another major blow was dealt to the superior courts by the withdrawal of powers to examine any law or any provision of a law if it was in accordance with Islamic injunctions. The Federal Shariat Court was set up with powers to declare invalid any law or provision of a law as repugnant to the injunctions of Islam as laid down in the Holy Quran and the *sunnah* of the Holy Prophet (PBUH).22 In a nutshell, the powers that had been conferred only a year earlier on the Shariat Benches of the High Courts under Constitution (Amendment) Order 1979, were withdrawn and vested in a new and parallel court, the Federal Shariat Court. This was another show of lack of confidence by Zia in the superior courts.

The Federal Shariat Court was to consist of five members, including the Chairman, who was to be appointed by the President. The chairman was to be a person who was, or had been, or was qualified to be, a judge of the Supreme Court. A member was to be a person who was, or had been, or was qualified to be, a judge of a High Court.23 The chairman or a member was to hold office for a period not exceeding three years but could be

appointed for a further term. A judge of aq Court who refused to accept appointment si member would be deemed to have retired fromS office. Appeal was provided to the Supreme Ccti Bench called the Shariat Appellate fieri consisting of three Muslim judges of the Supra Court.

Subsequently, appellate powers against 1 conviction and sentences under the *Hadool* 1m were also conferred in this Court. This m apparently done to give more work to and I strengthen the Court which was otherwise dealiij with abstract and academic controversies *at* questions. But correspondingly, the appelte jurisdiction of the High Courts in criminal cass was curtailed. The judiciary that had colluded wi martial law for nearly three years now fell undo its weight.

The Federal Shariat Court, a manipulate creation of Zia, soon ran foul of him and started creating

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serious embarrasments. In a case inwhick the sentence of *Rajm* (stoning to death) for *m* was challenged as repugnant to Islam, the Court, with a majority of 4 to 1, held in its judgment of 21 March 1981 that the provisions of sentence of *Rajm* as *Hadd* in section 5 and 6 of the Offence of *Zina* (Enforcement of Hudood) Ordinance 1979, were repugnant to the injunctions of Islam ami that the only *Hadd* was one hundred stripes and that necessary amendments be made in these sections by 31 July 1981.24 This judgment, when *i* came to light, raised a big furore in religious circls and the judges of the Federal Shariat Court were condemned for their lack of knowledge of Islan and for being western-educated and West-oriented. There was an outcry that *ulema* should be introduced into the Court, a demand to which Zia succumbed to appease the *mullahs.* A constitutional amendment was made for introducing three *ulema* into the Court in addition to five judges. including the Chairman. The *ulema* members were to be chosen from a panel *of ulema* to be drawn bj the President in consultation with the Chairman of the Court.25-As a face-saving device, the Court was empowered to review its decisions.

In this way, the Ulema were introduced into the Federal Shariat Court. Finally, the judgment on *Rajm* in Hazoor Bakhsh's case was reviewed on

the application of the federal with the *ulema* sitting on the one judge amongst the origins who had become Chief Justic review Bench. The review accepted and the earlier judj and the punishment *of Rajm* v under the injunctions of Isl exposed the inherent weak established Federal Shariat Ci of personal independence on 1 It was also established tl vulnerable to manipulation politically desired results.

CREATION OF PERMU BENCHES OF THE Hi

In January 1981, permanent B High Court were created at I and Rawalpindi under High C(Order (Punjab Amendment) The reason given for these Ber was being taken to the doorsti fact, the motive was dii postponement of general ele banning of political activities lawyer community was offerii to the martial law regim restoration of the 1973 Consti the powers of the judiciary, elections, and the lifting of M of their activities was Laiconventions were being held b the country, the Lahore Association. The Permanent were obviously created to pu Lahore by dispersing them thrc and by undermining their prer

The Permanent Benches < were given a semi-constitution Provisional Constitution (provided for Permanent Bend

• i. the Lahore High Coi Multan, and Rawalpinc

ii. the High Court of Sind

refused to accept appointment as a i\dbe deemed to have retired from his •al was provided to the Supreme Court led the Shariat Appellate Bench f three Muslim judges of the Supreme

sntly, appellate powers against the md sentences under the *Hadood* laws conferred in this Court. This was done to give more work to and to he Court which was otherwise dealing ict and academic controversies and But correspondingly, the appellate of the High Courts in criminal cases :d. The judiciary that had colluded with for nearly three years now fell under

leral Shariat Court, a manipulative Zia, soon ran foul of him and started ious embarrasments. In a case in which e of *Rajm* (stoning to death) for *zina* iged as repugnant to Islam, the Court, 3rity of 4 to 1, held in its judgment of
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the application **of the federal government in 1982,** *mtii the ulema* **sitting on the Bench of five. Only**

one judge amorist the *original five, Aftab Husain,* who had become Chief Justice by then, sat on the review Bench. The review application was accepted and the earlier judgment was set aside and the punishment of *Rajm* was accepted as valid under the injunctions of Islam.26 These events exposed the inherent weakness of the newly established Federal Shariat Court-there was lack of personal independence on the part of its judges. ll was also established that the Court was vulnerable to manipulation in order to reach politically desired results.

CREATION **OF PERMANENT** BENCHES **OF THE HIGH COURTS**

In January 1981, permanent Benches of the Lahore High Court were created at Bahawalpur, Multan, nd Rawalpindi under High Courts (Establishment) Order (Punjab Amendment) Ordinance, 1981.27 lie reason given for these Benches was that justice tas being taken to the doorsteps of the people. In fact, the motive was different. After the postponement of general elections by Zia, and taming of political activities in the country, the lawyer community was offering serious resistance lo the martial law regime and demanding Btationofthe 1973 Constitution, restoration of le powers of the judiciary, holding of general (lections, and the lifting of Martial Law. The hub of their activities was Lahore where lawyer conventions were being

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held by the premier Bar of ike country, the Lahore High Court Bar Association. The Permanent Benches in Punjab we obviously created to punish the lawyers of lioreby dispersing them throughout the province id by undermining their premier bar association.

The Permanent Benches of the High Courts m given a semi-constitutional position under the jhmsional Constitution Order 1981,which for Permanent Benches of:

i the Lahore High Court at Bahawalpur, Multan, and Rawalpindi;

i the High Court of Sindh at Sukkur;

in. the Peshawar High Court at Abbotabad and

IV.

Dera Ismail Khan; and

the High Court ofBalochistan at Sibi.

MOVEMENT FOR THE RESTORATION OF DEMOCRACY **(MRD)**

After the final break between Zia and the PNA in October 1979, nearly all the political parties in the country were arrayed against Zia. There was still a segment of the population and political workers who supported Zia for either the fear of return of the People's Party to power or for their narrow personal political objectives. The Muslim League, led by Pir Pagaro, continued to support Zia and his regime as he had admitted on more than one occasion that he was an agent of General Headquarters (GHQ) of the armed forces. He believed in sharing power, not wresting it from the army. He and his party had little following and his followers were looked down upon as 'collaborators' or 'lackeys'.

Despite antagonism with Zia, the PNA parties and those that broke from the alliance did not find it easy to come to terms with the leader of the PPP. There was the recent history of great hostility towards the PPP, including co-operation with the military *junta* for the execution of Bhutto. The PPP leaders took time to overcome the shock of Bhutto's execution. Their immediate reaction to the execution was dealt with a heavy hand with protesters sentenced to imprisonment and lashes, which were instantly administered. The student wing of the Jamaat-i-Islami also helped the government in controlling the situation by beating up of agitators under the protection and patronage of the police. Thus what divided the PPP from other political forces in the country was blood rather than political differences. The PPP leaders, the mother and daughter of Bhutto, Nusrat and Benazir, were under house arrest. Some of the more vocal opponents from other parties, like Asghar Khan, were also under house arrest.

Finally, political forces in the country rose from their slumber and decided to put their differences aside for the time being and face the military

dictatorship by uniting against it. The political parties opposed to the PPP thought that the real damage had come from Zia and not the PPP, particularly after the death of Bhutto. The PPP leadership also realized that they had to put the execution behind them and act under the political logic and compulsion of the situation and reach for the erstwhile political opponents for waging a collective struggle against the military dictator. After years in the political wilderness and exploitation of their political differences by the military regime, the PPP and most of the parties in the defunct PNA, decided to sit together on a table.

On 6 February 1981, the PPP and several smaller parties who had never been or were no longer associated with the PNA, formed a group named the Movement for the Restoration of Democracy (MRD) that would work both for putting an end to Martial Law and for holding free elections in accordance with the suspended 1973 Constitution.28 The MRD included Jamiat-i-Ulemai-Islam (JUI), headed by Mufti Mahmood, and Tehrik-i-Istiqlal (TI), headed by Asghar Khan. Jamaat-i-Islami stayed away from MRD because, according to its leadership, the gulf between the Jamaat and the PPP was unbridgeable. The Jamaat continued to support Zia.

For some time, Zia's government was in trouble due to agitation in various cities by students, doctors, and others. But the hijacking in 1981 of a Pakistan International Airlines (PIA) plane by Al-Zulfikar an organization led by one of Bhutto's sons, from Karachi first to Kabul and then to Damascus, deflected people's attention. The hijackers killed a young army officer while the plane was in Kabul and the incident created reaction amongst the people against the PPP once again. Zia arrested a large number of people and held them under preventive detention. He was thus able to ride the storm.

NOTES

1. Address to the nation by General Ziaul Haq **if**
30 August 1979 published the Mmistryifj Information, Government of Pakistan, Islamabad

2. Political Parties (Amendment) Ordinance, Ordinance XIII of 1979. PLD 1979 Central Saml 466.

3. *Dawn, 2* October 1979.

4. *Dawn, 3* October 1979.

5. *Dawn, 6* October 1979.

6. Political Parties (Third Amendment) Ordinawl
1979, Ordinance LIU of 1979. PLD 1979 CenHj Statues 555.

7. *Dawn, 8* October 1979.

8. 'President Ends Political Uncertainty'. Presida) Ziaul Haq's address to the Nation, 16 October

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197), published by Ministry of Information, Islamabad

9. Representation of the Peoples (Amendment) I Ordinance 1979. Ordinance L of 1979. PLD 191) Central Statues 532, Section 47-A.

10. Newberg, Paula R., *Judging the State' Courts out Constitutional Politics in Pakistan.* 1995, Cambridge University Press, Cambridge, 01 j p. 174.

11. Constitution (Second Amendment) Order 1979.1 President's Order 21 of 1979. PLD 1979 Central statues 567.

12. Zia told a delegation of lawyers that the Article 212-A had been vetted by Chief Justices, Anwar-ul-Haq and Maulvi Mushtaq.

13. Hamid Sarfraz v Federation of Pakistan. PLD 197); S.C. 991.

14. *Dawn,* 12 November 1979.

15. Constitution (Amendment) Order, 1980. President'i; Order 1 of 1980. PLD Central Statutes 89.

16. CMLA order number 72, 20 October 1979. PLD
1979 Central Statutes 568.

17. CMLA order number 77, 2 June 1980. PLD 198) Central Statutes 152.

18. Mahmood, M. Dilawar, *The Judiciary and Politia in Pakistan,* 1992, Idara Mutalia-e-Tareekh, Lahore, pp. 129-31.

19. Suleman v President, Special Military Court. Fall text of the Judgment is available on p. 96 to 120 of the book of Mir Khuda Bakhsh Marri (former Chief Justice of Balochistan and head of the full Bend rendering the Judgment), *A Judge May Spea(* Ferozsons (Pvt) Ltd., Lahore, 1990.

20. Muhammad Niaz v Martial Law Administrator, PLD 1979 Quetta 179.

21. Martial Law Administrator

PLD 1979 S.C. 921.
22 Constitution (Amendment) O ' Order 1 of 1980. PLD 1980 i

23. Article 203-C.

24. Hazoor Bakhsh v Federation i F.S.C. 145.

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;nt Ends Political Uncertainty'. President aq's address to the Nation, 16 October 1979, *id* by Ministry of Information, Islamabad, entation of the Peoples (Amendment) ice 1979. Ordinance L of 1979. PLD 1979 Statues 532, Section *47-A. g,* Paula R., *Judging the State: Courts and utional Politics in Pakistan.* 1995, dge University Press, Cambridge, UK

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v President, Special Military Court. Full i Judgment is available on p. 96 to 120 of j if Mir Khuda Bakhsh Marri (former Chief Balochistan and head of the full Bench the Judgment), *A Judge May Speak,* (Pvt) Ltd., Lahore, 1990. id Niaz v Martial Law Administrator, Quetta 179.

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24 HazoorBakhshv Federation of Pakistan. PLD 1981

F.S.C. 145.

25. Constitution (Amendment) Order, 1981. President's Order 5 of 1981. PLD 1981 Central Statutes 251.

26. Federation of Pakistan v Hazoor Bakhsh. PLD 1983 F.S.C. 255.

27. Ordinance I of 1981. PLD 1981 Punjab Statues 1.

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1991, Westview Press, Boulder, Colorado, p. 34.

28 The Provisional Constitution Order,

Zia was quick to take full advantage of the aversion of the general public to the hijacking of a PIA plane in March 1981. The night between 24 and
25 March 1981, the Provisional Constitution Order (PCO) was enforced' which was to serve as the constitution of Pakistan for years to come. It was the CMLA's order, meant to make adequate provisions for governing Pakistan and 'for effectively meeting the threat to the integrity and sovereignty of Pakistan and its Islamic ideology.' It restated that the 1973 Constitution was held in abeyance, while adopting 138 Articles of the Constitution of 1973. These Articles related to the daily working of government, both federal and provincial.

Other important features of the PCO were as under:

1. All fundamental rights under the 1973 Constitution and the provisions for their enforceability were taken out.

2. The office of Vice President was created. The CMLA could appoint one or more Vice Presidents of Pakistan who would serve at the pleasure of the CMLA and would perform functions assigned by the CMLA.

3. A Federal Council *(Majlis-e-Shoord)* would be set up consisting of people selected by the President. The Council would perform functions as specified in an order made by the President.

4. A number of provisions relating to the judiciary were excluded from the PCO and they were replaced by new provisions, the important ones being:

(a) The Supreme Court could transfer cases from one High Court to another.

(b) Principal seats and permanent Benches of the High Courts were determined and the permanent Benches that had been

formed under provincial laws were made part of the constitutional document (c) Provision regarding the acting Chief Justice of a High Court gave tit President the power to appoint anyjudge of the High Court concerned or even a judge of the Supreme Court to be the acting Chief Justice in the absence of the Chief Justice or when the office of the Chief Justice was vacant. (d) The writ jurisdiction of the High Courts with a number of restraints and exceptions, was however retained. Martial la» authorities and military courts and their acts and orders were placed beyond the pale of the writ jurisdiction of High Courts.

(e) A High Court judge could be transferred from one High Court to another for a period of up to two years without his consent and without consultation with the Chief Justices of the High Courts concerned.

(f) A retired judge was not to hold an office of profit in the service of Pakistan within two years of his retirement.

(g) Jurisdiction of the Supreme Court, the High Courts, or any other court or tribunal was barred in the cases of those civil servants who had been retired after completion of twenty-five years of service.

5. Only those political parties would be allowed to function, whenever political activity was restored, which had registered themselves with the Election Commission by 11 October 1979. All other political parties stood dissolved and their funds forfeited to the federal government. No new political party

could be formed except with permission in writing of the C Commissioner.

6. The Proclamation of 5 July 197

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7. The President and the CML^ and would be deemed alwa> power to amend the Constitut

8. All judges of the Supreme C Courts, and the Federal S including the Chief Justices, to take an oath under the PCO taking of oath was not left tc the judges alone; the President not to give oath to any judge who did not take the oath or the oath were to cease to hole

9. Judges, who took the oath u were to be bound by the pn PCO and could not call into q permit to be called into quest of its provisions.

Hence, the PCO fell heavy on th drastically curtailed its powers am judiciary had already been under fir

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formed under provincial laws were made part of the constitutional document. ;) Provision regarding the acting Chief Justice of a High Court gave the President the power to appoint any judge of the High Court concerned or even a judge of the Supreme Court to be the acting Chief Justice in the absence of the Chief Justice or when the office of the Chief Justice was vacant. ;d) The writ jurisdiction of the High Courts, with a number of restraints and exceptions, was however retained. Martial law authorities and military courts and their acts and orders were placed beyond the pale of the writ jurisdiction of High Courts.

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could be formed except with the previous permission in writing of the Chief Election Commissioner.

6. The Proclamation of 5 July 1977, President's Orders, CMLA's Orders, including those amending the Constitution, all Martial Law regulations and orders, and all other laws made on or after 5 July 1977, were declared valid notwithstanding any judgment of any court. All orders made, proceedings taken, and acts done or purported to have been made, taken or done under the aforesaid laws or notifications thereunder were also declared valid. Any execution of any order made or sentence passed was deemed to be and would always be deemed to have been validly made, taken or done and could not be called in question in any court on any ground whatsoever. The courts were barred from granting any injunction against the acts and orders of any martial law authority or a military court or tribunal. The superior Courts could not even issue any process against the CMLA, the MLA, or people acting under their authority. All orders, injunctions, or processes issued or to be issued were declared null and void.

7. The President and the CMLA would have and would be deemed always to have the power to

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amend the Constitution.

8. All judges of the Supreme Court, the High Courts, and the Federal Shariat Court, including the Chief Justices, were required to take an oath under the PCO. However, the taking of oath was not left to the choice of the judges alone; the President had the option

t to give oath to any judge. Those judges
10 did not take the oath or were not given ; oath were to cease to hold office. Judges, who took the oath under the PCO, were to be bound by the provisions of the PCO and could not call into question or even rmit to be called into question the validity ui its provisions.

Hence, the PCO fell heavy on the judiciary and illy curtailed its powers and position. The
1 had already been under fire for more than

a year but whatever little independence was left was finally done away with under the PCO. Zia and his *junta* were confident that they had been able to subdue and neutralize whatever little political resistance existed in the country. It was made sure that even a remote chance of a challenge to its unlawful authority from the judiciary was completely neutralized. The provision regarding the Vice President was never acted upon and the office remained vacant. It was speculated at one stage that Chief Justice Anwar-ul-Haq might be accommodated into this office, but it seems that due to resistance within the government, led by Attorney-General Sharifuddin Pirzada, this possibility did not materialize.

JUDICIARY HUMILIATED

The Zia government believed that merely stripping the judges of their powers and jurisdiction was not enough and that they should also be subjected to humiliation, particularly in the public eye. The judiciary was so demoralized that no judge could entertain the thought of defying the martial law government.

Since it was the option of the President to give or not to give oath to any judge, lists were prepared on the morning of 25 March of those judges who had to be administered oath. Even the Chief Justices of the Supreme Court and the High Courts were not consulted in the process and the lists were kept confidential. All of the judges were in a quandary as to whether to take the oath or not, and whether or not it would be given. They requested their respective Chief Justices for guidance, but found them equally blank. The Chief Justices of the High Courts tried to establish communication with the Governors of their respective provinces to find out what was going on.

The matter of taking the oath was discussed amongst the judges of the Supreme Court and there were two points of view. Justice Dorab Patel, who was the senior most judge after the Chief Justice, wanted the Supreme Court to take a clear stand against the oath taking. Justice Fakharuddin Ibrahim, who was only an ad hoc judge, was with him. Justice Maulvi Mushtaq argued strongly in

favour of taking the oath. A predominant majority of the judges favoured taking the oath. Thus, the decision was in favour of taking the oath.2 When Zia spoke to Anwar-ul-Haq, he asked him and the other judges of the Supreme Court to take the oath before him but advised him not to bring Maulvi Mushtaq because he was not to be included. Anwar urged Zia to give oath to Mushtaq, for old times sake, and must have referred to his services, but Zia did not agree. Even when Anwar threatened that he would not be taking the oath if Mushtaq was not given it, Zia did not budge from his position. Thus, Anwar-ul-Haq was cornered into not taking the oath. Consequently, Anwar-ul-Haq, Dorab Patel, and Fakharuddin Ibrahim did not take the oath and Maulvi Mushtaq was not given it. In this way, two leading benefactors of Zia in the judiciary, Anwar-ul-Haq and Maulvi Mushtaq, met a sad and ignominious end to their careers at the hands of their own principal beneficiary. They learnt the hard way the abject lesson of history

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that those who twist principles for their immediate

interests and betray their fellows must ultimately

come to a sad end.

The remaining six judges of the Supreme Court took the oath without their Chief Justice. Justice Muhammad Haleem,3 who was the most senior amongst the remaining judges, took oath as the acting Chief Justice of the Supreme Court. It was a matter of exceptional courage on the part of Dorab Patel not to take the oath, particularly when he was the senior-most judge and could have certainly been made the Chief Justice, a position he would have held for eight or nine years. He sacrificed office for his principles, a courage very few judges in Pakistan have shown.

The Balochistan High Court had only three judges, a Chief Justice and two judges at that time. Chief Justice Marri and Justice M. A. Rashid did not take the oath and only one judge was left in Quetta, Abdul Qadeer Chaudhry, who took the oath. Justice Zakaullah Lodhi of the Balochistan High Court, who was at that time a judge of the Federal Shariat Court, was brought to Quetta and administered the oath as acting Chief Justice of the Balochistan High Court. It must be said about the Balochistan High Court that its judges proved to be the most independent amongst the four *High /*

Courts, particularly since the Chief Justice anil senior most judge refused to take oath

The Chief Justice and five judges ofa Peshawar High Court took their oath in Peshrn before the Governor of the NWFP, Lieutem General Fazle Haq. One of the judges of 4 Peshawar High Court, Justice Muhammad Ik Khan, who at that time was the Chairman of ft Federal Service Tribunal, was not given the oat All the Sindh High Court judges decided to* the oath but two of them, Justice Abdul.... Memon and Justice Ghulam Muhammad Sk Syed, were not given the oath because they w regarded as being close to the leader of People’s Party.

In the Lahore High Court, four judges did w make oath. At the Governor House, three judjs were returned because they were not to be giva oath. Other judges present, including the acty Chief Justice, did not take any stand for the tint colleagues who were being so blatantly msuW and humiliated. Everyone was busy saving his on office and did not care what he had to pay in tens of self-respect to retain it. Out of the two Lahoti High Court judges in Multan, Justice Muhammad Hassan Sindhar, who was known to be personalty close to Maulvi Mushtaq, was not given the oath. The episode is a very unfortunate chaptering constitutional and judicial history of Pakistan Ai an organ of the state, the judiciary was insulted and humiliated by a military government who had no respect for the rule of law and institutions under the Constitution.

The Generals could not be entirely blamed foi this unfortunate episode. Judges were equallj responsible because they had submitted themselves to such humiliation. Had there been unity amongst them, they would not have seen such a day But, unfortunately, they were not made of the mettle that judges should be made of. They sacrificed the prestige and honour of the institution of the judiciary at the altar of their personal ambitions and career.

THE PROVISIONAL Coi ORDER **(PCO)** UPHEL

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THE PROVISIONAL CONSTITUTION ORDER (PCO) UPHELD

It did not take long for the judiciary to uphold the PCO as valid. In keeping with its dubious tradition, the Lahore High Court applied its seal of approval to the PCO soon thereafter. A retired army general who was convicted and sentenced by a Field General Court Martial, challenged the PCO on the that during the subsistence of the 1973 Constitution, the PCO could not be issued, nor eould the CMLA, an army officer under oath to jfcfend the Constitution of 1973, give such a isional Constitution in its supersession. These contentions were repelled by a divisional Bench of the Lahore High Court as under:4 i The PCO appeared to be a misnomer. It was not a compact and self contained constitutional document but derived its existence, strength, and validity from the judicially recognized proclamation of 5 July

1977 read with Laws (Continuance in Force) Order, 1977, and could not be of a superior or a higher status than its ancestor. The PCO, therefore, was just another order of the CMLA and did not lay down or give a new legal order.

ii The effect of the PCO as regards the powers of the High Court and terms and conditions of the superior judiciary was to relegate the two to substantially the same position as it was after the Fifth Amendment to the Constitution. If the CMLA could amend the Constitution to remove the effect of the Fifth Amendment, he could also withdraw his own enactment even if its effect was to curtail the powers of the High Court.

111 Since the Supreme Court had conceded to the CMLA the power to amend the Constitution, the PCO could not be said to be in excess of or *ultra vires* to the power of the CMLA.

n The courts would neither be pleased with more powers nor dismayed with less. The judges had never criticized any law on the ground of it being harsh or unjust and did not refer to the administration for amending

any law for the reason that it did not provide just or full relief. The judges, being themselves a creation of the law, ought to be indifferent as to the state of law which would be a pure political question.

The reasoning adopted by the High Court to validate the PCO was clearly complex, laboured, and faulty. The judges carefully avoided examination of the PCO on the touchstone of Nusrat Bhutto's case. Who can deny that the extraconstitutional step of martial law was validated by the Supreme Court, subject to the condition that superior courts would exercise the power of judicial review against acts and orders of the martial law authorities. This power of judicial review was completely taken away by the PCO. In any case, it could not be expected from judges who had taken a humiliating oath under the PCO to invalidate the same.

PCO-II-REINSTATEMENT ORDERS OF CIVIL SERVANTS NULLIFIED

It has been mentioned earlier while discussing General Zia's regime, that 303 senior officers in the civil services of Pakistan were dismissed, removed, or retired from service under Martial Law Regulation number 58 in 1969 .and 1970. Many of them challenged the orders before the High Court in writ jurisdiction. These petitions were pending when service tribunals were established at the federal as well as the provincial level under Article 212 of the Constitution. Therefore, petitions pending before the High Courts abated. These cases were then filed as appeals before the Federal Service Tribunal in the case of federal civil servants and before the appropriate provincial service tribunal in the case of provincial civil servants. The Federal Service Tribunal, in which a predominant majority of such appeals were pending, dismissed all of them for the reason that it had no jurisdiction to determine and adjudicate upon such cases. This judgment was challenged before the Supreme Court which reversed the decision of the tribunal, holding that

jurisdiction was vested in it in such cases and that all the appeals were remanded to the tribunal for hearing on merit.5 This decision was taken by the Supreme Court in 1980 by which time the fate of these men had hung in the balance for more than ten years and many of them had already crossed the age of superannuation.

The Federal Service Tribunal heard these appeals on merit after remand from the Supreme Court and accepted a number of appeals and ordered reinstatement of the successful appellants.6 The federal government, instead of complying with these orders or filing appeals against them before the Supreme Court, nullified all such decisions and validated the orders that had been set aside by the Service Tribunal by means of an amendment in the Provisional Constitution Order.7 All proceedings pending before any tribunal or court arising out of MLR 58 of 1970 were held to have been abated. The matter did not end here. Those members of the tribunal who had ordered reinstatement came under fire and were removed. In this way, the process of law for these ill-fated people came to nothing after legal proceedings of more than ten years.

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THE FEDERAL COUNCIL *(MAJLIS-E-SHOORA)*

It was provided under the PCO that the President could constitute a Federal Council *(Majlis-eShoord)* to perform functions that were to be assigned to it by the President. This was a step taken to create a political lobby for Zia and his cronies and to groom these people in future for election to the assemblies in addition to the people elected to the local bodies who owed allegiance to Zia. Nominees to the Federal Council were carefully selected by the Governors of the provinces on the basis of reports of bureaucrats and the intelligence agencies. Their chances of getting elected to the assemblies in the future based on their family background was given due weight. In this way, scions of feudal families got generous representation in this Council.

After this selection had been finalized by the end of 1981, Zia issued a President's Order for setting up the Federal Council." The purpose of

interim arrangement for association,, consultation regarding the affairs of the» Hence, the Federal Council was an «*

arrangement made by the martial law govl and the nominees thereto were expected to* as the pohtlcal arm of the military ;egim,W The President could nominate up to 3J members to the Federal Council Due tion was to be given to *ulema, mashai* farmers, professionals, labourers, and The Council would have a chairman and four chairmen, one from each province, all, I appointed

by the President and to hold o

PesrenTeth C°UnCilCOUldreCOm-t° President the enactment of a law, or tit

amendment of an existing law. It could discus J Five Year Development Plan and make reco! mendations. It could also discuss the annualbj ^couldnot vote on any of its items. Th e^ of the Council was one-fourth of its total sL and decisions of the Council were to be take * consensus of the members present. It co^

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any court for anything said or any p! expressed in the Council. The President c dissolve it at any time and it would automatically dissolved upon the establishn, ,,, permanent representative institutions Fent^V116 n,0mination of its members, fc

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helplessness in the face of an unashamed dictator backed only by brute force usurping the power of the state and tr the people and the world with such gm Everybody took a sigh of relief whenthe

Council met tts end on the holding of

elections in February 1985.

THE OFFICE OF THE O *(WAFAQI MOHTASIB)*

Since Zia did not want to restore and democratic institutions, he ke with various ideas that could validate his govenment. At th< wanted to show to the United St powers that institutions similai functioning in Pakistan. One si establish the office of Ombudsma such an institution in Swei Scandinavian countries. He toyed idea for a long time and ultimate President's Order establishing the *Mohtasib* (Ombudsman).9

The jurisdiction of the Oi extended to all departments government and statutory corpc institutions established or control] government. He could hear administration' which included a < recommendation, act of omissioi which was:

(a) contrary to law, rules, or n a departure from establi procedure, unless the sar and for valid reasons; or

(b) perverse, arbitrary or unre biased, oppressive, or disc

(c) based on irrelevant groun<

(d) involved the exercise of failure or refusal to do s improper motives, such as favouritism, nepotism, ar excuses.

Acts and omissions that c inattention, delay, incompetence, ineptitude in the administration duties and responsibilities woul ’maladministration’.’ °

The Ombudsman was to be i President for a term of four yea and conditions of service and rer to be determined by the Pres recommend action in any administration, *after* due inquir

icil given thereunder was that pending on of democracy and representative ns, it was deemed necessary to make an

arrangement for association anil tion regarding the affairs of the state the Federal Council was an intern lent made by the martial law govi nominees thereto were expected to ilitical arm of the military regime. President could nominate up to , to the Federal Council. Due n to be given to *ulema, mashaikh, w* professionals, labourers, and minonties ncil would have a chairman and four vice i, one from each province, all to be d by the President and to hold office ure. The Council could recommend to it the enactment of a law, or ;nt of an existing law. It could discuss the ar Development Plan and make recomms. It could also discuss the annual budget I not vote on any of its items. The quorum)uncil was one-fourth of its total strength sions of the Council were to be taken by s of the members present. It could not he conduct of judges. Its members were from any prosecution or proceedings IB rt for anything said or any opinion d in the Council. The President could

it at any time and it would be cally dissolved upon the establishment of j nt representative institutions, the nomination of its members, Council met in February 1982 and i the first session. Khwaja Muhammrf om Sialkot, an old Muslim Leaguer, \ •*d* as its Chairman. The Council held from time to time. It clearly 1 md, of course, deserved none. It iament holding mock discussions. It *v* dressing, an insult to the intelligi le of Pakistan and a reminder to thi plessness in the face of an unasi backed only by brute force bent the power of the state and trying to fool le and the world with such gimmicks, ly took a sigh of relief when the Sham met its end on the holding of general in February 1985.

THE OFFICE OF THE OMBUDSMAN *MOHTASIB)*

Since Zia did not want to restore the Constitution and democratic institutions, he kept experimenting with various ideas that could strengthen and »ahdate his govenment. At the same time he wanted to show to the United States and western powers that institutions similar to theirs were ^_ lonmg in Pakistan. One such idea was to fatabhsh the office of Ombudsman on the lines of Rich an institution in Sweden and other Scandinavian countries. He toyed around with the idea for a long time and ultimately promulgated a President's Order establishing the office of *Wafaqi Mtasib* (Ombudsman).9

The jurisdiction of the Ombudsman was Intended to all departments of the federal government and statutory corporations or other institutions established or controlled by the federal government. He could hear cases of 'maladministration' which included a decision, process, recommendation, act of omission or commission which was:

(a) contrary to law, rules, or regulations or was

a departure from established practice or

procedure, unless the same was bonafide

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and for valid reasons; or

Ib) perverse, arbitrary or unreasonable, unjust,

biased, oppressive, or discriminatory; or (c) based on irrelevant grounds; or

involved the exercise of powers, or the failure or refusal to do so, for corrupt or improper motives, such as bribery, jobbery, favouritism, nepotism, and administrative excuses.

Acts and omissions that caused neglect, ition, delay, incompetence, inefficiency, and in the administration or discharge of
1 responsibilities would also constitute Ministration'.10

: Ombudsman was to be appointed by the I President for a term of four years and his terms I nd conditions of service and remunerations were B be determined by the President. He could [ecommend action in any case of malutamistration, after due inquiry, but could not

enforce his decision. If any agency did not implement his recommendations, he could write to the President who might, at his discretion, direct the agency concerned to implement the recommendation. No appeal was provided against his decision but a representation could be filed with the President within thirty days of his decision or order.

ZIA'S CONSTITUTIONAL PLAN

Zia and his military coterie were carrying on the affairs of government by repressing political parties in the country and by denying all political activities. The media was under complete control of the government and press censorship of the worst kind had been imposed. It was not possible for the newspapers to print any news about political parties. Any statement which contained the slightest criticism of an act of the government was not allowed to be published. The scissors of government officials from the government's Department of Information, assigned the task of censorship, worked extensively to cut off all independent news.

The MRD also tried to launch an agitation against Zia but for one reason or the other, it fizzled out. In 1983, the MRD agitation was undone by a speech of Indira Gandhi in the Indian Parliament supporting the objectives of the opposition in Pakistan. This created a reaction in Pakistan, particularly in the Punjab. In Sindh, the MRD was able to sustain the agitation for quite some time but it unfortunately degenerated into lawlessness and wanton acts of violence and killing.

Apart from the internal pressures, Zia was also being pressurized by the USA and other western powers supporting him in the struggle against Soviet Union in Afghanistan. They were embarrassed by the criticism that they were supporting a military dictator who had sapped democracy, fundamental rights, and civil liberties in his own country. They impressed upon Zia the need to create a semblance of democracy that would give his regime some appearance of legitimacy. Zia capitulated to the pressure from

the donor countries and decided to work out a framework of civilian government while continuing as President with most of his powers intact.

Addressing the *Majlis-e-Shoora* (Federal Council) in Islamabad on 12 August 1983, Zia gave his own constitutional plan. As was habitual with him, the address was lengthy and repetitive. He severely criticized the parliamentary form of government and held it responsible for the political crisis of 1977 which, according to him, had brought the country to the brink of civil war, caused setbacks to the national economy, and disruption of normal life in the country. He quoted a personal notebook of Jinnah (the authenticity of which is doubtful) to the effect that Jinnah considered the presidential form of government more suitable for Pakistan and that the parliamentary form of government had only worked satisfactorily in England and nowhere else.

Zia discussed three alternatives available to him at that time: one, to restore the 1973 Constitution as it was; two, to abrogate the Constitution, frame a new one, and seek its endorsement by the people; and three, to promulgate the 1973 Constitution with necessary amendments.

He ultimately chose the last alternative and decided to make elaborate and fundamental changes to the 1973 Constitution in the following manner:

1. The 1973 Constitution was to be restored, but a balance was to be brought about between the powers of the President and the Prime Minister and the Constitution was to be harmonized with Islamic principles. In adopting these amendments, due consideration was to be given to the opinion of the members of the *Majlis-e-Shoora* and the recommendations of the Ansari Commission.

2. There was a lot of controversy regarding the role of the armed forces. Zia wanted to end this. The armed forces would have no new constitutional role. The accepted position then in this matter was to be maintained.

3. Elections would be held on the basis of adult suffrage.

4. The Prime Minister would be appointed! the President, but the person must, in the President's view, comnaiil majority support in the National AssemHi The Prime Minister, within two monthsif assumption of office, would be requindt obtain a vote of confidence fromtk1 National Assembly.

5. When the President felt that a needy arisen for seeking a fresh mandate of fa electorate, he could dissolve the Natiom Assembly, but in such an event, y elections would have to be held witk seventy-five days.

6. The President would have the powers tt return for consideration to the Nationl Assembly and the Senate a Bill which km already been passed.

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7. The President would be the Supreni Commander of the armed forces Hewouli appoint the Chairman of the Joint Chiefs of Staff Committee and the Chiefs of Staff 01 the three armed services and determine tk terms and conditions of their appointments

8. The appointment of the Chief Election Commissioner and members of the Commission would also be made by the President in consultation with the Chief Justice of Pakistan.

9. The provincial Governor would also be appointed by the President.

10. Additionally, a National Security Council would be established. The government of the day would not be able to declare an emergency without the advice of the Council. The composition and duties of the National Security Council would be announced later.

11. In order to improve the economic conditions of the country, the private sector would be encouraged and protected

12. For representation of minorities, separate electorates would be introduced both at the national as well as provincial level.

This constitutional plan formed the basis of Revival of the Constitution of 1973 Order 1985 (RCO) which was promulgated immediately after

the general elections of February got incorporated into the Constiti modifications as the Eighth Am Constitution. In a nutshell, Zia pn on a non-party basis within eightes people wondered if, with a p elections within ninety days, he c power for more than six years, he months to be measured along thai

THE REFERENDUM, DECEMBER 1984

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The Referendum Order, I1 putting a complex question to essence, seeking endorseme1 initiated by Zia for Islamizatic question read as follows:

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which was promulgated immediately after

the general elections of February 1985, and later got incorporated into the Constitution with some modifications as the Eighth Amendment to the Constitution. In a nutshell, Zia promised elections on a non-party basis within eighteen months. Some people wondered if, with a promise to hold elections within ninety days, he could hang on to power for more than six years, how were eighteen months to be measured along that scale.

THE REFERENDUM, DECEMBER **1984**

The problem of Zia's continuation as President under a civilian set-up was yet to be resolved. He did not want to face a national election and risk mobilization of people against him by the political parties. He knew that he could not be elected in a fair election. Pugging an election at

that level was also not easy and not without its many risks and dangers. So an ingenious scheme was made by his brilliant and contriving advisers. A referendum was lobe held for a vote of endorsement to the process of Islamization which was started by him. Who would vote against Islam? The affirmative vote was deemed to have given him a term of five years as President.

The Referendum Order, 198411 was passed, putting a complex question to the citizens but, in essence, seeking endorsement of the process initiated by Zia for Islamization in Pakistan. The question read as follows:

'Whether the people of Pakistan endorse the process initiated by General Muhammad Zia-ulHaq, the President of Pakistan, for bringing the laws of Pakistan in conformity with the injunctions of Islam as laid down in the Holy Quran and *aanah* of the Holy Prophet (PBUH) and for the preservation of the ideology of Pakistan, for the continuation and consolidation of that process, and for the smooth and orderly transfer of power to the elected representatives of the people.'

The question, by all standards, was very complex and complicated, particularly for the simple people of Pakistan. It was a loaded question couched in such a language that it could not be answered in the negative in all its aspects. An affirmative vote, it was stated in the order, was to

result in a five-year term for Zia as President of Pakistan. The MRD boycotted the referendum. The referendum that was held on 19 December 1984, left very little doubt in anybody's mind in Pakistan that it was a total hoax. Very few people went to the polling stations to cast their votes. All the polling stations gave a deserted look and the government staff on duty stuffed the ballot boxes with affirmative votes. All government servants were strictly instructed to cast their ballots in the referendum, of course, in the affirmative, failing which they could be hauled up for disciplinary action against them. A few who ventured to the polling stations found their ballots already cast.

Fully aware of the fraud being played on the nation, it was announced by the Chief Election Commissioner that the polling was fair and orderly and out of 34,992,425 registered voters, 21,750,901 (about 62%) had cast their ballots. Out of them,
21,253,757 (97.7% of the total polled) answered in the affirmative to the question put to them, while
316,918 answered in the negative. 180,226 ballots were found to be invalid.12 One of the glaring proofs of the hoax and cooked up results is that the results of such far-flung areas as Kohlu, Sibi, and Kalat were declared before those of Lahore, Peshawar, Rawalpindi, Quetta, and Karachi.13

GENERAL ELECTIONS, FEBRUARY 1985

After the referendum, Zia announced elections to the National Assembly for 25 February 1985 and elections to the Provincial Assemblies for
28 February 1985. The opposition parties (the MRD) boycotted the elections for the reasons that their demands for party based elections and restoration of the 1973 Constitution *in toto* were not met. On the contrary, Zia insisted that political parties should not take part in the elections and, as an additional precaution, detained almost all the opposition's leaders for the period of the elections. The successful boycott of the referendum of December 1984 led the MRD to

miscalculate their next confrontation with the government. Relatively confident of public support, they chose to boycott the general elections. The voters, faced with the opportunity of voting in national and provincial

elections for the first time in more than seven years, turned out in large numbers at the polls. The consequence was doubly disadvantageous. Popular support of the electoral process and the later stages of democratization undermined the MRD's very *raison d'etre* and the MRD politicians were effectively isolated from any positive role in subsequent developments.14

The general elections to the National and Provincial Assemblies were held peacefully and unlike the referendum, the people participated in large numbers. This was largely because the candidates persuaded the voters particularly in the Punjab. Total turn-out of the voters for the National Assembly elections was 53.69%; in the Punjab
60.14%; in the NWFP 40.63%; in Sindh 44.38%, and in Balochistan 37.42%. 1S In the Provincial Assemblies elections, where the constituencies were smaller and the contests were even harder, the turn-out of the voters was even better. It was
57.37% nationwide, 62.34% in the Punjab, 48.20% in NWFP, 50.15% in Sindh and 46.86% in Balochistan.'6

Since the elections were on non-party basis, therefore, no party position emerged, but the voters strongly rejected most people who were closely associated with Zia. All but one of his federal ministers lost in their bid for elections to the National Assembly. The people sent an indirect message to Zia. Jamaat-i-Islami was the only political party which was allowed to participate as a political organization in the elections but it lost miserably except in a couple of constituencies in Lahore. Jamaat's notorious association with Zia was an important factor in its poor showing at the polls, particularly so when it had no political organization opposing it.

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1. By amendment in the Provisia

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definitions of 'Muslim' and 'non-Musln

under:17

(a) ’Muslim’ means a person who , in the Unity and Oneness of Allah, in the absolute and finality of the Prophethood Muhammad (PBUH) the last of, prophets, and does not believe m, recognize as, a prophet or rehgii reformer, any person who claimed ,i claims to be a prophet, in any sensd the word or of any descripJ whatsoever, after Muhammad (peak upon him), and

(b) ’Non-Muslim’ means a person not a Muslim and includes a per». belonging to the Christian, Hindu, Sit Buddhist, or Parsi community, a persn of the Quadiani group or the Laku group (who call themselves ’Ahmedis or by any other name), or a Bahai and; person belonging to any of the scheduled castes.

This amendment was rait apparently to clarify and determine ik status of Ahmedis as ’non-Muslims The second amendment of 1974 onl\ gave definition of ’non-Muslim’ butnu of ’Muslim’. Even in the definition of ’non-Muslim’ there was no specific reference to Ahmedis.
2. By another amendment,18 the Federal Sham

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3. The nomenclature of the ’members’ of the Federal SI changed to ’Chief Justic respectively.19

4. A major change was brou Shariat Appellate Bench Court which previously c Muslim judges. It was extei Muslim judges of the Su two *ulema* to be appointed to sit on the Bench as a< Thus, the *ulema* who had Federal Shariat Court afte the ’ray’m’ case, now foui the Shariat Appellate Ben< Court. It was a harbinger which were to disturb the big way, particularly in emption and land reforms

5. The decisions of the Fed striking down a law or a as repugnant to the inji would not take effect bel of the period within whic be preferred to the Suprer an appeal was so pref disposal of the appeal.21

CURB ON THE RELIGI ACTIVITIES OF AHME

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nner, he made such amendments. Some of irtant amendments are discussed below: *t* amendment in the Provisional mstitution Order (PCO), he introduced the ;finitions of Muslim' and 'non-Muslim' as

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i) 'Muslim' means a person who believes in the Unity and Oneness of Almighty Allah, in the absolute and unqualified finality of the Prophethood of Muhammad (PBUH) the last of the prophets, and does not believe in, or recognize as, a prophet or religious reformer, any person who claimed or claims to be a prophet, in any sense of the word or of any description whatsoever, after Muhammad (peace be upon him), and

(b) 'Non-Muslim' means a person who is

not a Muslim and includes a person

belonging to the Christian, Hindu, Sikh,

Buddhist, or Parsi community, a person

of the Quadiani group or the Lahori

group (who call themselves 'Ahmedis'

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This amendment was made apparently to clarify and determine the status of Ahmedis as 'non-Muslims' The second amendment of 1974 only gave definition of 'non-Muslim' but not of 'Muslim'. Even in the definition of 'non-Muslim' there was no specific reference to Ahmedis.

2. By another amendment,18 the Federal Shanat Court was given revisional jurisdiction over the criminal courts trying cases of *hudood.* The Supreme Court was vested with appellate jurisdiction over the judgments, final orders or sentences of the Federal Shariat Court in *hudood* cases. The decisions of the Federal Shariat Court were madei binding on the High Courts. Thus, the revisional jurisdiction of the High Courts in criminal cases was further curtailed. The; status of the High Courts was reduced and subordinated to the Federal Shariat Court.

3. The nomenclature of the ’Chairman’ and ’members’ of the Federal Shariat Court were changed to ’Chief Justice’ and ’judges’ respectively.19

4. A major change was brought about in the Shariat Appellate Bench of the Supreme Court which previously consisted of three Muslim judges. It was extended to five: three Muslim judges of the Supreme Court and two *ulema* to be appointed by the President to sit on the Bench as ad hoc members.20 Thus, the *ulema* who had sneaked into the Federal Shariat Court after the judgment in the ’ra/m’ case, now found their way into the Shariat Appellate Bench of the Supreme Court. It was a harbinger of things to come which were to disturb the settled laws in a big way, particularly in relation to preemption and land reforms.

5 The decisions of the Federal Shariat Court staking down a law or a provision of a law as repugnant to the injunctions of Islam would not take effect before the expiration of the period within which an appeal might be preferred to the Supreme Court or, where an appeal was so preferred, before the disposal of the appeal.21

CIRB ON THE RELIGIOUS ACTIVITIES OF AHMEDIS

It has been discussed above that the Ahmedis had keen ostracized from Islam under the Second taendment to the Constitution in 1974. They were declared to be outside the definition of ’Muslim’. later on, the definition of ’non-Muslim’ was also introduced in the Constitution according to which , they were clearly included, regardless of whether i they belonged to the Qadiani or the Lahori group. j More was to come by way of Ordinance XX in 1198422

Under this ordinance, the Ahmedis were prohibited from using any of the epithets, descriptions, or titles reserved for holy personages or places in Islam. They were forbidden from calling their place of worship *’Mas/id’.* Anyone contravening this provision was liable to

punishment of imprisonment and fine. An Ahmedi found calling himself a Muslim or preaching or propagating his faith was liable to punishment of imprisonment and fine. They were forbidden from reciting the *’azan’.*

The Ahmedis were thus prevented from practising, preaching, and propagating their faith and were made liable to harassment and prosecution for any of their religious practices. They had, however, the audacity to challenge this ordinance before the Federal Shariat Court which upheld it as valid and constitutional.23 An Ahmedi who got some common Muslim religious expressions printed on the invitation card to the marriage of his daughter, landed in jail and languished there for quite some time. Even the High Court did not enlarge him on bail.24 He was eventually bailed out by the Supreme Court.25

In 1989, the Ahmedis wanted to hold centenary celebrations of their faith at Rabwah, District Jhang, but this was banned by the order of the provincial Home Secretary, Punjab on 21 March 1989 under Section 144 of the Code of Criminaf Procedure. The Ahmedis were directed to remove ceremonial gates, banners, and illuminations and they were forbidden from any further writings on the walls. This order of ban was challenged before the Lahore High Court in a writ

jurisdiction and was upheld.26 The Court held that there was no meeting point between the Ahmedis and the Muslims as the latter believed in the finality ol Prophethood while the Ahmedis believe in Mira Ghulam Ahmad as a new prophet. It was held tha the reasons of public policy, public good, and ir the interests of the ordinary people of the country the celebrations could be banned because activitie; of Ahmedis and the propagation of their faith i; resisted by the Muslim *ummah* to keep the mainstream faith pure and unpolluted and also t< maintain the integrity of the *ummah.* This judgmen was upheld by the Supreme Court.27

ISLAMIZATION OF THE LAW OF EVIDENCE

The law of evidence in Pakistan and India ha been regulated under a statute, the Evidence Acl

1872. This statute proved to be a very successful law and was applied by the courts in the subcontinent for more than a century with very few amendments. Zia ordered its Islamization and, as a result, a President's Order, namely the *Qanoon-e-Shahadat*, 1984 was promulgated and enforced in October 1984.28 It was nothing but a repetition of the Evidence Act of 1872 with some amendments/ alterations/variations in four sections of the Act and some additions in four Sections. The Sections in the Evidence Act were renumbered as Articles in the *Qanoon-e-Shahadat*, putting the courts and the lawyers to a great deal of inconvenience as they were called upon to consult the comparative table frequently. They generally remembered the section of the old Act on their finger tips.

The only significant changes made by the new law are as under:

(a) The courts have been given the power to determine the competence of a witness in accordance with the qualifications prescribed by the injunctions of Islam.29 In matters pertaining to financial or future obligations, if reduced in writing, the instrument is required to be attested by two men, or one man and two women, so that one may remind the other.30 The courts can decide a claim on oath provided all the parties agree to do so.31 The court can allow any evidence to be produced that might be obtained or made available because of modern devices or techniques.32

All these alterations or additions could have been made by just amending the Evidence Act of 1872. Zia and his advisers knew well that there was no justification for a new law and that, in any case, very few changes were being made in the old law. It was another example of his preferring the form to the substance and his endeavour to gain some political mileage by giving an Islamic name to an old law and claiming it as an advance towards the Islamization of laws.

(b)

(c) (d)

INTRODUCTION TO ISLAMIC BANKING

At the end of 1984, two ordinances'3 wen promulgated and enforced with the purpose of introducing Islamic banking in the country fle

change again was more in form rather

substance. The word 'loan' was substituted by the word 'finance'. 'Interest' was forbidden forbanb and, in its place, the concept of participation in profit and loss, mark-up or mark-down in pnce, hire purchase, lease, rent sharing, licensing, charge or fee of any kind, purchase and sale of property and actionable claims, *mushanka* and *modarda* certificates, were introduced. Banking tribunals were established to decide cases arising out of disputes from the Islamic mode of banking

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In reality, very little change has come about it the banking practice in Pakistan. The banks, instead of charging interest, now charge mark-up at a pre-determined rate which is generally muck higher than the previous rates of interest. The cost of obtaining loans from the banks has become much higher and more oppressive than the previous mode of banking which was interest based Now the banks are obliged to take immediate court action against a party that has defaulted in repayment and cannot give accommodation because the mark-up stops running at the expiry of a certain period.

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12.
13.

NOTES

3.

Provisional Constitution Order, 1981 CMLA's Order 1 of 1981. PLD 1981 Central Statutes 183 The present author learnt this from Mr Justice Dorab Patel.

He was one of the three dissenting judges in the judgment in appeal in the murder case of Bhutto

4. Tajjamal Husain Malik v Federal Government of Pakistan, PLD 1981 Lahore 462

5. M Yamin Qureshi v Islamic Republic of Pakistan, PLD 1980 S.C. 22.

6. W.A. Sheikh V Pakistan, 1981 PLC (C S) 363, Qazi Mohammad Anwar Barlas v Secretary Establishment Division, 1981 PLC (C S) 330, M.H.Shamim v Secretary Establishment Division,
1981 PLC (C.S) 337.

7. Provisional Constitution (Secon Order, 1982. CMLA Order No 3 of Central Statutes 349. Federal Council *(Majhs-e-Shoor,* President's Order No.15 of 1981 P Statutes 123.

9. Establishment of the Office of \ (Ombudsman) Order, 1983. Presid
1983. PLD 1983 Central Statutes Ibid, section 2.

President's Order 11 of 1984 (1 I PLD 1985 Central Statutes 449 *The Muslim,* 21 December 1984. Ibid. See Editorial

14. Baxter, Craig & Wasti, Syed R *Authoritarianism in 1980s,* 1991,' Lahore, p. 79.

15. *Report on the General Elections* * published by Election Commiss Islamabad, p. 73.

16. Ibid., p. 205.

17. Provisional Constitution (Amendm CMLA Order No.2 of 1981 PL Statutes 310.

18. Constitution (Second Amendmei President's Order 5 of 1982 PI Statutes 155.

Provisional Constitution (Amendm CMLA's Order 1 of 1982. PL Statutes 153.

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h v Pakistan, 1981 PLC (C.S) 363; Qazi

d Anwar Barlas v Secretary

ent Division, 1981 PLC (C.S) 330;

m v Secretary Establishment Division,

C.S) 337.

I Provisional Constitution (Second Amendment) Order, 1982. CMLA Order No.3 of 1982. PLD 1982 Central Statutes 349.

8 Federal Council *(Majlis-e-Shoora)* Order, 1981. President's Order No. 15 of 1981. PLD 1982

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Central Statutes 123.

9 Establishment of the Office of *Wafaqi Mohtasib* (Ombudsman) Order, 1983. President's Order 1 of
1983 PLD 1983 Central Statutes 17.

10 Ibid, section 2.

President's Order 11 of 1984 (1 December 1984).

PLD 1985 Central Statutes 449.
12 *The Muslim*, 21 December 1984.

Ibid See Editorial.

Baxter, Craig & Wasti, Syed Razi, *Pakistan* -

Authoritarianism in 1980s, 1991, Vanguard Books,

Lahore, p. 79. I li *Report on the General Elections 1985*, Volume II,

published by Election Commission of Pakistan,

Islamabad, p. 73.

Ibid., p. 205. [I? Provisional Constitution (Amendment) Order, 1981.

CMLA Order No.2 of 1981. PLD 1981 Central

Statutes 310.

Constitution (Second Amendment) Order, 1982.

President's Order 5 of 1982. PLD 1982 Central

Statutes 155.

Provisional Constitution (Amendment) Order, 1982.

CMLA's Order 1 of 1982. PLD 1982 Central

Statutes 153.

20. Constitution (Third Amendment) Order, 1982. President's Order No. 12 of 1982. PLD 1982 Central Statutes 344.

21. Constitution (Amendment) Order, 1984. President's Order 1 of 1984. PLD 1984 Central Statutes 86.

22. Anti-Islamic Activities of Qadiani Group, Lahori Group and Ahmedis (Prohibition and Punishment) Ordinance, 1984. PLD 1984 Central Statutes 102.

23. Mujibur Rehman v Federal Government of Pakistan. PLD 1985 F.S.C. 8.

24. Nasir Ahmed v The State, PLJ 1992 Cr.C (Lahore)
427.

25. Nasir Ahmed v The State, PLJ 1993 S.C. 1.

26. Khurshid Ahmad v Government of Punjab. PLD
1992 Lahore 1.

27. Zaheeruddin v The State, PLJ 1994 S.C. 1.

28. President's Order 10 of 1984. PLD 1985 Central Statutes 14.

29. Article 3.

30. Article 17.

31. Article 163.

32. Article 164.

33. Banking and Financial Services (Amendment of Laws) Ordinance, 1984 (Ordinance LVII of 1984). PLD 1985 Central Statutes 498; Banking Tribunals Ordinance, 1984 (Ordinance LVIII) of 1984). PLD
1985 Central Statutes 507.

29 The Eighth Amendment

It has been discussed above that general elections to the National and Provincial Assemblies were held in February 1985 on a non-party basis. No political party was allowed to nominate candidates in the elections. Before the parliament could meet on 23 March 1985, the Constitution was comprehensively amended through a President's Order, known as Revival of the Constitution of
1973 Order (RCO), on 2 March 1985.' The RCO made fundamental alterations in the Constitution and made significant departures from its original premises and concepts. As many as sixty-five Articles were amended/substituted/added/modified/ varied/deleted/omitted. RCO can be regarded with justification as part of the Eighth Amendment without which the significance and importance of the Eighth Amendment cannot be fully comprehended, appreciated, or analysed.

REVIVAL or THE CONSTITUTION ORDER **(RCO):** MAIN FEATURES

Important changes brought about by the RCO are briefly enumerated below:

1. Article 2A was inserted, making the Objectives Resolution of 1949 a substantive and effective part of the Constitution. The Resolution, with some modifications, had already been adopted as a preamble to the constitutions of 1956, 1962, and 1973. Now the resolution was reproduced as an annex and made an operative part, with a significant change. The sixth paragraph of the Objectives Resolution in its original form read as follows:

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6.

While reproducing the above paragraph i the Annex, the word 'freely' was omitted The electoral college for election to the office of the President was modified so as to comprise both Houses of Parliamen all four provincial assemblies (with equal weightage given in terms of votes to eack Provincial Assembly). The President was supposed to act on tie advice of the Cabinet, the Prime Minister or the appropriate minister, but he could require the Cabinet to re-consider suck advice.

The President was empowered to dissolve the National Assembly at his discretion where, in his opinion, appeal to the electorate was necessary. On suck dissolution, elections were to be called within a hundred days. On the dissolution of the National Assembly, the President could ask the Prime Minister to continue in office until his successor entered the office of Prune Minister. This apparently applied to the Prime Minister in the event of either his resignation from office or where the National Assembly was dissolved on his advice. Where fhe National

Assembly was dissolved at the discretion of the President, a caretaker Cabinet would be appointed till such time that the election of the Prime Minister had taken place on the reconstitution of the National Assembly after the general elections. The seats reserved for women in the

National Assembly were ^TxoreaaeA&o,*,^

J«T ii^vvv ^««-<= »p«««a scats tor women were only available until the holding of third, general elections to the National Assembly l^r'^-"^i^,^r^-"*,"*"A=" s=n.«« ~" *J^sea"'from "sixty-three to eighty-seven,*

with five seats from ea for technocrats, *ulem* The number of sc administered areas waj to eight. Seats for the increased from two to

8. The period of time President to give assen by Parliament was inci forty-five days. The Pi a Bill (other than a] forty-five days for re gave the President a p but this could be overri same Bill again by members, present an Houses of parliament ii

9. The President could, appoint any membei Assembly as Prime M opinion, could comman a majority of the memr. Assembly. However, a appointed had to o confidence from the I within sixty days. The 1 to hold office during t President, but the Pr< remove him unless he w Prime Minister did n confidence of the major of the National Assembl

10. Federal ministers and were to be appointed b; the advice of the Prime Procedure for passing tl of no-confidence against was altered and the reqi the name of an alternativ a motion was omitted.]2. The provision for *an*

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with five seats from each province reserved for technocrats, *ulema,* or professionals. The number of seats for federally administered areas was increased from five to eight. Seats for the federal capital were increased from two to three. The period of time provided for the President to give assent to the Bills passed by Parliament was increased from seven to forty-five days. The President could return a Bill (other than a Money Bill) within forty-five days for reconsideration. This gave the President a power to veto a Bill, but this could be overridden by passing the same Bill again by a majority of the members, present and voting, of both Houses of parliament in a joint session.

9 The President could, at his discretion, appoint any member of the National Assembly as Prime Minister who, in his opinion, could command the confidence of a majority of the members of the National Assembly. However, a Prime Minister so appointed had to obtain a vote of confidence from the National Assembly within sixty days. The Prime Minister was to hold office during the pleasure of the President, but the President could not remove him unless he was satisfied that the Prime Minister did not command the confidence of the majority of the members of the National Assembly.

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10 Federal ministers and ministers of state were to be appointed by the President on the advice of the Prime Minister.

11 Procedure for passing the motion of vote of no-confidence against the Prime Minister was altered and the requirement of giving the name of an alternative candidate in such a motion was omitted.

12 The provision for amendment to the Constitution was modified and under the new provision, an amendment to the Constitution could only be passed by a majority of two-thirds of the total members in the National Assembly and the Senate and by an absolute majority in all four Provincial Assemblies. The procedure for

amendment to the Constitution was further modified under President's Order *20* of 1985, and the requirement of laying the Amendment Bill before the Provincial Assemblies was dispensed with except where such amendment had the effect of altering the limits of a province. In such a case, the Provincial Assembly of the concerned province had to pass the amendment by two-thirds of its total membership.2

13. The Governor was supposed to act on the advice of the Cabinet or the Chief Minister, or appropriate minister, but he could require the Cabinet to reconsider such advice.

14. The period of time provided for the Governor to give assent to the Bills passed by the Provincial Assembly was increased from seven to forty-five days. The Governor could return a Bill (other than a Money Bill) within forty-five days for reconsideration. This gave the Governor power to veto a Bill but it could be overridden by passing the same Bill again by the votes of the majority of the total membership of the Provincial Assembly.

15. The Governor could appoint a member of the Provincial Assembly as Chief Minister who, in his opinion, could command the confidence of the majority of the members of the Provincial Assembly. However, a Chief Minister so appointed had to obtain a vote of confidence from the Provincial Assembly within sixty days. The Chief Minister was to hold office during the pleasure of the Governor but the Governor could not remove him unless he was satisfied that the Chief Minister did not command the confidence of the majority of the members of the Provincial Assembly.

16. Provincial ministers were to be appointed by the Governor from amongst the members of the Provincial Assembly on the advice of the Chief Minister.

17. Procedure for passing the motion of vote of no-confidence against a Chief Minister was altered and the requirement of giving the name of an alternative candidate was omitted.

18. The number of general constituencies (for Muslims) of the National Assembly was raised from 200 to 207. In addition to that, ten seats for minorities were reserved. Previously, under the Fourth Amendment, six seats were provided for non-Muslim minorities. However, previously the elections to the minority seats were held in the National Assembly itself, based on proportional representation with a single transferable vote. The RCO provided ten seats for minorities, four for Hindus and scheduled castes, one for Sikhs, Buddhists, and Parsi communities and other nonMuslims, and one for Ahmedis. These members were to be elected simultaneously with members from general constituencies, on the basis of separate electorates.
19. The seats in the Provincial Assemblies of Balochistan, the NWFP, the Punjab, and Sindh for minorities three, three, eight and nine, respectively. These members were to be elected, simultaneously with members from general constituencies, on the basis of separate electorates.

20. Separate electorates for minorities were given constitutional recognition for the first time in Pakistan. Zia had previously introduced separate electorates for minorities in 1979 by amendment to the Representation of the People Act, 1976.3 The RCO, however, gave constitutional status to the separate electorates.
21. There was, however, a strange contradiction in Articles providing seats in the National and Provincial Assemblies. In Article 51, providing seats in the National Assembly, it is stated that there would be 207 Muslim members in the National Assembly (which were previously known to be general seats representing constituencies on territorial and population basis). On the other hand, Article 106, providing for seats in the Provincial Assemblies, made no specific mention of general seats belonging to Muslims only.
22. One of the most striking changes brought

about by the RCO was *a.* large number of

additions to the qualifications an disqualifications for membership to tk parliament. Originally, the Constitute! provided for a few qualifications whidi included requirements of citizenship anil minimum age. The disqualification! provided originally in the Constitution wat also few, which included insanity, insolvency, termination of citizenship, an holding of office of profit in the service o Pakistan. The RCO made wholesalt additions to these qualifications and disqualifications.

The qualifications added under Arnck
62 require a candidate for the parliament to be someone:

(a) of good character and not commonly known as one who violates Islamic injunctions;

(b) with adequate knowledge of Islamic teachings and practices and obligatory duties prescribed by Islam as well as abstaining from major sins;

(c) sagacious, righteous, non-profligate, honest and *ameen;*

(d) with no criminal conviction involving moral turpitude or for giving false evidence; and

(e) after the establishment of Pakistan never to have worked against the integrity of the country or opposed the ideology of Pakistan.

The disqualifications added under Article 63 require a candidate for the parliament not to:

(a) be propagating any opinion, or acting

in any manner prejudicial to the

ideology of Pakistan, or the

sovereignty, integrity, or security of

Pakistan, or the maintenance of public

order, or the integrity or independence

of the judiciary of Pakistan, or which

defames or brings into ridicule the

judiciary or the armed forces of

Pakistan; or

It is noticeable t qualifications and dis

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(b) have been, on conviction for any
specific and can be adjudicated upon while
offence which in the opinion of the
others are so general that if they are strictly
Chief Election Commissioner involves
applied, hardly anyone would qualify.
moral turpitude, sentenced to
23. The RCO also introduced the office of
imprisonment for a term of not less
Adviser to the Prime Minister. The
than two years, unless a period of five
President could appoint up to five Advisers
years has elapsed since his release; or
to the Prime Minister, on the advice of the
(c) have been dismissed from the service
Prime Minister. However, these Advisers
of Pakistan on the ground of mis-
could not participate in the proceedings of
conduct, unless a period of five years
either House of the Parliament.
has elapsed since his dismissal; or
24. The executive authority of the federation

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(d) have been removed or been
would vest in the President which should
compulsorily retired from the service
be exercised by him, either directly or
of Pakistan on the ground of
through officers subordinate to him, in
misconduct unless a period of three
accordance with the Constitution. This was
years has elapsed since his removal or
a clear departure from the original scheme
compulsory retirement; or
of the Constitution which provided that the
(e) have been in the service of Pakistan or
executive authority of the federation should
of any statutory body or any body
be exercised in the name of the President
which is owned or controlled by the
by the federal government consisting of the
government or in which the
Prime Minister and the federal ministers
government has a controlling share or
which should act through the Prime
interest, unless a period of two years

Minister who was the chief executive of

has elapsed since he ceased to be in

the federation. Thus, the President was

such service; or

given a preponderant position over the

(f) have been found guilty of a corrupt or

Prime Minister.

illegal practice under any law for the

A similar provision was made regarding

time being in force, unless a period of

the relationship between a Governor and

five years has elapsed from the date on

the Chief Minister of a province.

which that order takes effect; or

25. The Supreme Court was empowered to

(g) have been convicted under Section 7

transfer any case pending before any High

of the Political Parties Act, 1962

Court to any other High Court.

(Ill of 1962), unless a period of five

26. It was provided for the first time that the

years has elapsed from the date of such

President could request one of the judges

conviction; or

of the Supreme Court to act as Chief Justice

I (h) have, whether by himself or by any

of a High Court. This provision of the RCO

I person or body of persons in trust for

has been grossly abused ever since. At

I him or for his benefit or on his account

various points in time, at least five judges

• or as a member of a Hindu undivided

of the Supreme Court have been asked to

family, any share or interest in a

be acting Chief Justices of the Lahore High

contract, not being a contract between

Court and the Sindh High Court for

a co-operative society and government,

extended periods of time running into

for the supply of goods to, or for the

several years. This provision caused great

execution of any contract or for the

harm to the independence of the judiciary.

performance of any service undertaken

27. The permanent Benches of the High Courts,

by, government.

which were mentioned in the PCO, were

incorporated in the Constitution and thus

It is noticeable that some of the

their establishment was made part of the

qualifications and disqualifications are

permanent Constitution. An effort was also

made to establish divisional courts and there was specific mention for their establishment.4 Fortunately, they were never established, otherwise it could have further undermined the position and prestige of the High Courts.

28. The President was conferred with the discretionary power to appoint the Chairman, Joint Chiefs of Staff Committee, and Chiefs of Army, Naval, and Air Staff. This was a very important power given to the President by the PCO.

29. All martial law regulations, martial law orders, laws framed during the martial law regime, and acts and orders made thereunder were validated under Article 270-A. Complete indemnity against suits and prosecution was extended to all people or authorities for or on account of or in respect of any order made, proceedings taken, or act done under such regulations, orders, laws, notifications and so on.

30. Appointment of the Governor of a province was left to the discretion of the President. A National Security Council was to be constituted under Article 152-A which was to include the President, the Prime Minister, the Chairman of the Senate, the Chairman of the Joint Chiefs of Staff Committee, and the Chiefs of the three armed forces.

Zia thus made sweeping changes in the Constitution before reviving it. The amendment was made immediately after the general elections and before nominating the Prime Minister and prior to the formation of a civilian government. These amendments were based on his constitutional plan which he announced on 12 August 1983. The balance of power had clearly shifted in favour of the President after the RCO and the office of the Prime Minister was relegated to a subservient and subordinate position. Zia held that the powers of the President were enhanced without reducing the authority of the Prime Minister and a balance was struck between the two. He thought that the lacunae discovered in 1977 in the powers of the President had been removed according to the constitutional and political requirements of

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and said that the provisions being through the RCO regarding the powers of fc President were the same as contained in the hit Constitution. He was of the opinion thai tk expression used in the *1973* Constitution ’tit President will act on the advice of the Pni Minister and such an advice shall be binding ot him’ was an insulting manner of giving powers it the President. He said that his aim was not to enjot maximum power. When asked under whit conditions he would consider it necessary to exercise the right to dissolve the National Assembly, he replied when the government, tk Prime Minister, and the National Assembly lose the confidence of the people. This would mean that a situation had arisen wherein the people anil the Assembly were thinking along different lues and the President could adjudge the right time to dissolve the assembly and hold fresh elections It would be only then, he said, that he would use his discretion.6 His explanation of the use of discretionary power of the President to the National Aco/»v.ui”

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Although the RCO brought some bas.c change, m the structure of the Constitution' which were

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SoM F-

On 10 March, Zia promulgated a new order enforcm, allj>ut ^ Articles of the amended Twenty-one of the Articles which

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a H

and writ jurisdiction of the High Courts

Also unenforced, Was Artic]* 6 whicrfdescnW the abrogation or subversion of the Const.tution as high treason punishable under the law.' Elect.

Zllvh Ht0 therenate °n 12 March and Pak* finally had a parliament

Under the RCO, the President was given ,he authority to nominate and appoint the Pnl Minister at his discretion from amongst membe

oi the National Assembly. Similar

Governors were vested with the j

Chief Ministers of their respectivi

amongst the members of i

Assemblies. This power of the P

Governors was qualified to the

Prime Minister and the Chief Mi

appointed should command the o

majority of the National Assi

Provincial Assemblies respective]

less assemblies, there was no que

commanding the confidence of tr

therefore, appointment by the Pr
Governors (to whom all the me
assemblies looked up to) was suf
to obtain a vote of confidence. T
what Zia wanted; divided a
assemblies, with all power gravita
hand and in the hands of his nomin
Zia nominated a veteran politic
Muhammad Khan Junejo, as Prir
23 March 1985. The next day,
unanimous vote of confidence fro
Assembly. Addressing the Natio
Junejo said that a civilian governj
co-exist with martial law for a Ion
the transitional arrangement shoi
earliest.9 In the contest of Spea
National Assembly, the hand-picke
the erstwhile *Majlis-e-Shoora,* Khw
to a young MNA from Southern]
Imam. The defeat of Khwaja Sa
attributed to his close association w
While handing over power to .
government, Zia made it clear tha

transfer of power from a militarj
government. It was at best the shan
the powers by the military with the
civilian government. He had the au
that the plant of democracy could g
tree of martial law. Zia envisaged
subordinate civilian government wor
umbrella of the military with hi
ultimate repository of power. Thus th
not the establishment of a civilian
rather it was the introduction of
government under military hegemo
as we learnt later, Junejo had other i

THE EIGHTH AMENDMENT

383

: referred to the Constitution of India it the provisions being incorporated

RCO regarding the powers of the re the same as contained in the Indian i. He was of the opinion that the ased in the 1973 Constitution ’the ill act on the advice of the Prime I such an advice shall be binding on insulting manner of giving powers to . He said that his aim was not to enjoy power. When asked under what le would consider it necessary to e right to dissolve the National ie replied when the government, the ter, and the National Assembly lose ice of the people. This would mean on had arisen wherein the people and y were thinking along different lines ident could adjudge the right time to assembly and hold fresh elections. It ly then, he said, that he would use his

His explanation of the use of ’ power of the President to dissolve

Assembly was very different from ’hich it was actually exercised by him ears.

the RCO brought some basic changes ire of the Constitution7 which were to, itutional and political crises in thej

j GOVERNMENT FORMED IARTIAL LAW

ch, Zia promulgated a new order
11 but 27 Articles of the amended . Twenty-one of the Articles which ispended, related to the fundamental rat jurisdiction of the High Courts, reed, was Article 6 which described >n or subversion of the Constitution as

punishable under the law.8 Elections

the Senate on 12 March and Pakistan

parliament. e RCO, the President was given thel) nominate and appoint the Primef lis discretion from amongst members

:rfthe National Assembly. Similarly, the provincial were vested with the power to appoint Chief Ministers of their respective provinces from st the members of the Provincial ihes. This power of the President and the Governors was qualified to the effect that the Prune Minister and the Chief Ministers being so should command the confidence of the ujority of the National Assembly and the Provincial Assemblies respectively. In the partyassemblies, there was no question of any one mmanding the confidence of the majority and, ierefore, appointment by the President and the Governors (to whom all the members of these issemblies looked up to) was sufficient for them 10 obtain a vote of confidence. That was exactly that Zia wanted; divided and dependent issemblies, with all power gravitating in his own tad and in the hands of his nominated Governors. Zia nominated a veteran politician from Sindh, \Uiammad Khan Junejo, as Prime

Minister on
1985. The next day, Junejo won a

tnous vote of confidence from the National ftanbly Addressing the National Assembly, ejo said that a civilian government could not xist with martial law for a long time and that [transitional arrangement should end at the iliest' In the contest of Speakership of the
1 Assembly, the hand-picked Chairman of Iterstwhile *Majlis-e-Shoora,* Khwaja Safdar, lost bayoung MNA from Southern Punjab, Fakhar m. The defeat of Khwaja Safdar could be

1 to his close association with Zia. We handing over power to Junejo and his nent, Zia made it clear that it was not a
• of power from a military to a civilian

Iwrnment. It was at best the sharing of some of le powers by the military with the newly formed dian government. He had the audacity to state it the plant of democracy could grow under the t of martial law. Zia envisaged a servile and late civilian government working under the

Ijbrella of the military with him being the itonate repository of power. Thus the concept was t the establishment of a civilian government,
• it was the introduction of 'civilianized' nent under military hegemony. However, iwe learnt later, Junejo had other ideas.

In the provinces, the Governors appointed the Chief Ministers. In the largest province, the Punjab, a young man in his thirties who came from an industrialist family of Lahore, Mian Nawaz Sharif, was appointed Chief Minister by the military Governor, Lieutenant-General Ghulam Jilani Khan, The most unlikely appointment was made in Sindh. A judge of the Sindh High Court, Ghaus Ali Shah, who was still serving and not a member of the Provincial Assembly of Sindh, was appointed Chief Minister. It was only afterwards that he resigned as a judge and was elected as a member of the Sindh Provincial Assembly in a byelection. All the chief ministers easily obtained a vote of confidence from their respective provincial assemblies.

Zia was soon to discover that Prime Minister Junejo had a will of his own. The main divergence was on the party system. The new Prime Minister revived the Muslim League and other registered parties were allowed to function and participate in the elections. The stringent restrictions imposed on political parties by amendments made to the Political Parties Act of 1962 were not acceptable to the PPP and its allies in the Movement for Restoration of Democracy and they refused to comply with the registration process.

During 1985, Prime Minister Junejo enhanced his prestige and power. He was elected president of the All Pakistan Muslim League and also the leader of the Muslim League Parliamentary Party. His popularity increased when he lifted the emergency and restored fundamental rights. A vast majority of the members of the National Assembly joined the Muslim League, further strengthening the Prime Minister. Under the rules of business, the Prime Minister was the final authority in the daily administration of the State. The Prime Minister controlled the purse strings and enjoyed the privilege of appointing and transferring officials except for the chiefs of staffs of the armed forces, who were appointed by the President at his discretion.

EIGHTH AMENDMENT: COMPROMISING THE CONSTITUTION

As discussed earlier, the civilian government was running the day-to-day affairs of the state. There was evidently no justification for the continuation of martial law. Junejo had promised the nation he would lift martial law and restore the Constitution of 1973. This was not easy to come by. Zia, by then, had assumed the office of President for five years as a result of the referendum of 1984 and was in no hurry to lift martial law, certainly not without iron clad guarantees that he would continue to enjoy a preponderant position and sweeping powers, and that all the laws, regulations, and orders of martial law were protected and validated. In a nutshell, Zia wanted the National Assembly and the civilian government formed under Junejo to accept his constitutional package oftheRCO.10

It was in these circumstances that the Constitution (Eighth Amendment) Bill was moved. The Eighth Amendment did not make extensive changes like the RCO, it modified some of the alterations already made under the RCO. Eighteen Articles in all were amended, added, modified, varied, or omitted. Their cumulative effect was to reduce the powers of the President a little bit and to correspondingly extend the powers of the Prime Minister and the Cabinet. While the powers of the President were not curtailed in material terms, the enactment of the Eighth Amendment led the way to the lifting of martial law. Certain material modifications brought about by the Eighth Amendment are discussed below:11

1. The President was required to act on the advice of the Prime Minister or Cabinet (but not the appropriate minister). The President could, however, require the Prime Minister or the Cabinet to reconsider such advice. The period for giving assent by the President to the Bills passed by the Parliament, was reduced from forty-five to thirty days, but the rest of the provisions of the RCO remained the same. The President retained the power to dissolve the National Assembly at his

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opinion, i

discretion, but this power was c He could dissolve the National provided that, in his government could not be earned o accordance with the provisions of Constitution and an appeal to the el became necessary. However, the penal holding elections after the dissolutionofi

National Assembly was reduced i to ninety days.

The President retained the power to at his discretion, Chiefs of armed and the Chief Election Commissioner The power of the President to appoia Prime Minister was limited to a pendi five years, that is, until 20 March 1990*) which date, the President was invite that member of the Natiwi Assembly who commanded the confita of the majority of its members,! ascertained in a session of the assmlr summoned for the purpose, to assume* office of the Prime Minister In oik words, the procedure for the election oft Prime Minister by majority ofi membership of the National Assembly «i restored.

The President retained the power J appoint, at his discretion, Governors ofil provinces but in consultation with* Prime Minister. The power of the Governor to appoint* Chief Minister was limited to three yet that is, until 20 March 1988 after wlj date, the Governor was required to invi that member of the Provincial Assemblyi be the Chief Minister, who commandedii confidence of the majority of thememtu of the Provincial Assembly as ascertain! in a session of the assembly summoned w the purpose. In other words, the elections the Chief Minister by majority of MI membership of the Provincial Asseri| was restored.

The Governor could also *dissobt* Provincial Assembly at his *discretes,* subject to the previous approval of President where, in his opinion:

(a) a vote of no-confii passed against the other member o Assembly is likelj confidence of th« members of the Pi in accordance with the Constitution, a session of the Pn summoned for the]

(b) a situation has ar government of the carried on in ace provisions of the *(* appeal to the electc

9 Article 152-A, regardii and establishment of th Council, was omitted.

10 Article 270-A, regardii laws, acts, and orders o was extended to cove word ’validation’ was word ’affirmation’. President’s order, ordi regulations, martial law Order, 1984, the constitutional amendr time to time were affi Article 270-A has the of including the name Muhammad Ziaul Haq as President as a resul held on 19 Decembe Article covered up the on the nation in the na

The Eighth Amendrnei capitulation, or at least a corn of the newly formed civiliar martial law lifted. Zia and hi *ihe* vulnerable position of the j of Junejo, took full advantage to make maximum concessi regime. Despite getting iron way of affirmation of a\\ acts ; law and indemnity iot a^v \> ensured his preponderant pos ».£&> issassif the P

discretion, but this power was conditional. He could dissolve the National Assembly provided that, in his opinion, the government could not be carried on in accordance with the provisions of

Constitution and an appeal to the el

became necessary. However, the period holding elections after the dissolution of I National Assembly was reduced from to ninety days. .,

. The President retained the power to appoint, at his discretion, Chiefs of armed forces and the Chief Election Commissioner. The power of the President to appoint the Prime Minister was limited to a period of five years, that is, until 20 March 1990 after which date, the President was required to invite that member of the National Assembly who commanded the confidence of the majority of its members, as ascertained in a session of the assembly summoned for the purpose, to assume the office of the Prime Minister. In other words, the procedure for the election of the Prime Minister by majority of total membership of the National Assembly was restored.

The President retained the power to appoint, at his discretion, Governors of the provinces but in consultation with the Prime Minister. The power of the Governor to appoint the Chief Minister was limited to three years that is, until 20 March 1988 after whu date, the Governor was required to invite that member of the Provincial Assembly to be the Chief Minister, who commanded the confidence of the majority of the members of the Provincial Assembly as ascertained in a session of the assembly summoned f the purpose. In other words, the election 01 the Chief Minister by majority of total membership of the Provincial Assembly was restored.

The Governor could also dissolve the Provincial Assembly at his discretion, but subject to the previous approval of the President where, in his opinion:

(a) a vote of no-confidence having been passed against the Chief Minister, no other member of the Provincial Assembly is likely to command the confidence of the majority of the members of the Provincial Assembly in accordance with the provisions of the Constitution, as ascertained in a session of the Provincial Assembly summoned for the purpose; or

(b) a situation has arisen in which the government of the province cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

9 Article 152-A, regarding the Constitution and establishment of the National Security Council, was omitted.

10 Article 270-A, regarding validation of the laws, acts, and orders of martial law regime was extended to cover more cases. The word ’validation’ was substituted by the word ’affirmation’. In addition to the President’s order, ordinances, martial law regulations, martial law orders, Referendum Order, 1984, the RCO and other constitutional amendments by Zia from

time to time were affirmed and validated. Article 270-A has the dubious distinction of including the name of Zia (as General Muhammad Ziaul Haq) and affirming him as President as a result of the referendum held on 19 December 1984. Thus, this Article covered up the fraud played by Zia on the nation in the name of referendum.

The Eighth Amendment was clearly a ion, or at least a compromise, on the part newly formed civilian government to get law lifted. Zia and his Generals, realizing it vulnerable position of the fledgling government ifkejo, took full advantage of it and forced them
10 make maximum concessions to the military tgime Despite getting iron clad guarantees by ny of affirmation of all acts and orders of martial to and indemnity for all its functionaries, Zia tared his preponderant position as President by reserving unto himself the power to dissolve the

National Assembly at his discretion and to appoint a caretaker government. For a change, he was true to his word, though for self-serving reasons, when he said that he was not transferring power to the civilian government but was only sharing some of his power with it.

Zia's unscrupulous tampering with and the addition of his commandments to the 1973 Constitution changed the entire complexion of the supreme law of the land. While retaining elements of both the parliamentary and the presidential forms of government, the Eighth Amendment tilted the balance of power in the latter's favour. While making the office of the President the fulcrum of power, the Eighth Amendment reduced the status of the Prime Minister, making him subservient to the desires of the former. Removing the 'excessive' powers of the Prime Minister in the original 1973 Constitution, the amendment grafted presidential 'discretion' without the protection of a system of checks and balances.

The 'balance' that Zia struck between the powers of the Prime Minister and the President began to tell immediately on the new political system. Popular will had been flouted and national politics had changed from parliamentary democracy to military dictatorship. Zia's main obsession was to retain power at any cost, even if this meant the negation of constitutional democracy, national integrity and national institutions. He deliberately contrived constitutional devices in which he, as life-long President of the country, was above the parameters of the Constitution and unaccountable to the people.12

LONGEST EVER MARTIAL LAW LIFTED

After having made a deal with the parliament and the civilian government by way of the Eighth Amendment, and after having secured ultimate powers and validating all martial law regulations and orders with actions taken thereunder, General Zia lifted martial law on 30 December 1985.13 It had continued for eight-and-a-half years, the longest martial law in the history of Pakistan.

All martial law regulations and martial law orders by the CMLA and MLAs stood cancelled on 30 December 1985.14 However, nine martial law orders and four martial law regulations issued by the CMLA and specified in the schedule to the MLO 107 were saved with some modifications and would continue as law of the land and their contravention would continue to be punishable. The cancellation of martial law regulations and martial law orders would not affect the previous operation thereof and anything done, action taken, or liability incurred, or punishment suffered, or proceedings commenced would be deemed to have been properly and validly done, taken, incurred, or commenced, as the case may be. Cases pending before special or summary military courts stood transferred to competent criminal courts. The President and the Governors retained power in regard to cases decided and disposed of by the special and summary military courts but were awaiting confirmation. They also retained the powers of review of sentences passed by such military courts before 30 December 1985.

NOTES

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2. Constitution (Second Amendment) Orda 1 President's Order 20 of 1985 PLD 19 Statutes 582.

3. Representation of the People (Amento Ordinance, 1979. Ordinance L of 1979 !,,,,,. Central Statutes 532. Section 47-A was ate] the purpose.

4. Article 198(2). ,

5. Interview with General Mohammad Ziaul Hq||L panel of editors of national newspaptnj Islamabad on 3 March 1985. Published by li of Information, Government of Pakistan,!!

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7. Even an old friend of Zia, former Chief Ju. Anwar-ul-Haq, said that the RCO had changaH basic structure of the Constitution, *The I*

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While installing Junejo in po clear that it was not a tran sharing of power.

Yet Junejo tried to pur course on several occasions his government was nev< autonomy. Junejo could not i government had been pli dictator, owed its existence duty bound to obey and app

BENAZIR BHUTTO 1 APRIL **1986**

Ms Benazir Bhutto and ht Bhutto, who had been un long time during Zia's m from 1979 to 1984, were be in 1984, ostensibly for m were thus relieved of th< undergone during the Zia r the execution of Bhutto.

After the lifting of mart
1985, Benazir felt secui Pakistan and take over th as an heir to Zulfiqar Ali her freedom and

security given to a friendly foreig death, Nusrat had been ac chairperson. However, in Benazir, Nusrat had to chairperson. In this capa Pakistan on 10 April welcome in Lahore by *r*< her supporters. She led , of thousands through the large crowd. Soon aftei towns in the Punjab and enthusiastic crowds. Her

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Order 14 of 1985. PLD 1985 Central

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n (Second Amendment) Order, 1985

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ition of the People (Amendment)
1979. Ordinance L of 1979. PLD 1979 rules 532. Section 47-A was added fot

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n, 11 March 1985. *n,* 25 March 1985.

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w Order by CMLA No. 107. PLD I1 atutes 9.

’30 Partial Democracy and the Death of Zia

We installing Junejo in power, Zia had made it clear that it was not a transfer of power but a sharing of power.

Yet Junejo tried to pursue an independent course on several occasions but in the public eye to government was never respected for its utonomy. Junejo could not ignore the fact that his government had been planted by a military toator, owed its existence to him, and was thus toy bound to obey and appease him.

BENAZIR BHUTTO RETURNS IN APRIL 1986

Ms Benazir Bhutto and her mother, Mrs Nusrat Bhutto, who had been under confinement for a tag time during Zia’s martial law, particularly from 1979 to 1984, were both allowed to go abroad

11984, ostensibly for medical treatment.1 They rae thus relieved of the agony that they had undergone during the Zia regime, particularly after fe execution of Bhutto.

After the lifting of martial law on 30 December

1985, Benazir felt secure enough to return to

Pakistan and take over the leadership of the PPP

8 an heir to Zulfiqar Ali Bhutto. A guarantee of

btr freedom and security was said to have been

given to a friendly foreign power. After Bhutto's

death, Nusrat had been accepted by the PPP as the

chairperson. However, in order to give the reins to

Benazir, Nusrat had her made the party co-

ckrperson. In this capacity, Benazir returned to

Pakistan on 10 April 1986 to a tumultuous

welcome in Lahore by a very large gathering of

pporters. She led a procession of hundreds

d!>ands through the city and addressed a very

aowd. Soon afterwards, she visited other

'n the Punjab and was received by similarly

lastic crowds. Her confidence grew, and she

boasted that she could take over the Governor House and the government buildings in Lahore that day, if she wanted.

However, Benazir soon found that her popularity was not sufficient to oust the government which was backed by the military and the establishment. Her call for agitation and demonstration against the government in the streets in August 1986 was not successful and the government easily crushed the protest that took place.

THE AFGHAN WAR SETTLEMENT

Zia's gamble in supporting the *mujahideen* in Afghanistan in their struggle against the Soviet invasion paid him huge dividends. Soviet forces suffered heavily in terms of men and material. The Afghan war effort proved very costly to even a world power like the Soviet Union. In the beginning, the Soviet army was successful in occupying and controlling Afghanistan. It has always been said ab6ut Afghanistan that it can be invaded and occupied easily but it is very difficult to hold and control power there. Afghans have a history of resisting foreign invaders. The British imperial power failed in three attempts to occupy and hold Afghanistan.2 The Soviets were to learn the same lesson for themselves. The turning point in the war came when the *mujahideen* were supplied with Stinger missiles by the United States. Till then, the Soviet forces had been successful in controlling guerilla activity by using helicopter gunships in the mountains and in the deserts. The *mujahideen* suffered enormous casualties being out-gunned and overwhelmed by the extraordinary force of a super-power which was operating easily from the air through helicopters, bombers, and other aircraft. Stinger missiles changed all this. It was a very accurate weapon against air operations,

particularly to target helicopters from the ground. These missiles were simple to operate. Just two men could easily handle and operate them.

Other than the problems faced due to the Afghan war effort, the Soviet empire was breaking apart at the seams. Its size and commitments had grown too big for its resources and its economy was in shambles. The Baltic states of Latvia, Lithuania, and Estonia were in revolt and were demanding independence. The Central Asian states and states between the Black Sea and the Caspian Sea were suffering from serious internal dissensions and ethnic problems. Communism in the Soviet Union was under a great strain and challenge. The new Soviet leader, Gorbachev,3 promised economic reforms and ’restructuring’4 and ’openness’5 of the media and the society. All these factors led the Soviet leadership to seek peace in Afghanistan.

The offer of negotiations on Afghanistan was accepted by the Junejo government which entered into dialogue with the Soviet government and its puppet regime in Afghanistan. Junejo took the opposition parties into confidence, this being a national issue. A national conference was held and it was attended by the leaders of most of the political parties in the country, including Benazir.6 As a result of negotiations, the Geneva Accord was signed on 14 April 19887 under which the Soviet Union agreed to withdraw its forces in two instalments; the first half by 15 May 1988, the date the Accord came into force, and the remaining by the end of May 1989.8 The

Soviet government lived up to its commitment of withdrawal of forces according to the agreed timetable.

Still, the victory in Afghanistan was achieved at a very great cost to Pakistan. It had to look after and feed more than three million Afghan refugees that crossed over to Pakistan. The refugees, apart from being an economic burden, caused enormous problems of crowding in the cities of NWFP. They came into conflict with the local population in these cities and are generally blamed for the spreading of contraband drugs. The Afghan war also caused gun running in the country. Pakistan was glutted with automatic weapons which landed into the wrong hands and contributed to the increase in crime and terrorism in the cities.

Dangerous drugs like heroin also came* common use in Pakistan.

BENAZIR BHUTTO'S CASE-

?OR REGISTRAR

It has been discussed earlier that through n amending ordinance in 1979,9 the Political Pans Act had been amended and sections 3-A, 3-B.aid
3-C were added to it. In brief, these provision required all the political parties to submit then accounts to the Election Commission and apply to it for registration. A political party which failed it do so could not conduct any political activity It could not participate in any election or nominate its candidates. Later, the requirement of registration was relaxed10 after negotiations between Zia and Mufti Mahmood and, instead of registration, the Election Commission could satisfj itself by circulating a questionnaire to the political parties and receiving their replies to it. However, a number of political parties remained unregistered, including the PPP, and only a few minor parties were registered. Zia's purpose was to keep the PPP out of the general elections proposed to be held in
1979. However, general elections were indefimtel) postponed by Zia.

Further amendments were made to the Political Parties Act, 1962 in January 1985, before the general elections of February 1985. These elections were to be held on a non-party basis but Zia feared that important leaders of the PPP might decide to contest the elections in their individual capacity and get elected. The presence of such persons in the National Assembly could cause difficulties and problems to him. Also, these elected members, Zia feared, might try to thwart his constitutional plan He wanted a pliant, docile, and servile parliament elected on a non-party basis which could agree to any of his terms and conditions for the transfer (rather sharing) of power and the lifting of martial law.

The amendments to the Political Parties Act provided that any person 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 a political pai neither been registered nor declare participate in elections by the Electioi by 11 October 1979, would not be c penod of seven years to be elected c member of Parliament or a Provinc However, the members of the Fee (hand picked by Zia and his underli

to be hit by the aforesaid disqualify further provided that any person wt federal minister, or minister of state, provincial minister, at any tn
1 December 1971 and 5 July 1977 (di regime), would not be qualified fo seven years to be elected as a Parliament or a Provincial Asse provisions clearly and manifestly en entire leadership of the PPP was disc being elected to the parliament or I assemblies.

In the capacity of co-chairpersoi

Benazir challenged all such offendi

of the Political Parties Act as uncom

violative of the fundamental right (

association directly before the Supr

its original jurisdiction under Article

Constitution. The following points ’

support of the petition:

i. Article 17(2) of the Constiti

firstly the imposition of

restrictions’ by law in the i

sovereignty and integrity of

secondly that a political party

account for the source of

accordance with law. There

ments in the Political Partii

were extraneous to these co

void.

ii. That the requirement for a pi its finances and accounts t person or authority autho Election Commission w< unreasonable restriction and beyond the scope of Article 1 lii. While the requirement of r political parties might not be stitutional, the giving of i power to the Election Commi

s like heroin also came ikistan.

UTTO’S CASEJT FOR REGISTRAI

assed earlier that throug :e in 1979,9 the Political Pa ided and sections 3-A, 3-E D it. In brief, these provisi olitical parties to submit ction Commission and apply| ^ political party which fail< induct any political activity.^ te in any election or no Later, the requirement relaxed10 after negotiatio ufti Mahmood and, instead (:tion Commission could i a questionnaire to the politic > their replies to it. However, I parties remained unregis and only a few minor s purpose was to keep the I ections proposed to be held in :ral elections were indefinitely

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3 the Political Parties Act” (>n who had at any time after a an office bearer or even a *re* committee at the national

Ijrovincial set-up of a political party which had r been registered nor declared eligible to e in elections by the Election Commission f!l October 1979, would not be qualified for a pod of seven years to be elected or chosen as a r of Parliament or a Provincial Assembly. tr, the members of the Federal Council d picked by Zia and his underlings) were not (hit by the

aforesaid disqualification. It was r provided that any person who had been a il minister, or minister of state, an advisor or icial minister, at any time between mber 1971 and 5 July 1977 (during Bhutto's K), would not be qualified for a period of i years to be elected as a member of merit or a Provincial Assembly. These s clearly and manifestly ensured that the ^leadership of the PPP was disqualified from g elected to the parliament or the provincial iblies

I lie capacity of co-chairperson of the PPP, r challenged all such offending provisions (Political Parties Act as unconstitutional and *t* of the fundamental right of freedom of i directly before the Supreme Court in il jurisdiction under Article 184(3) of the ion The following points were urged in hurt of the petition:

11 Article 17(2) of the Constitution provides firstly the imposition of 'reasonable restrictions' by law in the interest of the sovereignty and integrity of Pakistan, and secondly that a political party is required to account for the source of its funds in accordance with law. Therefore, requirements in the Political Parties Act which were extraneous to these conditions were void

|. That the requirement for a party to submit its finances and accounts to audit by a person or authority authorized by the Election Commission was a highly unreasonable restriction and void as being beyond the scope of Article 17. i While the requirement of registration of political parties might not be *per* .se unconstitutional, the giving of untrammelled power to the Election Commission to allow

or not to allow a political party to function was on the face of it arbitrary, unreasonable, and unconstitutional.

iv. The Election Commission was given unfettered power to cancel the registration of a political party and the same was final and could not be challenged in appeal. This subjected the political parties to double jeopardy as there were provisions in addition to this for dissolution of a political party.

v. The provisions regarding the participation of political parties in the elections were discriminatory, the object being to allow certain parties in the former PNA to participate in the elections indirectly, though they had not applied for registration directly.

vi. The Freedom of Association Order 1978,12 applying restrictions on the freedom of association beyond the ambit of Article 17, stood repealed by implication by the Revival of Constitution Order, 1985 (the RCO) and its provisions, being subconstitutional, could not override Article
17, which had been revived.

vii. The amendment made in the Political Parties Act between 5 July 1977 and
11 November 1985, though validated under the Eighth 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.

The Supreme Court accepted the constitutional petition of Benazir and repelled the two

objections taken by the federal government, firstly, that Benazir was not an aggrieved party as no act detrimental to her had been taken under the provisions of the laws being challenged; and secondly, that she should have approached the High Courts first, particularly when similar petitions were already pending in some of the High Courts. The Court held on the first objection that an enactment might immediately on coming into force take away or abridge the fundamental rights of a person by its very terms and without any

further overt act being done. In such a case, the infringement of the fundamental right would be complete instantly on the passing of the enactment and, therefore, there could be no reason why the person so prejudicially affected by the law should not be entitled immediately to avail himself of the constitutional remedy. The Court went on to hold that a political party could also be an ’aggrieved party’. Regarding the second objection, the court held that as to the choice of the forum, ordinarily the forum of the court in the lower hierarchy should be invoked but that principle would not be inviolable and genuine exception could exist to take it out of that practice. The exception was applied in favour of the case in hand because, the Court observed, too rigid an adherence to precedent might lead to injustice in a particular case and also unduly restrict the proper development of the law.13

Regarding validation of the laws under Article
270-A, the Court held that this Article did not give protection to existing laws which were violative of fundamental rights. The Political Parties Act, 1962 had not been given validity against constitutional violations because it did not find mention in the seventh schedule to the Constitution wherein the laws mentioned had been given constitutional protection. If a legal measure was not itself in existence (being unconstitutional), the Court observed, how could it operate prospectively. 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 right under Article 17 and its remaining on the statute book would be of no effect.

The Court held in no uncertain terms that the constitutional guarantees to every citizen (if not in the service of Pakistan), including the right to form a political party, could only be subject to reasonable restrictions imposed by the law in the interest of the sovereignty or integrity of Pakistan. The right to form associations is not an absolute or uncontrolled one, but the restrictions thereto under the Constitution (as stated in Article 17(2)) should be construed as exhaustive and liable to strict construction.

On the question of rendering of accounts by a political party for audit, the Court held that it could

not be regarded as an unreasonable restnctui outside the ambit of Article 17(3). This of the petitioner was thus rejected.

Regarding inclusion of the expression’« of Pakistan’ in addition to other expressions in the Political Parties Act, it was held! inclusion of this expression was a constrain the ’freedom of association’ beyond the scon Article 17. This expression was not used in A
17 and, therefore, its inclusion in the Act violative of Article 17 and hence void.

Compulsory registration of political parties

also declared by the Court as violative of Ma

17 as it placed unreasonable restrictions oil

exercise of a right by superimposing itself onilj

fundamental right since it was not singfe

registration, but was accompanied by p®

consequences. It was also observed that the pun

of cancellation of registration, which was vejj|

in the Election Commission, was without*

safeguards and was entirely discretionary to i]

Election Commission and no remedy hi

provided against^ its decision. Hence, th

concluded that it constituted an unre^

restriction on the right to form associations, i

The Supreme Court declared and held to bevj

the following provisions of the Political Parac

Act, 1962 (to the extent stated) being inconsistm

with the fundamental right of freedom o1

association as enshrined in Article 17 of it

Constitution:

1. Section 3(1) in so far as it relates to an includes therein the disability regardiij 'security of Pakistan' was void Ik remaining part of section 3 was upheld

2. Section 3-A (regarding rendition of accounts by a political party) was upheld but tk penalty under section 6(1) arising therefm by its insertion therein was declared void

3. Section 3-B (regarding registration of i political party) was declared void in its entirety.

4. Section 3-C (regarding circulation ofi questionnaire) was held to have outlived its purpose.

5. Section 6(1) in so far as it related to anil included therein the references to ’secunh of Pakistan’ and ’the contravention of tk

provisions of Section *’*. However, the inclusioi ’Islamic ideology’, ’m tenance of public order was upheld for the expressions formed pa inherently included ’sovereignty’ and ’integ in Article 17 of the cor

6. The remaining parts o sub-section (2) thereof

7. Regarding sections 7 a that in view of the d other provisions of tb legislature to amend th

This judgment was annoi Court on 20 June 1988 whil< was a clear rebuff to Zia \\ National Assembly on 29 Junejo’s government, and an would be held on a non-part^ one of the very few judgmi while he was still in powe this judgment stands out. It reviving the political party tried hard to suppress fo judgment paved the way fo in November 1988. It was , that whittled down the Va Article 270-A which was i the Eighth Amendment to t

MUSTAFA KHAR’S VALIDATION CLAUI EIGHTH AMENDME

The RCO introduced *A* Constitution validating all i martial law orders, Presidi laws passed between 5 Ju This Article also savei proceedings taken, and acl period. The Eighth Ame Article and extended its sci of the referendum of 1 President, the Constirutior Order, 1985 (P.O. No.

rded as an unreasonable restnction ambit of Article 17(3). This content oner was thus rejected, g inclusion of the expression ’securm in addition to other expressions used ttical Parties Act, it was held tha’ f this expression was a constraint n of association’ beyond the scop This expression was not used m Artiue jrefore, its inclusion in the Act was; Article 17 and hence void, .ory registration of political parties wai^ :d by the Court as violative of Article aced unreasonable restrictions on the a right by superimposing itself on the tal right since it was not simply n, but was accompanied by penal •es. It was also observed that the power tion of registration, which was vested ction Commission, was without any and was entirely discretionary to the ommission and no remedy had been gainst its decision. Hence, the Court that it constituted an unreasonable on the right to form associations. ireme Court declared and held to be void ing provisions of the Political Parties (to the extent stated) being inconsistent fundamental right of freedom of i as enshrined in Article 17 of the. m:

on 3(1) in so far as it relates to and’ ides therein the disability regarding iirity of Pakistan’ was void. The inmg part of section 3 was upheld on 3-A (regarding rendition of accounts political party) was upheld but the Ity under section 6(1) arising therefrom s insertion therein was declared void. ion 3-B (regarding registration of a ical party) was declared void in its ety.

ion 3-C (regarding circulation of a tionnaire) was held to have outlived its ose.

ion 6(1) in so far as it related to and ided therein the references to ’ security *t* akistan’ and ’the contravention of I

provisions of Section 3-A’ was held void. However, the inclusion of the expressions ’Islamic ideology’, ’morality’, and ’maintenance of public order’ used in section 6(1) was upheld for the reason that these expressions formed part of and were thus inherently included in the expressions ’sovereignty’ and ’integrity’ of Pakistan used m Article 17 of the constitution.

6 The remaining parts of section 6 including sub-section (2) thereof was upheld.

7 Regarding sections 7 and 8, it was observed that in view of the decision in respect of other provisions of the Act, it was for the legislature to amend them.

This judgment was announced by the Supreme Court on 20 June 1988 while Zia was still alive. It »as a clear rebuff to Zia who had dissolved the National Assembly on 29 May 1988, dismissed taejo’s government, and announced that elections louldbe held on a non-party basis. It is, of course, sue of the very few judgments given against Zia •Me he was still in power and for this reason, •sjudgment stands out. It also had the effect of wing the political party system which Zia had .ned hard to suppress for eleven years. This rodginent paved the way for party-based elections DNovember 1988. It was also the first judgment (whittled down the Validation Clause under icle 270-A which was included as a result of
4e Eighth Amendment to the Constitution.

\IISTAFA **KHAR'S** CASE AND i VALIDATION **CLAUSE UNDER THE** I EIGHTH **AMENDMENT**

i RCO introduced Article 270-A in the | Constitution validating all martial law regulations, il law orders, President's orders, and other Us passed between 5 July 1977 and the RCO. His Article also saved all orders passed,
1 readings taken, and acts done during the said I mod The Eighth Amendment modified this
1 tele and extended its scope to affirm the results Id the referendum of 1984, election of the itedent, the Constitution (Second Amendment) |Mer, 1985 (P.O. No. 20 of 1985) and the

Constitution (Third Amendment) order, 1985 (P.O. No. 24 of 1985). These two amendment orders were passed by the President after the RCO and before the first meeting of the Parliament, that is, between 2 and 23 March 1985. P.O. No. 20 of
1985 amended Article 239 of the Constitution modifying the procedure of amendment to the Constitution.14 P.O. 24 of 1985 made amendments in certain provisions relating to the High Courts and Federal Shariat Court.

A significant modification was made by the Eighth Amendment in Article 270A and the word 'validation' used in the RCO was substituted by the word 'affirmation'. All the laws, regulations, orders, proclamations etc. stood 'affirmed, adopted and declared' under this Article. The expressions 'affirmed' and 'affirmation' were apparently used to avoid judicial review of such laws, regulations, or orders and/or Acts, orders or proceedings thereunder, under the dictum of *'State v Zia-urRehman'.*

Despite the effort and intention to pre-empt any challenge to Article 270-A, it became the subjectmatter of a number of cases. In such cases, the Lahore High Court held that:16

i. All legal measures mentioned in clause (1) of Article 270-A of the constitution, having been validated, cannot be subjected to judicial review.

ii. As regards the orders passed, proceedings taken, and acts done in exercise of the powers derived from said legal measures, the jurisdiction of High Courts is limited to *coram non judice,* without jurisdiction, malice in law and violation of the constitutional provisions, in. Article 270-A cannot be struck down on the assumption that the parliament was not sovereign.

Article 270-A then came up for interpretation before the Supreme Court of Pakistan.17 The Court held that by enacting clauses (2) and (5), Parliament had not intended to validate such acts, actions, or proceedings or to put them beyond the reach of courts or to deprive persons who had suffered thereunder of any remedy or relief whatsoever. The Court observed that during martial law, when fundamental rights stood suspended,

Article 4 furnished the only guarantee or assurance to the citizens that no action detrimental to the life, liberty, body, reputation, or property of any person would be taken except in accordance with the law.’8 Acts, actions, or proceedings which suffered from excess or lack of jurisdiction or were *coram non judice* or malafide, could hardly be treated as those in accordance with law. Such acts, actions, or proceedings, it was observed, were bad even under the system which was validated by Parliament under Article 270-A on account of violation of the guarantee of due process of law given by Article 4. The Court repelled the argument that by enacting clauses (2) and (5), Parliament had intended to validate such acts, actions or proceedings or to put them beyond the reach of the courts or to deprive the persons who had suffered thereunder of any remedy or relief whatsoever. There is always a legal presumption that legislature does not perpetuate inequity or injustice and there is no reason why such a presumption should not be invoked while interpreting clauses (2) and (5) of Article 270-A.

The Supreme Court thus held that there is no clog on the jurisdiction of the courts to exercise their power of judicial review in respect of the acts, actions, and proceedings made, taken or held by those authorities which suffered from defect of jurisdiction or were *coram non judice* or were malafide. The protection under Article 270-A could not bo used for defending an order which, ex facie,

was without jurisdiction.19 The Supreme Court held

that constitutional validity given toy Article

270-A(1) is retroactive and is of & oMaxYve or x^\v<iSiJ>JJ\% ^J&xh.^ and *i/adesySootf aatf 6e operative in* that context.

v \s\on ot

flooded with 3.5 million refugees from with the attendant problems of gun running, smuggling, and an increase in crimes tta Pakistan, yet the Afghan war stabilized tin government. The government, particularly 4e! Services Intelligence (ISI), was a conduit for supply of arms and ammunition to Afghan fighters. This afforded an opportunity to sooti the generals involved in this effort to themselves to handsome money by selling of the arms to Iran, particularly missiles for« the Iran-Iraq war. It is therefore no wonder some generals have become rich beyond belief

It cannot be said with any certainty whetkeii’ was to cover up such unauthorized sales weaponry that an explosion occurred camp, or if the explosion on 10 April place accidentally. Ojheri was an ordinance depj situated near the twin cities of Islamabad a Rawalpindi and when it exploded, missiles, rocks and other weapons flew in different directions t the two cities, killing hundreds of people mi injuring many others. About 100 people dial within the first hour, most of them instantly, whilt many more were maimed permanently and quite i few succumbed to injuries later in the follow^ days and weeks.21 There was also substantial damage to property. One of the federal ministers’” was also killed because his car was struck by \ missile flying from Ojheri. There were clai attempts on the part of the military establishes

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MILITARY *A VTHORITIES*

violations.

AND

It has been discussed above that the Afghan war effort provided strength to Zia's government due to American support. Although PakisJa?

wmch had brought so much misery and *tO th0* cY5ftlmon people of the federal capitaJ *and Rawalpindi. The* decision to hold an enquiry into

6y military

authorities. The *Generals SdW it* as 6/a(ant interference in their military affairs and Zia was asked to come to their aid. The enquiry could have exposed the misdeeds of many a general and would have embarrassed the *m\\\\xsyjunta, TJ}g£fffl$tf* oVtween the civilian and military authorities on

"•proposed visit to Africa,' by Junejo since he felt thi fie should" be making , *Concurrently, there WOVt,*

ills on prolonged military rule.

In July 1986, Junejo embarkec to the United States which prove, the relationship between the Pr

5 million refugees from Afghanistan ant problems of gun running, drugs, i an increase in crimes throughout the Afghan war stabilized the Zia be government, particularly the Inter igence (ISI), was a conduit for the and ammunition to Afghan freedom afforded an opportunity to some of involved in this effort to help handsome money by selling some Iran, particularly missiles for use in tvar. It is therefore no wonder that have become rich beyond belief. e said with any certainty whether it r up such unauthorized sales of t an explosion occurred at Ojheri le explosion on 10 April 1988 took ally. Ojheri was an ordinance depot the twin cities of Islamabad and id when it exploded, missiles, rockets ipons flew in different directions in s, killing hundreds of people and y others. About 100 people died ,t hour, most of them instantly, while ere maimed permanently and quite a ed to injuries later in the following :eks.21 There was also substantial Dperty. One of the federal ministers22 ed because his car was struck by a ig from Ojheri. There were clear he part of the military establishment ic matter and not to give out accurate information to the public. The press liament clamoured for truth and exhaustive and impartial enquiry into ;ident. It was under this pressure that sed to a thorough enquiry and of those responsible for the grim h had brought so much misery and the common people of the federal awalpindi.

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3 not seen favourably by military

The Generals saw it as blatant

in their military affairs and Zia was

e to their aid. The enquiry could have

nisdeeds of many a general and would

issed the military *junta.* The conflict

civilian and military authorities on

the Ojheri incident became a major reason for the parting of ways between Zia and Junejo.

There were other irritants too. Junejo was becoming too assertive and independent for Zia and his generals to bear. He was forgetting that he had been inducted as Prime Minister in a subordinate role. He did not spare the military high-ups He ordered a spartan style of government by ordering federal secretaries and military generals to give up big staff cars in favour of small Suzuki cars. He also used the expression ’putting Generals into Suzukis’ while addressing Parliament. The generals, who had become used :o unbridled power and unparalleled perks and pvileges, took this as an insult to them. A few of iheiri even protested in the press that they had been

The Afghanistan war settlement was yet another imtant in relations between Zia and Junejo. Junejo lad taken major initiatives independent of Zia in settling the dispute directly with the Soviet Union n the negotiations at Geneva. He had invited ’eaders of all the political parties, including Benazir, which could not possibly be with Zia’s blessing He signed an accord with the Soviet Inionon 14 April 1988 over the withdrawal of Soviet forces from Afghanistan which, it is [•cured, did not find favour with Zia and his ulitary colleagues.

After the lifting of martial law in December
1585, battles over protocol and personnel started i earnest between the Prime Minister and the President These included differences over the fpomtments of Ambassadors and Secretaries, and MI on such petty issues like the use of the Falcon’ aircraft. For instance, Zia advised the Foreign Office to prepare a summary for a pposed visit to Africa, but this was shot down i» Junejo since he felt that being Prime Minister, it should be making all the foreign tours. (kurrently, there were two consistent refrains in linejo’s public pronouncements; first, taking adit’ for lifting martial law and restoring taocracy and secondly, blaming the country’s Is on prolonged military rule.

In July 1986, Junejo embarked on a state visit lite United States which proved a watershed in It relationship between the President and the

Prime Minister. Junejo came back so excited from his American sojourn that Zia remarked to one of his confidants, ’I hope this visit does not go to his head’. Junejo felt that after having received a ’pat on the back’ from Reagan, he had been politically strengthened within Pakistan. His first act of bravado was to remove Major-General Agha Nek Muhammad as head of the Intelligence Bureau without clearing this decision in advance with Zia. Junejo felt that Zia was trying to undermine him by playing the ’Jatoi card’. It was then, in August
1986, that Ghulam Mustafa Jatoi launched his political party with great fanfare and the covert blessings of Zia.

By late 1986, the relationship between Zia and Junejo was marked by increasing suspicion and mutual distrust. Basically, Zia had started suspecting Junejo on two counts. First, he felt that Junejo, in some form or the other, was hobnobbing with Benazir Bhutto by giving her a free hand to abuse Zia without anyone in the government willing to defend him. In fact, he felt that Junejo and Benazir had reached some sort of an ’understanding’ whereby, in return for the freedom given to her, Benazir would not attack Junejo. That she somehow refrained from criticizing Junejo added to Zia’s suspicions. The second, perhaps more important suspicion was that Junejo was trying to undermine his position as Chief of Army Staff by encouraging criticism of his wearing ’dual hats’ (as President and COAS).

Zia also felt that all his ’men’ were either being purged by Junejo or their authority considerably pruned. Junejo consciously cut Zia’s ’three doctors’ down to size: Dr Mehbubul Haq, Dr Asad, and Dr Attiya Enayatullah. However, the countdown to the 29 May operation began in November 1987 with the easing out of Sahabzada Yaqub Khan as Foreign Minister. Yaqub’s exit was followed by an informal instruction by the Prime Minister that henceforth no file from the Foreign Office would be sent to the President. Zia not only felt that he was losing control over his favourite area, foreign affairs, but that there was a design on Junejo’s part to exclude him

from the domain of foreign policy and that too in a period when the crucial Afghan issue seemed to be reaching a conclusion. Privately, Zia had started expressing

his ’disgust’ with Junejo and the civilian set-up, and by the time things started moving on the Afghan issue in 1988, the only question in Zia’s mind was not whether he should get rid of Junejo but the right moment when he should embark on this fateful surgical operation.23

To be fair to Junejo, he consulted Zia frequently and gave him his due respect. Their mutual uneasiness emerged out of the power sharing process. Zia frequently wrote directives to the ministers and his staff pestered them for a quick response. Under the rules of business, the ministers were required to route their replies to the President through the Prime Minister’s Secretariat. The delay annoyed Zia. His crafty staff blamed Junejo for the delay and the gap between the two, created by suspicions, kept widening. Junejo requested Zia to address all the directives to him directly and promised their speedy implementation. This was in conflict with Zia’s style, the direct personal approach. Such incidents created bitterness between the two men which was exploited by Zia’s close advisers. They advocated pre-emptive action before Junejo could cause grievous political damage to Zia.24

DISSOLUTION OF ASSEMBLIES AND THE DISMISSAL OF JUNEJO ’s GOVERNMENT

Zia knew that his real constituency was the armed forces. It was due to their support that he had survived for eleven years in power. That was the reason that despite being President, he did not shed his uniform and clung so dearly to the office of Chief of Army Staff. He knew that the office of Army Chief was his real power base and ceding this office to anyone (even to a close associate) would make him vulnerable.

Having come under pressure from the military leadership, particularly after the Ojheri incident, Zia decided to act in order to please, or maybe

protect, his generals On 29 Msyy V9%%, Vie

e satOI«,l Aa==mt»iy «» d,,m,s=.«<J jmv«=jt»-= government This was followed by the

dissolution of the Provincial Assemblies by the Governors. On 30 May 1988, addressing the nation

on television and radio, Zia levelled the folio allegations against the Junejo government
1 - The government remained ineffective des» enjoying full powers during its three* tenure.

2. The National Assembly, which was elwd on a non-party basis, was converted«, party-based body because of po|,ta compulsions of the former Prime Mimster

3. Plots and permits were used as pol,ta bribes, besides financial benefits torn political support. ’Nepotism was at its pd he remarked in the speech.

4. About the amount provided for the memb of the assemblies for development proj% Zia said ’every one of us knows how it n spent and where. If corruption is patron^ at the highest level, how can it be stopped! the lowest level?’ he asked. The fa* provided to MNAs and MPAs in the nan of development were misappropriated

5. The economy was crippled. The govemna

was depending, both internally 4

externally, on loans, and the economy u

m the grip of a crisis as a result off*

economic policies. Bribery and nepotisi

were well entrenched.

6. The state of affairs in the country overfe

three-and-a-quarter years compelled him to

take this step, as he could not remain a ah

spectator to this situation. He said that k

had been informing the Prime M.mster,B

private conversations with him and up*

speeches, that the conditions were not

satisfactory but no heed was paid to his

advice.

7- The life, property, and honour of the citizens were no longer secure.

8. Linguistic, regional, and ethnic deferences assumed enormous proportions.

9. In-fighting between Muslims was being waged in some parts of the country.

The priorities announced by z;a i

of law and order and stabiliza the country’s faltering economy.” Z,a at

announced a caretaker goverr Prime Minister. The ensuing partyless once again, and elect Assembly would be held on He thus committed a breach i the Constitution 26 which re general elections within n dissolution of the National President at his discretion un< He deliberately fixed a date dissolution of the National As volumes for his lack of respect which he believed more in vie complying.

PERFORMANCE OF Ji GOVERNMENT REVIE

Junejo was nominated by Zia < the specific understanding that not a transfer of power but onl; These were the conditions und to work till the end of Dei martial law was finally lift nominated, the RCO was enfoi position was weak and vulm labour under the amendm Constitution from July 1977 o the position of the President pi the Prime Minister subordina the nation that he would li civilian government would earliest. He did carry out his price of the Eighth Amendri RCO and previous amendment with slight modifications. Tc cannot be denied that he had i relent under the pressure of that had brought him into po\ circumstances in which the was passed by the Parliament.

rt.fter the lifting of martial take a course independent c

m,}uary generals by withdrai from them and replacing them tried to conduct an independ particularly on Afghanistar

ision and radio, Zia levelled the following ms against the Junejo government: e government remained ineffective despite joying full powers during its three-year lure.

e National Assembly, which was elected a non-party basis, was converted into a rty-based body because of political npulsions of the former Prime Minister. its and permits were used as political bes, besides financial benefits to gain itical support. 'Nepotism was at its peak', remarked in the speech, out the amount provided for the members the assemblies for development projects, said 'every one of us knows how it was nt and where. If corruption is patronized be highest level, how can it be stopped at lowest level?' he asked. The funds vided to MNAs and MPAs in the name levelopment were misappropriated, economy was crippled. The government . depending, both internally and •rnally, on loans, and the economy was he grip of a crisis as a result of faulty lomic policies. Bribery and nepotism
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state of affairs in the country over the ;-and-a-quarter years compelled him to this step, as he could not remain a silent tator to this situation. He said that he been informing the Prime Minister, in ite conversations with him and in public ches, that the conditions were not factory but no heed was paid to his ;e.

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orities announced by Zia included >n of the process of Islamization; n of speedy and inexpensive justice, of law and order and stabilization of y's faltering economy.25 Zia also

loounced a caretaker government but without a [te Minister. The ensuing elections would be IJBtylessonce again, and elections to the National nbly would be held on 17 November 1988. I Bt thus committed a breach of the provisions of I k Constitution 26 which required him to hold ral elections within ninety days of the teolution of the National Assembly by the todent at his discretion under Article 58(2)(b). It deliberately fixed a date 172 days after the tolntionofthe National Assembly. This speaks totaes for his lack of respect for the Constitution ikh he believed more in violating rather than in

PERFORMANCE **OF JUNEJO'S**

GOVERNMENT **REVIEWED**

Jnejo was nominated by Zia as Prime Minister on fc specific understanding that his nomination was ti a transfer of power but only a sharing of power. tee were the conditions under which Junejo had »»ork till the end of December 1985 when urtial law was finally lifted. Before he was minated, the RCO was enforced by Zia. Junejo's position was weak and vulnerable as he had to bbour under the amendments made in the Constitution from July 1977 onwards which made

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^position of the President paramount and that of le Prime Minister subordinate. Junejo promised 4t nation that he would lift martial law and tnilian government would be restored at the arliest He did carry out his promise but at the pe of the Eighth Amendment, validating the ICO and previous amendments in the Constitution nth slight modifications. To be fair to him, it aroot be denied that he had no real option but to •dent under the pressure of the military regime lit had brought him into power. These were the Bumstances in which the Eighth Amendment tis passed by the Parliament. \fterthe lifting of martial law, Junejo tried to *it* a course independent of Zia. He annoyed iitary generals by withdrawing big staff cars

cm and replacing them with small cars. He conduct an independent foreign policy,

larly on Afghanistan, by taking into

confidence and consulting leaders of other political parties, including Benazir, the leader of the PPP. His government even tried to probe into the military bungling and fiasco at the Ojheri Camp near Islamabad on 10 April 1988, which resulted in the death of and serious injuries to a large number of civilians. This probe perhaps became the immediate cause for the dismissal of his government by Zia on 29 May 1988 in exercise of his power under Article 58(2)(b).

Although Junejo had no claim of his own to power and he was beholden to Zia for being appointed prime minister, his performance was commendable. With limited options and Zia breathing down his neck, he did what was possible for him. He restored the fundamental rights of citizens under the Constitution which had been denied to them for a very long time. He tried to put the country on the course of development and some progress was made, particularly in the area of construction of roads in rural areas and the electrification of villages. Keeping in view the conduct and character of his contemporary political leaders in Pakistan, he was an honest man. He is faulted for introducing political corruption by allowing each member of Parliament five million rupees every year for development programmes in his constituency when everyone knew that these funds would be misappropriated. But for a sugar mill in his native village, Sindhri, which he installed in association with some other partners, there is no other blemish on him personally. He was a polite and low-key political personage; traits which are not easy to find in political leaders today.

CARETAKER GOVERNMENT WITHOUT PRIME MINISTER

Zia was required under Article 48(5)(b) to appoint a caretaker cabinet. There can be no concept of a Cabinet without a prime minister but Zia, who cared little for constitutional provisions, defied them once again by appointing a caretaker Cabinet without Prime Minister. Most of the members of the Junejo Cabinet were retained. Only those people were excluded who were known to be close

to Junejo personally and loyal to him. In the provinces, Zia retained those chief ministers who had his confidence. Nawaz Sharif, who was known to be closer to Zia than to Junejo, was retained. He was even encouraged by Zia and his henchmen to take on Junejo within the Muslim League. At a stormy meeting of the Muslim League in July/ August 1988, the two factions headed by Junejo and Nawaz openly collided and there were scenes of pandemonium. Junejo was declared to have lost. The prime minister, even in a caretaker government, is essential under the Constitution despite the Eighth Amendment. He is head of the cabinet and the president is required to act in accordance with the advice of the cabinet or the prime minister.27 Even the advice of the cabinet is conveyed to the president through the prime minister. It is not always possible to call a cabinet meeting for every matter concerning the federal government and the day-to-day business of the government is run on the advice of the prime minister. Technically, cabinet meetings cannot be held without the prime minister calling them. Hence, the business of the government after
29 May 1986 was not being run according to the Constitution and the failure to appoint a caretaker prime minister was clearly unconstitutional.

THE SHARIAH ORDINANCE, 1988

The dissolution of the National Assembly and the dismissal of Junejo's government had left Zia more vulnerable than ever before. He was suddenly left alone and exposed. Martial law had been lifted and he had to run the government under the constitutional umbrella, which he was not used to. He had done to death the civilian government and the assembly which he had himself created. The dismissal of Junejo's government was a clear admission on his part of the failure of the constitutional plan he had proudly announced on
12 August 1983. He was left once again to survive by his wits. Zia was still the Chief of Army Staff. In order to give new life and legitimacy to his regime, he once again fell back on political exploitation of Islam. He promulgated an ordinance on 15 June 1988 for the enforcement *of shariah* in Pakistan.28

Shanah defined as the injunctions of J laid down in the Holy Quran and, ' declared the supreme source of law ,nPah *MAtegnmdnorm* for policy-making by the»

m the country. They were required ore! quests of repugnancy of any law or £ of law to *shanah* in the Federal Shanatir,

ques ions relating to Muslim personal b fiscal aw, or ^ law P J

collection of taxes and fees, or bank^

nsurance practice and procedure were V referred to the High Court which'

^Theimplementa^ISr; High Court m the above matters, subject to J to the Supreme Court, would not take effect«

at least six months from the date of the dec! However, the High Court had no powers to* proceedings before any court or tribunal £ mg under the law under challenge before,, It was provided that experienced and qual.fe

^awouldbeeligibleforappointment; of courts subordinate to the High Courts. SJM such *ulema* from reputable institutions offal* learning and *deeni madaris* in Pakistan or I

matt rs f T” * ”»”* ^ « matters of interpretation of the *shanah* PerMs

holding graduate and post-graduate degrees ,nt and *shanah* from the universife ”£

Intematl0na,Islamic Uersity, Islamabad be eligible as advocates,

cpgoegapra

the Bar Councils. Provision was also made for appointment of *muftis* for assistance ”

ShaTr. Urt’Athe Hi8h C°UrtS’ «* <he *W Shanat Court. A *mufti* had the right of aud«

before the Supreme Court and the Hlgh

eF * s

the Federal Shariat Court. However *mftl,*

were prohibited from pleading on behalf^ party. They could only address the courts onth mterpretation *Of shariah. A mufti* could

There was also a provision for the Islamizata of the economy for which a commission was to be appointed to undertake an examination of fiscal laws and determine whether they were repugnant to the *shariah. A* similar commission was to be

appointed for the Islamization of ; were to be taken for the prom ’ values through the mass media. be interpreted in the light of t Council of Islamic Ideology w expeditious codification of Islam! the financial obligations incurred and contracts made or to be i national institution and a foreig remain valid, binding, and operai could pass any order or make an any such obligation or contract.

From the above provisions, it i *shariah* ordinance was nothii dressing and another last step by and perpetuate himself in powei Islam. It was meant to cover up hi and malafide act of dissolvir Assembly and dismissing Junej The only practical aspect of the usher in a class of so-called *ulemt* as *muftis,* advocates, and judges, could serve as the vanguard of his and become a rival of lawyers wl and agitated by his unconstitution acts. Zia wanted to create a class within the judiciary and the B£ designs were not to succeed. Prov to rescue Pakistan from his stran]

ZIA’S DEATH, AUGUST A REVIEW OF HIS REGI

Zia was killed in an air crash on near Bahawalpur on his wa demonstration of tanks. He was was accompanied by a numb including the Chairman, Joint Committee, Chief of General Sta military officials. He was also ace US Ambassador to Pakistan a Attache. The two American dip with him in the crash. The Vic< Staff, General Mirza Aslam Beg at the tank demonstration t accompany Zia in the C-130 plan He later admitted to having fli military plane over the crash site a

h, defined as the injunctions of Islam as a in the Holy Quran and *sunnah*, was the supreme source of law m Pakistan •*undnorm* for policy-making by the courts untry. They were required to refer all

of repugnancy of any law or provision *shanah* in the Federal Shariat Court. The

relating to Muslim personal law, any *f*, or any law relating to the levy and n of taxes and fees, or banking or : practice and procedure were to be a the High Court which were to be heard led by a Bench of not less than three he implementation of the decision of the rt in the above matters, subject to appeal preme Court, would not take effect until x months from the date of the decision.

the High Court had no powers to stay gs before any court or tribunal function-

the law under challenge before it. provided that experienced and qualified uld be eligible for appointment as judges subordinate to the High Courts. Similarly, *la* from reputable institutions of Islamic md *deem madaris* in Pakistan or abroad

eligible to appear before any court in f interpretation of the *shanah.* Persons raduate and post-graduate degrees in law *nah* from the universities or the nal Islamic University, Islamabad would ble as advocates, notwithstanding
3 of the law relating to legal practitioners ar Councils. Provision was also made for tent of *muftis* for assistance to the Court, the High Courts, and the Feder ourt. A *mufti* had the right of audiem *2* Supreme Court and the High Couru rcising jurisdiction under this Ordinance •ederal Shariat Court. However, *muftis* libited from pleading on behalf of any :y could only address the courts on the ion *ofshariah.* A *mufti* could be entitled luneration of a Deputy Attorney-General n.

vas also a provision for the Islamization nomy for which a commission was to be

to undertake an examination of fiscal determine whether they were repugnant *mah.* A similar commission was to be

ipnted for the Islamization of education. Steps were to be taken for the promotion of Islam's values through the mass media. All laws were to lie interpreted in the light of the *shariah.* The Council of Islamic Ideology was to undertake expeditious codification of Islamic laws. However, lie financial obligations incurred or to be incurred and contracts made or to be made between a national institution and a foreign agency would , binding, and operative and no court any order or make any decision about my such obligation or contract. From the above provisions, it is evident that the *Amah* ordinance was nothing but window tessmg and another last step by Zia to legitimize id perpetuate himself in power in the name of Mam It was meant to cover up his unconstitutional ud malafide act of dissolving the National Assembly and dismissing Junejo's government. He only practical aspect of the ordinance was to islienn a class of so-called *ulema* for appointment ismu/to, advocates, and judges, so that this class odd serve as the vanguard of

his political support ad become a rival of lawyers who were disturbed ad agitated by his unconstitutional and impetuous ids Zia wanted to create a class of his supporters rib the judiciary and the Bar but his sordid tegns were not to succeed. Providence intervened It rescue Pakistan from his stranglehold.

ZIA'S **DEATH, AUGUST 1988, AND** i REVIEW **OF HIS REGIME**

killed in an air crash on 17 August 1988 lahawalpur on his way back from a btration of tanks. He was in uniform and us accompanied by a number of generals, •hiding the Chairman, Joint Chiefs of Staff Committee, Chief of General Staff, and other high iitory officials. He was also accompanied by the IS Ambassador to Pakistan and his Military he The two American diplomats also died nth him in the crash. The Vice Chief of Army Staff, General Mirza Aslam Beg was also present it the tank demonstration but he did not company Zia in the C-130 plane which crashed. It later admitted to having flown in his own ilitary plane over the crash site and seen the plane

burning. He did not stop but flew directly to Islamabad where the question of succession to Zia had to be decided.

On the confirmation of Zia's death, a meeting was held in Islamabad to decide the question of succession. Some of the participants like General Fazle Haq, Chief Minister of NWFP, were in favour of the imposition of martial law. However, the military chiefs present there, including Mirza Aslam Beg, did not support the idea and allowed transition to take place constitutionally. Under the Constitution,29 when the office of President becomes vacant by reason of death, resignation, or removal of the President, the chairman of the Senate acts as President until a new President is elected under the Constitution. Ghulam Ishaq Khan, chairman of the Senate, took over as acting President. One of his first acts was to appoint Mirza Aslam Beg as Chief of the Army Staff. He was thus immediately rewarded for his support to the peaceful transition of power in a constitutional manner.

Zia was initially seen as an unassuming and 'reluctant coup-maker'. He was constantly underestimated by his friends and foes. Most people saw him as a transitional figure. There were few expectations attached to him and the earlier years allowed him to grow in office, particularly because of the exclusive attention that was devoted to the Bhutto trial.

Zia came from the middle class. His hallmark was humility. His double hand-shake and triple embrace as the style of greeting became a legend, together with his routine opening of car doors for his visitors and waiting in the driveway till the visitor departed.30 He was patient and never in a hurry. He had a relaxed and stable relationship with his colleagues. He relied on them and had a *de facto* number two in General Arif for almost seven years although most of his colleagues were eased out by Zia with a 'golden handshake'.31 Though outwardly a cool man, he had a very good memory and would give a blow or two to his opponents at a time of his own convenience.

Zia was a lucky man and rode his luck for too long. Events somehow favoured Zia. Whether it was the timing of the Islamic revolution in Iran which led to the ouster of the Shah, one of Bhutto's closest supporters, or the fact that Bhutto's hanging

was followed three days later by the hanging of the former Iranian Prime Minister, Hoveida, the international impact of Bhutto's hanging was nullified. A large number of people resented Bhutto's death but were too engaged in the dynamics unleashed by the boom in the Middle East to undertake any serious attack on Zia.32 The Soviet military intervention which aroused western interest in Pakistan, or the PIA hijacking which effectively scuttled the newly formed MRD's agitation in its infancy, or even the timing of Mrs Gandhi's assassination just when she was planning a military strike against Pakistan, were all developments that somehow came to Zia's rescue. In many ways, he was an enigmatic, authoritarian military leader, who could not easily be slotted in the category of classic third world tinpot despots or military dictators. He presided over Pakistan's longest period of military rule but then himself lifted martial law to begin a unique power-sharing experience with civilian politicians. His rule was one of Pakistan's worst periods of human rights abuses, which included for the first time in the country's history the whipping of journalists, lawyers, and political workers. But he also tolerated a reasonably lively and free press, un-characteristic of third world military rulers. He had his predecessor, Bhutto, executed but then went ahead to appoint as Chief Justice of the Supreme Court one of the three judges who had sought Bhutto's acquittal. During his rule, he continued to lead and strengthen Pakistan's one organized institution, the army, but, at the same time, he ensured the weakening of all other institutions, the civil bureaucracy, the judiciary, the political parties and, of course, the Constitution. He loved to be in the limelight and to call the shots, but also consciously avoided a personality cult, unlike his predecessors. Despite his abiding pro-Americanism, he defied Washington on the nuclear issue and built a close rapport with Iran.

If one word can describe his rule, it would be 'ad hocism'. There were no long term, well thought-out policies for specific sectors like industry, agriculture, education, or health. He followed a cautious, moment to moment, reactive, one-step-at-a-time approach that was guided more

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by his instinct for political survival rather than h a well-defined vision for Pakistan.

If Zia was clear on the fate of Bhutto, he«g equally clear on the question of his on relationship with power which was more like i 'catholic marriage' in which there could be no divorce. He wanted to rule with the exclusion of political parties or politicians of stature Genuine power-sharing was out, as the dismissal of' exemplified. He wanted to maintain the statu,. as far as possible; no 'rocking of the boat' «g permissible. Finally, all through this, he knew thi the army was his primary constituency.33

Zia successfully created for himself an of a pious and devout Muslim, but his br Islam created fear even among the deeply re people of Pakistan. Zia also managed to a reputation as an honest man, despite the fact tk he developed a habit of dishonouring his owi promises, due to which some people interpreted his official title CMLA as not 'Chief Martial Lw Administrator', but 'Cancel My Last Announcement'. He is alleged to have been involved ID underhand deals for

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the sale of Stinger missiles to Iran during the Iran-Iraq war from where he is alleged to have made a lot of money. There were about half a dozen bungalows owned by Zia or his near relatives in various places, including Islamabad.34 So much for his honesty. He also fostered his image as a very friendly, direct, and simple man, unlike a typical military dictator, but his actions proved otherwise and even his 'friends' could never predict what his next move would be." He built no political institution that could outlast him. The old Constitution was not preserved nor was anything new put in its place. Even when he spawned a new political order through non-party polls in 1985, he demolished it himself three years later. His rule turned out to be a running battle between him and the political forces, with him usually holding the initiative. He, alternately, tned to use the political forces, repress them, confuse them, and confront them, combining the military techniques of surprise and deception. Towards the end of his rule, they were all getting together against him. Politicians were always suspicious of him as if waiting to be 'ambushed' by his next move.

He had little respect for state inst judiciary met with rough treatment ; He appointed and dismissed judges will. He treated the Constitution no icrap of paper which he could keep his convenience. He made basic ch constitutional structure as it stood o succeeded in changing the face of the ' \ond recognition.

Zia's emphasis on Islam helped constituency based on the support c ethos among Pakistan's clergy, se middle-class, and other conservative aety. He was not above exploitatic ntiment for his narrow political ei .ven years trying to legitimize his this endeavour, changed the stitution, destroyed and debasi the judiciary, created division before, and aggravated the ••,v»dy existed in society. The N Movement (MQM) is his gift and nation. The country was already but frictions of four nationalities and h a fifth one. His objective was t narrow, to create a balancing politic the PPP in the province of Sindh, t that he helped create has opened the nation. He caused the escalal between *shias* and *sunnis* whicr before him. His policies caused scl *sunnis,* with militant wings belong jtinni schools, going for each other his guile and brutality under the n and ostentatious religiosity, Zia powerful pillars of authoritarianisi and obscurantism. These were reci to suppress every legitimate den rights, constitutionalism, and fe country. 3 6

The Afghan war and it consequences for Pakistan a dangerous legacy. Pakistan was b support of more than three i *mohajirs.* Due to Pakistan's dee] the Afghan war effort, Pakistan for gun running and drugs. The K and escalation in crime througho

ct for political survival rather than by :d vision for Pakistan. is clear on the fate of Bhutto, he wu ;ar on the question of his with power which was more like I arriage' in which there could be no wanted to rule with the exclusion of ties or politicians of stature. Genuine ng was out, as the dismissal of Junejo . He wanted to maintain the status quo assible; no 'rocking of the boat' WM . Finally, all through this, he knew " as his primary constituency." essfully created for himself an i and devout Muslim, but his brand of
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little respect for state institutions. The met with rough treatment at his hands. ^pointed and dismissed judges at his sweet [i He treated the Constitution no better than a of paper which he could keep amending to convenience. He made basic changes in the :ional structure as it stood originally and in changing the face of the Constitution recognition.

Zia's emphasis on Islam helped him create a icy based on the support of the Islamic among Pakistan's clergy, sections of the :, and other conservative segments of He was not above exploitation of religious for his narrow political ends. Zia spent years trying to legitimize his position and, hs endeavour, changed the face of the ion, destroyed and debased institutions lie judiciary, created divisions that did not II before, and aggravated the divisions that existed in society. The Muhajir Qaumi it (MQM) is his gift and legacy to the The country was already burdened with the of four nationalities and he helped create one His objective was temporary and /, to create a balancing political force against in the province of Sindh, but the mischief he helped create has opened the wounds of Won He caused the escalation of conflict *shias* and *sunnis* which was dormant m His policies caused schisms within the i, with militant wings belonging to different schools, going for each other's throat. Hiding jiileand brutality under the mask of humility astentatious religiosity, Zia relied on two iifiii pillars of authoritarianism, military force :taurantism. These were recklessly employed every legitimate demand for human constitutionalism, and federalism in the
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Afghan war and its debilitating .ences for Pakistan are Zia's most legacy. Pakistan was burdened with the of more than three million Afghan Due to Pakistan's deep involvement in tfgtan war effort, Pakistan became a target tunning and drugs. The Klashnikov culture in crime

throughout Pakistan are a

consequence of the Afghan war. The heroin culture, unknown to Pakistan before him at such a scale, has taken root. The internal conflicts of Afghanistan and their spillover into in Pakistan are constant sources of worry, anxiety, and tension.

The army remained his primary power base and he headed it for over twelve years, the longest in the history of Pakistan. Three characteristics made Zia somewhat different both as Chief of Army Staff and as President. One was his relationship with his *'rufaqa'* (colleagues), which was defined by a close camaraderie and a relaxed bond. The other was the degree of trust and delegation of authority to his *de facto* number two, General Arif, for a long period of almost seven years. Another important difference between Zia and his military predecessor was in his being probably the first representative of a new generation of 'native' Generals.

With his sudden death on 17 August 1988, Zia left Pakistan in the same state of uncertainty and fear of the future that existed eleven years earlier when he seized power in a military coup.

After the sudden death of Zia, the transition to democracy took place constitutionally. Ghulam Ishaq Khan, who was chairman of the Senate at that time, stepped in as acting President. He announced that the general elections fixed by Zia for 16 and 19 November for National and Provincial Assemblies respectively, would be held on schedule. He also promised to hold free, fair, and impartial elections.

ORDER or DISSOLUTION OF NATIONAL ASSEMBLY

This discretionary power was exercised for the first time after the lifting of the last martial law on
29 May 1988, by General Zia. In exercise of his power under Article 58(2)(b) of the Constitution, Zia, through a short order, dissolved the National Assembly and as a consequence, the Junejo government was dismissed. The order of dissolution said:

WHEREAS the objects and purposes for which the National Assembly was elected have not been fulfilled;

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PARTIAL DEMOCRACY AND THE DEATH OF ZIA

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APPEAL BEFORE THE SUPREME COURT

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ippriate judgment striking down the exercise of such power for being unreasonable and unfair. has also held that the discretion conceded to the teident by Article 58(2)(b) of the Constitution aid not be regarded as absolute but was to be Kerned to be qualified in the sense that it was to xexerased in consonance with the objects of the that conferred it. The mere fact that the [Stances about the impugned action had il over-tones, it was observed, would not the Court from interfering with it provided shown that the action taken was violative of Constitution. It was also held that the superior in the country have an inherent duty together lie appurtenant power in any case coming them to ascertain and enforce the provisions Constitution and as this duty is derived from express provisions of the Constitution itself, the Court would not be deterred from its constitutional duty merely because action impugned had political implications. the Supreme Court upheld the judgment of Lahore High Court and found that the isite prescribed for the exercise of the in this behalf did not exist and, therefore, ncton of dissolution was not justified in law. the question of relief, the Supreme Court the judgment of the Lahore High Court and led the relief of restoration of the National

and the Cabinet.

major gain from these judgments was that Khon of the President in dissolving the Assembly at his discretion was subjected review by the superior courts. The order President was struck down as unjustified [•reasonable. These judgments, however, ifter the death of Zia on 17 August 1988. ’his sons had the audacity to boast publicly such judgments would have come had his [been alive. Nevertheless, it cannot be denied healthy beginning had been made by the courts to build on later on.

DENYING ELECTION OLS TO POLITICAL PARTIES CK DOWN

i symbols allocated to political parties play ible role in a predominantly illiterate

society by helping the voter to identify the political parties, their candidates, and the issues

involved, and in facilitating the casting of votes.40 Although a provision of the law on election to the National and Provincial Assemblies allowed allocation of prescribed symbols to each contesting candidate, there was no specific provision in the law for allocation of a symbol to a political party.41 This provision of law was challenged as invalid by Benazir before the Supreme Court being violative of the fundamental rights of freedom of association under Article 17 of the Constitution. It was contended that the citizens of Pakistan enjoyed the fundamental right of not only forming a political party but also of its functioning as such. This right necessarily extended to its participation at all stages of the constitutional process of elections, culminating in the formation of the government in a parliamentary system. It was thus contended that the provision of allocation of election symbols to candidates and not political parties fielding candidates in the elections, was violative-of Article
17 of the Constitution. It was further argued that denial of the election symbol to a political party or to a combination of political parties, was frustrating the dictum of the Supreme Court in *Benazir Bhutto v Federation of Pakistan*2* upholding the right of citizens to form and run political parties.

The Supreme Court accepted the petition, holding that the provisions of section 21(l)(b) of the Representation of the People Act, 1976 were violative of the fundamental right enshrined in Article 17(2) of the Constitution insofar as they failed to recognize the existence and participation of political parties in the process of elections, particularly in the matter of allocation of symbols and, for that reason, would be void to that extent.43

PARTY-BASED

GENERAL ELECTIONS, 1988

The elections to the National and Provincial Assemblies in Pakistan were held in a more or less peaceful atmosphere on 16 and 19 November 1988 respectively. They appeared, by and large, to be free and impartial as is evident from the almost universal acceptance of the verdict by all the

political parties. There was some resentment on the condition of identity cards being made mandatory for voters and allegations of rigging in some areas. Compared to the 1977 polls when Bhutto's Pakistan People's Party (PPP) blatantly resorted to rigging that led to violent agitations and eventually resulted in the overthrow of Bhutto's government, these elections appeared to be peaceful and impartial.

One noteworthy aspect of the elections was that the percentage of voting was rather low-less than
50 per cent. This was in contrast to the earlier elections of 1970 (58 per cent), 1977 (55 per cent), and 1985 (53 per cent), the last being held on a non-party basis. It showed a declining trend in voters' participation. The reasons could be general public apathy towards politicians and the political process, the gradual withdrawal of womenfolk, at least among the uneducated, to their shells, or the strict implementation of the condition to produce the identity card at the time of casting one's vote.

The results of the National Assembly elections confirmed earlier fears that no party would be in a position to command an absolute majority in the Parliament. Determined campaigns were launched by the two political tendencies, one spearheaded by the PPP of the Bhuttos and the other by the Islamic Democratic Alliance or the Islami Jamhoori Ittehad (IJI), led by the ruling Pakistan Muslim League. In fact, pre-poil assessments had pointed to such a possibility. The PPP assessment wing comprising eminent party men and a few US experts, had predicted in early November that it would get about 101 seats in the National Assembly elections which was eight short of an absolute majority. (Incidently, the assessment had predicted the sure defeat of IJI leader and former Prime Minister Muhammad Khan Junejo.)

A poll survey conducted by the mass circulation Urdu daily *Jang* had concluded that a coalition government was likely to be formed after the elections surico. According to the survey, the PPP was expected to get 82 and the IJI 61 seats only, far short of a comfortable majority.

However, when the votes were counted, the PPP turned out to be the largest single party, having 93 seats out of the 205 seats for which polling was held, followed by IJI that won 55 seats. More than

80 per cent of the latter's strength came fail Punjab. However, the PPP's popularly balanced at the national level, the populous1 contributing 52 seats, followed by Sindh
31 seats. The PPP's national image was reinforced as the IJI failed to muster even a: seat from Sindh whereas the PPP position in the NWFP and registered its in Balochistan. The voting pattern in elections held three days later was more or repetition of the national elections except improvements by the IJI in the province offcl Punjab and in the NWFP. While the ffl maintained its two-thirds majority in Sindh, mfc1 Punjab it was relegated to second position uni' the National Assembly elections. In the Nffl too, the PPP slid down. In Balochistan there «i no change. However, in the overall tally if Provincial Assembly seats, the PPP had 187 seas and

remained ahead of the IJI which had 146 sea In other words, the PPP had vindicated its" as the largest national political party in the. This became all the more significant in the fact that the other political force, the lil, »& an alliance of nine disparate political parties n groups, the main constituents being the Pakistan Muslim League (PML) led by Junejo, the Jama* i-Islami (JI) led by Qazi Hussain Ahmad, tin National People's Party (NPP) of Ghulam Mustafi Jatoi, and the Independent Parliamentary Group (IPG) of Fakhar Imam.

The Muhajir Qaumi Movement's (MQM) won
13 seats in the National Assembly and 26 seats in the Provincial Assembly of Sindh. Its success stands out, perhaps, as the most significant, yet not a surprising development, in the 1988 general elections. The MQM is essentially an ethnic political movement of Urdu-speaking Muslim immigrants from northern and central India who settled in the Sindh province when Pakistan was carved out of the Indian subcontinent and was developed and encouraged by'Zia to counteract the popularity of the PPP in Sindh.

NOTES

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cent of the latter's strength came from ftie
3. However, the PPP's popularity was ed at the national level, the populous Punjab buting 52 seats, followed by Sindh with its. The PPP's national image was further reed as the IJI failed to muster even a single rom Sindh whereas the PPP improved its on in the NWFP and registered its presence ilochistan. The voting pattern in provincial ons held three days later was more or less a ition of the national elections except for ovements by the IJI in the province of the ab and in the NWFP. While the PPP itained its two-thirds majority in Sindh, in the ab it was relegated to second position unlike National Assembly elections. In the NWFP, the PPP slid down. In Balochistan there was change. However, in the overall tally of yincial Assembly seats, the PPP had 187 seats remained ahead of the IJI which had 146 seats, rther words, the PPP had vindicated its position he largest national political party in the country. ,s became all the more significant in view of fact that the other political force, the IJI, was alliance of nine disparate political parties or mps, the main constituents being the Pakistan jslim League (PML) led by Junejo, the Jamaatslami (JI) led by Qazi Hussain Ahmad, the itional People's Party (NPP) of Ghulam Mustafa toi, and the Independent Parliamentary Group PG)ofFakharImam.

The Muhajir Qaumi Movement's (MQM) won i seats in the National Assembly and 26 seats in ; ie Provincial Assembly of Sindh. Its succe»j ands out, perhaps, as the most significant, yet] ot a surprising development, in the 1988 general] lections. The MQM is essentially an olitical movement of Urdu-speaking Muslim* mmigrants from northern and central India who ettled in the Sindh province when Pakistan wai ;arved out of the Indian subcontinent and wil leveloped and encouraged by'Zia to countf""* he popularity of the PPP in Sindh.

NOTES

1 Ms Benazir Bhutto was said to be suffering from some ear ailment and Mrs Nusrat Bhutto was said to be suffering from malignancy.

2 b &e frs! Afgten War V 832-} 345}, tte B^tisk forces did occupy Afghanistan and removed its King, Amir Dost Mohammad Khan, but could not hold it for long and had to leave it after heavy loss of men. Their attempts to do so hi Second Afghan War (1879-80) and in 1919-20, during King Amanullah's regime, failed.

! He became Secretary-General of the Communist Party in March 1985 on the death of Chernenkov.

\ Perestroika.

i Glasnost.

is It is said that Benazir had agreed to participate in the political leaders conference on the condition that Zia would not come or even be seen around the conference area.

I The signing of the Geneva Accord was delayed as a result of Zia's disagreement with Junejo.

I Baxter, Craig & Wasti, Syed Razi, *PakistanAuthoritarianism in the 1980s,* Vanguard Books,

Lahore. 1991, pp. 61-2.

) Ordinance No. XLII of 1979. ID Ordinance No. LIH of 1979.

II Political Parties (Amendment) Ordinance, 1985. Ordinance in of 1985. PLD 1985 Central Statutes
567

President's Order 20 of 1978. PLD 1978 Central Statutes 171.

Benazir Bhutto v Federation of Pakistan. PLD 1988 SC.416.

\M Under the 1973 Constitution originally, an Amendment Bill in the Constitution could only originate in the National Assembly and could be passed by a two-thirds majority of the total membership of the National Assembly and a majority of the total membership of the Senate. The RCO substituted Article 239 (relating to Constitution Amendment Bill) and allowed a Constitutional Amendment Bill to originate in any House and both the Houses are required to pass the Amendment Bill by two-third majority of their total membership. It was also provided that after the Bill was passed by the Parliament, the same was to be transmitted to the Provincial Assemblies each of which was to pass it by a majority of the total number of its members present and voting.

P.O. 20 of 1985 deleted the role of the Provincial

Assemblies in the Amendment procedure except in case of alteration in the limits of a province.

15. PLD 1973 S.C. 49.

16. Ghulam Mustafa Khar v Pakistan, PLD 1988

***Lahore* 40**

17. Federation of Pakistan v Ghulam Mustafa Khar, PLD 1989 S.C. 26.

18. Article 4 of the Constitution embodies ' due process clause'.

19. National Bank of Pakistan v Wafaqi Mohtasib (Ombudsman), PLD 1992 Karachi 339.

20. Benazir Bhutto v Federation of Pakistan, PLD 1988 S.C. 416.

21. Joshi, V.T., *Pakistan: Zia to Benazir,* 1995, Konark Publishers, New Delhi, p. 77.

22. Namely, Khakan Abbasi.

23. Husain, Mushahid, *Pakistan's Politics-The Zia Years,* 1990, Progressive Publishers, Ichhra, Lahore, pp. 245-7.

24. Arif, General Khalid Mahmud, *Working with Zia: Pakistan's Power Politics, 1977-1988* 1995, Oxford University Press, Karachi, p. 392.

25. *The Nation,* 31 May 1988.

26. Article 48(5).

27. Article 48(1).

28. Enforcement of Shariah Ordinance, 1988. (Ordinance I of 1988) PLD 1988 Central Statutes 29.

29. Article 49(1).

30. Husain, Mushahid, *Pakistan's Politics-The Zia Years,* 1990, Progressive Publishers, Ichhra, Lahore, p. 134.

31. He offered his parting colleagues diplomatic offices like Ambassadorships etc. He also gave them commercial and residential plots of very high value so that they could retire in comfort.

32. Burki, Shahid Javed and Baxter, Craig, *Pakistan Under the Military,* 1991, Westview Press, Boulder, Colorado, p. 20.

33. Husain, Mushahid, *Pakistan's Politics - The Zia Years, supra, note 30, p. 266.*

34. Joshi, V.T., *Pakistan: Zia to Benazir, supra,* note 21, p. 55.

35. Hymen, Anthony, *Pakistan: Zia and After,* 1989, Abhinav Publications, New Delhi, p. 105.

36. Maluka, Zulfiqar Khalid, *The Myth of Constitutionalism in Pakistan,* 1995, Oxford University Press, Karachi, p. 276.

37. Reproduced on pp. 756-7 in PLD 1988 Lahore 725.

38. PLD 1988 Lahore 725

39. PLD 1989 S.C. 166

40. Chaudhry, Barrister

The Leading r

41. The Representation of the People Act, I1 Section 21(l)(b)

42. PLD 1988 S.C. 416.

43. Benazir Bhutto v The Federation of Pakistan, (
1989 S.C. 66.

PART SEV

The Post-; August 19

iresentation of the People Act, 1976,

8 S.C 416.

3hutto v The Federation of Pakistan, PLD

.66.

FART SEVEN

Ihe Post-Zia Period: August 1988 Onwards

(in a vote bureaucrat governments in any every important other ideas. He was, president and was aspiring -term of his own. The IJI was in
5ause it was a creation of the

31 Benazir’: A Divid*

It is apparent from the earhe discussion polls gave a divide the PPP and the IJI In the > with 207 general seats,1 the 1 majority but emerged as the 1 with 93 seats, followed by 55 Ul The PPP still required 1 majonty The independents h< which was a very important could tip the balance either v, them was free to make his \nother important factor w£ secured 13 seats in the Nation; the urban areas of Karachi ai political parties did not fare polls Only JUI (Fazl ur Rah 7 seats, 3 from NWFP and areas of Balochistan

The PPP, headed by Ben, task of forming alliances witV or independents to be able ti thp National Assembly so a1 the government. Nawaz Shi made an announcement on t

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government It was difi jj f&rtf £>vt £>f 2t>7, t

government or obtain a vot Shanf was apparently rely Ghulam Ishaq to manoeuv He had been helped \n the] by the establishment, partu *ihe results proved, the nun*

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^*£.v* ^fc-^L.*.1*^ ^>*^>is^-i-t*^srs”E.*>

The crucial *factor in the pi*

irent from the earlier chapter that the i polls gave a divided verdict between »and the IJI. In the National Assembly, }] general seats,1 the PPP did not get a / but emerged as the largest single party
193 seats, followed by 55 seats taken by the : PPP still required 11 seats to form a ; The independents had secured 27 seats i was a very important factor because they U tip the balance either way and each one of i was free to make his or her own choice. .; important factor was the MQM which _.d 13 seats in the National Assembly, all from jioiban areas of Karachi and Hyderabad. Other _. 1 parties did not fare well at the national s Only JUI (Fazl ur Rahman Group) secured i, 3 from NWFP and 4 from the Pakhtoon jofBalochistan.

f Ik PPP, headed by Benazir Bhutto, faced the Jrfforming alliances with other political parties ndependents to be able to show its majority in ^National Assembly so as to be invited to form k government. Nawaz Sharif, head of the IJI, ban announcement on the day following the I polls that the IJI would form the new ment It was difficult to see how, with out of 207, the IJI could form a .jnent or obtain a vote of confidence. Nawaz rfwas apparently relying on acting President __.a Ishaq to manoeuvre things in his favour. kwbeen helped in the planning of the elections Lie establishment, particularly by the ISI and as Jiiesults proved, the number of seats the IJI had i were much above its expectations.

m NOMINATED PRIME MINISTER

k crucial factor in the power equation was the ntial power to nominate the prime minister.

Under the original scheme of the Constitution, the prime minister was to be elected by the National Assembly in its first session immediately after the election of the Speaker and the Deputy Speaker. The RCO amended the Constitution and the president was empowered to appoint, at his discretion, any member of the National Assembly as prime minister who, in his opinion, could command the confidence of the majority of the National Assembly.2 This provision was modified by the Eighth Amendment and this power of the President was limited to five years, that is, until
20 March 1990, after which date the President had to invite that member of the National Assembly who commanded the confidence of the majority of its members in a poll held for the purpose, to take over as prime minister.3

Thus, in 1988, the president had the discretionary power to appoint the prime minister, an unfettered power particularly in the event of a divided verdict where no party had an absolute majority. No doubt, the person appointed as prime minister had to obtain a vote of confidence from the National Assembly within a period of sixty days,4 but this could be managed by those who held the reins of power. The independents, in particular, were likely to go with whoever was nominated by the president and thus had been brought into power. Understandably, the IJI was counting on this presidential power. If the president had nominated someone from the IJI, he would have time (sixty days), to win over fifty other members to form a majority and to obtain a vote of confidence. But Ishaq, a consummate bureaucrat who had survived under all governments in Pakistan and had served in nearly every important administrative position, had

other ideas. He was, after all, only an acting president and was aspiring for a full five-year term of his own. The IJI was in his pocket because it was a creation of the

establishment that he headed. Ishaq had good rapport with the chiefs of the armed forces, so he found his options open. He could obtain the votes of the IJI and the others that the establishment could deliver to him. The only opposition that he could face was from the PPP. Ishaq could make a deal with the PPP by appointing Benazir Prime Minister. With the help of the establishment, he had already delivered a majority in the Provincial Assembly of the Punjab to the IJI, guaranteeing Chief Ministership to Nawaz Sharif who could be used to contain Benazir Bhutto at the centre.

Benazir had her own reasons to seek power. She received two sets of advice. Perhaps the more rational one was not to make a compromise and not to seek the office of prime minister at a price. She was only thirty-five-years-old and could bide her time. With a hostile government in the Punjab under the protection of the establishment and the President, and the establishment breathing down her neck, she could not succeed and would fall into the trap of those who wanted to prove that she was not up to the mark. The other advice was that she should not miss the opportunity to take power. A majority of members of her party had suffered for eleven years at the hands of Zia and his *junta* and they were desperate to get into power regardless of the terms and conditions being offered to them. Benazir went for the second option and embarked upon the course to seek the office of prime minister. Her first step was to forge alliances with the MQM and the JUI (FR). These alliances gave her a clear majority in the National Assembly. Some of the independents were also

won over.

However, the most important move was the deal with Ishaq Khan who was offered full support of the PPP in the forthcoming presidential election. This eventually resulted in Benazir's appointment as Prime Minister of Pakistan on 1 December 1988.

ISHAQ ELECTED PRESIDENT

According to the consummation of the deal between Ishaq and Benazir, the PPP voted for Ishaq. Ishaq had also been adopted as the candidate of the IJI. Other candidates, of whom Nawabzada Nasrullah was the most prominent, were ignored.

Nawabzada's party was a constituent of the! which had fought alongside the PPP again! for the restoration of democracy. The PPP i its old ally in favour of an old bureaucrat i used his position to make a deal.

Ishaq won the election with an overall majority. Four candidates, including Nawabzada Nasrullah Khan, Ahmad E H and Muhammad Nauroz Malik, took part in fcl polls. The votes they received were cou4| according to the procedure laid down ID ' Constitution. The results were:5

1. Ahmad E.H. Jaffar 6 vota

2. Ghulam Ishaq Khan 603 \«|

3. Muhammad Nauroz Khan Malik 3 vota

4. Nawabzada Nasrullah Khan 140 vota I

Despite the fact that Ishaq hailed from NWI the Awami National Party (ANP) decided to I support the Nawabzada from the Punjab This»as j done apparently because ANP beleved u tkt | political credentials of Nawabzada instead of Ishaq's whom they called a I and a staunch supporter of the legacy of Zia Similarly, Jamiat-i-Ulema-i-Islam (JUI) its support for Nawabzada as a more candidate. The JUI believed that Ishaq being a one time comrade of Zia should not be supported because he could prove dangerous to the prospects of democracy in Pakistan.

PROVINCIAL GOVERNMENTS FORMED

In Sindh, the PPP had won 67 out of a 100 general! seats in the Provincial Assembly. Out of! 31 independents elected to the Sindh Assembly,
26 belonged to the MQM. They had not used the party ticket but the voters in Karachi and Hyderabad knew that though independent, they represented the MQM. Hence, the PPP had no difficulty in forming a government. In any case, the Chief Ministers were not to be appointed by the Governors but were to be elected by the respective provincial assemblies. The period until the Governors could appoint chief ministers had lapsed on 20 March 1988.6 Hence, Qaim Ah Shah,

- *r the PPP, was easily e , nominee of the rrr,

Minister of Sinon.

the situation was

to the independents and by makm th. Punjab

the ui *v** to 45), the Provincial Assembly.! against 94 seats won by the!

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If Baiochistan, the sUuatio

to UI, 4 to the PPP,

minor political parties and m< Sculttoformagoverarnen

largest parties, JUI an

, after that, to elect the C Out of a total of

BENAZIR’S FIRST TERM: A DIVIDED HOUSE

409

tv was a constituent of the MRD /alongside the PPP against Z* a of democracy. The PPP ignored avour of an old bureaucrat who L to make a deal, e election with an overwhelming
- candidates, including Ishaq, ;rullah Khan, Ahmad E.H. Jaffa, i Nauroz Malik, took part m the es they received were counted the procedure laid down in the he results were:5

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Khan Malik 3 votes
140 votes,

fact that Ishaq hailed from NWFP,

National Party (ANP) decided•« Wabzada from the Punjab. This*

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ie of Zia should not be supw ouldprove dangerous to the

,y in Pakistan.

CIAL GOVERNMENTS >

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could appoint chid. <- March 1988.’ Hence, Qaim M

nominee of the PPP, was easily elected as the WMinister of Sindh.

In the NWFP, the situation was complex. No ’it political party had won an absolute majority Li the Provincial Assembly. Out of 80 general Bts,the IJI had won the highest number of seats, 13 followed by the PPP which won 22, and the which won 13 seats. As many as 15 I alependents had been elected. In this situation,
1 nd ANP could form the government. Benazir pached Wali Khan, head of the ANP, to form idition government and the offer was accepted. I SUM, the PPP, in coalition with ANP, by

winning IMF a number of independents, formed the wrnment with Aftab Sherpao as the Chief 1 faster. The coalition between the PPP and ANP loot last very long in the NWFP and after some ermg, the ANP withdrew from the Imminent However, Sherpao held on as Chief •with a paper thin majority by holding on ! independents and by making some dents in | It opposition.

situation in the Punjab was the most for the PPP. Despite winning more seats :Punjab in the National Assembly as against I IJI (52 to 45), the situation reversed in the ml Assembly. The IJI got 108 seats as JJBI94 seats won by the PPP. With the help of (of the independents (32 in number), the IJI !to form a government in the Punjab with : Sharif as the Chief Minister. The PPP did within its power to prevent this from ngbut failed. The IJI had support from the ent and the establishment who were ; in keeping Benazir in check by having a aent of the opposition installed in the

|Balochistan, the situation was even more i. Out of 40 general seats, 11 went to JUI

\ 10 to Balochistan National Alliance (BNA),
1,4 to the PPP, and the remaining seven to

i political parties and independents. It was Ito form a government, particularly when

0 largest parties, JUI and BNA, did not see |to eye with one another. The Provincial

nblv met on 2 December 1988 to elect the

1 and the Deputy Speaker of the assembly |ifter that, to elect the Chief Minister of the

Out of a total of 44 members of the

assembly, the Speaker and 42 members were present. Mir Zafarullah Khan Jamali was proposed as Chief Minister. He received 21 votes in favour and 21 votes against him. The Speaker issued a certificate declaring him elected by securing
22 votes including the casting vote of the Speaker. In this way, he formed a very fragile government in the first week of December 1988.

DISSOLUTION OF THE BALOCHISTAN PROVINCIAL ASSEMBLY

The Balochistan Chief Minister, Jamali was in a vulnerable position and he was in fear of losing his office on a vote of no-confidence at any time. On 15 December 1988, he advised the Governor to dissolve the Assembly. The dissolution was challenged on the ground that Jamali had not obtained the majority vote of the Provincial Assembly, which meant that he had not obtained a vote of confidence and, therefore, he was not empowered to advise the dissolution of the Assembly.

A full Bench of the Balochistan High Court accepted this contention, thus holding that unless the Chief Minister had obtained a vote of confidence from a majority of the total members of the assembly (not merely a majority of those present and voting), he could not advise the Governor

to dissolve the Provincial Assembly as he was not a Chief Minister within the meaning of Article 112 of the Constitution.7

This judgment opened the door to challenge an order of dissolution of a Provincial Assembly even where it was done on the advice of the Chief Minister. Prior to this case, it was generally believed that dissolution of an assembly, National or Provincial, if based on the advice of the Prime Minister or a Chief Minister (as the case may be), could not be subject to judicial review by the courts.

THE HAJI SAIFULLAH CASE

After the Junejo government was dismissed by Zia in May 1988, Zia chose to appoint a caretaker government without a prime minister. Thus,

i f

Pakistan was without a prime minister for more than six months till Benazir was sworn in in December 1988. This led to a serious constitutional question as to whether the federal government was functioning legally and constitutionally during this period and whether the actions taken and the orders passed during this period could be regarded as valid. The Supreme Court considered this matter in *''Federation of Pakistan v Muhammad Saifullah Khan'** and held that the office of the prime minister was necessary at all times for running the affairs of the country and that the President should have appointed a prime minister to head a caretaker cabinet. It was also observed that the absence of the prime minister from a caretaker cabinet altered the character of the Constitution from a parliamentary democracy to a presidential system of government and was tantamount to violation and breach of the essential features of the Constitution which the courts could neither countenance nor condone. However, the legal consequences of the individual acts done or actions already taken and suffered were left to be decided in individual cases when they were brought before the court.

This judgment led the federal government to conclude that all appointments, including judicial ones, were invalid during the period when there was no prime minister. A press note to this effect was issued by the Law Ministry. As a result, more than thirty judges of the superior courts appointed during the said period did not function for about a week. This matter was resolved in a review petition9 in which the Supreme Court held that a portion of the press note did not appear to reflect accurately the judgment of the Supreme Court insofar as it stated the consequences of the judgment to the effect that actions taken, orders passed, or appointments made between 29 May
1988 and 2 December 1988 by the President, which were required to be taken, passed, or made on the advice of the Prime Minister were illegal and required regularization and re-affirmation awaiting which the appointees should suspend the performance of their official duties. The Court held that such relief was in fact requested from the Court but was not granted.10 The findings, it was observed, on all matters in controversy were recorded to remove all doubts and ambiguities with

regard to distribution of functions: under the constitution for guidance in the!

MOTION OF ’NO-CONFIDENCE’ **AGAINST BENAZIR**

As already noted, it did not take long for and the PPP to fall out with their alb alliance with the MQM did not last long ami latter abrogated its eleven-month old accord the PPP alleging that the PPP had failed implement even a single clause It entered • secret agreement with the IJI which was splii September 1989.” The Awami National Put (ANP) of Wali Khan, though ideologically dj to the PPP, also fell out with the PPP due to i’ latter’s style of governance. The governmenii] Punjab led by Nawaz Sharif of the IJI wasalrak hostile and, with the support of the MQM andfo1 ANP, the common front calling itself Corny Opposition Parties (COP), gained strength ill moved

a motion of no-confidence against! Benazir government.

On 23 October 1989, the COP handed overt1 the Secretary of the National Assembly a note for a no-confidence resolution against Benazir 1 claimed the support of 129 to 135 MNAs (out od total of 237) including 14 MQM members However, the leading members of the PPI expressed confidence that the opposition's noconfidence motion would be defeated Nevertheless, the notice submitted for the vote o no-confidence was signed by 86 MNAs belonging to all the constituents of the COP, including sow independents.14 On 24 October, the resolution wj formally submitted to the National Assembly and
98 opposition members stood up in its support The Speaker granted leave to move the resolute and 1 November was fixed for voting on it1S

The no-confidence motion set the stage for i showdown between the government and the opposition. The opposition, with the tacit support of the President and the resources of the provincial government of the Punjab under IJI chief Nawaz Sharif, embarked upon an endeavour to win ova an adequate number of members to carry the motion. The government of Balochistan, headed by Nawab Muhammad Akbar Khan Bugti, threw

its lot in favour of the no-coi

* government took steps to «

were no dissensions in its rank

members of the opposition were-

Lr allegiance. There were all government physically prevente, LosUion from attending th, Zonal Assembly during the Wnfidence motion. The opposit,

Sport of the army to prote, poached the President who a mltenance of law and order

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fc reach of the opposition. On 1 November 1989, the nc

W8S debated and put to vote initiated by the leader *o* the National Assembly, Ghularn -cused the government oitai

-d older, and for being me! JJter a couple of speeches, passion and eloquence a Lernment of eleven montl Jen put to vote and defeated present in the National Ass' lotion and 124 members pre ied the motion. Five mei were absent. There we the ranks of the opposition government- Some of the , the opposition were later .nducted into the Cabinet an loans from nationalized ban

CONFLICT OVER Di POWERS BETWEEN AND THE PRIME M

Article 94 of the Constituti

allowed the prime mimste

along with his cabinet on

National Assembly till su(

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rd to distribution of functions and powers :r the constitution for guidance in the future.

DTION OF 'NO-CONFIDENCE' AINST BENAZIR

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n its lot in favour of the no-confidence motion. He government took steps to ensure that there we no dissensions in its ranks and that some umbers of the opposition were induced to switch Aeir allegiance. There were allegations that the lovemment physically prevented members of the opposition from attending the session of the Assembly during the vote on the noice motion. The opposition even sought the of the army to protect its MNAs and ;hed the President who assured them of the ice of law and order. Meanwhile, more I MNAs from the PPP were taken to and kept there so that they were beyond reach of the opposition.16

On 1 November 1989, the no-confidence motion debated and put to vote. The debate was by the leader of the opposition in the Assembly, Ghulam Mustafa Jatoi, who the government of failure to maintain law order, and for being inefficient and corrupt. a couple of speeches, Benazir spoke with fusion and eloquence and defended her jwnment of eleven months. The motion was to put to vote and defeated. Only 107 members |Bsent in the National Assembly voted for the utaiand 124 members present in the Assembly the motion. Five members, including Wali were absent. There were six defections from ranks of the opposition and three from the ient.17 Some of the defecting members of isition were later rewarded by being into the Cabinet and by the award of soft from nationalized banks.

CONFLICT **OVER DIVISION OF** foWERS **BETWEEN THE PRESIDENT**

JTHE PRIME MINISTER

le 94 of the Constitution, in its original form,
1 the prime minister to continue in office *I* with his cabinet on the dissolution of the il Assembly till such time that a successor selected by the National Assembly, after the g general elections. Since, under the original ic, the dissolution of the National Assembly E only possible on the advice of the prime Bister, the president could not appoint a

caretaker government for the period till the election of a new prime minister. However, the RCO as modified by the Eighth Amendment, empowered the President to dissolve the National Assembly at his discretion and also to appoint a caretaker Cabinet. Even when the National Assembly was dissolved on the advice of the prime minister, the continuation of the incumbent prime minister in office was no longer guaranteed. Under Article 94, as replaced by the RCO and the Eighth Amendment, it is the option of the president to ask the prime minister to continue to hold office until his successor. This can also mean that the president might not ask the prime minister to continue in office and might appoint a caretaker prime minister and cabinet in such a situation.

These provisions again made the office of the president very powerful. He had the discretion to appoint a caretaker cabinet of his choice not only at the centre but also in the provinces. This power had the effect of influencing and affecting the future course of events, in particular the conduct and results of the ensuing elections. Caretaker governments could be key actors in the manipulation of the election machinery with obvious effects on the results.

There were other areas under the Constitution, as amended by the RCO and the Eighth Amendment, where the president was given clear ascendancy; for instance, the appointment of chiefs of the armed forces and the chief election commissioner. These appointments could be made by the president at his discretion without the advice of or even consultation with the prime minister. Even in the appointment of governors, the president had the final say. He was only required to consult with the prime minister. There was no requirement to act on his/her advice.18 Even if the president was required to act on the advice of the prime minister or the cabinet in other matters, he could still send back the matter to the prime minister or the cabinet, as the case may be, for reconsideration of the advice.19

It did not thus take long before the President and the Prime Minister ran into conflict with one another. Ishaq was obviously supporting Nawaz Sharif in his opposition to Benazir and was making life difficult for her. He sat on a number of matters referred to him by her. He was constantly asserting

his powers and position and avoided making appointments on her advice. Consequently, there was widespread frustration in the federal government. Some of the President's stalling actions were not without justification because recommendations made to him were often irresponsible and outrageous, still, the dictates of the Constitution had to be obeyed and the Prime Minister and the Cabinet were to allowed to perform their constitutional functions.

The conflict between the President and the Prime Minister was particularly sharp in two areas: the appointment of military chiefs and superior court judges. When, at the end of 1989, the term of office of the Chairman of the Joint Chiefs of Staff and Chiefs of Naval and Air Staff was nearing expiry, it was given out from the prime ministerial circles that Benazir wanted to have a say' in the appointment of their successors. Ishaq refused to have any of this because these appointments were within his discretionary domain. This caused enormous tension in relations between the top constitutional functionaries. The other major irritant was the appointment of judges of the superior courts. Even in this area, the President asserted himself and sat on the appointments advised by the Prime Minister.

CONFLICT OVER THE APPOINTMENT OF JUDGES

On the face of it, it appears that appointments to the superior courts were required to be made on the advice of the prime minister, if Articles 177 and 193 were read in conformity with Article 48. Articles 177 and 193 do not state that the appointments of judges of the Supreme Court and High Courts could be made by the president at his discretion. Therefore, the obvious construction that can be placed on these Articles is that such appointments should be made on the advice of the prime minister as envisaged under Article 48. This matter was once tested before the courts, but it was still in a state of uncertainty. The Lahore High Court in *'M.D. Tahir v Federal Government',20* 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 argument concern advice of the prime minister under Article 48 w brushed aside with the observation that *m* Article 193 specifically dealt with appointeei of High Court judges and Article 48 ordm generally that, in exercise of his functions,! president should act in accordance with the adviet of the cabinet or the prime minister, therein under the rules of statutory interpretation, «kt| there are two provisions, one of which is speci in character and the other of a general nature, to the specific provision ought to be applied unfettered by the general one.

This judgment was belatedly challenged by ikt federal government before the Supreme Court ant the case was argued at length before a full of the Supreme Court consisting of eleven judja During the course of the hearing the judges on tkt Bench were sharply divided on the issue. T1 obvious from observations they made during the hearing which clearly ran con one another.21 However, after lengthy argument spread over a number of weeks, the federal government, apparently under the pressure of the President, withdrew the petition for leave to appeal purportedly on the basis of mutual agreement reached between the President and the Prime Minister. No final decision on this question could, therefore, be rendered by the Supreme Court.

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The Supreme Court,22 excised a para of the judgment of the Lahore High Court in which the aforesaid reasoning was given. The question, thus, remained unresolved. It would only be appropriate that the provision of Article 48 regarding advice of the prime minister be read in consonance with Articles
177 and 193, meaning thereby that the appointment of the judges of the Superior Courts be made w the advice of the prime minister.

Minister and the Cabinet cease forthwith. The order passed by ’ based on the following reasons:

(a) The utility and efficacy Assembly was defeai dissensions and frictior scandalous ’horse-tradi gain, and furtherance of corrupt practices and ind

(b) The government of th willfully undermined a federal government usu of the provinces resi confrontation, and de affecting the integrity, s being of Pakistan.

(c) Corruption and nepot government, its ft authorities, and agencif proportions, that the or the government in ac provisions of the const

(d) The federal governme under Article 148(3) o protect the province internal disturbances, among citizens and failure of the provin< its law-enforcing agen behalf, failed to ad provisions of the Con

(e) The government of violated the provisior and the law by rid judiciary and undermi of Pakistan

DISSOLUTION OF NATIONAL ASSEMBLY

The conflict between the President and the Prime Minister had its drop scene on 6 August 1990 when the President applied *coup de grace* by issuing an order under Article 58(2)(b) of the Constitution, thereby dissolving the National Assembly of Pakistan. In consequence thereof, the Prime

DISSOLUTION OF [PROVINCIAL ASSEM

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I The order of dissolution of 1 was soon followed by tr provincial assemblies. Tl Balochistan and the Punjab provincial governors to di provincial assemblies. Th have PPP governments. In t of Sindh and the NWFP,

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i taste and the Cabinet ceased to hold office whwith. The order passed by the President was used on the following reasons:

The utility and efficacy of the National Assembly was defeated by internal dissensions and frictions, persistent and scandalous 'horse-trading' for political gam, and furtherance of personal interests, corrupt practices and inducement. i) The government of the federation was willfully undermined and impaired. The federal government usurped the authority of the provinces resulting in discord, confrontation, and deadlock, adversely affecting the integrity, solidarity, and wellbeing of Pakistan.

|(c) Corruption and nepotism in the federal government, its functionaries and authorities, and agencies had reached such proportions, that the orderly functioning of the government in accordance with the provisions of the constitution (J) The federal government failed in its duty under Article 148(3) of the Constitution to protect the province of Sindh against internal disturbances, politics of violence among citizens and widely condemned failure of the provincial government and its law-enforcing agencies, and also, in this behalf, failed to act under appropriate provisions of the Constitution. The government of the federation has violated the provisions of the Constitution and the law by ridiculing the superior judiciary and undermining the civil services of Pakistan

OLUTION OF NCIAL ASSEMBLIES

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iviuer of dissolution of the National Assembly (soon followed by the dissolution of the ncial assemblies. The chief ministers of astan and the Punjab advised their respective Rial governors to dissolve their respective lal assemblies. These provinces did not P governments. In the PPP ruled provinces i and the NWFP, the governors had to

exercise their discretionary powers under Article
112 to dissolve their respective provincial assemblies.

BENAZIR'S FIRST TERM REVIEWED

After eleven long years of the rule of Zia and his military *junta,* the induction of Benazir, a young and well-educated woman as Prime Minister appeared to be a pleasant change. The people of Pakistan had pinned their hopes and expectations on her. Unfortunately, they were deeply disappointed. Benazir had no economic programme, no future plans, and no clear idea about how to govern. Her claim to power and political ascendancy was purely hereditary, her political capital being the suffering inflicted on the family from the execution of her father by Zia and her confinement after his execution.24 She wasted her political capital and got bogged down in unnecessary and wasteful confrontation with the provincial government of Punjab headed by Nawaz Sharif. Her main concern appeared to be to benefit the members of her party who claimed to have

suffered for her.

One of her first acts on assuming office was to grant clemency under Article 45 of the Constitution, including commutation of all death sentences awarded by the military or other courts upto 6 December 1988, to life imprisonment. There was obviously no justification for the commutation of death sentences awarded by ordinary courts. Some of the most hardened offenders were spared execution for no reason whatsoever. This order is reminiscent of the times of monarchy when a King or Queen, upon ascending the throne, would remit or commute sentences of the prisoners as a mark of celebration on being crowned. This order was challenged before the Lahore High Court. The Court held the order of clemency as repugnant to Article 2-A. It was also held that the cases in which death sentences had been awarded, the President had no power to commute, remit, or pardon because, under Islam, pardon in such cases is only vested with the heirs of the deceased.25 On appeal, the Supreme Court reversed the judgment of the High Court.26 It was observed that if the Court found that Article 45 of the Constitution

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contravenes the injunctions of Islam in some respects, it had to bring the transgression to the notice of Parliament which alone was competent to amend the Constitution, so that it could initiate remedial legislation to bring the impugned provision in conformity with the injunctions of Islam.

Benazir Bhutto's foreign policy was without any direction. She had no control over foreign policy and did not even have the option to appoint the Foreign Minister.27 Her policy on Afghanistan was clearly a failure. Her government was seriously embarrassed by her husband, Asif Ali Zardari, who, it was generally alleged, went on a rampage of corruption, graft, bribery, blackmail, high handedness, and even acts of terrorism.28 Although these allegations might be difficult to prove against him in a court of law for want of evidence, yet there was little doubt in the perception of the people that many of the rumours circulating about him were true. Benazir appeared to be helpless in curbing her husband and his father from causing enormous embarrassment to her government. Several of her ministers were known to be inept and corrupt. Many of them were in a hurry to make a quick buck as if they knew that the government was not going to last long.

Not only that, Benazir also involved herself in disputes and confrontation with the President and military, particularly in the matter of appointment of the military chiefs and judges of superior courts. She was accused of political horse trading, particularly at the time of voting on the resolution for no confidence against her. She showered political favours on her partymen in the form of government jobs and plots of land in Islamabad.29 The law and order situation in the province of Sindh, where PPP was in power, went completely out of hand.

When her government was ultimately dismissed on 6 August 1990 by the President under Article 58(2)(b), there were few who could defend its performance. It was a sorry end to the high hopes held and the great confidence reposed by the people of Pakistan in Benazir Bhutto.

OF JATOI

THE CARETAKER GOVERNMEM I ORDER OF DISSOLUTION

NATIONAL ASSEMBLY

CHALLENGED AND Cou VERDICTS

f dissolution of the N;

When Benazir's government was dismissal; August 1990, the President's power to appou., caretaker cabinet at the federal as well n provincial levels, was abused to the Instead of appointing neutral and non-| caretaker cabinets, all the people who wn opposition and were known to be openly hostile the dismissed government were appointed in caretaker cabinets at the

federal as well as at provincial levels. The leader of the opposite: the erstwhile National Assembly, Ghulam Mian, Jatoi, was appointed as the caretaker Minister. Similarly, the chief ministers, parncuM from Sindh and the Punjab, were taken front. opposition, especially from amongst those who were openly hostile to the PPP. The carettb' Chief Minister of the Punjab, Ghulam Wyne, was a hand-picked nominee of Nawaz Sharif. Wyne openly campaigned with Nawa throughout the Punjab and made available to hi all the resources of the provincial government Ht was rewarded after the general elections by taij elected chief minister of the Punjab in the UI government.

The caretakers, under the guidance and supp of the President, were to ensure that the PPP would not return to power and the favountes of the President would get themselves installed as pnmt minister of Pakistan and chief ministers of the provinces.30 The desired results were eventually achieved with Nawaz Sharif elected prime minister and all provincial governments hostile to the PPP Even in Sindh, where PPP emerged as the largest party in the Provincial Assembly, although not in a majority, it was not allowed to form the government and was kept out of power through clever manoeuvering by an extremely unscrupulous character, Jam Sadiq Ali, who later became the Chief Minister of Sindh.

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federate could not be earned with the provisions of the Co «ll to the electorate had b STopinion could reasonably others, the following ac

and could be carried on in the National Assembl reason that the govern, no representation in the twenty-months' tenu Ordinances/Bills pres National Assembly, on passed by Parliament ^ thirty-five were not p allowed to lapse. , The federal governm failed to perform its Article 148(3) of tl protecting the provin. internal disturbance unabated and assumec beyond the control government. Despite r

President, clear viei Governor of Sindh, ar Attorney-General, res Article 245 of the < taken resulting in UK and property, there integrity and solidan The Constitution en\ Islamic Federal R' federal government a had well-defined p operation. A median

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AKER GOVERNMENT

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TERM: A DIVIDED HOUSE

CHALLENGED **AND COURT** VERDICTS

r of dissolution of the National Assembly *\wiMknged before the Lahore High Court and* ItWi High Court. A full Bench of the Lahore kCourt decided the writ petition upholding the *'ssolution passed by the President.31 The* lOnt held that the President was justified in Iking the opinion that the government of the |slmtion could not be carried on in accordance he provisions of the Constitution and an I to the electorate had become necessary. s opinion could reasonably be formed from, t others, the following acts or omissions of **It** federal government:

i No substantial legislative work had been and could be carried on by the government in the National Assembly *inter alia* for the reason that the government had virtually no representation in the Senate. During its twenty-months' tenure, out of fifty Ordinances/Bills presented before the National Assembly, only fifteen could be passed by Parliament while the remaining thirty-five were not processed and were allowed to lapse.

The federal government had miserably failed to perform its obligations under Article 148(3) of the Constitution in protecting the province of Sindh against internal disturbances which continued unabated and assumed serious proportions beyond the control of the provincial government. Despite repeated advice of the President, clear view expressed by the Governor of Sindh, and opinion of the then Attorney-General, resort to the provision of Article 245 of the Constitution was not taken resulting in the colossal loss of life and property, thereby endangering the integrity and solidarity of Pakistan. The Constitution envisaged Pakistan as an Islamic

Federal Republic wherein the federal government and the federating units had well-defined powers and sphere of operation. A mechanism had been provided

IV.

v.

VI.

tne Constitution to reso/ve disputes tfie federation and its units and between the units *inter se.* Inaction on the part of the federation in resolving such *disputes coufcf endanger the federaf* structure of the state. In this regard, one of the important institutions, the Council of Common Interests constituted under Article
153 of the Constitution, was meant to *formulate and regulate policies in relation* to matters in Part II of the Federal Legislative List and Entry 34 (Electricity) in the Concurrent List (reference Article
154). The Council supervises and controls the related institutions and is also required to determine the rates at which net profits are to be calculated in terms of Article 161. The documents on record revealed that the federal government, despite repeated demands by three out of four federating units, and a unanimous resolution of the Senate, failed to call a meeting of the Council of Common Interests resulting in polarization and confrontation between the federation and two federating units which eventually obliged them to file a suit against the federation in the Supreme Court of Pakistan.

The formation of the National Finance Commission, another important institution, required to be setup under Article 160 of the Constitution for distribution of revenues between the federation and the provinces, was unnecessarily delayed with the result that not a single meeting could be convened, thereby depriving the federating units redress of their grievances. The provincial autonomy guaranteed by the Constitution was eroded by launching the Peoples' Works Programme in a manner contrary to Article 97 without any legislative backing.

Article 14 of the Constitution guaranteed that the dignity of man and, subject to law, the privacy of home would be inviolable. This fundamental right was flagrantly violated and disregarded by tapping the telephones of highly respected peoples, including dignitaries like the Chairman of

the Senate and Speaker of the National Assembly. Even members of the government were not spared. The petitioner was one of those whose telephones were tapped.

vii. Important constitutional organs of the state like the Senate and superior judiciary were publicly ridiculed and brought into disrespect. Even the legal existence and validity of the Senate was disputed by the federal government.

viii. There was misuse by the federal government of secret service funds running into crores of rupees and unauthorized use of aircraft belonging to PAF and PIA for transporting MNAs at the time of the noconfidence motion.

ix. Wholesale and indiscriminate appointments were made in the civil services of Pakistan and the services under the statutory corporations which was clearly in violation of the law.

x. The federal government, in not giving effect to the judgment of the Supreme Court by legislating on the subject of *qisas* and *diyat*, had failed to carry on government in accordance with the provisions of the Constitution. The federal government did not present any legislation to give effect to the judgment of the Supreme Court and showed its resistance by dubbing the punishment under the Islamic Laws as impracticable and cruel.

The Court thus held that the President of Pakistan had validly passed the order of dissolution of the National Assembly because the government of the federation could not be carried on in accordance with the provisions of the Constitution and that appeal to the electorate had become necessary. The Court also held that the grounds which weighed with the President for passing the impugned order had direct nexus with the preconditions described under Article 58(2)(b) of the Constitution. The Court repelled the argument that if one of the grounds for the dissolution of the National Assembly was proved to be non-existent, the entire order for the dissolution of the National Assembly would fall.

CHALLENGE BEFORE THE SINDH HIGH COURT

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A full Bench of the Sindh High Court also^ the order of the President in terms similar tofc’ of the

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Lahore High Court.32 The Court held* the several reasons and grounds given \ President in the order of dissolution are s and independent, and the order of the 1 could be justified independently on sotne^ grounds, the Court would uphold the order n than strike it down as unconstitutional on a of the presence of other irrelevant and insigr independent reasons in the order.

The Court examined the grounds given iij order of the President and found them s pinpointing the provisions of the Con; which had been violated. The Court took s notice of the speech made by the President in| joint meeting of the two Houses of Parliamentol
2 December 1989, in which he made referenceII the failure of the National Assembly **asil** heed was paw 0”””~reby jeopard

legislative body, scandalous horse trading,conlkI not discharged,^ ^ ^^

between the federal government and two provincit governments, non-convening of meetings of tk Council of Common Interests and the Finance Commission, and failure to mainta public order in Sindh. The Court felt persuadet from the material produced before it that it conk be reasonably concluded that political horsetrading was resorted to at the time of the modal for vote of no confidence; that the meeting of tW important constitutional institutions, namely it’ Council of Common Interests (CCI) and the National Finance Commission (NFC) were not convened, disregarding the wishes of tie provinces, the Senate, and the President; thai Peoples’ Programme had no backing of law and its implementation amounted to over-stepping by the federation into the provincial sphere; that large number of ad hoc appointments were made in the service of the federation and its statutory corporations in flagrant violation of service rules and the law; that ’Pucca Qila Operations’ in Hyderabad proved the breakdown of law and order and that the Senate was not shown the respect and importance due to the Upper House.

a)The Opinion of the Majority

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member has been el of a manifesto of a pol account of his particular* of public importance, his to a clear breach of cor-

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BENAZIR'S FIRST TERM: A DIVIDED HOUSE

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iPPEAL BEFORE THE SlPREME COURT

ment of the Lahore High Court was i before the Supreme Court of Pakistan /fl *Ahmad Tariq Rahim v the Federation* fMb'sfan.33 The Supreme Court, upheld the lament of the Lahore High Court by a majority. **|!ie** Court, after examining the grounds for the of the National Assembly and the |«i£ral produced by the federal government in l of the grounds, came to the conclusion I the dissolution order of the President was Ijtfied. It was noticed that persistent requests had |fcmadeby the provinces to make constitutional tons like the Council of Common Interests, lite National Finance Commission, functional I a view to sorting out disputes over various and policy matters concerning the ition and the federating units. The Court felt
1 despite the intercession of the President, no rfws paid and constitutional obligations were lischarged, thereby jeopardizing the very e of the federation.

t Opinion of the Majority

k Supreme Court, in its leading judgment by «Shafmr Rehman, took very serious view of i of elected members of the National *i* (called 'horse trading' in the order for i by the President') for the following

If a member has been elected on the basis of a manifesto of a political party, or on account of his particular stand on a question ofpublic importance, his defection amounts to a dear breach of confidence reposed in him by the electorate.

The political sovereign, that is the elector, is rendered helpless by such betrayal by his own representative. The elector has to wait, till new elections take place, to repudiate such a person but, in the meantime, the defector flourishes and continues to enjoy worldly gains.

The defection destroys the normative moorings of the Constitution of the Islamic

State. It is nothing but mockery of the democratic constitutional process.

The term ’government’ was held to have wide meanings and connotations which include legislative, judicial, and executive functions and hence the argument that Article 58(2)(b) talk of ’government’ and not of ’national assembly’ was repelled. Although the grounds like (c), e(ii), and e(iii) might not be independently sufficient to warrant such an action, yet the Court held, they could be invoked, referred to, and made use of along with grounds more relevant like (a) and (b) which by themselves were sufficient to justify the action taken.

(b) The Dissenting View

However, Justice Abdul Shakoor Salam, in his strong dissent, held that the discretionary power to dissolve the Assembly was exclusive to Zia, and that such power perished with his demise. The learned judge further held that such power could not be deemed to have devolved on his successor. If, according to him, divine will did not permit the late President to complete his mission or tenure, then nobody could step into his shoes. He further held that it was not advisable to continue the discretionary power of dissolution because that would strike at the very root of the parliamentary system of government established under the Constitution after much trial and error and after loss of half of the country. The learned judge also examined the grounds given in support of the order of dissolution and held that, notwithstanding the dissatisfaction of the president with the functioning of the prime minister or Parliament, the reasons for dissolving the National Assembly were not good enough under the Constitution and the principles previously laid down by the highest courts in the land. It was remarked that it could not be lost sight of that if the national and provincial assemblies were reckoned to be so bad by the President so as to be dissolved, then it was these assemblies that had not long before elected him as the President. So, he questioned, how could what was good then have become so bad now? How could a creature condemning the creator sound well?

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Another dissenting opinion came from Justice Sajjad AH Shah. He was of the view that the impugned order of dissolution suffered inherently from malafides, primarily because the unavoidable object behind it was not only that the government of the time be toppled, but that the image of the People's Party be tarnished in the eyes of the people so that it could be routed in the ensuing general elections. The learned judge, held the order of dissolution as not sustainable under the provisions of the Constitution and the law. However, he was of the view that relief for restoration of the National Assembly could not be granted (as held in the Haji Saifullah case) because after the dissolution of the Assembly, elections had taken place with the full participation of all political parties, including the deposed Prime Minister and her party.

DISSOLUTION OF PROVINCIAL ASSEMBLIES CHALLENGED AND COURT VERDICTS

Aftab Ahmad Khan Sherpao, the ousted chief minister of NWFP, challenged the order of dissolution of the Provincial Assembly34 before the Peshawar High Court.

A full Bench of the Peshawar High Court, by a majority of four to one, accepted the Constitution petition and declared the impugned order of dissolution of the NWFP Assembly and the dismissal of the provincial Cabinet thereby as *ultra vires* of the Constitution, without lawful authority and, therefore, of no legal effect. The Court directed that the NWFP Assembly and the Cabinet would stand restored.35

The Court held that the grounds forming the opinion of the governor for the exercise of the said discretion should be objective and not vague, general, or devoid of particulars. On the matter of prior approval of the president, the Court held that was subject to the advice of the cabinet or the prime minister and that such approval could not be given by the president independently. It was held that the expression 'cannot be carried on' meant the breakdown of the constitutional mechanism, a stalemate or a deadlock in ensuring the observance of the provisions of the Constitution and the Court

found no material indicating such breakdm stalemate, or deadlock. On the contrary, the Co; observed, the budget had been unanimous passed. The order of dissolution was thus held, be arbitrary, totally bereft of the reasr necessitating the dissolution of the Assembly it without the objective conditions relatabletot! grounds laid down in the Constitution The Cor did not deem it necessary to wait for and hear to Attorney-General (who was busy at that tin before the other courts defending the order dissolution of the National Assembly) andregaiik the association of Advocate-General of \\ province in this case as adequate. To the pleat the relief of restoration of the Assembly and it Cabinet should not be granted, the Court heldtl the High Court, in exercise of its discretion to par relief in its constitutional jurisdiction, was so bound by any precedent and relief could be grantee or refused according to the objective conditionsot each case.

VERDICT OF THE SUPREME COURT

The judgment of the Peshawar High Court was landmark in the sense that, for the first time, restoration of an Assembly or a Cabinet had been ordered by a Court. However, this judgment was never given effect and was soon suspended ” The President was clearly offended by this judgment and the judges on the Bench had to face dire consequences for rendering such judgment” This judgment was set aside by the Supreme Court by a majority judgment primarily on the ground that the judgment of the Peshawar High Court uas vitiated because the mandatory requirement of notice to the Attorney-General of Pakistan before deciding substantial questions as to the interpretation of constitutional law had not been complied with.38 In the majority judgment, it was observed that since there was no direct challenge to want of approval by the President nor to the lack of advice of the caretaker Prime Minn therefore the High Court should not h proceeded to examine these facts on its own ar constitutional power reserved for the Governor *a* the President ought not to have been interfere with by raising a doubt. On merits, it was held tha

in view of large-scale defect, the representative character c the democratic character government had become open

thus, the provincial governs mg m accordance with th Constitution.

Justice A.S. Salam, in hi once more held that notwitb of a formal notice, the Attorn

of the proceedings in the t have appeared or sought^ .ntended to appear. The leai opinion that non-issuance of

circumstances could not a dealing with such high coi merits, he held that an api exercised high constitu absolving an elected Ass thought or care. Three othe separate opinions, joined Ju

dissent and agreed with 1 judgment of the Peshawar

upheld.39

These four judges w< DrNasim Hasan Shah to notice to the Attorney-Get judgment of the Peshawar

Justice Ajmal Mian, agree judges and upholding Peshawar High Court, dem the dissolved Assembly an

DISSOLUTION OF i ASSEMBLY OF SIN

BEFORE THE SlND

On 6 August 1990, tr dissolved, in his disc Assembly of Sindh on th. (a) The Government has failed in its d order, and to pi dignity, and prop((b) The mandate, effe the Provincial / representative

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CT OF THE SUPREME COURT

;ment of the Peshawar High Court was . in the sense that, for the first time, n of an Assembly or a Cabinet had been y a Court. However, this judgment was en effect and was soon suspended.36 The

was clearly offended by this judgment udges on the Bench had to face dire ices for rendering such judgment." This was set aside by the Supreme Court by a udgment primarily on the ground that lent of the Peshawar High Court was ecause the mandatory requirement of he Attorney-General of Pakistan before

substantial questions as to the on of constitutional law had not been vith.38 In the majority judgment, it was lat since there was no direct challenge

approval by the President nor to the vice of the caretaker Prime Minister, the High Court should not have o examine these facts on its own and a al power reserved for the Governor and nt ought not to have been interfered ing a doubt. On merits, it was held that

|iwr of large-scale defections in the province, *ojKsentative character oftne* renegades *and* democratic character of the provincial lent had become open to serious doubt and, the provincial government was not functionin accordance with the provisions of the solution.

I Justice A.S. Salam, in his dissenting opinion, t more held that notwithstanding the absence *ii* formal notice, the Attorney-General had notice iffe proceedings in the High Court and could be appeared or sought accommodation if he i to appear. The learned judge was of the n that non-issuance of a formal notice in the nces could not annul the proceedings ! with such high

constitutional issues. On , he held that an appointed Governor had rased high constitutional authority by olvmg an elected Assembly without much t or care. Three other judges, writing their ate opinions, joined Justice A.S. Salam in his l and agreed with him that the majority nt of the Peshawar High Court should be

!9

I These four judges were joined by Justice l\asim Hasan Shah to the extent that lack of Bee to the Attorney-General did not render the llgnent of the Peshawar High Court as nullity.40 Sice Ajmal Mian, agreeing with the dissenting idjes and upholding the judgment of the MroarHigh Court, denied the relief of restoring dissolved Assembly and the dismissed Cabinet.

DISSOLUTION **OF THE PROVINCIAL** (SSEMBLY **OF SlNDH: CHALLENGE**

KFORE THE **SlNDH HlGH COURT**

to 6 August 1990, the Governor of Sindh sdved, in his discretion, the Provincial Issembly of Sindh on the following grounds: 41 The Government of the Province of Sindh has failed in its duty to maintain law and order, and to protect the life, honour, dignity, and property of the people. The mandate, effectiveness, and purpose of the Provincial Assembly in Sindh as a representative institution under the

(c)

Constitution is defeated by widespread *corruption* including misapplication *of* public funds by the Provincial Government, its functionaries, the statutory authorities/ bodies operating under its control. The Government of the Province has undermined the Civil Services in violation of Articles 240 and 242 of the Constitution.

This order of dissolution of the Provincial Assembly of Sindh was challenged by the former Chief Minister of Sindh.42 The Sindh High Court dismissed the constitution petition holding that the grounds mentioned in the order of the Governor for dissolving the Provincial Assembly were quite clear and specific and clearly showed the failure and breakdown of Constitutional machinery of provincial government inasmuch as it had totally failed to protect the life, liberty, honour, and property of the inhabitants of the province. The Court took notice of the correspondence between the President, the Prime Minister, and the Governor of Sindh in connection with the ’Pucca Qila’ incident in Hyderabad and the demand for extension of provisions of Article 245 of thfe Constitution to the territory of Sindh. The Court observed that the refusal of elected representatives of urban areas of Sindh to attend the Assembly session, including the budget session, on the ground of threat to their lives; the allegation against sitting ministers and MNAs regarding their involvement in heinous crimes like kidnapping for ransom and harbouring of dacoits; and the exchange of kidnapees between the PPP and MQM, the two major political forces in the province, under the aegis of army authorities, could only reflect failure of the working of constitutional government in the province. The Court also took notice of large-scale irregular appointments in the services of provincial government in violation of service laws and disposal of government land in violation of rules for political considerations. As

such, the material brought before the Court was found adequate and reasonable for passing the order of dissolution by the Governor.

GENERAL ELECTIONS, OCTOBER **1990**

In the general elections held in October 1990, the Islami Jamhoori Ittehad won 105 seats in the National Assembly. The Pakistan Democratic Alliance, which also included Pakistan People's Party, captured only forty-five seats. MQM (Haq Prast) and Awami National Party headed by Wali Khan, who lost his one seat in the election, got fifteen and six seats, respectively. Of the remaining seats, three went to JTJP (Noorani), two each to Jamhoori Watan Party and Pakistan National Party, and one to Pakhtoon-Khwah Milli Party.

Prominent party leaders including Wali Khan, former Speaker Meraj Khalid, veteran leader Nasrullah Khan, Maulana Fazlur Rahman, Minister for Information and Broadcasting Syeda Abida Husain, former NWFP Chief Minister, Aftab Ahmad Sherpao, Mumtaz Bhutto, and Hafeez Pirzada lost in the elections. The leaders who won included Muhammad Khan Junejo, Ghulam Mustafa Jatoi, Nawaz Sharif, Benazir, Nusrat Bhutto, Ghulam Mustafa Khar, and former Speakers Hamid Nasir Chattha and Syed Fakhar Imam.43

It was alleged by the PDA that the general elections had been rigged on a massive scale with the objective of defeating PDA and installing an LJI government. It was alleged that Ishaq Khan had played a major role in the rigging of elections. He made a speech on television on the eve of the

elections in which he asked the people to ^H| against the PDA. Under instructions iron U^B an 'election cell' was set up in the Preai^Hf secretariat in Aiwan-e-Sadar 'in order to q^B the President with the latest position ik|H| elections to the national assembly and piDv^H| assemblies'. This cell was headed by *dtjf* (Retd.) Rafaqat. Similar cells were setupufcK provincial and local levels. It was alleged h^B Ishaq made appointments of such people to fcH Election Commission whose duty it wastoenaBF the defeat of PDA candidates.44 I

It was also alleged in the PDA White PapaiB Pakistan Elections 1990, that caretaker gowl ments at the federal and provincial levels plaql an active role in defeating the PDA by themwH of state media, violation of election niJ disinformation campaign, misuse of pgfl servants, misuse of public funds, and misustiB government facilities. The caretakers placed il kinds of administrative hurdles in the way of i I PDA in the matter of issuance of identity carii I manipulation of boundaries of constituencies, d I disruption of PDA rallies. The caretakers, it j I alleged, used the power of transfer and posting oil public servants to the advantage of the IJI and t the complete disadvantage of the PDA, particular!; in certain critical constituencies. They applied pressure on subordinate officials in the administration and threatened them with dire consequence if they did not participate in rigging.45

Final Party Position

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MQM

JUI

ANP

PNP

JUP

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JWP

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fe NOTE

1 In the general elections ’ reserved for women and

Jj. Article 91(2). £$ Article 91(2A). U Article 91(3)-

5 *The Nation,* 13 Decerobe I 6 Article 130 (2) and (2A)
17 Muhammad Anwar I Baluchistan, PLD 1989 <

* g PLD 1989 S.C. 166.

: 9 Muhammad Akram . I Pakistan, PLD 1989 S.C
110. It is interesting to not. I judges of the Supreme <

I judges only.

LJ. *The Muslim,* Islamabad

•t. Ibid.

R’SL 26 October 1989 **F£** ,bid., 26 October 1989 t 16. Ibid., 28 October 1989

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• 17. Ibid., 2 November 198

• 18 Article 101. P 19 Article 48(1).

W 20 1989 Civil Law Cases

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ich he asked the people to vote L Under instructions from Ishaq,
1’ was set up in the President’s iwan-e-Sadar ’in order to apprise with the latest position about national assembly and provincial lis cell was headed by General Similar cells were set up at the local levels. It was alleged that (ointments of such people to the ssion whose duty it was to ensure IA candidates.44

ileged in the PDA White Paper on jns 1990, that caretaker governieral and provincial levels played i defeating the PDA by the misuse a, violation of election rules,

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2 of public funds, and misuse of ilities. The caretakers placed all strative hurdles in the way of the tter of issuance of identity cards, ’ boundaries of constituencies, and ’DA rallies. The caretakers, it is e power of transfer and posting of to the advantage of the IJI and to iadvantage of the PDA, particularly cal constituencies. They applied srdinate officials in the administrated them with dire consequences)articipate in rigging.45 ,

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NOTES

In die general elections of 1988, 20 seats were reserved for women and 10 seats for minorities.

:tocle91(2).

;tele91(2A).

i tele 91(3).

• Matio/j, 13 December 1988.

• tele 130 (2) and (2A).

' Muhammad Anwar Durrani v Province of Baluchistan, PLD 1989 Quetta 25. ' PLD 1989 S.C. 166.

• Wiammad Akram Sheikh v Federation of Pakistan, PLD 1989 S.C. 229.

ll is interesting to note that judgment of eleven judges of the Supreme Court was reviewed by four judges only. *Ik Muslim,* Islamabad, 24 October 1989.

•W, 26 October 1989. : lid, 26 October 1989.

• W,28 October 1989 and 29 October 1989. lid, 2 November 1989.

i tele 101

F We 48(1).

Elf Civil Law Cases 1369.

! (bench of 11 Judges was hearing the case and itision appeared to be 7 to 4 in favour of the Prone Minister-reckoned from the remarks openly nade by the judges in the Court during the joceedings Undoubtedly, interest of the judges or »least some of them on the Bench, was involved lie outcome of the case. Even the appointment We next Chief Justice, due in January 1990, was

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• the line. The two sides even resorted to amassing the judges on the Bench. One of the iges on the Bench later told the author that he us visited by the then Chief Minister of the hjab, Nawaz Sharif, with his brother Shahbaz, at
8 residence in Lahore who requested him to side inn the President in the verdict. His refusal to foge resulted in the severance of his long-time Ttoonship with Nawaz Sharif.

!fdenl Government of Pakistan v M.D. Tahir, 1990

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produced on pages 66 to 68 of PLD 1991

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hlto, Benazir, *Daughter of the East.* 1988,

bush Hamilton, London. She took pains in

Mug about her sufferings and privation at the

•Is of the military regime.

BENAZIR'S FIRST TERM: A DIVIDED HOUSE 421

25. Mst. Sakina Bibi v Federation of Pakistan, PLD 1992 Lahore 99.

26. Hakim Khan v Government of Pakistan, PLD 1992 S.C. 595.

27. Benazir was obliged to retain Sahabzada Yaqub Khan as Foreign Minister, who did not belong to her political party.

28. Zardari was tried for terrorist activities before a Special Court constituted under Suppression of Terrorist Activities (Special Courts) Act, 1975.

29. Thousands of jobs were given under the Placement Bureau without proper scrutiny and without resorting to the method of selection provided under the law. Hundreds of plots were allotted to her partymen in the C.D.A. Schemes.

30. The President, in the broadcast to the nation a day

before the polls, appealed to the voters to reject PPP. He used the expression that he had already put them (PPP) in the coffin and it was for the nation to bury them.

31. Ahmad Tariq Rahim v Federation of Pakistan, PLD

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1990 Lahore 505 is the short Order in the case. Detailed judgment in this case is reported as PLD

1991 Lahore 78.

32. Khalid Malik v Federation of Pakistan, PLD 1991 Karachi 1.

33. PLD 1992 S.C. 646.

34. Reproduced on pages 197-8 of PLD 1990 Peshawar
192.

35. Aftab Ahmad Khan Sherpao v The Governor of NWFP, PLD 1990 Peshawar 192.

36. Within minutes of the announcement of this judgment, a petition was presented before a single judge of the Supreme Court of Pakistan, who happened to be available in Peshawar (in the building of the Peshawar High Court), and he suspended the operation of this judgment. Later on, this petition was presented before a full Bench of the Supreme Court at Karachi and the order of suspension of operation of the judgment was continued.

37. The Chief Justice, Sardar Fakhre Alam, who presided over the full Bench, and Justice Inayat Elahi Khan, were not elevated to the Supreme Court and instead a judge junior to them and who had not even completed five years as a judge of the High Court, was elevated to the Supreme Court. A third judge, Justice Nazir Ahmad Bhatti, was banished to the Federal Shariat Court. Justice Qazi Mohammad Jamil, who was an additional judge, was not made a permanent judge. The only dissenting judge, Justice S. Ibne Ali who was an

additional judge, was rewarded and made a permanent judge.

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Federation of Pakistan v Aftab Ahmad Khan

Sherpao, PLD 1992 S.C. 723.

These three judges being Abdul Qadeer Chaudhry,

Ajmal Mian, and Sajjad Ali Shah, JJ.

The full Bench was composed of twelve judges.

On merits, there were four dissenting judge. On the

question of notice to the Attorney-General, there

were five dissenting judges.

41. Reproduced on p. 62 of PLD 1991 Karachi 1.

42. Khalid Malik v Federation of Pakistan, PLD 1991 Karachi 1. The Sindh High Court disposed of, by

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one order, all constitution petitions chi dissolution of the National Assembly passdi]) President and the dissolution order of the Pi Assembly of Sindh passed by the (Sindh. The Constitutional Petitions thus d of included the petition filed by the fomad Minister of Sindh, Syed Qaim All Shah *The Nation,* 26 October 1990. *How A Election Was Stolen,* The PDAW on the Pakistan Elections, 1990 PublisWj Pakistan Democratic Alliance, Islat September 1991. Ibid.

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twenty-four out of forty-six seats reserved for the National Assembly m Smdfe

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’ to the provincial assemblies, the ipletely swept the polls in the Punjab out of the 240 general seats. After g a humiliating defeat at the hands of the | the polls for the National Assembly, the to have resigned to its fate when »to *the* provincial assemblies were held Jtes later. Thus PDA fared much worse in

llJrimwcial assemblies Man /nose of1

lonat’Assemfi/y. ft seemed’ JjJte 3 Joss a. ; was no effort on *their part* to *hold* d the decline was clearly discernable. e days intervening between the national ivincial assemblies polls, the PDA had *I* its energy on crying itself hoarse about ! and laid the blame for it on the

could win forty-eight out of the 100 Provincial Assembly general seats. The MQM won twentyeight seats, IJI six seats, and eighteen seats went to the independents. With the aid, assistance, and abetment of Ishaq, coupled with the manoeuvering and manipulation of Jam Sadiq Ali, the PDA was rendered into a minority despite being the largest party in the Assembly.

Having swept the polls in the Punjab with 211

out or 240 seats in the Provincial *Assembly, the*

^challenge of the provincial assembly polls, t Punjab, the PDA won fourteen seats in iaJ Assembly out of 115 seats but in the
1 Assembly, it could only win thirteen
10. If the law of averages in the National f could be applied to the result in the \ assemblies polls, the PDA should have i thirty seats. Similarly, in the NWFP, on five seats in the National Assembly li total of twenty-six, but in the Provincial

majority, and elected Ghulam Haider Wyne as chief minister. In the NWFP, it won thirty-two seats followed by twenty-one by ANP, its ally, out of eighty seats. Thus, IJI formed government in the NWFP in coalition with ANP, with Mir Muhammad Afzal as the chief minister. In Sindh,

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Mahmood A. Haroon, made a coalition with the MQM and won over all the independents. He

even won over some members from the PDA in the Sindh Assembly. The result was that Jam Sadiq Ali was elected chief minister without contest and PDA members left the House when the election to the office was held.2

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ver by the government for any reason ver. No foreign industrial or commercial j se established or owned in any form by or Pakistani investor for private gain in nee with law, and no investment in share .y of any company, firm or enterprise and amercial bank or financial institution hed, owned or acquired by any foreign or ai investor should be compulsorily acquired i over by the government. it, secrecy of bonafide banking transactions quired to be strictly observed by all banks ancial institutions by whomsoever owned, led, or managed them.

UIONALIZATION AND ATIZATION

’ember 1990, Nawaz declared his policy on zation based on the following methodology: sale of individual state-owned enterprises SOEs) by inviting bids from the private sector.

Sale of shares of SOEs in suitable tranches through the Stock Exchange at a price per share to be determined through an evaluation process to ensure broad-based ownership and participation of foreign institutional investors.

Encouraging employees to constitute Employee Management Groups and negotiating with them a market price per share on the basis of an evaluation of assets, liabilities, and net worth, besides promoting the concept of ESOP (Employees’ Si ’ Ownership Plan).

Encouraging prospective investm managers to form Modaraba Companies and raise funds for purchasing shares of SOEs on the basis of a negotiated market price. Entering into a management contract with a Modaraba Company, leasing or contracting of management to private entrepreneurs for a specified period, and so forth. Entering into a lease management contract with employees for a specified period to enable them to buy out units.5

The Nawaz government took bold decisions to jjvatizenot only industrial units and banks which ,been taken over from the private sector but IK the public sector including DFIs and industrial •B, whether taken over initially from the private Ktorornot. In order to enforce the government’s jolicy, an amending Ordinance for Transfer of \taaged Establishments was promulgated which ighonzed the government to invite bids for the jk of shares and proprietary interest in the SOEs tough public advertisement.6 On receipt of bids, It government was required to offer to sell shares I nil proprietary interest, equal to the highest bid in ^auction, to previous owners. In case of a refusal Uccept such an offer, the government could sell Im to others on such terms and conditions as the Ltnunent deemed fit. This ordinance was further Laded by another ordinance whereby on receipt WHs, if the workers’ bid was the highest, the Etwould be sold to them.7

It is not possible to enumerate all the jiejularities that crept into the process of nationalization and privatization. Some of the iijoiones noticed were:

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1. Financial statements prepared by the Privatization Commission to arrive at a reference price were done in a disorganized manner and were not based on any objective

criterion.
2 There was interference by bureaucrats,

particularly by some federal secretaries, who

wanted to benefit their own relatives and, of

course, themselves in the process. !. Privatized units were handed over to new

owners without the settlement of workers'

dues.

4. The management of some privatized units was handed over without receiving payment of the bid value. In one case, the requirement was payment of 40 per cent of the bid value before transfer of management but this was not done and the management was transferred on receipt of only 26 per cent of the bid value.

i. In some cases, the management was handed over to the new owners without obtaining acceptable bank guarantees for the balance
60 per cent of the bid value.

6. In some cases, bids were not opened at the scheduled date and time but later, in a clandestine manner, in the interest of favourites.

7. There were frequent defaults in the payment of the balance amount of the bid price and no serious effort was made to recover it or to repossess the unit.

8. Exorbitant fees were paid to legal consultants who were appointed on political considerations.8

Thus the process of denationalization and privatization was contaminated by those involved in it, obviously out of consideration for their own interest or the interest of their political bosses, without any regard for the common national interest.

PRESIDENTIAL REFERENCES

As discussed earlier, the PDA did not accept the results of the elections which, according to the White Paper issued by it, were massively rigged at the instance of Ishaq, in association with the caretaker governments at the centre and in the provinces. However, the PDA decided to sit in the opposition in the national as well as in the provincial assemblies. It is rumoured that Benazir offered Nawaz co-operation in her attempt to repeal the Eighth Amendment, thus withdrawing the power of the President to dissolve the National Assembly at his discretion. This proposal was

not accepted by Nawaz who was obviously obliged to Ishaq for dismissing Benazir and for paving the way to his rise to power.

The opposition initially attacked the President for rigging the general elections of 1990 and for instituting presidential references against Benazir for misconduct. Benazir's husband, Asif Ali Zardari, was also involved in several criminal cases, remained in jail for more than two years during the pendency of proceedings against him. All these references were filed under a special law introduced in the year 1977 for the disqualification of members of Parliament and provincial assemblies.9

All these references lingered on for so long that, before they could be decided, Benazir returned to power in 1993. Consequently, the references were not prosecuted and were eventually dismissed. There are always serious difficulties in proving allegations of a factual nature, particularly when bureaucrats and other interested parties to shady deals do not cooperate and did everything within their power to frustrate and defeat such proceedings. This is perhaps the reason why no serious accountability of politicians, senior bureaucrats, and army Generals could take place in Pakistan. After all, the charges were not wholly concocted.

THE TWELFTH AMENDMENT

It has been discussed earlier that one of the consequences of the Afghan war was the spread of violence throughout Pakistan. Street crimes and car snatching, hitherto a rare phenomena in Pakistan, became common occurrences. Robberies and dacoities on highways and break-ins in residential areas spread widely. One of the solutions to this thought out by the Nawaz government was to create special courts for the trial of heinous offences. Special courts for speedy trials had been established during Junejo's government but the laws creating them had expired. It was considered important by Nawaz that such courts be given a constitutional cover.

Consequently, the Twelfth Amendment to the Constitution was passed by Parliament in July 1991, the main purpose of which was the establishment of Special Courts for the trial of heinous offences. For this purpose, Article 212B was added to the Constitution.10 It read:

212B Establishment of Special Courts for trial of heinous offences:

1. In order to ensure speedy trial of cases of persons accused of such of the heinous offences specified by law as are referred to them by the Federal Government, or an authority or person authorized by it, in view of their being gruesome, brutal, and sensational in character or shocking to public

morality, the Federal Government *wt* law constitute as many Special Cows may consider necessary.

2. Where the Federal Government more than one Special Court, determine the territorial limits within each one of them shall exercise jum

3. A Special Court shall consist of a being a person who is, or has been, ij qualified for appointment as High Court and is appointed by the Fi Government after consultation with the' Justice of the High Court.

4. A person other than a judge of a who is appointed as a judge of a Court shall hold office for the Article remains in force and shall UK removed from office except in the prescribed in Article 209 for the from office of a judge and, in the appl of the said Article for the purpose of a clause, any reference in that Article Hi judge shall be construed as a reference it judge of a Special Court.

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5. The law referred to in clause (1) shaU» provision for the constitution of as HE Supreme Appellate Courts as the Feda Government may consider necessary ami an appeal against the sentence or final of a Special Court being preferred to Supreme Appellate Court which shall of -

(a) a Chairman, being a judge of Supreme Court to be nominal Federal Government after o with the Chief Justice of Pakistan;

(b) two judges of the High Courts to nominated by the Federal Govi after consultation with the Chief of the High Court concerned.

6. Where the Federal Government constitaa more than one Supreme Appellate Court,! shall determine the territorial limits which each one of them shall exetcia jurisdiction.

7. A Special Court and a Supreme Appelk Court shall decide a case or, as the casew be, an appeal within thirty days.

%. Notwithstanding anything i Constitution, no court shi jurisdiction whatsoever in proceedings before, or 01 passed by a Special Cou Appellate Court constitu1 referred to in clause (1), e in such law.

Other provisions of the Tw tied to the enhancement of sa ,»the Supreme Court and the 1 (he Fifth Schedule to the Constil ndment was a temporary ai le 212B was concerned ai iod of three years only. ,_ ineffective in July 199 The Twelfth Amendment cr prts parallel to the const consisting of the High Court Court. A Special Court under not subordinate to the High Cc Court. The Supreme Appe1 anomalous court ranking soi the High Courts and the Sup Supreme Court judge as its cr Court judges as members.

I

LEGISLATION REGA [SEPARATION OF Jui THE EXECUTIVE

Since Zia had suspended
• Constitution, in particular tt the separation of the judicii the matter remained in c(when, under the RCO, the fourteen years, which was
1987. The government at tl despite the fact that the \ expiry because it desired ji in the hands of executive Inaction on the part challenged by members ol the expiry of the fourte
1987 before the High < jurisdiction, and they pra>

ality, the Federal Government may by constitute as many Special Courts as it ’ consider necessary. ;re the Federal Government constitutes •e than one Special Court, it shall rmine the territorial limits within which i one of them shall exercise jurisdiction. Ipecial Court shall consist of a judge, ig a person who is, or has been, or is ified for appointment as a judge of a ti Court and is appointed by the F eminent after consultation with the ice of the High Court. ;rson other than a judge of a High

is appointed as a judge of a S rt shall hold office for the period cle remains in force and shall not be Dved from office except in the manner cribed in Article 209 for the removal i office of a judge and, in the application ic said Article for the purpose of thtt se, any reference in that Article to a e shall be construed as a reference to a e of a Special Court, law referred to in clause (1) shall m ision for the constitution of as •erne Appellate Courts as the F ernment may consider necessary and for ppeal against the sentence or final order

Special Court being preferred to a erne Appellate Court which shall consist

a Chairman, being a judge of the Supreme Court to be nominated by the j Federal Government after consultation 1 with the Chief Justice of Pakistan; and two judges of the High Courts to be lominated by the Federal Government ifter consultation with the Chief Justice)f the High Court concerned. re the Federal Government constitute*] than one Supreme Appellate Court, h] determine the territorial limits within h each one of them shall exercise liction.

>ecial Court and a Supreme Appellate t shall decide a case or, as the case may n appeal within thirty days.

FIRST NAWAZ GOVERNMENT: DISMISSED AND RESTORED 427

! Notwithstanding anything contained in the Constitution, no court shall exercise any jurisdiction whatsoever in relation to any proceedings before, or order or sentence passed by a Special Court or a Supreme Appellate Court constituted under a law referred to in clause (1), except as provided in such law.

| Other provisions of the Twelfth Amendment id to the enhancement of salaries of the judges ik Supreme Court and the High Courts under IkFifth Schedule to the Constitution. The Twelfth ment was a temporary amendment as far as Kle212B was concerned and was to last for a J of three years only. Article 212B thus e ineffective in July 1994. He Twelfth Amendment created a hierarchy of s parallel to the constitutional hierarchy ing of the High Courts and the Supreme J A Special Court under this amendment was |«»bordmate to the High Court and the Supreme The Supreme Appellate Court was an lous court ranking somewhere in between (kBigh Courts and the Supreme Court. It had a me Court judge as its chairman and two High it judges as members.

LEGISLATION **REGARDING THE** SiPARATION **OF JUDICIARY FROM** [EXECUTIVE

e Zia had suspended the operation of the ition, in particular the provisions regarding ion of the judiciary from the executive, flatter remained in cold storage until 1985 i, under the RCO, the period was extended to n years, which was to expire on 14 August

1 The government at that time felt no urgency t the fact that the period was reaching its ly because it desired judicial powers to remain le hands of executive magistrates. (inaction on the part of the executive was raged by members of the Bar immediately on of the fourteen years on 14 August I before the High Courts in constitutional :tion, and they prayed for mandamus against

the federal and provincial governments to fulfil the constitutional dictate of separating the judiciary from the executive. A full Bench of the Sindh High Court consisting of seven judges accepted the writ petition filed by Sharaf Faridi" and other advocates by a majority of six to one. The Court held that the separation of the judiciary from the executive would mean:12

(a) that the executive should place adequate annual funds at the disposal of the judiciary for operating it without any interference by any agency of the executive;

(b) that the appointment of the Chief Justice and judges of the Supreme Court and Chief Justices and judges of High Courts by the President, in consultation with the Chief Justice of Pakistan and Chief Justice of the concerned High Court, as the case may be, should be meaningful;

(c) that transfer of a High Court judge to another High Court without his consent or his appointment to the Federal Shariat Court without his consent, militates against the concept of independence/separation of judiciary as envisaged by the Constitution;

(d) that denial and failure to establish independent courts and tribunals by separating them from the executive would negate the fundamental right of life and liberty guaranteed to citizens by the Constitution.

The Court held that since after the enforcement of the Constitution, the various federal and provincial governments had failed to do what they were required to under the Constitution, a direction under Article 199 could be issued to them. The Court emphasized that in order to bring the laws in conformity with Article 175 and similar provisions, not only administrative but also some legislative measures were needed. Since it was contestable whether direction could be issued to legislatures to discharge their constitutional obligation, a direction could be issued to the federal and provincial governments to initiate legislative measures for bringing existing laws in conformity with Article 175.

The Court issued the following directions to the government of Sindh:

1. to issue necessary notification for bifurcating the magistracy into judicial and executive magistrates and to place the judicial magistrates under the administrative control of the High Court within a period of six months;

2. to issue necessary notification for placing the judicial magistrates under the departmental control of the High Court including their disciplinary matters; and

3. to initiate legislative measures within a period of six months in order to make necessary amendments in the relevant statutes to bring them in conformity with Articles 175 and 203 of the Constitution.

The federal government was directed to initiate all legislative and administrative steps to bring existing laws relating to or affecting the judiciary in accordance with Articles 175 and 203 of the Constitution within a period of six months.

The dissenting judge, Justice Mamoon Kazi, held that the provisions of Article 175(3) could not be construed as self-executory and, therefore, Article 175(3) was not enforceable nor did it confer any power on the High Court to issue directions for its implementation.

The Supreme Court upheld the majority judgment of the Sindh High Court in nearly all its material details.’3

DIFFERENCES BETWEEN THE PRESIDENT AND THE PRIME MINISTER

To begin with, the relationship between the President and the Prime Minister had been cordial, but in 1993 it turned sour. It was rumoured that *^meMv/sfer/\&fvaz-Sfian’fwanted(o amendt&s*

Constitution so as to undo the discretionary x>ow«=ri

oi tne”President to dissolve me National Assembly *and* a/so to appoint chiefs of armed forces. The

Pre<4ident p>u.Wlid;y defended such, jsovvesrt, under the

Eighth Amendment and vowed to fight for their retention in the Constitution. The relationship

between the two further deteriorated till finally,

the Prime Minister came out publicly on 11

1993, and attacked the President, alleging d was actively encouraging intrigues conspiracies to destabilize his government vowed not to resign, not to advise the di; of the National Assembly, and not to take dictation from the President.

One of the immediate causes of the dil between the two men was disagreement ova appointment of the Chief of Army Staff Asif Nawaz, Chief of Army Staff, had suddenly in January 1993 and his successor W be chosen. Nawaz wanted a General of his but Ishaq did not want any encroachment on discretion to appoint the army chief Earlier, relationship between Nawaz and General Nawaz had soured and it was felt that Nawaz his family wanted to have their way with the and' forces so that his stay in power was not tl This conflict came to a head when Ishaq General Abdul Waheed Kakar as army without consulting or even informing Nai Sharif. The Prime Minister saw this as a affront to him.

DISSOLUTION OF THE NATIONAL ASSEMBLY

It has been discussed earlier that in his addressH the nation on television and radio on 17 Apd 1993, Nawaz openly criticized Ishaq and threatened to act in future without consultata with the President. Ishaq, an old wamor aid already 7 8-years-old, was not going to take such threat lying down. He immediately started collecting his advisers around him to make his own move at the earliest. For his assistance, Ishaq called Syed Sharifuddin Pirzada who, as Law Minister and Attorney-General during Zia's regime, W earned a reputation as someone adept at distort

ne Constitution and framing laws in *orftertanot* """" OrTT^Apnri993,"the'*day following Sharif s speech, Ishaq retaliated by ordering the

dissolution of tlic INational Assembly and dismissed trie Prime Minister and his Cabmei

A caretaker prime minister and cabinet were | immediately installed.

Order of Dissolution

Order Of Dissolution was b ing grounds:14

rhe mass resignation of the me Opposition and of conside

from the Treasury Benches desire to seek fresh mane

people. . ,

The Prime Minister in h
17 April 1993, made false allegations against the Presu who was Head of State and unity of the Repubhc.Th tried to cover up the fata of the government altl repeatedly apprised of the

this behalf.

A The federal government t ”’ the interests of the integ. solidarity, and well-being and to protect the autonoi

Provinces.

(ft Maladministration, c nepotism reached very h the Federal Government,

authorities, and other c« was lack of transparent

privatization and in the government properties. (e) The functionaries, authc of the Government ui control, collaboration, a Prime Minister and M’ reign of terror against 1

government.

(f) Resources and agencie of the Federation, i corporations, authonti misused for

The ***Order of*** **»«»«>i««°» -**

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fore the Lahore High

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Regarding the speech of the Prime Minister made on 17 April 1993, it was held that the material placed before the Court satisfied it that the opinion formed by the Prime Minister that the President had ceased to be a neutral figure and had started to align himself with his opponents and was encouraging them in their efforts to destabilize his government, was indeed one that could be reasonably entertained. No man, howsoever high, can destroy an organ consisting of chosen representatives of the people unless cogent, proper, and sufficient cause exists for taking such a grave action and that no such situation had arisen or could be said to have arisen on account of the Prime Minister. The speech of the Prime Minister did not amount to subversion of the Constitution, nor could it create a complete deadlock or stalemate resulting in collapse of constitutional machinery. If a speech does not create lawlessness, disorder, or threat to security or disruption, it would hardly amount to subversion of the Constitution. Resignations from the Cabinet could not be a sure indication of lack of confidence in the government, nor do they affect or impair the smooth functioning of parliamentary democracy. The resignations of the ministers would be wholly irrelevant while taking into consideration or forming grounds for taking action under Article
58(2)(b) of the Constitution. The ground of lack of ’transparency’ in administration or privatization was held as vague criteria, not referable to any statutory provision, thus making the satisfaction of the empowered authority subjective and not objective. Such a ground for taking action under Article 58(2)(b) was held to be farfetched, a matter of degree and quite unjustified, particularly in an environment of secrecy of financial transactions and

non-existence of freedom to obtain

information.

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in matters financial, administrate! and international, were held to be neitln independently decisive nor within tk domain of the President for action tint Article 58(2)(b) and thus wholij extraneous.

The President had no authority to recent resignations of the members of the National Assembly which had to be handed ms personally by the members concerned it the Speaker of the National Assembh Thus, resignations handed over to tkt President had no constitutional validity « value and these documents could not f«i: the basis for arriving at the conclusion the National Assembly had lost representative capacity. The requirements of Article 58(2)(b) of Constitution are all objective and to the various constitutional provisions.
10. The grounds mentioned in the dissol order of 18 April 1993, neither collectively nor individually, justified the inference that a situation had arisen in which the government of the federation could not be carried on in accordance with tk provisions of the Constitution and an appeal to the electorate was necessary.

Justice Saad Saood Jan, while agreeing witl the majority view on the merits of the case, held that the petition was not maintainable under Article
184(3) of the Constitution. Justice Muhammad Rafiq Tarar went to the extent of observing that the President had no power to dismiss a prime minister, directly or indirectly, howsoever illegal, unconstitutional, or against public interest his actions might look to him. The President, according to him, by removing the Prime Minister under the cloak of the powers contained in 58(2)(b) and dissolving the National As

might be accused of subverting the Constit

within the meaning of Article 6 of the Constitution. Nine judges out of the majority held that the.

petitM WaS Mitimsblt rlavmg reference *i* enforcement of the fundamental rights or am

tfiero. Justice^ Shafrar Rehman, re.n<kine .

of the discretionary power of tl appoint chiefs of the armed forces was not apparently a list before learned judge proceeded to President's discretionary power v\ the appointment of the Chairmt Chiefs of Staff and the appointed Chiefs of Army, Air, and Naval 5 be made by the President on thi Prime Minister. This interpretatio very attractive on the face of it respect to the learned judge who \ been one of the competent judge; ,4068 not appear to be correct ap jlished principle of statutory plain reading of the langu
3(i)(c) as amended by the RCO amendment made in a statul I parcel of the parent statute an<

ately therefrom. Justice Sajjad Ali Shah, the lorn up with a strong opinion diff colleagues, both on the question as on the question of maintainabilit .He held that the petition coul straightway in the Supreme Court
184(3) could not be invoked for there was no fundamental right petitioner to continue the governm ; came to an end. He made a corn the case of Ahmad Tariq Rahim i that the material produced in the i both qualitatively and quantitati' that of the case of Tariq Rahim. 1 the same

yardstick for evaluation interpretation of Article 58(2 followed and no departure shoul the guidelines laid down in th Saifullah and Ahmad Tariq Rahirr ourt. He took notice of the lioori Ittehad, an amalgam o jintly contested the electioi government but the several pai iselves from it and even the

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2S out of the majority held that as maintainable having reference it of the fundamental rights or any tice Shafiur Rehman, rendering Igment, ventured into the determir

^retionary power of the President to nefs of the armed forces. Although this apparently a list before the Court, the ludge proceeded to hold that the |UH«»,ui's discretionary power was restricted to I appointment of the Chairman of the Joint s of Staff and the appointment of the three s of Army, Air, and Naval Staff could only : by the President on the advice of the line Minister. This interpretation appears to be |tv attractive on the face of it, but with due t to the learned judge who undoubtedly has e of the competent judges in Pakistan, it t appear to be correct application of the ihshed principle of statutory interpretation to It plain reading of the language of Article lc) as amended by the RCO (PO 14 of 1985) I amendment made in a statute becomes part ^parcel of the parent statute and cannot be read utely therefrom.

I face Sajjad Ali Shah, the lone dissentor, came nth a strong opinion differing with his , both on the question of merit as well lie question of maintainability of the petition. |field that the petition could not be filed 'ay in the Supreme Court because Article IP) could not be invoked for the reason that iwas no fundamental right available to the i to continue the government till the tenure (to an end. He made a comparison between e of Ahmad Tariq Rahim in order to show c material produced in the present case was ^qualitatively and quantitatively superior to ifthe case of Tariq Rahim. He observed that t yardstick for evaluation of material and tation of Article 58(2)(b) should be i and no departure should be made from Ipndelmes laid down in the cases of Haji band Ahmad Tariq Rahim by the Supreme L He took notice of the fact that Islami ori Ittehad, an amalgam of several parties, f contested the elections and formed ;nt but the several parties dissociated i from it and even the Muslim League pinto two groups, the Nawaz Sharif Group

(Junejo Group. Hence, he held that IJI was |fte time of dissolution, the same group of tl parties which had been voted into power.

He held that the prime minister and the president, have to work together in an atmosphere of congeniality to run the daily affairs of the government. The fact that a situation creating stalemate in the working relationship of the two pillars of the government had become a *fait accompli* validly enabling the President to exercise his discretionary power under Article 58(2)(b). Regarding the grounds of maladministration, corruption, and nepotism, the learned judge took notice of the sale of Muslim Commercial Bank and eight cement factories to the Mansha Group, a favourite of Nawaz Sharif. The learned judge observed that there was no difference in the case of Ahmad Tariq Rahim and the one in hand in so far as allegations, grounds of dissolution, and material produced in support thereof were concerned, and that a departure was made and the same yardstick of evaluation of material was not applied. He lamented that 'seemingly it so appears that two prime ministers from Sindh were sacrificed at the altar of Article 58(2)(b) of the Constitution but when the turn of a prime minister from the Punjab came, the tables were turned'.

While rendering his incisive dissenting opinion, the learned judge appeared to have forgotten that he was also making a departure from his own earlier dissenting opinion in the case of Ahmad Tariq Rahim. Was he not expected or required to apply the same yardstick as he had done in his earlier judgment? After holding the two cases similar and liable to similar result, was he not bound by his opinion in Ahmad Tariq Rahim's case holding the order of the President invalid?

THE CARETAKER GOVERNMENT

When the President and the Prime Minister fell apart in 1993, and Nawaz Sharif s government was sacked, the power to appoint a caretaker cabinet was abused to the maximum. Balakh Sher Mazari, who had fallen out with Nawaz and had formed a group hostile to him within the Muslim League, was appointed caretaker prime minister. Benazir and her husband, against whom the Pesident had filed cases alleging corruption, abuse of power, and resorting to terrorist activities, were invited to

participate in the caretaker cabinet, an offer that she and her husband readily accepted. Bhutto had her husband appointed federal minister, against whom several cases for corruption and terrorist activities were pending. Ishaq, in his moment of desperation, did not hesitate to administer oath as federal minister to a person whom he had accused of serious acts of terrorism and corruption. Benazir Bhutto also got several of her partymen appointed federal ministers and advisers. The number of ministers and advisers in the federal cabinet broke all previous records.16 Preparations were afoot to repeat the performance of 1990, this time to keep Nawaz out of power, in the aborted elections of July 1993. The leader and members of the PPP who had been crying hoarse the previous three years against the injustices done to them by Ishaq, were suddenly his main supporters trying to do unto their opponents in 1993 exactly what had been done unto them in 1990. The caretaker cabinet became a spectre of unethical, ad hoc government without any care or consideration for principles or even basic dignified behaviour. The Supreme Court ended this political feast amongst strange bedfellows by restoring the dismissed federal government and by setting aside the order of dissolution of the National Assembly.

A lot can be said about this judgment, but the fact remains that it constitutes a judicial milestone in the history of Pakistan. It was a heartening departure from all the previous spineless judgments by the Courts. It is widely believed that the Courts in Pakistan, at various crucial times in history, have failed to stand up to men in power and their acts or orders, howsoever atrocious, have been upheld on one line of reasoning or another. In a couple of cases, where acts or orders of a person in power were actually disregarded by the Courts, the judgments came only after the death or departure from power of such a person.

It is unfortunate that the gains of this judgment were soon eroded by the vengeful President, in collusion with the provincial governments, and the restored federal government could not even last for two months. The positive effects of the judgment cannot be ignored or underestimated. In future, any president will have to think a hundred times before dissolving the National Assembly.

The unfettered power of the president wU checked, clipped, and fettered. It went to h(of judges who sat long hours every day toll case on priority basis, even at the i personal concerns.17 It would havebeensojl the better if some of the judges on the [exercised restraint in making observations in the open court, thus disclo ideas rather prematurely.18

.Secretary oi me Provincial As S version was supported

CONSTITUTIONAL DUEL OVERT **PUNJAB**

After the dismissal of the Nawaz gov Wattoo managed to oust Wyne as Chief) of the Punjab and assume office.

The situation changed on 26 May 1993i the Supreme Court restored the National *i* and the federal cabinet headed by Nawaz! who now felt that he could not run the i government in the face of a hostile gove Punjab. Besides, he was indebted to the O1 of Gujrat who had stood by him during hi from office and perhaps he had made a them to support their nominee, Parvez u.,.

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election to the office of chief minister of Pmji,I Soon after the resumption of office on 26 May,l came to Lahore and launched a campaign to i over a majority of the members of the Provii Assembly. With Nawaz in the saddle as Print! Minister and Shujaat Husain as Federal Mmist&l for Interior, an enterprise that was backed by M money, the position of Chief Minister Wattool started sagging and large-scale defections beganto take place from his camp to the opposite Preparations were being made to table a vote of I no-confidence against him. Pitted against sudij heavy odds, Wattoo threw in the towel on 29 Mm
1993, and tendered advice to the Governor AW' Husain for dissolution of the Provincial Assembly. who immediately complied. Simultaneously, his opponents were gearing up to table a vote of noconfidence in order to incapacitate him from tendering advice to the Governor to dissolve tkj Assembly under explanation to Article 112(1) on the Constitution. The explanation under this *Article'* disentitles the chief minister against whom a notice

,«er"and the Governor, and and his supporters

^ GhulamHa

"challenged the ord .provincial Assembly of Pi ' High Court in a const *gheard by a full Bend urt made a detailed fad Acting versions of the pa ice which included the s Minister, a former chief*

bureaucrats. The petition der of dissolution was voi,

t notice of the resolutio confidence was delivered the Provincial Assembly (residence at 12:00 noon c
2. at the time the advice w Chief Minister to the disentitled to do so as an

for vote of no-confide* already been given;
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3' dissolution based there subsequent to the del aforementioned; and
4 the advice and the ord collusive and malatide.

On behalf of the re controverted that the notice no-confidence was given

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TITUTIONAL DUEL OVER THE

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Besides, he was indebted to the ChaudhnV it who had stood by him during his removal ’fice and perhaps he had made a deal with i support their nominee, Parvez Elahi, for i to the office of chief minister of Punjab. *CT* the resumption of office on 26 May, he > Lahore and launched a campaign to win] majority of the members of the Provincial! >ly. With Nawaz in the saddle as Prime] r and Shujaat Husain as Federal Minister] :rior, an enterprise that was backed by bigj

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HiBolution for vote of no-confidence had been Into! in the Provincial Assembly, but has not |im voted upon, from tendering, advice to the mor to dissolve the Provincial Assembly. : events led to two conflicting claims and IBSIOIIS, one being that the advice to dissolve was I earlier and the other that the notice of n for vote of no-confidence was delivered to It Secretary of the Provincial Assembly earlier, version was supported by the Chief
• and the Governor, and the second by : Elahi and his supporters who included i chief minister, Ghulam Haider Wyne. I Panez Elahi challenged the order of dissolution pie Provincial Assembly of Punjab before the : High Court in a constitutional petition k was heard by a full Bench of five judges. [Court made a detailed, factual enquiry into ^conflicting versions of the parties and recorded which included the statements of the jfMinister, a former chief minister, and some pit bureaucrats. The petitioner contended that

r of dissolution was void because: lithe notice of the resolution of a vote of noconfidence was delivered to the Secretary of the Provincial Assembly of the Punjab at his residence at 12:00

noon on 29 May 1993; I at the time the advice was tendered by the Chief Minister to the Governor, he was disentitled to do so as a notice of a resolution for vote of no-confidence against him had already been given;

: advice, as also the impugned order of i dissolution based thereon, were fabricated subsequent to the delivery of the notice
1 aforementioned; and

I the advice and the order of dissolution are [collusive and malafide.

behalf of the respondents, it was rted that the notice of resolution for vote ;onfidence was given at 12:00 noon or any Iprior to the tender of advice for dissolution. lasserted that the Chief Minister had tendered Ivice to the Governor to dissolve the which was received by him at 11:35 c29 May 1993 and on the basis thereof, the bly was dissolved at 4:00 p.m. on the same

date, even if any notice had been served for a resolution for vote of no-confidence at 12:00 noon, the same day, it was of no legal effect.

The Lahore High Court accepted the constitutional petition and declared the order of the Governor dissolving the Provincial Assembly of Punjab without lawful authority, and of no legal effect, with the result that the Assembly stood restored.19 After a lengthy examination and discussion of the evidence, the Court was led to the inference that neither the receipt of notice nor the tendering of advice and the passing of the order of dissolution had been established to have taken place at the said timings. However, it was concluded that the notice of resolution of noconfidence was delivered to the secretary at a time prior to the tendering of advice. The Court also held the advice tendered by the Chief Minister as malafide in law for the following reasons:

1. It was tendered solely to keep himself in power and to forestall any attempt to dislodge him.

2. The action was contrary to the assurances given by the Chief Minister even until
28 May 1993 that the Assembly would not be dissolved.

3. There was no issue on which an appeal to the electorate was necessary to curtail the normal constitutional life of the Assembly.

4. It did not lie with the Chief Minister to advise dissolution as a measure of punishment to those who had elected him, especially when it was with the help of those very members that he toppled the previous leader of the House and became the chief minister.

5. The advice was made apparently with a view to disturbing the functioning of a constitutional organ and the government machinery as an aftermath of the judgment delivered by the Supreme Court in the case of *Mian Mohammad Nawaz Sharif v the Federation of Pakistan,* etc. (PLD 1993 SC473) whereby the National Assembly and the federal government were restored on 26 May 1993.

ATTEMPT TO IMPOSE FEDERAL GOVERNMENT RULE IN THE PUNJAB

However, this judgment was immediately frustrated because, only an hour or two after its announcement, the Chief Minister again advised the dissolution of the Assembly and the Governor dissolved it forthwith. In the face of this situation, the federal government resorted to a proclamation under Article 234 of the Constitution to take over the administrative control of the Punjab. This proclamation was issued on the basis of a resolution passed at a joint sitting of the two Houses of the Parliament but was never sent to the President for his approval because the position taken by the federal government was that if such a proclamation was based on the resolution of Parliament in a joint sitting, then it could be issued without sending it to the President. On the contrary, the President's standpoint was that the matter had to be referred to him because only he could issue such a proclamation. This led to another serious constitutional crisis. The federal government appointed its representative to take over the provincial government in Punjab and ordered the federal force of Rangers to help him take over the government and to forcibly eject the Governor and/or the Chief Minister, if necessary. The Chief Minister, at the behest of the President, ordered the provincial police force to resist all such efforts. The Rangers force was forbidden by the Army High Command to get involved in any showdown with the police because the office of Judge Advocate General of the Army felt that the position taken by the President was legally correct. After the frustration of this proclamation, another constitutional petition was filed by Parvez Elahi which was heard by a full Bench of eleven judges but before the hearing could proceed any further, a compromise between the President and the Prime Minister was brokered by the Army High Command on 18 July 1993 under which the President and the Prime Minister had to quit and neutral caretaker governments were installed at the federal and provincial levels to hold free and fair general elections.

DISSOLUTION OF THE NWFP PROVINCIAL ASSEMBLY, 1993

Simultaneous to the dissolution of the Provincial Assembly of Punjab, the Provincial Assemb' the NWFP was dissolved by the Governor i advice of the Chief Minister. The situatu NWFP was somewhat similar to that of the P and the opponents of the Chief Minister Muhammad Afzal, were trying to overthn government bringing a resolution for a vote 01 noconfidence against him. Obviously, the fedd' government headed by Nawaz was mstrumer doing so because the Chief Minister was belinea to be sympathetic to the President. This dissolution was also challenged through a constitutional petition before the Peshawar High Court, which was heard by a full Bench of five judges

The Peshawar High Court dismissed the constitutional petition holding that the advice for dissolution by the Chief Minister was tendered before a notice for a vote of no-confidence was given.20 The Court also rejected the plea of the petitioners for liberal and progressive interpretation of Clause (1) of Article 112 read with the Explanation thereto. The Court was of the view that the sensitive nature of the dissolution and its political repercussions demand that nothing more than what was already there in Article 112(1) and the Explanation thereto should be read into them The Court thus held

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1. It is nowhere mentioned in this Clause and the Explanation that the Chief Minister should record reasons that prompted him to tender the advice for dissolution of the Assembly.

2. It is also nowhere mentioned that the Governor, instead of dissolving the Assembly forthwith on receipt of the advice, should hold an inquiry about the existence of a resolution for a vote of no-confidence against the advising Chief Minister or to require him to reconsider the advice or place it before the Cabinet or to ask him to obtain a vote of confidence from the Provincial Assembly

3. It is also not provided that a Chief Minister, under the threat of a vote of no-confidence was disqualified to tender advice.

4. The notice of a resolution

confidence cannot be g

Assembly. Such notice, if’

on the floor of the House’

is in a position to ascerta

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EXIT OF THE PRESII PRIME MINISTER

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Assembly and then resigned, the order of dissolution oft!

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LUTION OF THE **NWFP** NCIAL ASSEMBLY, 1993

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disqualified to tender advice.

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ifidence cannot be given outside the

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membership of the Provincial Assembly. If

the notice is in writing, it must be given

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either on the floor of the House to the

Speaker or in the Assembly Secretariat to

the Secretary of the Provincial Assembly.

The meanings of the Assembly Secretariat

cannot be extended so as to include the

residence of the secretary and the additional

secretary.

[\IT OF THE PRESIDENT AND THE PRIME MINISTER

Ik dramatic confrontation between Ishaq and to had its drop scene on 18 July 1993. The tare Minister advised dissolution of the National tembly and then resigned. The President passed It order of dissolution of the National Assembly gl stepped down. The Chairman of the Senate, ijsrai Sajjad, took over as Acting President. This aipromise was evidently brokered by the army, nit Chief of Army Staff General Abdul Waheed, P,,,ig a leading role. It also spoke volumes for it incompetence and timidity of Nawaz Sharif ilo mishandled the situation when everything was ng m his favour. He had a two-thirds majority lite Parliament, the judiciary stood by him and ail restored his government, and Ishaq was a lame kck president due to retire in six months time. kt this mindless confrontation with the outgoing resident and sordid efforts to oust the Punjab merriment through hasty horse trading, led to the i of his government. When cornered by the icsident, the provincial government and, finally, [military leadership, Nawaz demonstrated no range and meekly bowed out.

PERFORMANCE OF THE

NAWAZ GOVERNMENT, **1990-93**

Nawaz Sharif started his political career as a provincial minister under the Martial Law regime of Zia. It is said that his father had old ties with Lieutenant-General Ghulam Jilani Khan, Governor of Punjab, who patronized and introduced him to the inner circle of the generals around Zia. Nawaz Sharif soon won their confidence, which facilitated his appointment as Chief Minister of Punjab in
1985 while he was still in his thirties. He remained loyal to the military leadership and, in the differences that rose between Zia and Junejo resulting in the dismissal of Junejo's government, Nawaz took sides with Zia. He was thus retained as caretaker chief minister of Punjab and was encouraged by the military High Command to take on Junejo and challenge his leadership within the Muslim League.

It is generally believed that IJI, which included other political parties like Jamaat-e-Islami, was formed with the assistance of Inter Services Intelligence (ISI), and Nawaz Sharif was installed as

its president to circumvent the stranglehold of the Muslim League headed by Junejo. It is also widely believed that it was due to the shrewd planning of the ISI that Nawaz Sharif emerged as the principal leader against the PPP which ultimately paved his way to the prime ministership of Pakistan in his early forties.

When Nawaz Sharif took over as the prime minister, he presented a package of liberal economic reforms which included privatization of nationalized industries, free movement of foreign exchange in and out of the country, and incentives to foreign and Pakistani capitalists for investment in Pakistan. He also did away with most of the restrictions of customs duty on goods being brought in by Pakistanis as accompanied baggage. It cannot be denied that these policies were, on the face of it, progressive and, if properly implemented, could have led to economic development. The main reason whey they failed was the inherent conflict between the personal interests of Nawaz and his family on the one hand, and national interests on the other. His family was a medium-size industrial group successful around

1980 in steel works like iron re-rolling, when Nawaz Sharif entered politics. Since then, his family has built an industrial empire running into a large number of steel units, cotton textile mills, sugar mills, and so on. His official positions as a minister, chief minister, and then as prime minister, have come in handy in the process of building the family empire.

The second cause of the failure of the Nawaz government was political corruption. Nawaz is believed to have started his career as a businessman, where bribing officials belonging to government departments is a way of life. He apparently brought these skills into politics and refined it under mentors like Zia and Ghulam Jilani Khan. He is alleged to have used money, urban plots of lands, and other material favours to win over members of Parliament and the Provincial Assembly of NWFP to destabilize the federal government and the provincial government of NWFP when these were headed by the PPP. At the height of the confrontation between the federal government headed by Benazir and the Punjab government headed by Nawaz, there developed a war of urban plots of land between them. The federal government was using Capital Development Authority (CDA) plots, and the Punjab government was using Lahore Development Authority's (LDA) plots to grant political favours and to destabilize the governments of one another.

The privatization of nationalized industries, undoubtedly a good policy, was done in a not very commendable manner. There was no transparency to it and it clearly degenerated into favouritism and nepotism where favourites were given industrial units at a fraction of their real value. Nawaz introduced what is known as the 'Yellow Cab' scheme. It is said that valuable foreign exchange amounting to nearly 750 million US dollars was poured into it. For a political rather than economic cause it provided employment to a few at a price that was very high. The concessions given under the scheme were widely abused.

Nawaz and some members of his cabinet are believed to be deeply involved in the co-operative societies scandal where 17 billion rupees of the people's savings were siphoned off. The motorway from Lahore to Islamabad, costing nearly one

billion US dollars, came under severe criticism an example of misplaced priorities and extravap* policies. It is said that for this money, thelonE awaited Indus Highway could have ben constructed and the National Highway could tat been doubled.

The foreign policy of Nawaz Sharif was anofa example of failure. There appeared to be to direction to it and Pakistan was increasing isolated in the world. Relations with neighbour^ countries hit a new low. Foreign aid was fat drying up. Nawaz had little understanding of ail exposure to the management of foreign affairs

Despite being the blue-eyed boy of the establishment and having been beholden to Iskij, Nawaz Sharif finally fell out with him apparently on the appointment of the Chief of Army Staff The gulf between the two widened until, on 18 April 1993, the National Assembly was dissolved

under Article 58(2)(b) and Nawaz and his Cabinet were dismissed. His government was restored by the Supreme Court on 26 May 1993 Nawaz Shanf addressed the nation and promised to let bygones be bygones but old habits die hard. He was soon involved in horse-trading to topple the provincial government in Punjab which led to an open confrontation between the federal and the provincial governments, particularly in Punjab and the NWFP.

THE CARETAKER GOVERNMENT

To everyone's surprise, Moeen Qureshi, a retired bureaucrat who had served for a long time outside the country in the World Bank, was appointed Caretaker Prime Minister. He was totally unknown in Pakistan and there were doubts about his Pakistani credentials. His only merit appeared to be that he was a political outsider and therefore expected to be neutral. Moeen Qureshi's experience, connections, and clout in the international community, particularly in international economic institutions, was to come in handy m resolving the economic mess Pakistan found itself in. For the caretaker government, governors and caretaker chief ministers were all taken from amongst retired civil and military bureaucrats

Despite the fact that Qureshi i ,cal and social milieu in Pakisi presence felt. In the short period o1 med to expose the misdeeds c Mvemments and published a list Jank loans, exposing those ^, influence to abuse the banking i foe depositors' money literally obtaining big loans without a ent. Moeen Qureshi also I ers that exposed many at! dodging the tax collectors I being borne by less fortunal

»ition of nominal tax on a< another significant step th ..shying away from to avoid Bfeudals. Moeen Qureshi ma [Pakistan an autonomous bod> [keeping political interference Mks Ordinances were pai ^Pakistan Radio and Television towards greater freedom of spe Other commendable steps ocluded cutting down the s administrative machinery, abol of the prime minister and the c allotment of residential plots,: against drug traffickers. C campaign against the defaulte ' 5 had only limited success jllect unpaid utility bills i. It goes to his credit t Euros' effort to recover gc Uy blemish on Moeen Qui Mast day, he made a large n and other administrative dec a favour to his brother and s

GENERAL ELECTIOI OCTOBER I"'-*

The general elections to t were held on schedule on 6

as were officially declared
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| Despite the fact that Qureshi was new to the J and social milieu in Pakistan, he made his e felt. In the short period of ninety days, he i to expose the misdeeds of the previous raents and published a list of defaulters of ; loans, exposing those who used their : to abuse the banking system and used |l depositors' money literally as their own by hinmg big loans without any intention of it. Moeen Qureshi also published a list of s that exposed many affluent people who ging the tax collectors while the burden orne by less fortunate tax-payers. The toon of nominal tax on agricultural income I another significant step that earlier regimes p skying away from to avoid the displeasure of |hdals. Moeen Qureshi made the State Bank i an autonomous body with the objective g political interference out of commercial , Ordinances were passed which made D Radio and Television autonomous, a step s greater freedom of speech and expression, [commendable steps of the caretakers cutting down the size of the bloated rtrative machinery, abolishing the discretion fcpnme minister and the chief ministers in the at of residential plots, and concerted moves : drug traffickers. Qureshi initiated a pagn against the defaulters of bank loans but I only limited success. His endeavour to
1 unpaid utility bills also met with little i It goes to his credit that at least he made a s effort to recover government dues. The i on Moeen Qureshi was that on his ly, he made a large number of promotions r administrative decisions which included i to his brother and some other relations.

IERAL **ELECTIONS,** OBER **1993**

Ijeneral elections to the National Assembly lleld on schedule on 6 October 1993. Results {officially declared on 7 October 1993 of uencies, are as under:

BaloParty Punjab NWFP Sindh chistan Total

PPP

PML(N)

PML(J)

PIF (Pakistan

Islamic Front)

ANP

Other political

parties. Independents

47
52

33
10

1

(Islam abad 1)

86

72

3
3

16

In addition, seven seats in the Federally Administered Tribal Areas went to the independents.

It is interesting to note that there was a very low turn out of voters in the general elections to the National Assembly. The overall percentage of voters was only 40.54 per cent.

The low turnout of voters compared to previous elections demonstrated a lack of interest and apathy on the part of the common citizen, who had discovered to his dismay that successive general elections did not bring any real change in his life and that all governments that came and went were inefficient, corrupt, and indifferent towards the problems of the people. When there is only a change of faces at the polls, there is hardly any motivation for the voter to go cast his vote.

As a result of elections to the National Assembly, no political party or political alliance emerged with a clear majority in the National Assembly. PPP and PML(N) stood as equal political forces in the country. Religious parties, including Pakistan Islamic Front (PIF), led by Jamaat-i-Islami, suffered a humiliating electoral defeat. PPP emerged as the largest party with eighty-six seats, followed by PML(N) with seventy-two seats. The number of votes taken by the PPP were 7,563,909 (38.1 per cent of the total votes cast) against 7,890,676 (39.7 per cent of the total votes cast) taken by PML(N). Nawaz thus claimed that his party had won a popular vote.

There are two factors worth mentioning have that tilted the balance in favour of the PPP. The first one was the PIF which secured only three seats in the National Assembly but was

instrumental in the defeat of PML(N) in at least fourteen constituencies where there was a close race between the PPP and the PML(N). PIF, which was previously an ally of PML(N) in the IJI, took away enough votes from the PML(N) to ensure its defeat at the hands of PPP candidates with very narrow margins in fourteen closely contested seats. Had it not been so, the results would have been just the opposite. The second factor was MQM's boycott of the elections. The result was that in Karachi, thirteen seats were divided by PML(N) and PPP, each getting six seats and one going to PIF. Had MQM participated in the elections, all thirteen seats would have been taken by it. It has remained a political mystery why the MQM boycotted elections to the National Assembly, especially since they participated in the elections to the Provincial Assembly of Sindh three days later. The MQM has paid dearly for this political lapse. One explanation generally proffered in political circles is that they were forced by the armed forces not to participate in elections to the National Assembly. This explanation is at best speculation.

On 9 October 1993, elections were held to
459 seats of the provincial assemblies of four provinces. Once again, PPP and PML(N) emerged as the principal parties in the provincial polls. The voter turnout was slightly better, with twenty-two million voters casting their ballots and the percentage of turn out was.43.10 per cent. An important factor that might have made the difference of 2.5 per cent in voter turn out between the National and Provincial Assembly polls could be the MQM. The MQM participated in the local polls with the result that it swept Karachi and Hyderabad, once again winning twenty-seven seats in the Sindh Assembly.

Before the general elections, an understanding or alliance had been reached between the PPP and PML(J) on the one hand, and the PML(N) and AMP on the other. The position that emerged after the provincial polls was that PPP had an absolute majority in Sindh with fifty-six out of ninety-nine seats for which elections were held. The other party with a substantial following in Sindh was MQM (Altaf Group or Haq Prast) which won twentyseven seats. In the Punjab, the PPP and PML(J)

alliance had an edge over PML(N) v. against 106 seats respectively. In PML(N) and ANP alliance had a clear edeeii thirty-six seats over the PPP and PML(I) together won twenty-six seats. PML(N)M emerged as the single largest party in the Ptni with 106 seats as against 94 taken by the NWFP, the PPP was the largest single p twenty-two seats, with a slight edge over i which had twenty-one seats. Balochistan was a hotch-potch with nine out of forty seats going it independents and the remaining thirty-one son divided amongst eleven parties. PML(N) won a seats which was more than any other single part; Pakistan Islamic Front (PIF) led by Jamaal-iIslami, once again fared very poorly in the provincial polls. It only made its presence felt in the NWFP with two seats in the National Assembl) and four seats in the NWFP Assembly. In tit Punjab, PIF did not win any seat in the National Assembly and only had two seats in the Provincial Assembly. It did not win any seat in the provincial assemblies of Sindh and Balochistan.

NOTES

1. The actual number of seats in the Provincial Assembly of the NWFP are eighty-three, out of which eighty belong to regional constituencies ami three to minorities.

2. *The Nation, 6* November 1990.

3. Protection of Economic Reforms Ordinance, 1991 (Ordinance XXVI of 1991) PLD, 1991 Central Statutes 494. Protection of Economic Reforms Ordinance, 1991 (Ordinance XXXIX of 1991), PLD
1992 Central Statutes 55. Protection of Economic Reforms Ordinance, 1992 (Ordinance in of 1992), PLD 1992 Central Statutes 166.

4. Protection of Economic Reforms Act, (Act XII of 1992) PLD 1992 Central Statute 250

5. Mirza, S.A. *Privatization in Pakistan,* Ferozsons (Pvt) Ltd., Lahore, pp. 32-3.

6. Transfer of Managed Establishments *(i* Ordinance, 1991 (Ordinance XV of 1991),

1991 Central Statutes 338. This Ordinance wasl substituted by Transfer of Managed Establishment (Amendment) Act, 1991 (Act XXII of 1991), PLD

1992 Central Statutes 47.

Transfer of Managed Estab Amendment) Ordinance, 1991 of 1991), PLD 1991 Centra amendment contained in tl subsequently incorporated in' Establishments (Amendment) 1992). PLD 1992 Central Stat -, Mirza, S.A., Privatization Note 5, Chapter V, pp. 93-11'
9. Parliament and Provincial qualification of Members president's (Post-Proclamatio PLD 1978 Central Statutes 1' Constitution (Twelfth Ame Act XIV of 1991, PLD 1991
11. Mr Sharaf Faridi was a pn Karachi. He was elected to th< for three consecutive ten President, Sindh High Cour . four consecutive years. M2 Sharaf Faridi v The Federatii of Pakistan etc., PLD 19891

13. Government of Sindh v Sh; S.C. 105.

14. The text is reproduced on 'Mohammad Nawaz Sharif v PLD 1993 S.C. 473.

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1 Central Statutes 338. This Ordinance was later stituted by Transfer of Managed Establishment* lendment) Act, 1991 (Act XXII of 1991), PI

2 Central Statutes 47.

1 Transfer of Managed Establishments (Second Amendment) Ordinance, 1991, (Ordinance XXXIII of 1991), PLD 1991 Central Statutes 551. The amendment contained in this ”Ordinance was subsequently incorporated in Transfer of Managed Establishments (Amendment) Act, 1992 (Act V of
1992) PLD 1992 Central Statutes 224.

I Mirza, S.A., Privatization in Pakistan, Supra Note 5, Chapter V, pp. 93-114.

) Parliament and Provincial Assemblies (Disqualification of Membership) Order, 1977. President’s (Post-Proclamation) Order 17 of 1977, PLD 1978 Central Statutes 17.

I Constitution (Twelfth Amendment) Act, 1991, ta XIV of 1991, PLD 1991 Central Statutes 461. ’ Mr Sharaf Faridi was a prominent lawyer from tachi. He was elected to the Pakistan Bar Council for three consecutive terms and was elected President, Sindh High Court Bar Association for four consecutive years.

1 Sharaf Faridi v The Federation of Islamic Republic ofPakistan etc., PLD 1989 Karachi 404.

< Government of Sindh v Sharaf Faridi, PLD 1994 SC 105.

He text is reproduced on pages 572 to 575 of ’Mohammad Nawaz Sharif v President ofPakistan’, PLD 1993 S.C. 473.

15. Muhammad Nawaz Sharif v Federation of Pakistan, PLD 1993 S.C. 473.

16. At one point in time, there were sixty-three members of the federal cabinet and more were coming if the Supreme Court did not restore Nawaz’s government.

17. The devotion to duty on the part of Justice Shafiur Rehman must be noted. He did not waste a day of the Court and continued hearing the case despite the shocking death of his young son in

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Lahore by accidental electrocution.

18. ’Justice Sajjad AH Shah, in his dissenting opinion, has taken note of indications given at the very beginning of the proceedings that decision of the Court would be such which would please the nation’, The Chief Justice, Dr Nasim Hasan Shah reportedly observed in open court during the course of the proceedings that he would not like to be remembered as Munir, obviously referring to the former Chief Justice who earned discredit in the cases of Maulvi Tamizuddin and Dosso.

19. Parvez Elahi v Province of Punjab, PLD 1993 Lahore 518. The detailed judgment is cited as PLD
1993 Lahore 595.

20. Nawabzada Mohsin Ali Khan v Government of NWFP and others, PLD 1993 Peshawar 207.

33 Benazir’s Second Term: The Judicial Crisis

Governor of H1 •a which the go arriedoninacc

As a result of the general elections in 1993, the PPP secured eighty-six seats and the PML(N) seventy-three seats. In addition, the PML(J) secured six seats and formed an alliance with the PPP at the centre and in the Punjab. With the help of independent members and some small parties, Benazir was elected prime minister on 19 October
1993 (with *121* votes as against seventy-two polled by Nawaz).1

In the Punjab, Mian Manzoor Wattoo of the PML(J) was elected chief minister (with 131 votes against 105 polled by Shahbaz Sharif). In Sindh, the PPP had an absolute majority in the Provincial Assembly, where it formed the government. Syed Abdullah Shah was elected Chief Minister of Sindh. In the NWFP, the PML(N) had an electoral alliance with the Awami National Party (ANP) which did well and won thirty-six out of eighty seats in the Provincial Assembly. Pir Sabir Shah of the PML(N) was elected Chief Minister of NWFP (with forty-eight votes against twenty-nine polled by Aftab Sherpao). In Balochistan, Nawab Zulfiqar Magsi was elected chief minister with the support of the PML(N) and the ANP alliance. All his opponents withdrew their nominations papers.2

After the formation of the governments at the centre and in the provinces, the next step was the election of the president, which was held on
13 November 1993. Initially, a number of candidates, including some leading political figures like former President Ishaq, Nawabzada Nasrullah Khan, Nawab Akbar Bugti, Air Marshal (Retd) Asghar Khan, Yahya Bakhtiar, Balakh Sher Mazari, and others filed their nomination papers. Later on, however, they dropped out of the race one by one and only two candidates were left in the field, Acting President Wasim Sajjad, a nominee of the PML(N), and Farooq Ahmad Leghari, a nominee of the PPP. Leghari was elected with *274* votes cast in his favour against

tfte Pre;

or to

declaring’ should be ordered 1

nds,

168 votes polled by Sajjad. In a goodwill unknown to Pakistani politicians, Sajjad a defeat and congratulated Leghari on his e1

In his first speech, Leghari stated that tie J the Eighth Amendment was lifted, the I would be.3 Benazir said that with the dec Leghari as President, the Eighth , become ineffective for at least five • promised to present a Bill for the repeal^ Eighth Amendment which, according to her,* expose Nawaz who had bitterly criticized j Amendment after the dismissal of his govcr but was not now willing to co-operate with B for its repeal.4 Despite this statement, noBilln ever presented by her government.

THE SABIR SHAH CASE

It was difficult for the PPP government at | centre to countenance opposition parties ft the provincial government in the NWFP audit' coalition government of the PML(N) andtheAM under Sabir Shah was a thorn in the side of tit I repf PPP. The PPP tried to destablize it by corn tutional subterfuge. After all, it had its on nominee elected as President which would corn in handy for the purpose. The PPP had to overcomt the obstacle of the majority in the coalition and to somehow reduce it to a minority. This could not happen as long as Sabir Shah and his govemmem was in office. Therefore, it was imperative to have the government suspended, providing an intoregnum for the PPP in the NWFP headed by AM Sherpao to win over members of the Provincial Assembly, thus reducing Sabir Shah and his supporters into a minority.

Ultimately, a constitutional solution was found to accomplish this. The emergency powers of the President were pressed into service. A report was

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Benazir’s Second Term: The Judicial Crisis

As a result of the general elections in 1993, the PPP secured eighty-six seats and the PML(N) seventy-three seats. In addition, the PML(J) secured six seats and formed an alliance with the PPP at the centre and in the Punjab. With the help of independent members and some small parties, Benazir was elected prime minister on 19 October
1993 (with 121 votes as against seventy-two polled by Nawaz).1

In the Punjab, Mian Manzoor Wattoo of the PML(J) was elected chief minister (with 131 votes against 105 polled by Shahbaz Sharif). In Sindh, the PPP had an absolute majority in the Provincial Assembly, where it formed the government. Syed Abdullah Shah was elected Chief Minister of

Sindh. In the NWFP, the PML(N) had an electoral alliance with the Awami National Party (ANP) which did well and won thirty-six out of eighty seats in the Provincial Assembly. Pir Sabir Shah of the PML(N) was elected Chief Minister of NWFP (with forty-eight votes against twenty-nine polled by Aftab Sherpao). In Balochistan, Nawab

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support of- tiac FMLfrf) and the AIMF alliance. All

Ms opponents withdrew their, nominations papers.1

After the formation of the governments at the ’

centre and in the provinces, the next step was the

election of the president, which was held OH

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candidates, including some leading political figures

like former President Ishaq, Nawabzada Nasrullah

Khan, Nawab Akbar Bugti, Air Marshal (Retd)

Asghar Khan, Yahya Bakhtiar, Balakh Sher

Mazari, and others filed their nomination papers.

Later on, however, they dropped out of the race

one by one and only two candidates were left in

the field, Acting President Wasim Sajjad, a

nominee of the PML(N), and Farooq Ahmad

Leghari, a nominee of the PPP. Leghari was

elected with 274 votes cast in his favour against

168 votes polled by Sajjad. In a goodwill ge unknown to Pakistani politicians, Sajjad coBcdd] defeat and congratulated Leghari on his election In his first speech, Leghari stated that the SOOM' the Eighth Amendment was lifted, the better |l would be.3 Benazir said that with the election Leghari as President, the Eighth Amendment become ineffective for at least five years promised to present a Bill for the repeal of to1 Eighth Amendment which, according to her, wnli expose Nawaz who had bitterly criticized *it* Amendment after the dismissal of his govemn' but was not now willing to co-operate with BOOT for its repeal.4 Despite this statement, no Bill *w* ever presented by her government.

THE SABIR SHAH CASE

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1994, the President issued a pn Article 234 of the Constitute Governor to assume the f\ government of NWFP declaring the Provincial Assembly shoul< *fyrliaffient.* Jt was also orden Minister and the provincial forthwith cease to hold office. (lifted to allow the PPP to forrr NWFP through blatant hor operators armed with large sum ultimately won over e ibers of the ruling coaliti is bring down Sabir Shah's] Sabir Shah challenged tl ilamation before the Suprer Article 184(3) of the

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government was malafide as the House; secondly, that tl province, the only politics Section of two membe

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[ttaned from the Governor of NWFP that a had arisen in which the government of W could not be carried on in accordance with [^provisions of the Constitution. On 25 February the President issued a proclamation under Wide 234 of the Constitution directing the Gmernor to assume the functions of the government of NWFP declaring that the powers of k Provincial Assembly should be exercised by diament. It was also ordered that the Chief lister and the provincial ministers should vith cease to hold office. Governor rule was
1 to allow the PPP to form a government in FP through blatant horse trading. PPP ! armed with large sums of money enticed [ultimately won over enough borderline abers of the ruling coalition to weaken and sbnngdown Sabir Shah's government.5 fSabir Shah challenged the validity of the nation before the Supreme Court of Pakistan : Article 184(3) of the Constitution on the inds, firstly, that the dissolution of his nent was malafide as he had a majority in (House; secondly, that there was peace in the e, the only political problem being the tion of two members of the Assembly jing to his political party to the PPP; thirdly, Ithe report on the basis of which the President
1 was made by the Acting Governor whose

nent was unconstitutional; fourthly, that

([President under Article 234 could not terminate ; of chief ministers and other ministers; ry, that the proclamation deprived the elected itatives of their fundamental right to govern ielves in violation of Article 17 of the tion of Pakistan; and sixthly, that the sole ! of the proclamation was to topple the duly ed government with the assistance of the Jtdefected members.

I Ik respondents pleaded firstly that the validity pie proclamation could not be challenged in i of Article 236(2) of the Constitution of plan, secondly, that the petition was :onceived as no fundamental right was lived; thirdly, that the President and the nor could not be impleaded in view of pie 248 of the Constitution of Pakistan; hly, that the petitioner's government was weak

as seven ministers and advisers had resigned their posts; fifthly, that the appointment of the Governor was valid and the report submitted by him legal; and sixthly, that the defection of the two members was sub judice. The petition was accepted by the Supreme Court by a majority of seven to two holding that the proclamation-to the extent that it purported to declare that the Chief Minister and his Cabinet would cease to hold office beyond the period of currency of the proclamation-was in excess of the power conferred on the President under Article 234 of the Constitution of Pakistan and that on the revival of the Provincial Assembly on the lapse of the proclamation, the Chief Minister and the Cabinet would stand revived. The Court clarified that it would be open to the Governor to re-fix a date and time in accordance with Article 130(5) of the Constitution of Pakistan requiring the Chief Minister to obtain a vote of confidence from the Assembly.

The Supreme Court held that:6

1. The ouster clause of Article 236(2) would not save a proclamation issued under Article 234 which is without jurisdiction, *coram non judice* or malafide, and the superior court in exercise of its judicial power can examine the validity of the proclamation.

2. The validity of the appointment of an incumbent of a public officer cannot be impugned through collateral proceedings. Therefore, it is not necessary to hold whether the Acting Governor was validly appointed or not for the reason that the actions taken or orders passed by the Acting Governor were covered by the *de facto* doctrine.

3. Under Article 234, receipt of a report by the President from the Governor is not a condition precedent to the issuance of proclamations. The President may act on the basis of information received by him from any other source. The word 'otherwise' in Article 234(1) has a wide connotation.

4. There were clearly conflicting efforts on the part of the opposition to oust the Chief Minister and his Cabinet, and on the part of the Chief Minister and his party to continue in office. The Speaker in this situation had declined to re-fix the date pursuant to the

notice issued by the Governor under Article
130(5) of the Constitution requiring the Chief Minister to obtain a vote of confidence. Such a situation necessitated the taking of a temporary measure under Article 234 of the Constitution in order to provide a cool-down period to both the parties. The President was justified in these circumstances in issuing the proclamation under Article 234 of the Constitution.

5. Refusal of the Speaker to allow the Assembly to meet in pursuance of the order of the Governor and declaration of the Chief Minister that he would not seek a vote of confidence created a situation where the exercise of the constitutional powers of the Governor were being obstructed and a person who had possibly lost the confidence of the Assembly was insisting on continuing in office as Chief Minister. The Governor was, therefore, justified in advising the President that the government of the province was not being carried on in accordance with the provisions of the Constitution.

6. The President under article 234 of the Constitution can only suspend the Chief Minister and his Cabinet for a period of two months. But he has no power to dismiss or remove them from office.

7. The Governor was competent under Article
130(5) of the Constitution to require the Chief Minister to obtain a vote of confidence.

8. ’Satisfaction’ of the President under Article
234 with regard to the existence of a situation in which the government of the province cannot be carried on in accordance with the provisions of the Constitution cannot be treated subjectively; it must be based on the existence of objective conditions justifying the issue of the proclamation. If the Court finds that the material used by the President in arriving at his satisfaction bears nexus to the object of proclamation, it cannot interfere with the proclamation on the ground that there was not sufficient material before the President to express his satisfaction with regard to the existence of a condition which would justify issuance of the proclamation.

PUBLIC HANGINGS BANNED

Election 10 of the Special Courts for Speedy Tnals Act, 1992, allowed the government to fix the place of execution of the death sentence The government could order a public hanging undei the law in order to create a deterrent effect The Supreme Court of Pakistan took *suo moto* notice of this law and held that public hanging is violatm of the dignity of man as enshrined in Article 14 of the Constitution of Pakistan.7 The Supreme Court of Pakistan also held that public hanging is violative of Article 7 of the ’Universal Declaration of Human Rights in Islam’, a document prepared by a number of leading Muslim scholars and published in London on 12 April 1980 The relevant portion of Article 7 reads:

The right of protection from torture:

It is not permitted to torture the criminal, still les the suspect: ’God will inflict punishment to those who have inflicted torture in this world ’

IMPLEMENTATION OF DECISION TO SEPARATE THE JUDICIARY FROM THE EXECUTIVE

The Supreme Court of Pakistan had ordered the immediate separation of the judiciary from the, executive in Sharaf Faridi’s case However,] Benazir’s government was dragging its feet over it. The Supreme Court of Pakistan was approached, for an extension of time which was denied to the j government. Ultimately, steps were taken to implement the decision by the promulgation of Legal Reforms Ordinance, 1996 on 20 March
1996. This was followed by succeeding ordinances j after every four months till it became an Act of Parliament on 3 July 1997.8 The Ordinance provided for ’Executive Magistrates’ and ’Judicial Magistrates’ who would work under the Distnct Magistrate, and the Sessions Judge respectively. 1 Judicial Magistrates were given the power to tn offences under the Pakistan Penal Code and other criminal law statutes. Executive Magistrates could try cases of offences against public tranquility, •, contempts of the lawful authority of public

servants, offences relating t measures, and offences affectin safety, convenience, decencj Executive Magistrates were coi power to award punishment for three years.

These provisions of the law 1 strong criticism by legal circles such powers to an Executive 1 negation of the dictates of the Pakistan to separate the judi executive and the judgment of th of Pakistan given in Sharaf Farid

THE LOCAL BODIES C

Local bodies are regarded as th democratic order. Zia, who was a otherwise, relied heavily on loca to introduce a new cadre of leadi Pakistan and succeeded largely in new leaders, particularly the PML from local bodies elections whic for their calibre and understand People who should not have rise of municipal corporations and became federal ministers, chic governors, particularly in the Pu

When Nawaz resigned as p
18 July 1993, the caretaker gove undo his main support in the m, from the local bodies. The loca had been held on 28 December 1 for a term of four years which < of 1995. However, on 15 August office of the local councilors v immediate effect through a n< Governor of the Punjab. It was i elections to the local bodies wo month of January 1994. Elect replaced by civil servants.

This notification was chall number of constitutional peti Lahore High Court by office councils. The petitions were all Bench on 30 January 1994, but ’ were not restored and the prov

ic HANGINGS BANNED

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|!HE LOCAL BODIES CASE

1 bodies are regarded as the backbone of a Itaocratic order. Zia, who was averse to elections Ifcrwise, relied heavily on local bodies elections Itintroduce a new cadre of leadership throughout Itiistan and succeeded largely in this attempt. The IB leaders, particularly the PML(N), had emerged lira local bodies elections which speaks volumes Ik their calibre and understanding of statecraft. Iteple who should not have risen above the level It! municipal corporations and district councils •tone federal ministers, chief ministers, and Ipvemors, particularly in the Punjab. fen Nawaz resigned as prime minister on |lMy 1993, the caretaker government decided to ihis main support in the masses which came i the local bodies. The local bodies elections dbeenheld on 28 December 1991 in the Punjab kt a term of four years which expired at the end
5. However, on 15 August 1993, the term of : of the local councilors was curtailed with diate effect through a notification of the or of the Punjab. It was directed that fresh ; to the local bodies would be held in the of January 1994. Elected officials were
1 by civil servants. (Tins notification was challenged through a iber of constitutional petitions before the High Court by office bearers of local mis. The petitions were allowed by a single tion 30 January 1994, but the local councils t not restored and the provincial government

was given two months to hold elections, failing

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1991 were to be restored.' *TbT}peng&ggZg? sot* satisfied and filed Intra-Court Appeals, *challenging non-restoration* of *the local* counci'/s. During the pendency of these Appeals, an Ordinance was promulgated on 5 April 1994 by the Governor of the Punjab declaring that the government had, and should be deemed always to have had, the power to control the term of local councils regardless of the duration of the residual term.10 The Ordinance also validated the notification set aside by a single judge of the Lahore High Court.

The Intra-Court Appeals were dismissed on
9 April 1994 on the grounds that another notification had been issued fixing a fresh date,
27 July 1994, for elections to the local councils in supersession of the earlier impugned notification.11

However, this judgment was set aside by the Supreme Court of Pakistan with the direction to allow the appellants to amend their appeals. After the remand, these Intra-Court Appeals were disposed of through a judgment dated 19 February
1995. Provincial government was given a period of three months to hold fresh elections to the local councils subject to the consideration that, in case of failure on the part of the provincial government to do so, all local councils in the province would stand restored. The validating Ordinance was held as invalid law and notifications issued thereunder were also held to be invalid.12

This judgment was challenged in appeals before the Supreme Court of Pakistan which were allowed on 26 June 1996 and all the local bodies/councils in the province of Punjab were ordered to be restored to enable them to complete their term up to 9 February 1997.13 On the following

day,
27 June 1996, the Provincial Assembly of Punjab passed the Punjab Local Government (Repeal) Act.
1996 (Act VI of 1996), repealing the Punjab Local Government Ordinance, 1979 declaring that al members of the local councils would cease to hole office. It was soon followed by the Punjab Loca Government Act, 1996,14 providing for re structuring and continuance of local governmer institutions.

The Punjab Local Government (Repeal) Act,
1996 was challenged before the Supreme Court of Pakistan on the plea that it was an exercise of legislative powers in as much as the intention was to keep the elected members of the local councils out of office and to defeat the earlier judgment of Supreme Court restoring the elected members to office. The Supreme Court upheld the validity of the Punjab Local Government (Repeal) Act, 1996 because it had been passed by the elected representatives of the people, that is, members of the Provincial Assembly under the power conferred upon them by the Constitution of Pakistan. The Court also held that it was not at liberty to inquire into the motives or malafide intent on the part of the legislature. Once a statute is made competently, the Court is not entitled to question the wisdom or fairness of the legislature. Nor can the Court refuse to enforce a law made on the ground that the result would be to nullify its own judgment.15

WATTOO GOVERNMENT SACKED: LAHORE HIGH COURT VERDICT

In a bid to keep the PML(N) out of power in the Punjab, though it held more seats than any other political party in the Assembly, the PPP entered into a coalition with the PML(J) to form a government in the Punjab. The PPP had to take the bitter pill of accepting Manzoor Ahmad Wattoo from the PML(J) as the chief minister even though his party only held eighteen seats in the House of
248. This uneasy coalition continued for nearly two years by which time PPP members of the Punjab Assembly had had enough of him. They could not come to terms with his arrogant and autocratic style of governance. Ultimately, Benazir gave in and plans were made to sack Wattoo. It was going to be a repeat performance of what was done in the NWFP for the removal of Sabir Shah. A report was obtained from the Governor of Punjab against Wattoo on the basis of which on
5 September 1995 the President issued Proclamation under Article 234 of the Constitution directing the Governor to assume the functions of the provincial government.16 After the above Proclamation, the control of the affairs of the

province were assumed by the Governor on I of the President.

The Governor then called upon Wattoo to i a vote of confidence from the Provincial.. in a session hurriedly summoned by
12 September 1995. Wattoo did not, the session and the Speaker informed the < that Wattoo failed to obtain a vote of c<

as a consequence of which he was

the office of the chief minister of Punjab. Wattoo's removal did not solve _.. problems, who wanted someone from the be the chief minister of Punjab. But the short of the requisite majority in the .__ Assembly and had to depend upon the supportj the PML(J) in order to form the government PML(J), which had tasted power for two was not ready for anything less than

ministership. After making several offers, _._ had to succumb to the demands of the PML(J)i conceded to her junior coalition parti Agreement was reached on appointing a weaki_ pliable person, Sardar Muhammad Anf Nakai. Under the agreement, a PPP nominee was the senior minister, sharing several ofther..,_ of the chief minister, particularly those pertaining to administration. Nakai was only too happy to become the chief minister, even if only in name On 13 September 1995, Nakai was ele< unopposed as Chief Minister of the Punjab
152 votes. He took oath of office the same. and on 14 September 1995 obtained a vote confidence with 148 votes to his credit
13 September 1995, the President revoked Proclamation of Emergency issued on 5 September 1995. In this way, once again, emergency provisions were used to dislocate one chit minister and elect another.

The Proclamation of Emergency under Article
234 of the Constitution and the order of the Governor for obtaining a vote of confidence were challenged before the Lahore High Court as illegal and unconstitutional. The constitutional petition was finally heard and accepted by a full Bench of the Lahore High Court *vide* judgment dated
30 October 1996.

The Court held that the power to issue a Proclamation of Emergency in case of failure of

.tional machinery in a province H of an exception and should and strictly construed. Such
5 an inroad into provincial autoi perly used, can destroy the e<
1 the federation and the federal s a sense of deprivation in the would not be healthy for the fedei ; the Court held, is not unb .oiled. It is circumscribed by two i | that the President must be sat iction must be objective and
1 relevant to Article 234; and sec _^_n must be to the effect tha iprovince cannot be run in accor ititution. The satisfaction must I B>ed on some material within tr ! 234. Although the Court coulc -eal over the satisfaction of the Pr I it substitute its own opinion foi tent, yet it must be shown that *t* basis of which he had acted wa wvonditions mentioned in Article 2

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tried on in accordance with the < be demonstrated that there wa institutional breakdown or ex n not contemplated by the Con i not otherwise cater for or provii jbation could be remedied ,,isions of the Constitution, action
01 could not be taken. The Court also held that only a fu ;er could be directed to obta

Fience. Since Wattoo had cease lief minister after the proclamat U, he could not have been asked tc pf confidence in such circumstanci lilso observed that although no time

1 prescribed for obtaining a vote c I reasonable time should have been a I to do so. It was held that sixteen r I sufficient for the Chief Minister to c

confidence, particularly when there as 248 members of the Provincial *t* The Court repelled the argument being a political question, fel constitutional jurisdiction of the O

BENAZIR'S SECOND TERM- THE JUDICIAL CJU5J5

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ant to Article 234; and secondly, that ion must be to the effect that the affairs

rate cannot be ran in accordance with ion. The satisfaction must be objective on some material within the nexus of Although the Court could neither sit over the satisfaction of the President, nor substitute its own opinion for that of the yet it must be shown that the material is of which he had acted was relevant to ions mentioned in Article 234. In order that the affairs of the province could not on in accordance with the Constitution, demonstrated that there was a deadlock itutional breakdown or existence of a not contemplated by the Constitution, and otherwise cater for or provide remedy. If m could be remedied under other of the Constitution, action under Article not be taken.

lit also held that only a functional chief [could be directed to obtain a vote of Since Wattoo had ceased to function iter after the proclamation of Article not have been asked to obtain a vote in such circumstances. The Court that although no time limit had been obtaining a vote of confidence, should have been allowed to him > held that sixteen hours were not the Chief Minister to obtain a vote of icularly when there were as many of the Provincial Assembly, elled the argument that the matter litical question, fell outside the jurisdiction of the Court. The Court

Constitution be condoned or allowed to be perpetuated.

Applying the above tests, the Proclamation of the President dated 5 September 1995 under Article
234 was declared to be without lawful authority. The election of Nakai as chief minister was held to be without lawful authority. As a consequence, Wattoo stood restored as Chief Minister on 5 September 1995. The Governor could call upon Wattoo to obtain a vote of confidence by

giving him not less than two clear days to do so. It was, however, undertaken by Wattoo not to advise the Governor to dissolve the Assembly before obtaining a vote of confidence.17 Finally, it was ruled that if Wattoo failed to obtain a vote of confidence, Nakai would stand restored as Chief Minister without any fresh election or other formalities.

Rejoicing over the restoration proved to be very short lived. The judgment was announced on 3 November 1996. The same day, eighty-five members of the Provincial Assembly moved a resolution for a vote of no-confidence against him. On 5 November 1996, Benazir's government was dismissed. Wattoo appealed before the Supreme Court for an extension to obtain a vote of confidence. The Supreme Court extended the time from ten to thirteen days. Consequently, Wattoo was required to obtain a vote of confidence by
16 November at the latest. The motion for vote of no-confidence was also fixed for 16 November. On 16 November, the motion for vote of noconfidence was withdrawn by the movers, thus forcing Wattoo to obtain a vote of confidence from the Provincial Assembly. That very day, ninetythree members of the Provincial Assembly from

Proclamation

the PML(N) tendered their resignations. Thus, Wattoo was *left* high and dry without any prospect of getting a vote of confidence. He therefore resigned from chief ministership of the Punjab that day on the pretext that he did not want to be a hurdle in the way of elections.18

CONFRONTATION WITH THE JUDICIARY

Justice Sajjad Appointed Chief Justice

Appointments to the Superior Courts in Pakistan have been made generally on considerations other than merit, being decided on the basis of political affiliations, nepotism, or favouritism. There has been a tacit understanding between the judiciary and successive governments on this issue. Governments could get their political favourites appointed to high judicial offices who, in return, obliged them and their colleagues by appointing their relatives and favourites. This dubious co-operation between the two organs of the State continued for quite some time until differences between the two developed into a major confrontation.

Before Benazir took over as prime minister in
1993, she promised reforms regarding the appointment of judges who would, in future, be made on merit. It did not take her long to renege on her promise. In order to understand the confrontation that subsequently took place between the judiciary and the executive, it is important to understand the experiences of Benazir with the judiciary that might have shaped her opinion, attitude, and policy towards the superior judiciary.

Benazir's first encounter with the superior judiciary was at the trial of her father in the Lahore High Court, followed by the rejection of his appeal by the Supreme Court of Pakistan which she later termed a 'judicial murder' in her book *Daughter of the East.* She thus perceived the judiciary to be a hostile institution.

Benazir also noticed that the judiciary was hand-in-glove with the Martial Law regime of General Zia and submitted meekly to humiliation at his hands. After all, the Supreme Court of Pakistan had conferred legitimacy on Zia's Martial Law in Nusrat Bhutto's Case and even allowed

him to amend the Constitution of unilaterally, a power he exercised maliciously, and capriciously, at all tma detriment of the PPP.

Although Benazir got relief from the Court of Pakistan in the Political Parties
1988, she faced hostile courts « government was dismissed by Ishaq Except for the Peshawar High Court, tk High Courts comprehensively upheld the of her government and the government of in Sindh. The Supreme Court of Pakistan these judgments and reversed the judgment Peshawar High Court favouring the PPP jj NWFP. Not only this, Benazir had that her arch rival and his party were alwaysi favourable verdicts from the High Courts Supreme Court, once again with the sole of the Peshawar High Court.

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She had thus taken over the reigns of1
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On 5 June 1994, Justice Jan was shocked learn that he had been ignored for appointment the Chief Justice of Pakistan and instead Sajjad Ali Shah, who was junior to him and to other colleagues,19 was appointed Chief Justice Pakistan. Thus, a forty-year-old practice appointing the senior-most judge as the Justice was arbitrarily dispensed with. In any country, senior judges would have resign protest, but in Pakistan there is no such Justice Jan went on long leave and came back work after that.20

What w'ere the factors behind the appointment of Justice Sajjad as Chief Justice? The mam reason appears to be the short-sighted, narrow-minded, and parochial approach of Benazir and her government.21 She was perhaps carried away by

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Peshawar High Court favouring the PPP in i

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i) dissents apparently in favour of the PPP. t, k Ahmad Tariq Rahim's case, in which the I of Benazir's government by Ishaq in I was challenged, Justice Sajjad was one of |tio dissenting judges and held that Ishaq's rto dissolve the National Assembly was He observed that the purpose of the i was to get rid of the government of the |,"InNawaz Sharif s case, where the dismissal tNawaz government by Ishaq was under ige, Justice Sajjad was the lone dissenter |lof eleven judges on the Bench who upheld the i as valid and expressed disapproval of the (in which Chief Justice Nasim Hasan Shah kionounced at the beginning of the proceedings pie nation was about to hear 'good news'. He a pungent remark at the end of his ; saying that when two prime ministers i were removed under the discretionary s of the president, the Supreme Court did listore them but when it was the turn of a (minister from the Punjab, the tables had been i!) These remarks must have rankled in it's mind while deciding on his appointment. *\w]* have thought that, being a Sindhi and a izer of the PPP (as it appeared apparently kthe said judgments), he would go along and
1 the interests of her government.

°'s ROUGH HANDLING OF RIOR COURTS

kite, the PPP government went on a rampage t the judiciary. The Chief Justices of the

m and Sindh High Courts, whom the ment believed to be opposed to the PPP or thetic to the political party in opposition,

i removed and appointed as judges of the I Shanat Court. The Chief Justice of the i High Court accepted the humiliating nt, but the Chief Justice of the Lahore

JCourt refused to do so and retired. They were iby two Supreme Court judges who were i as Acting Chief Justices of the two High s. In Sindh, Justice Abdul Hafiz Memon was

lippointed a judge of the Sindh High Court quently as an Acting Chief Justice. On

discovering that his appointment as a judge of the High Court had made him the junior-most judge and thus he could not be the Acting Chief Justice, the notification was immediately rescinded. He was then notified as a judge of the Supreme Court, followed by another notification appointing him as the Acting Chief Justice of the Sindh High Court.24

The Lahore High Court suffered a similar fate. After the removal of the Chief Justice, the PPP government brought back a retired judge of the Lahore High Court, Justice Muhammad Ilyas,

who was then serving as a judge of the Federal Shariat Court and was deeply aggrieved from the previous government which, in his reckoning, had denied him appointment as Chief Justice of the Lahore High Court. He was appointed, as a judge of the Supreme Court and was then sent as Acting Chief Justice to the Lahore High Court. The Peshawar High Court was also headed by an Acting Chief Justice not drawn from the Supreme Court.

With three High Courts headed by Acting Chief Justices, the PPP government embarked upon the second phase of its plan which was to pack the High Courts with political appointees. Nine judges were appointed to the Sindh High Court, most of whom were either political appointees or favourites of the PPP bosses. A majority of them either did not qualify for appointment or were not fit for appointment because of a lack of requisite experience at the Bar of the High Court. In August
1994, the Lahore High Court was packed with twenty appointees. Out of these two were from amongst the sessions judges and the remaining were supposedly taken from the Bar. Only six 01 seven judges could justify their appointment or merit. Another three or four could be considerec marginal cases. Eight or nine of these appointment were simply outrageous. Four or five of them ha< never or seldom appeared in the High Court a advocates.265One of them is said to have seen th building of the High Court for the first time whe he came to take the oath of office. Four or five c them did not have the requisite experience of t« years at the Bar of the High Court. Even among these political appointees, there were clear cas of nepotism. The Governor of Punjab got h younger brother appointed to the post. The Chi Minister had one of his old friends appoints

A powerful MNA got his own son appointed, one who had never been known to practise law. There seemed to be some kind of quota for governor, chief minister, and president.

In the Supreme Court as well, the courts were packed with ad hoc judges. At one point in time, there were as many as seven ad hoc judges against ten permanent judges, including the Chief Justice, with two out of these permanent judges serving as Acting Chief Justices of the High Courts. Thus the permanent judges and ad hoc judges in the Supreme Court were nearly equal in number at the time.

Acting Chief Justices of the High Courts were made simple rubber stamps, recommending all that the government desired. They had virtually abdicated their role as judicial consultees under the Constitution. Chief Justice Sajjad went along with all this up to a point. Initially, he was even supportive of PPP appointees and issued contempt notices against those who spoke or wrote against such appointments.26 Ultimately, he balked when things began to cross all levels of tolerance. He parted ways with the PPP government on a number of issues, including the appointment of a judge of the Sindh High Court from amongst sessions judges ahead of many others senior to him.27 He decided to resist when he thought that the actions of the PPP were harmful to the judiciary as an institution.

THE JUDGES' JUDGMENT

The Supreme Court of Pakistan granted leave to appeal against the appointment of twenty judges to the Lahore High Court so as to consider the constitutionality of such appointments. After considerable arguments spread over several months, a Bench of the Supreme Court of Pakistan comprising five judges, gave a majority judgment of four to one,28 accepting the appeal against such appointments. The Supreme Court held as under:29

1. Appointment of ad hoc judges against permanent vacancies of the Supreme Court violates the Constitution.

2. Appointment of Acting Chief Justices can only be a stop-gap arrangement for a short

period and not, in any case, e^ period of 90 days.

3. An Acting Chief Justice cannui consultee for the purposes of a]

of judges, and the appointments mafc the recommendation of an Acting Justice were invalid and unconstii

4. An additional judge of a High acquires a reasonable expectancy to considered for appointment as judge, and if he is recommended *[* Chief Justice of Pakistan, he is appointed as such in the absence of reasons to the contrary to be reran the President/Executive which would way be

justiciable.

5. All permanent vacancies in the judiciary, particularly those of the Chief Ji should be filled in advance if tl normal ones (like arising out of

and in any case, not later than 30 days their occurrence. If a vacancy ~ account of death or for any unft cause, it should be filled, at the most w*»’
90 days.

6. The senior most judge of a High Cou

a legitimate expectancy to be consiu. „, for appointment as Chief Justice He b entitled to be appointed as Chief Justice of that Court in the absence of very strong reasons to the contrary to be recorded by the President/Executive.

7. That sending of a Supreme Court judge to a High Court as an Acting Chief Justice would be undesirable, particularly in vie* of adverse observations in the judgment of the Supreme Court in Abrar Hassan v Government of Pakistan (PLD 1976 SC
315).

8. The words ’after consultation’ occurring 11 Articles 177 and 193 of the Constiruuoa involve a participatory consultative process between the consultees and the Executive. It should be effective, meaningful, purposive, and consensus oriented, leaving no room for complaint of arbitrariness or unfair play. The Chief Justice of a High Court and the Chief Justice of Pakistan are

well-equipped to assess he to suitability of a candidate for the superior Courts. The op Chief Justices as consUtuUon, was held to be binding on * and if the Executive disagrview of the Chief Justice of Chief Justice of a High O strong reasons whi justiciable. The Court fou, consistent practice that ha. status of convention during^

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period and not, in any case, exceeding period of 90 days. An Acting Chief Justice cannot be consultee for the purposes of appoint of judges, and the appointments made the recommendation of an Acting Justice were invalid and unconstitutional. An additional judge of a High C< acquires a reasonable expectancy to considered for appointment as permi judge, and if he is recommended by Chief Justice of Pakistan, he is to appointed as such in the absence of reasons to the contrary to be recorded the President/Executive which would way be justiciable.

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well-equipped to assess the knowledge and suitability of a candidate for judgeship of the superior Courts. The opinion of the Chief Justices as constitutional consultees was held to be binding on the Executive, and if the Executive disagreed with the view of the Chief Justice of Pakistan and the Chief Justice of a High Court, it should record strong reasons which would be justiciable. The Court found it to be a consistent practice that has acquired the status of convention during the pre-partition days of India as well as the post-partition period, that the recommendations of the Chief Justice of a High Court and the Chief Justice of the Supreme Court, in India as well as in Pakistan, have been consistently accepted and acted upon except in very rare cases.30

9. The requirement often years practice as an Advocate of the High Court for appointment as judge of the High Court does not mean mere enrolment for that period as an advocate, but actual practice/experience as an advocate of the High Court for such period.

10. If a person of unimpeachable integrity and sound knowledge of law is recommended by the Chief Justice of the High Court and the Chief Justice of Pakistan, his past political affiliation would not be a disqualification because a person of integrity and sound knowledge normally severs his past connections with the political party with which he had affiliation and decides the matter purely on merits. However, it would be desirable not to appoint a person who is a strong activist in a political party and for him, it would not be possible to erase an unconscious tilt in favour of his party.

11. The power to transfer judges from one High Court to another cannot be invoked by the President/Executive for any purpose other than public interest, and that too only after consultation with the Chief Justice of Pakistan. The power of transfer cannot be pressed into service for the purpose of

inflicting punishment on a judge or for any other extraneous consideration.

The Supreme Court directed the government to appoint permanent Chief Justices to High Courts where acting Chief Justices were working within thirty days of the judgment. The permanent Chief Justices were directed to process the cases of those judges whose appointment had been held invalid/ unconstitutional under the judgment for regularization of the appointment of those judges who were qualified or fit to be so appointed. It meant that those amongst the appointees who had been confirmed on the recommendations of the acting Chief Justices and found to be not qualified or fit for appointment were to be dropped.

This judgment proved to be a red rag to the bull. Benazir took it as a personal affront to her. She could no longer make arbitrary appointments to the judiciary and those already made by her were re-opened for review. Once again, the judicial establishment had done her in. After all, these appointments were not the first of their kind. The previous government had also made similar and, at times, equally outrageous appointments. It was all the more painful that this was done to her by someone whom she had favoured by appointing him ahead of his senior colleagues. Her reaction to the judgment was confrontational. She criticized, even ridiculed, the judgment publicly before Parliament and the press. She made no secret of her feeling that she had been betrayed by a person who was her beneficiary. Even during the course of the hearing, there were strong rumours (and some of them were even reported in the press), that the government was trying to pressure the Chief Justice through various means.31 All this did not make an impression on the Chief Justice whose resolve only hardened. What began as a difference of opinion developed into a bitter personal feud, which became one of the main reasons for the downfall of Benazir's government.

The Judges' Judgment is indeed an important milestone in the judicial history of Pakistan. It made consultation with chief justices on the matter of appointment of judges effective and meaningful. The undesirable practices of appointing ad hoc judges to the Supreme Court and Acting Chief

Justices of the High Courts was done away with. Such appointments had degenerated into vehicles for rendering the judiciary subservient to the wishes of and pressures from the executive. Recognition of the convention/practice of appointment of the senior-most judge of a High Court as its Chief Justice was a step in the right direction. This would eliminate the possibility of in-fighting or bickering amongst judges and would render the superior judiciary self-operative, free from fear of and inducement from the executive. Continuation in office by the judges was no longer left to the vagaries of changing governments. Their appointment as permanent judges, after having served as Additional Judges was, to some extent, made self-operative.

Nevertheless, the judgment was not without its shortcomings. It suffered from the inherent defect of being passed in a case where the judges were interested in its outcome. Certain interpretations of constitutional provisions were beyond the recognized principles of statutory or constitutional interpretation and bordered on re-writing the constitutional provisions concerned. It was laid down that the appointment/ confirmation of judges on the consultation of an Acting Chief Justice would be invalid, but the same principle was not extended to those appointed/confirmed as judges on the consultation of the Acting Chief Justices during Zia's government. It is quite unusual in the annals of constitutional law for one provision of the Constitution to have superceded another. It is also unusual that a provision of the Constitution is held to be inoperative and ineffective.

Be that as it may, the overall impact of the judgment was healthy and it restored the eroding public confidence in judicial institutions. The judgment became instantly popular in the public at large and attracted a lot of attention from the press and other public fora. When Benazir's government offered resistance to its implementation, it became a rallying point for the political parties in opposition. The Bar Councils and the Bar Associations throughout Pakistan passed resolutions in its favour and became the vanguard of the movement for its implementation.

Benazir's government adopted a self-destructive attitude towards the judgment. While it agreed to

implement the judgment and actually took steps towards it's implementation, it hostile attitude towards the judges responsibk it, particularly towards the Chief Justice

Despite her resentment, the Judges' was implemented. Permanent chief juste »n appointed in the three High Courts within days. Ad hoc judges in the Supreme Court relieved and repatriated to their respective He Courts. A number of High Court judges appoints during Benazir's government who did not *m* the criteria were laid off.

After trying to retain the judges who, scrutiny by the Chief Justice, were recoi to be dropped, this six month struggle came to end on 30 September 1996. Benazir advised President to notify the regularization of twentynine judges of the High Courts, which included fourteen judges of the

Lahore High Court, ten of the Sindh High Court, and five of the Peshaw High Court. Those who were not regularized and thus laid off were eleven in all, including judges of the Lahore High Court, three of the High Court, and one of the Peshawar High Another seven judges who were not recoi for regularization had already resigned, resignations were secured by the government. President accepted those resignations which were received by him before 21 September, 1996 He returned five which he received after that da1

Benazir and her government did not gu, „. easily. There were certain other political evente September 1996 that led to the surrender of government. On 20 September 1996, Benazir's brother Murtaza Bhutto was shot and killed in Karachi near his residence, apparently in a police encounter. The government, and Benazir's husband Zardari in particular, were blamed for the death Another factor was the rift between Benazir and Leghari which had been brewing for some time, but came to the surface on 21 September 1996 when Leghari filed a reference on his own before the Supreme Court seeking its opinion on the question of whether he was bound by the advice of the prime minister in appointing judges to the superior courts.

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LEGHARI-BENAZIR **RIFT:** PRESIDENT'S **REFERENCE No. 2**

aces had been brewing between Leghari and : over several months," particularly on the mentation of the Judges' Judgment. It led to | open confrontation between the two which i public on the filing of the President's ;No. 2 of 1996 on 21 September 1996,33 i events since the judgment of 20 March
6 were recounted and it was stated that the : constitutional objective of securing the idence of the judiciary required that the |»ident should be the effective appointing tority of judges in accordance with the :nt given by the Supreme Court in that case. also stated that the impasse in the ^mentation of the Supreme Court judgment d assumed urgent public importance and that *I* m the implementation was hurting public st, a controversy that needed to be speedily ved once and for all. le President referred the following question i for the consideration and opinion of the me Court: whether the powers of the

; to make appointments to the Supreme

A and the High Courts under Articles 177 and
1 of the Constitution are subject to the piisions of Article 48(1) of the Constitution. liis Reference was initially resisted by Benazir t ground that it could not be filed without the |te of the prime minister. The President had
1 his own counsel to represent him in the : the Attorney-General may withdraw or ! it. The

situation created some bizarre i in court, when the Attorney-General _.Ito object that being the chief law officer (federation, only he could conduct the case
1 other lawyer could only appear on his »tion. This problem was overcome by the of Benazir's government and the new y-General withdrew this objection and ,...J the standpoint of the President. *K* Supreme Court held that on the question of ointments of judges, as contemplated under
177 and 193 of the Constitution, the advice Itcabmet or prime minister under Article 48(1) It Constitution of Pakistan is attracted but it is

qualified by and subject to the ratio decided in the Judges' Judgment in which it was held that in the appointment of judges, the opinion of the Chief Justice of Pakistan and Chief Justice of the concerned High Court as to the fitness or suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive.34

In support of the conclusion that the president is bound by the advice of the prime minister or the cabinet, it was observed that amendments introduced by the Eighth Amendment did not change the form of government from parliamentary to presidential, although more powers were conferred on the president to carve out an effective role for him.

While agreeing with the conclusion that the

president is bound by the advice of the prime

minister in the matter of appointment of judges,

Justice Ajmal Mian discussed various options that

the president could exercise. He could agree with

the reasons recorded by the prime minister for not

accepting the recommendations of the Chief Justice

or Chief Justices, he could refer the matter back to

the prime minister for reconsideration, he could

refer the matter for the consideration of the cabinet,

he could convene a meeting of the prime minister

and the Chief Justices concerned for resolving the

issue by a participatory consensus-oriented

consultative process, or make a reference to the

Supreme Court under its advisory jurisdiction for

soliciting its opinion.

The Court also took into consideration the eventuality of the judgment of the Supreme Court in the matter of appointment of judges not being implemented. The Chief Justice observed that it would be the constitutional duty of the President to see to it that the judgment is implemented and that there is no violation or non-compliance of Article 190 of the Constitution which makes it mandatory for all executive and judicial authorities throughout Pakistan to act in aid of the Supreme Court. If the judgment is not implemented, then such a situation could be construed as an impasse or deadlock and would amount to the failure of the constitutional machinery, and one would be justified to say that a situation had arisen in which a government of federation could not be carried on

in accordance with the provisions of the Constitution. Justice Saiduzzaman Siddiqui, in his separate opinion, went a step further. He observed that if the prime minister fails to tender his advice within the time-frame fixed in the judgment in AlJehad Trust Case, he or she shall be deemed to have agreed to the recommendation of the Chief Justice of Pakistan and that of the Chief Justice of the Provincial High Court, as the case may be, and the President may proceed to make the final appointment on that basis.

DISMISSAL OF BENAZIR'S GOVERNMENT

Apart from the confrontation with Leghari that developed in September 1996, there were other developments that bedevilled Benazir's government and made it vulnerable. Misgovernance by Benazir was no secret. The Pakistani rupee was being repeatedly devalued and the balance of payments was becoming increasingly adverse. The International Monetary Fund (IMF) had informed the government in September 1996 that its continued support would be made dependent on the administration imposing a tax on agricultural income, or a sizeable reduction in military expenditure, or the removal of regulator import duties, or the slashing of tariffs, and the management of flexible exchange rates.35 Another development was Leghari's overtures towards the opposition. He met the opposition leader, Nawaz, on 26 September when the latter requested that Leghari dismiss the government because it had forfeited its mandate, and to order fresh elections under a neutral caretaker government. Nawaz also asserted that the government was not being run in accordance with the Constitution and action should, therefore, be taken under Article
58(2)(b) of the Constitution. Leghari responded by saying that this was a matter that lay at his discretion, adding that he would act in accordance with the constitutional provisions if the supreme national interest so demanded. Nawaz assured Leghari that the PML(N) would counter any move against him.36

The restoration of Wattoo as Chief 1 the Punjab by the Lahore High
3 November 1996 was another serious I Benazir's government. She had to prepare *if* plan to oust Wattoo by moving a resolu vote of no-confidence by eighty-five MPAsi the PPP and its allies, minutes after his r Zardari was immediately despatched to I executing the game plan. However, further showdown in Punjab, Leghan strucka) night between 4 and 5 November by i the National Assembly under Article 58(2) thereby dismissing the government. Meraj 1 a founder member of the PPP, a former Spi the National Assembly, and a former chief n of Punjab, was appointed caretaker prime miwa.|

ORDER OF DISSOLUTION

The order of dissolution of National Assembly *a based on the following grounds:-

a) Thousands of persons in Karachi were killed in police custody and false police encounters in violation of their nght to life guaranteed under Article 9 of the Constitution.

b) The Federal Government and the Provi Governments of Sindh, Punjab and NWFP' (where

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PPP was in power) failed to maintain law and order and did nothing to stop the crime of extra judicial killings The law and order situation further deteriorated because of wide spread interference by the members of the government in the appointment, transfer and posting of officers and staff of the law enforcing agencies.

c) Prime Minister Bhutto falsely insinuated that the Presidency and other agencies of state were involved in conspiracy that resulted in the murder of Mr Murtaza Bhutto.

d) Prime Minister ridiculed judgment of the Supreme Court in the Judges' case and deliberately delayed its implementation Therefore, she underminded the independence of the judiciary.

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BENAZIR'S SECOND TEI REVIEWED

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organ of the statement by proposing a law under which a judge could be stated by proposing a law under which a judge could be removed through a vote of no confidence.

f) The judiciary was not being fully separated from the executive in violation of the provincies of Article 175(3). Prime Minister and her government deliberately violated the fundamental right of privacy under Article 14 of the Constitution by including in illegal phone tapping and eavesdropping techniques on massive scale.

Ik) Corruption, nepotism and violation of rules in the administration of the affairs of the Government and its various bodies, authorities and corporations had become so extensive and widespread that the orderly functioning of government in accordance with provisions of the Constitution and the law had become impossible. The Constitutional requirement that the cabinet together with Minister of State should be collectively responsible to the National assembly had been violated.

IENAZIR'S **SECOND TERM**

VIEWED

i Benazir came into power for the second e, it was hoped that she had learnt her lesson. ilk performance of her government was, once i,very disappointing. This time, she did not R any excuse whatsoever. The PPP had its own : as President and the military leadership, iud large, stood by it.

[lie law and order situation deteriorated daily, arly in Karachi, and thousands of innocent :ns were murdered in deliberate acts of m. Mosques and other places of congrega|iwere bombed and innocent worshippers were I in the manner of execution by sectarian trists. Despite all this, Benazir and her s kept chanting that everything was alright lider control.

Sabir Shah's government in the NWFP was overthrown through questionable constitutional means and Aftab Sherpao formed the government there through political horse trading. Manzoor Wattoo was also removed as Chief Minister of the Punjab by using constitutional subterfuge.

The judiciary had a rough deal at the hands of the second PPP government. Although it was part of the manifesto of the PPP in the 1993 general elections to introduce judicial reforms and lay down objective standards for the appointment of judges,38 the steps that were taken only led to a further deterioration of the judicial structure.

Benazir's handling of the economy was highly inept. There was virtually no economic policy and she failed to attract any appreciable foreign investment. The only area in which some progress was made was the energy sector which was at a very heavy cost to the consumers of electricity in Pakistan. Power purchase agreements signed in this behalf were detrimental to the national interest. It was self-evident that the rates at which electricity was to be purchased would ruin the economy. WAPDA would go bankrupt paying the heavy bill of power purchase and consumers would be burdened by raising the tariff of electricity manifold. Industry would not afford electricity at that rate and industrial units would have to close. Despite such obvious problems, the PPP government proceeded to sign such power purchase agreements. Consequently, WAPDA, a national institution, is tottering on the brink of bankruptcy. The only accomplishment of Benazir's government was the restoration of peace in Karachi, but it was achieved through questionable means. The law enforcement agencies were given a free hand in dealing with the MQM and there were serious allegations of extra-judicial killings and excesses by police and other law enforcing agencies.

Benazir's government was also undermined by family feuds. Her brother Murtaza Bhutto became an open critic of her government and of her husband, whom he accused of embezzlement and looting. Her mother, Nusrat, sided with Murtaza Bhutto, the only surviving male heir of the Bhutto legacy. Benazir fell out with her mother and removed her as Chairperson of the PPP. The

division in the family became absolute with Benazir and her husband Zardari on one side and Murtaza Bhutto and his mother Nusrat on the other. After Murtaza's murder, the differences became acute and the widow of Murtaza, Ghinwa, headed the party of her husband, PPP (Shaheed Bhutto group). She openly blamed Benazir and Zardari for the death and participated in general elections in February 1997 to undermine Benazir's party in Sindh. Her party was instrumental in the defeat of the PPP in Sindh in closely contested races.

In short, Benazir's second term in office became the symbol of corruption and incompetence. A growing number of Pakistanis questioned whether she had any coherent vision of the future of the country at all.39 The legacy of her government has been corruption, high inflation, political and economic uncertainty, disillusionment, and widespread apathy amongst the common citizens.

NOTES

1. *The News,* 20 October 1993.

2. *The News,* 21 October 1993.

3. *The News,* 14 November 1993.

4. *The News, 5* December 1993.

5. Ziring, Lawrence, *Pakistan in the Twentieth Century- A Political History,* 1997, Oxford University Press, Karachi, pp. 556-7.

6. Sabir Shah v Federation of Pakistan, PLD 1994 S.C. 738.

7. In re: Suo Moto Constitutional Petition, 1994 SCMR 1028.

8. Legal Reforms Ordinance, 1996 (Ordinance XL of
1996), gazetted on 2 March 1996, reported as PLD
1996 Central Statutes 300. It was followed by Legal Reforms Ordinance, 1996 (Ordinance XXII of
1996), gazetted on 4 July 1996, reported as PLD
1996 Central Statutes 1800. It was then followed by Legal Reforms Ordinance, 1996 (Ordinance XCIV of 1996) gazetted on 2 November 1996, reported as PLD 1997 Central Statutes 102. Another Ordinance, Legal Reforms Ordinance, 1997 (Ordinance XL of *1997) was gazetted on 4 March*

1997 and reported ;,

"enactedTas Legal Reforms Act, \997 tAct XXVII of

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1997) gazetted on 3 July 1997 and reported as

9. Mian Abdul Majeed v Province of CLC 1244.

10. Punjab Local Government (Amendnw Validation) Ordinance 1994. Punjab Ordr of 1994. PLD 1994 Punjab Statutes 51

11. Mehr Zulfiqar Ali Babu v Government c

1994 CLC 1794.

12. Muhammad Aslam v Punjab Governme

1995 Civil 630.

13. Mehr Zulfiqar Ali Babu v Government o
1997 SCMR 117.

14. Punjab Act VII of 1996, PLJ 1996 Punjab
43.

15. Mehr Zulfiqar Ali Babu v Governmerr Punjab, PLJ 1997 S.C. 175.

16. The Proclamation as reproduced on page:' report of the case titled 'Manzoor Ahmad \\ Federation of Pakistan', PLD 1997 Lahore ^

17. The counsel of Wattoo had requested the Court 10 allow him sixty days to obtain a vote of confidence, the period allowed to a newly elected Chief Minister. The request was declined by the Coat because it was a matter of restoration of office

18. *The News*, 17 November 1996.

19. Justice Sajjad Ali Shah was also junior to Justice Ajmal Mian and Justice Abdul Qadeer Chaudhry

20. In India, during Indira Gandhi's prime immstership,

the senior-most judge of the Supreme Court was • 29 ignored in favour of someone fourth in senionty and the three senior judges resigned/retired in protest. Reportedly, Justice Ajmal Mian and Justice Abdul Qadeer Chaudhry offered Justice Jan thenresignations in his support if the latter would do so Justice Jan did not accept the offer.

21. The author learnt from a very influential member of the PPP who said that he was consulted m this matter. He claimed that he supported Justice Jan for appointment as the chief justice. Soon after the note of 2 June 1994, he was summoned by Benazir to Lahore and was shown the note in the Governor's House. He was then sent to the Supreme Court Rest House in Lahore where he

found Justice Sajjad sitting with Asif Ali Zardari, Benazir's husband and assuring the latter that he would do what the PPP government desired him to do.

22. PLD 1992 S.C. 646.

23. PLD 1993 S.C. 473.

24. Such was the state of confusion <kt the law

Justice Nasir Aslam Z,atiiti, supercedmg one after

the other on the same day. In one, he was appointed ad hoc judge of ti}g §«jpfflS=Qfilttt; JB }

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b Local *Government (Amendment and*

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Zulfiqar All Babu v Government of Punjab,

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b Act VII of 1996, PLJ 1996 Punjab Statutes

Zulfiqar Ali Babu v Government of the b, PLJ 1997 S.C. 175. roclamation as reproduced on page 51 of the

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1992 S.C. 646.

1993 S.C. 473.

was the state of confusion that the law try issued three successive notifications ling the Chief Justice of the Sindh High Court, e Nasir Aslam Zahid, superceding one after her on the same day. In one, he was appointed c judge of the Supreme Court, in the second,

Court, *and in* the third and *final, after rescinding*

the two notifications, ***he*** was *appointed as a judge*

of the Federal Shariat Court.

Chief Justice and the Governor. They were actually I never recommended by a constitutional consultee.

Some of tVie names are reported to \va-ve feeen added

at the last minute. Their names were faxed from

tie Prime Minister House to the Law Ministry

requiring the *latter to* include them *in* the

notification to be issued in this behalf.

He issued notices for contempt of court to a number

of lawyers and journalists, including Mr Ardeshir

Cowasjee who wrote for the daily *Dawn,* for

criticizing such judicial appointments.

Agha Rafiq is said to have close relations with Asif

41i Zardari who tried to manage his appointment

rat of turn. When the Chief Justice objected to his

appointment, the story goes, he was rudely

reminded of his own appointment ahead of three

senior judges.

He dissenting judge, Justice Mir Hazar Khan

Khoso, was the only ad hoc judge in the Bench and

his appointment as such was being adversely

affected by the verdict of the majority.

Al-Jehad Trust v Federation of Pakistan, PLD 1996

SC. 324.

Tie Supreme Court, on this point, has heavily relied

upon judgment of the Indian Supreme Court in the

supreme court Advocates-on-Record Association

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v the Union of India AIR 1994 S.C. *268.*

31. One of the instances commonly kno\vn is the police

raid on the residence of his daughter with the

32. *The News,* 1 October 1996.

33. There were also other factors that led to such

confrontations TV\e arrogant attitude o£ ^Benazir and

her husband towards Leghari was mainly responsible for the rift. It is also rumoured that the attempt on the part of Zardari to wire-tap the phone of Leghari’s daughter made the rift deeply personal and bitter.

34. Al-Jehad Trust v Federation of Pakistan, PLD 1997 S.C. 84.

35. Ziring, Lawrence, *Pakistan in the Twentieth Century-A Political History, supra,* note 5, p. 572.

36. *The News,* 27 September 1996.

37. The text taken from the daily *The News,*
5 November 1996.

38. While replying to the offer of cooperation being made to the then Prime Minister Nawaz on 29 May
1993 on the floor of the National Assembly, Benazir referred to the need for changing the method of appointment of judges of the superior courts. She repeated the proposal in her interview before national television prior to the general elections of October 1993.

39. Weekly *Time* of 17 April 1995, p. 16.

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A founder member of the PPP, Meraj Khalid, former Speaker of the National Assembly, and former Chief Minister of Punjab, was sworn in as Caretaker Prime Minister. The caretaker cabinet included Sahabzada Yaqub Khan, a former Foreign Minister, Abida Hussain, a former Federal Minister from PML(N), and Shahid Javed Burki as chief economic adviser, a role he had played earlier in the caretaker government of Moeen Qureshi. Burki was taken in order to restore the confidence of financial markets in Pakistan and abroad.1 Fakharuddin G. Ibrahim, a highly respected lawyer, was taken as Federal Law Minister. The rest of the cabinet was the selection of Leghari who packed it with his old friends and cronies, particularly from the civil service batch of 1964 to which he belonged, his class-fellows from the days of Aitchison College, and his relatives.

All the provincial assemblies were dissolved within days and caretaker chief ministers were appointed everywhere. The Governor of Punjab was removed and replaced by another old friend and class-fellow of Leghari, Ahmad Tariq Rahim. The most startling appointment was that of Mumtaz Bhutto as caretaker Chief Minister of Sindh. Asif Ali Zardari, who was in the Governor's House Lahore during the night between 4 and
5 November 1996, plotting the overthrow of Wattoo, was taken into custody.2

Benazir, who was initially placed under 'protective custody', was soon allowed to move freely. She wasted no time in condemning the President's actions as undemocratic and unconstitutional. Claiming she had been illegally detained and her husband 'kidnapped', Benazir said she would fight Leghari's actions in the highest courts and questioned why Nawaz Sharif, a Punjabi, could be reinstated by the judiciary while Sindhi leaders, from Bhutto to Junejo to herself, were never the recipients of similar justice.

LAW OF ACCOUNTABILITY

During the year 1996, with public disci every day of corruption in Benazir's gov there was a general outcry for the accountabiliTi!' 'c'n(^s of those who had served in public office and personally enriched themselves by abuse of and authority. Leghari justified dismis Benazir's government by rolling the process accountability. The Ehtesab Ordinance, 1996*8 promulgated on 18 November, purportedly for tit eradication of corrupt practices from public offa

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and speedy disposal of cases involving comip1 The provisions of the Ehtesab Ordn would apply to a person who: ’(i) has been President or the Governor of a Province; (ii) has been the Prime Minister, Chairman Se Speaker National Assembly, Deputy Chair Senate, Deputy Speaker National Assemb,, Federal Minister, Minister of State, Attorney General and other Law Officers appointed under the Central Law Officers Ordinance, 1970 (VII ot
1970), Adviser to the Prime Minister, Special Assistant to the Prime Minister, Federal Parliamentary Secretary, Member of the Parliament, Auditor-General, Political Secretan Adviser or Consultant to the Prime Mimsur Federal Minister or Minister of State or attached with any Ministry or Division, holder of a post ot or office with the rank or status of a Federal Minister or Minister of State; (in) is, or has been, the Chief Minister, Provincial Minister, Adviser to the Chief Minister, Special Assistant to Chief Minister, Provincial Parliamentary Secretary, Member of the Provincial Assembly, AdvocateGeneral including Additional Advocate General and Assistant Advocates-General, Political Secretary, Adviser, or Consultant to the Chief Minister, Provincial Minister, or attached to any

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ACCOUNTABILITY

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nt of the Province, hoWer of a post or ewith rank or status of a Provincial Minister; f)is, or has held an office or post in Basic Pay 't 20 or above, in the service of Pakistan or j service in connection with the affairs of the ration or of a Province or in equivalent pay *'', of management in corporation, banks,* il institutions, firms, concerns, undertakings y other institutions, or organization established, tiled or administered by or under the Federal ment or a Provincial Government'. |lhe Ordinance gave a wide definition of ton' and 'corrupt practices' which included s of activities such as bribery, graft, fraud, propriation, enrichment and possessing i in one's own name or another's beyond i means. An office in the name of Chief b Commissioner was created who would be I by the President for a period of four i after consultation with the Prime Minister, of the Opposition in the National bly, and the Chief Justice of Pakistan. The i Ehtesab Commissioner (CEC) would be a \ or retired judge of the Supreme Court of i. The proceedings under the Ordinance had k initiated by the CEC on his own, or upon |tof a reference received from a government,
1 or provincial, or a complaint. He could ike inquiry or investigation into any hint through any person or authority ; a public officer. After due inquiry or ition, the CEC could send a reference to h Court which would be heard by a Bench tjudges.

it punishments included sentencing to a term nent of up to seven years, imposition i forfeiture of property, disqualification to (elections to Parliament or a Provincial nbly or, if an incumbent member of : or a Provincial Assembly was found |, he could lose his seat. The appeal against :nce by the High Court would lie before ne Court of Pakistan. The Court was (with the power to freeze the property, : or immovable, of the accused pending

dings against him.

ItEhtesab Ordinance was amended and cases kte Ordinance could be heard by a Bench of

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two judges as *well.4* It was provided that an accused could be arrested after reference against *him* by *the* CEC *to the Court. The provisions* regarding bail to the accused were made very stringent and the cases were required to be heard daily and disposed of within sixty *days.*

The law of accountability was indeed the need of the hour, keeping in view the misdeeds of succeeding governments. It was criticized because it made an exception in favour of the incumbent president and governors. The idea of making a judge, retired or serving, a CEC was however, ill conceived. A job like this should have gone to a lawyer well-versed in the art of prosecution.

ELECTION LAWS AMENDED

The dismissal of Benazir's government was taken with indifference by the general public which felt that successive governments had grown insensitive to their needs and leaders of both the major parties had done nothing for them but enriched themselves. Everybody believed that corrupt leaders and bureaucrats should be brought to justice. They took a sigh of relief when Leghari indicated that he would make the forthcoming elections subject to the process of accountability and disqualify those found guilty, and that he would take steps to eliminate big spending by the candidates. With these objectives in view, election laws were amended introducing the following requirements:5

1. Every candidate had to declare in his nomination papers that no loan obtained by him from any bank or other financial institution in his own name or in the name of his spouse, dependent children, or dependent parent, remained unpaid for more than one year from the due date or had been written off. He had also to declare that he and his relatives stated above were not in default for over six months in payment of taxes. Similarly, he had to declare that he and his such relatives were not in default of any government dues or utilities for over six months.

2. A candidate was also required to make a statement of assets and liabilities of his own, his spouse, and dependents. He was also required to make statement specifying income tax and wealth tax during the preceding three assessment years.

3. A candidate could however make payment of any loan, tax, government dues, or utilities before the rejection of his nomination papers.

4. The election expenses were restricted to one million rupees for election to a seat in the National Assembly and six hundred thousand rupees to that of a Provincial Assembly. The return of election expenses had to be filed before notification of the election result and such returns would remain subject to inspection by any member of the public.

5. The election expenses by a political party for a national election campaign were restricted to thirty million rupees. The political parties were required to submit the return of their expenses within thirty days of the poll.

6. Affixation of hoardings, posters or banners of any size or wall chalkings were completely prohibited. There was also a ban on the hoisting of party flags on any public property or public places.

LEGHARI-NAWAZ SECRET PACT: JUSTICE FAKHARUDDIN RESIGNS

The dismissal of Benazir's government was the first major step taken by Leghari on his own. Previously, Leghari was known to play second fiddle to Benazir. In the beginning, he had publicly promised to be neutral and to carry out the process of accountability even-handedly. But subsequent events proved that Leghari wilted under the pressure of incessant and persistent attacks from Benazir. He made a secret pact with Nawaz hoping that the latter would protect him from Benazir. He I

made significant concessions to Nawaz to enable |

The secret deal between the two became public because of two important events. One was the

softening of the rigors of law for public loans. Under the reforms brought: electoral laws, an unpaid loan from a bank financial institution taken in the name of business concern mainly owned by a would make him a defaulter unable to in the elections. The expression 'mainly was defined as the holding or controlling rfj majority interest in a business concern. ordinance was promulgated on 19 December I1 which re-defined the expression as referring someone who was a director, a partner, or sok proprietor in a business concern at the time tk loan was written off.6 This amendment was madt to help Nawaz and his brother Shahbaz parti in the elections. They had obtained a number loans in the past for their business concerns had been written off because of their pow,1 authority, and influence. They had cleverly avoided becoming directors or

partners in such concern but owned major shares in their own names or u the names of immediate family members.

The other event was the resignation by Fakharuddin G. Ibrahim, the Federal Law Minister, who was the most respected member of the caretaker government. He made a public statement' to the effect that Leghari had reneged onL promise to the nation to hold fair and even-Ik accountability and had joined hands with *\nu* in a deal to bring him to power. The changes u election laws proved the allegations levelled b; Fakharuddin to the hilt.

DISSOLUTION OF NATIONAL ASSEMBLY UPHELD

The dissolution of the National Assembly was challenged before the Supreme Court of Pakistan under its original jurisdiction by Syed Yousaf Raza Gilani, Speaker of the National Assembly on 11 November 1996. Leghari and the Caretaker

• Prime Minister Meraj Khalid were Mk, respondents in person. Two days after, Benazir also

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SOLUTION OF NATIONAL EMBLY UPHELD

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• its original jurisdiction by Syed vousaf 1 ii, Speaker of the National Assembly lovember 1996. Leghari and the e Minister Meraj Khalid were ma indents in person. Two days after, Benazir i a petition challenging the order of dissolutio e National Assembly and the dismissal oft mment.

Confrontation over the implementation of the dges’ Judgment inevitably brought the Chief Bice to centre stage. He had become a symbol resistance and opposition to Benazir’s ranment and a hero for all opposition forces in (country. The popularity of Justice Sajjad was ((without its toll. It transformed his personality Eii he assumed an air of arrogance. He enjoyed stag press statements and could not stay away a show of partisanship. When Benazir the order of the dissolution of the Assembly, his attitude was clearly hostile. iteturned her petition twice on flimsy procedural ids It appeared that he wanted to delay and ite the petition. He also had the petition so that it would be heard after other itional petitions pending at that time which of course, not as urgent. He pulled out old pending against the validity of the Eighth idment and fixed them ahead of the ilution cases. He made another significant irture with this petition. On all previous ions, the cases of dissolution of Assemblies heard by all available judges of the Supreme of Pakistan but this time he constituted a of only seven judges, keeping a number of judges out of the Bench. Such manoeuvres in the dismissal of the petition only four before the general elections. Hie Supreme Court, by a majority of six to upheld the order of the President dissolving National Assembly and dismissing Benazir’s ient.8 The reasons that prevailed with the ity are briefly quoted below:

1. For the President to objectively form the opinion that a situation had arisen in which the government could not be carried on in accordance with the provisions of the Constitution is the availability of material in support of the ground of dissolution. The discretionary power of the President in this behalf, though exercisable in an objective manner, cannot be equated with that of a court of law. He is rather required to act according to the rules of prudence. There is no requirement of a standard of proof of evidence as in a trial in a court of law. I The Court is only required to examine whether or not the President had exercised

his power in accordance with provisions of Article 58(2)(b) and that action taken by him was bonafide. The Court has no concern with quantity or sufficiency of material nor can it sit in approval on the dissolution order.

3. Article 58(2)(b) requires 'opinion' and not 'satisfaction' of the President. 'Opinion' can be formed without the touch of finality. It lacks the dissent of absolutism and can always be differentiated from 'satisfaction', which has the touch of finality, containing absolutism. In other words, it can be said that opinion has lesser responsibility than satisfaction from the point of view of burden of proof.

4. There was deliberate non-compliance, rather defiance, on the part of the Prime Minister in acting on the joint recommendation of the Chief Justice of Pakistan and the Chief Justice of the concerned High Court. The instances mentioned here are those of Justice Rana Bhagwan Das and Justice Javed Nawaz Khan Gandapur of the Sindh and Peshawar High Courts respectively who were not confirmed despite recommendations of the Chief Justice, but were extended as Additional Judges for six months.

5. There is no protection available to an individual member of a legislative assembly to ridicule a judgment of the Supreme Court in the garb of fair comment. Constitution Fifteenth Amendment Bill was introduced in Parliament for initiating the process of accountability of judges by sending them on forced leave if fifteen percent of the members moved a motion against them, was designed to humiliate and embarrass the superior judiciary and ran counter to Article 209 meant for action against judges by the Supreme Judicial Council.

6. There was a general impression that all official acts were motivated by corruption, favouritism, and nepotism. The actions of a government, about which such an impression has been created and commonly perceived, lose authority, legality, and validity. Such action though purported to

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UNDER THE SHADO W OF THE EIGHTH AAfEJVDAfENT ***<ftff***

Analysing the grounds, particularly the: •xtra-judicial killings, ridiculing the udiciary, corruption, bribery, withdrawal of noney from Bait-ul-Mal and the banks, it s established that the people had lost faith in the services, the administration and m the impartiality and legality of the Assembly as well. The members of the Assembly are not required to remain mere spectators of violations of the Constitution and infringement of fundamental rights at a massive scale. They have a duty to discharge as required by the Constitution to prevent such violations and infractions. In these circumstances, the President was justified in forming an opinion that an appeal to the electorate was necessary.

brief, the majority held that there was ient material available on the record in rt of the following grounds mentioned in the of dissolution: Extra-judicial killings.

Non-implementation of the judgment of the Supreme Court in the case of appointment of judges.

Harassment of judges by introduction of the Bill in the National Assembly proposing to send a judge on forced leave if 15 per cent of the total members of the National Assembly moved a complaint of-misconduct against him.

. Non-separation of the judiciary from the executive as required under Article 175(3) of the Constitution within the time stipulated which was so set by the Supreme Court in the judgment.

. Violation of Article 14 by tapping the telephones of judges, leaders of political parties, and high-ranking military and civil officials.

). Corruption in government departments and corporations, and making appointments in violation of rules and regulations.

The Court repelled the objection of nonintainability by relying on Nawaz Sharif s case JD 1993 S.C. 324), holding therein that the tition was directly maintainable before the-

•erne Court under Article 184(3) of the (Constitution.

Justice Zia Mahmood Mirza wrote a strong |teent and noted in particular that:

1 There was no material available with the President at the time of passing of the dissolution order in support of the allegation of phone-tapping and eaves-dropping.

I Mere moving of a Bill in the Assembly cannot be made a ground for dissolving the National Assembly. It is for the Parliament to adopt it or reject it. If National Assembly which is the highest elected/representative body in the country is allowed to be dissolved on premises that a Bill was moved therein which the President disapproved, then there would be no end to it and no Assembly would survive.

13 The power under Article 58(2)(b) should only be exercised when the constitutional machinery

of the government completely breaks down, making it impossible for representative government to function in accordance with provisions of the Constitution.

14 Since there were no proceedings for contempt or disqualification under Article 63 of the Constitution pending against Benazir, therefore, the ground of ridiculing the judgment in the Judges case and its nonimplementation/deliberate delay in its implementation was not available to the President for taking drastic action of dissolving the National Assembly.

i The ground of extra-judicial killings was neither legally nor factually available to the President. He having remained actively associated with government policies regarding the situation in Karachi for a penod of three years and having all along applauded and appreciated policies of the government. In any case the involvement of Benazir or of the federal government in extra-judicial killings did not appear to have been substantiated on record.

i That the provision empowering the President to dissolve the National Assembly at his discretion, being drastic in nature, shall be construed strictly and this power must be

exercised sparingly and only in an extreme situation when no other option is available within the framework of the Constitution.

EIGHTH AMENDMENT HELD VALID: MAHMOOD ACHAKZAI'S CASE

The Eighth Amendment to the Constitution in 1985 had been at the centre of political controversy, particularly in relation to the discretionary powers of the President to dissolve the National Assembly and to dismiss the federal government. This power was exercised on four occasions and each time after being thoroughly judicially reviewed by the superior courts. 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 one occasion only the National Assembly and the federal government was restored.

A number of citizens, or their organizations, had challenged the Eighth Amendment. Some of these appeals were pending before the Supreme Court since 1990. As discussed earlier, Chief Justice Sajjad decided to hear all such cases ahead of the cases concerning the dissolution of the National Assembly. The reason apparently was that if the Eighth Amendment is held to be invalid, then the discretionary power to dissolve the National Assembly would not be available and dissolution orders would consequently become void and unconstitutional.

The main arguments raised by the petitioners were as under:

(a) The decision of the Supreme Court in Nusrat Bhutto's case (PLD 1977 S.C. 657) was violated by Zia in promulgating and enforcing amongst others Provisional Constitution Order, 1981 and Referendum Order, 1984. This being so, the National Assembly and the Provincial Assemblies elected in 1985 and their functioning thereafter could not be taken to be duly elected bodies under the Constitution. Consequently, the Eighth Amendment passed by such a National Assembly would be invalid.

(b) The basic structure of the Constitution of Pakistan has been given in the Objectives Resolution and any amendment that violates such a basic structure would itself be invalid. The Eighth Amendment being violative of such basic structure by having altered its parliamentary character was liable to be struck down as invalid.

(c) The National Assembly, elected on a nonparty basis in 1985, was unconstitutional and illegal and could not thus amend the Constitution.

The Counsels for the federation raised the following objections in response:

i. That the judges hearing the cases had taken oath under the Constitution as amended by the Eighth Amendment. Therefore, they could not question it or allow it to be questioned.

ii. That all the petitions were hit by the doctrine of political question. Since the question of balance of power between the President and the Prime Minister, because of its political sensitivity, is political question, therefore, the Court could not determine the same.

in. That doctrine of *de facto* would favour the validation of the Eighth Amendment as it has been in force for so long. Its invalidation after more than twelve years would affect large number of orders made or actions taken thereunder.

The Supreme Court after hearing all the parties at length, upheld the validity of the Eighth Amendment.9 The main findings of the Court were as under:

1. Although 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. Similarly, courts cannot be abolished through amendment in the Constitution. It is an emerging 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.

2. The salient features of the reflected in the Objectives Ri federation and parliamentary government blended with Islamic As long as such salient features are and not altered in substance, amem be made as per procedure pn Article 239 of the Constitution Tht held that the Eighth Amendment did the basic features of the Constitute! was, therefore, valid.

3. The National Assembly elected party basis was held to be constitutional legal. Parliament having been constituted, Constitution (Eighth ment) Act, 1985 introduced in and such Parliament was a competently piece of legislation.

4. Article 58(2)(b) of the Constitution brought about balance between the of the President and the Prime Mi parliamentary form of government contemplated under a parhai democracy. There was nothing unusual it and such provisions enabling the

to exercise such power could be foimd various parliamentary democratic tions like those of Australia, Italy, France, and Portugal. This provisioning has shut the door on Martial Law forever

5. By recognizing certain basic features characteristics of the Constitution, it does mean that the Supreme Court has impl accepted the theory of the basic structure the Constitution. Only a limited

of the theory has been made to prominent features found within the of the Constitution itself.

6. On the objection regarding the doctrine political question, it was held that question being a political question would deter the Court from determining it on touchstone of the Constitution. Courts -not adopt a ’political question doctrine’ f«1 refusing to determine difficult and problems barring political overtures. It amount to abdication of judicial power vM’ neither the Constitution permits

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The Eighth Amendment w, into the Constitution in l* three elections were held o and the resultant Parliamen this Amendment. It amply d this Amendment was ratine and had come to stay in unless amended in the man Article 239.

ENERAL ELECTIONS,

1997

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e National Assembly elected on a non- • rty basis was held to be constitutional and I gal. Parliament having been validly B»E nstituted, Constitution (Eighth Amend- *mil* ent) Act, 1985 introduced in and passed by • ich Parliament was a competently enacted jBf ece of legislation. fltt

rticle 58(2)(b) of the Constitution only Bn rought about balance between the powers Bid f the President and the Prime Minister in H arliamentary form of government as is *mt* ontemplated under a parliamentary 9n lemocracy. There was nothing unusual about K t and such provisions enabling the President Bi .o exercise such power could be found in li various parliamentary democratic constitutions like those of Australia, Italy, India, France, and Portugal. This provision in fact has shut the door on Martial Law for ever. By recognizing certain basic features and characteristics of the Constitution, it does not mean that the Supreme Court has impliedly accepted the theory of the basic structure of the Constitution. Only a limited application of the theory has been made to save prominent features found within the realm of the Constitution itself. . On the objection regarding the doctrine of political question, it was held that any question being a political question would not deter the Court from determining it on the touchstone of the Constitution. Courts should not adopt a 'political question doctrine' for refusing to determine difficult and knotty problems barring political overtures. It would amount to abdication of judicial power which neither the Constitution permits nor the law allows. The crucial factor is that the action

impugned is shown to be violative of the Constitution.

7 The Eighth Amendment was incorporated into the Constitution in 1985 after which three elections were held on a party basis and the resultant Parliaments did not touch this Amendment. It amply demonstrated that this Amendment was ratified by implication and had come to stay in the Constitution unless amended in the manner prescribed in Article 239.

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IENERAL **ELECTIONS,** IEBRUARY **1997**

lias expected that there would be a low turnout of ite at these hurriedly called elections, but the tout was even less. Leghari appeared on Pakistan Revision (PTV) on the evening on 3 February JI, the polling day, and said that turnout in urban us had been 26 per cent and in rural areas 27 per H Subsequently, he resiled and stated that it was Khmore. Observers felt that his initial statement •correct and later figures of higher turnout were insult of padding and fabrication. According to the election results, the PML(N) ion a two-thirds majority in the National tenbly,

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about 90 per cent of the seats in the tajab Assembly, and a near majority in the (!IFP Assembly. In Sindh and Balochistan, no ity had an absolute majority though in Sindh, tPPP had obtained more seats than any other ity. Benazir denounced the election results as jig'engineered'.10 The results of the elections tabulated as under:11

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1. Ziring, Lawrence, *Pakistan in the Twentieth Century-A Political History,* 1997, Oxford University Press, Karachi, p. 585.

2. It was widely rumoured that Zardari was caught with a lot of cash in foreign currency and gold bullion which he was keeping with him to win over MPAs in the Punjab to oust Wattoo. However, despite the outcry about this rumour, the government did not come up with anything.

3. Ordinance CXI of 1996, PLD 1996 Central Statutes
1954,

4. Ehtesab (Amendment) Ordinance, 1997 (Ordinance VII of 1997), PLD 1997 Central Statutes 255.

5. Representation of the People (Fourth Amendment) Ordinance, 1996 (Ordinance CVII of 1996), PLD
1997, Central Statutes 6.

6. Representation of the People (Fifth Amendment) Ordinance, 1996. Ordinance CXIX of 1996, PLD
1997 Central Statutes 215.

7. *The News,* 19 December 1997.

8. Benazir Bhutto v Farooq Ahmad Leghari, PLJ 1998 S.C. 27.

9. Manmood Khan Achakzai v Federation of Pakistan,

PLD 1997 S.C. 426.

10. *The News,* 4 February 1997.

11. *The News,* 6 February 1997.

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PARTY POSITION

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35 Second Nawaz Government: Storming the Supreme Court

The PML(N) had obtained more than two-thirds majority in the National Assembly and consequently, Nawaz Sharif, the leader of the PML(N) was elected prime minister by the National Assembly. In his acceptance speech, he made special mention of the need for accountability at all levels, like Benazir before him had done. He obtained a vote of confidence from the National Assembly on 18 February 1997 and the federal government was formed in coalition with the ANP and the MQM.

In the Punjab, the PML(N) had completely swept the polls and there was no opposition worth the name. It was expected that the chief ministership of Punjab would go to Parvez Elahi who had been so promised in 1993 after the reinstatement of the Nawaz government by the Supreme Court of Pakistan. Nawaz and his family had second thoughts about offering the Punjab government to the Chaudhris of Gujrat. They had a bitter experience with Wattoo in 1993 and decided not to risk Punjab at any cost. Besides, with such an overwhelming majority in the Punjab Assembly, Nawaz had little to fear from any group inside the party. So, it was decided to keep the chief ministership of the Punjab within the family and Shahbaz Sharif, the brother of Nawaz, was chosen for the post. Parvez Elahi was offered the office of Speaker of the Provincial Assembly of the Punjab as compensation. The Chaudhris of Gujrat had little choice but to accept what was offered them.

In the NWFP, a coalition government of the PML(N) and the ANP was formed, headed by Mahtab Abbasi of the PML(N). In Sindh, a coalition government of the PML(N) and the MQM was formed, headed by Liaquat Ali Jatoi of the PML(N). In Balochistan, no party had a majority and a coalition headed by Akhtar Mengal was formed.

THIRTEENTH AMENDMENT: END OF EIGHTH AMENDMENT

After the general elections, Leghari emerged very powerful. He got away with the dismissal of Benazir's government and had a government of his own choice inducted. Leghari assumed an assertive air and got an old friend and civil service colleague appointed as Governor of Punjab, apparently against the wishes of Nawaz and his colleagues in the Parliament, without realizing that his position was quite vulnerable with Nawaz having a two-thirds majority m both Houses of Parliament.

Nawaz struck soon, using his overwhelming majority in the Parliament, and did away with the discretionary powers of the President The Constitution (Thirteenth Amendment) Act, 1997' was moved and passed in a matter of minutes on
4 April 1997 by relaxing the usual rules regarding constitutional amendment, particularly those concerning advance consideration and repeated readings.

The most significant amendment was the omission of Article 58(2)(b) of the Constitution vesting discretionary power in the President to dissolve the National Assembly. The corresponding power of the Governors to dissolve the Provincial Assembly under Article 112(2)(b) was also

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done away with. The power of the president to appoint governors was watered down Previously, such appointments were made by the president ’after consultation with’ the prime minister. After the Thirteenth Amendment, such power was exercisable ’on the advice of the pnme minister. This change made all the difference because the advice of the pnme minister is binding on the president. By the amendment of Article 243 of the Constitution, the discretionary powers <

the president to appoint chiefs of air also taken away.

There has been a consensus am

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FOURTEENTH AMENDMI DEFECTION CLAUSE

The problem of defection anc trading had assumed alarming p past. It has been discussed how t Ghulam Haider Wyne in t overthrown in 1993 by Wattoo's had defeated the motion for vote against her in 1989 by winning o from the opposition. The ovi Shah's government in NWFP in was another example of blatar defections.

With two-thirds majority of Parliament, Nawaz had (Fourteenth Amendment) Act,

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AMENDMENT: EIGHTH AMENDMENT

eral elections, Leghari emerged very e got away with the dismissal of vernment and had a government of lice inducted. Leghari assumed an md got an old friend and civil service ppomted as Governor of Punjab, gainst the wishes of Nawaz and his the Parliament, without realizing that was quite vulnerable with Nawaz o-thirds majority in both Houses of

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to president to appoint chiefs of armed forces was [also taken away.

There has been a consensus amongst political parties and legal circles that power under Article 58(2)(b), introduced by the Eighth Amendment,

1 in the general elections of 1985, 1988, W,and 1993 could complete their five year term ily because of the exercise of discretionary i of the President to dissolve the National mbly The manner in which the Thirteenth nent was hurriedly introduced and passed e it suspect. If it were not for the fact that the nent had been passed in the late hours of knight, the President, the armed forces, or the might have intervened and stopped it.2 Thirteenth Amendment was passed usly because both the major parties had
1 at the hands of the President. | Ike Thirteenth Amendment proved to be the *i* of the Eighth Amendment. Once again, the lent became the titular head with only imal powers as envisaged by the original ihtution of 1973. The discretionary powers of (President to appoint the Chief Election isioner were not touched, intentionally or wise It is an irony that the Eighth nent was undone within a few months of Iking held valid by the Supreme Court.

OIRTEENTH **AMENDMENT:** EFECTION **CLAUSE**

problem of defection and political horse •jig had assumed alarming proportions in the flit has been discussed how the government of 'ilarn Haider Wyne in the Punjab was irown in 1993 by Wattoo's defection. Benazir (.defeated the motion for vote of no confidence .isther in 1989 by

winning over certain MNAs
3 the opposition. The overthrow of Sabir J s government in NWFP in 1994 by Sherpao .another example of blatant bribery causing aions.

lith two-thirds majority in both Houses ’arhament, Nawaz had the Constitution jteenth Amendment) Act, 1977 passed on

3 July 1997.3 This amendment was apparently introduced in order to put to an end to the problem of defections. Lake the Thirteenth Amendment, this one too was also bulldozed through Parliament in *a matter* o/ *minutes around midnight 4 A)]*

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the opposition of being taken unawares and of being confronted with the draft of the amendment when they came to attend the session, it was passed unanimously.

The Fourteenth Amendment added Article 63-A to the Constitution. It provides that 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 in this behalf may give notice to him to show cause within seven days why disciplinary action be not taken against him. After the show cause notice, the disciplinary committee of the party would decide the matter if it pertains to breach of party discipline such as violation of the party constitution, code of conduct, or declared policies. In case of a decision against such a member, he can appeal to the head of the party whose decision would be final. In case a member votes contrary to any direction issued by the parliamentary party to which he belongs, or abstains from voting against party policy in relation to any Bill, the head of the party concerned, after examining his explanations, would determine whether or not such member has defected. The presiding officer of the House5 to which the member concerned belonged would be sent the decision who would transmit it within two days to the Chief Election Commissioner who, in turn, would give effect to the decision within seven days of its receipt.

The action of the party head cannot be challenged before any court, including the Supreme Court or a High Court. This constitutional bar has made heads of political parties in Parliament and the provincial assemblies virtual dictators. Such an Amendment was passed because all party heads wanted to keep dissenting members in line.

Although defections in the political parties had become a problem and needed to be addressed, yet the solution offered went beyond the problem. The Fourteenth Amendment silenced dissent within

political parties rather than defections therefrom. Voting within the party on a Bill or abstention from voting on a bill, is not unusual in established democracies and has never been equated with defection. Nawaz and Benazir tried to kill all dissension, thus reducing the members of the Parliament voting for the amendment to mere rubber stamps.

NEW ACCOUNTABILITY LAW

The Ehtesab Ordinance, 1996 has been discussed earlier. It was replaced by another Ordinance on the subject in February 1 *9976* which was repealed by the Ehtesab Act, 1997.7 Certain important departures have been made in the Act from the previous Ordinance on the subject. They are:

(a) The scope and ambit of the law was extended to include the incumbent or former government servants holding posts in Basic Pay Scales 17 or above. The Ordinance included the holders of posts in Basic Pay Scales 20 or above.

(b) The Ehtesab Cell was provided for which was to be set up by the Federal Government for the purpose of investigation and enquiry of offences under this Act. This Cell took over the responsibility of enquiries and investigations to the exclusion of any other agency or authority of the government. It can, however, require the assistance of any agency, police officers, or other officials, if it so deems fit. After completion of the enquiry or investigation, the Ehtesab Cell is required to communicate to the Chief Ehtesab Commissioner its appraisal of the material and evidence in the form of reference to him. The effect of such reference is that the Chief Ehtesab

Commissioner can direct thai fAe accused

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Court for trial.

\Xxe case

TVve primary purpose of xYve go-vemmenX in creating the Ehtesab Cell was to take all investigations into its own hands and to undermine the powers and position of the Chief Ehtesab

Commissioner. The developments that the Act prove that the Ehtesab Cell had beam more powerful than the Ehtesab Commissioner m all resources had been placed at the disposal of *k* Cell. It was headed by Saif-ur-Rahman Khan i close confidant of Nawaz. This precluded tut accountability of Nawaz and his cronies, making! a selective weapon used to victimize any memte of the opposition that the Cell chose to against.

CONFRONTATION WITH THE JUDICIARY

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Although Justice Sajjad was a benefactor of tk PML(N) and had paved the way for its coming back into power, it did not take long before serious differences arose between him and the new prime minister. Trouble started when he took *suo* P notice of the hand-cuffing of certain office Water & Sanitation Agency in Faisalabad o verbal orders of the Prime Minister. Justice Su later set them free on bail.8 Differences deepened with the enforcement of the Anti-Terrorist La» which he strongly opposed. His point of view uas that the money being spent on the establishment o! new anti-terrorist courts could be better spent or the existing court structure and that sessions judges could be spared from hearing cases against terronsi acts on a daily basis. Nawaz and his government were committed to the idea of a parallel court structure of anti-terrorist courts to obtain quick results and also to accommodate some PML(N) members as special judges. Consequently, the antiterrorist law was introduced and special courts were established. Appeals against their sentences did not lie before High Courts but before special appellate courts, consisting of High Court judges Since the appellate forum was not the High Coyjl therefore, no further appeal would Ue to \w

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and the Supreme Court were excluded from the due process under the anti-terrorism law.

The situation came to ahead on 18 August \991 when Justice Sajjad recommended five judges from three High Courts for elevation to the Supreme Court.9 Under the Judges' Judgment, the

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war of attntjon- 0 three-member Bench heac passed an otder invotay Constitution asking the P five judges since the gove so The President warned

be compelled to no

•. The developments that followed that the Ehtesab Cell had become
1 than the Ehtesab Commissioner and lad been placed at the disposal of the leaded by Saif-ur-Rahman Khan, a int of Nawaz. This precluded the ’ of Nawaz and his cronies, making it ;apon used to victimize any member tion that the Cell chose to proceed

ITATION WITH THE Y

itice Sajjad was a benefactor of the

had paved the way for its coming rer, it did not take long before serious rose between him and the new prime iuble started when he took *suo moto* ; hand-cuffing of certain officers of litation Agency in Faisalabad on the , of the Prime Minister. Justice Sajjad n free on bail.8 Differences deepened ”orcement of the Anti-Terrorist Law angly opposed. His point of view was ey being spent on the establishment of rorist courts could be better spent on ;ourt structure and that sessions judges red from hearing cases against terrorist ily basis. Nawaz and his government itted to the idea of a parallel court

anti-terrorist courts to obtain quick also to accommodate some PML(N) special judges. Consequently, the anti/ was introduced and special courts shed. Appeals against their sentences jefore High Courts but before special urts, consisting of High Court judges, ipellate forum was not the High Court,
10 further appeal would lie to the jurt and, in this way, the High Courts preme Court were excluded from the

under the anti-terrorism law. ition came to a head on 28 August 1997 e Sajjad recommended five judges from

Courts for elevation to the Supreme nder the Judges’ Judgment, the

ommendation of the chief justice is binding on executive, which may differ but would have to raid reasons in writing which, in turn, would be .sociable. There was strong resistance to these rammendations from the executive, particularly n the Prime Minister. The reason apparently is that two of the judges recommended were not ixeptable to Nawaz because one of them had ded a number of cases against his industrial rae while Nawaz was out of power, and the ite had served as federal law secretary during nazir’s government. Both of them were rceived by him as being hostile to his eminent. Once again, personal and family nests stood in the way of his decision making, ^recommendations were not acted upon, though ilv thirty days were available to the government do so. The government could not give any sons in writing because they would clearly be raved as being personal in nature. In order to defeat the recommendations, the lernment notified a reduction in the number of iljsofthe Supreme Court from seventeen to tlve, a number fixed as far back as in 1986. is was done to preclude the making of wintments altogether. However, Justice Sajjad tckback and suspended the notification.10 The ^eminent had to eat humble pie and withdraw notification on 16 September 1997, but it innued to resist making the appointments. nous proposals came from government quarters ding one that said that the two

recommendees Utr dispute be sent on long leave and the other *K* be appointed. The proposal, although absurd ike face of it, had its rationale. Nawaz was Braced by now that Justice Sajjad was on the ipath and should not have judges sympathethic ton because that would only strengthen him. itr intense confrontation, Nawaz backed down not before Justice Sajjad, heading a Bench of [te judges, suspended the Fourteenth mdment to the Constitution in this constimalwar of attrition. On 30 October 1997, a K-member Bench headed by Justice Sajjad an order invoking Article 190 of the rttution asking the President to appoint the [judges since the government had failed to do He President warned the government that he jit be compelled to notify the elevation of the

judges. At this, Nawaz capitulated and ordered notification of appointment of these judges.

The appointment of the five judges according to Justice Sajjad's recommendations proved to be a high point for him in this confrontation and a low point for Nawaz. The latter was perceived to have led the country to unnecessary confrontation over a period of two months for reasons clearly personal to him. It was a victory for Justice Sajjad because he appeared to be fully justified.

Another important development that had taken place during one-and-a-half years of confrontation with succeeding governments was that the Chief Justice had antagonized many people within the judiciary. His growing arrogance and autocratic style were alienating the judges of his own Court since he was becoming increasingly intolerant of any difference of opinion or dissent within the Court. One of the causes for resentment amongst the judges of the Supreme Court was the departure from the tradition of consulting senior judges in important matters who were being kept out of the Benches constituted for hearing important constitutional cases. The same judges were being unnecessarily humiliated by being despatched to registries against their consent and by withdrawing various facilities from them.

When the Fourteenth Amendment to the Constitution was suspended by a three-member Bench headed by the Chief Justice, there was a strong reaction from the Prime Minister and members of his Cabinet, members of Parliament from the PML(N) and its allied parties. In his press conference, the Prime Minister called the order of suspension 'illegal' and 'unconstitutional'. There were speeches in Parliament in which strong remarks were made against the Chief Justice and the members lamented that the order was violative of the supremacy and sovereignty of Parliament. These speeches led to contempt proceedings against the Prime Minister and members of Parliament before the Supreme Court. Nawaz made an appearance in these proceedings before the Supreme Court on two occasions, 17 and
18 November, before a Bench of five judges headed by the Chief Justice himself. Though he did not tender an unqualified apology, he expressed his regrets in a written statement over the remarks made. The matter could have been dropped at that

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f Justice on the other. At this point, the leadership was sucked into the situation.

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the Prime Minister, the President and the slice. He earned a respite for the Prime by getting the contempt case and other imst him adjourned for about a week, from mber to *21* November.

OF JUSTICE SAJJAD ALI SHAH

yernment used the respite of one week November) to its full advantage. It was ware of the differences and the rising ent amongst the judges of the Supreme gainst the Chief Justice. Leaders of the), known to be past masters in the art of g and dealing, got down to what they did n 18 November, a two-member Supreme Jench in Quetta had entertained a petition the appointment of the Chief Justice on the that he was not the senior-most judge when ed. However, no interim order had been on the petition and the case was referred to lef Justice for constituting a full court to the matter. It was indeed a warning to him ngs to come. They stopped short of ling the Chief Justice from performing his ns, but this did not prevail for long. On vember, a day before the hearing on the; ipt case against the Prime Minister was to e, a petition was presented before the try of the Supreme Court in Quetta, iging the appointment of Justice Sajjad as Justice. Initially, the petition was not lined by the office in Quetta because under ipreme Court Rules, a petition under the tal jurisdiction can only be filed and lined at the Principal Seat in Islamabad. quently that day, the Bench of two judges in i entertained it and passed an intenm order ning the Chief Justice from performing nil

preciatmg the contention that recognition had been! en to constitutional convention by the judgmenlj the Judges' case to the effect that the senior-mostl

judge of the Supreme Court had always been appointed *chief justice with the exception of Justice*

fundamental rights at the mam Registry, *Islamabad, was regulatory in nature and could be*

was ordered to be held in abeyance°°unti "further orders and that the Chief Justice should cease to perform judicial" ancf administrative *functions ancT* powers of the Chief Justice till further orders.12

This restraining order touched off the most tare events. The Chief Justice and the judges tpposed to him simply ran amok. Justice Sajjad, siting alone in Chamber in Islamabad, suspended te judicial order of the Quetta Bench through an dmmistrative order. This led to another (weeding at the Quetta Bench the same evening nwhich a third judge also joined in and suspended it suspension order of the Chief Justice on the rang of 26 November 1997 at the Judges' Rest in Quetta. In this three-member-Bench legmen!,13 it is stated that the petition of Asad All was not originally entertained at the Quetta istry on the ground that petitions under Article [3) of the Constitution, as per practice generally d, are to be filed at the main Registry, >ad.14 However, despite such practice, the ir Judge in Quetta, Justice Irshad Hassan i, directed the Assistant Registrar on iNovember 1997 to entertain the petition of Asad dianze it in the

relevant register, and place it the Court for appropriate orders. The lent takes notice of the administrative order the Chief Justice, faxed to the Quetta Registry pm. on 26 November 1997, which had that the judges at the Quetta Registry had without lawful authority and the Assistant Quetta Registry was directed not to fix cases before them for disposal until further is

[On28 November 1997, the petition of Asad Ali s fixed before the judges in Quetta, namely : Irshad Hassan Khan, Justice Nasir Aslam itid, and Justice Khalil-ur-Rehman Khan. mfaddin Pirzada, who until then was working
1 the scenes, now surfaced as *amicus curiae.* ing on the judgment of 27 November 1997 of i sister Bench consisting of two judges in war, it was held that the rule requiring station of the petition for enforcement of

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dated 26 November 1997 of the Quetta Bench

the basis of a dialogue between an advocate and the dissenting judge as reproduced in an English daily.

Simultaneous to the events in Quetta, a similar petition was presented before the Peshawar Registry of the Supreme Court. A two-judge Bench in Peshawar entertained a petition on 27 November
1997 under Article 184(3) of the Constitution and dispensed with the rule requiring the presentation of such a petition at the main Registry, Islamabad, and passed an interim order restraining Justice Sajjad from passing any judicial or administrative order in his capacity as the Chief Justice of Pakistan. The Bench consisting of Justice Saiduzzaman Siddiqui and Justice Fazal Ilahi Khan also directed the Registry of the Supreme Court to take immediate steps and place the matter forthwith before the senior puisne judge, Justice Ajmal Mian, in Karachi and obtain appropriate instructions of the Bench for hearing such cases15 (entertained in Quetta and Peshawar).

Subsequently, on 28 November 1997, Justice Saiduzzaman Siddiqui, after being informed that the senior-most judge, Justice Ajmal Mian, had declined to assume the office of Acting Chief Justice, assumed unto himself the administrative powers of the Chief Justice and ordered the constitution of a full fifteen-member Bench (excluding the Chief Justice and Justice Ajmal Mian) in Islamabad to hear the petition against the Chief Justice.16

On 27 November, the Quetta decision of the three judges, passed on the evening of
26 November 1997, was suspended, this time by a five-member Bench in Islamabad, headed by Justice Sajjad himself, by a majority of four to one. Some of the PML lawyers who were also members of Parliament created a scene in the courtroom, becoming altogether hysterical. They kept shouting that the Chief Justice had been suspended and, therefore, could not preside over the Bench. Amongst those seen shouting in the

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g the hearings. It was indeed one of the picable assaults on the courts in judicial obviously sponsored by the government iy its ministers and members of Parliament vincial assemblies. PML workers from

places in the Punjab were taken to id in buses under the leadership of their *is* MNAs and MPAs. They attacked the

and the police contingent present there

of five judges

r Justice Sajjad) described the incident in vmg words:18

the proceedings were in progress, one of the mers came forward and whispered something ear of Mr S. M. Zafar who told him that since , not his advocate, he could not make a request behalf Meanwhile, Raja Muhammad Akram > and came to the rostrum and stated that he epresentmg Khwaja Muhammad Asif and sted for leave of his client's absence on the d that he had to attend some very important He was allowed to go. A little later a big lotion was heard as if there was a riot outside ourt room and slogans were being raised. It ired that a big mob wanted to rush into the court i. In fact, a few persons did succeed in doing so • >ne of them informed the judges that they should j ind go away, as a fully charged mob behind him j forcing entry into the court-room to take the j •f Justice into custody. This was supported byj sersistent commotion and highpitched slogans of | pie who were in the process of raiding the! rtroom In such circumstances, there was no other] •rnative for the Court but to adjourn :eedings and the judges retired. Even outside t , a flurry of activities as people were running hew j I there and some policemen escorted the judges t chamber of the Chief Justice. Later on, the Registrar came and informed us in I te of shock, that he had been manhandled and I
5 mob got unruly and made a raid on the co lere the contempt case was being heard against the ' ipondents, including the parliamentarians.

fter the storming of the building, the Chief ce wrote to the President requesting army ;ction. In his letter, he alleged that the attack led by the government's ministers whose faces been recorded by the closed circuit television

«eras mside the Supreme Court building. It was J Council, Supreme Court Bar Association Lahore ! ibo alleged that affer tne attach, trie asrsarrgmr <^&^*r f^^ff^f f^^^s^^^*^^?,^, ^^^J^^ ^7^?l* _ the PML leaders to have lunch at the I Council, went to the Supreme Court on

!LHr!/r!L^ *?.w,^} JS^^^^^^

Unfortunately, they found the Supreme Court totally divided. The Chief Justice and four other judges present in his chamber were ready to sit as a Bench on his order. Ten judges led by Justice Siddiqui had assembled in his chamber. Justice Ajmal Mian wisely stayed out of this conflict and

was alone in his chamber. The air was filled with

of course, app)auded by of the Punjab as if they had just won a
• The Chief Justice also asked the President to i a reference against the five Supreme Court . at the Quetta and Peshawar Registries to

\tSupreme Judicial Council for nusconduct ’9

In response to the letter of the Chief Justice, the Itedent wrote a letter to the Prime Minister

; *Aim Co provide armyprotection to tAe Cfijes*

sto The Prime Minister ignored the advice and i Chief Justice wrote directly to the Chief of i Staff. Two separate cause lists were issued i Supreme Court hearings on 1 December, one ((the Chief Justice of five judges Bench and the it by Justice Siddiqui of ten judges Bench. The (Justice annulled the administrative order of ; Siddiqui calling for a full Bench hearing of kChief Justice’s case on 1 December. Ten judges a statement terming the Chief Justice’s nent order illegal.

| Subsequently, a Bench of three judges of the i Court held an inquiry into the matter of ng of the Court on 28 November 1997. It a large number of witnesses under oath I,by its order of 3 July 1998, the Bench held i twenty-six people, including two MNAs and eMPAs of the PML(N), the Prime Minister’s ; secretary, ten office bearers and activists tPML(N), and ten members of administration jibe police, were prima facie guilty of gross npt of the Supreme Court, of violation of the able law, and of being involved in, or aiding I abetting, or facilitating the storming of the ne Court. In pursuance of this finding, the ne Court directed that show cause notices
1 calling upon them to explain why action dd not be taken against them for contempt of \ Supreme Court.

DIVIDED **JUDICIARY**

ike face of such a situation, a delegation of Bar ientatives belonging to the Pakistan Bar

^ that the battle was lost, had mellowed down

was receptive to the Bar delegation. He immediately accepted the suggestion that in order to show solidarity they would not be working that day. However, he kept insisting that if others assembled as a Bench, then he would along with the other four judges also sit as a Bench. He was prepared to confer with all the judges to address their grievances and iron out the differences. The other group of judges was in an aggressive mood. Initially, their response to the bar delegation was negative but after some persuasion, they accepted the suggestion to sit with the Chief Justice and other colleagues to discuss their differences.

In these circumstances, it was a major achievement to bring together all seventeen judges of the Supreme Court in the same room.20 It seemed that they had not met one another for quite some

time. The Bar representatives sat and had tea with them. Abid Hassan Minto, President of the Supreme Court Bar Association, and the leader of the delegation, requested all the judges to sort out their differences and save the image of the judiciary from being tarnished. He also stated that, in the view of the bar, Justice Sajjad was the chief justice and should be accepted as such by his colleagues for the good of the institution. However, the Chief Justice was requested to address the genuine grievances of his colleagues. After that, the Bar representatives left the room, hoping that something good would come out of the meeting. The meeting went on for one-and-a-half hours. It lowered the tension for the time being and it was decided that, in deference to the wishes of the Bar delegation, no Bench would function that day.

Initially, a formula was evolved under which three Benches were to be formed for the following day, a five-member Bench headed by the Chief Justice to hear cases against the Prime Minister, a seven-member Bench headed by Justice Siddiqui to hear cases against the Chief Justice, and another five member Bench for other cases. The underlying understanding was that the Bench of the Chief Justice would adjourn the cases against the Prime Minister and the cases against the Chief Justice would be disposed of. The formula did not work because some of the judges in the opposition demanded that the Chief Justice should adjourn all cases against the Prime Minister for three months so that, in the meantime, he would retire. The Chief Justice refused to accept the suggestion because he took it as dictation and a deadlock ensued. It became an open secret that the origin of the differences between the two groups of judges was not within, but outside the Court, and that they were working on their respective agendas of protecting or advancing conflicting interests. The institution of the Supreme Court had obviously fallen prey to such interests.

On 2 December 1997, the Supreme Court committed collective suicide and rival Benches met in the Supreme Court building. The Chief Justice, instead of taking steps to diffuse the situation, became even more erratic. Heading a threemember Bench, he suspended the Thirteenth Amendment without adequate hearing, thus restoring the President's powers to dissolve the National Assembly.21 The rival ten-member Bench immediately held the order in abeyance and restrained the President from acting on such a ruling.22 In a separate order, it was held that Justice Ajmal Mian should immediately assume the administrative and judicial powers and functions of the Chief Justice.23 With various rumours circulating throughout the country that day, Leghari resigned in protest against what he termed the 'unconstitutional' demands of the government. Finally, the curtain was drawn on the high drama of the judicial and constitutional crises.

ASAD ALI CASE

Justice Ajmal Mian took the oath of Acting Chief Justice of Pakistan after the order passed by At ten-member Bench of the Supreme Court on
2 December 1997. Soon after, the ten-member Bench headed by Justice Siddiqui commenced tht hearing of Asad Ali's case. Surprisingly, Justice Sajjad decided to participate in the hearings of tk case by appointing counsels to defend himself He could have easily stayed out of these proceedings by denouncing them as *coram non judice,* the Bench not being competently constituted under the authority of the Chief Justice, but he lent legitimacy to these proceedings by his participation. The judgment was announced on
23 December 1997.

The first and foremost objection raised by the counsel of Justice Sajjad was bias on the part of several judges sitting on the Bench. Five judges on the Bench-Justice Siddiqui, Justice Fazal Ilahi Khan, Justice Irshad Hassan Khan, Justice Nasir Aslam Zahid, and Justice Khalil-ur-Rehman-were objected to as biased because, while sitting mthe Quetta and

Peshawar Registries, they had entertained petitions against Justice Sajjad for violating express provisions contained in the Supreme Court Rules on this matter. Justice Sheikh Riaz Ahmad was objected to as he was associated with the preparation of the summary fc appointment of Justice Sajjad as the Chief Justin of Pakistan in his capacity as the federal la* secretary. Justice Siddiqui was also objected to on two other counts: first, that he was an interested party to the controversy as he was the direct beneficiary of upholding of the rule seniority for appointment to the office of the chief justice because he would automatically be appointed chief justice on the retirement of Justice Ajmal Mian m
1999, and, secondly, because Justice Sajjad as Chief Justice had already made reference against him to the President of Pakistan for proceedings for misconduct before the Supreme Judicial

Council.

The objections regarding bias or disqualification

1. The fact that a certain judge two petitions challenging the v appointment of Justice Sajjad Justice at Branch Registries nei any bias on his part nor ami expression of a final opi controversy in the case.
2. Disqualification from hearing 1 arise only when a judge is sh personal interest or a pecui however small it may be, matter of the case before hir the judge so disqualified has jurisdiction in the matter and t competent court available to 1 the quorum for hearing of the be formed without the preser so disqualified, then in such in spite of disqualifications, hear the case under the docti to prevent failure of justii cases, where general bias 01 is alleged against a judge of it is left to him to decide \v like to hear a particular cai

not.

3. The mere fact that one of 1 on the Bench was at one with the case of appoint Sajjad as the Chief Justice federal law secretary, cou from hearing the case bee; element of personal bias o

An objection was raised to t of the petition because the pet had no *locus standi* to challenge I appointment of Justice Sajjad as objection was rejected on the selection of a person to the high Justice wf Pakistan is a pivol maintain the independence of 1 provide free and unobstructed and independent courts/rribi citizens. Therefore, it was reasc

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LD ALI CASE

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'he objections regarding bias or disqualification
5 repelled as under:24

1 The fact that a certain judge had admitted two petitions challenging the validity of the appointment of Justice Sajjad as the Chief Justice at Branch Registries neither displayed any bias on his part nor amounted to the expression of a final opinion on the controversy in the case.

I Disqualification from hearing the case would arise only when a judge is shown to have a personal interest or a pecuniary interest, however small it may be, in the subject matter of the case before him. However, if the judge so disqualified has the exclusive jurisdiction in the matter and there is no other competent court available to hear the case or the quorum for hearing of the case could not be formed without the presence of the judge so disqualified, then in such circumstances, m spite of disqualifications, he can sit and hear the case under the doctrine of necessity to prevent failure of justice. In all other cases, where general bias or disqualification is alleged against a judge of a superior court, it is left to him to decide whether he would like to hear a particular case before him or not

| J The mere fact that one of the judges sitting on the Bench was at one stage associated with the case of appointment of Justice Sajjad as the Chief Justice in his capacity as federal law secretary,

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could not debar him from hearing the case because there was no element of personal bias or prejudice.

|An objection was raised to the maintainability ; petition because the petitioner, Asad Ali,

lino *locus standi* to challenge the validity of the mtment of Justice Sajjad as Chief Justice. This tion was rejected on the rationale that the ton of a person to the high office of the Chief of Pakistan is a pivotal appointment to ;am the independence of the judiciary and to free and unobstructed access to impartial

I independent courts/tribunals to ordinary us Therefore, it was reasoned, any deviation nthe method prescribed under the Constitution

i appointment to the office of Chief Justice i give rise to the infringement of the right of

a citizen to have free, fair, and equal access to independent and impartial courts thus violating the rights guaranteed under Articles 9 and *25* of the Constitution.

To the contention that the appointment of Justice Sajjad as Chief Justice was a closed chapter, it was held that in view of the observations of the Supreme Court in the Al-Jehad case (PLD 1996 S.C. 324), the question relating to the validity of the appointment of the Chief Justice of Pakistan was a live controversy requiring an authoritative pronouncement by the Supreme Court. It was also observed that the Bench of the Supreme Court that decided the Al-Jehad case could not come to an effective decision on the controversy because it was presided over by the Chief Justice in question.

It was held that the senior most judge of the Supreme Court of Pakistan, in the absence of any concrete or valid reason, has to be appointed the Chief Justice on the basis of convention. The appointment of Justice Sajjad as Chief Justice, superceding three judges of the Court who were senior to him, was made without any concrete or valid reason. Such an appointment was, therefore, unconstitutional, illegal, and contrary to the decision of the Supreme Court of Pakistan in the case of Al-Jehad Trust (PLD 1996 S.C. 324).

The Court ruled that Justice Sajjad would cease to hold the office of Chief Justice of Pakistan and ordered his reversion to the position of a judge of the Supreme Court in accordance with his seniority among the judges of the Supreme Court. The federal government was directed to denotify the appointment of Justice Sajjad as Chief Justice and notify the appointment of the senior most judge as the Chief Justice of Pakistan forthwith. All actions taken and orders passed by Justice Sajjad in his capacity as Chief Justice up to *25* November 1997 were to be deemed valid and passed and were not open to challenge on the ground of defect in his appointment. This was held on the basis of the *de facto* doctrine. However, all actions taken or orders passed by him as Chief Justice on and after
26 November 1997 were declared of no legal effect.

On 23 December 1997, the federal government denotified Justice Sajjad as Chief Justice and notified Justice Ajmal Mian as the Chief Justice of Pakistan who took oath on the same day.

ROLE OF LEGHARI AS PRESIDENT

Leghari resigned on 2 December 1997, and blamed Nawaz for the constitutional crisis.25 His resignation brought to an end the high drama of conflict between the judiciary, the executive and the legislature. His resignation cut short the normal term of office of the president of five years by nearly one year.

Leghari was nominated by the PPP in 1993 as President with the tacit understanding that he would safeguard its interests. He lent his name, power, and prestige to the imposition of an emergency in the NWFP and the Punjab with the dubious intent of ousting the governments of Sabir Shah and Wattoo.

Leghari began his term with the reputation of being Mr Clean, but this was soon tarnished by the Mehran Bank scandal. There are rumours that his sons were involved in smuggling vehicles from Afghanistan and making huge gains in the process with the protection available to them due to the high office of their father. He was responsible for making inapproprirate appointments to the judiciary. Leghari condoned the corrupt ways of the PPP government but ran into conflict with Benazir and Zardari over more personal matters. Once he had dismissed Benazir's government, he went overboard to make a deal with Nawaz, helping him into power by putting the entire administration behind him in the general elections of February 1997. Later, when he realized the impact of the huge mandate he had helped Nawaz gain, he tried to undermine it by attempting to align the judiciary and the armed forces against Nawaz. Justice Sajjad went along with him to the very end but not everyone did. When the leaders of the armed forces refused to stand with Leghari in his conflict with Nawaz and he faced the prospect of being impeached, Leghari lost courage and resigned in disgrace. On his resignation, Wasim Sajjad, Chairman of the Senate, took over as Acting President.

TARAR ELECTED PRESIDENT

In a surprise move, it was announced by the federal cabinet on 15 December that Justice (Retd.)

Muhammad Rafiq Tarar would be the PMLfi) candidate for president. This appeared to be tit personal choice of Nawaz and his family and i was Nawaz who disclosed it to his Cabinet m specially convened meeting on 15 December

Tarar's election as president was not free fa' difficulties. His nomination papers were rejectee by the Acting Chief Election Commissions Justice Mukhtar Junejo, on 18 December for propagating an opinion and acting in a manna prejudicial to the integrity or independence of *k* judiciary in Pakistan or defaming or bringing ufc ridicule the institution of the *judiciary26* Reliana was placed on press statements made by Tamil which he made strong remarks against Justice Sajjad and went to the extent of calling him i 'judicial terrorist'. Tarar challenged the decision of the Acting Chief Election Commissioner before the Lahore High Court and, in an unprecedented order, a single judge suspended the order of rejection of his nomination papers and referred the matter to a larger Bench. A full Bench of trra judges was constituted which,

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apart from a senior judge, Justice Malik Qayyum, had two of the most junior judges on it. This was unprecedented because generally a Bench of senior judgi constituted in a case of public importance Bench, on hearings held on 24 and 29 December adjourned the case but extended the mtenm order of suspension of nomination papers of Tarar'"

Nawaz did not want to take a risk with Justice (Retd.) Mukhtar Junejo as Acting Chief Election Commissioner and replaced him with Justice (Retd) Abdul Qadeer Chaudhry, a retired judge of the Supreme Court, on 27 December 1997 The election was held on 31 December 1997 and Tarar won with a huge margin. He secured 374 votes out of a total of 457 votes polled. His nearest rival, Aftab Shaaban Mirani, a PPP nominee, secured only fifty-eight votes.28

The Constitution petition filed by Tarar was accepted by the full Bench of the Lahore High Court on 12 January 1998.

Justice "(Retd) Rafiq Tarar was a sure winner to be elected as President. Coming from Gujranwala in central Punjab, Tarar had a short stint at law practice there before being appointed district and sessions judge.29 At that time, there was a quota amongst advocates for direct appointment as

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Later Tarar was a judge m_la

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IMPORTANT CONSTITI CASES

A large number of petitions fc

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The contempt proceeding

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imad Rafiq Tarar would be the PML(N): ite for president. This appeared to be the il choice of Nawaz and his family and it iwaz who disclosed it to his Cabinet in a \ y convened meeting on 15 December, r's election as president was not free from ties. His nomination papers were rejected Acting Chief Election Commissioner, Mukhtar Junejo, on 18 December for iting an opinion and acting in a manner, cial to the integrity or independence of the j
7 in Pakistan or defaming or bringing into ; the institution of the judiciary.26 Reliance : iced on press statements made by Tarar in! he made strong remarks against Justice j and went to the extent of calling him a< il terrorist'. Tarar challenged the decision] Acting Chief Election Commissioner before \ bore High Court and, in an unprecedented a single judge suspended the order of m of his nomination papers and referred the to a larger Bench. A full Bench of three j was constituted which, apart from a i Justice Malik Qayyum, had two of the most! judges on it. This was unprecedented j
16 generally a Bench of senior judges is uted in a case of public importance. The , on heanngs held on 24 and 29 December, ned the case but extended the interim ordefi jension of nomination papers of Tarar.27 vaz did not want to take a risk with Justice) Mukhtar Junejo as Acting Chief Election i tissioner and replaced him with Justice' Abdul Qadeer Chaudhry, a retired judge of J ipreme Court, on 27 December 1997. m was held on 31 December 1997 and Tarar1 ith a huge margin. He secured 374 votes out | stal of 457 votes polled. His nearest rivaLij Shaaban Mirani, a PPP nominee, ifty-eight votes.28 ; Constitution petition filed by Tarar wasl ed by the full Bench of the Lahore High* on 12 January 1998. tice (Retd) Rafiq Tarar was a sure winner 1 cted as President. Coming from Gujranwala!? itral Punjab, Tarar had a short stint at law ;e there before being appointed district and j ns judge.29 At that time, there was a gst advocates for direct appointment

land sessions judges. He was one of the last i appointees. .

I later, Tarar was a judge in labour courts in

s districts of Punjab before being appointed itional judge of the Lahore High Court in

r 1974. He was confirmed as judge in 1977. (December 1989, he became Chief Justice of the

eHigh Court after fifteen years on the Bench. plamiary 1991, he was elevated to the Supreme

, where he served until his retirement in

icr 1994. After retirement, Tarar entered

s and joined the PML(N) when he was later

j Senator in March 1997. I Tarar was neither a politician of standing nor jdheever been a distinguished judge. The office ((President being a symbol of the State should

; gone to someone well acquainted with Tarar did not qualify on any of these

. The only reason for his nomination that

s to have prevailed with the Prime Minister

Id be his unflinching personal loyalty to Nawaz jjhis family which seems to have outweighed It political logic of a regional political balance ong the offices of the president and the prime

.ster, requiring that they be from different

inces.30

HPORTANT **CONSTITUTIONAL**

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pge number of petitions for contempt of court .. been filed against Benazir, Nawaz, frliamentarians, journalists, and some advocates. j contempt proceedings against Nawaz, \ Muhammad Asif, Asfandyar Wali, and others je in progress when PML(N) workers stormed [(building of the Supreme Court on 28 November ..., :hem. After the ouster of Justice Sajjad, it s decided by the Supreme Court to take up jig cases.

IA Bench headed by Chief Justice Ajmal Mian **js** formed which heard all these cases at length pa number of days, concluding on 2 March 1998, d delivered a comprehensive judgment. This ,inent took into account all the leading jnents on the subject of contempt of court in India, England, and in other countries.

The judgment authored by Justice Ajmal Mian is a monumental piece of work recording the history and development of contempt of court law and is virtually a book of reference on the subject. The judgment leads to the inescapable conclusion that the laws of contempt of court have undergone radical changes conceptually. Courts around the world are becoming less sensitive to the utterances that were once taken to be contemptuous. This liberalization has much to do with the march of history, particularly in the twentieth century, conferring high sanctity and respect for the freedom of speech, expression, and the press. The Court defined that the objective of clubbing all contempt cases together was to lay down the parameters of contempt law in the light of the fundamental rights of freedom of speech, expression, and the press.31

The Court proceeded to determine the cases of

the two prime ministers and members of

Parliament. The Court expressed displeasure with

Nawaz and Benazir saying that when out power,

they make reckless expressions about the judiciary

merely because certain judgments, otherwise lawfully passed, did not suit their temperament. However, contempt proceedings against Nawaz were dropped because (1) his replies when minutely examined suggested feelings of dejection, despondency, and despair or semblance of desperation; (2) all the questions and answers viewed in their entirety did not appear to be crossing the boundaries of the Constitution and law; (3) he categorically repeated his respect for the judiciary and the Chief Justice; and (4) in his written reply had also affirmed his respect of the Court while he also expressed regrets if someone's feelings had been injured. The contempt proceedings against Benazir were dropped on the grounds of (1) lapse of many years without action since the filing of the petition; (2) she was no longer in power, and (3) she was already facing too many cases.

The Court, after examining the highly charged speeches on the floor of the Parliament by Khwaja Asif, Asfandyar Wali, and others, came to the conclusion that these speeches did constitute contempt of court but exonerated them on the ground that 'they were under the mistaken belief

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e Chief Justice, writing for four members of ench, held that the freedom of speech in a mentary form of government, subject to sable restrictions, was *sine qua non* and e 63-A could not be construed in a manner i would defeat the basic feature of the mentary form of government. He observed ifferert clauses of the Amendment should be Dreted in conjunction with Articles 66 lege of members) and Article 19 (freedom of h) and efforts should be made to preserve the of freedom of speech on the floor of the e, subject to reasonable restrictions without i a parliamentary form of government cannot n effectively.

ie Court held that there had been a consistent from the very beginning in Pakistan that a sion of the Constitution cannot be struck i by holding that it was violative of any inent feature, characteristic, or structure, and it has no application to strike down a itutional amendment.

ttending to the argument that the Fourteenth ndment has abridged fundamental rights and ites Article 8 which prohibits the federal :rnment, *Majlis-e-Shoora* (Parliament), a isional government, and a provincial assembly, making any law which takes away or abridges fundamental rights and declares that lawmg to the extent of such contravention shall oid, the Court held that such limitation is on legislation. However, quoting Article 8(2) of Constitution of Pakistan, the Chief Justice rved that by employing the words ’any law in provision’, the intention of the Constitution is to be that Article 8 of the Constitution would y to all laws made by the parliament be it ;ral or any law to amend the Constitution, wise, no enactment can be made in respect of provisions of the Constitution relating to the ciary by which the independence of the ciary or its separation from the executive was ermined or compromised. These are built-in itations in the Constitution, completely :pendent from political morality and force of public, the Chief Justice said. ”he Chief Justice, speaking for a majority of
• members of the Bench, assumed that he was ble to agree that the explanation of Article 63-A

also include the conduct of the legislators outside the House. The principle of interpretation iat a penal provision should be construed strictly ml its scope should not be extended unless it was ID required by the clear language used therein or ly necessary intent, therefore a legislator cannot ie declared disqualified under Article 63-A for isconduct committed outside the precinct of the arliament. He said that Article 63-A(ii) of the institution also does not debar a High Court or k Supreme Court from examining any order Bed or action taken against a member. In Pakistan, instead of adopting the basic structure theory or declaring provisions of the Constitution as *ultra-vires* to any of the iidamental rights, the apex court has pressed into mce the rule of interpretation that if there is a mfhct between two provisions of the Constitution are not reconcilable, the provision which stains a lesser right must yield in favour of a povision which provides higher rights. This rule «s also applied in the Al-Jehad Trust case,34 the Quef Justice recalled. Thus the Court would adopt D interpretation which was more in consonance [nearest to the provisions of the Constitution Lanteeing fundamental rights, independence of iciary, and democratic principles blended with lamic provisions. The Chief Justice also referred Hakam Khan’s case,35 where the Court held that provision of the Constitution could be declared \-*wes* on the ground that the same was in lict with Article 2-A of the Constitution. Concerning

arguments that Article 63-A has the itial of abuse, it was held that at this juncture, cannot be assumed that Article 63-A could be uted or misused by the leader of a political . There seems to be no conflict between [graphs (a) to explanation to clause (i) of icle 63-A with Articles 19 and 66 of the itution as these do not expressly provide that member cannot express his views in exercise of right under Article 66 on any matter which is ight before the House.

Justice Saiduzzaman Siddiqui and Justice Irshad isan Khan, though concurring otherwise, id with the Chief Justice about findings ling clauses (A), (B), and (C) of explanations Article 63 and A(l) and declared them

independent of each other. They held that clause (a) of Article 61-A covers the acts of an elected member of a political party both inside and outside the House only, while clauses (b) and (c) relate to his actions outside the House. He noted that the act of defiance by an elected member of a political party of the Constitution code of conduct and declared policies of the party outside the Assembly is as much damaging to the image and working of that party as his conduct inside the Assembly. A division was looked upon with suspicion by the people and was likely to lose the confidence of its electorate. A member of the political party who, after his election to the Assembly on the ticket of that party, publicly denounces the Constitution, code of conduct, or declared policy of the party cannot claim the right to represent that party in the Assembly on any moral, ethical, or legal grounds. They, however, held that the right of honest dissent cannot be held to include defiance and denunciation of the discipline, code of conduct, and declared policies of the party. If an elected member of a political party feels so strongly that he cannot stand by the policies of the party on account of his convictions on these issues, he may shed his representative character as is required of him for having been elected on the ticket of that party.

Justice Mamoon Kazi dissented from the majority judgment and declared the amendment as violative of the fundamental rights and, therefore, void and unenforceable.

After this pronouncement, the head of a political party has been made stronger and a 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 absents from voting in the House against the party policy or in relation to any Bill. However, the breach of party discipline would be presumed only when a member commits such violation inside the parliament. The judgment has reserved the right of freedom of speech for a member in the House subject to the reasonable restrictions envisaged under Article 66 (privilege of members) read with Article 19.

SUPREME COURT STRIKES DOWN ANTI-TERRORIST LAW

It has been discussed above that the introduction of the anti-terrorist law in June 1997 became one of the major causes leading to the confrontation between the judiciary and the executive. The law, Anti-Terrorism Act, 1997 (ATA), was challenged before the Lahore High Court as unconstitutional. A full Bench of the Lahore High Court upheld the law as valid by a majority of four to one. This verdict was challenged before the Supreme Court which, in its judgment released on 15 May 1998, struck down twelve provisions of the Act as invalid and brought special courts at par with ordinary courts working within the existing judicial system. Among other things, the five-member Bench in a unanimous short order held that the power to law enforcement agencies to open fire on suspicion of terrorism, and accepting of a confession before a DSP as a valid piece of evidence, were untenable and needed to be suitably amended.

The Court also directed the government to make suitable amendment in the ATA to vest the appellate power in a High Court instead of an appellate tribunal. According to legal experts, after this decision of the apex court, those convicted under the ATA will also be able to approach the Supreme Court after a High Court.

The ATA 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. The short order of the Supreme Court is reproduced as under:36

For the reasons to be recorded later on, we dispose of the above cases as under:

i. Section 5(2)(i) is held to be invalid to the extent it authorizes the officer of police, armed forces, and civil armed forces charged with the duty of preventing terrorism, to open fire or order for opening of fire against person who in his opinion in all probability is likely to commit a terrorist act or any scheduled offence, without being fired upon;

ii. Section 10 of the Anti-Terrorism Act, 1997, hereinafter referred to as the Act, in its present form is not valid. The same requires

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to be suitably amended as to provide that before entering upon a premises which is suspected to have material or a recording in contravention of Section 8 of the Act, the concerned officer of

police, armed forces, or civil armed forces shall record in writing his reasons for such belief and serve on the person or premises concerned a copy of such reasons before conducting such search;

Section 19(10)(b) of the Act, which provides for trial of an accused in absentia on account of his misbehaviour in the court, is violative of Article 10 of the Constitution and, therefore, is declared as invalid Sections 24, 25, 27, 28, 30, and 37 of the Act are also not valid in their present fora as they militate against the concept of independence of judiciary and Articles 175 and 203 of the Constitution. They need to be amended as to vest the appellate power in a High Court instead of appellate tribunal and to use the words 'High Court' in place of 'Appellate Tribunal'. Section 26 of the Act is not valid in its present form as it makes admissible the confession recorded by a police officer not below the rank of a Deputy Superintendent of Police as it is violative of Articles 13(b) and 21 of the Constitution and that the same requires to be suitably amended by substituting the words 'by a police officer not below the rank of a Deputy Superintendent of Police' by the words 'Judicial Magistrate'.

That the offences mentioned in the Schedule should have nexus with the objects mentioned in Sections 6, 7, and 8 of the Act.

Section 35 of the Act in its present form is not valid as it militates against the concept of the independence of judiciary and is also violative of Articles 175 and 203 of the Constitution and, therefore, it needs to be suitably amended inasmuch as the power to frame rules is to be vested in the High Court to be notified by the Government

viii. Section 14 of the ^ amended as to provi tenure of the judges o in consonance witl independence of judici

LAHORE HIGH corn EHTESAB ACT

A five-member full Bench Court, headed by the Chief Ji one provision of the Ehtesa provision struck down sought involving offences committe date of 6 November 1990, li itself.37

Two references against fo ministers, and several bureai to the Lahore High Court E the Ehtesab Act for which suspended in view of the tul The Court held that 'No exc(the process of accountabilit measure adopted to give eff date of 6 November 1991 induction of the first Nawaz the centre, was also uph< observed in the course of pi the merit of embracing one Nawaz Sharif and Ms Ben ministers.

The full Bench upheld th Ehtesab Bureau in the Prime and the appointment of Se Khan as its chairman for th work under the overall sur. Ehtesab Commissioner; th Commissioner has the povvt by an agency independent sections 15 and 22 of the alone can order arrest of an the u\timate authority to de file a reference.

The cut-off date was discriminatory as it exclude Benazir government and fi Chief Minister of the Punji

***>oa 14* of the Act requires to be**

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concerned officer of police, armed ;es, or civil armed forces shall record in ting his reasons for such belief and serve the person or premises concerned a copy such reasons before conducting such rch;

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[Section **14 of the Act requires to be**

amended as to pro-vide security Of the

tenure *of the judges of the Special Courts in consonance with the concept of independence of judiciary.*

WORE HIGH COURT UPHOLDS

iTESAB ACT

five-member full Bench of the Lahore High art, headed by the Chief Justice, upheld all but r provision of the Ehtesab Act of 1997. The msion struck down sought to validate references wiving offences committed before the cut off K of 6 November 1990, laid down by the Act

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Two references against former ministers, chief ulsters, and several bureaucrats were sent back ike Lahore High Court Benches set up under ; Ehtesab Act for which hearings had been fended in view of the full Bench proceedings. (Court held that ’No exception can be taken to i process of accountability and the legislative asiire adopted to give effect to it’. The cut-off It of 6 November 1990, which marks the iction of the first Nawaz Sharif government at centre, was also upheld. The Bench had wed in the course of proceedings that it had merit of embracing one tenure each of Mian *n* Sharif and Ms Benazir Bhutto as prime liters

ike full Bench upheld the establishment of the tab Bureau in the Prime Minister’s Secretariat appointment of Senator Saif-ur-Rehman mas its chairman for the reason that it would it under the overall supervision of the Chief Commissioner; that the Chief Ehtesab

ussioner has the power to investigate a case in agency independent of the Bureau under 15 and 22 of the Ehtesab Act; that he

can order arrest of an accused; and that he is ultimate authority to decide whether or not to i reference, cut-off date was indeed arbitrary and

iinatory as it excluded the period of the first government and five years of Nawaz as

Minister of the Punjab, from the process of

accountability The first Ehtesab Ordinance promulgated ry the caretaker *gQySrmBBt* ^

November 1996 provided for across-the-board accountability from 31 December 1985, the day when constitutional rule was restored after a long speff of martiaf faw. ft was not acted upon tnougn it was revived on 1 February 1997 through a succeeding ordinance. The Ehtesab Act was enacted on 31 May 1997 by the new parliament. It brought forward the cut-off date to 6 November
1990. However, while repealing the Ehtesab Ordinances of 1996 and 1997, it saved all the proceedings taken up or pending under the Ordinances even if they involved pre-1990 offences.

NUCLEAR TESTS: DECLARATION OF EMERGENCY

On coming into power, Nawaz Sharif opened a dialogue with the Indian government headed by Prime Minister, Inder Kumar Gujral. Talks were held at the levels of prime ministers and foreign secretaries, and although not much could be achieved because of deadlock over Kashmir, the tension level between the two countries was brought down considerably. Unfortunately this did not last very long. The general elections held in India in February/March 1998 brought the

Bharatiya Janata Party (BJP) as the largest party in Parliament. The BJP, a Hindu nationalist party, along with its allies, held 250 seats out of a total of 545 in the Lok Sabha. It was able to form the government by making coalitions with regional parties. The government was shaky and unstable, but its programme was radical, which included the development of nuclear weapons, undoing of the special status of Jammu and Kashmir under article
370 of the Indian Constitution, and the construction of Ram Mandir at the site of Babri Masjid which was demolished by BJP supporters in 1992.

The BJP embarked upon its ambitious programme by detonating three nuclear devices in the Pokhran desert in Rajasthan on 11 May 1998 and another two nuclear devices on 13 May 1998 at the same site. Following these tests, the Indian government adopted a belligerent attitude towards

Pakistan with its leaders making bellicose statements indicating their intention to invade Azad Jammu and Kashmir.

Although there was strong reaction from the USA, Canada, and Japan, other western powers had a lukewarm response to the nuclear tests. Russia openly supported India. In the G-838 meeting held immediately after the explosions, no consensus could be arrived at amongst these powers regarding sanctions against India. France and Germany openly opposed the sanctions. Only USA and Japan took some half-hearted measures and applied minor sanctions.

In this situation, all political parties in Pakistan

came to a consensus that in order to provide an

effective defence and to deter Indian adventurism,

- it was imperative that Pakistan respond with its

own nuclear tests.

On 28 May 1988, Pakistan held five successful tests of nuclear devices in the Chagi region of Balochistan province. The entire nation rejoiced and supported the government in this step expressing their approval of the policy of nuclear deterrence. Another test was conducted on 30 May
1998.

On 28 May 1998, while the people were still rejoicing, the government took a hasty decision. For reasons best known to the government, an emergency was proclaimed throughout the country under Article 232 of the Constitution. This proclamation was followed the same day, 28 May 1998, by an Order by the President under Article
233(2) of the Constitution declaring:

The right to move any court including a High Court or the Supreme Court, for the enforcement of all the Fundamental Rights conferred by Chapter I of Part II

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any court for the enforcement, or involving the determination of any question as to the enforcement of any of the said rights would remain suspended for the period during which the said Proclamation would be in force.

Another very unfortunate step taken by the government rather hurriedly was the freezing of all

foreign currency accounts in local banks

regardless of whether they belonged to residents

the guarantee given to foreign currency holders under the Protection of Economic 1 Act, 1992. This step has completely dc credibility of the government and the economy (the country, which was already m considerable^ difficulty. The Pakistani rupee went into free tall against the US dollar and other leading cur in the world. The value of the Pakistani against the US dollar fell from 44 rupees to more than *55* rupees in a matter of one month Remittances from overseas Pakistanis were drastically reduced.

SUPREME COURT JUDGEMENT ON PROCLAMATION OF EMERGENT

It has been mentioned above that a nation-wde emergency was proclaimed throughout the countn on 28 May 1998, the day when nuclear tests were conducted in Pakistan. All the fundamental rights of the citizens were suspended under the proclamation. All the foreign currency accounts with banks in Pakistan were frozen. The imposition of emergency and suspension of the fundamental rights were challenged amongst others, by a number of political leaders including Farooq Leghari, Imran Khan and Manzoor Wattoo All these petitions were filed directly before the Supreme Court on the original side under Article
184(3) of the Constitution.

The Supreme Court partly accepted the petitions and a seven judge bench headed by the Chief Justice Ajmal Mian held unanimously that"

1. That the petitions were maintainable.

2. That the materials placed before the Court and shown to the judges in Chambers *pnm*

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justified in issuing the Proclamation under clause (1) of Article 232 of the Constitution
3. That keeping in view the effect of the Proclamation provided for in clause (1) of Article 233 of the Constitution, which authorizes the State to make any law or to take any executive action in deviation of Articles *15,* 16, 17, 18, 19 and 24 of the Constitution and also keenins in view the

are hedged with qualifical under clause (2) of Arti< Constitution for suspending of the Fundamental Righ justification.

4. That the Supreme Court woi tion to review/re-examine of Emergency at any subseq circumstances so warrant.

COURTS' **DECISION ON** OF **FOREIGN CURRENT ACCOUNTS**

The matter of freezing of foreign i was also challenged before the judge40 of the Lahore High Court of the government. In appeal a fu1 High Court held that the action foreign currency

accounts under (Temporary Restrictions) Act, 19 of the Constitution being ref protection clause as well as excessive, unguided and arbitrary on the functionaries of the State 1 It was argued on behalf of the f that the foreign currency accoun banks in Pakistan (amounting
11 billion US Dollars on 28 actually been stripped of foreig the foreign currency deposite holders had been acquired by Pakistan and that more than 8 exchange had already been sper governments since 1991 and t little foreign exchange actual

to ttie account

or non-residents. This was clearly in violation of language of *Articles Id, 1]*

by the federal government requi foreign currency account had b as security for the payment of same should be converted in
31 July 1998 so that the amom used to liquidate the loan for w collateral. This was regardless c a loan was due for payment or T}ie Supreme Court, in a]

certain

•antee given to foreign currency account under the Protection of Economic Reforms)2. This step has completely destroyed the ity of the government and the economy of ntry, which was already in considerable .y. The Pakistani rupee went into free fall the US dollar and other leading currencies world. The value of the Pakistani rupee the US dollar fell from 44 rupees to more 5 rupees in a matter of one month, ances from overseas Pakistanis were illy reduced.

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are hedged with qualifications), an order under clause (2) of Article 233 of the Constitution for suspending the enforcement of the Fundamental Rights was without justification.

I That the Supreme Court would have jurisdiction to review/re-examine the continuation of Emergency at any subsequent stage, if the circumstances so warrant.

COURTS' DECISION ON FREEZING i FOREIGN CURRENCY

UCCOUNTS

It matter of freezing of foreign currency accounts s also challenged before the Courts. A single "of the Lahore High Court upheld the action e government. In appeal a full bench of Lahore k Court held that the action of freezing of the i currency accounts under Foreign Exchange crary Restrictions) Act, 1998 was *ultra vires* Constitution being repugnant to equal tection clause as well as on account of sive, unguided and arbitrary powers conferred Ifte functionaries of the State Bank of Pakistan.41 s argued on behalf of the federal government (the foreign currency accounts maintained with i in Pakistan (amounting to approximately |l billion US Dollars on 28 May 1998) had illy been stripped of foreign currency and all (foreign currency deposited by the account i had been acquired by the State Bank of and that more than 80% of the foreign inge had already been spent by the successive nents since 1991 and that there was very i foreign exchange actually available to be
1 to the account holders. Another step taken klfae federal government required that where any

ten currency account had been put under lien (security for the payment of any bank loan, the i should be converted into Pak rupees by |faly 1998 so that the amount thus obtained be dto liquidate the loan for which it was held as il. This was regardless of the fact that such
11 was due for payment or not. Supreme Court, in appeal, upheld the i of the full bench of the Lahore High Court
4 certain modifications as follows:42

1. It was violation of the assurance given by the Legislature in the Protection of Economic Reforms Act, 1992 to the effect that ”The State Bank of Pakistan or other banks shall not impose any restrictions on deposits in and withdrawals from the foreign currency accounts and restrictions, if any, shall stand withdrawn forthwith”. The improper utilization of the foreign exchange deposits of the foreign currency account holders by successive governments constitutes breach of the above solemn commitment. The State Bank of Pakistan also failed to perform its statutory duty of protecting the interest of the foreign currency account holders, thereby creating a situation where it became practically impossible to honour the above solemn statutory undertaking.

2. No power was conferred on the federation or on the State Bank of Pakistan under the Foreign Exchange (Temporary Restrictions) Act 1998 to compel foreign currency account-holders to liquidate their accounts into Pak Rupees where foreign exchange holdings had been accepted by the respective banks as security against any loans or other facilities extended to them.

3. That the foreign currency account-holders were entitled to receive interest/profits in foreign exchange on their deposits at rates already agreed as per original arrangements between them and the respective banks.

4. That the non-resident Pakistanis and foreigners maintaining foreign currency accounts as on 28.5.1998 would be entitled to utilize the interest/profits, payable to them under the above arrangements between them and the banks concerned, in any manner, including the right to remit the same abroad.

5. That in order to restore the confidence of the existing/prospective foreign currency account-holders, the federation/State Bank of Pakistan should evolve a scheme within a reasonable period keeping in view the foreign exchange position of the country for gradual removal of restrictions on operation of foreign currency accounts.

SUPREME COURT DECLARES MILITARY COURTS UNCONSTITUTIONAL

During the Nawaz government, the law and order situation was gradually deteriorating and sectarian killings were taking place all over the country. The situation in Karachi was getting out of control particularly when Hakim Saeed, a highly respected public figure, was murdered in broad daylight. The blame for his murder was put on MQM and Nawaz decided to crack down on the MQM. In this behalf, Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998 (Ordinance XII of 1998) was promulgated on 20th November 1998. This Ordinance allowed establishment of military courts for trial of civilians charged with offences mentioned in the schedule to the Ordinance. The MQM leadership challenged the Ordinance under Article 184(3) of the Constitution as violative of the Constitution. The Supreme Court accepted the petition in the following terms:43

1. The Ordinance No. XII of 1998 as amended up to date in so far as it allowed the establishment of military courts for trial of civilians charged with the offences mentioned in the said Ordinance was 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 AntiTerrorist Courts in terms of the guidelines provided hereunder 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 affect any of the powers of the Presiding Officer in this regard available under the law. However, the sentences and punishments already awarded and executed would be treated as past and closed transactions.

2. However, solution to menace of terrorism in

iMcfe, Vha\ Vad a\ready taW toft of thousands of innocent lives and had

adversely affected the economy of the entire tjoxint-iry , shc.v»lcl fee found -within the

framework of the Constitution.

3. The following guidelines were laid down 6

achievement of the above objective

i. Cases relating to terrorism be entrusted to the Special Courts already established or which might be established under the Anti-Terrorism Act, 1997 or under ai) law in terms of the judgment of tin Court in the case of Mehram Ah v Federation of Pakistan (PLD 1998 SC 1445)

ii. One case be assigned at a time to a Special Court and till judgment is announced in such a

case, no other case be entrusted to it;

in. The concerned Special Court she proceed with the case entrusted to i1 day to day basis and pronoi judgment within a period of 7 days

iv. Challan of a case should be submitta a Special Court after full preparation ,.- after ensuring that all witnesses wd be produced as and when required the concerned Special Court;

v. An appeal arising out of an ordi/ judgment of the Special Court should DC decided by the appellate forum within a period of 7 days from the filing of such appeal;

vi. Any lapse on the part of the investigating and prosecuting agencies should entail immediate disciplinary action according to the law applicable;

vii. The Chief Justice of the High Court concerned should nominate one or more judges of the High Court for monitoring and ensuring that the cases/appeals are disposed of in terms of these guidelines;

viii. That the Chief Justice of Pakistan could also nominate one or more judges of the Supreme Court to monitor the implementation of these guidelines.

The Supreme Court by striking down the law for establishment of military courts for civilian offences did a great service to the nation.

Undoubtedly the step taken by the government in

this toehalf was inherently unconstitutional.

1998, the Nawaz regin* a olan to virtually undo

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contained the following provision

”Addition of new Article /o

tion.. In the Constitution of the

Pakistan, hereinafter referr.

Constitution, after Article 2A tl

Article shall be inserted, namely

2B Supremacy of the Quran

m The Holy Quran and bu Prophet (peace be upon supreme law of Pakistan

Explanation:- In the a; clause to the personal li sect, the expression Q shall mean the Qurai interpreted by that sect. The Federal Governrnei obligation to take ste Shariah, to establish s zakat, to promote anirt anil munkar (to prescn to forbid what is wi corruption at all lev substantial socio-ec< accordance with the pi laid down in the Holy The Federal Govei directives for the un provisions set out in and may take the nee any state functionarj of the said directives (4) Nothing contained affect the personal li traditions or custom their status as citizen (5) The provisions of t effect notwimstandi *in* the Constitution,

any Court".

Amendment oi Constitution:- In the

(3)

Mowing guidelines were laid down for •ement of the above objective: ases relating to terrorism be entrusted the Special Courts already established
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ny lapse on the part of the vestigating and prosecuting agencies ould entail immediate disciplinary tion according to the law applicable; le Chief Justice of the High Court ncerned should nominate one or more dges of the High Court for monitoring d ensunng that the cases/appeals are sposed of in terms of these guidelines; lat the Chief Justice of Pakistan could >o nominate one or more judges of the preme Court to monitor the implemtation of these guidelines.

sme Court by striking down the law ment of military courts for civilian d a great service to the nation, the step taken by the government in as inherently unconstitutional.

CONSTITUTION

(FIFTEENTH **AMENDMENT) BILL**

1998, the Nawaz regime suddenly came , ._ a plan to virtually undo the Constitution tough introduction of Fifteenth Constitutional todment Bill on 28 August 1998 which jjlamed the following provisions:

”Addition of new Article 2B in the Constitufd-Inthe Constitution of the Islamic Republic

Pakistan, hereinafter referred to as the said institution, after Article 2A, the following new |ide shall be inserted, namely:

2B Supremacy of the Quran and Sunnah:-

(1) The Holy Quran and Sunnah of the Holy Prophet (peace be upon Him) shall be the supreme law of Pakistan. Explanation:- In the application of this clause to the personal law of any Muslim sect, the expression ’Quran and Sunnah’ shall mean the Quran and Sunnah as interpreted by that sect.

(2) The Federal Government shall be under an obligation to take steps to enforce the Shariah, to

establish salat, to administer zakat, to promote amr bil ma'roof and nahi anil munkar (to prescribe what is right and to forbid what is wrong), to eradicate corruption at all levels and to provide substantial socio-economic justice, in accordance with the principles of Islam, as laid down in the Holy Quran and Sunnah.

(3) The Federal Government may issue directives for the implementation of the provisions set out in clauses (1) and (2) and may take the necessary action against any state functionary for non-compliance of the said directives.

(4) Nothing contained in this Article shall affect the personal law, religious freedom, traditions or customs of non-Muslims and their status as citizens.

(5) The provisions of this Article shall have effect notwithstanding anything contained in the Constitution, any law or judgment of any Court'.

Amendment of Article 239 of the Constitution:- In the Constitution, in Article

239, after clause (3) the following new clauses shall be inserted, namely:- (3A) Notwithstanding anything contained *in* clause *(!) to* /3i *a* BJJJ ID amend the Constitution providing for fne removal of any impediment in the enforcement of any matter relating to Shariah and the implementation of the Injunctions of Islam may originate in either House and shall, if it is passed by a majority of the members voting in the House in which it originated, be transmitted to the other House; and if the Bill is passed without amendment by the majority of the members voting in the other House also, it shall be presented to the President for assent.

(3B) If a Bill transmitted to a House under clause (3A) is rejected or is not passed within ninety days of its receipt or is passed with amendment it shall be considered in a joint sitting. (3C) If the Bill is passed by a majority of the members voting in the joint sitting, with or without amendment, it shall be presented to the President for assent.

(3D) The President shall assent to the Bill presented to him under clause (3A) or clause (3C) within seven days of the presentation of the Bill".

The Bill generated heated debate throughout the country. The opposition in the Parliament was almost united against the Bill and there was even some resistance from within the PML(N). Nawaz called upon the members of the Parliament from his party, who were opposed to the Bill, to resign. Consequently the opposition within the party caved in under such threat. Though the Bill was somewhat modified to appease such members of the party, the main provisions were retained. The clauses relating to executive directives and the constitutional amendment by simple majority were withdrawn. The Bill was tabled before the National Assembly on 9 October 1998 and it passed by 151 in favour and 16 against it. The members of the

National Assembly voting in favour of the Bill included 143 from PML(N), seven FATA members and Hasil Bizenjo from Balochistan. Members belonging to the MQM remained absent from the House. The members belonging to minorities were present in the House but they did not participate in the vote. ANP and PPP members present in the House voted against the Bill.

The Bill was not presented before the Senate because Nawaz government did not have the required two-third majority there. The Bill was initially kept back to be tabled after March 2000, when elections to half the membership of the Senate were due to be held and it was expected PML(N) would then acquire two-third majority in the Senate.

The Fifteenth Amendment Bill was apparently a blatant attempt by Nawaz to introduce dictatorship in the country in the name of Islam. This Amendment was unnecessary because the Islamic provisions included in the Constitution were adequate for the purpose of bringing the existing laws or any future legislation in conformity with the Injunctions of Islam. The Amendment would have empowered the centre more and weakened the provinces thus jeopardizing the provincial autonomy further. It would have created more divisions, accentuated the existing ones, and might have led to more sectarian and other violence. The Constitution would have lost its efficacy and would have been rendered into a meaningless document. The directives issued by the executive would have prevailed over the constitutional provisions. The law of the land would have slided into uncertainty jeopardizing the fundamental rights and civil liberties of the citizens. The Parliament and the Provincial Assemblies would have lost their character as law making bodies and the legislation would have ceased to be the business of the chosen representatives of the people. The Judiciary would have been undermined as an independent organ of the State and its decisions would have been openly flouted and overridden by the executive through directives issued in the name of Islam. Such directives would have been beyond correction through the process of judicial review. The freedom of press and speech would have been

drastically curtailed and draconian ce; might have been clamped. The already i position of women in society would havel rendered untenable. The rights and legiti interests of the minorities would have been fi jeopardized and they would have suffered <»” greater insecurity. In a nutshell it was a r attempt to impose dictatorial rule based us predesired fatwas obtained from favourite faqihoi ulema. It would have set the clock back, pushnj the country back into the dark ages.

SUPREME COURT STORMING CASE DECIDED

It has been discussed above that a number of Parliament and Punjab Assembly members from the PML(N) and certain others from the PML(N) stormed the Supreme Court building in Islamabad on 28.11.1997 in order to disrupt the contempt proceedings against Nawaz. The Chief Justice Ajmal Mian appointed one of the judges of the Supreme Court, Abdur Rahman Khan to hold an inquiry into the incident. In this report dated

18.2.1998 he held that those individuals who had forced their entry into the court premises and raised slogans against the judiciary were pnma facie guilty of gross contempt of court. He recommended that since most of such individuals had to be identified, it would be appropriate that a Bench of the Supreme Court be constituted for initiating contempt proceedings for the outrageous incident

Accordingly a Bench of three judges of the Supreme Court consisting of Nasir Aslam Zahid, Munawar Ahmad Mirza and Abdur Rahman Khan was constituted by the Chief Justice to hold contempt proceedings against persons responsible for the incident. This Bench examined 53 witnesses, perused a large number of documents and watched the video cassettes containing coverage of the incident. By order dated 3 July
1998, Show Cause notices for contempt of court were issued to 26 persons including two members of the National Assembly (MNAs) and three members of the Punjab Assembly (MPAs).

Ultimately, the charges for contempt of court were framed against seven persons including the

-two MNAs and three J were either dischar ing or cases against t Definitely. The Court held jay was not spontaneous ...rpose was to disturb tr tuctmg contempt procs However, all the accused v reaching the conclusion that

crowd amounted to a flagrai court. The reason given for the evidence did not specifi the respondents to the exter that the case against any o established beyond reasonat The judgment in the sto deep disappointment to the p mdgment was contradictor reasoning and findings, government to jealously gv of the judiciary while at the

the leading members of t holding representative pos committing gross contempt hand the court lamented tl had undermined independer the other hand it itself weal

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SIXTEENTH AMEND

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'm tfffffrs saar'citc&^ tfrftt. is were either discharged after issuance of ,, or cases against them were postponed Infinitely. The Court held that the action of the »as not spontaneous but planned and the irpose was to disturb the Court which was ducting contempt proceedings at that time. Iwever, all the accused were acquitted despite idling the conclusion that the action of the mob/ rod amounted to a flagrant type of contempt of nt The reason given for the acquittal was that [evidence did not specifically point out any of [respondents to the extent that it could be said I the case against any one of them had been (Wished beyond reasonable doubt.44 Hie judgment in the storming case came as a i disappointment to the people of Pakistan. The lent was contradictory and confused in its inmg and findings. It sermonized the lent to jealously guard the independence lie judiciary while at the same time letting off [leading members of the government party _g representative positions responsible for milting gross contempt of court. On the one id the court lamented that the court storming .undermined independence of judiciary but on [Other hand it itself weakened and undermined institution of judiciary by acquitting those •lonsible for the incident. However, in appeal, a It-member bench of the Supreme Court icted seven persons belonging to PML(N), __.g two MNAs and four MPAs, for contempt (tourt for storming the Supreme Court building iber 1997 and sentenced each of them to month simple imprisonment.45

TEENTH AMENDMENT

cle 27 of the Constitution provides for __-ds against discrimination in services on (pound of race, religion, caste, sex, residence _.e of birth. However, an exception was made illy for ten years for reservation of quota for _ of disadvantaged class or area to secure i adequate representation in the service of . This was indeed an affirmative action to : the interest of the people living in areas

educational facilities were not available in such areas. This period was extended to twenty years under the Eighth Amendment.

However no special efforts were made by the successive governments to uplift backward areas and to provide good education to the people of these areas. In fact, social services like education and health have remained as matters of low priority with the government in the last more than fifty years. When the period of twenty years expired in August 1993, there was an outcry to abolish quotas. The litigation in this behalf culminated before the Supreme Court which held that construing Articles 27 and 25 together, it was obvious that after expiry of twenty years there could not be any quota in the services creating discrimination on the basis of residence or place of birth.46

The abolition of quota is very sensitive political issue particularly with the disadvantaged small provinces and backward areas within each province. In order to avoid this issue, Sixteenth Amendment to the Constitution47 was promulgated amending Article 27 and extending period of quota system in services to forty years; that is, until August 2013.

KARGIL CRISIS: CONFRONTATION WITH MILITARY

Nawaz in his endeavour to acquire more power for himself, soon ran into serious difficulty with the leadership of the Armed Forces. The Chief of Army Staff, General Jehangir Karamat, in his address to the Naval War College on 5 October
1998, proposed the establishment of a National Security Council for addressing important national issues. On 7 October 1998, General Karamat was forced to resign as Army Chief of Staff for making the proposal. He was replaced by General Pervez Musharraf, who was selected ahead of his senior colleagues. However, the sudden resignation of Gen. Jehangir Karamat caused resentment in the rank and file of the Army because the same was seen by many as a humiliation of the Armed Forces. On the other hand, his resignation was

drummed up as a personal triumph for Nawaz who was now portrayed by the media as the most powerful Prime Minister that Pakistan ever had. He was seen as someone who had stripped the President of his powers through the Thirteenth Amendment, neutralized the Parliament through the Fourteenth Amendment, forced a President to resign his office and driven out a Chief Justice from office. Now he had prevailed over the leadership of the Army by sacking its Chief of Staff.

In February 1999, Nawaz took a major initiative towards normalization of the relationship with India. Prime Minister Atal Behari Vajpayee of India visited Lahore on a bus in February 1999 thus launching a regular bus service between the cities of Lahore and Delhi. He was met at Wagah border by Nawaz and a joint communique known as ’Lahore Declaration’ was signed between the two leaders spelling out various steps to be taken by the two countries towards normalization of relations. Except for Jamaat-i-Islami, whose workers demonstrated against the move, the visit of Vajpayee was not opposed by any other political or social elements in Pakistan. The move of Nawaz to normalize relations with India was generally seen with favour by opinion makers in Pakistan.

Unfortunately good relations between the two countries did not last for long. Within a few months of the Lahore Declaration, the two countries ran into a bitter confrontation over disputed territory of Kashmir. Certain mountain peaks in the region of Kargil, from where Pakistani forces were ejected by the Indians some years ago, were occupied by the Mujahedeen (the freedom fighters) backed by Pakistan’s Armed Forces. The Indian Army was badly trapped but India successfully opened a propaganda front at international level accusing Pakistan of aggression. Indian propaganda was so successful that Pakistan was left virtually without friends on the international scene. Even old friends like China refused to come to the aid of Pakistan. Faced with such a dire situation and acute isolation, Nawaz hurriedly appealed to President Clinton of the USA to bail him out. Consequently on 4 July 1999, Nawaz rushed to Washington DC and unilaterally (without participation of India) signed an accord

with the USA for withdrawal of forces from and to respect the line of control in Kashmir jj future. Consequently, Army personnel Mujahedeen were withdrawn from Kargil unfa very humiliating circumstances. India came out with flying colours because most of the accusations it made stood admitted by Nawaz government u the Washington Accord. Bharatia Janata Party (BJP), Vajpayee’s party, became the benefician of Pakistan’s misadventure in Kargil and was returned to power with greater strength in the Lok Sabha this time in the general elections that were held in September 1999. The question as to who was responsible for the Kargil debacle, Nauaz government or the leadership of the Armed Forces boggles the mind. It is, however, clear that Pakistan suffered a terrible setback and international humiliation. Nawaz in a recent statement blamed the Army leadership for the Kargil misadventure11 Nevertheless, Nawaz, being at the helm of affairs, cannot escape responsibility for the Kargil fiasco General Musharaf also cannot be absolved of responsibility of Kargil Fiasco. He was Chief of Army Staff and fully responsible for planning and execution of the military misadventure. An enquiry needs to be held into the matter and the nation should be informed about the responsibility of the debacle and the

number of Mujahidin and membere of Armed Forces killed and injured in this Kargil misadventure. Those responsible should be brought to book.

THE MILITARY TAKES OVER

In the aftermath of the Kargil crisis, the relationship between the Nawaz government and the leadership of the Armed Forces grew extremely tense. It was rumoured that Nawaz was prepanng to sack another Army Chief and to appoint in his place some-one of his own personal choice. In the middle of such rumours arrived the fateful day of
12 October 1999. General Pervez Musharaf was in Sri Lanka on an official visit on that day, when Nawaz tried to promote Lt. Gen. Zia ud Dm (who was junior to several of his colleagues) to General and appoint him as Chief of Army Staff. The formalities of the appointment were somewhat

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craved out but the Army Corps *Commander did* lot allow him to take over the charge of his new ration. An announcement was made on national demon about the appointment but it was soon

tours. People were anxious to know what was illy happening. After a few hours, the TV ;ens displayed the announcement that the ,az government had been dismissed and that :eral Pervez would soon be addressing the

It later transpired that while the Army simanders were taking over the TV stations, ne Minister House, Governor Houses and other Mine places and installations, an attempt was •:made by Nawaz and his officials not to allow i PR plane, with General Pervez aboard, to land *x* Karachi Airport. It was ordered to be taken nyto a destination either in the Gulf States or n When the pilot informed that the plane was ling out of fuel and could not make the journey, *m* diverted to Nawabshah. However, before it lid land there, the control of the airport at

was taken over by the Army and the plane

to land at Karachi.

KFORMANCE **OF SECOND** NAWAZ

fOVERNMENT

^performance of the second Nawaz government [been very disappointing. Despite what has ;dly been called a heavy mandate, the of the Nawaz government were prodand obvious. •One, the government was a failure in the
1 sense. It failed miserably in holding on to alliances. It broke its long-time political _rship with the Awami National Party (ANP) i turned hostile. The issue that has estranged I was the renaming of the Frontier Province. I proposed ’Pakhtoonkhwa’ as the name for P. It claimed that Nawaz had promised to it this name to the Province but backed out [pressure from the hawks in his party. This ;ation is not without substance. Nawaz niment was also in trouble with its other
1 allies, the MQM, and the BNM led by irMengal, Chief Minister of Balochistan.

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terrorism and the deteriorating law and order situation. The situation in Karachi remained grave with warring factions of the MOM on *a rany^ye &n<jfe<& af peopfe were faffetfm Karac&i* wm/e the federal and provincial governments stood as helpless spectators. With no policy of his own on Karachi, lawlessness reigned supreme as a result. The law and order situation in Punjab had deteriorated. Sectarian killings, murders, dacoities, and other crimes were on the rise. The introduction of Anti-Terrorist Courts did little to check rising crime.

Three, the Nawaz government caused great harm to the federation by alienating smaller provinces from the Punjab. The acts and policies of his government only strengthened the perception that Punjab dominates other provinces which were not given their due. Since top constitutional positions like those of the president, the prime minister and the chairman of the senate, had all gone to the Punjab, this view had only gained further strength and credence.

Four, Nawaz has done incalculable harm to the judiciary. In his confrontation with Justice Sajjad, he went beyond all limits creating a schism within the Supreme Court and, in this way, divided and destroyed the Court. He did not stop short of engineering an assault by his party workers on the Supreme Court to pre-empt a decision on the contempt of court case against him.

Five, Nawaz’s economic policies had been a complete failure. Despite the pretension of being an economic wizard and claiming the support of the business community, he failed to revive and regenerate economic activity after the disastrous years of Benazir’s government. The economy was still in dire straits and, after the nuclear tests, the country reached the brink of economic disaster. Nawaz reneged on his own policy of opening the economy by freezing foreign currency accounts in Pakistan.

Six, Nawaz concentrated on keeping all power his own hands. He further personalized the system of governance by holding open courts instead of strengthening state institutions. Nawaz Sharif ruled the country like a private fiefdom. He could trust no one but his own brother, Shahbaz, for chief

ministership of the Punjab. His father, Mian Sharif, interfered with his decision-making in a big way. The running of the State became a family concern for Nawaz. His repeated attempts to sack Army Chiefs resulted in unnecessary confrontation with the Army which led to his undoing.

Seven, the exercise of accountability undertaking by Nawaz's government failed miserably. The only creditable achievement being the uncovering of some foreign bank accounts of *Benazir,* Zardari, and other members of the family. Otherwise, the process of accountability has been conducted selectively by his close confidants in order to ensure that his family members and important leaders of the PML(N) were not touched.

NOTES

1. Act I of 1997, PLD 1997 Central Statutes 323.

2. Nawaz visited Leghari in his home-town, Choti, in Dera Ghazi Khan, a few hours before the introduction of the Amendment Bill to inform him that the PML(N) Parliamentary Committee had decided to do away with his dispretionary powers. Leghari, who was initially not willing to grant him an audience, was shocked to learn the news of the castigation of presidential powers. The Parliamentary Committee had met under great secrecy and the news had not leaked to him.

3. Act XXIV of 1997, PLD 1997 Central Statutes 324.

4. Two Senators from the PPP told the author that they received the draft of the Fourteenth Amendment when they went to the Parliament to attend the session. They did not know that the session was called to consider such an amendment.

5. The Presiding Officer of the House means Speaker of the National Assembly in case of an MNA, the Chairman of the Senate in case of a Senator, and Speaker of the concerned Provincial Assembly in case of an MPA.

6. Ordinance XX of 1997, PLD 1997 Central Statutes
140 (Unreported Statutes volume).

7. Act IX of 1997, PLD 1997 Central Statutes 369.

8. It is learnt on good authority that when the Attorney-General tried to argue that hand-cuffing was a result of the FIRs registered against these officers, an audio-tape was played on the order of Justice Sajjad in his chamber where the proceedings were being held. It was clearly audible that a police officer whispered in the ear of Nawaz, when the

latter had ordered hand-cuffing, that the FIR U not been registered. Nawaz replied using crak vernacular that he did not care.

www.cssexampoint.com

9. *Herald*, December 1997, p. 32.

10. A Bench of the Supreme Court headed b) *ins* Sajjad admitted a petition filed by Supreme Cora Bar Association on 5 September 1997 challenging the notification for reduction in the number of judges of the Supreme Court. The notifications also suspended in this order.

11. It is widely rumoured that the Quetta verdict *m* obtained after two retired judges of the Supreme Court and a chief minister were flown in to Quetu on a special plane and that Shanfuddin Pirzada, privy to the whole plan, was also present there

12. Asad Ali v Federation of Pakistan, 1998 SCMR
122.

13. Asad Ali v Federation of Pakistan, 1998 SCMR 15

14. It is not a matter of practice alone. It is a requirement of Rule 1 of Order XXV of tic Supreme Court Rules, 1980 that a petition for enforcement of fundamental rights under Article
184(3) should be filed at the main Registry

15. Akhunzada Behrawar Saeed v Sajjad All Shah,
1998 SCMR 115.

16. Ibid., pp. 118-19. Prior to this administrative order, the Peshawar Bench passed an order on
28 November 1997, taking notice of the refusal of Justice Ajmal Mian to be Acting Chief Justice, calling upon the next senior judge to constitute the Full Court for hearing in terms of the earlier order Akhunzada Behrawar Saeed v Mr Justice Sajjad Ali Shah, 1998 SCMR 173.

17. In re: Constitutional Petition No. 248-Qof 1997,
1998 SCMR 127.

18. Muhammad Ikram Chaudhry v Mian Muhammad Nawaz Sharif, 1998 SCMR 176.

19. The text of the letter dated 28 November 1998 of Justice Sajjad to Leghari has been printed in *Dann*,
16 May 1998 at page 9.

20. The author, being a member of the Pakistan Bar Council, was a member of the bar delegation

21. Syed Iqbal Haider v Federation of Pakistan, 1998 SCMR 181. In this order, the happenings like rowdyism in the Court on 27-11-1997 and storming of the Court on 28-11-1997 are recorded.

22. Syed Iqbal Haider v Federation of Pakistan, 1998 SCMR 179.

23. Asad Ali v Federation of Pakistan, 1998 SCMR

119.

24. Asad Ali v Federation of Pakistan, PLD 1998 S.C
161.

Dawn, 3 December 199 Article 63(g) of the Cor J. *Dawn, 25* December 19'

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28 *Dawn,* 1 January 1998. » Tarar owed his appoint
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30 Ever since the promulg
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31 Syed Masroor Ahsan
1998 SC 823.

32 Dawn, IV March 1998 « WukalaMahazBarail

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Ali v Federation of Pakistan, PLD 1998 S.C.

< *Dawn, 3 December* .

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H Davw), 25 December 1997 and *Dawn,* 30 December

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28 *Dam,* 1 January 1998. $ *Taar owed his appointment as Sessions Judge in*

native Gujranwala. At that time Bhmder was *$t>isk& of* the Provincial Assembly of West

Pakistan. In that capacity, he was able to help his otherwise briefless lawyer friend to be appointed as Sessions Judge.

id Ever since the promulgation oi <ne Cons'lAM'ttCia 0\
1973, a convention had developed *that presidents* and prune ministers came from different provinces. From 1973 to 1977, Prime Minister Bhutto was from Srndb- and PresidentTaza\Tilaru ^rom^Tarijat). From 1985 to 1988, Prime Minister Junejo came fern Smdh. and President Zia from Punjab. From *m* to \990, Pnme Mm\sto B<mra tea\<i4 from Sindh and President Ishaq from NWFP. From 1990
10 *(995, fnme frlimscerft&vraedaft-erftfvaz ^fc^ya-^-* and President Ishaq from NWFP. From 1993 to
1996, Prime Minister Benazir came from Sindh and President Leghari from the Punjab. I Syed Masroor Ahsan v Ardeshir Cowasjee, PLD

1998 SC 823.
1 *Dawn,* 17 March 1998.

i Wukala Mahaz Barai Tahafaz Dastoor v Federation ofPakistan, PLD 1998 S.C. 1263.

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37. *Dawn, 27* March 1998.

38. It stands for the Group of Eight most industrialized

France, ItaJy, *Japan, and Russia.*
39. Sardar Farooq Ahmad Khan Leghari and others v fetferarton ***offtucrao**** *****?*>' *****&-*, **-raz-o** *jooo*

S.C. 57
40. Zahoor Ahmad v. The Federation ofPakistan, PLD

41. Shaukat AYi Mian v Federation ofPakistan, 1999 CLC 607.

42. Federation of Pakistan v Shaukat Ah Mian, PLD

43. Sh.

1999 S.C. 504

44. State v Taciq tail MNk and 6 othere, 1QQQ SCMR
751

SCMR 1969

46. Mushtaq Ahmad Mohal V. The Lahore High Court,
1997 SCMR 1043.

47. Constitution (Sixteenth amendment) Act, 1999 (Act VII of 1999) promulgated on 5 August 1999; PLD 1999 Central Statues 413.

48. The News of 13 June 2000.

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36 Musharraf and the Legal Framework Order

In a delayed broadcast to the nation (in the early hours of 13 October 1999) General Pervez Musharraf announced that the Nawaz government had been removed and the Armed Forces had moved in and taken control of the affairs of the country. Later on it was decided by the military leadership that martial law would not be imposed and a new set-up would soon be announced. On
14 October 1999, Musharraf proclaimed emergency throughout Pakistan and assumed the office of the Chief Executive. He proclaimed that the Constitution would be held in abeyance but the President would, however, continue in office. It was also announced that the National Assembly, the Senate, and the four Provincial Assemblies would stand suspended and their speakers and chairmen were also suspended. Provisional Constitution Order (PCO) was promulgated which provided that notwithstanding the abeyance of the provisions of the Constitution, Pakistan (subject to PCO and other orders made by the Chief Executive) would be governed, as nearly as may be, in accordance with the Constitution. All courts in existence would continue to function and to exercise their respective powers and jurisdiction provided that the Supreme Court, High Courts or any other court would not have the power to make any order against the Chief Executive or any person exercising power or jurisdiction under his authority. The fundamental rights under the Constitution, not in conflict with the Proclamation of emergency or any order made thereunder from time to time, would continue to be in force. The President was to act on the advice of the Chief Executive. No court could pass any judgment, decree, writ, order or process whatsoever against the Chief Executive or any authority designated by him. All laws other than the Constitution would continue in force until altered, amended or repealed

by the Chief Executive or any authority designated by him. All the persons who were members of the services would continue in office.

Musharraf in his speech of 13 October 1999 appealed to the people of Pakistan to remain calm and support the armed forces which had moved in as a last resort to prevent any further destabilization of the country. He stated that the Armed Forces would preserve the integrity and sovereignty of the country at any cost. In his address to the nation on 17 October 1999, he announced that he would head a six-member National Security Council, whose members would be the Chief of Naval Staff, the Chief of Air Staff, a specialist each in law, finance, foreign policy and national affairs. He also announced the following seven-point agenda:

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 investors' 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.

MILITARY GOVERNMENT CONFRONTS THE JUDICIARY

The judiciary was not initially touched by the change. The military government promised the judiciary its independence and full powers and jurisdiction under the Constitution, subject to

restraints on jurisdiction -Tders of the Chief Execut, ,g under him. The judges of I !ftot required to take oath u .allowed to continue to Pert(

_ exercise their junsdic Constitution. The question as to

, be given to judges of superior ’the time when retirement of th te Peshawar High Court becar week of January 2000. It was a

Chief Justice of that Court w under the Constitution. Thilough Oath of Office (Juc Jromulgated on 31 Decembe, SB provided that the judges of

would take the oath specified and in the appropriate form s< Schedule to the Constitution.

This situation was not to number of petitions had been other PML(N) leaders m the Si

Article 184(3) of the Consul niUtaiy takeover on 12 Octob,

restoration of the Assemblies had been entertained and we, on 31 January 2000. As tr approached, it was strongly . petitions might be sccep Umblies might be resto government reinstated On 25 of Office (Judges) Order 20 in which all the judges of the

required to take oath to the e discharge their duties and pe m accordance with the Procla of 14 October 1999 and the P tone to time. However, it w ,udge would not be given *oz* Joath within the time fixed b^ for the purpose, he would ce pursuance of this Order, 1 Pakistan, Justice Saiduzzanu take oath. His standpoint i regime had given solemn judiciary that it would n, Independence and it would! under the Constitution. He v

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’hief Executive or any authority designated All the persons who were members of the would continue in office, larraf in his speech of 13 October 1999
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The military government promised the

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in restraints on jurisdiction in regard to acts orders of the Chief Executive or authorities c under him. The judges of the superior courts not required to take oath under the PCO and : allowed to continue to perform their functions _ exercise their jurisdiction under the Institution. The

question as to what oath should .given to judges of superior courts came up at it time when retirement of the Chief Justice of It Peshawar High Court became due in the first Kk of January 2000. It was agreed that the new lief Justice of that Court would take an oath Bier the Constitution. This was reaffirmed tough Oath of Office (Judges) Order 1999 ^ranulgated on 31 December 1999) wherein it isprovided that the judges of the superior courts did take the oath specified in the Constitution id in the appropriate form set out in the Third Mule to the Constitution. This situation was not to stay for long. A iber of petitions had been filed by Nawaz and PML(N) leaders in the Supreme Court under
184(3) of the Constitution challenging the , takeover on 12 October 1999 and seeking ... lion of the Assemblies. All these petitions been entertained and were fixed for hearing
31 January 2000. As the date of hearing ;hed, it was strongly rumoured that these tions might be accepted and that the iblies might be restored and the Nawaz

lent reinstated. On 25 January 2000, Oath

[Office (Judges) Order, 2000 was promulgated iihich all the judges of the superior courts were to take oath to the effect that they would __ige their duties and perform their functions jiccordance with the Proclamation of Emergency [14 October 1999 and the PCO as amended from to time. However, it was provided that if a ,. would not be given oath or would not take .within the time fixed by the Chief Executive ithe purpose, he would cease to hold office. In ice of this Order, the Chief Justice of i, Justice Saiduzzaman Siddiqui refused to oath. His standpoint was that the military had given solemn undertaking to the :iary that it would not interfere with its .dence and it would be allowed to function the Constitution. He was virtually put under

MUSHARRAF AND *THE LEGAL* FRAMEWORK ORDER

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nouse arrest *until n.oo A.M. on ze sanuary* so that he might not influence those judges who were willing to take the oath. Four judges of the Supreme Court who originally hailed from Sindh, namely Nasir Aslam Zahid, Mamoon Kazi, Wajeehuddin Ahmad and Kamal Mansoor Alam, following the example of the Chief Justice, did not take oath. Khalil-ur-Rehman Khan, a Supreme Court Judge from Punjab, also refused to take oath. Only seven judges took oath and the senior most amongst them, Irshad Hassan Khan was appointed the Chief Justice. Two judges of the Lahore High Court, three judges of the Sindh High Court and two judges of the Peshawar High Court were not given oath and thus they ceased to hold office. None of the judges of the High Courts refused to take oath voluntarily.

TRIAL OF NAWAZ SHARIF FOR HIJACKING

Nawaz Sharif along with six others were tried for hijacking of the PIA plane on 12 October 1999 which had Musharraf on board. There are indications that prior arrangements had been made for *coup d'etat.* While General Musharraf was still in the air craft, Prime Minister House, Radio and Television stations at Islamabad had already been surrounded by the military personnel.

Nawaz and his brother Shehbaz were immediately taken into custody and military take over of the government was complete. This high profile trial held in Karachi by Special Judge Rehmat Hussain Jaffri ended in a verdict of guilty against Nawaz on
6 April 2000. He was awarded the sentence of life imprisonment. All his co-accused were acquitted. Before his appeal could be decided, Nawaz alongwith the members of his family left for exile to Saudi Arabia in December 2000. The agreement between the Governments of Pakistan and Saudi Arabia remains shrouded in mystery. There are divergent claims on the part of the Musharraf government and Nawaz family. The Musharraf government claims that Nawaz and his family has been banished to Saudi Arabia for a period of 10 years. On the other hand, Nawaz and his brother Shehbaz claim that they have a right to return to

Pakistan at any time. It is obvious that Musharraf would not allow Nawaz, Shehbaz or their families to return to Pakistan as long as he is in power. It appears that Nawaz and his family capitulated by going into exile due to their failure to stand confinement in jails in Pakistan.

SUPREME COURT UPHOLDS MILITARY TAKEOVER

The petitions against the military takeover and for restoration of the Assemblies were heard by a Bench of 12 judges of the Supreme Court headed by Chief Justice Irshad Hassan Khan. After months of hearing, judgment was announced as 12 May
2000 disposing of all the petitions with the following findings:

1. On 12 October 1999 a situation had arisen for which the Constitution provided no solution and the intervention by the Armed Forces through an extra-constitutional measure became inevitable. Sufficient corroborative and confirmatory material had been produced by the Federal Government in support of the intervention by the Armed Forces through extra-constitutional measures. Thus, the intervention was validated on the basis of the doctrine of State necessity and the principle of *salus populi suprema lex* as embodied in Begum Nusrat Bhutto's case.

2. All past and closed transactions, as well as such executive actions as were required for the orderly running of the State and all acts, which tended to advance or promote the good of the people, were also validated.

3. That the 1973 Constitution remained the supreme law of the land subject to the condition that certain parts thereof were held in abeyance on account of State necessity.

4. That the Superior Courts would continue to

function under the Constitution. The mere fact that the Judges of the Superior Courts had taken a new oath did not in any manner

derogate from this position because the Courts had originally been established under the 1973 Constitution.

5. i) That General Pervez Musharraf, through Proclamation of Emergency dated the

14 October 1999 followed by PCO I of
1999, had validly assumed power by means of an extra-constitutional step He was held entitled to perform all such acts and promulgate all legislative measures as enumerated hereinafter as under

(a) All acts or legislative measures which would be in accordance with, or could have been made under the 1973 Constitution, including the power to amend it;

(b) All acts which tend to advance or promote the good of the people,

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(c) All acts required to be done for the ordinary orderly running of the State, and

(d) All such measures as would establish or lead to the establishment of the declared objectives of the Chief Executive stated in his speeches of
13 and 17 October 1999

ii) That constitutional amendments by the Chief Executive could only be resorted to if the Constitution does not provide a solution for attainment of his declared objectives.

in) That no amendment should be made in the salient features of the Constitution i e independence of judiciary, federalism parliamentary form of government blended with Islamic provisions.

iv) That fundamental rights provided in the Constitution should continue to hold the field but the State would be authorized to make any law or take any executive action in deviation of Articles 15, 16,17,18,19 and 24 of the Constitution.

v) That these acts, or any of them, could be performed or carried out by means of orders issued by the Chief Executive or through Ordinances on his advice.

vi) That the Superior Courts would continue to have the power of judicial review lo determine the validity of any act or action

of the Armed Forces, if challenged, mthe light of the principles underlying the law of State necessity. These powers under

Article 199 of the Constitution would remain available to their full extent,

notwithstanding anything

contained in any legislal

enacted by the Chief Execi

order issued by the Chief

vii) All orders made, proceec

acts done by the Chief E

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legislative measures, woi

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6. That the cases of former C judges of the Supreme Cou taken oath under the Order those judges of the High C not given oath, could not be been hit by the doctrine of transaction.

7. That the Government shou process of accountability ii transparent manner justly, fa in accordance with law.

8. That the judges of the Supe also be subject to accountab with the methodology laid & of the Constitution.

9. General Pervez Musharraf, Staff and Chairman Join Committee was held to Constitutional post. His p removal in violation of thi *altram partem* was held as of no legal effect.

10. Old legal order had not suppressed or destroyed, t case of constitutional transitional period so as 1 Executive to achieve his d

11. That the current electoral and fresh elections could updating them which as pe Election Commissioner w

Obviously, after preparat rolls some time -wottY* delimitation of constltuei objections, etc. Hence th allowed to the Chief E from the date of the *i*
12 October 1999 for hole and achieving his declars

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MUSHARRAF AND THE LEGAL FRAMEWORK ORDER

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notwithstanding anything to the contrary

contained in any legislative instrument

enacted by the Chief Executive and/or any

order issued by the Chief. Executive.

vii) All orders made, proceedings taken and

acts done by the Chief Executive or any

authority on his behalf including the

legislative measures, would be subject to

judicial review by the superior courts on

the touchstone of the State necessity.

That the cases of former Chief Justice and

judges of the Supreme Court, who had not

taken oath under the Order 1 of 2000, and

those judges of the High Courts, who were

not given oath, could not be re-opened having

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been hit by the doctrine of past and closed

transaction.

’ That the Government should accelerate the process of accountability in a coherent and transparent manner justly, fairly, equitably and in accordance with law.

I That the judges of the Superior Courts would also be subject to accountability in accordance with the methodology laid down in Article 209 of the Constitution.

General Pervez Musharraf, Chief of the Army Staff and Chairman Joint Chiefs of Staff Committee was held to be holder of a Constitutional post. His purported arbitrary removal in violation of the principle of *audi dtram partem* was held as *ab initio void* and of no legal effect.

Old legal order had not been completely suppressed or destroyed, but it was merely a case of constitutional deviation for a transitional period so as to enable the Chief Executive to achieve his declared objectives. That the current electoral rolls were out-dated and fresh elections could not be held without updating them which as per report of the Chief Election Commissioner would take two years. Obviously, after preparation of the electoral rolls some time would be required for delimitation of constituencies and disposal of objections, etc. Hence three years period was allowed to the Chief Executive with effect from the date of the Army take-over i.e. 12 October 1999 for holding general elections and achieving his declared objectives.

12. That the Chief Executive would appoint a date, not later than 90 days before the expiry of the aforesaid period of three years, for holding of a general election to the National Assembly and the Provincial Assemblies and the Senate of Pakistan.

13. That the Supreme Court would have jurisdiction to review/re-examine the continuation of the Proclamation of Emergency dated
12 October 1999 at any stage if the circumstances so warrant.

The military government could not have asked for more. The Supreme Court went all the way to justify the military takeover of 12 October 1999. The government was allowed a period of three years to accomplish its seven-point programme spelled out in the speech of General Pervez on 17 October 1999. The court did not appreciate that the programme was so comprehensive that it might not even be accomplished in many more years. The court also ignored the bitter experience of the past when Zia as head of a military regime was allowed to amend the Constitution. He made frequent use of this power and mostly in a wanton and irresponsible manner. He virtually changed the face of the Constitution particularly when he introduced amendments/alterations/additions/ substitutions in 65 Articles of the Constitution under the Revival of the Constitution of 1973 Order 1985 (RCO). Conferrment of the same power on the Chief of Army Staff under the judgment of 12 May 2000 has resulted in similar abuse once again. The Supreme Court, ventured into matters which were not even an issue before the court. The validity of the removal of Musharraf as Chief of Army Staff on 12 October 1999 was not directly an issue in the case but the court went out of its way to invalidate his removal on the

principles of natural justice. Most unusual was the finding regarding the judges of the Supreme Court who did not take oath voluntarily or judges of the High Courts who were not given oath. The matter of not taking or being given oath was declared as a closed and past transaction. The matter was not an issue before the court. Besides, the finding was clearly against the principles of natural justice. None of these judges were heard or even

represented before the court and they were all been virtually condemned unheard.

The Supreme Court after oath under PCO had ceased to be a Constitutional Court. It had abandoned its oath to preserve, protect and defend the Constitution. In any case, Supreme Court has no authority itself to amend the Constitution. How can it delegate such authority to someone else?

REMOVAL OF PRESIDENT TARAR

After the judgment in Zafar Ali Shah's case, military steadily gained in strength and confidence; all at the expense of independence of judiciary, supremacy of the constitution and the rule of law. On 20 June 2001, Musharraf as Chief Executive promulgated President's Succession Order 2001 in which he declared the office of President vacant (for any reason whatsoever) thus empowering the Chief Executive to become President of Pakistan and perform all functions of the office of President until his successor enters upon his office. President Tarar was unceremoniously removed although neither President Tarar had resigned his office nor his term of office had expired. He in fact had more than one and half year of his term left. Chief Justice Irshad administered oath of office as President to Musharraf without taking into consideration constitutionality of his assumption of office of President. Such assumption of office was never envisaged in the judgment in Zafar Ali Shah's case. The only reason given out for such high handedness was that since Musharraf was proceeding to India for talks with the Indian government in July 2001, therefore, he wanted to be armed with the office of President to be in a better position to negotiate with the Indian government.

MUSHARRAF AND 9/11

The events of 11 September 2001 (universally known as 9/11) in New York and Washington completely changed the political landscape of the world and has left deep imprints on the politics of Pakistan and the neighbouring region. Bush

administration immediately blamed Osama bin Laden and his Organization *Al-Qaeda* in Afghanistan as being responsible for the terrorist acts on 9/11. Pakistan Government, as supporter of Taliban Regime in Afghanistan which was playing host to Osama, came under heavy pressure U.S. Government demanded co-operation from Pakistan under threat of dire consequences. Musharraf immediately succumbed to all the demands of U.S. government. The capitulation on his part was so complete that he immediately accepted all the demands made on him and that also without any consultation. He agreed to completely reverse the policy on Afghanistan and abandon Taliban regime. He agreed to lend bases within Pakistan for American military operations against Afghanistan. He also agreed to share intelligence with American intelligence agencies in the war against terrorism.

For Musharraf, the events of 9/11 afforded him the unique opportunity to perpetuate his rule in

Pakistan. Like Zia who gained from American support due to the Afghanistan war in the 1980s, Musharraf regarded the American ’war on terrorism’ an opportunity to extend his stay in power indefinitely with the help and active support of the U.S. government.

IRSHAD APPOINTED

CHIEF ELECTION COMMISSIONER

Chief Justice Irshad was appointed Chief Election Commissioner on his retirement. This was not accomplished without a blow to the principle of seniority laid down in the Judges’ case.6 Irshad, as judicial consultee for appointment of Supreme Court Judges, recommended three junior judges of Lahore High Court for appointment as Supreme Court judges. The junior most amongst such recommendees was the federal law secretary at that time. Irshad, a retiring Chief Justice, obliged him because he (the law secretary) was instrumental in his (Irshad’s) appointment as Chief Election Commissioner on his retirement.

These appointments were challenged before the Supreme Court in its original jurisdiction by the Pakistan Bar Council and Supreme Court Bar

Association and a number < However, such appointments bench of the Supreme Court Justice Sheikh Riaz Ahmed,8 principles of seniority and It neither apply nor can b< appointment of judges of the 5 was no constitutional conver for appointment of the senioi Court as a judge of the S absence of the words ’the m
177 of the Constitution for a of the Supreme Court show dge in the High Court is appointment as a judge of th court, therefore, held that m seniority is applicable as *i* appointment of judges in th the said rule attained the sta This judgment destroyed I matter of appointment of ji
1 seniority.

REFERENDUM, 30 ^

Musharraf, now decided t continue in power, a favo rulers. After all Ayub in 19’ held referenda to assume i for five years. Why shouk same? He announced on ! would hold referendum o question to be put to the answered in either ’yes’ or in the appropriate circle pri The question on the ballot

If the majority voted in t be deemed that people of 1

mmediately blamed Osama bin s Organization *Al-Qaeda* in aeing responsible for the terrorist ikistan Government, as supporter ;ime in Afghanistan which was)sama, came under heavy pressure. :nt demanded co-operation from r threat of dire consequences, nediately succumbed to all the
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Itaciation and a number of other petitioners. /er, such appointments were upheld by a of the Supreme Court headed by the Chief fisto Sheikh Riaz Ahmed,8 It was held that the [nciples of seniority and legitimate expectancy Kither apply nor can be extended to the ^ointment of judges of the Supreme Court. There us no constitutional convention or past practice appointment of the senior most judge of High as a judge of the Supreme Court. The of the words ’the most senior’ in Article i of the Constitution for appointment of judges the Supreme Court shows that seniority of a in the High Court is not *sine qua non* for itment as a judge of the Supreme court. The :, therefore, held that neither the principle of ity is applicable as a mandatory rule for intment of judges in the Supreme Court nor said rule attained the status of the convention. Is judgment destroyed the edifice built in the of appointment of judges on the basis of

IEFERENDUM, **30 APRIL 2002**

af, now decided to hold referendum to in power, a favourite ploy of military !. After all Ayub in 1960 and Zia in 1984 had li referenda to assume the office of President Jive years. Why should Musharraf not do the He announced on 8 April 200210 that he I hold referendum on 30 April

2002. The torn to be put to the electorate was to be I in either ’yes’ or ’no’ by affixing stamp B appropriate circle printed on the ballot paper, ((question on the ballot paper read:-

ir continuation of the system of local government, iblishment of democracy, continuation and *i* of reforms, elimination of sectarianism and iism and attainment of the ideals of Quaid-e-

Do you want to make General Pervez Musharraf ident for the next five years?’

(majority voted in the affirmative, it would med that people of Pakistan gave democratic

mandate to Musharraf to serve as President of Pakistan for five years.

Even Musharraf conceded that some officials may have exceeded limits. At least in the previous referenda, there were electoral lists provided at every polling station and the registered voters knew where to cast their votes but this time there were no electoral lists and everyone was free to cast his vote wherever he desired. He could cast his vote at
20 polling stations if he so pleased. Despite such open ended facility very few people turned up to cast their votes and the polling stations gave a deserted look. Yet, supposedly more than 97% voted for Musharraf.

The Election Commission was conferred the responsibility for conduct of the referendum. Due to unfair conduct of referendum, one conscientious member of the Commission, Justice Tanq Mahmood of Baluchistan High Court, resigned from the Commission and later from the Balochistan High Court. The manner in which referendum campaign was run by Musharraf and his supporters shocked the nation. The people were disgusted by the sight of uniformed General Musharraf along with other generals in uniform (Corp commanders) on the stump like political campaigners. Billions of rupees belonging to the local governments and government departments were spent on this wasteful exercise.

The referendum was challenged before the Supreme Court as unconstitutional in a number of constitutional petitions. Clearly the Constitution lays down special provisions for electing President with elaborate procedure and that referendum could not be used as a devise for election as President. Yet the Supreme Court in *Hussam Ahmed V. Pervez Musharraf11* declared that the petitions before it were premature. The consequences of the referendum were left to be determined before a proper forum (presumably the Parliament) at the appropriate time (presumably after the general elections). In the short order announced on 27 April 2002, it was stated that the questions of consequences flowing from the holding of referendum were purely academic, hypothetical and presumptive in nature and Supreme Court would leave the same to be determined at a proper forum at the appropriate

time. Months later, when the detailed reasons were announced, the contents of the detailed judgement were altogether different to the conclusions stated in the short order. In fact different conclusions were drawn and it was held that appeal to the political and popular sovereign i.e. the people of Pakistan could not be termed as undemocratic and could not be regarded as against the letter and spirit of the Constitution. Apparently after the declaration of results of the referendum on 30 April
2002, the Supreme Court changed its reasoning and conclusions obviously to appease Musharraf who now appeared to be firmly in the saddle of power.

LOCAL GOVERNMENT REFORMS

Military rulers in Pakistan have used local government laws and local bodies elections in the past to create their own political cadre. Ayub brought his own system of local bodies through Basic Democracies Order 1959. Later, he used these basic democrats for political purposes by getting their vote in the referendum in February
1960 for continuing his Presidency for five years and for conferring authority in him to give a new constitution to Pakistan. These basic democrats were also used as members of electoral college for electing President and members of National Assembly and Provincial Assemblies. Zia gave local government laws in the year 1979 followed by elections in the same year. He regarded the members of these local bodies, elected on non party basis, as his political cadre whom he used for his referendum in the year 1984.

Musharraf government was determined to put in place local government structure prior to the holding of elections to the parliament and the provincial assemblies. His key advisor Lt. Gen. (Retd.) Tanveer Naqvi, head of the National Reconstruction Bureau (NRB), devised a new system of local government in Pakistan based on the concept of district governments. Every district under the system had to be headed by its own district and deputy district governors *(Nazim and Naib Nazims)* with its own council. *Nazims* and *Naib Nazims* were to be elected by the elected

members of the Union Councils within t districts. These proposals finally were enacted through four Ordinances (one for each province! in the year 2001,12 These ordinances were folW by elections to the local councils in each province These elections were spaced out from January to August 2001 in four stages. With hindsight it no* appears that these elections were held in pars because Musharraf regime wanted to manipulate results of these elections by involving intelligence agencies particularly the political wing of 1SI The administration interfered blatantly in the selection of candidates for district and tehsil *nazims* Only those who got the nod from the military government could contest against position of the *Nazims* in sensitive districts and tehsils The processes of elections degenerated into process of selections. A number of members of Peoples Party and PML(N) got elected but they were the exception and had to face serious resistance from the military government in the process.

The funds of the local government were misused during the referendum of April 2001 Though this system of local government is apparently grounded on the principles of devolution but in reality local governments have become serious rivals of provincial governments. The new system has the effect of centralization rather than decentralization. The members of local government look upto Musharraf and Musharraf has used them to undermine the provincial governments The provincial tier of government has been virtually emaciated. The division, a stratum between Province and District has been abolished.

In any case the new system of local government has thrown the entire system of district governments into disarray. The district administration is in a state of confusion and the people do not know whom to approach for solution of their problems They are confused as to who would be responsible for policing, revenue administration and magistracy in the district. The settled system of district administration over the past nearby 150 years has been undone at the alter of experimentation on the part-of persons who were neither trained nor had the capacity to understand the problems that would be caused under the new dispensation.

LEGAL FRAMEWORK ORDE

2002

\fter the referendum, Musharraf strengthen his hold on power by a Constitution before it was revived, the power to amend the Constitutor

of Supreme Court judgment in Zar,

case He had assigned the task of dral

Constitutional amendments to

particularly its chief, Lt. Gen.(R) ^

7ho worked on these draft amend

secrecy. He is said to have co

constitutional experts from abroad

credit of Musharraf that he couk

general into a constitutional experi

Initially two proposed constituti

packages, purportedly one t

democracy and the other fc

strengthening, were circulated foi

opinion. The proposed packages,

contrary to the scheme an*

Constitution, were even poorly <J

glaring omissions and contra

drafts. The exercise of obtaim

turned out to be a sham. Na<

meeting of persons carefully <

his constitutional proposals, lit

the talking and was averse to a

during such meetings. Ther<

protests against the propo

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the country.

Musharraf, in total Ais objections against the exer the Constitution, proceede Framework Order 2002 (
2002. Important features <

below.-

Political parties are party elections to e and party leaders. I

MUSHARRAF AND THE LEGAL FRAMEWORK ORDEJ

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)f the Union CoUnciJc *within their*

' Ordinances (one for each province) Q01.w These ordinances were followed to the local councils in each province, ans were spaced out from January to *in four stages. With hindsight it* now these elections were held in parts irujraf regime wanted to manipulate se elections by involving intelligence icularly the political wing of ISI. The n interfered blatantly in the selection i for district and tehsil *nazims.* Only got the nod from the military could contest against position of the: .ensitive districts and tehsils. The elections degenerated into process of number of members of Peoples Party) got elected but they were the i had to face serious resistance from jovernment in the process. s of the local government were ing the referendum of April 2002. i system of local government is •ounded on the principles of devoluality local governments have become of provincial governments. The new ie effect of centralization rather than on. The members of local government sharraf and Musharraf has used them *s* the provincial governments The r of government has been virtually rhe division, a stratum between District has been abolished. : the new system of local government ic entire system of district governsarray. The district administration is Dnfusion and the people do not know •oach for solution of their problems, used as to who would be responsible *I,* revenue administration and the district. The settled system of listration over the past nearby 150 i undone at the alter of experimentat-of persons who were neither trained apacity to understand the problems caused under the new dispensation.

I tfter the *referendum, Mvsb<fmzf wanted to* :hen his hold on power by amending the •Constitution before it was revived. He assumed like power to amend the Constitution on the basis

onal hatred or

K. He had assigned the task of drafting proposed tasdfufiona/ amendments to the *NRB,* rtcularly its chief, Lt. Gen.(R) Tanveer Naqvi to worked on these draft amendments in great icrecy He is said to have consulted some institutional experts from abroad. It goes to the

of Musharraf that he could turn a retired Krai into a constitutional expert. Initially two proposed constitutional amendment ickages, purportedly one for sustainable mocracy and the other for institutional igthening, were circulated for soliciting public men The proposed packages, apart from being mtrary to the scheme and spirit of the institution, were even poorly drafted. There were nng omissions and contradictions in these ite The exercise of obtaining public opinion led out to be a sham. Naqvi would address rtng of persons carefully selected to explain constitutional proposals. He would do most of talking and was averse to any objections raised nig such meetings. There were widespread ntests against the proposed constitutional ickages and lawyers' bodies throughout the ntry rejected them outrightly. In the first place, lawyers' resolved, that there was no legitimate i»er vested in Musharraf to amend the «stitution and secondly the proposed endments would undermine parliamentary of government and provincial autonomy in

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country. Musharraf, in total disregard of vociferous

ions against the exercise of amendments in Constitution, proceeded to promulgate Legal •ork Order 2002 (LFO)13 on 21 August

Important features of LFO are enumerated

Political parties are required to hold intra party elections to elect their office bearers and party leaders. It has also been provided

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sectarian,

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Musharraf would relinquish the office of Chief Executive on such day that might determine in accordance with the judgment

60/tf office off'resident of Pakistan for a term of five years from the day he assumed such office.

The seats in the National Assembly were increased to 342 with 60 seats reserved for women and 10 seats reserved for non Muslims. The number of seats in provincial assemblies were also raised. In Baluchistan, the number of seats were raised to 65 (11 seats reserved for women and 3 for non Muslims); in NWFP, seats were raised to 144 (22 seats reserved for women and three for non Muslims); in the Punjab, seats were raised to 371 (66 seats reserved for women and 8 seats for non Muslims); and in Sindh, seats were increased to 168 (29 seats reserved for women and 9 seats for non Muslims). The seats in the Senate were increased to 100 with 16 seats reserved for women i.e. 4 from each province. Article 58(2)(b), deleted from the Constitution by 13th Amendment, was revived. The President is again empowered to dissolve the National Assembly at his discretion.

New disqualifications were added to Article
63 which include persons convicted and sentenced to imprisonment as absconders, defaulters in the payment of loan from banks or cooperative societies amounting to Rs. 2 million or more, defaulters of the payment of government dues and utility bills etc. Article 63A, added by the 14th Amendment, was drastically changed and the defection clause would only be applicable to a member of a political party who votes against the direction of his parliamentary party in relation to election of the Prime Minister or the Chief Minister; or in a vote of no confidence; or a money Bill. Defection clause would only apply to a member of a

parliamentary party, if composed of a single political party in a House, on his resignation from membership of that political party or joining of another parliamentary party.

vii) In case of difference of opinion between the two Houses of the parliament on a Bill, it would be referred to a mediation committee consisting of 16 members, 8 members from each House of the parliament.

viii) Whenever the Money Bill would originate in National Assembly, its copy would be transmitted to the Senate which may make its own recommendations on the Bill to the National Assembly within seven days. However, National Assembly can pass the Money Bill with or without incorporating the recommendations of the Senate.

ix) Where a Bill is passed by both the Houses of the Parliament and is presented to the President for assent, he may return the Bill to the parliament for reconsideration. However, the Bill can only be passed with or without amendments by the parliament after going through the process of mediation committee.

x) A governor of a province would be appointed by the President after consultation with the Prime Minister.

xi) Article 112 (2)(b), deleted by the 13th Constitutional Amendment, was revived, thus, conferring discretionary powers on a Governor to dissolve Provincial Assembly at his discretion subject to the previous approval of the President.

xii) Article 140A has been added so as to confer constitutional status to the local government system.

xiii) Article 152A, which was deleted under the
8th Constitutional Amendment, has been added. It includes four men in uniform namely the Chairman Joint Chiefs of Staff Committee and three Chiefs of Staff of the Pakistan Army, Pakistan Navy and Pakistan Air Force. The functions of National Security Council (NSC) include consultation on strategic methods like sovereignty, integrity and security of the State and democracy, governance and inter provincial harmony.

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Article 209 has been modified confer--j power in the Supreme Judicial Counc enquire into the matter of miscondi judges on its own motion. The Election Commission of Pakistan has been

enlarged by including four judges of the High Courts, once from each Province A provision has been made whereunder the President would appoint caretakei government on the dissolution of National Assembly. The Governors would have the same power in the event of dissolution of Provincial Assemblies.

xvii) Article 270AA has been added validating all the laws made during the period of suspension of the constitution and actions taken thereunder.

xviii) Article 270B has been added declaring that the elections held in October 2002 would be deemed to have been held under the constitution.

Article 270C has been added declaring that all the judges who had taken oath under the Oath of Office of Judges Order 2000 would be deemed to have been appointed under the Constitution. Similarly those who had not taken oath under the said Order would be deemed to have ceased to continue as judges Schedule VI was amended and a number of laws were added to the list of laws that could not be altered, repealed or amended without previous sanction of the President. These laws include State Bank of Pakistan Act, National Accountability Bureau Ordinance, Election Commission Order 2002; Conduct of General Elections Order 2002, Political Parties Order 2002, the Police Order 2002 and all the four Local Government Ordinances for the four provinces, passed in
2001.

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LFO is an attempt to rewrite the

Mhtary ruler and to subordinate ,0 the will of one person. Its mo the Constitution are discusse< l)By reviving Article 58(, discretionary authority m dissolve the National Assemt federal government, the parh, of the government has been' prime Minister and his c subordinated to the Preside Article 58(2)(B) resurrec unstable governments from! which period the discretional the National Assembly wa: occasions. Similarly by
112(2)(b) conferring discre Governors, under prior President, to dissolve Provn

dismiss provincial governn has been dealt to the provi

H By introducing Nationa (NSC) in the Constitution forces as its members, en the Constitution has beer military authority, c) Musharraf has been all< President in uniform. Ini of the Constitution in rel the President. Accordir, President cannot hold an: service of Pakistan or occ

carrying the right to rendering of services, opinions that the office o is an office of profit m which carries right to re read with Article 63 dis a candidate for the offi he holds office of pt Pakistan. Being Presid the same time creati anomalies. President is of Chief of Army Sta hold both the positions d) Inclusion of import Schedule saps the po* ?tovi.ncial Asse

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LFO is an attempt to rewrite the Constitution by a

I military ruler and to subordinate the Constitution Pit; fie will of one person. Its most harmful effects *fa the Constitution are discussed as under:* |i)By reviving *Article 58(2)(b)* conferring discretionary authority in the President to dissolve the National Assembly and dismiss the federal government, the parliamentary character of the government has been seriously impaired. Prime Minister and his cabinet have been subordinated to the President. The revival of Article 58(2)(B) resurrects the spectre of f unstable governments from 1985 to 1999 during i which period the discretionary power to dissolve [the National Assembly was exercised on four ’occasions. Similarly by reviving Article
112(2)(b) conferring discretionary power to the | Governors, under prior approval from the President, to dissolve Provincial Assemblies and dismiss provincial governments, a serious blow has been dealt to the provincial autonomy. l)By introducing National Security Council (NSC) in the Constitution with Chiefs of armed
1 forces as its members, civilian authority under [the Constitution has been subordinated to the

military authority.

i) Musharraf has been allowed to continue as ! President in uniform. This destroys the scheme of the Constitution in relation to the office of | the President. According to Article 43, the President cannot hold any office of profit in the I service of Pakistan or occupy any other position carrying

the right to recommendation for | rendering of services. There can be no two opinions that the office of ’Chief of Army Staff is an office of profit in the service of Pakistan [which carries right to remuneration. Article 41 read with Article 63 disqualifies him even to be a candidate for the office of President because] he holds office of profit in the service of Pakistan. Being President and Army Chief at the same time create many constitutional anomalies. President is the appointing authority of Chief of Army Staff. How can one person hold both the positions? | Inclusion of important laws in the Sixth [Schedule saps the power of the Parliament and the Provincial Assemblies to legislate in

important matters like laws in relation to

f ^

accountability^ central banking election^

police, local governments etc. The legislatures *have thus been deprived of their basic function of legislation* on *subjects entrusted to them* under the Constitution. What is the worth of provincial governments when they cannot regulate legislation of the local governments under them. How does this promote provincial autonomy?

In addition to the above, there appears to be no over riding reason for increasing the number of general seats in the National Assembly from 207 to 272 and in the Provincial Assemblies of Baluchistan, NWFP, the Punjab and Sindh from
40, 80, 240 and 100 to 51, 99, 297 and 130 respectively. It has only burdened the public exchequers unnecessarily. However, the redeeming aspects of the LFO are the allocation of reserved seats for women, reduction of voters’ age from 21 to 18 and re-introduction of joint electorates.

The LFO is an attempt to establish that the civil society and its institutions are inferior to the will of the military and its leadership. The resistance to place it before the Parliament is meant to give the message that the edict of an individual is the basic law of the land and that the military will have the last word. In the words of Musharraf; ’If you want to keep army out you have to bring them in’.14

On 9 October, LFO was amended and Articles
179, 193 and 195 were amended and the retirement age’of judges of Supreme Court was raised from
65 to 68 and that of the judges of High Courts was raised from 62 to 65.15 The minimum age for appointment of a High Court judge was also raised from 40 to 45. In making this amendment, Musharraf violated his own pronouncements, which he repeatedly made on radio and television that no amendment in the Constitution would be introduced unless it was circulated in advance for soliciting public comments. Enhancement in the retirement age of the judges was not included in the two Constitution amendment packages. The judges were apparetly beholden to Musharraf for this extension in service but this has been achieved at the expense of independence of judiciary. Prior to this amendment, the Supreme Court had

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disposed of the case titled ’Watan Party V. Chief Executive’16 with the following observation:

’The elected Parliament is in immediate sight and obviously the Parliament and not this Court is the appropriate forum to consider all these amendments. We may further observe that procedure to amend the Constitution as enshrined in Article 239, Part XI remains unaltered. The Parliament retains same power to amend the Constitution as it did before the promulgation of the Legal Framework Order’.

Despite the above observation, the Chief Justice, author of the judgment, and other judges had no qualms about accepting extension in the tenure through an amendment in the LFO without the bill being placed before the Parliament for consideration.

GENERAL ELECTIONS, 2002

On 27 February 2002, Conduct of General Elections Order, 2002 was promulgated.17 On 16 August 2002, Election Commission announced the election schedule and 10 October was fixed as polling day for elections to the National and Provincial Assemblies. Election campaigning commenced throughout the country on the announcement of the elections schedule. All the political parties decided to participate in the elections.

The military government, in the meanwhile, had put together a political party consisting of dissenters from the PPP and the PML(N) and gave it the name of PML(Q). All those whose cases were pending investigation with NAB or whose cases were being prosecuted before Accountability Courts were easily susceptible to the pressures of military government and they were easily persuaded to join the King’s party, PML(Q). Their cases were either withdrawn or the pace of prosecution against them was considerably reduced. The defaulters of the Banks who joined King’s party, were let off with very favourable terms. Some others were arm twisted by the ISI on the basis of their adverse intelligence reports. Another pro-Musharraf alliance was built with the help of government facilitators. It consisted of six

small parties including Millat Party of former

President Farooq Ahmad Leghari. It was given the

name of National Alliance (NA). The government

officials including provincial governors facilitated the adjustment of seats between PML(Q) and NA Musharraf and his government was openly siding with the PML(Q) and NA. Musharraf, his Principal Secretary and his Governors were instrumental in finalizing the tickets for the candidates of these parties. Musharraf government placed its resources at the disposal of these candidates and the Governors openly campaigned for them. Governor of the Punjab travelled from district to district offering favours like connections of electricity, natural gas and telephones to those who supported the candidates of these parties All cries of foul play and pre poll rigging from parties like PPP and PML(N) fell on deaf years. Musharraf was desperate for a majority in the Parliament

Another significant development was the formation of an electoral alliance of six religious parties (including *Jamat-e-Islami* and *Jamiai-e Ulema Islam)* calling itself, *Muttahida Majhs-eAmal* (MMA). It decided to contest the election with common candidates. It adopted an anti American stance during the election campaign and attracted large crowds in the provinces of Baluchistan and NWFP.

The polling was held on 10 October amidst serious allegations of rigging and other electoral abuses. European Union observers termed general elections as ’seriously flawed’ due to State

interference in the voting process.18 There were allegations by the opposition parties that election machinery delayed results in order to give voting edge to pro-military government parties. In some cases, the results were changed and those from PML(Q) who had lost the elections were declared successful the next day. The role of Election Commission, particularly its Chief, was dubious. The party position in the results of the elections emerged as under:-19

I Parties

National

Punjab

I PML(Q)

78

128

I PPP-P

62

63

I MMA

45

07

I IND

28

34

I PML(N)

14

37

I MOM

13

I NA

12

12

I PML(F)

04

I AMP

I PPP-Sherpao

02

I Other Parties

10

06

1 Total

268

287

Overall votes turn out Islamabad had the highes followed by the Punjab 45.! per cent, NWFP and Trib and Baluchistan 28.66 per

JAMALI ELECTED 1

Despite all efforts, includ
day rigging, by the milita
government political parti
and NA were well short (
for electing a Prime Minis
reserved seats for wonu
postponed after the
government sponsored pa
their strength they woul
percentage of seats among
According to the elect!
frequently changed wit
elections to suit the pro
reserved seats were to b
the percentage of the scat
hi the National and Pro
independents were thus
the government in joinir
ranks. Even then the gove
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National Assembly who i
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es including Millat Party of former arooq Ahmad Leghari. It was given the itional Alliance (NA). The government eluding provincial governors facilitated ient of seats between PML(Q) and NA. •af and his government was openly the PML(Q) and NA. Musharraf, his Secretary and his Governors were al in finalizing the tickets for the of these parties. Musharraf government resources at the disposal of these and the Governors openly campaigned jovernor of the Punjab travelled from istrict offering favours like connections ty, natural gas and telephones to those rted the candidates of these parties. All
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!ttes	National	Punjab	Sindh	NWFP	Baluchistan
NL(F)					
LIP					
|W-Sherpao Parties					
	78				
	62				
	45				
	28				
	14				
	13				
	12				
	04				
		02			
		10			
			128		
			63		
			07		
			34		
				37	

12

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47
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05

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02
13
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11

I’oial

268

287 128

99

47

ill votes turn out was 40.69 per cent. mabad had the highest with 51.16 per cent, ..wed by the

Punjab 45.55 per cent, Sindh 37.72 i cent, NWFP and Tribal Area 31.42 per cent d Baluchistan 28.66 per cent.20

IAMALI ELECTED PRIME MINISTER

pile all efforts, including prepoll and polling ngging, by the military government, the pro eminent political parties particularly PML(Q) .NA were well short of the requisite majority electing a Prime Minister. The elections to the /ed seats for women and minorities were jostponed after the independents joined tvernment sponsored parties because by raising Kir strength they would have received higher trcentage of seats amongst women and minorities. tording to the elections laws, which were lequently changed within one month of the tctions to suit the pro government parties, the served seats were to be allocated according to K percentage of the seats held by a political party [the National and Provincial Assemblies. The .pendents were thus easily prevailed upon by government in joining PML(Q) and swell its is Even then the government parties were short the bare majority. Finally NAB and ISI, acting her, were able to break ten members of the .jnal Assembly who were elected on the tickets PPP Parliamentarian.21 These ten members led themselves into a forward bloc and called

themselves as Patriots. As a bait, they were offered six ministerships including important ministries like Interior and Defence.22 To facilitate such horse trading, the Constitution was partly revived on
15 November 2002 and Article 63A, which prohibited floor crossing, remained suspended. After the government succeeded into breaking the opposition parties, the remaining parts of the Constitution were revived on 31 December 2002. It was ensured that the members of the opposition parties who had crossed over to the governments parties might not return to their original parties. In any case, by that date, Jamali had already obtained vote of confidence.

On 24 November 2002, Mr Zafarullah Jamali from Baluchistan was elected as Prime Minister with 172 votes in a House of 342. It was a barest minimum majority required for such election. PPP Chairperson, Benazir also helped the military government by keeping the opposition divided. Thus two candidates were put up, one by MMA and other by PPP-P. Consequently it has not been decided even after more than a year who would be the leader of the opposition in the National Assembly.

Jamali has proved to be totally ineffective as Prime Minister during the last more than a year. He does not want to take any chance by asserting himself. He does not want to be a Junejo and get on the wrong side of the military establishment. He has gone to the extent of calling Musharraf his boss. It appears that he is happy with the protocol of Prime Minister. Musharraf calls all the shots and Jamali and his cabinet do what they are told to do.

THE SEVENTEENTH AMENDMENT: MUSHARRAF AND THE PARLIAMENT

The Opposition in the Parliament has been at loggerhead with Musharraf since October 2002. The session of the National Assembly, which should have met immediately after notification of the results, was delayed and met on 16 November
2002, that is, 36 days after the elections. The elections of the Senate, which were scheduled to be

held on 12 November were delayed till February 2003.

A dispute occurred on 16 November 2002, when the opposition members objected to taking oath under the LFO. They made it clear that they were taking oath under the Constitution as it stood on
12 October 1999. The presiding officer of the oath taking session, Mr Ilahi Bux Soomro, assured the members that the copy of the Constitution under which he was administering oath did not include the LFO. Similarly, opposition members of the Senate, when they took oath on 12 March 2003, made it clear that they were taking oath under the Constitution as it existed prior to 12 October
1999.23

The members of Opposition in the Parliament kept protesting against the LFO and no serious business could be transacted. They were thumping their desks and raising slogans. These protests forced the political parties in the government to have dialogue with the opposition parties. Elaborate parleys took place in May 2003 between the government and the opposition parties but did not prove fruitful. Later on government parties twice held discussions with MMA but again without any result.

Finally the negotiations between PML(Q) and MMA bore fruit. On 24 December 2003, the PML(Q) and its allies signed an agreement with MMA on constitutional amendment package. The agreement was reached on the following seven points:24

(1) Three years extension in retirement age of judges of the superior Courts would be withdrawn.

(2) National Security Council would be deleted from the Constitution and would be constituted under an ordinary Act of the Parliament.

(3) Exercise of discretionary power by the President to dissolve National Assembly under Article 58(2)(b) and similar exercise of power by the Governors to dissolve Provincial Assemblies under Article 1 1 2(2)(b) would be referable to the Supreme Court within 1 5 days of such exercise.

(4) The laws regarding the local governments and the police, which had been protected under

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Sixth Schedule to the Constitution, would be

(5) Musharraf would seek vote of confidence from the Parliament and the four Provincial Assemblies.

(6) The President would be required to consult the Prime Minister in the matter of appointment of the chiefs of armed forces though such consultation would not be binding on him.

(7) Musharraf would give up the office of Chief of Army Staff by December 2004.

The government moved the Constitution (Seventeenth Amendment) Bill on 26 December
2003 in the National Assembly. Aitzaz Ahsan of PPP(P) raised an objection that the amendment bill was contrary to the joint stand of the ARD and MMA that LFO was not part of the Constitution Qazi Hussain Ahmed, Amir Jamaat-e-Islaim admitted that the draft amendment bill would constitute acceptance of LFO as part of the Constitution and that the same was against the agreement reached between the government and the MMA. He thus demanded redrafting of new bill in accordance with the agreement.25 On this, Prime Minister Jamali agreed to adjourn the House in order to present a new draft of the Seventeenth Amendment Bill. However, on 27 December 2003, another agreement was reached between the PML(Q) and its allies with MMA and it was agreed that no new bill would be tabled but suitable changes would be in the existing bill in order to satisfy MMA.26 Finally on 29 December 2003, the revised Seventeenth Amendment Bill was passed by the National Assembly with 248 out of 342 members in favour and no vote in opposition. In fact, ARD and other opposition parties had boycotted the session in protest against the deal between the government and MMA." On
30 December 2003, the Senate passed the Amendment Bill by 72 votes to nil. ARD and other opposition parties again boycotted the session of the Senate.28

However, LFO was never submitted before the Parliament and Seventeenth Amendment Bill only contained amendments which were being made in

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the Constitution under the assumption that LMJ had become tjart of the Constitution. In fact the

altered/amended/added/varied b> amendments made in Articles 17
63A, 70, 71, 73, 75, 101, 140A,
218,224, 260, 270B and 270C ol by LFO were not touched by Amendment Act, These were dee validly made in the Constiti language used in Article 270Av the relevant words in the LFO : under:

'(1) The Proclamation of I fourteenth day of October 19 Orders, Ordinances, Chief E including the Provincial Constit
1999, the Oath of Office (Judgi
1 of 2000), Chief Executive's C the amendments made in the » 1 Pi-oinpwnrk Ol

Executives s wmvi ..~. Framework (Amendment') (Executive's Order No. 29 <

- ''/Co^nnH amendrnei

lwAV/fc.fc*v. . » _

made between the twelfth

thousand nine hundred and ni

on which this Article comes

inclusive), having been duly

affirmed, adopted and declare

made by the competent author

anything contained in the Cc

called in question in any c

ground whatsoever.’

(The underlining is that of th

The Seventeenth Amendme

ments in the following Art

tion:-

1) Article 41 (Election of tt amended. It adds a provi Clause (7) to the effec, tl incurred by an MNA for of profit would be
31 December 2004. ft paragraph (b) in the introduced by the LFO

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J/amended/added/varied by the LFO. The _nents made in Articles 17, 51, 59, 62, 63, UO, 71, 73, 75, 101, 140A, 199, 203C, 209, .1,224,260, 270B and 270C of the Constitution jLFO were not touched by the Seventeenth

_nent Act. These were deemed to have been

ilidly made in the Constitution under the ^ used in Article 270AA. In this behalf, It relevant words in the LFO are reproduced as

’(1) The Proclamation of Emergency of the fourteenth day of October 1999, all President’s Orders, Ordinances, Chief Executive’s Orders, including the Provincial Constitution Order No. 1

of
1999, the Oath of Office (Judges) Order, 2000 (No.
1 of 2000), Chief Executive's Order No. 12 of 2002, le amendments made in the Constitution through

Legal Framework Order. 2002 (Chief

Executives's Order No. 24 of 2002X the Legal Framework (Amendment Order. 2002 (Chief

Executive's Order No. 29 of 2002). the Legal Framework (Second amendment") Order. 2002 (Chief Executive's Order No. 32 of 2002) and all other laws made between the twelfth day of October, one thousand nine hundred and ninety nine and the date on which this Article comes into force (both days inclusive), having been duly made or accordingly affirmed, adopted and declared to have been validly made by the competent authority and notwithstanding anything contained in the Constitution shall not be called m question in any court or forum on any ground whatsoever.'

(The underlining is that of the author)

: Seventeenth Amendment Act made amend; in the following Articles of the Constitu-

».-

I Article 41 (Election of the President) has been amended. It adds a proviso to paragraph (b) in Clause (7) to the effect that the disqualification incurred by an MNA for holding another office of profit would become effective on
31 December 2004. However, there was no paragraph (b) in the Constitution. It was introduced by the LFO. Clause (8) has been added to the Article 41 which provides only for endorsement of Musharraf's election as *[* President. Clause (9) has been added to Article

41 which authorizes the Chief Election Commissioner to regulate and conduct the proceedings for vote of confidence for Musharraf and to count the votes cast during such proceedings. The Clauses (8) and (9) are transitional provisions and have already become dead letter.

2) In Article 58, a new Clause (3) has been added to provide for reference to the Supreme Court within 15 days of dissolution of National Assembly under Article 58(2)(b). The sub clause (b) of clause (2) of Article 58 was deleted by the Thirteenth Amendment Act 1997. It was reinserted by the LFO in 2002. An identical amendment has also been made in Article 112 (Dissolution of a Provincial Assembly by the Governor), which was also deleted by the Thirteenth Amendment Act, 1997.

3) Article 152A (National Security Council) has been deleted. However, this Article did not exist in the Constitution and was only added by the

LFO.

4) Article 179 purports to substitute new text in the Article. The new text (Retiring age of Supreme Court judges) was already there in the Constitution before it was changed by the LFO. This amendment erases the change in the Constitution deemed to have been affected by the LFO whereby the judges retirement age was raised by three years.

5) The substitution of Article 195 (Retirement age of High Court judges) is similar to that of the substitution in Article 179.

6) Article 268 lists the enactments that cannot be amended or even discussed in the Parliament or the Provincial Assemblies without the prior approval of the President. Before the LFO was issued, 24 laws listed in the Sixth Schedule were so protected. The LFO added eleven more laws to the list. The Seventeenth Amendment Act reduces the protection to provincial local government ordinances and the Police Order to six years.

7) Article 270AA, inserted by LFO, was replaced with a new text. It affirms and validates all amendments made by the LFO in the Constitution. It also validates laws made from
12 October 1999 onward as having been validly

made or accorded affirmation, adoption and declaration by the competent authority. All orders made, proceedings taken, appointments made, acts done by any authority or person under such laws from 12 October 1999 onwards have also been validated and affirmed under Article 270AA. 'Competent authority' is defined as the appropriate legislature in respect of President's Orders, Ordinances, Chief Executive's Orders and enactments, including amendments in the Constitution. Since LFO and its amendments were made through Chief Executive's Orders, therefore it would be deemed that the amendments made in the Constitution by LFO were made by the Parliament itself.

LFO had amended/added twenty nine Articles in the Constitution out of which twenty have been left untouched by the Seventeenth Amendment. Only the provisions of nine Articles namely 41, 58, 112, 152A, 179, 195, 243, 268 and 270AA have been amended/deleted/substituted by the Seventeenth Amendment. Thus, LFO was deemed to have become part of the Constitution which was in clear negation of the stance of MMA for more than a year.

It is interesting to note that MMA leadership took a tough stance in the proceedings of the Parliament on 26 December 2003 thus requiring the government to come up with a new Amendment Bill which would manifest that LFO was not part of the Constitution. It is strange that in two days time, MMA meekly submitted to the draft of the Amendment Bill moved on 26 December 2003. There are only three minor changes in the draft Bill presented on 26 December and the one presented on 28 December. In the earlier Bill, it was stated in Article 152A that the National Security Council would be constituted under an Act of Parliament and in the later Bill, Article 152A was altogether omitted. In Articles
179 and 195, the words 'sixty eight years' and 'sixty five years' was substituted by 'sixty five years' and 'sixty two years' respectively in the earlier Bill. In the later Bill, the text of these Articles was substituted and the text prior to LFO was substituted for the text that came about due to

LFO. All these changes were minor, immaterial and inconsequential. It remains a mystery as 10 why MMA leadership capitulated so humihatingh

Seventeenth Amendment is the rerun of Eighth Amendment. In 1985, the Parliament was spineless having been elected on non-party basis and wilted under the pressure of Zia. This time the elections though rigged were held on party basis and the Parliament had substantial opposition and yet Musharraf got away with whatever he wanted The manner in which the members of the Parliament have been prevailed upon by the military establishment and intelligence agencies to submit to the wishes of a military ruler only establishes that the democracy and democratic institutions in Pakistan are weak and vulnerable before the might of the military. The power still flows out of the barrel of the gun and not from the will of the people.

In consequence of the Seventeenth Amendment, three judges of the Supreme Court including the Chief Justice, two judges of the Lahore High Court, one judge of the Peshawar High Court and four judges of Sindh High Court, who had excessed the age of retirement under the Constitution

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due to LFO, stood retired. Mr Justice Nazim Husam Siddiqui was appointed as the new Chief Justice of Pakistan.

VOTE OF CONFIDENCE FOR MUSHARRAF

The Parliament and four Provincial Assemblies were summoned on 1 January 2004 for holding a vote of confidence for Musharraf. According to the result announced by the Election Commission, Musharraf received 658 votes out of the an electoral college of 1,170 (342 members of the National Assembly, 100 members in the Senate and 728 members of the four Provincial Assemblies), which represented about 56 per cent of the total votes.

The following is the breakc confidence:29

House

Total For Ag Members

Senate

100

56

NA

342

191

Punjab

371

234

Sindh

168

99

NWFP

124

30

Baluchistan

65

28

Total

1170

658

Under the provisions of Sec

Constitution, it is provided I

member of the Parliament i

one vote. However, the weig

member of a Provincial *i*

determined by dividing the

in the Provincial Assembly

number of seats with the m

Assembly.30 At present the

seats are in the Provincial As

j numbering sixty five. So tr

member of the Balochistan

would be equal to one. Appl

to the Provincial Assembly

has 371 members, the w

member of the Assembly

65/371=0.175. Suppose a

votes of the members of

Assembly, the total weighta

out to be 200 x 0.175=35 v

vote of confidence, not onl

Constitution relating to el

were flagrantly violate

weightage of votes so vi

provincial autonomy was

principle of weightage je

of the vote of confidence, t

in the electoral college v

702. Out of this, 373 woul

for Musharraf, 216 absent,

’no’ vote. Hence, the vo

have been just 53 per cen

As a result of the prot

the Parliament, Musharn

address both Houses of

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The following is

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of the

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sitting. This was clear violation of the Constitution

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which requires the President to address both

Houses of the Parliament assembled together at

louse

Total

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Against

Absent Abstained

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Members

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342

191

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Finally he addressed the joint session of the

tab

371

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Parliament on 17 January 2004 amidst protest by

jrfi

168

99

0

27

42

the opposition. When he took the podium, he was

IfFP

124

30

0

27

67

jeered and hooted by the members of the

puchistan

65

28

0

36

1

Opposition.32 Before departing, he raised his fists

jtai

1170

658

1

336

175

towards the opposition.

jkder the provisions of Second Schedule to the

lonstitution, it is provided that the vote of each

jember of the Parliament would be counted as

nevote. However, the weightage of the vote of a

neraber of a Provincial Assembly would be

stemmed by dividing the total number of seats

i the Provincial Assembly having the smallest

umber of seats with the number of seats of that

tanbly.30 At present the smallest number of

ats are in the Provincial Assembly of Balochistan

mbenng sixty five. So the weightage of every

mber of the Balochistan Provincial Assembly

ould be equal to one. Applying the same formula

i the Provincial Assembly of the Punjab which

is 371 members, the weightage of the each

ember of the Assembly would work out to be

i<371=0.175. Suppose a candidate obtains 200

fe of the members of the Punjab Provincial

isembly, the total weightage of these would work

it to be 200 x 0.175=35 votes. In this exercise of

Jte of confidence, not only several Articles of the

Institution relating to election of the President

we flagrantly violated but the system of

feghtage of votes so vital to the principle of

JBvmcial autonomy was abandoned. Had this

taciple of weightage been applied to the count

Ithe vote of confidence, the total number of votes

I the electoral college would have added up to

12 Out of this, 373 would have been 'Yes' votes

•Musharraf, 216 absent, 112 abstentions and one

i)' vote. Hence, the votes in his favour would

m been just 53 per cent of the total votes.

I As a result of the protest by the Opposition in

I Parliament, Musharraf had not been able to

press both Houses of the Parliament in a joint

ACCOUNTABILITY UNDER THE MILITARY GOVERNMENT

The military government, on taking over the affairs of the government, made tall claims about holding accountability across the board of corrupt politicians and bureaucrats. National Accountability Bureau (NAB) Ordinance, 199933 was promulgated for the purpose which contained quite a few draconian provisions particularly those relating to bail and detention. A National Accountability Bureau (NAB) was set up under this Ordinance headed by a serving general. So far, its performance has left much to be desired and the process of accountability appears to be selective and not across the board as claimed. Even the campaign for recovery of bank dues did not produce the desired rules.

Subsequently NAB resorted to plea bargaining with the corrupt former generals, bureaucrats and politicians and they have been let off after payment of fraction of the national wealth they had looted. NAB is totally a non-transparent institution. It has lost all its credibility when it was used to help Musharraf in raising King's party. Politicians involved in NAB cases were coerced to join PML(Q). Many a corrupt politicians got off the hook by agreeing to joint PML(Q) or NA. Some others, against whom the cases had already been sent to the Accountability Courts, also jointed PML(Q) or became turncoats of PPP or PML(N) joining the government of Jamali on the promise that their cases would not be actively prosecuted. In any case, the process of accountability under the NAB has been selective throughout. Some of

the most corrupt politicians were spared from accountability altogether because they declared their support for Musharraf. Thus accountability under Musharraf has been flawed from the very beginning.

NAB Ordinance was challenged before the Supreme Court in a number of petitions on the ground that its provisions were in conflict with some of the fundamental rights and other provisions of the Constitution. Some of the important points raised in these petitions were that NAB Ordinance:

- created a parallel judicial system;

- denied the courts the power to grant bail;

- allowed the prosecution to detain a person for 90 days;

- provided for unfair procedures;

- created new offences;

- was couched in vague and imprecise language;

- reversed the principle on burden of proof;

- applied retrospectively;

- delegated unfettered and unguided discretion to the executive;

- provided criminal penalty for civil debt/ contractual obligations;

- constituted *ex post facto* law;

- suspended certain fundamental laws;

- denied right of appeal.

The Supreme Court held that it could declare any

legislation as unenforceable, partly or wholly,

which it regared as undermining independence of

judiciary or would abrogate or abridge any

fundamental right. It gave the following findings :-

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(a) The federal government was competent to

make law providing for special courts and

procedure. Thus NAB Ordinance was

competently promulgated and was not *ultra*

vires the Constitution.

(\>) Sxi&ges ot A.ccoxmVa\AYi\.-y Courts \\a<i to \>e

serving District and Session Judges appointed for three years in consultation with the Chief Justice of the concerned Hieh Court.

(c)

The offences under the NAB Ordinance including that of 'wilful default' were held to be not retrospective.

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including the High Courts, power to

grant bail were held to be *ultra vires* tne Constitution.

(e) The power of NAB Chairman to grant bail was held to be in violation of the principle of j separation of powers.

(f) The denial of the right of appeal against orders of freezing of assets was held unconstitutional

(g) Shifting of burden of proof to the accused was upheld on the principles of good governance However, the prosecution had first to make out a reasonable case against the accused to discharge *prima facie* burden of proof before it shifted to the accused.

(h) The period of 90 days for remand in custody of an accused was held to be excessive and violative of personal liberty of citizens guaranteed by the Constitution. Accountability courts were directed not to remand an accused person to custody for more than 15 days at a time.

(i) Plea bargaining was upheld for settlement of cases and compounding of offences provided undue pressure and influence was not exerted on the accused.

(j) The ouster of jurisdiction clause in NAB Ordinance did not curtail the jurisdiction of High Courts under Article 199 of the Constitution.

(k) The provisions regarding appointment of NAB Chairman were to be suitably amended. His appointment had to be in consultation with the Chief Justice, for a tenure of three years and could not be removed except under the provisions of removal of judges of superior courts.

The petitions were allowed and the federal government was directed to make appropriate amendments in the NAB Ordinance in accordance with the direction contained in the judgment.34

CONCLUSION

The Musharraf Regime has co **it** may be premature to evalue of the regime but certain his taken shape over this period \v of some tentative conclusions. There is no doubt that e\
1999 followed by Supreme Zafar AH Shah's case have bi to square one. Once again a has been legitimized on the doctrine of necessity. Once i was given power to amend tl he has been exercised wantc basic structure of the Constih himself in power. The civilii parliament, judiciary and b sidelined and made subserv military. Musharraf s sever included promises of good progress, inter provincial h and accountability; has dis; The hallmark of Mushar of civilians, civil society ai introduction of retired or armed forces in all sphere at all levels. These miht planted in the services up The regime has trump as its achievement. The e is increased foreign exct not the consequence sour the reversal of the flight
9/11 and increased remitt abroad through banking below poverty line has i people are caught in the \ ment, rising prices of es of security and widespn

promulgated in August 2,OO\ vncoTporalvng directions of the Supreme Court. In this case the judiciary asserted itself. Despite the said judgment

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MUSHARRAF AND *THE LEGAL FRAMEWORK ORDER*

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The Musharraf Regime has completed four years. It may be premature to evaluate the performance of the regime but certain historical trends have taken shape over this period which can form basis of some tentative conclusions.

There is no doubt that events of 12 October
1999 followed by Supreme Court judgment in Zafar AH Shah’s case have brought Pakistan back to square one. Once again a military government has been legitimized on the touch stone of the doctrine of necessity. Once again a military ruler was given power to amend the constitution, which he has been exercised wantonly to undermine the basic structure of the Constitution and to perpetuate himself in power. The civilian institutions like the parliament, judiciary and

bureaucracy have been sidelined and made subservient to the will of the military. Musharraf s seven point agenda; which included promises of good governance, economic progress, inter provincial harmony, clean politics and accountability; has disappeared into thin air.

The hallmark of Musharraf regime is its distrust of civilians, civil society and civil institutions and introduction of retired or serving officers from armed forces in all spheres of administration and at all levels. These military officers have been planted in the services up to saturation point.36

The regime has trumpeted economic progress as its achievement. The evidence being presented is increased foreign exchange reserves, which is not the consequence sound economic policy. It is the reversal of the flight of capital in the wake of
9/11 and increased remittances by Pakistanis living abroad through banking channels. The population below poverty line has increased alarmingly. The people are caught in the web of poverty, unemployment, rising prices of essential commodities, lack of security and widespread corruption. There is no new investment coming into the country and bulk of money has gone into real estate where the prices have skyrocketed.

The law and order situation in the provinces, particularly Sindh and Baluchistan, has gone out of control. The natural gas pipelines were repeatedly blown up and culprits were not even apprehended. There is little writ of the State and

the common man is at the wrong end of the sticV

The farmers are denied the price of sugarcane fixe by the government Out sugar *ravcorj an oar*--« subsidized by the government in the price of the sugar. The civil service, or whatever is left of it. is manned by persons who are thoroughly demoralized and its professionalism and discipline have diminished. *Nazims* and Councillors reportedly, the blue eyed boys of Musharra regime, have used their offices to suppress thei opponents without any regard for the law of th< land and rules of decency.

Musharraf promised real democracy bu delivered ’sham democracy’. The elections to th Parliament, provincial assemblies and loca government were openly rigged at the behest c military regime which blatantly encouraged hors trading, kidnapping of voters, purchase of vote stuffing of ballot boxes and manipulation of coun The Election Commission and the judicial became partisan with the military government malpractices during the elections to benel

Musharraf.

The judiciary in Pakistan has suffered the me during this period. Its role has been to suppc Musharraf regime without any regard Constitutional dictates and the law laid down the Supreme Court in earlier cases.

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1. PLD 1999 Central Statutes 448.

2. PLD 2000 Central Statues 38.

3. PLD 2000 Central Statutes 86.

4. Zafar All Shah V. General Pervez Musharraf, F
2000 SC 869.

5. PLD 2001 Central Statutes 392.

6. Al-Jehad Trust V. Federation of Pakistan. F
1996 S.C. 324.

7. The junior most amongst the recommendees Justice Faqir Muhammad Khabbar, who wa No.
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8. Supreme Court Bar Association V. Federatio Pakistan, PLD 2002 S.C. 939.

9. White Paper on the Role of Judiciary, issue Pakistan Bar Council on 28 June 2003.

10. Referendum Order, 2002 (Chief Executive's C
12 of 2002) PLD 2002 Central Statutes 218.

11. PLD 2002 S.C. 853.

12. The Baluchistan Local Government Ordinance 2001 (XVIII of 2001). The North West Frontier Province, Local Government Ordinance 2001 (XIV of 2001). The Punjab Local Government Ordinance 2001 (XIII of 2001). The Sindh Local Government Ordinance 2001 (XXVII of 2001).

13. Legal Framework Order 2002 (Chief Executive's Order 24 of 2002) PLD 2002 Central Statutes (Supplement) 1604.

14. Rabbani, Mian Raza; LFO - A Fraud on the Constitution: First Edition August 2003, Q.A. Publishers, Karachi, p. 63.

15. Legal Framework (Amendment) Order, 2002, PLD
2002 Supplement Federal Statutes 1698.

16. PLD 2003 S.C. 74.

17. Chief Executive's Order 7 of 2002, PLD 2002 Central Statutes 193.

18. The Nation, 13 October 2002.

19. Ibid.

20. Ibid.

21. PPP did not register as party with the Election Commission before the general elections. Instead it registered as PPP-Parliamentarians with Makhdoom Amin Faheem as its leader. PPP-P participated in the general election.

22. It is ironic that the leader of this break away group, Faisal Saleh Hayat was involved in a number of cases with the NAB and was under trial. The trial

against him before the Accountability though k had become Interior Minister himself.

23. Rabbani, Mian Raza, LFO - A Fraud on tbt Constitution, Supra Note 14, p. 56.

24. *Dawn*, 25 December 2003.

25. *Dawn*, 27 December 2003.

26. *Dawn*, 28 December 2003.

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27. *Dawn*, 30 December 2003.

28. *Dawn*, 31 December 2003.

29. *Dawn*, 02 January 2004.

30. Para 18 of the Second Schedule to the Constitution.

31. Article 56.

32. Dawn, 18 January 2004.

33. National Accountability Bureau Ordinance (XVIH of 1999), PLD 2000 Central Statues.

34. Khan Asfandyar Wali V. Federation of Pakistan, PLD 2001 S.C. 607.

35. National Accountability Bureau (Amendment) Ordinance, 2001, PLD 2002 Central Statutes 81

36. As many as 104 serving and retired Lieutenant Generals, Major Generals or equivalent ranks from other services were among the 1,027 military officers inducted on key civilian posts in different ministries, divisions and Pakistani missions abroad after 12 October 1999. Serving and retired military officers have served against 27 prized civilian posts in Grade 22, 62 posts in Grade 21 and 150 in Grade
20. For details see daily *Dawn* of 3 October 2003

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99), PLD 2000 Central Statues, i Asfandyar Wali V. Federation of Pakistan,
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