DOCTRINE OF THE LAW OF NECESSITY: POLITICAL
REPERCUSSIONS OF JUDICIAL DECISIONS
(A CASE STUDY OF PAKISTAN 1954-2007)

A Ph. D THESIS PRESENTED TO THE FACULTY OF
POLITICAL SCIENCE FOR THE DEGREE OF DOCTORATE

By

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2015
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CERTIFICATE

THIS IS TO CERTIFY THAT Mr. Zahid Mahmood s/o Abdul Jabbar, a candidate of Ph.D (Political Science), Registration No. BASR No/0664/Ar. Apr 2, 2013 Resol No. 07 (A) Dated 22-02-2013, has prepared this Thesis titled, ‘DOCTRINE OF THE LAW OF NECESSITY: POLITICAL REPERCUSSIONS OF JUDICIAL DECISIONS (A CASE STUDY OF PAKISTAN 1954-2007). This Thesis on the subject of Political Science satisfies the requirement for the degree of Ph.D in Political Science.

The Thesis is based on his own research work carried under my supervision.

Dr. Summer Sultana,
Research Supervisor

Karachi
Dated:
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My Father, Abdul Jabbar  My Mother, Allah Rakhi,

My Wife Dr. Mona,  My Daughters Javeria Zahid, Maria Zahid and Zaaria Zahid, My brother Tahir Mahmood
خلاص

یہ بات ہے کہ کبھی کبھی تاریخ کی سادگی اور عظمت کی سمندری بہو ہے جسے تاریخ دانوں نے بھی سمجھا کے نہیں کہا ہو کہ تاریخ کی سمندری بہو کا کہانی کی رہنما کا کہانی ہے۔

تاؤ باپو کے ہی بیٹے کا ہی بیٹے تاریخ کے خصوصی کی درجنوں واقعات کا تعلق میں اس کی نظر کا شکار ہے۔

1947 کی تسلیم کے بعد بہت سے قومی اور ملیہ اشاعتیں کے صدابرداری کے سیاسی اور ملیہ اشاعتیں کے سطح پر گھر گھر کا کردار رکھنے کے لئے کسی ایک اور تجربہ کا کمیشن کی کہانی کا لذ میں بہت سے عوامی اور وہاں کی تعلیمی دھاتوں کے دوسرے سے پورے بہت سے اثر ہے۔

تاؤ باپ کے ساتھ ساتھ بھی تاؤ کے دوسرے بیٹے کی کہانی کا کچھ مضمون کی تعلق میں اس کی نظر کا شکار ہے۔

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آمریکی میں دو بار سرشارہ ہیں۔ 1962 کا کرنسی یادداشت ہے۔ یہ ہمارے لیے ایک مثال ہے۔ ان کے لیے LFO کا استعمال ہے۔

پاکستان کے ساتھ، دو ممالک کے کئی اچھے خصوصیات کے لیے اہم ہے مہم۔ پنا 1962 کے ہم منگ جاتے ہیں

PNA پاکستان کے ساتھ ہے۔ بحری جہازات کے لئے اہم ہے۔ ایک اچھا خصوصیت یہ ہے کہ جب ہمارے باپوں کا

1973 کے ہم منگ جاتے ہیں سنگاہا کے کئی خصوصیات کے لیے ایک اچھا خصوصیت یہ ہے کہ جب ہمارے

کا حکمران کی ہماری شکر ہے۔

کیوں کہ ماکسیمیم ساتھیتیں، دوسرے بات ہے۔ جب ہمارے باپوں کی خصوصیات کے لیے کئی اچھا خصوصیت یہ ہے کہ جب

PML(N) کا حکمران کی ہماری شکر ہے۔


ABSTRACT

This study deals with the history of use of ‘Doctrine of Necessity’ in Pakistan by the judiciary from 1947 to 2007 to provide legal justifications for the military governments. Pakistan has seen as many as four Martial Laws and it is always feared that the sapling of democracy may be trampled upon any time by the military rulers owing to the bickering of the politicians. The supreme judiciary of Pakistan affixed a seal of legitimation on every unconstitutional step taken by the undemocratic forces in the name of demon Doctrine of Necessity which had political implications for Pakistan. Jinnah’s vision of establishment of parliamentary democracy in Pakistan, which would have ensured peace, progress and stability in the country, was put aside and military dictatorships were imposed in the country. Consequently, disruption of democracy at times posed a number of challenges to Pakistan like Regional, Ethnic, Economic, Social, Legal and Sectarian etc. The underlying hypothesis of the study is that owing to the Doctrine of Necessity the military regimes got legal justifications and thus damaged the political stability of the country and thereby Pakistan is facing huge challenges like extremism, energy crisis and others. The Bench and Bar facilitated the dictators to achieve their vested interests. Therefore, it is of great importance to explore and investigate the legal history of Pakistan with special reference to the use of ‘Doctrine of Necessity.’ Much has been written on the political history of Pakistan but few have discussed the legal and constitutional history of Pakistan. Those who have discussed the constitutional history of Pakistan have not given proper attention to the ‘Doctrine of Necessity’ which not only provided justification to the illegitimate rulers but gave them free hands to rule authoritatively. This study aims to investigate only this aspect of the legal history of Pakistan. Pakistan has seen as many as four Martial Laws. The first one was clamped by the Field Marshal Muhammad Ayub Khan in 1958 and continued till 1969. It is generally said that Pakistan recorded impressive economic growth and it is also regarded as the era of prosperity. But, there is one segment of critics who also opine that the notion of economic prosperity is merely a bubble which has no permanence in it and it vanishes as the military junta is out of the corridors of powers. It seems true in the case of
Ayub khan as he left the office of President of Pakistan, then his edifice fell like a house of cards.

He handed over the power to another military dictator General Agha Muhammad Yahya Khan (1969-1971). The world witnessed as how in his presence the country was rent-asunder in two parts. He also gave his own scheme of governing the affairs of country. He gave his legal frame work order as General Ayub khan gave his own Constitution of 1962. The compliant judiciary was ever ready to serve the military masters applying the doctrine of State Necessity as was set by their predecessor chief Judge of the then Federal Court Muhammad Munir.

General Zia (1977-1988) took reins of country with a promise to handover the control of country to the elected representatives with in ninety days. But, this didn’t happen as his control on the civil administration lasted for almost eleven years. He made innovations with the constitution of 1973. Its format was changed from parliamentary to a quasi-parliamentary and quasi presidential. An infamous 8th amendment was inserted which made the President powerful to dissolve the assembly to his whims. General Zia enjoyed the power raising the slogan of Islamisation in country. To save his rule, it was the then Supreme Court of Pakistan which came to succour using the Doctrine of Necessity despite the fact that the same Supreme Court in its earlier case of Mss Asima Jillani had termed the legalisation of Military rule as ultra vires. General Zia used the 8th amendment and sent packing the government of Junejo as he had developed differences with him.

The end of Zia era marked the beginning of controlled and guided democracy being run by the new players such as Benazir Bhutto and Mian Nawaz Sharif. However, the political bickering between both the leaders paved way for military to enter into the corridors of politics. In October, 1998, General Pervez Musharraf took over the reins of country. The Supreme Judiciary of Pakistan again helped military to legalise its unconstitutional, illegitimate and illicit rule which lasted till 2008.
CHAPTER 1

INTRODUCTION TO THE TOPIC

Necessity is regarded as the mother of invention. It transcends law and has no boundaries. Necessity is that which is unavoidable, inevitable or indispensable. It is the condition of being needy or necessitous, a pressing need or want\(^1\). Necessity should be real, immediate, and urgent and serves as a state or condition imperatively demanding relief.

In criminal law the word necessity has been defined as a justification as defense for a person who acts in an emergency that he or she didn’t create. Resultantly, he inflicts harm that is less severe than harm that would have occurred but for the person’s action. For instance, a mountain climber lost in a blizzard can assert necessity as a defense to theft of food and blankets from another’s cabin. It is also termed as choice of evils; duress of circumstances; lesser- evils defense.

The aim of this legal canon is to ensure proper conduct of the human beings in a society so as to benefit one another. The religion of Islam has elasticity and gives allowance for a departure from the strict adherence, observance and application of its legal principles in cases where severe necessity ‘warrants. The canon of public welfare (salus Populi Est suprema Lex) runs from the Islamic concept of necessity.

The expediency as a principle is practiced by Islam wherever required. There are innumerable instances which may be quoted to prove it. Where it was found by the Holy Prophet (S.A.W) and His caliphs that the Quranic injunction may cause great hardship and mischief instead of curing a disease, its enforcement was temporarily abandoned on the ground of expediency. Therefore, the western concept of the doctrine of necessity does not match with the Islamic concept of the necessity\(^2\).

The concept of Necessity in English Law is not alien. The concept of Necessity in Criminal Law has been engraved in such manner as it defends the same.

\(^1\)http://www.merriam-webster.com/ (The Website was visited on 2\(^{nd}\) November, 2014)

\(^2\)Muhammad Afzal cheema J, Nusrat Bhutto’s case, PLD 1977 SC 657, p. 89.
The case of R v Dudley and Stephens\(^3\) may be cited to elicit the concept of Necessity in English Law.

The two seamen killed a cabin boy of a wrecked ship. They were stranded in open boat with no food for more than twenty days. When faced with death due to starvation, these seamen had no choice except kill a cabin boy under the circumstances warranting Necessity. When these seamen were rescued, their trial was carried for a murder of a cabin boy.

The court awarded six months punishment to the seamen instead of giving death sentence under the shelter of Doctrine of Necessity. The judge Lord Coleridge suggested that the accused may have acted under the stress of Necessity. The extent to which Necessity may be a defense to a certain act of an individual depends upon the nature of every case.

The executive has the authority to take away the physical possession of a property of a citizen in circumstances where the rule “Salus Pouli Est Suprema Lex” is applicable. This act may be carried out without making the compensation, unless by statute it is provided. The Crown, in May 1916, acting under the Law of Necessity took physical possession of hotel in order to house personnel of the Head Quarters Royal Flying Corps. The act of Crown held justified keeping in view of the Law of Necessity. But it was also held that the owners of hotel were entitled for compensation under Defense of Realm Consolidation Act, 1914\(^4\).

The Defense Regulations 1939 of the United Kingdom is an excellent example of a Maxim “Salus Populi Est Suprema Lex”. According to this Act, the government had power to make “Preventive Detention” of persons holding hostile assembly\(^5\).

It took a lot of time to the political philosophers and jurists of different centuries to develop the Doctrine of Necessity. This is how they made valuable contributions to the development of this doctrine.

\(^{3}\) (1884) 14 QBD 273
\(^{4}\) Attorney General V D Keyser’s Royal Hotel 1920 A C 50
\(^{5}\) Liversidge V Anderson 1942 A C 206
Bracton, in his book, “De Legibus et Consuetudinibus Angliae” (of Laws and Customs of England) has stated following maxims which are oft-quoted and give foundation to present day philosophy of law and political science.

- “Id Quod Alias Non Est Licitum, Necessitas Licitum Facit”
  That which otherwise is not lawful, necessity makes it lawful.

- “Salus Populi Suprema Lex”
  Safety of people is the supreme law.

- “Salus Republicae Est Suprema lex”
  Safety of the state is the supreme law.

The law of civil or state necessity and law of natural necessity are part of the statutes of various countries now-a-days. The principle underlying the above maxims is part of the law.

Broom says that the maxim of “salus pouli suprema lex” is based on the notion that every individual of a society should understand that his individual welfare, life, liberty and property etc. may be sacrificed for the good of public.

Justice Darling mentioned the maxim of “Salus Populi Suprema Lex” in a case viz, Arbitration between Shipton, Anderson & Co. and Harrison Brothers & Co as not only good piece of law but also as “essential law”. In this case, the owner sold a parcel of wheat lying in a ware house in Liver Pool in September 1914. The wheat was sold upon the terms of “cash payment within seven days”. Before the wheat could have been delivered to the buyer, it was requisitioned by His Majesty’s government and the same was also delivered to Him. The buyer approached the court for performance of a contract against the seller. The court of King’s Bench held that the onus for performance of contract does not lie on the shoulders of seller as wheat was rightly requisitioned by the Government. Chief Justice Lord Reading and, Justice Lush stated the” act of requisition” as an act of state. Justice Darling referring to the” act of state” stated that:-

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7Broom’s legal maxims, 10th ed.
8(1915) 3 KB 676.
“The subject matter of this contract has been grabbed by state acting for the welfare of public. Salus Populi Est Suprema lex is a good maxim and the enforcement of that essential law does not give a right of action to anyone.”

Lord Moulton observed in a case viz, “Attorney General vs. De Keyser’s Royal Hotel”. In this case, he had to deal with the Crown’s prerogative in taking possession of land for defense purposes. The king may take the property of a subject during the times of war. It has been laid down in cases viz, Ship money vs. Hampdon and Saltpeter case.

Dicey in his book “The law of the constitution” has propounded on the right of the executive to act in contravention of the law in emergent situation. He says that “there are times when government is left with no other option except break law for the sake of legality. This act legalizes the illegality and brings forth the practical solution of a problem which unnerved the statesmanship of the sixteenth and seventeenth centuries.

A book authored by chitty named as “A Treatise on the law of the Prerogatives of the Crown” mentions that king is the only person who is superior to both the houses of parliament and he is the one who can legislate when parliament is not in existence. He further dilates that there were two instances when parliament assembled in illegal manner i.e. without the authority of King. One instance when parliament restored Charles II and the other instance when parliament of 1688 disposed of kingdom to William III. He points out that on both these instances it was the principle of “Necessity” on the basis of which parliament had to be in session without the authority of king; it is Necessity that supersedes all law.

“Opinion of eminent lawyers” is a book written by George Chalmers. He has mentioned in this book regarding the circumstances which were apparently illegal but turned legal in case of necessity.

9 Ibid
10 (1636) 3 St. Tr.825.
11 1606, XII Cox. Rep12.
13 Joseph Chitty, A Treatise on the law of the Prerogatives of the Crown, London, Butter Worths, 1820. p68
In certain circumstances, an act which otherwise is illegal becomes legal under the stress of Necessity. It is also true in a case of a country, where in order to silence turmoil, tumult or a revolt, the organs of state are allowed to deviate from the defined path enunciated by the constitution to restore law and order and safeguard state and society.

In Pakistan, the ‘Easement Act, 1882’, Section 4 deals with the enjoyment of use of another’s land, and Section 13 pertains to the Necessity and Quasi Necessity\textsuperscript{14}.

The ‘Penal Codes’ of different countries have also made provisions for the Law of Necessity. Section 94 of the English Penal Code also pertains to the same. As per this Section, if someone has apprehension of instant death, his action in response to this shall not constitute offence. Pakistan Penal Code has also provision for the Law of Necessity. Sections 96 to 106 pertain to the right of a person’s private defense. Section 96 says that if an act is done in the exercise of a private defense, the same shall not constitute an offence.

The Doctrine of Necessity is a panacea for the Head of States to exercise vast powers during emergency when security of State is at stake. The state actors use this Doctrine to bring order of the chaotic situation by implying the extra-legal actions. These actions are although, unconstitutional yet are not cognizable by the law of land. They are termed as constitutional and the legal cover is contentious judgment in 1954. The Chief Judge of the Federal Court Mr. Muhammad Munir granted legal sanctity to the steps taken by the Governor General Ghulam Mohammad for the use of emergency powers which were extra provided by the superior judiciary to keep intact the integrity, stability and solidarity of country. The medieval jurist such as Henry de Bracton has based his writings on this concept. There is another name of William Blackstone who has also rendered identical countenance for an extra legal action by the state actors.

In modern times, Pakistan superior judiciary took a lead to use the doctrine of necessity. It was Chief Justice of the Federal Court Mr Muhammad Munir who used

\textsuperscript{14}Halsbury, \textit{Laws of England}, 3\textsuperscript{rd} (Simonds) ed. 1935, Vol.12, p574.
this doctrine in a constitutional. Amita\textsuperscript{15} Shastri says that once the Defense Minister Field Marshal Muhammad Ayub Khan dismissed the President of Pakistan Iskander Mirza and took over the country as the Chief Marshal Law Administrator. It was the compliant judiciary headed by the Chief Justice Muhammad Munir which rushed to help the dictator for legalising his rule relying on the far-fetched Doctrine of Necessity. The Chief Justice quoted maxim of Bracton in his judgement that which is not lawful can be made lawful on the touchstone of law of necessity.

Ayesha jalal says that it was the judicial complexity with the executive that determined the outcome. Stretching the law of necessity to its outer limits and spuriously equating the revolutionary legality with legitimacy, Chief Justice Muhammad Munir and three other his fellow judges of the then apex Federal Court created a demon doctrine. This demon doctrine has danced in the Supreme Court every time judicial sanction is needed to legitimize the dictatorship.

The so-called doctrine of necessity, rather than the constitution, national or international law has become the basis on the legitimacy of military takeover. With a single stroke of pen, Chief Justice Muhammad Munir destroyed the foundations of constitutional rule in Pakistan. With one blow, he opened for the army to walk into the corridors of government any time it wanted.

Maulvi Tamizuddin as President of the Assembly preferred an appeal before the Chief Court of Sind at Karachi. It was pleaded to restrain the new Council of Ministers from implementing the dissolution. Further, it was also prayed that the legal status of the appointment of the new Council of misters be determined as per Section 223-A of the constitution. The action of Maulvi Tamiz-ud-Din Khan was challenged by the ministers of new council on the grounds that the Sind Chief Court had no jurisdiction to hear the case of President of the Assembly as regards the dissolution and appointment of the ministers. The incorporation of Section 223-A was questioned. This Section was not validly enacted as it lacked the approval of Governor General. The applicability of this section was invalid in the eyes of law.

The Chief Court of Sind\textsuperscript{16} passed verdict in favour of President Constituent Assembly Maulvi Tamizuddin Khan. It was held by the Court that the assent of Governor General was not mandatory when the Constituent Assembly acts as a constituent organ and not as the Federal legislature.

Against the verdict passed by the Sind Chief Court, the Federation of Pakistan and the new Council of Ministers preferred an appeal before the Federal Court. It was held by the Federal Court presided by the Chief Justice Muhammad Munir that the assent of the Governor General was mandatory for any bill to attain the status of law. The Constituent Assembly acted as ‘Legislature of the Domain’. It was further held by the Court that the Sind Chief Court lacked jurisdiction to vacate the order of dissolution of assembly by the Governor General. Therefore, the dissolution was upheld.

The Federal Court decided that the Governor General was impotent to invoke emergency powers. The act of invocation by him validated some of the invalid laws which were invalid as he had not rendered his assent to them previously. It was further held by the Chief Judge Muhammad Munir that the Governor General was bereft of the powers to validate any constitutional legislation. The Federal legislature has the only prerogative to extend such approval.

Justice Muhammad Munir stated that in certain situation the constitution may be surpassed to which he calls the Common Law. The application of Doctrine of Necessity by Muhammad Munir has taken inspiration from the general legal maxim English historical precedent. He has placed his\textsuperscript{17} reliance on maxim of Bracton 'that law of necessity can make anything lawful which is otherwise not lawful. For the use of this doctrine he has also placed his reliance on the Roman law maxim which has been emphasized by Ivor Jennings, it is that the well-being of the people is the supreme law.'

There is no denying a fact that the tool of ‘Necessity’ employed by Muhammad Munir in 1954 went a long way in the judicial history of Pakistan. It left indelible imprints on the political history of this country. It was used last time in 2007

\textsuperscript{16}PLD 1955 Sind 96.

\textsuperscript{17}PLD 1955 I FC 561-562
by the Chief Justice of Supreme Court of Pakistan to grant a legal sanctity to the emergency invoked by General Pervez Musharraf. Since the elections of 2008, although, the government has been run by the elected governments but nothing can be said with certainty that how long the politicians with the electoral process will run the affairs of this country. It is indeed lamentable that the politicians of this country themselves invite the military-men to come and take the reins of civil government affairs due to their political bickering and poor delivery to the people whom they represent.

1.1 Issues addressed

Thesis focuses on the use of Doctrine of Necessity by the Superior Judiciary in Pakistan. Its use to extend legal sanctity to the rule of military in politics started in 1954 when the then Chief Judge of the federal Court gave a legal cover to the unconstitutional steps of the then then Governor General Mr. Ghulam Muhammad. He had ousted the constituent assembly which was about to pass a bill to clip his powers. The new council of ministers was allowed to replace the old constituent assembly on the basis of Section 223-A which had not yet sought the approval of Governor General. The emergency powers ordinance which was issued by the Governor General Ghulam Muhammad to grant approval retrospectively was accepted by the Court of Muhammad Munir on the basis of Doctrine of Necessity.

This thesis would make analysis of the impact of the use of Doctrine of Necessity on the political situation on Pakistan through the annals of history. The periods of different governments have been discussed. Further, the four Martial governments have also been discussed with regard to their performance. Simultaneously, the patches of elected governments have also been discussed so as to highlight deeds and misdeeds of the politicians and how they smoothened?the entry of military into politics. The role of judiciary has also been discussed in detail. The subject matter is Muhammad Munir who showed the judges of the Supreme Court of Pakistan to legalize the military rule in Pakistan. The judgments of the Supreme Court of Pakistan which have been rendered on the basis of the Doctrine of Necessity have also been discussed. Since 1954, the repercussion of this doctrine on the political scenario has also been discussed under the heads of different chapters. Chapter-wise details are provided hereunder;
First chapter gives introduction to the dissertation. This chapter introduces to the topic of thesis. Background to the problem has been given so as to highlight the importance of the topic. This chapter briefly highlights the issues raised and addressed in each chapter. Further, the existing literature on the topic has also been dilated upon. This chapter also throws light as how the research on this topic has been conducted.

Second chapter delves into the concept of Doctrine of Necessity. It discusses circumstances which force the use of term Necessity. How the criminal law takes this term has also been looked into. Necessity has different shades which have also been described. For developing theoretical framework, various authors, jurists and academicians, along with pertinent case law have also been mentioned.

Third Chapter has been dedicated to the military intervention in Pakistan and use of Doctrine of Necessity by the Superior Court to grant legal sanctity to the military rule.

This chapter gives theoretical understanding of the concept of the civil governments run by the military men. The focus is on what necessitates the imposition of Martial Law. In this chapter the imposition of Martial Laws in different countries has also been discussed. Its performance with reference to running the affairs of civil affairs has been looked into.

The chapter further discusses the factors responsible for the intervention of army into the corridors of politics in Pakistan. Then the Martial Laws clamped in Pakistan in the different years have also been discussed. The factors responsible for the imposition of Martial Laws have been looked into and what impact they left on the political scenario has also been discussed.

Chapter four discusses the impact of judicial decisions on the political scenario. The political scene might have been different, had the superior judiciary not rendered its decisions based on the Doctrine of Necessity.

The judgments of the Superior Courts based on the law of necessity left indelible imprints on the political scenario of Pakistan. The effects of such decisions are both positive and negative. This chapter would in length analyze the impact of these decisions on the political system of Pakistan.
In Chapter five political developments made during the period from 1969 till 1988 have been discussed in detail so as to analyse the impact of Necessity based decisions rendered by the superior judiciary of Pakistan.

Chapter six discusses the political developments made from 1988 till 2007 in detail and it has also been analysed as what impact the Martial Law of General Zia left on the political scenario.

In chapter seven, the details have been given regarding the application of use of ‘Doctrine of Necessity’ to grant legal cover to the unconstitutional and illegitimate rule and steps by the military men and bureaucrats.

The case law from 1954 till 2007 decided on the basis of Doctrine of Necessity by the Superior Judiciary of Pakistan has been discussed in this chapter.

Chapter eight concludes the dissertation. The impact of the Doctrine of Necessity on politics of Pakistan and how in future the democratic rule may flourish in the country has been made subject of discussion.

1.2 Importance/Contribution of the research

The importance of this research topic can hardly be belittled. It has great significance as after sixty seven years of the independence still we question about the future of democracy in Pakistan. We still ask why the democratic institutions ail. We ask for any panacea for the debilitating health of national institutions. The democratic institutions didn’t work and we have rent asunder half of the Pakistan. Parochialism, sectarianism, terrorism, economic deprivation, destitution and linguistic differences have marred the unity of Pakistan.

We are still uncertain as who will put country on the right path. Pakistan Army is a leader which after one decade or two decade has to peep into the affairs of civil government. How long the politicians will take to shun their differences and let the sanity prevail upon them. The people of this country have a right to ask as why the politicians think of their own selves and why don’t they prefer the national interests over their own.
This research has tried to trace a historical political developments happened in the different periods reigned by the military and political leaders on Pakistan. The cases decided by the judiciary based on the Doctrine of Necessity have also been discussed.

This research suggests for the future researcher to look into the different vistas of every challenge that the country faces as regards the democracy, constitution and strengthening of the democratic institutions in Pakistan.

1.3 Relation with existing Literature

There is no denying the fact that much has been written on the civil-military relations, debilitating democracy and weakening democratic institutions in Pakistan. But, there is a general dearth of literature on the issue of role played by the superior judiciary of Pakistan in invoking the Doctrine of Necessity to grant legal sanctity to the military rulers.

Since the Constitutions of Pakistan have been under discussion, therefore, the research would remain in-satiated if the Constitutions of 1956\textsuperscript{18}, 1962\textsuperscript{19} and 1973 are not looked into. Besides the Constitutions of Pakistan and experimentation in this field, the judgments of the Superior Judiciary which are based on the Doctrine of Necessity have also been discussed. The cases are, inter alia, the following:

i. Maulvi Tameez-ud-Din Khan Case\textsuperscript{20}
ii. Usif Patel and others vs. The Crown\textsuperscript{21}
iii. Reference By His Excellency the Governor General\textsuperscript{22}
iv. The State vs. Dosso & Others\textsuperscript{23}
v. Miss Asima Jillani vs. The Government of Punjab\textsuperscript{24}
vi. Begum Nusrat Bhutto Vs. Chief of Army Staff and Federation of Pakistan\textsuperscript{25}
vii. Miss Benazir Bhutto vs. Federation of Pakistan and others\textsuperscript{26}

\textsuperscript{18} Constitution of 1962
\textsuperscript{19} Constitution of 1973
\textsuperscript{20} PLD 1955 FC 240
\textsuperscript{21} PLD 1955 FC 387
\textsuperscript{22} PLD 1955 FC 435
\textsuperscript{23} PLD 1958 SC 533
\textsuperscript{24} PLD 1972 SC 139
\textsuperscript{25} PLD 1977 SC 657
\textsuperscript{26} PLD 1988 SC416
viii. Syed Zafar Ali Shah and others vs. General Pervez Musharraf, Chief Executive of Pakistan and others\textsuperscript{27}

1.5 Research Methodology

The research has been conducted by using the descriptive/qualitative methods and exploring historical development, analysis and comparison with English, Islamic jurisprudence, principles, practices, developments and positions on the subject of Doctrine of Necessity. This method is a critical part of my research as these principles are common to all jurisdictions. But, application of this doctrine has left indelible impact on Pakistan’s political situation as the un-constitutionalism is rampant in Pakistan.

Therefore, the focus of my study remained to examine case-laws and other legal instruments which extended legal cover to the unconstitutional steps of the military and a bureaucrat Governor General. In this connection, I have benefited from the library of the Supreme Court of Pakistan and the Lahore High Court Library and also Quaid-i-Azam and Punjab University libraries.

For my enlightenment on the subject I have extensively held parleys with the Pakistan Army Generals, politicians, legal luminaries and academicians.

\textsuperscript{27} PLD 2000 SC 869
CHAPTER 2

CONCEPTUAL AND THEORETICAL FRAMEWORK

Necessity is regarded as the mother of invention. Generally, it is also said that the Necessity is beyond Law. It transcends law and has no boundaries. If, necessity is treated as a source of law, it would give rise to certain questions of law. For instance, its meaning, nature and whom to make a judge of the law of Necessity.

In order to transpire the intricacies, it is important to dilate upon the concept of Necessity and Law of Necessity as well. Prima facie, the word Necessity has different shades of meanings. But, in a politico – legal sphere, it has different connotations

Necessity is that which is unavoidable, or absolutely requisite; inevitable or indispensable. It is the condition of being needy, or necessitous; pressing need or want\(^1\). Necessity must be real, immediate and urgent and serves as a state or condition imperatively demanding relief\(^2\).

2.1 What is Necessity?

The term necessity refers to the presence or pressure of circumstances that justify or compel a certain course of action; especially; a need to respond or react to a dangerous situation by committing a criminal act: an affirmative defense originating in common law that the defendant had to commit a criminal act because of the pressure of a situation that threatened a harm greater than that resulting from the act\(^3\).

In criminal law the word Necessity has been explained as a justification defense for a person who acts in an emergency that he or she didn’t create and who commits a harm that is less severe than the harm that would have occurred but for the person’s action. For instance, a mountain climber lost in a blizzard can assert necessity as a defense to theft of food and blankets from another’s cabin. It is also termed as choice of evils; duress of circumstances; lesser- evils defense.

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\(^1\) Webster’s Dictionary http://en.wiktionary.org (The Website was visited on 30\(^{th}\) October, 2011.

\(^2\) Words and phrases, 1976 ed, vol. 28p. 437

\(^3\) Merriam – Webster’s dictionary of law, 1996 Merriam – Webster, Inc
Manifest necessity is a sudden and overwhelming emergency, beyond the court’s and parties’ control, that makes conducting a trial or reaching a fair result impossible and that therefore authorizes the granting of a mistrial.

The standard of manifest necessity must be met to preclude a defendant from successfully raising a plea of former jeopardy after a mistrial.

Moral necessity arises from a duty incumbent on a person to act in a particular way. Physical necessity involves an actual, tangible force that compels a person to act in a particular way.

In a private necessity the personal interests of defendants are involved and thus provide a limited privilege. For example, if the defendant harms the plaintiff’s dock by keeping a boat moored to the dock during a hurricane, the defendant can assert private necessity but must compensate the plaintiff for the dock’s damage.

Whereas, public necessity is a necessity that involves the public interest and thus completely excuses the defendant’s liability. For instance, if the defendant destroys the plaintiff to stop the spread of a fire that threatens the town, the defendants can assert public necessity.

2.2 Islam and the Law of Necessity

The aim of this legal canon is to ensure proper conduct of the human beings in a society so as to benefit one another. The religion of Islam has elasticity and gives allowance for a departure from the strict adherence, observance and application of its legal principles in cases where severe necessity warrants. The canon of public welfare (salus Populi Est suprema Lex) runs from the Islamic concept of necessity.

The expediency as a principle is practiced by Islam wherever required. There are innumerable instances which may be quoted to prove it. Where it was found by the Holy Prophet (S.A.W) and His caliphs that the Quranic injunction may cause great hardship and mischief instead of curing a disease, its enforcement was temporarily abandoned on the ground of expediency.

\[4\text{Black’s law dictionary, Free Online Dictionary (The Website was visited on 6th November, 2011)}\]
Therefore, the western concept of the doctrine of necessity does not match with the Islamic concept of the necessity\(^5\).

In fact, the doctrine of necessity has its roots from the following verses of the Holy Koran.

**SURAH AL-INAAM PART VI VERSE NO. 119**

“He hath dilated to you in detail what is forbidden except under compulsion of necessity”.

**SURAH AL-NEHAL PART XVI VERSE NO. 115**

“He hath only stopped you from eating meat of dead, blood and the flesh of swine…. But if one compelled under Necessity not crossing due limits, then God is forgiving and the Most Merciful”.

**SURAH AL-BUQRA PART II VERSE NO. 173**

“If one is not forced by Necessity, without lawful disobedience, nor transgressing limits then he is free from guilt, god is forgiving, most Merciful”.

**SURAH AL-MAIDA PART V VERSE NO. 4**

“The meat of dead, blood, the flesh of swine, and that on which name of some other beside Allah has been invoked…. But if one is compelled by the hunger, and has no resort to crossing the limits, God is forgiving and the Most Merciful”.

The above verses of the Holy Koran explain that it is Necessity on the basis of which the forbidden things also fall in the permissible limits. The Holy Koran is replete with such examples at length. These are legal excuses which exempt from legal duties, e.g., lunacy, ailment, duress, minority, ignorance and forget fullness. Besides these examples, there are certain other instances where prohibited things fall in the permissible precinct: a hungry person to eat the meat of dead animal, permission to take wine in order to quench the thirst. Islamic fiqh is not in the water - tight compartments not to address the hardships of people facing problems

Hardship does not refer to luxury. The allowance or laxity from defined path/rules and regulation is provided in the case where Necessity occurs. Difficulty is the cause for easiness and in urgent times laxity must be given.

Bai bil-wafa or redeemable sale is a transaction which was introduced to help the people trapped in a heavy debt. The rule of Necessity and Need has been treated as a source of law by Fitzgerald.

“Necessity transcends law” is a general notion and can be applied to cases of utmost urgency. The soldier on a horse back is allowed to pray prayer in his saddles. Fasting in the Holy month of Ramadan is obligatory upon Muslims as explicitly enunciated in the Holy Koran, but exemption is allowed to a Muslim in a journey. Likewise, a Muslim facing starvation is allowed to feast upon forbidden things so as to keep his body and soul together.

2.3 Formulation of Juristic Principles

The Muslim jurists have formulated the following principles from the verses of the Holy Koran narrated above:-

1. If confronted with two evils, the evil with lesser magnitude be chosen.

2. It is Necessity that permits the things which are otherwise prohibited.

3. In order to avoid harm of general character the specific harm may be borne.

4. Prevention of greater harm may be made by harm lesser in gravity.

5. Prevention of harm is more important as compared to the achievement of good.

Shariah law gives more importance to the compliance of prohibitions instead of observance of the positive commandments.

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6 Musclehuddin Dr. Muhammad., *Islamic Jurisprudence and the Rule of Necessity and Need*, 1975 ed., p. 60
7 Fitzgerald, *Nature and Source of Sharia in Law in the Middle East*, p102
2.3.1 Limitations to the Concept of Necessity

The rule of Necessity has certain limitations. It cannot be applied with freedom. Given below are conditions which must exist before the rule of Necessity may be invoked.

1. Forbidden things may be adopted only if it is driven by Necessity.
2. Only that restricted access be made to forbidden things as is necessary to keep body and soul together.
3. In adopting the forbidden things the desire should not be to infringe upon the limits prescribed by ALLAH.

There is general presumption that rule of Necessity is limited in its scope. Therefore, the same cannot serve as an independent source of law. But there is no truth in it. The rule is always there to fulfill the needs as and when they arise.

2.4 Application of the Concept of Necessity in English Law

The concept of Necessity in English Law is not alien. The concept of Necessity in Criminal Law has been engraved in such manner as it defends the same.

The case of R v Dudley and Stepehens\(^8\) may be cited to elicit the concept of Necessity in English Law.

The two seamen killed a cabin boy of a wrecked ship. They were stranded in open boat with no food for more than twenty days. When faced with death due to starvation, these seamen had no choice except kill a cabin boy under the circumstances warranting Necessity. When these seamen were rescued, their trial was carried for a murder of a cabin boy.

The court awarded six months punishment to the seamen instead of giving death sentence under the shelter of Doctrine of Necessity. The judge Lord Coleridge suggested that the accused may have acted under the stress of Necessity. The extent to which Necessity may be a defense to a certain act of an individual depends upon the nature of every case.

\(^8\) (1884) 14 QBD 273
The executive has the authority to take away the physical possession of a property of a citizen in circumstances where the rule “Salus Populi Est Suprema Lex” is applicable. This act may be carried out without making the compensation, unless by statute it is provided. The Crown, in May 1916, acting under the Law of Necessity took physical possession of hotel in order to house personnel of the Head Quarters Royal Flying Corps. The act of Crown held justified keeping in view of the Law of Necessity. But it was also held that the owners of hotel were entitled for compensation under Defense of Realm Consolidation Act, 1914.\(^9\)

The Defense Regulations 1939 of the United Kingdom is an excellent example of a Maxim “Salus Populi Est Suprema Lex”. According to this Act, the government had power to make “Preventive Detention” of persons holding hostile assembly.\(^10\)

Constitutional Law of England owes a lot to the Doctrine of Necessity. It played vital role in its development. Some instances have been provided hereunder to elicit this point;

1) The Governor of Madras during the British Raaj on India, acted illegally by refusing to accept the demands of councilors for recounting of votes. The councilors, in retaliation locked the Governor for more than eight months and carried on the business of the government themselves. In a trial, the councilors put up defense under the Law of Necessity. Lord Mansfield justified the action of councilors legal under the Law of Necessity.\(^11\)

2) On 12\(^{th}\) Feb 1689, the parliament had handed the British Crown to William III by breaking the line of succession.\(^12\) In 1649, King Charles I was murdered and his infant son continued to reign for eleven years. The Convention Parliament proclaimed him as King in May 1660. The assembly of the parliament was illegal because it was assembled without the authority of King.

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\(^9\) Attorney General V D Keyser’s Royal Hotel 1920 A C 50  
\(^10\) Liversidge V Anderson 1942 A C 206  
\(^11\) R V Stratton and others (1779) 21 St. Tr. 1222  
Under the law of Necessity, Joseph Chitty holds the assembly on both above stated cases as legal\(^{13}\).

**2.5 Evolution of the Concept of Necessity**

It took a lot of time to the political philosophers and jurists of different centuries to develop the Doctrine of Necessity. This is how they made valuable contributions to the development of this doctrine.

Bracton\(^{14}\) in his book, “De Legibus et Consuetudinibus Angliae” (of Laws and Customs of England) has stated following maxims which are oft-quoted and give foundation to present day philosophy of law and political science.

- “Id Quod Alias Non Est Licitum, Necessitas Licitum Facit”
  That which otherwise is not lawful, necessity makes it lawful.

- “Salus Populi Suprema Lex”
  Safety of people is the supreme law.

- “Salus Republicae Est Suprema lex”
  Safety of the state is the supreme law.

The law of civil or state necessity and law of natural necessity are part of the statutes of various countries now-a-days. The principle underlying the above maxims is part of the law.

Broom says that the maxim of “salus populi suprema lex” is based on the notion that every individual of a society should understand that his individual welfare, life, liberty and property etc. may be sacrificed for the good of public\(^{15}\).

Justice Darling mentioned the maxim of “Salus Populi Suprema Lex” in a case viz, Arbitration between Shipton, Anderson & Co. and Harrison Brothers & Co\(^{16}\) as not only good piece of law but also as “essential law”. In this case, the owner sold a parcel of wheat lying in a ware house in Liver Pool in September 1914. The wheat was sold upon the terms of “cash payment within seven days”. Before the wheat could

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\(^{13}\) Barrister A.G. Chaudhry, Lectures On constitutional law.


\(^{15}\) Broom’s legal maxims, 10\(^{th}\) ed.

\(^{16}\) (1915) 3 KB 676.
have been delivered to the buyer, it was requisitioned by His Majesty’s government and the same was also delivered to Him. The buyer approached the court for performance of a contract against the seller. The court of King’s Bench held that the onus for performance of contract does not lie on the shoulders of seller as wheat was rightly requisitioned by the Government. Chief Justice Lord Reading and, Justice Lush stated the “act of requisition” as an act of state. Justice Darling referring to the “act of state” stated that:-

“The subject matter of this contract has been grabbed by state acting for the welfare of public. Salus Populi Est Suprema lex is a good maxim and the enforcement of that essential law does not give a right of action to anyone17.”

Lord Moulton observed in a case viz, “Attorney General vs. De Keyser’s Royal Hotel18”. In this case, he had to deal with the Crown’s prerogative in taking possession of land for defense purposes. The relevant observation is provided hereunder;

‘The crown has enough power to seize upon the land of its subjects since it is Crown which is entrusted with the charge to protect its subjects from the enemy. The Crown may take away land without payment of any compensation to the subject. But the prerogative of the crown is subject to an actual and immediate necessity and in the circumstances where the rule of salus populi est Suprema Lex is clearly applicable18.

The king may take the property of a subject during the times of war. It has been laid down in cases viz, Ship money vs Hampdon19 and Saltpeter case20.

Dicey in his book “The law of the constitution” has propounded on the right of the executive to act in contravention of the law in emergent situation. He says that “there are times when government is left with no other option except break law for the sake of legality. This act legalizes the illegality and brings forth the practical solution of a problem which unnerved the statesmanship of the sixteenth and seventeenth centuries21.

17 Ibid.
18 (1920) A.C. 508.
19 (1636) 3 St. Tr. 825.
20 1606, XII Cox. Rep 12.
A book authored by Chitty named as “A Treatise on the law of the Prerogatives of the Crown” mentions that king is the only person who is superior to both the houses of parliament and he is the one who can legislate when parliament is not in existence. He further dilates that there were two instances when parliament assembled in illegal manner i.e. without the authority of King. One instance when parliament restored Charles II and the other instance when parliament of 1688 disposed of kingdom to William III. He points out that on both these instances it was the principle of “Necessity” on the basis of which parliament had to be in session without the authority of king; it is Necessity that supersedes all law”.

“Opinion of eminent lawyers” is a book written by George Chalmers. He has mentioned in this book regarding the circumstances which were apparently illegal but turned legal in case of necessity.

Lord Boltimore’s charter of Mary Land was forfeited and granted to another Governor. The question arose whether before the forfeiture of Boltimore’s charter, the same could have been granted to another Governor. Lord Chief Justice Holt opined in this case:

“Before commission of forfeiture of the charter, the inquisition could have been made. But, here it is Necessity which has forced the king to constitute a Governor, whose authority will be legal”.

George Chalmers, author of the afore-referred book has also quoted the opinion of Solicitor General, Northey and Harcourt. “During war, imminent danger or emergent situation, the Crown may appoint governor of a province or a colony for the preservation and protection of Majesty’s subjects”.

James dissolved the parliament in 1688 and fled from London. Thereafter, the question arose regarding the validity of legislation. Issues of such nature have been discussed in detail by Maitland in his book “Constitutional History of England”. While fleeing from England, James threw the great seal into the river Thames. The prince who was not King by then, called upon the convention of the states of country on 22nd January, 1689 at the advice of assembly. The convention passed an Act in

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22 Chitty, Joseph, A Treatise on the law of the Prerogatives of the Crown, London, Butter Worths, 1820, p68
which it was declared to be the parliament of England. Further, it was declared that the “statutes made by the convention were and are laws and statutes” of the Kingdom.

The King had no legal authority to call upon the convention parliament. In this way it was not lawful parliament. William III had no hereditary legal title to the throne. Therefore, he was not a King, that being so, the Act of Settlement which regulated the Succession to the throne was not a valid piece of legislation. The bills assented by the Sovereign (under the above-mentioned Act) were invalid in the eyes of law. It was “the Necessity of Situation” which provided a basis for the illegal laws to become legal, as observed by Chitty in his book mentioned earlier.24

The law of Civil Necessity and Military Necessity are founded on the same principle. During Emergency, the powers of a Head of a State to protect State and safeguard the Constitution of his country are similar to the powers of a Military Man during Martial Law. Chief Justice Muhammad Munir has discussed in detail the powers of a Military Commander during Martial Law in a case titled as Muhammad Umar Khan Vs. The Crown. In this case he has referred to the dicta of Willies J. in Philip vs. Eyre, that there may be certain occasions where Necessity demands immediate action to maintain law and order. Chief Justice Muhammad Munir relied on this dictum of William J. and held in the case of Muhammad Umar Khan Vs. The Crown that where the civil authority fails to perform its functions the armed forces have the authority to intervene and control the affairs of country in order to safeguard the state, society and constitution from disruption. Since the all acts done by the Military are in Good Faith and dictated by the Necessity of Situation, hence, do not require bill of indemnity. The duty of an army commander does not only arise in case of revolt, or disturbance of a public order but also during the Emergency as may be exercised by the Head of a State in case of Necessity when the legislature is out of existence.

Lord Mansfield dealt with the law of civil Necessity in the proceedings against George Stratton and others. During his address to the jury, he said that Necessity

25 1953 PLD Lahore. p825
26 1870 6 Q B 1.
27 1779 21 Howell’s State Trials p1045
must be immediate and the circumstances must justify that whatever has been done is in Good Faith to keep intact the state and society.

From the address of Lord Mansfield, it is explicitly emerged that subject to the principle of severity and extremity, an act which is illegal becomes legal if done under the umbrella of Necessity. The Necessity should be such as to protect state, society and its people from disorder and lawlessness. It should affirm Chitty’s saying that “Necessity knows no Law”. Maxim by Bracton is also quoted here that “Necessity makes lawful which otherwise is unlawful”.

2.6 Individual Necessity and Collectiveness

Individual necessity and collective necessity are two principles of law of Necessity. The individual Necessity may be termed as “Self Defense” and collective necessity may be called as “State Necessity”.

Laws are made for observance by the individuals of a society so as to maintain law and order. But, there are certain occasions or some exceptional circumstances where it is allowed to deviate from the prescribed laws in order to avert greater loss to one’s property and life.

In these circumstances, an act which otherwise is illegal becomes legal under the stress of Necessity. It is also true in a case of a country, where in order to silence turmoil, tumult or a revolt, the organs of state are allowed to deviate from the defined path enunciated by the constitution to restore law and order and safeguard state and society. Self-defense or individual necessity has been defined in the following words;

“The use of force to protect oneself, one’s family, or one’s property from a real or a threatened attack. Generally, a person is justified in using a reasonable amount of force in self-defense if he or she believes that the danger of bodily harm is imminent and that the force is Necessary to avoid this danger”

“The law of self-defense, as it is applied by the courts, turns two requirements: the force must have been necessary, and it must have been reasonable”.

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Self-defense comprises of essential elements. One the accused takes an action without causing any provocation, two, Nature of danger must be immediate without availability of any mode of escape. If an accused inflicts injury and is equipped with plausible explanation of “Self-Defense” then he will not be tried under criminal code or can be sued under Tort for damages.

Homicide is also excusable in some cases where instant danger is struck against one’s life and property. This point may be elucidated from the following two cases;

(i) In a case of R vs. Dudley\(^{29}\), the two shipwrecked seamen had lost their way in open boat. They remained without food for more than twenty days. They had no other course left to finish their hunger except kill a cabin boy who was accompanying them. The seamen were later tried for murder of a cabin boy. The judge Lord Coleridge commuted the punishment of murder for six months imprisonment on the plea that the accused acted under the “Stress of Necessity”.

(ii) The point of “Self Defense” has been taken into consideration while deciding the case of “R vs. Smith”. In this case the accused used weapon for his Self Defense. Judge made a point in his judgment that the accused must satisfy jury before taking plea of self-defense as Necessity that the danger was imminent to his life and that he had no other means of resistance or escape available with him\(^{30}\).

Both the examples cited above show that in case of exceptional circumstances the accused has a right to take a step in order to save his life and protect his property. In this connection, if an accused takes any step which is beyond precinct of law, his actions to save his life and protect his property would be justified. Law also presumes that there is absence of ‘mensrea’ as regards the cases of ‘self defense’\(^{31}\).

\(^{29}\) (1884) 14 QBD 273
\(^{30}\) (1837) S. C. & p160.
\(^{31}\) Ibid.
In Pakistan, the ‘Easement Act, 1882’, Section 4 deals with the enjoyment of use of another’s land, and Section 13 pertains to the Necessity and Quasi Necessity\(^\text{32}\).

The ‘Penal Codes’ of different countries have also made provisions for the Law of Necessity. Section 94 of the English Penal Code also pertains to the same. As per this Section, if someone has apprehension of instant death, his action in response to this shall not constitute offence. Pakistan Penal Code has also provision for the Law of Necessity Sections 96 to 106 pertain to the right of a person’s private defense. Section 96 says that if an act is done in the exercise of a private defense, the same shall not constitute an offence.

The right of private defense is based on two principles. One, it is the right of every one to protect his property and save his life. Two, the right of private defense must be used with prudence. The injury caused in the private defense should not be out of proportion to the injury as threatened by the defendant\(^\text{33}\).

The right of private defense is not available if one starts settling the previous scores. It can be exercised only where one is struck against immediate Necessity to avoid forthcoming danger. The right of private defense as provided by Law is of ‘defense’ and not of ‘retaliation\(^\text{34}\).

The law of Necessity is applied both for the individual and collective cases. In an individual case, this law is applied for the protection of property and to save life. Collectively, it is applied for the protection of a state during political crisis. The law of Necessity supersedes all laws of a state; because, it is more important to save a country from getting dismantled instead of complying with the Constitutional Law. Safety of people is supreme law. Owing to the Necessity of safety of people, the organs of state are bound to take all possible measures, even in departure from the distinct provisions of the Constitution. The law of Necessity is subject to certain restrictions. The same are enumerated here under;

- an imperative and inevitable Necessity or exceptional circumstances;
- no other remedy to apply;


c. The measure taken must be proportionate to the necessity; it must be of a temporary character limited to the duration of the exceptional.

The state may take possession of a property of a citizen where circumstances warrant applicability of maxim “salus populi suprema lex” without making payment of compensation and it has been held in the case of ‘Attorney General vs. De Keyser’s Royal hotel’\(^{35}\).

Personal freedom a citizen may also be seized by the government in the interest of public welfare and state integrity. This has been held in the cases of Liversidge vs. Anderson\(^ {36}\).

The constitution of the United States of America guarantees fundamental rights to its citizen, i.e. one’s right to save one’s life and protect property etc. and no can snatch this right of an individual without recourse to the due process of Law. But, during Second World War, Supreme Court of the United States of America had to decide in violation of its constitution against Americans of Japanese origin residing on the West Coast. The U.S was in war against the Japanese after its attack on Pearl Harbour. Fear existed that there may be espionage and sabotage among Americans of Japanese origins, therefore, night curfew was imposed and residents on the West-Coast were segregated. These orders were challenged before the Supreme Court of the United States of America in Korematsu vs. United States\(^ {37}\), Yasusi vs. United States\(^ {38}\) and Hirabayashi vs. United States\(^ {39}\).

The Doctrine of Necessity is not only confined to the infringement of rights of an individual as when its need arises, but also, it empowers the Executive to take the role of Legislature when the same is inactive. The Supreme Court of Nigeria had to give a cushion to the Doctrine of Necessity in ‘Lakanmi vs. the Attorney general’\(^ {40}\). In this case, the civilian ministers handed over matters of Government to the Military on 16\(^{th}\) January, 1966. The Supreme Court held in its judgment that Constitutions are notexpected to give provisions for all emergent situations. The cabinet becomes non-

\(^{36}\) 1920 A.C.508.
\(^{37}\) 1942 A.C. 206
\(^{38}\) (1944) 323 U.S. 214
\(^{39}\) (1943) 320 U.S. 81 & 115.
existent in the absence of a Prime minister; therefore, the Federal Ministers had to hand over power to the Armed Forces. The action of Federal Ministers to hand over power to the Military was by virtue of State necessity\textsuperscript{41}.

The Doctrine of Necessity is a panacea for the Head of States to exercise vast powers during emergency when security of State is at stake. In Pakistan, the Doctrine of Necessity was for the first time applied in the case of Maulvi Tamizuddin khan which took a new dimension in a Reference by His Excellency the Governor General\textsuperscript{42}. As per facts of the case, the Governor General dismissed the Prime Minister beyond his powers. This act of the Governor General was challenged by the Speaker of the Constituent Assembly, Maulvi Tamizuddin Khan before the Chief Court of Sind. This Court termed the action of Governor General as ultra vires of the Constitution.

The Governor General challenged the judgment of Sind Chief Court in the Federal Court on the plea that the Government of India Act under which the Sind Chief Court issued a Writ had yet to seek the assent of the Governor General. The contention of the appellant was accepted.

This judgment rendered negative impact as number of laws could turn ineffective. Therefore, the Governor General had to make a Reference to the Federal Court for its opinion as how laws which in danger of getting invalid can be turned valid.

In response to the ‘Reference by His Excellency the Governor General’, Chief Justice Muhammad Munir stated in his judgment that in the situation portrayed in this reference, the Governor General has power under the Common Law of State Necessity to validate retrospectively the laws provided in the Schedule to the Emergency Powers Ordinance, 1955 and these laws would be enforceable from the date they were first brought in force.

\textbf{2.7 Hans Kelsen on the Subject of Doctrine of Necessity}


\textsuperscript{41}PLD 1979, Journal 22. P.25.  
\textsuperscript{42}PLD 1955 F.C. 435
‘General Theory of Law and State’. The followers of his group are labeled as ‘Vienna School’. His theory of ‘Revolutionary legality’ came to light in 1911 when Hans kelsen was at the age of 30 and serving as a lecturer at the University of Vienna. The excerpts from his afore-mentioned book are reproduced hereunder;

“Suppose that a group of individual attempts to seize power by force, in order to remove the legitimate government in a hitherto monarchical state, and a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the order regulates actually behave by and large in conformity with the new order, then this order is considered as a valid order."

Kelsen’s theory was non-political (apolitical), pure and positivistic. Owing to this theory, the judges accepted the legality of successful revolutions. Besides Hans kelsen, Jeremy Bentham (1748-1832) and Austin (1790-1859) were the advocates of theory of positivism. They had a strong belief in separation of law and morality. Professor H.L.A. Hart is also supporter of the theory of positivism.

Hans kelsen argued that law should be dealt as the law on specific subject is and as it ought to be and it should also be free from all variable factors e.g. sociology, politics, history and ethics. In other words, it should be ‘pure law’. As per contention of Kelsen, the knowledge of law means knowledge of ‘norms’. For him, ‘law is a primary norm, which stipulates the sanction."

According to Hans Kelsen, every legal order with whatever premise law begins, a hierarchy of ‘ought’ is traceable back to some inchoate, fundamental ‘ought’ on which the validity of all the other finally relies upon. This is the Grund norm, the initial or rudimentary or a pinnacle norm. the Grund norm need not be the same in every legal order, but a Grund norm of some kind there will always be whether, e.g., a written scripture/constitution or will of a dictator. The Grund norm can’t replace constitution, it is a postulate demanded by theory that the constitution given by dictator must be obeyed in letter and spirit. Therefore, the Grund norm is usually adapted to the existing situation of a country. Only the Grund norm has power to

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validate constitution. Besides this, the Grund norm is also empowered to validate the other norms deriving from it. In United Kingdom, for example, the whole legal order can be traced back to the conjecture that the legislation made by the Crown in Parliament and judicial precedents must be treated as ‘Law’. According to Kelsen, every rule of law derives its validity from some other rule standing behind it.

It is needless to mention here that the Grund norm has no rule which provides a source to it. The existence of other rules of law may lose their existence if they lack any support. A rule is valid, not because it is, or is likely to be, obeyed by those to whom it is addressed, but by virtue of another rule imparting validity to it. The validity of each individual rule does not depend on the effectiveness of the legal order as a whole, or in case it is by and large effective.

This point is worthy to be taken into account that the Grund norm should secure a minimum degree of effectiveness. It means that there must exist certain number of people who are ready to abide by a Grund norm without any demure. A Grund norm will fail to form the basis of a legal order if it loses a minimum support required for its existence. This situation leads to ‘revolution’ in the eye of law. Hans Kelsen also dilates in his book ‘General theory of law and state’ regarding the subject of ‘change of the Basic Norm’. In this regard, he says that,

“It is just the phenomenon of revolution which clearly shows the significance of the basic norm. For instance, that a group of individuals attempts to seize power by force, in order to remove the legitimate government in a hitherto monarchic state, and to introduce a republican form of government, if they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with new order, then this order is considered as a valid order. It is now according to this order that the actual behavior of individuals is interpreted as legal or illegal. It means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, a norm endowing the revolutionary with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the
crime of treason, and this according to the old monarchic constitution and its specific basic norm\(^{46}\).

Propounding on the theory of Hans Kelsen, following legal inferences may be drawn;

1. If a revolution stands successful, it is adjudged in relation to its success and not with reference to the annulled constitution.

2. With whatever mode a change has been brought about, either it is through violence, non-violent coup d’etat or by a person in public prominence, will be considered a revolution in the eyes of law if it abrogates constitution and such invalidation of constitution is effective.

3. An abrupt political change (not covered by constitution) that disrupts constitution and national legal order is called as revolution.

4. Revolution has a legal effect. It destroys the old constitution and validates the national legal order.

5. Revolution attain

6. Law creating fact if a person who has assumed power under a political change can successfully make the people conform to the order of new regime.

7. Legality of the laws enacted later is to be seen with reference to new order instead of revoked constitution.

8. According to Kelsen, the only condition for legality of revolution is effectiveness of the political change.

9. Theory of Kelsen has gained strength from fact that according to international law a victorious revolution is an internationally recognized mode of changing a constitution.

2.8 Conclusion

It may be concluded from the above narrated discourse that the Necessity plays pivotal role in our lives. It existed and it will exist in the future to come. It is in the instincts of human beings. An act which otherwise is illegal is allowed or made legal under the Doctrine of Necessity. The English Courts have decided on the basis of this concept. Therefore, it has no denial. The religion of Islam also accommodates the same in its legal paradigm. Pakistan was the first country where the Superior Court used this doctrine to settle a case of political expediency in order to accommodate an unconditional step taken by a bureaucrat Governor General Ghulam Muhammad. It is an unfortunate to say that it set a course for the future supreme judiciary to accommodate the military rulers.
CHAPTER 3

LAW OF NECESSITY AND JUSTIFICATION OF MARTIAL LAWS IN PAKISTAN

Martial law means a system of military government which abrogates constitution and takes control of all affairs of government in its hands in the name of integrity of a country and security of people. Imposition of Martial law is a phenomenon in the developing countries of Asia and Africa. Pakistan is also no exception to it. In this chapter, it has been analyzed as what circumstances led to the imposition of martial law in Pakistan and how the military governments were granted legal sanctity by introducing the concept of doctrine of Necessity.

According to Encyclopedia Britannica, martial law is imposed in a situation when a country is facing aggression from an external enemy, struck with internal disorder and civil machinery breaks down. Such situation invites army of a country to take control of the affairs of a civil government.

Imposition of martial law brings legal and political repercussions. Basic human rights are suspended and justice is dispensed by the military courts or through summary trials.\(^1\)

The constitution of United States does not mention martial law. But, there are certain provisions which permit militia to intervene if political crises deepen. Writs of habeas corpus may also be suspended temporarily in order to keep intact the national solidarity.

Martial law has legal justification if there is a precarious situation against public order, tranquility and peace. This situation invites a military dictator to replace a civil government. During such political crises, award of punishments by military tribunals under martial law regime is considered legal.\(^2\)

British Jurist Sir Frederick Pollock has mentioned martial law with reference to the interests of common wealth. In his opinion, if common wealth is struck with a war-like situation, the laws of martial law may be adopted according to “Doctrine of

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\(^1\)Encyclopedia Britannica, Micropedia, Vol. VI, 15\(^{th}\) Ed, p653.

\(^2\)New Age Encyclopedia, Vol, 18, 7\(^{th}\) Ed,p315
Necessity”. The civil courts cannot exercise a right to interfere the judgments delivered by the tribunals established by the military authorities. No remedial action is allowed to be taken against the misuse of powers by the military authorities. He however is of opinion that international law and laws applicable during war may regulate martial laws³.

Martial law takes different forms. In one form, constitution is revoked, orders are proclaimed by martial law and affairs of government are run. In other form, martial law is imposed in a specific area. The martial laws are preferred as compared to the civil laws. In 1953, martial law was imposed in Lahore and civil laws were suspended in this area only.

In martial law, generally the powers lie with military authority which is called as Chief Martial Law Administrator. Sometimes, the Chief Martial Law Administrator can be a civilian also instead of military person. Zulfiqar Ali Bhutto served as Chief Martial Law Administrator of Pakistan from 20th December, 1971 to 20th April, 1972. It is also likely that President of a country may be a civilian whose powers are enjoyed by a military chief martial law administrator. When General Mohammad Zia-ul- Haq imposed martial law in 1977, Fazal Elahi Chaudhary was allowed to serve as President of Pakistan till September, 1978. After his resignation, General Zia chief martial law administrator held office of the President of Pakistan⁴.

Under Martial Law, a military dictator is chief martial law administrator who serves as the ultimate source of all laws. He enjoys complete control on legal and administrative matters. These powers are either enjoyed by himself or by his appointed deputies. The remaining civil machinery works under subordination of chief martial law administrator. The martial law government treats it as mutiny and sedition if someone disobeys its orders. Disobey to the martial laws is treated with severe punishments.

It is generally believed that the Martial law is imposed to overcome crises by creating an atmosphere of harassment. The martial laws also help a military

³Encyclopedia Britannica, p 34.
government in catering stability. Personal stability in a government is of prime importance to a dictator instead of the interest of nation.

First regular martial law in the sub-continent was imposed in 1919 after the Jalianwala incident in Amritsar. During this martial law, innumerable cruelties were perpetrated on the people of Punjab province\(^5\).

After the establishment of Pakistan, first martial law was proclaimed in Lahore in 1953 when due to *Khatam-en Nabuwat* movement the civil machinery had broken down and the Punjab government had failed to maintain the supremacy of law in its province\(^6\).

### 3.1 Military Intervention in Different Parts of the World

Military intervention in developing countries has become a routine matter. The reason may be that the army in these countries is organized on the political pattern. In Pakistan, the military commander- in-chief Ayub Khan had been taking interest in the affairs of government before formally taking its control.

The army has successfully controlled affairs of a civil government in countries such as Burma, Cambodia, Indonesia, Pakistan, Laos, South Korea, South Vietnam, Thailand and Turkey.

The situation of the continent of Africa is not different from the continent of Asia. The army enjoyed massive powers in countries such as Uganda, Nigeria, Burundi, Libya, Ghana, Egypt and Algiers.

Latin America has special significance as regards military revolution. There are countries like Argentina, Bolivia, Brazil, Dominican Republic, Ecuador, El Salvador, Haiti, Honduras, Guatemala, Nicaragua, Panama, Paraguay and Peru where military intervention in the affairs of civil government is routine business. Even the continent of Europe has not been safe from the military intervention. The military governments remained in countries like Greece and Portugal\(^7\). Out of twenty eight

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states which sought independence during 1917 to 1955, thirteen states had to face military intervention.

During the years 1950-1960, many instances of civil-military relation were found in the continents of Asia, Africa and Middle East⁸.

As regards military intervention in the third world countries, scholars have different opinions. Some say that military intervention helps in economic and national development. Besides this, it also helps in the achievement of national solidarity⁹. Some scholars object the direct and indirect involvement of military in the affairs of civil government. In Latin America, the military intervention has been considered as a stumbling block in national growth and way to democracy¹⁰.

During the years 1960-1970, military intervention in politics of seventy seven countries of third world has not been considered proper for the economic change. The military governments did not do different as compared to the civil governments¹¹.

The countries which have less per capita income embrace military revolution in their countries. Poverty and backwardness of people invite the military dictators. The political analysts are agreed on a point that the countries where army took reins of power in their hands had great resemblance in their political culture and socio-economic structure. These states are by and large poor and under developed¹².

Some researchers are of opinion that intervention of army in affairs of civil government is due to their innate desire to run affairs of the civil governments. It is also said that repeated military intervention is also due to lack of political wisdom of people¹³.

Civil war, political instability or emergent situation in a country may give justification for military to intervene or take full control of the affairs of a civil government. There are countless examples of such intervention in the third world

countries. In some situations, military does not take over a civil government but intervenes only to assist a civil government in its smooth functioning and restore law and order. The army performs such functions not only in developing countries but also the developed countries. During the decade of sixties in the United States, national guards helped civil government for restoration of civil rights and control demonstrations of public against war. Help of military was also sought in France and Great Britain to control such situation.

Sometimes, army instead of direct intervention takes an indirect control of a civil government which is otherwise lean. This kind of a civil government heavily depends upon military for its existence. Some politicians after taking control of government keep looking for cooperation from military for their existence. In Pakistan, Ghulam Mohammad and Sikander Mirza had to depend on the civil service and the army for their survival.

S.E. Finer has mentioned following four different forms of military’s political intervention;

1. through blackmailing
2. through involvement
3. Overthrow of civil governments
4. Taking direct control of a civil government

According to Finer, in first two forms, military helps a civil government in a clandestine manner for its survival. In the third form, military authorities change a civil government into another so as to avoid the risk of revolution. In the fourth form, military itself takes control of the affairs a civil government in order to control topsy-turvy in a country. This method is frequently practiced in the new borne states. In this way, military intervention has become a force. The military also intervenes in the newly independent states because the majority of people in these countries are

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illiterate and disorganized\textsuperscript{16}. They lack enough political wisdom to comment on the pros and cons of military dictatorship.

After taking control of government, the military governments usually pledge to revive civil government. In order to prolong its stay in the government, a new political structure is formed. The purpose of which is to give constitutional protection to the military government. According to new arrangements, participation of people in the political activities is allowed to certain extent. It is ensured that people do not make their full involvement in the politics. The whole political system is run and controlled by the military dictators.

The military government forms a political party in order to establish a contact with the people. The other political parties are either completely banned or they have to face severe restrictions. The military dictators raised slogan of nationalism or advertised program of socialism in order to give stability to their government. The slogan of Arab nationalism was raised in Egypt, Iraq, Libya, Syria, Sudan and Algiers. Generally, social and economic changes of immediate nature are brought in vogue. The army introduced positive changes in Indonesia in 1965, Brazil in 1964 and Peru in 1969. The actual advantage of introducing socialist economy is enjoyed by the military dictators in the form of prolonged stay in government and pleasure of exercising powers\textsuperscript{17}.

The military dictatorship promotes centralization in the administration of country. In Congo, military dictator reduced number of provinces to twelve so as to ensure effective control of center. General Ironsi in Nigeria introduced unitary form of government. The civil service co-operates military in transforming political process into administrative process. The whole process of political decision making is caught a prey to severe centralization. Military dictator enjoys status of a governor of a colony during capitalistic period. Civil-military bureaucracy monopolizes the whole process of decision making. Due to mental cohesion both the institutions keep extending cooperation to each other\textsuperscript{18}.

\textsuperscript{17} Sarwar, Mohammad, \textit{Taqabli wa Taraqiyati Siyasat}, Ilmi Kitab Khana, 1990, Lahore. p 177.
It has been observed that the military governments usually lay greater emphasis on the economic development. The gigantic projects are started in haste but they end in fiasco due to limited political support. The military government in Ghana made tall claims regarding economic development but they failed to keep their words. Economic resources are diverted to the military men to cater them abundant facilities\(^9\). The military personnel are generally appointed on the important posts of civil service during the military governments. This increases the involvement of military in the civil services. In Ghana and Egypt military governments installed military men on attractive posts of civil service. Pakistan is no different than other countries where military usually takes over the affairs of civil governments. The retired military personnel enjoy important posts of civil service in Pakistan.

The military governments fail to establish any system on permanent basis. They have to face an important stumbling block that they have an unrepresentative status. Very soon, the military leaders feel that they would fail to run affairs of government unless they are assisted by civil bureaucracy. Therefore, they have to make a silent agreement with the bureaucracy.

The internal problems of military and political problems of country force military leaders to transfer power to civil government or introduce certain changes to make their government look like a civil government.

### 3.2 Military intervention in Pakistan and Kelsen’s Theory

Keeping in view the British military traditions, civil government had precedence over military in Pakistan. Quaid-i-Azam, the founder of Pakistan, himself had defined a specific role of military to defend geographical borders of country. The military was advised to intervene only when situation arose to help civil government in order to maintain law and order in country\(^20\). When General Ayub Khan was installed at the post of commander-in-chief in 1951, he addressed to his military men in the following words.


“When I ask you to avoid from interfering in the politics then it does not mean desistance of interest from affairs of country. As a citizen of Pakistan, you should take interest in the affairs of a country you belong to. You should desist from practical participation in the party politics and advertisement of specific ideology."20"

The army should keep itself away from civil machinery. The training, professional skill and military affairs are disturbed due to its interference in the affairs of civil government. According to Ayub Khan, it was Governor General Ghulam Muhammad who himself had asked him in 1954 to take over the affairs of civil government. But, he refused to do so21. This statement of Ayub Khan could not be corroborated from any other source. Instability of civil governments, lack of leadership/political parties and strength of military as an organization led her step into the field of politics.

Pakistan is one of those countries of the third world where army often intrudes and imposes martial laws. In eleven years after the independence of Pakistan in 1947, first martial law was clamped in 1958. Five martial laws have been imposed so far in Pakistan by army during the period mentioned in parenthesis (1958-1968, 1969-1971, 1977-1985, 2000-2008). In these years, army governed the country herself and controlled the civil governments established beyond the periods mentioned afore.

In Pakistan, army has intervened due to debilitating economy, disorganization of civil political institutions and strength of military as a disciplined organization.

According to Janowitz, army became civil keeping in view the specific circumstances of Pakistan22. One of the causes of political instability in Pakistan is also due to lack of strong political parties. Muslim league although became a movement for achievement of Pakistan but afterwards it failed to serve as an organized political party. The reason for its failure was that the provinces (Utter Pradesh, Bihar and Bombay) where Muslim league was organized became part of

20 Fazal Muqeem Khan, The Story of Pakistan Army, p 178.
22 Janowitz, Moris, The Military in the Political Development of New Nations, Phoenix
India after partition. Besides this, leaders of Muslim league had not enough courage to fight against the decisions of bureaucracy and governor general\textsuperscript{23}.

“The political personalities in Pakistan for the sake of lust of power endeavor their best to stay in governments and keep changing their loyalties. They are without any ideology but they remain prominent on account of their wealth and influence\textsuperscript{24}.”

The opposition plays a pivotal role in running the affairs of the democratic institutions. The constructive criticism of the opposition strengthens the democratic values in a country. But it is a lamentable fact that the political parties in government generally discourage the opposition parties\textsuperscript{25}.

Pakistan follows the theory of Huntington, according to which the Army intervenes in order to save economic and political institutions. In the absence of strong political institutions the political groups confront each other. People change their political affiliations. The military dictatorship destroys the status of the political institutions\textsuperscript{26}.

When the political leaders and civil servants failed to give any leadership, the army played a role of shadow cabinet. The proverb ‘when nothing else is turned up clubs are trumps’ may be applicable in such situations. In order to make democratic process successful and strengthen the institutions and traditions, the general elections should be held continuously. The countries where the political system is in order, the election are held regularly. People repose confidence in their representatives or reject them and bring the others in power. The candidates for the constituent assemblies contact the people of their constituencies and get election on the basis of their votes. From 1947 to 1958 there was no election on the national scale. The politicians kept delaying the elections on one pretext or the other. From 1958 till 1962 there were two elections. In 1970, however, there were direct elections which led to the debacle of the East Pakistan\textsuperscript{27}. Pakistan Peoples’ Party and Pakistan National Alliance didn’t

\begin{itemize}
\item \textsuperscript{24} Callard, Keith, \textit{Pakistan, A Political Study}, George Allen and Unwin Ltd, London, 1957. p 67
\item \textsuperscript{25} Khan, Khan Liaqat Ali, \textit{Pakistan: Heart of Asia}, Cambridge University Press, 1950, p 2.
\item \textsuperscript{26} S.P. Huntington, \textit{Political Order in Changing Societies}, New Heaven, London: Yale University Press, 1968, p 238-239.
\item \textsuperscript{27} Safdar Mahmood, \textit{Pakistan Political Roots and Developments}, Lahore, Vangurad Publishers, 1990, p 236.
\end{itemize}
agree on the results of the elections of 1977. General Zia-ul-Haq took advantage of the political chaos and imposed Martial Law. This Martial Law halted the democratic process. The year of 1985 saw the holding of elections on the non-party basis. However, in 1988, the elections were held and a political government was installed. The democratic process as again halted in Oct, 1999 when the General Pervez Musharraf imposed Martial Law. In 2008, elected political government came to power. In 2013, another political government has come to power.

The affairs of defense also played pivotal role for the intervention of military in the political scenario. During the initial years of Pakistan, the country had no defense industry. There was complete dependence on the foreign aid. The fear of Indian hegemony, issue of Kashmir and geographical distance between East Pakistan and West Pakistan created serious defence and political problems. Such situation led the army to get central position in the decision making.

3.3 First Martial Law 7th October, 1958 to 24th March, 1969

Pakistan came into being on 14th August, 1947. The government of India Act, 1935 was made as provisional constitution of the country with few amendments. It introduced the parliamentary form of government in Pakistan. Efforts for the constitution making also initiated. The first constituent assembly in 1946 was elected through in-direct elections. This assembly started working on constitution making in 1947. The work on this project continued till 1954. But, seven years project failed to prepare a constitution for country. The country was hit by the political uncertainty. Taking advantage of such situation, governor general Ghulam Muhammad dissolved the constituent assembly on 24th Oct, 1954. The reason enunciated was that the assembly had lost the confidence of people. The second constituent assembly started on 7th July, 1955. This constituent assembly passed the country’s first constitution on 29th Feb, 1956. On 23rd March, 1956, this constitution was proclaimed in the country. The preparation for election under the 1956 constitution was on way when the President Sikander Mirza abrogated the constitution and proclaimed Martial Law on

\[28\text{ Kukreja, Veena, p 62}\]
7th Oct, 1958. The central and provincial legislative assemblies were dissolved and the political parties and their leaders were banned\textsuperscript{29}.

From 1956 to 1958, the political upheavals were on the rise. The military came to help the civil administration on several occasions in order to maintain law and order, peace and stability. The economic instability prevailed. There was a great divide between poor and rich. The middle class was extinct. The military had started taking interest in the affairs of the civil government. The army came to help to overcome the problems such as Ahmedia troubles in 1953, Karachi upheavals in 1957 and the East Bengal topsy-turvy in 1952 and 1958.

The political uncertainty left bad impact on the economy of the country. The food shortage became rampant. The foreign exchange depleted. But the politicians of the country did nothing to overcome such a situation. Ayub Khan wrote in his book ‘Friends Not Masters’;

“In the middle of 1958, country faced worse economic crisis. Massive expenditure was hallmark of the time. The expenditure was high as compared to the earnings foreign exchange. The reserves of foreign exchange depleted to the level of 42 crores as every month 3 to 4 crores were being spent without frugality. If this situation continued for another 10 months, our currency would have lost its value. It was possible that the monetary system and banking would have destroyed\textsuperscript{30}.”

In the last week of September, 1958, the army decided to remove the civil administration. The Commander-in-Chief ordered the Chief of General Staff to plan the takeover of the civil administration. This plan was to be executed in the middle of Oct, 1958. But, keeping in view the fast changing political situation of the country, it was decided to take over the affairs of the civil administration before time\textsuperscript{31}. After the proclamation of Martial Law, Ayub Khan said that “it is always the responsibility of the Army to look after the rights of the people. I asked the President whether he is willing to take any step in this direction. It is responsibility of President to bring any change. God forbids if you fail to bring any change then we will bring change in the

\textsuperscript{30} Khan, Ayub, Translated by Ghulam Abbas, \textit{Jis Rizq Se Aati Ho Parwaaz Mein Kotahi} (Than to live on a prey that clogs thy wings in flight), Oxford University Press, Lahore, 1977, p 95
\textsuperscript{31} Khan, Fazl-e-Moqueem, \textit{The Story of Pakistan Army}, p 194.
circumstances\textsuperscript{32}.” Keeping in view this situation, the President Sikander Mirza was willing for a military to take over the affairs of the civil administration. The army was sent on the important posts.

General Mohammad Ayub Khan installed himself as the Supreme Commander, Administrator of Martial Law and Prime Minister. On 24\textsuperscript{th} Oct, 1958, General Ayub Khan formed his twelve members’ cabinet including three Army Generals. Despite the proclamation of Martial Law, Sikander Mirza was the President of Pakistan. On 8\textsuperscript{th} Oct, 1958, General Mohammad Ayub Khan revealed in a Press conference regarding this arrangement, ‘under the new government, I and Sikander Mirza discuss a policy and then I execute it.’

The revolution of 1958 proves that how apolitical military seized the civil government by and by. It happened only as the politicians had failed to run the affairs of the government and also could not run the affairs of the democratic institutions. The army which had a tradition of keeping itself aloof from the politics had to intervene. After the in dependence, the army remained subservient to the civil government and helped it in the maintenance of law and order. Gradually, the military attained the integral status in decision making\textsuperscript{33}.

Failure of the civil administration proved that the politicians were devoid of the political machinery required for the economic development, political prestige and stability. As soon as the politicians entangled in the regional issues, the bureaucracy and military came to know that the politicians cannot work without the aid of police and military\textsuperscript{34}.

Ayub Khan introduced two laws in 1959 so as to eradicate malpractices of the politicians.

Public offices (disqualification) order, 21\textsuperscript{st} March, 1959\textsuperscript{35}


\textsuperscript{33} Rizvi, Hassan Askari, p 67.


\textsuperscript{35} Shahab, Qudrat-ul-Ilah, \textit{Shahhab Nama} (this is an autobiography of the writer Mr. Shahab who held important bureaucratic position during the reign of Ayub Khan). Lahore, Sangemeel Publications, 1992, p 867.
Elective bodies (disqualification) order, 7th August, 1959

As per above laws, as many as 5000 to 6000 politicians were banned from taking part into politics of Pakistan. The ministers, deputy ministers and parliamentary secretaries were served with notices under the above enactments. Ayub Khan also banned the political parties. Nonetheless, he had to announce that if the National Assembly allows removal of ban from the political parties, then it will have to frame new code of ethics. However, by removing the ban from political parties, it is likely that country might catch topsy-turvy again.

It is indeed interesting to note that in Ayub Khan’s opinion the political parties create disturbance in country. However, on the recommendations of the NA, political parties were allowed to work.

In order to attract support of the public, general Mohammad Ayub Khan, like other military governments also took certain steps. The Martial Law government established 30 commissions in its initial years. On the basis of recommendations of these commissions, many reforms were introduced in the fields such as taxes, family, land, labor and monetary policies etc.

3.4 Second Martial Law 25th March, 1969 to 20th April, 1972

General Ayub Khan ran his government in Pakistan under the presidential form from 1958 to 1969. The political system of Pakistan got strength from economic and industrial progress with the cooperation of military and bureaucracy. Certain incident took place during the period from Oct, 1968 to March, 1969 which gave a rise to the mass movement against political system and government of Ayub Khan. Political crises from 1968-1969 were constitutional, religious and emotional. There

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36 This law was applicable only to the politicians. If he was proved guilty then he was disqualified to hold any political position for 15 years. Qudrat-ul-llah shahab, Shahhab Nama (this is an autobiography of the writer Mr. Shahab who held important bureaucratic position during the reign of Ayub Khan). Lahore, Sangemeel Publications, 1992, P.867. If guilt was proved under this law then he was banned for 06 years to participate in the politics.
38 Ayub Khan, Speeches and Statements, Vol.6, p 152
39 Daily Nawa-i-Waqt, Lahore, 7th April, 1962.
40 Daily Nawa-i-Waqt, Lahore, 7th April, 1962.
41 Daily Nawa-i-Waqt, Lahore, 7th April, 1962.
were certain other issues which it inherited. President had all mighty powers under the Constitution of 1962. He introduced indirect system of election so as to keep itself away from the opinion a common man. Electoral College was formed of 80,000 basic democrats. The Electoral College was responsible to elect members of the national assembly and President. This arrangement of Ayub Khan was against the spirit of democratic values. President Ayub seized more powers under the emergency imposed during the September 1965, when India and Pakistan went into a war. This emergency was not lifted even after the war ended.

After the war of 1965, the political gap widened between both the East Pakistan and West Pakistan. Earlier Bengalis clamored that the center didn’t give them their due rights. The Awami League gave its own six point agenda for provincial autonomy. Ayub Khan tried to address their issues but could not appease them. The leaders of the East Pakistan kept their propaganda against the government of the Ayub Khan.

It is true that country economically prospered during the time of Ayub Kahn but the gap between have and have not widened. Economic imbalance heightened. The rich got richer and poor got poorer. Dr. Mahboob-ul-Haq stated in 1968 that twenty families had captured 66% of industry, 80% of banks, and 70% of insurance. These facts raised sentiments against Ayub Khan.

In 1968, shortage of sugar in country, shortage of water in Karachi and rampant unemployment sprang up. The economic system of Ayub Khan was severely criticized by the politicians. Ayub Khan also had to face an allegation that his son Gohar Ayub after retirement from army had started business with his father-in-law General Habibullah and became industrialist and also participated in politics.

There was a strong opposition against Ayub Khan in the initial days of 1969. Political parties, labor unions, teachers, advocates, journalists, doctors, engineers joined in anti-Ayub movement. This movement entered in to villages crossing the

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44 Rizvi, Hassan Askari, p 149.
urban areas. However, viewing the deteriorated political situation, Ayub decided to enter into dialogues with the political parties. In Feb, 1969, a round table conference was called in which PPP and NAP of Bhashani group didn’t join. In March, 1969, although the dialogues were successful, yet they failed to work out\textsuperscript{46}.

Ayub tendered resignation on account of public pressure. The constitution was abrogated. In this way, the land of Pakistan again once again turned to be a constitution-less land after twenty two years\textsuperscript{47}. The government was handed over to another military man named as General Mohammad Agha Yahya Khan by General Ayub Khan on 255\textsuperscript{th} Match, 1969\textsuperscript{48}.

Yahya Khan imposed Martial Law in country after attaining the control of government. The Constitution of 1962 was abrogated and central and provincial assemblies were once again dissolved. The ministers and governors of all provinces were sacked. He himself installed as the Supreme Commander of the military forces and the Chief Martial Law Administrator\textsuperscript{49}. He explained that Martial Law was clamped in country so as to keep its integrity intact\textsuperscript{50}. As regards the previous Martial Law, in the Yahya’s Martial Law, the courts kept working in a routine manner. However, they were barred to adjudicate on matters pertaining to the fundamental rights. The courts were also not allowed to hear any appeal against military court’s judgment. Further, the courts had no power to reject the orders tendered by the courts of Martial law. On 30\textsuperscript{th} March, 1970 legal frame work order was issued on the basis of which elections were to be held.

The general election was held in Dec. 1970 which enabled PPP to win 82 seats from138 West Pakistan. Awami League won 160 seats of the 169 seats of the East Pakistan. But, both the parties failed to get even one seat from the part\textsuperscript{51}.

After the elections, PPP raised a question of joining hands with the other party in running government. He declared his intention that he wanted his government in


\textsuperscript{49} Daily Nawa-i-Waqt, Lahore, 26\textsuperscript{th} March, 1969.

\textsuperscript{50} Daily Imroze, Lahore, 26\textsuperscript{th} March, 1969.

\textsuperscript{51} Daily Nawa-i-Waqt, 5th Jan, 1971.
the center and it is difficult to ignore him. In response to Bhutto’s stance, Awami League also took tough stance. The talks which were held between Mujeeb and Bhutto on 12th Jan, 1971 ended in fiasco.

In view of these circumstances, Yahya decided to carry out military operation in Dacca. Meanwhile, the activities of separatists were on rise. He banned all political activities. India started intervening in the affairs of East Pakistan and finally entered its armies in the East Pakistan on 22nd November, 1971. This war of India and Pakistan ended on 16th Dec, 1971. This is how the second Martial Law ended with the gifts of dissolution of Pakistan and bloodshed. The East Pakistan ushered into Bangladesh as a separate state.

On 30th Dec, 1971, Governor Punjab Malik Ghulam Mustafa Khar as MLA gave orders to arrest former MNA Malik Ghulam Jillani under the Martial Law Regulations no.78. Before this, orders were also issued as per Defense of Pakistan Rules, 1971 against Malik Ghulam Jilani. Asima Jilani filed a petition of habeas corpus in the Lahore High Court on 15th Jan, 1972. But, the Judge of the High Court Mr. Justice S. Rehman rejected this petition. He referred the already decided matter in the Dosso vs. State and explained that the Removal of Doubts Order No.3 of 1969 is an effective law and still holds waters. Owing to this the High Court has no jurisdiction as per afore-referred Order Clause No.2. Meanwhile, the chief editor of Daily Dawn Mr. Altaf Hussain Gohar was arrested without warrant on 4th and 5th Feb, 1972 at midnight under the Martial Law Administrator Zone-D, Martial Law Regulation No.78. Mrs. Zarin Gohar approached High Court Sindh on 18th Feb, 1972 against the arrest of her husband Mr. Altaf Husain Gohar. But, the Sindh HC announced the same verdict as already given in the case of Malik Ghulam Jillani. It was held that the courts do not have jurisdiction against the Military courts. Hence Mrs. Zarina’s application was rejected.

Mrs. Zarin and Asima Jillani filed appeals against the judgments of High Courts in the Supreme Courts for the release their husband and father respectively. The Supreme Court had to decide whether the High Courts have jurisdiction to decide

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54 PLD 1972 SC 139 p 157.
case against the Martial Law Regulation No.78, 1971. Further the SC also had to decide whether the principle formed in the case State vs. Dosso (PLD 1958 SC 533) was true interpretation of the Law⁵⁵.

Chief Justice Hamood-ur-Rehman while talking about the events of March, 1969 stated “there is no doubt that Constitution of 1962 didn’t empower General Ayub Khan to hand over affairs of government another. As per Article 12 of the Constitution, President may tender his resignation by presenting it to Speaker of the NA. Further, as per Article 16 of the afore-referred Constitution, if the office of the President falls vacant, Speaker of NA performs the duties as President of Pakistan temporarily. He is bound to conduct elections within 90 days and restore the office of the President. If the integrity of country is at stake and economic life is endangered and provincial government’ can’t control the situation, then President may invoke emergency as per Article 30 of the Constitution of 1962. The President may impose Martial Law if the situation is out of control of the civil administration. But, this is beyond understanding under what power a military man may impose Martial Law in country⁵⁶.

On 20th April, 1972, the Supreme Court gave its judgment holding that Yahya Khan was a usurper. It was unconstitutional and illegal to hold the positions as CMLA and President of Pakistan. All administrative and legal steps taken by the Yahya’s illegal and unconstitutional Government is not valid. However, protection was granted to the steps taken for the welfare of people and smooth administration of country. President’s Order No.3 of 1969 was also declared wrong. Martial Law’s Order No. 78 of 1971 as per which both of the above were prisoned was declared illegal. These orders for imprisonment were not accepted under the “Doctrine of Necessity”. The Supreme Court orders both the imprisoned to be release if not required to be arrested in another case⁵⁷.

It was also stated that with the promulgation of Martial Law, the civil law and obligations of the civil authorities don’t stop. If this argument is valid that the objective of the Martial Law is to destroy legal system, then the armed forces don’t help in suppressing the disorder and lawlessness. Rather, it is true that the whole legal

⁵⁵ PLD 1958 SC 533
⁵⁶ Ibid. p 139-40.
⁵⁷ Ibid. p185.
system is put at stake by military and hence engenders further uncertainty. The justification for imposition of Martial Law rendered by Yahya Khan is doubtful; this is what the SC observed. The proclamation for the imposition of Martial Law should have come from the civil government. Only in this way, a military Commander is authorized to take any step for the imposition of Martial Law.

It was also stated in the judgment that Malik Ghulam Jillani was arrested under the Defense of Pakistan Rules and his house-arrest was changed into the order of Martial Law. The house-arrest also has no legal justification. Whatever was done as per section 78 of the Martial Law Regulations could be done as per Defense of Pakistan Rules. The objective to change this order into section 78 of Martial Law was to deprive the courts of their jurisdiction.

The Supreme Court abrogated its Order tendered in the case of Dosso vs. State, because, it didn’t lay foundation for a proper law. While announcing the judgment of the case of Dosso vs. State, basic theory of ‘legal positivism’ was accepted, because, this principle lays foundation of modern legal science. Besides this, a sudden change in the constitution no matter how temporary it is attains a status of revolution if not contradicted. The sovereignty of State is effective if international law extends recognition to a state.\(^58\)

The observations of Chief Justice in the case of Dosso vs. State are not true that “if area and people are same then as per international law the revolutionary government and new state would be considered as valid. Its constitution would also be legally valid. It has been clarified in the book of Oppenheim on international law if there are doubts in the stability of revolutionary government then the international community may refuse to recognize the revolutionary government despite the fact that the area and people are same.

Further, theory of Kelsen has also been applied by the Chief Justice in a wrong manner. It would be exaggeration to hold that the international law recognizes this theory. So far the students of Kelsen are concerned that they are also hesitant to accept this theory.\(^59\)

\(^{58}\) Ibid. p 190
\(^{59}\) Ibid
Therefore, on the basis of above arguments the court decided that the legal principle evolved in the case of Dosso vs. State cannot be accepted and also it cannot become a good piece of law.

This judgment, however, left following impact:

i). Theory of Kelsen propounded in the case of Dosso vs. State was rejected.

ii). Martial law can neither abrogate constitution nor army can use powers in Toto.

It is also worthwhile to mention here that when this judgment was made, Yahya Khan was not in power. The country of remaining Pakistan had already approved of provisional constitution and few hours before its promulgation this judgment was announced. This is how this judgment was in favor of the incumbent government of Z.A. Bhutto. Had the Supreme Court given this judgment during the reign of Yahya Khan, it would have been considered as an audacious step. But this judgment was rendered when the Martial Law had already been abolished.

3.5 Third Martial Law 5th July, 1977 to 31st December, 1985

Zulfqar Ali Bhutto took the office of the President of Pakistan and Chief Martial Law Administrator on 20th December, 1971. Provisional constitution was promulgated after four months in April, 1972. The third constitution in country was enforced on 14th August, 1973. After the introduction of this constitution he adopted the office of the Prime Minister of Pakistan. He left the office of the President of Pakistan and Fazal Elahi Chaudhary took the office of the President of Pakistan.  

Z.A. Bhutto served as the Prime Minister of Pakistan from 20th Dec, 1971 to 4th July, 1977 for more than five years. During this period many reforms and policies were introduced in the fields of law, constitution, economy, and health. But these policies and reforms remained fruitless. It left bad impact on the performance of the government of Bhutto. There were certain other steps taken which rather reduced the graph of Bhutto’s government popularity. Bhutto nationalized the institutions such as

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Although, the Constitution of 1973 was constituted keeping in view the wishes of people. But, the rights of people and judiciary were affected due to certain changes introduced during the years 1975 and 1976. These changes discouraged people and the political parties who had supported the constitution and this polluted the environment of country democratic atmosphere.

Law and order was in disorder and worsening every day. It sent a wave of panic in the general public. The political crisis further deepened. PM Bhutto was certain of the fact that his political party PPP would defeat the other political parties in the general elections. Hence, he announced 7th Jan, 1977 for holding the general election. These were general elections after the general elections of 1970.

The President of Pakistan dissolved the Parliament at the advice of the PM on 10th Jan, 1977. Likewise, the four assemblies were also dissolved by the governors of the respective provinces. As per Article 224 clause II of the Constitution of 1973, after the dissolution of the assemblies, the elections are required to be conducted within 90 days. On 7th March, 1977 elections were announced for the National Assembly and on 7th March, 1977, elections were announced to be conducted on 10th March, 1977.

With the announcement of the general elections, nine opposition political parties formed a political unity known as ‘National Alliance’ under the leadership of Maulana Mufti Mahmood on 11th Jan, 1977. Preparations were started for the general elections. The election campaign was started with great pomp and show. On 9th March, 1977 when results for the NA appeared, the PPP had won 155 seats out of 200 seats and National Alliance had won only 36 seats. Only eight independent candidates were declared successful. Muslim League (Qayyum Group) could manage only one

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64 PLD 1977 SC 657 p 694.
The Pakistan National Alliance rejected the results of the election. It leveled the allegation of rigging on the government. The elections were considered as farce. The PNA boycotted the elections of provincial assemblies to be held on the 10th March, 1977. PNA demanded the conduct of elections under the auspices of the military. The resignations of the Bhutto as PM and Chief Election Commissioner were demanded. Country-wide protests for rigging in the general election were started on 14th March, 1977.

The government didn’t consider the demands of the PNA as unconstitutional. Overall, this situation led to the topsy-turvy political process in country. People were dismayed. By and by the political and administrative situation in country worsened. The circumstances went so bad that it became uncontrollable to restore peace, stability and law and order. It seemed that this situation would usher in dissolution of PPP government.

In order to suppress the agitation of the opposition parties, the government imposed curfew in Hyderabad, Karachi, Lahore and other important cities of country. The important leaders of PNA were arrested and cases were registered against them in the military courts. But, protests didn’t stop. It created an unending political crisis and led to the brink of civil war. In these circumstance Chief of Army Staff General Mohammad Zia-ul-Haq took advantage of the situation and on 5th July, 1977 captured the reins of government. Fazal-Elahi Chaudhary remained as the Head of the State. The Constitution was not abrogated as done in the past, but it was only suspended. General Mohammad Zia-ul-Haq promised to hold fair and free elections in country in the month of Oct, 1977.

Like the previous Martial Laws, the Martial Law Regulations were also issued. Special military courts and summary courts were established but against the decisions of these courts no appeal could arise in the other civil courts. It is also a fact that the civil courts were allowed to work as per routine.

The promise of General Zia-ul-Haq to hold elections within 90 days and hand over the matters of government to the civilian authorities could not be fulfilled. He gave dates for the general elections twice in the years of 1977 and 1979 but the elections were suspended.

He gave one after the other different reasons to postpone the elections. Finally on 12th August, 1983, he announced that the on 23rd March, 1985 the government would be handed over to the representatives of the people. But before the general elections could be held, he himself installed as the President of Pakistan for five years through a general referendum in the name of Islam. The political parties were kept out of the political process and general elections were held for NA on 25th Feb, 1985 and for the provincial assemblies on 28th Feb, 198570.

In the wake of these elections, joint session of the Parliament was held on 23rd March, 1985. In this session, General Mohammad Zia-ul-Haq took oath of the office of the President of Pakistan for the next five years. However, despite taking the oath of the office of the President of Pakistan he clung to the post of the Chief of the Army Staff. Mohammad Khan Junejo MNA took oath of the office of the Prime of Pakistan. Despite the initiation of the democratic process in country, the Martial Law was not lifted. With efforts of the Junejo government, however, the Martial Law was lifted on 30th Dec, 1985. The joint session of the Parliament was summoned in which lifting of the Martial Law from country was pronounced71. This is how the longest Martial Law in country came to an end. Emergency was lifted and fundamental rights of people were restored.

In the field of law and politics, necessity has special meanings. Necessity in special circumstances means imperative of law or process. In these circumstances anything which is otherwise illegal is declared legal and valid. It is same as murder of someone is declared valid if there is a matter pertaining to one’s life and security, a right of private defense.

In a political environment, it amounts to a situation in which integrity of country is endangered and law of country is suspended. These circumstances warrant

70 Ibid. 232-246
71 Dr. Safdar Mahmood, p 99.
‘Law of Necessity’. This law is the produce of immediate circumstances and to overcome the uncontrollable situation in a specific period.

The history is replete with certain incidents when certain steps were taken which were not in consonance with prescribed and prevailing law. But the situational requirement demanded that those illegal steps were given legal protection.

The 16th and 17th century saw many such incidents when for the protection of the Parliamentary democracy certain immediate steps were taken which were beyond the gamut of the constitution. In other words, the unconstitutional steps required the Parliamentary shield. The solution of this crisis became a problem for the politicians. Therefore, under the law of necessity keeping in view of the constitutional status of the parliament certain steps were taken which, although unconstitutional had to be given legal sanctity72.

Chitty has written in his book ‘A Treatise on the Law of the Prerogatives of the Crown’; it is only king who has prerogative to exercise powers as per which he may create law as the circumstances warrant. In this reference, he cites the example of the Charles II whose position was restored from Parliament. He also cites the example of William III whom Parliament made King in 1688. In both the situations it was imperative on the parliament to act upon as the circumstances warranted setting aside the law in force.

Maitland has mentioned in his book ‘Constitutional History of England’ some interesting references regarding constitutional history of England. What legal circumstances were created when William Prince was became King, whereas, James after dissolving the parliament left London on 11th Dec, 1688. The Prince William who was not King by then summoned the session of Assembly. He gave advice to William to call the convention of the states. On 25th Jan, 1689, it was decided in convention since King James has given up his government, William and Marry may be installed as King and Queen in his absence. When this Kingdom was accepted, the convention passed an Act as per which the convention was considered as Parliament. This parliament was term as Convention Parliament.

72 PLD 1955 FC 435 p 480.
These proceedings were carried out on the basis on ‘Doctrine of Necessity’. Because from 1688 to 1689, there was neither any King nor William III inherited any Kingdom. Therefore, legally speaking no King could summon the session of assembly. Further, this parliament had no constitutional status. Besides this, the enactment which this parliament made after 1688 was illegal. According to Chitty, these laws were given constitutional and legal protection\textsuperscript{73}.

The Doctrine of Necessity has not only been created by the western powers rather, Islam also has a room for it. It is acceptable in both the situations whether individually or collectively. Surah\textsuperscript{74} Baqra Verse No. 2, Allah says “Allah has forbidden upon you meat of dead animal, blood and pork. A person may under a necessity, without breaching code of Islam and without transgressing valid rights, he may use these banned articles. It is undoubted that Allah is kind and forgiving”.

Islamic law and books on ‘law of necessity’ such as written by Dr. Muslih-ud-din Edition 1975 and Dr. Hameed-ul-llah’s book ‘Muslim Conduct of State’ give details about usage of the things which are not allowed to be used in normal circumstances\textsuperscript{75}.

The popularity of ‘Doctrine of Necessity’ can be gauged from a fact that whenever the life of people and public peace is at stake, the law of necessity becomes a superior law to extend protection to people. According to this principle of law, a government gets some powers which apparently strike as contradictory with the prescribed law. But keeping in view of specific circumstances, due to these extraordinary powers law and general public both get protection. It saves both the society and state. The Doctrine of Necessity in such situation is valid. Before application of the doctrine of necessity, it is important to see that there is no other recourse available to restore law and order. Whatever step is taken is required in view of the situation. This step should remain intact until the house is in order. However, if the circumstances get normal, then application of law of necessity would be unfair.

\textsuperscript{74} The Holy Quran, Surah Baqra, Verse No.2.
\textsuperscript{75} Daily Jang, Karachi, 12\textsuperscript{th} November, 1977.
If law of land has become paralyzed temporarily, the doctrine of necessity may be applied\textsuperscript{76}. The law of necessity helps in countering the emergent situations which are not mentioned in a constitution and further such law cannot be predicted before the emergent situation actually arises\textsuperscript{77}. In other words, it may be said that a process which is otherwise illegal becomes lawful by virtue of the Doctrine of Necessity.

In Pakistan, the law of Necessity was first applied in ‘Reference by his Excellency the Governor General\textsuperscript{78}, and Asima Jillani vs. the Government of Punjab, which have been mentioned in the forgoing pages. The military take-over of country on 5\textsuperscript{th} July, 1977 in the case of Begum Nusrat Bhutto\textsuperscript{79} was declared legal under the Law of Necessity. The country was struck with severe political crisis and there was no other remedy available to impose Martial Law in country. But, it may also be said that the Doctrine of Necessity was applied when the rulers had their own axe to grind. The details of the Nusrat Bhutto case are given below:

The article 184(3) of the Constitution of Pakistan 1973 pertains to the fundamental rights. Relying on these constitutional rights, Begum Nusrat Bhutto filed an application wherein the arrest of Mr. Z.A. Bhutto and ten other leaders of the PPP was challenged. Further, it was also stated that the COAS had no power under the constitution to impose Martial Law. Besides this, Laws Order, Continuance in Force 1977, Martial Law Order No.12 and imposition of Martial Law under article 199 of the Constitution of Pakistan 1973 had no legal status\textsuperscript{80}.

It was stated in the application that Mr. Zulfiqar Ali Bhutto and ten other leaders of the PPP were arrested on 17\textsuperscript{th} September, 1977 and they were imprisoned in different prisons of the provinces. On 17\textsuperscript{th} September, 1977 the COAS tendered a statement in which he gave improper explanation and charged untrue allegations for the arrest of these leaders inclusive of Z.A. Bhutto. It was also stated by the COAS that these arrestees would be presented before the military tribunals and courts for the accountability of their deeds. This step against the detainees was unconstitutional and

\textsuperscript{76} Leslie Wolf Phillips, p 90.
\textsuperscript{78} Reference by His Excellency The Governor General PLD 1955.
\textsuperscript{79} PLD 1977 SC 657
illegal as it was taken to dispossess the PPP to take part in the future elections effectively which have been scheduled\textsuperscript{81} in the month of Oct, 1977. Mr. Yahya Bakhtiar adopted a contention that by violating the Constitution, Detention Orders were issued. This detention is illegal as per Articles 9, 10, 17, 25 of the Constitution of Pakistan, 1973 Part II and Chapter 1. These Sections pertain to the person’s freedom, arrest and detention. These sections of the constitution guarantee that all citizens are equals in the eyes of law. Yahya Bakhtiar further took a plea that the detainees were detained in different prisons of the country and it is difficult to have a recourse to the different High Courts for their release, therefore, the Supreme of Pakistan has power under the Article 184 of the Constitution Chapter I Part II to take cognizance of the any issue pertaining to the fundamental rights.

Mr. A.K. Brohi representing the Federation of Pakistan contended as to the legal justification of the Martial Law issuance of different regulations and orders from the President of Pakistan and the Chief Martial Law Administrator. He further contended that till 5\textsuperscript{th} July, 1977 country was being run on the basis of Constitution of Pakistan, 1973. But on this day a new legal system was devised which was superior to the Constitution in question. It may be considered as revolutionary legal justification. He further contended that in respect of Dosso Case and Asima Jillani Case\textsuperscript{82} new workable solution may be looked into\textsuperscript{83}.

Mr. Brohi said about the necessity of imposition of the 5\textsuperscript{th} July, 1977 Martial Law, the development could be divided into two stages. The first stage pertains to the detainees of this country and also their way of governing unconstitutionally and illegally. This stage ends at the imposition of the Martial Law. The second stage pertains to the preparations which brought country to the brink of civil war so that fair and free elections may be stopped and illegal and to continue his illegal position.

Mr. Brohi said that the court should take judicial notice of these events. The learned lawyer said that illegal acts of the former government or done in at its behest are the subject of different independent legal proceedings. The concerned persons would find equal sufficient opportunity to defend its case.

\textsuperscript{81} PLD 1977 SC 657 p 670
\textsuperscript{82} The Stat vs. Dosso and others PLD 1958 SC p 670.
\textsuperscript{83} PLD 1977 SC 657 p.670-71.
The Attorney General Mr. Sharif-ud-din Peerzada supported the contention of Mr. Brohi as a Law officer that the change on 5th July, 1977 is not usurpation on country rule by the COAS. Rather, in fact, its object is to remove a usurper from rule, who had illegally captured it by rigging elections on 5th March, 1977. It’s another object was to remove center and provincial assemblies which came into being in the wake of massively rigged elections because the member of these assemblies were elected through unfair and corrupt means.

Mr. Peerzada also had a contention that in the present situation Dosso case and Asima Jillani case are inapplicable, because, the circumstances which we confront today are completely different by that time. The change in the wake of military intervention was of flagrant nature in the case those two afore-referred cases. The present COAS wants to remain in power for a limited time and temporarily so that fair, free and equitable elections are held in country and democratic institutions are restored.

The Court rejected the theory of Henry Kelsen saying that it could not gain popularity. Further, this theory of law cannot be treated as a foundation of modern law. Therefore, the revolutionary circumstances in which a court has to decide the status of new legal order in the wake of a revolution. Keeping in view of it, this theory is inapplicable. Due to these reasons the theory of Kelsen is subject to severe criticism that the only standard and principle is effectiveness of political change which serves as legal justification.

The sociological and legal aspects pertaining to justice have been altogether ignored which is an important element for the acceptance and effectiveness of a legal system. The court said, “This fact may not be ignored that inclusion of element of morality in new legal system renders a moral background to it”.

It has also been stated in the judgment by the Supreme Court that in a situation where law has been declared to be in existence for a ‘temporary purposes’, the revolutionary theory of law presented by Mr. Brohi is inapplicable, because, such conduct does not amount to revolution rather deviation from the constitution. If constitution or law is suspended for a temporary period then the theory of Kelsen is

84 Ibid.
inapplicable. This situation may lead to far-reaching results which is not the object of those bringing a limited change\textsuperscript{85}.

Therefore, as per the law of necessity Martial Law of General Zia-ul-Haq was given a legal status. It was stated in the judgment that General Zia has taken over civil rule to conduct fair and free elections and in this connection he has authority to bring necessary changes and take certain steps. General Zia took benefit of this Order of the SC and prolonged his rule in country. The elections were postponed twice. The constitution was amended. In 1981, a provisional constitution was enforced. It seems that due to these measures General Zia had trespassed the limits determined by the judgment of the Supreme Court.

3.6 Fourth Martial Law Oct, 1999 to 2008

The military in Pakistan has in the past usually entered into corridors of powers whenever economy has shambled or political instability has gone beyond control. But, the fourth Martial Law was the result of the personal antagonism between Nawaz Sharif and Musharraf. The military and civil authorities were at daggers drawn\textsuperscript{86}.

The military regime this time changed its way to rule civil government. The government officials were not stopped to discharge their official obligations but they were put under the supervision and vigilance of the military officers. Pervez Musharraf didn’t assume himself the title of CMLA rather he installed himself the title of Chief Executive of Pakistan. President of Pakistan Muhammad Rafiq Tarrar continued to work as the Head of State. The Constitution of Pakistan 1973 was not abrogated rather it suspended for a time being. The work of representative body was suspended but they were not completely banned. The political bodies had to face some limitation but overall there was no ban on their working. The democracy was declared by Mr. Musharraf as ‘Complete Democracy’ and not a guided or controlled democracy was to be practiced. He also declared that a campaign be launched for the observation of human rights in Pakistan.

\textsuperscript{85} Ibid. p 692-693.
General Pervez Musharraf coming to power was not welcomed by the international community. The comity of nations took him as ‘power usurper’. The reaction was no negative and sharp that the British Commonwealth suspended the membership of Pakistan. The sanctions were tightened further on Pakistan which were imposed in connection with the nuclear tests of May, 1998. The Musharraf Martial Law was imposed at the time when world had changed its attitude towards dictatorship and authoritarian government.

Musharraf allowed the courts to discharge their day to day affairs in a routine manner. It was again the Supreme Court of Pakistan which came to rescue the Musharraf military regime. The judgment of the apex court was interesting. The SC was so generous and prodigal as it allowed Musharraf to make necessary amendments in the constitution so as to facilitate him in the governance of his day to day administration of the affairs of civil government. However, it gave the time schedule to military government to finish the job within years then return to barracks.

After the coup d’ etat in Oct, 1999, the legislative assemblies of provinces and center were not dissolved. However, the public representatives were stopped to work. It was after two years in June, 2001 after the coup that the military ruler thought of dissolving the central and provincial legislatures\textsuperscript{87}. The plea he advanced for dissolution was elections were to be held in the autumn of 2002.

The\textsuperscript{88} Legal Frame Work Order 2002/2003 and other Ordinances formed the foundation for introduction of seventeenth amendment to the Constitution of Pakistan, 1973. The stage was set for the military ruler to take the cloak of direct-military-civil parliamentary form of government. The heads of PML-N and PPP were in exile. These parties were politically ineffective and General Musharraf had no potential threat from these parties. The leaders of these parties had traditional influence in country. They were deprived of a chance to participate in country’s politics. Third time rise to the post of Prime Minister of Pakistan was banned through a Presidential Order. There was yet another Ordinance in waiting which completely banned a person to take part in the politics and lead a political party who was denied to contest election to a legislative assembly. The main target was the party leaders of PPP, PML-N and

\textsuperscript{87} Musharraf, Pervez, \textit{In the Line of Fire: A Memoir}, New York, Free Press, 2006
MQM. This arrangement demonstrates to what extent the military leaders were afraid of the politicians.

To suit the rule to his favor, General Musharraf centered some powers in his hand. He as the Head of State enjoyed power to dissolve NA and other legislative assemblies. He had power to appoint Chiefs of three services. He could appoint Chairman (CJSC) Joint Chief of Staff Committee. The political system was changed during Musharraf era. Originally, the Constitution of Pakistan, 1973 introduced parliamentary form of government. But, due to amendments in the Constitution, it took the Presidential form of government.

The Legal Frame Work Order LFO was introduced before the general elections scheduled on 10th Oct, 2002. It included amended constitution and working of the Parliament and provincial legislative assemblies. These arrangements were made in order to ensure favorable conditions for the Musharraf military regime which was ready to transform into civil government (in the name only).

The military regime under General Pervez Musharraf tried to boost the economic performance of country. This left positive impact on the socio-psychological climate of country and helped government to make propaganda highlighting its positive steps and achieved results in certain sectors of economy. It resulted in growth of employment in formal sector. The health sector was improved. The number of doctors and paramedics with hospital and allied facilities also improved. Education sector growth was also noticed. The number of students increased as there was large number of educational institutions was allowed to in the private sector. During the years 2001-2002, the officially projected figures of literacy rate in Pakistan stood at 50%.

Under the military regime of Musharraf, general elections were held on 10th Oct, 2002. The official estimates claimed that 42% voters or in number 72 million people took part in these elections. The figure was really high as compared to the previous years’ elections in country. The majority of voters were shown from rural areas. Overall 2098 candidates contested for 272 seats and 5100 candidates contested for 577 seats of the National Assembly and Provincial Assemblies respectively. The opposition political parties which formed the alliance for restoration of democracy
were PPP, PML-N and ANP. PML-Q was the King’s Party which joined the dissidents from PPP and PML-N in its ranks. Together they won the elections with the special cooperation of local administrators. The National alliance headed by the former President Pakistan Farooq Khan Laghari had its members from N.W.F.P and Baluchistan also supported the King’s party. The MMA Mutahida Majlis-e-Ammal was formed by the unity of Islamists from the whole country and had clear majority in the province presently named as KPK (Khyber Pakhtoon Khawah) and thereof formed its government. The PML-Q managed to make a total of 172 seats in the NA by cobbled the support of MQM, independents and FATA members. In Punjab, PML-Q won more than half of the seats in Punjab Assembly. MMA had majority in Baluchistan. The Sindh assembly was dominated by the PPP.

General Pervez Musharraf took oath\(^89\) of the office of President of Pakistan on 16\(^{th}\) November, 2002. Chaudhary Ameer Hussain became the Speaker of NA and Mir Zafrullah Khan Jamali became Prime Minister of Pakistan. Although, the era of direct military rule was over with the general elections of NA and Provincial assemblies, swearing in of the new cabinet and installation of the Prime Minister and other Ministers, yet it may be termed as the controlled civil parliamentary government which was in full control of a Uniformed General named as Musharraf, a military dictator-turned a democratic Head of State.

3.7 Joint Collaboration of Civil-Military Rule 2002-2007

In the year 2002, after the general election Pakistan entered into the era of constitutional and parliamentary existence. The general decision making remained in the hands of military junta and they determined the overall contours of policy making. The civil and military bureaucracy as such created stumbling blocks to allow free nourishment of grass root democratic institutions. It was, however, the fourth time that the military tried to lead to the path of democracy. The process of self-transition from military rule to the civil rule remained under the control of military. It was not a complete transition to the civilian to rule the affairs of government. As in the previous Martial Laws, this time again the military released democratic rule under its own supervision.

\(^{89}\) Dawn, 17\(^{th}\) November, 2002
The struggle between ruling party of PML-Q and opposition parties stalled the proceedings of Parliament. In the year 2003, only two bills could be passed. The legal Frame Work Order LFO could become part of the Constitution in parts and finally became full-fledge part in March, 2003. The President of Pakistan General Musharraf could not address the joint session of the Parliament till 17th January, 2004.

General Musharraf faced three important issues. One pertained to his election as the President of Pakistan from the Electoral College; second issue was passing of the 17th amendment (comprising mainly the LFO) from the Parliament and the approval of NSC. This institution was subject to severe criticism as it had indirectly legitimized the inclusion of military in the affairs of country’s governance. The government of Musharraf needed some support in the Parliament. His own King party didn’t have two-third majority which could accomplish the desires of a military dictator. The weakest link was sought in the MMA. They were acquiesced in and they lent their support on these issues after enjoying the dividends. They also helped the government to move out of this quagmire as they were assured that General would remove his uniform and he would hold only position instead two positions as COAS and the President of Pakistan.

2007 was the year the ruling Junta became unpopular to a great extent. It had to extend its hands to PPP for friendship. It was bearable to shake hands with this party as it was moderate and popular amongst masses as compared to the PML-N. General Musharraf had to issue National Reconciliation Ordinance to win the support of PPP. This Ordinance washed the sins which someone had committed before Oct, 1999. Musharraf in return enjoyed the easy victory of the slot of President of Pakistan as it had benefited the PPP leader to come to Pakistan under the deal of NRO. Benazir Bhutto came back to Pakistan on 18th Oct, 2007 after a long self-exile. However, on her return she had to face huge bomb blast which took the lives of hundreds of people, but she remained safe and sound.

On 3rd November, 2007, General Musharraf imposed emergency in country. The Constitution was suspended. The civil rights and liberties of people were ceased. The judges were disallowed to discharge their official obligations. The politicians

were put at house arrest or detained. Why was emergency imposed by General Musharraf as the COAS and not as the President of Pakistan? In fact, the case of legitimacy of General Musharraf to participate in presidential election was before the Supreme Court of Pakistan headed by the Chief Justice Iftikhar Chaudhry who was reinstated after getting dismissed by General Musharraf. The SC delayed the decision and meanwhile, the tenure of General Musharraf as the President of Pakistan was about to expire. Therefore, it seems as Musharraf had no choice except by invoking emergency send Iftikhar Chaudhary home. After wards, Dogar was made as the Chief Justice of SC. He validated the presidential candidature of Mushrraf. Before this, he had tendered a resignation from the post of COAS and appointed General Ashfaq Pervez Kiyanni as the new COAS.

The elections of 2008 were lost by the General’s King party known as PML-Q and PPP/PML-N surfaced. His political career ended with the removal of his uniform as happened in the case of Ayub Khan in 1969. The public opinion had turned against General Musharraf. His immediate exit was demanded by the political forces especially PML-N Nawaz Sharif. The international forces had realized that Musharraf had lost the confidence of people of Pakistan and he would be of no help to them in fighting against the Talibanisation. They thought that his dismissal would rather help in strengthening Pakistan and the new government would cooperate with them in fight against extremism and terrorism.

3.8 Conclusion

It may be concluded from the above discourse that the military intervened on accounts when the civil government failed to function. The military rulers tried to infuse discipline in the different walks of life. The setup of each dictator vanished with his exit from the political arena. The rule of military men was legitimized by the Superior Court of Pakistan using the Doctrine of Necessity.
CHAPTER 4

MAJOR DEVELOPMENTS IN POLITICAL LANDSCAPE & REPERCUSSIONS OF DOCTRINE OF NECESSITY (1947-1969)

The judgments of the Superior Courts based on the law of necessity left indelible imprints on the political scenario of Pakistan. The effects of such decisions are both positive and negative. This chapter would in length analyze the impact of these decisions on the political system of Pakistan.

Supreme Court is the ultimate court of appeal in Pakistan. It has a jurisdiction to safeguard the civil liberties and fundamental rights of people. Besides this, it also has jurisdiction to protect the constitution.

The provision of Judicial Review like the US Constitution empowers the SC of Pakistan to uphold the sanctity of its constitution. On the eve of coup d’ etat by the military or a break down in the wake of constitutional inadequacy, the provision of Judicial Review has come to provide succor and thereby bring country out of quagmire. During the time of crises and emergencies the superior court has taken a refuge in the Doctrine of Necessity propounded by Hans Kelsen. The unconstitutional acts or ultra vires steps by the military dictators or the Head of States have been legitimized by the Supreme Court of Pakistan on the basis of famous theory of Law of Necessity. The superior courts have applied the doctrine of necessity where the ultra vires or illegitimate/unconstitutional acts of military dictators or Heads of State have been justified as it was necessary to save the state from going in to disaster or in the larger interests of people of Pakistan.

In retrospect, the illegitimate act of the Governor General Ghulam Muhammad was justified by the Federal Court in a Reference filed by His Excellency. It is interesting that on one hand the court legalized his action and also simultaneously warned him not to go beyond the gamut of constitution. The constitution defines his functions as a Head of state to perform what pertains to the executive authority. It was, however, beyond his power to enter into the domains of legislative functions. The Federal Court further stated in its judgment that he as the Governor General had

2 PLD 1955 FC 435.
power to summon the constituent assembly but it was only the prerogative of that assembly to frame the constitution. Further, the Governor General cannot nominate any member of the constituent assembly as it was the right of the provincial assemblies to elect such members.

This is how the Court restricted the Governor General to the executive functions only. It was meant to strike the balance of power and the Governor General was stopped from taking the extreme political steps. It was necessary to do so as the Governor General would have exercised his limits and stop meddling in both legislative and executive functions. The parliamentary practices do not allow for such functions.

The judgment of the Federal Court left positive impact on the constitutional evolution. In the wake of it, the Governor General on May 25th, 1955 asked for the elections to the second constituent assembly comprising 80 members, both from the East Pakistan and the West Pakistan. This assembly toiled hard zealously and gave the Constitution of 1956 in the month of February which was later enforced on 23rd March, 1956. The second constituent assembly which was constituted in compliance with the orders of the Court framed a constitution according to which the country could be run and administered.

The judgment also made it clear that the Governor General had no power to trespass in the matters that pertain to the constitutional matters. As per Independence Act, it was the jurisdiction of the constituent assembly to legislate in the constitutional arena. It struck a balance between executive powers of the Governor General and the legislative functions of the constituent assembly. The constitution could either be framed or amended by the constituent assembly and not by the Governor General. If the constituent assembly is not functioning then the Governor General has no right to claims such powers unto himself. He is neither the constituent assembly nor can succeed to it. It also encouraged the concept of popular sovereignty which propagates that people are politically sovereign and they exercise their political rights through their elected representatives who become members of the legislative assemblies. This engendered the development of concept of a modern state which says that people are powerful as far as the politics of country is concerned. However, this judgment of the Federal Court has been criticized by the critics. They opine that the Court by virtue of
this judgment has put the authority of representative body at stake. It has tilted towards the executive instead of maintaining balance between the both. Instead of shutting the doors of executive, it has rather encouraged executive to step in to the shoes of legislative. This is how it encouraged Major General Iskindar Mirza who once again after Ghulam Muhammad took an unconstitutional act and abrogated the Constitution of 1956. Further, he dissolved the National and Provincial assemblies and clamped Martial Law in Pakistan.

General Muhammad Ayub Khan rose to the occasion. He came to power after a successful coup after removing the government of Iskandar Mirza. The superior judiciary came to his help. His illegitimate rule was legalized by the Court applying the theory of Henry Kelsen in a famous case of Dosso. The pure theory of law of Kelsen is not universally acceptable and the Judges held in the Asima Jillani’s case that this theory was misapplied and misinterpreted. The result of wrong application of Kelsen theory was that the adventures of usurpers did not stop in the political years to come.

The Court affixed approval on the successful revolution of Ayub Khan. It was held that the victorious revolution changes a constitution and it is an internationally recognized legal method for changing a constitution. The Court judgment made a powerful Ayub Khan saying that the changed national legal order after a successful revolution for its validity depends upon the new law creating organ. Ayub Khan in furtherance of his powers decided to introduce the presidential form of government and grabbed the executive and legislative powers unto him. With these powers he enjoyed exerting influence on the National Assembly. His presidential form of government gave birth to a powerful president who wielded the greatest control over government affairs.

The constitution of 1962 was drafted by Ayub Khan which suited to his whims and desires. He derived authority for its craftsmanship from his basic democrats in February, 1960. It was a constitution crafted by a dictator and not by the representatives of the people of Pakistan. Further, the Ayub Khan’s rule validity given

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by the court in case of Dosso introduced a presidential form of government and the system of basic democrats. These two organs although helped Ayub Khan to prolong his rule but proved later that they were harmful for the political heath of country. The basic democracies replaced the local bodies system.

However, it would not be exaggeration to say that the system of basic democracies benefited the development of local economic and social life of people. Its existence as an Electoral College for the selection of President/Head of State and members of legislative assemblies proved dangerous for the concept of one man one vote.

There was however, a positive political repercussion of the judgment in Dosso case that it overturned the disaster which was apparent. It brought stability and peace in country. Law and order was restored as there was unity of command. Besides this, the positive political repercussion of Ayub era is explicit in introducing a stable form of government in the form of presidential system of governance. He introduced radical reforms on massive scale. The reforms were carried out in the field of education, land, labor and industry. These reforms brought prosperity in country and improved standard of living of a common man.

The Asima Jillani case has turned the wheel set by the superior court in Dosso’s case. The Supreme Court declared in its judgment that a person who attains power through illegal and unconstitutional means is a usurper and he can never be a legal source of legislation. General Yahya Khan’s coming to power and imposition of Martial Law was an unconstitutional and illegitimate act because he had destroyed the whole fabric of the existing order. Further, the judges declared that the Dosso case has been decided on the basis of pure theory of law of HansKelsen which is not universally accepted. Chief Justice Hamood-ur-Rehman said that the C.J. Munir erred in the application of the doctrine of necessity propounded by Hans Kelsen. Further, he wrongly thought that it was a generally accepted doctrine of modern jurisprudence.

Although, the court had declared the Yahya Khan’s expedition as unconstitutional, yet his acts taken for the welfare of nation and ordinary orderly

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7 PLD 1972 SC 139 p180.
administrative measures were held legal. The court did so as to avoid the confusion and chaos in country\(^8\). The court in this judgment vehemently stated that any future adventure to destroy the national political order would be unbearable. Seizing power through unconstitutional means and illegitimate act is usurpation and such usurper is punishable\(^9\). Theory of pure law of Kelsen was rejected by the court as per which a successful coup d’etat was a legitimate new political order\(^10\).

Begum Nusrat Bhutto’s case establishes that the imprints of Asima Jillani’s case were merely on pages and nothing was learnt from the past. It had negative political implication that it gave power in the hands of General Muhammad Zia-ul-Haq to amend the constitution. The power to amend the constitution rests with the parliament, but it was given to the Military dictator.

General Muhammad Zia-ul-haq had novelty to extend his stay in power as he brought the RCO on 2\(^{nd}\) March, 1985. The Revival of the Constitution Order 1973 introduced amendments in 67 articles out of 280 articles. The Parliamentary system was although retained yet, a powerful President was created who enjoyed vast powers to dissolve the NA, appoint judges of the superior courts, Chiefs of Defence Forces, the provincial Governors, summon or prorogue the sessions of legislative assemblies. The RCO incorporated the referendum, Presidential orders and martial law orders/regulations since the July, 1977 when General Zia imposed martial law in country. Indeed, the RCO introduced the amendments in the Constitution of 1973 in a way that it turned to be a quasi-parliamentary system in country. The Supreme Court while delivering its judgment in the Nusrat Bhutto case declared that the power of Judicial Review would remain intact with the courts. The courts can review any Martial Law order if challenged under the principle of law of necessity. The military authorities took it as a stumbling block in their way to discharge their administration of country.

Therefore, on 26\(^{th}\) May, 1980 article 199 was amended and the courts were stopped to hear any appeal arising out of the orders of the Martial law courts. The


\(^10\) PLD 1972 SC 139 p181.
high courts were deprived of the power of judicial review. A person could be detained without being known to him the charges leveled against him. The judiciary was stopped from quashing the detention orders of the military courts. It was also made mandatory in the PCO that all the judges of the High Courts and Supreme Courts required to take new oath under the PCO and the earlier oath under the Constitution of Pakistan, 1973 was declared void. If any of judge didn’t take oath under the PCO was considered as if he has ceased to hold the office. The PCO of 1981 made the judiciary of Pakistan completely under the control of military authorities as the power of Judicial Review and writ jurisdictions were snatched from the superior courts.

The Supreme Court in the case of Begum Nusrat Bhutto concentrated all political powers in his own self. He was all powerful and mighty in respect of political arena as the fundamental rights were snatched from people. This restraint made them inactive in the political life. They failed to participate in the affairs of government. General Muhammad Zia as the sole decision maker didn’t share power with the people of Pakistan. Hence, people lost their interest in the affairs of governance as they knew that the decision making was in the hands of one man.

The court validated the unconstitutional and illegitimate acts of General Zia under the Doctrine of Necessity just to save the country from disorder and instability. There lurks a wisdom that an act which had no legal justification and rather subject to impeachment was passed by the superior court rather given a legal sanctity.

The Constitution of Pakistan, 1973 created the most powerful Prime Minister. The president of Pakistan was a mere formality and a ceremonious title during the time of Zulfiquar Ali Bhutto as the Prime Minister of Pakistan. Z.A. Bhutto had adopted a posture more akin to a dictator. General Zia through RCO introduced amendments in the Constitution of Pakistan, 1973 which created powerful President. In fact, he propagated that he wanted to strike a balance between the both positions of the PM and the President. But, truly speaking the PM was subordinated to the President of Pakistan as if the President became unhappy or displeased with the

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demeanors of PM, he could send him. The PM could hold the charge of his office only till the president was happy with him. Apparently to strike such a balance he introduced 8th amendment in the Constitution of Pakistan, 1973.

4.1 Political Developments during the Formative Years 1947-1958

The period in question witnessed eclipse of the politicians in the new born state of Pakistan. The civil-military bureaucracy rose to the prominence leaving far-reaching impact on the future politics of country. Pakistan adopted the Government of India Act, 1935 with certain amendments. This Act provided for the Parliamentary form of Government in country.

The governance of new born country began with the swearing in ceremony of Muhammad Ali Jinnah known as Quaid-i-Azam (a great leader) by Lord Mount Batten, the last Viceroy of the British India. Jinnah chose his cabinet. The new government of Jinnah struck a crisis in the form of refugees. There was huge flow of refugees to Pakistan. They were in distressed condition, shelter less, diseased, plagued by hunger and caught by communal riots. It is estimated that around seven million people had migrated from India to the West Pakistan. India had inherited a smooth functioning of government system. Pakistan, on the other hand, had to start from scratch. The economy was dilapidated and its administrative machinery was in great limbo.

The 1935 Act created a powerful center. The Governor General enjoyed ample powers to invoke emergency. He could, in this respect pass laws as given in the provincial legislative list. Besides this the Governor General had power to select and dismiss the ministries of the provinces. The Section 92-A empowered a Governor General to such an extent that he could put the administration of a province at the disposal of a Governor of that province. The Governor was under his direct control, it means that administration by a bureaucrat.

Muhammad Ali Jinnah died in September, 1948. Khawaja Nazim-ud-din was appointed as the second Governor General of Pakistan. Liaquat Ali Khan remained as the Prime Minister of Pakistan.

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The Muslim League had taken birth in Bengal and was subject to dictation from center. The disgruntled from the ML left this party and joined together under the banner of Awami League of Hussain Shaheed Suharwardi.

The Bengali sentiment was misjudged right during the initial years of the birth of Pakistan. Khwaja Nazim said that Urdu alone would be the language of State. This statement sent a wave of anger, anguish and wrath amongst the Bengalis. There were riots on massive scale. During agitation, in a cross fire, the police killed a student. The Muslim League lost the provincial elections in 1954. The language agitation was so intensified in 1952 that a number of political leaders were arrested including Sheikh Mujeeb-ur-Rehman. Moreover, the Bengal was controlled by the non-Bengali officers. The arrogance of these Punjabi officers led to the estrangement of Bengalis. The grievances of the Bengalis were numerous. But, they had great anguish over language issue, deprivation of foreign exchange from Jute, powerful center, provincial autonomy, inequitable economic flows and division of revenues.

The divisible tendencies were apparent as the Finance Minister Ghulam Muhammad led the West Punjab group in the cabinet and the Bengalis in the cabinet were headed by Fazalur Rehman. The weakness of government was further evident in the issuance of PRODA (The Public Representatives Offices Disqualification Act). Prime Minister Liaquat Ali Khan had uneasy relations with the senior military officers. They were unhappy with Liaquat Ali Khan on cease-fire with India in Kashmir as animosities had broken out in October, 1947.

Liaquat Ali Khan made General Muhammad Ayub Khan as the Commander-in-Chief of the Pakistan Army who was sent in the East Pakistan to serve as the General Officer Commanding. Liaquat Ali Khan ignored many of the serving senior Generals and gave promotion to Ayub Khan, maybe there was a factor of Ali Garh or it may be that he was out of army action in Kashmir 1947-48. To crush dissidence in the files of Army during the time of Ayub Khan, Rawalpindi Conspiracy came to surface. It is worthy to mention here that at the very outset, the political authorities had felt the need of army to support and it was General Ayub Khan who came to provide this help. People of Pakistan were not taken into confidence as regards cease-

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15 A monument was constructed at the firing place to commemorate his sacrifice every year.
fire in Kashmir. It gave a jolt to the Muslim League and Liaquat Ali Khan didn’t succeed in building image of the party. The Muslim League started losing their representative status amongst the masses because of their policies. The split is evident from the fact that the Muslim League in Constituent Assembly was divided into groups. Liaquat Ali’s Plans to strengthen the Muslim League ended when he was caught a prey to an assassin’s bullet in Rawalpindi while addressing a Public rally on 16th October, 1951.

After the death of Mr. Liaquat Ali Khan the regional differences between two wings came to the surface and the process of constitution making became difficult. The rift between politicians and bureaucracy enhanced as Ghulam Muhammad rose to the office of the Governor General. A Constituent Assembly had been formulated through the indirect election by the provincial legislatures as per plan of the Cabinet Mission of 1946. It had the responsibility of constitution making for the undivided India.

The constitution makers came to face difficulty in devising a constitution of a state which was complex in nature itself. The East Bengal was filled with great number of people. They were aspirant for the democratic norms and wanted a stable economic milieu. The west wing of this state had abundant area which had a strategic importance and endowed with huge natural resources. The western wing had occupied seats in the civil services and the military forces. This wing had apprehension that the Bengalis would dominate the scene. Both the parts were miles away. In view of these complexities it was taxing for the constitution makers to bring a constitution that would be acceptable to both the parts of this state. This is how it took seven years to bring the Constitution of 1956. As regards the Constitution, the Quaid had estimated that it should take a period of 18 months to two years to formulate the constitution for country. He did not give any blueprint of the future constitution. However, on 9th June, 1947 he said that the future constitution would enshrine the basic principles of Islam. It will be democratic and democracy is in the blood of Pakistanis. The Islam has given the teachings of justice, fair play, equity and equality of man.

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Quaid-e-Azam, unequivocally said that there is no discrimination amongst the communities in Pakistan; “We are starting in the days when there is no discrimination, no distinction between one community and another, no discrimination between one caste and creed or another. We are starting with this fundamental principle that we are all citizens and equal citizens of one state.”

He further said that;

“Now I think you 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 a personal faith of each individual but in the political sense as citizen of the state.”

Chaudhary Rehmat Ali viewed the above speech as assurance to the minorities, while Chief Justice Muhammad Munir\textsuperscript{21} said that it is the clear cut exposition that ‘Pakistan is a secular State’. The constitution making remained on a slow pace. After independence more than two years had gone by the Constituent Assembly had shown no progress in the constitution making.

Meanwhile the battle for the constitution making was going on between the two wings of the new born Pakistan; an important incident took place which left indelible marks on the future political scenario. The Majlis-e-Ammal (joint action group), which was authorized by All Pakistan Muslim Parties Convention, gave an ultimatum on 21st January, 1953 to the government of Khawaja Nazim-ud-din to declare all Qadianis/Ahamdis as non-Muslim within one month. ‘If he fails to do so then direct action would be taken against him’, they declared. Chaudhary Zafrullah Khan, a Foreign Minister was a Qaadiani and there were other Qadianis/Ahamadis also who had occupied key posts in the government.

The flames of this agitation went high which paved the way for the imposition of martial law in the country. This time it was not the political leadership that sought a solution to this problem rather Iskander Mirza, by then a Defense Secretary called the Army to silence the uprising. First Martial Law was imposed in country at Lahore. People got a sigh of relief from military action. This awakened the military and gave them a sense of their importance, power and position. The politicians who were

\textsuperscript{21} Munir, Muhammad, \textit{From Jinnah to Zia}, Vanguard Publishers, Lahore. p30.
considered as the legitimate heirs to the British got their position low in the eyes of general public. The Army felt that if they rule country people would accept them as their ruler and feel comfortable. The military and bureaucracy cooperative was on its way to get acceptability and legitimacy from people in the West Pakistan but it was not true in the East Bengal.

The anti-Ahamdia riots forced Nami-ud-din to evict the Punjab Chief Minister Mian Mumtaz Daultana from his Chief Minister ship. The Martial Law was lifted in Apr, 1953. The Governor General after the noise of Martial Law hushed up, asked for the resignation of Khawaja Nazim-ud-Din and his Cabinet. Ghulam Muhammad dismissed him from the Prime minister-ship. He wanted to approach the Queen of England\textsuperscript{22} to ask her to remove the Governor General from his office. But, he found that his telephone was cut and he failed to have any contact with her.

It is generally believed that the action taken by the Governor General to remove Nazim-ud-Din from prime minister-ship was more alike truncating the nascent plant of democracy. The Governor General knew the support he could lend support from the constituent assembly. He could easily fall back upon the suppressing powers of the Police and above all the Army stood at his back in anti-democratic practices.

Keith Callard\textsuperscript{23} has rightly observed that the action of Ghulam Muhammad was aimed at the assembly and the Prime Minister. He went further to say that “the major convention of the cabinet government had been destroyed or gravely weakened. First the tradition of impartiality of the governor general had been demolished. Second the convention of cabinet and party solidarity had been disregarded. Third, the role of the legislature as the maker and sustain of government had been impugned. The price of the governor general’s coup was high.”

Five months in abeyance passed by the constituent assembly. It was only after the elapse of these five months when the necessity of governance was felt and Muhammad Ali Bogra was called from the USA from his duties as the ambassador of

\textsuperscript{22}Jalal, Dr Ayesha, \textit{The state of Martial Law}, Cambridge University Press, 2008, UK. p177. Dr. Ayesha Jalal further says that Ayub Khan and Iskander Mirza had actively participated in removal of Khawaja Nazi-ud-Din. They had readied their armies to take action in case the resistance is put up.

Pakistan in the USA and given new assignment as the Prime Minister of Pakistan in the place of Khawaja Nazim-ud-Din. It is interesting to note that the six ministers out of nine of the cabinet of Nazim had joined the under the flag of the new Prime Minister ship of the Muhammad Ali Bogra. Sardar Abdu-Rab Nishtar was not amongst the six of the ministers who joined new set-up. Muhammad Ali Bogra was also given the president ship of the Muslim League. Nazim had tendered his resignation from this post feared that he may not be able to command the vote of confidence. Lawrence Ziring\textsuperscript{24} observes that Ghulam Muhammad was eliminating the independent voice of the Muslim League in the central government.

The constituent assembly was gone and this gave confidence to Governor General Ghulam Muhammad that the new assembly would translate his dream of one-unit province into reality. Over the new assembly he had also desired to exercise the power of veto. The plan of one unit was liked by General Muhammad Ayub Khan. Ghulam Muhammad also found approval of the Army in his idea of one-unit. The fears of smaller provinces regarding likely dominance of Punjab were reduced with the assurance that the Punjab would not exercise more than 40% voting power as according to its population it had enjoyed more than 40% voting power.

The Constituent Assembly met for the first time in September, 1953 after the lapse of five months when the assembly of the Nazim-ud-Din was sent home by the Governor General Ghulam Muhammad. To the utmost chagrin of Ghulam Muhammad, the new constituent assembly rejected the interim constitution tabled by Muhammad Ali Bogra. The Governor General Gulam Muhammad had never thought of it that his edifice would crumble down. The rejection of interim constitution served as iconoclasm for him. His dream of enjoying the vice regal power gone sour.

To arrive at the solution, Muhammad Ali Bogra gave his own formula to solve the crisis. It is known as the ‘Muhammad Ali Bogra Formula\textsuperscript{25}. He proposed that election in the lower houses be made in the basis of the population of the respective provinces and hence representation in the lower house accordingly. In the upper house


\textsuperscript{25} As per this formula, 50 seats were proposed for the Upper House and 300 seats were proposed for the Lower House. So the total seats for the Parliament stood at 350.
he proposed to have equal representation of all provinces irrespective of the population of any constituent unit.

The 1954 elections to the provincial legislature in the East Bengal were the eye opener for the Muslim League. It could manage to win only 10 seats out of the 309 seated house. Nur-ul-Amin cut a sorry figure in elections. A.K. Fazlul-Haq’s United Front Party swept these elections. He gave a charter of demands which contained 21 points inclusive of new elections to the constituent assembly and provincial autonomy. His acts brought an adverse reaction as his ministry had to be dismissed on 29th May, 1954. The Governor’s rule was imposed in the province. Iskander Mirza was sent as the Governor of province.

Sir Ivor Jennings was deputed to vet the draft constitution. Muhammad Ali Bogra announced that the new Constitution would be effective from the birth day of the Quaid which is 25th December, 1954. The Objective Resolution was made as the preamble and Government of India Act, 1935 adopted by the BPC, the Islamic provisions and the Fundamental rights contained in the new constitution. The Governor General was in full control of position. In the East Bengal he had a governor rule and in the Punjab he had his own nominee Sir Feroze Khan Noon as the Governor. He was enjoying the full support of Army and also civil administration. After getting a nod from General Muhammad Ayub Khan regarding imposition of emergency, dissolution of the Constituent Assembly and formation of the one-unit he issued a proclamation;

“The Governor General having considered the political crisis with which the country is faced, has 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 Proclamation further enunciated;

“The ultimate authority vests in the people who will decide all issues including constitutional issues through their representatives who are to be elected; fresh elections will be held as early as possible”.

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26 Jennings papers, Institute of the Common Wealth Research, London B/XV/4-S.
The Act of 1935 didn’t explicitly provide any provision for the dissolution of assembly; therefore, it could not be dissolved as such. The final draft of the new constitution was passed on 25\textsuperscript{th} Oct, but the dissolution was made effective on 27\textsuperscript{th} October when the police physically stopped the members from entering the house\textsuperscript{27}.

The President of the Constituent Assembly Maulvi Tameez-ud-Din Khan challenged the act of the Governor General in the Chief Court of Sindh under Section of 223-A of the Government of India Act, 1935 by a writ petition. This section had been made part of the Act on 16\textsuperscript{th} July, 1954. George Constantine was Chief Judge of the Court and had presided over full bench. He decided in favor of the President of Assembly. The Governor General went in appeal in the Federal Court against the judgment of Sindh Chief Court. The Federal Court avoided going into merits of the action of the Governor General. It remained concerned with the validity of clause 223-A. The Chief Judge Muhammad Munir decided\textsuperscript{28} that the writ issued by the Chief Court on the basis of 223-A had not yet become a law as it didn’t receive the assent of the Governor General. Therefore, the court declared the dissolution of assembly by the Governor General as valid. The Judge Cornelius dissented with the Bench of the Federal Court. After the Judgment of the Federal Court, Muhammad Ali Bogra continued to serve as the nominal Prime Minister of Pakistan. Ghulam Muhammad continued to serve as the Governor General of Pakistan. He was a bureaucrat and liked to his great taste the vice regal system. The main administrators of country were, however the military men. General Muhammad Ayub Khan himself became the Defense Minister and Ch. Muhammad Ali retained the portfolio of the Finance. Iskander Mirza served as the interior Minister.

The self-created philosophy of Iskander Mirza\textsuperscript{29} gave an enlightenment regarding his interior Ministry as under;

“The illiterate masses elect crooks and scallywags. These scallywags make a mess of everything and then I have to clean up the mess. Democracy requires education, tradition, breeding and pride in your abilities to do something good”.

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\textsuperscript{28} PLD 1955 FC p242. *Federation of Pakistan vs. Maulvi Tameez-ud-Din Khan*

\textsuperscript{29} Reporter, 27\textsuperscript{th} January, 1955.
The interior ministry had foremost job to establish one-unit in the West Pakistan. Ayub Khan pleaded Punjab to accept in the larger interests of country to acquiesce in reduced share. The minority provinces had their own fears as their identity could be submerged in the larger unit as Punjab would have dominated the scene. Many evil machinations, clever tactics and adroit maneuvers had to be employed in order to make the West Pakistan as the one-unit. Dr. Khan Sahab was offered the Chief Minster-ship of the newly created province of the West Pakistan.

The Governor General had no jurisdiction to assign himself the powers of the Constituent Assembly as decided in the Usif Patel’s case. Therefore, he was under obligation to have a new assembly. As per Tamizud-Din Khan Case, the impression was that the new constituent assembly would go under the veto power of the Governor General.

On 7th July, 1955 the new constituent assembly met. 26 of its members pertained to the Muslim League out of the total of eighty member assembly. Muhammad Ali Bogra was replaced by Ch. Muhammad Ali as the Prime Minster of Pakistan.

The West Pakistan became a hot bed of the conspiracies. The Muslim League under the banner of Daultana determined to bring down the ministry of Dr. Khan Sahab who was prized the Chief Minster ship for his support of the one-unit. Iskander Mirza had helped Dr. Khan Sahab to form the Republican Party and the Muslim League sided with the minority group to bring down the Republicans. Later, they were saved when the Governor’s Rule was imposed. In the West Pakistan he had his hands on the heads of the Republicans and in the East Pakistan he was backing the Krishak Sramik Party. Ch Muhammad Ali lost his seat in the center and Surharwadi became the Prime Minister of Pakistan. He was heading a coalition of the Awami League and the Republicans. There were differences between Iskander and Suharwardi. He was forced to tender his resignation on 11th October, 1957.

Sir Feroz Khan Noon replaced Suharwardi and he failed to win confidence of the President. Iskander Mirza was suspicious of Feroz Khan Noon of being offered

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31 PLD 1955 FC p384 *Usif Patel and two others vs. The Crown*.
the President ship by Suharwardi. Mirza wanted to grab authority. He never wanted to
lose the seat of President. He had the fullest opportunity to play a game in the present
political bickering. The elections were likely in the month of Feb, 1959. United Front
was expected to lead the East Pakistan in league with the Awami League of
Suharwardi. This situation didn’t suite Uskander Mirza who was ambitious to clamp
the Martial Law right from 1957. This situation was unsuitable for General
Muhammad Ayub Khan whose plan to introduce reforms might have gone with the
wind.

Given the foregoing state of affairs, General Muhammad Ayub Khan on 7-8th
October along with his group of Generals issued a proclamation. He had abrogated
the Constitution of 1956, dissolved the national and provincial assemblies, abandoned
the political parties and imposed Martial Law throughout the country. Mirza had
appointed Ayub Khan as the Chief Martial Law Administrator and the Prime
Minister. Although, later he abolished this post and installed himself as the President
of Pakistan. Mirza wanted to cling to power. He wanted to assert his own authority.
He wanted to remain in the corridors of power. He had no plans to quit the saddles.
Ayub khan forced him to go in exile for good as he had ordered General Musa to
arrest General Muhammad Ayub Khan. He wrote about Mirza that “I am sorry for
him but then he could not be loyal to anyone”.

The two wings’ differences caused an inordinate delay in framing the
constitution. Both the wings’ problems were further compounded thousand miles
distances between two halves. The Eastern wing was dominated by the massive
population. The Western Wing enjoyed the position of dominance in political,
military, administrative and economic fields. These factors were responsible for the
tensions between two halves. The Muslim League lost as a party. Its fragmentation
led to the political cleavages and power went in the hands of bureaucracy and then the
military dominated the scene.

33 Gauhar, Altaf, Ayub Khan-Pakistan’s First Military Ruler, Sang-e-Meel Publications, Lahore. p150.
34 Major General Fazl-e-Moqeem Khan, The Story of the Pakistan Army, Dacca, Oxford University
4.2 Political Developments during the Ayub Era 1958-1969

General Muhammad Ayub Khan commanded the army of Pakistan (the most powerful institution of state) for many years. It may be out of place to think that he was never consulted in the major political decisions. It is safe to presume that he would have been consulted and his consent would have been sought before taking any major political decision. He said that innumerable times, Ghulam Muhammad had invited him to seize the power but he always declined his offer. He said that he never backed the Governor General on two occasions: one that Khawaja Nazi-u-Din was dismissed in 1953 and the other when the first constituent assembly was dissolved in 1954. It is an undeniable fact that influence of the Pakistan Army had increased since the Kashmir war and Rawalpindi Conspiracy. It was further enhanced when strength of the Muslim League declined and power of the bureaucrats increased in the affairs of country’s governance with the cooperation of Army. Ayub Khan ruled Pakistan for ten years. He was infused with agenda of reforms, modernization and instilling a new lease in to the national life of a Pakistani in his own perspective. Ayub Khan had his own thesis regarding the parliamentary democracy. In his opinion, it failed to answer the political stability and national unity. Poverty, ignorance, illiteracy and failure to observe the democratic traditions were a stumbling block in the way to smooth functioning of democracy in Pakistan. He was failed to appreciate the political ideas and aspirations of the politicians in the East Pakistan.

Z.A. Bhutto, a young minister in the cabinet of Ayub Khan said on the floor of House that the ebdoed politicians should be grateful that they had been treated softly. He quoted Stalin;

“I am full of blood when you have you have a revolution it is necessary to be full of blood up to your elbows”.

The scheme of Basic Democracies was introduced in 1959 by Ayub Khan. He devised a plan under a presidential form of government to give to the country a political system free from party-politics. Elections for 80,000 basic democrats were announced in the month of May, 1959. The number of basic democrats was equally

35 General Ayub Khan had been in command of the Pakistan Army since 1951.
36 Khan, Muhammad Ayub, Friends Not Masters, Oxford University, 1964. p139.
divided between both the wings i.e. East Pakistan and the West Pakistan. These BDs were to be elected on the basis of direct adult franchise. They had to provide membership of a four tiered structure of a local government. In urban areas there were town committees where as in the rural areas union councils were formed. These committees had elected members and chairmen. The tiers like tehsil council, district council and divisional council had a different composition. The system of BD was introduced to gradually induct them in the democratic process. The system also aimed at political transformation and socio-economic change. Further, it was also aimed that the system would offer as training in democracy, but it was not properly arranged as how democratization would be achieved. Ayub Khan had great expectation from these BDs. He once uttered about them, “the Basic Democrats would become less basic and more democrats”.

In February, 1960, 80,000 Basic Democrats were elected. Ayub Khan required legitimacy for his own self and for this purposes the democrats came to his help. Following was the question put to these democrats who performed as the Electoral College for his vote of confidence,

“Have you confidence in the President Field Marshall Muhammad Ayub Khan, Hilal-i-Pakistan, Hilal-i-Jurat?”. Interestingly, 75,283 BDs voted in favor of General Ayub Khan and gave reply to this question in affirmative. In this way 95.6% BDs showed their confidence in Ayub Khan as the President of Pakistan. On 17th Feb, 1960, he was sworn in as the President of Pakistan. He also announced the constitution commission on this day.

It was said by Ayub Khan that the constitution embodies democracy with discipline. It offered a quasi-federal and presidential form of government. The President of Pakistan in the center enjoyed an executive authority who was elected for a fixed term by the Electoral College of the Basic Democrats. There was unicameral legislature consisting of 150 members equally representing from both the wings i.e. East Pakistan and the West Pakistan.

Judicial Review was not available to any Act passed by the National Assembly. East Pakistan and the West Pakistan were two provinces of the Federation of Pakistan. President appointed a Governor in each province who was his nominee in a province. The legislative assembly of a province was also elected by an Electoral College comprising of BDs as these BDs served as an EC for the members of the National Assembly. The fundamental rights were not made part of the constitution earlier; they were infused into the 1962 Constitution afterwards.

The Constitution of 1962 created a powerful President. A powerful center emerged out of the constitution. The provinces were subservient to the center. The politicians had no say in the affairs of governance. Bureaucracy emerged as powerful in the practical administration. Ayub khan didn’t demur saying that it was his own constitution and based on his own philosophy of governance of country. He said that he had his own ideals and wanted to consummate them under his own leadership. He said once that it was the ‘result of his wide study, deep and prolonged thought and burning desire to help people in building country into a sound, progressive and a powerful state’.

It was felt imperative after the adoption of Constitution that the ministers who were elected to the NA retained their seats. The Presidential Order No.34 issued to his effect was held ultra vires of the constitution by the High Court of the East Pakistan and it was held by the Supreme Court of Pakistan also. However, the Court gave a verdict that the ministers remain present in the assembly. They sat in the assembly but without being answerable to the assembly. The separation of the executive and legislature as envisaged in the constitution was compromised.

The Army was the final support of Ayub Khan’s existence despite the fact that he had found a constitutional basis of his authority.

The bureaucrats proved partners in autocracy. They served as engine of governance. The CSP as descendants of ICS were in close communion with military regime in translating their dreams into reality. The feudal classes and the rising business and industrial tycoons were the other pillars of the military regime besides

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41 Mr. Fazlul Qadir Chaudhary vs. Mr. Muhammad Abdul Haque, PLD 1963 SC p487.
The land reforms didn’t usher in any significant change as the ceiling for land holdings was very high. The military and bureaucrats were also among the land classes. They enjoyed the state land. The national and provincial assemblies were replete with the landed aristocracy in the West Pakistan.

The passage of the Political Parties Act, 1962 in fact weakened his authority. He had no political base upon which he could rely. What he did was to rely heavily on the bureaucracy for his existence. In order to silence the dissent he had to resort to the use of force.

When the political activities resumed, the criticism and autocratic rule were subject to criticism. The Ayub era was called by Ch. Muhammad Ali as the “rule by Rod”. The urban middle class never reconciled with the political system put in place by Ayub Khan. “Ebdoeing” the politicians and indirect elections were not understandable by people and were subject to criticism. Ayub Khan was greatly in criticism. The opposition in the West Pakistan didn’t pose any threat to Ayub’s rule because bureaucracy, the landed aristocracy and the industrial tycoons enjoyed hold over the province.

The Presidential System of Ayub Khan completely deprived the East Pakistan of an authority. Even the province of the East Pakistan failed to exercise rule of authority during the two intervals of Nazim and Suwarwardi. Both of them remained in saddles for a sojourn. The power was exercised by the Army General to the detriment of the East Bengalis. They felt that they were deprived of political participation and they started reacting against the injustices with great rapidity and severity with the passage of time. The disparity of income was huge. The economic growth in East Pakistan was poor. The East Bengalis had negligible representation in the Armed Forces and Civil Services. In these circumstances demand for regional autonomy grew strong with help of political ambitions. Karachi was selected as the capital of Pakistan and this may be a factor for the economic disparity, however, besides this, there were multiple other factors for disparity. Difference in natural resources, the initial gap in economic advancement, undeveloped infrastructure and the availability of capital and entrepreneurial skills may be regarded as the factors responsible for disparity between both the wings. The difference also enhanced when the West wing took larger share of foreign aid and the development funds since 1950.
The West Pakistan had greater significance of geographical strategic position which attracted the West and the US more and therefore, they preferred to spend military aid more on this part of Pakistan. The West wing enjoyed its industrial growth due to the foreign exchange earnings from the export of the jute and tea.

There is no denying a fact that Ayub’s regime failed to appreciate the gravity of situation. The bureaucracy was given the task to find out answer to the political turmoil in the troubled East Pakistan. By 1963, there was a thinking that wave of disintegration in the East Pakistan may be removed by the economic development. Ayub Khan was confident that whatever he was doing for the East Bengalis was enough for them and would save Pakistan from disintegration. But he had poor understanding of the problem. He was perhaps oblivious of the fact that economic development cannot be a substitute for a share in political authority\textsuperscript{42}.

People in both the parts of Pakistan started feeling alienated. The political institutions, the author of which was Ayub Khan himself could no longer bridge a wide gulf between both the wings of Pakistan. The national legislature was as small as of 150 members. Moreover, the members had no roots in the masses. They were fraught with the vested interests. They had no moral strength which springs up from the direct election. In these circumstances it may be safely said that the NA didn’t reflect the national will.

The presidential election focused on the personalities. Mohtarma Fatima Jinnah was marked as a symbol of the revival politics in Pakistan. Ayub Khan was known for his authoritarian rule. His government was known for corruption, nepotism and indirect election. He was also censured for his foreign policy as huge arms were supplied by the West to India after the Indo-China skirmishes in 1962. Fatima Jinnah campaigned against Ayub Khan on the issues of maladministration referred afore. She toured around the whole country. Despite the fact that there was ban on the public meetings, yet the crowd thronged to hear her. The election was indirect. Only 80,000 BDs were to decide the fate of people. Still, people hoped that this election might reverse the political order in country. Listening to her in the public rallies they reminded her illustrious brother. She criticized the Ayub regime for its misadventures

which was true feelings of people. She was lauded and overwhelmingly welcomed wherever she went for address.

The results of election were not very surprising. Ayub Khan defeated Mohtarmas. Ayub Khan took 49,647 votes and Fatima Jinnah could obtain only 28,345 votes of the BDs. Despite the fact that she was made to meet failure in these elections, yet, this is a fact that her performance in these elections was remarkable. She criticized an authoritarian for his misdeeds. She swept in the urban centers like Dacca, Chittagong and Karachi. There is no denying a fact that the election results were tempered. Monem Khan, the Governor of the East Pakistan was known for his maneuvering of the results. The results of these elections were also tempered in the West Pakistan. Ayub Khan was the architect of Pakistan’s foreign policy. He had joined the West and especially the US. Pakistan was considered to serve as a bastion in the Asia to contain the spread of Communism. On the other hand, Pakistan had its own fears and security concerns against India. In order to build a potent defense against possible aggression from India, it joined SEATO and CENTO. The people of Pakistan had natural feelings for Kashmir and wanted its solution. Ayub Khan had entered into alliance with the West to develop its defense capabilities to use them if there is any threat from India.

However, Pakistan started making a shift in foreign policy after getting dismayed from the US and the West. It anchored its relations with the communist world. However, Ayub Khan never liked communism as a philosophy. The shift perturbed the West and the US. Ayub Khan remarked that

“In case of trouble the US will not find any place in Asia to bank upon except the Pakistan. It is only the people of Pakistan who will stand by in the difficult times.”

During the border skirmishes between India and China, India had to pocket an insult. China, although won this war, yet it withdrew from the conquered territory. This war alarmed the US and the West. India became center of attraction and started getting heavy shipments of arms from the West and the US. This ammunition\(^\text{43}\) was used against Pakistan by India in the war which ensued in September, 1965. India used ‘Chinese Bogey’ and it was Ayub Khan who knew very well that this

\(^{43}\text{The Pakistan Times, 20th September, 1965}\)
ammunition will be used against Pakistan as there was a long outstanding dispute of Kashmir between both the countries. Pakistan raised hue and cry against supply of arms, but the US paid a deaf ear to its protests and continued the arms supply to India. The supply of arms to India was not linked to the settlement of Kashmir issue. The USSR vetoed in the Security Council regarding settlement of Kashmir issue in the light of the UN resolutions. It is needless to say that Pakistan had tried to enter into cordial relations with the USSR. Besides the US, the USSR also announced to make supplies of arms and ammunitions to India in September, 1964.

Ayub Khan didn’t care for the American pressure during the Sino-India war of 1962. It is argued by Qudrat-ullah Shahab that during the midnight the Chinese ambassador came to him and woke him up and informed that they had attacked India. He further asked him that the issue of Kashmir may be resolved. Qudrat-ullah says that he woke Ayub up and related the whole story of the Chinese ambassador. Ayub replied him, “you civilians you know nothing about the military action”. This could be a rare opportunity to solve the Kashmir issue by a military action which perhaps, Ayub Khan lost and will never come back. When Ayub Khan visited China in 1964, he was overwhelmingly welcomed. China had in its mind the stand which Ayub took during the Sino-India war despite the US pressure. Meanwhile, he also visited the USSR. During his visit in Kremlin, he assured that no further renewal of Baddabair base to the US will be made. During visit of the Kremlin, he was informed regarding rescheduling of his visit to the US. Pakistan was found to be in the interest of the Chinese. They wanted an access to the Middle East and other world which they found in Pakistan. The inland and outland routes were opened for them. The treaty of friendship was signed between both the countries having inclusive of Indonesia. Zulfiqar Ali Bhutto stepped in to the office of foreign ministry after the death of Bogra in 1963. He was elevated from the post of Commerce Minister as the Minister for Foreign Affairs. He deserved well for this post. He adopted an anti-American posture and went for pro-China policy. He started gaining popularity amongst the masses. He was also liked in the international circles. Ayub didn’t know that the ministry of foreign affairs would win for him the laurels to this extent. A nationalist Bhutto emerged. Bhutto’s image as the protagonist of Pak-China friendship further

44Shahab, Qudrat-ul-llah, Shahhab Nama (this is an autobiography of the writer Mr. Shahab who held important bureaucratic positions during the reign of Ayub Khan). Lahore, Sang-e-meel Publications, 1992.
strengthened when he visited China to sign border agreement on 9th March, 1963. Manzoor Qadir laid the foundation of independent foreign policy by inclining towards China. But, Bhutto reaped its credit, as rightly commented by Lawrence Ziring. However, there is no denying a fact that Manzur Qadir as the Foreign Minister 1958-1962 stressed on developing the cordial relations with China, yet Mr. Bhutto as a junior minister was also an ardent lover of China. Manzoor recalled that it was Bhutto who came to support him in the cabinet regarding the China’s entry in to the UN. Bhutto said that the two countries of NATO i.e. Denmark and Norway were ready to support his proposal of China’s admission into the UN. It was Bhutto who as a Minister for Commerce had won cabinet approval for oil exploration cooperation from the Soviet Union. Oil and Gas Exploration Development Corporation was set up to work with the Soviet Union’s institutions.

India had been eyeing since 1957 to formally integrate Kashmir into its fold. In 1963, it did so and this raised series of protests from Pakistan. India after enjoying huge arsenals from the West and the US had mustered up enough courage to integrate Kashmir. Pakistan brought this matter to the UN which remained inconclusive. The relations between both Pakistan and India deteriorated further. Meanwhile, hair of the Holy Prophet Muhammad (S.A.W) was stolen from the shrine of Hazrat Bal. this incident sent a wave of anger and anxiety amongst the Muslims. The Sringar was struck with riots on massive scale. In 1964, China abandoned its unclear position and made an unequivocal support of Pakistan on Kashmir issue. Chou En Lai made a visit to Pakistan and gave a statement that the Kashmir dispute be settled in the light of wishes of people as promised to them by Pakistan and India.

The 1965 war left indelible impact on the minds of people of Pakistan. The East Pakistan people felt more insecure with this war. The myth that the defense of East Pakistan lies in the West Pakistan simply shattered. It was strongly felt that there are separate defense requirements for the East Pakistan. The people of Pakistan were alarmed by the attack. They wanted their armies to fight. They were not ready to accept a cease-fire. Bhutto while addressing the UN Security Council accepted cease-fire on 22nd -23rd September night said that it was being done for the defense of down-

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45 Ziring, Lawrence The Ayub Khan Era, Syracuse University, 1971.
trodden Kashmiris. He however made a fiery and emotional speech saying that they were ready to wage war for thousand years, a war of defense. His speech was on air through the radio Pakistan and was heard by all and sundry in country. It made him a hero in Pakistan. The partners of Pakistan in SEATO and CENTO never helped it during the war as the West maintained its neutrality. However, Iran and Turkey gave it some limited military help. Naval assistance was provided by Sukarno of Indonesia. China also helped Pakistan. It gave ultimatum to India and this stopped her not to infiltrate in the East Pakistan. People of the West Pakistan took the cease fire with heavy heart. They had never expected that the valiant defense put up by the armed forces would come to this result. Perhaps, it was the FM Ayub Khan who was well abreast of the situation that the army deprived of tanks, ammunitions and thousands of valiant soldiers would not go beyond further against its enemy. The army was constituency of Ayub Khan and he had lost his ground in it after the cease fire. With the blessings of US, the Soviet Union offered mediation which was accepted and hence a Tashkent Declaration was signed on 4th January, 1966.

He made a speech on radio to the nation after breaking his silence from the Tashkent. The demonstrations were widespread. His address to the nation could not assuage the feelings of people. Bhutto made speeches on 14th March and 16th March, 1966 on floor of the house and gave a defense of declaration. The unrest was widespread and the political parties convened a conference on 5th-6th Feb, 1966 to evolve a common stand on Tashkent Declaration. There were 700 delegates and 21 represented the East Pakistan. Sheikh Mujeeb-ur-Rehman led delegation from the East Pakistan. In this conference, he put forward demand for more autonomy of the East Pakistan. He gave his famous six points in this conference. When his proposals were unwelcomed, he boycotted the conference and rejected the resolution passed in this conference and left for the East Pakistan. The success of this conference may be gauged from the fact that most of the leaders attending the conference were arrested later. The demonstrations failed to move the government.

Sheikh Mujeeb-ur-Rehman went back to the East Pakistan and was arrested on the charges of secessionist activities. The odd situation was yet out of control and a storm in the near future was omnipresent. The forces which were perturbed in the

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presidential election of 1965 were finding their ways, despite the fact that the opposition was sufficiently controlled. It was a source of discontentment that his re-election as the President of Pakistan by the BDs didn’t reflect the general will of people. His system failed to establish the popular authority of his rule. In the aftermath of war and the Tashkent declaration, the rioting by students didn’t control and this was a ripe situation for the politicians to exploit it.

It is opined that Bhutto’s agitations started against Ayub regime with the help of some army Generals. Bhutto capitalized Tashkent incident in his political movement against the Ayub era. Meanwhile, Air Marshal (Rtd) Asghar Khan and Justice Murshed also entered in the politics of riots and agitations. The entry of these two personalities in the politics lent prestige to the uprising against Ayub Khan. Air Marshal Asghar Khan was categorical in his statement when he said that the rejection of Ayub Khan is utter and complete. He further said that the President Ayub Khan symbolizes in his eyes as evil in our society. It was hour of the need that Ayub Khan must leave the scene.

The agitation which was confined to the West Pakistan now spread to the East Pakistan also. The emergency which was imposed during the September, 1965 war was lifted in the month of Feb, 1969. The detainees were released. The opposition was invited to hold parleys with the President of Pakistan. The case of Agartala Conspiracy was closed. Mujib was apparently found exonerated from the charges leveled against him the opposition put certain preconditions to the talks. He agreed that he would not run for the election of President of Pakistan due to be held in Jan, 1970. But he didn’t agree with the Six Points of Mujib and also dissolution of one unit. Mujib left the conference. The student’s demonstrations were widespread. The BDs were murdered and trains were halted.

In these circumstances, Ayub Khan was left with no other option except to bid adieu to the corridors of powers. He tendered his resignation from office of the President of Pakistan on 25th March, 1969. He asked the Commander-in-Chief of the

50 The Pakistan Times, dated 27th Jan, 1969.
51 The Imroz, dated, 19th Feb, 1969.
52 It was against the Constitution of 1962 to hand over a control to the Army Chief. As per Constitution, on vacation of the Office of the President, the office should have been handed over to the Speaker of the NA. It was in breach of his Constitution on which he had “sweated his blood”.
Pakistan Army General Muhammad Agha Yahya Khan to take control of country. Yahya Khan clamped the Martial Law in country. The Constitution of 1962 was abrogated.

The rule of Ayub Khan ended on disenchantment and fiasco. His romance to drill the people in running self-government under BDs failed to yield any results. His experiment of indirect election also didn’t work. It is saddened to note that the East Pakistanis were kept aloof from sharing political authority. They were subjugated to the West for the economic benefits. This attitude helped in promotion of Bengali nationalism and East Pakistanis united to raise their voice for the regional autonomy. The power remained centered around the land barons twined with the industrial and commercial classes. The bureaucracy enjoyed the rule of Ayub Khan. They were in partnership with the autocrats but they had to share blame for their failures. People could not be prepared for democracy under the auspices of controlled democracy. The genuine political growth stilted. Indeed, his political system relied upon Ayub Khan for its existence. It terminated with the termination of its creator. The edifice of his political party to which he gave birth crumbled down and had to lick dust. In the East Pakistan, it was a person like Shiekh Mujeeb-ur-Rehman who stood up and championed the rights of the East Pakistanis asking fulfillment of his six points which led to the secessionism. The political vacuum created by Ayub Khan was ready to be fulfilled by Zulfiqar Ali Bhutto in the West Pakistan he gathered people under his PPP asking for their right to social and economic justice. These movements were artificially hushed up by the Martial Law of Yahya Khan.

4.3 Conclusion

The political developments during this period set the course for the future judiciary and politics of Pakistan. During this era, the politicians proved their inability to bring the consensus constitution for Pakistan. They remained entangled in the incessant power politics. The military was called on many instances to impose martial law and help the civil administration. General Ayub Khan was in uniform when he served as the Defence Minister of Pakistan. During this era, the superior judiciary also proved itself as the extension of executive. Till 2007, it was the same compliant judiciary which helped military dictator to legalize its unconditional and illegitimate steps under the banner of Doctrine of Necessity.
CHAPTER 5


The country was in limbo when General Agha Muhammad Yahya Khan\(^1\) took reins by imposing the Martial Law and abrogating the Constitution of 1962. Both the parts of country rendered a picture recalcitrant to the authority of Ayub Khan. The fabric of unity of Pakistan was at stake in the East Pakistan as the people clamored for regional autonomy. The West Pakistan was inundated by the mass movement of ZA Bhutto’s PPP and raising slogans of the social and economic justice. These movements were result of the years’ suppression of the political growth and Ayub Khan took them as ‘senseless agitation’. General Yahya Khan gave a political recipe under the banner of which elections of 1970 were conducted and gave birth to crises. Perhaps, Yahya was not at the pedestal to handle such crises. This chapter discusses the Martial Law of Yahya Khan and its aftermath in the form of dismemberment of the Eastern wing of Pakistan and with dismemberment, the contours of South Asia changed\(^2\). The democratic turned totalitarian rule of ZA Bhutto has been discussed which paved a way to the Martial Law of General Zia-ul-Haq. It was the subservient apex judiciary which succored the illegitimate rule of military rulers. General Aga Muhammad Yahya needs discussion as he marked bearings on the integrity and political arena of this country.

At the age of forty, he rose as a General of the Pakistan Army. He was confidant and akin to General Ayub Khan in the military coup of 1958. These were his qualifications which made him nearer to Ayub. He was a professional soldier and apolitical. He was in contact with the politics when he served as the GOC in the East Pakistan in 1962. It was time when peace of the province was disturbed due to the unceremonious exit of the Governor General Azam Khan. By then Yahya Khan was given a task to hush up silence which he did with his utter brutality. By now, eight years had gone down the line and his previous tricks to use force against East Pakistanis to hush up them was, perhaps unworkable as the determinants of the

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\(^1\) After six days taking control of country from Ayub Khan, Yahya Khan took office of the President of Pakistan on 31\(^{st}\) March, 1969.

politics of the present had changed a lot. Yahya Khan was inside a jovial and sociable person who had thrown himself to the ethereal pleasures of life.

The unhappy recourse of events took place during his rule. A National Assembly was called into existence under the Legal Framework Order. The assembly never met. He and his colleagues lacked abilities to tackle the insurmountable socio-economic and constitutional problems.

He resorted to military action in the East Pakistan which proved disastrous as the country dismembered on 16th December, 1971. During the last days of Ayub Khan Regime, while holding parleys with the opposition parties, he had agreed to parliamentary system and allowed universal adult franchise as the basis of election instead of Electoral College of the basic democrats. Further, as regards, one-unit, he had vehemently refused to accede to the demands of smaller provinces. Khan Abdul Wali Khan and ZA Bhutto were raising their voices for restitution of provincial status. He also didn’t agree with the opposition parties as regards the issue of one-man-one-vote so as to change the principle of parity between the two wings. Yahya’s military regime abolished the West Pakistan as one unit to appease the political parties in both the wings of country. The principle of one-man-one-vote was not acceptable to the westerns’ of country as it was legitimately feared that the Bengalis would dominate. But, it may be argued that with the adoption of afore-referred principle of parity had the eastern part dominated the scene they might not have acted the interests of the westerners’. It was adopted in the Constitution of 1956 as a compromise formula. However, it was not practically applied as the elections were not held under the said constitution. The principle of parity became irrelevant under the system of Ayub Khan as the center of power didn’t concentrate in legislature rather it was dragged to the office of the President of Pakistan. This is how the East Pakistanis were practically excluded from share in authority which in due course of time culminated in to the Clarian calls for the regional autonomy.

The political activities in both the wings of country were halted. It was a full of danger to allow one-man-one-vote principle. The danger was that the East Pakistanis would have dominated the political scene on account of their vast number as compared to the West Pakistan.
Yahya Khan had pledged to the nation that with the framing of constitution authority would be transferred in the civilian hands. The Legal Frame Work Order\(^3\) was issued on 30\(^{th}\) March, 1970. The constitution was subordinated to the LFO in a way as it was required to conform to the LFO. It was the job assigned to the NA to frame constitution within 120 days. The NA was proposed to have 313 seats, while reserving 169 seats for the East Pakistan. Total 13 seats were reserved for the women, wherein 7 seats of women to the East Pakistan. The remaining seats went to the other provinces of the West Pakistan. The politicians were allowed to resume their political activities from Jan, 1970. The constitution could be approved with a simple majority. The LFO had provided 60% requirement of the total membership of the legislature as LFO drafted by G.W. Chaudhary. This is what G.W. Chaudhary says that it was dropped by Yahya Khan himself just before its issuance\(^4\). The simple majority clause made it apparent that the East Pakistanis could easily maneuver the political situation in their own favor. The future constitution was deemed to be federal in character. However, the clause of simple majority could spark the flame of political confrontation between both the wings.

From the speech, General Agha Muhammad Yahya Khan made soon after taking control of the country, it sounds as if he had no ambitions of his own. He clarified that he wanted to create condition suitable to the enforcement of a constitutional government. He said that the Martial Law would resume administration on right track and also to protect the life and property of people of Pakistan. The Martial Law was proclaimed by CMLA General Yahya Khan and the Constitution of 1962 was abrogated. However, the courts of law, tribunals were not stopped from exercising their jurisdiction. Such courts and tribunals were not allowed to pass any verdict in contravention of the Martial Law Orders. Further the courts were also stopped from calling in question any Martial Law order, regulation or judgment of a military court. The courts were banned from issuing any writ or order against the CMLA. The judges of the Supreme Court, High Courts, Advocate Generals and other office bearers could enjoy their offices till the pleasure of the CMLA\(^5\).

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\(^3\) Pakistan News London, 15\(^{th}\) April, 1969.

\(^4\) G.W. Chaudhary, Last Days of United Pakistan, Bloomington, Indiana University Press, 1974, P.90. The author had drafted the LFO and didn’t exert his influence as regards the eleventh hour change. He was also member of the Cabinet. He says that the Awami League was delighted to know such constitutional changes pertinent to the East Pakistanis.

\(^5\) Proclamation of Martial Law, PLD 1969.
The Provisional Constitutional Order came into force on 4th April, 1969. Despite the fact that the Constitution of 1962 was abrogated, yet it was announced that the State of Pakistan would be run closely to the abrogated Constitution. The CMLA was made to discharge functions of the President of Pakistan. The fundamental rights were abrogated. However the rights such as prohibition against slavery and forced labor, freedom of religion, access to public places and abolition of un-touch-ability remained in force. CMLA or Deputy CMLA had exception from getting any writ, order, judgment or decree passed against by them by any tribunal or a court. The time limitations were not exercised against the Ordinances issued by the Governors or President. If death sentence was passed or orders were made for transportation of life or person was convicted after holding trial, then an appeal lied with the Supreme Court of Pakistan. For the administrative affairs of state, General Yahya Khan as the president had deemed fit. Yahya Khan assumed the office of the President of Pakistan with effect from 25th March, 1969. To this effect, a notification was issued on 31st March, 1969. On 4th April, 1969, it was officially published in the Gazette of Pakistan.

General Agha Muhammad Yahya Khan concentrated many offices in his own self. He was a President of Pakistan but was supervisor of the Armed Forces of Pakistan. He was the Army Chief and it was fully under his control. He was unto law himself as every word uttered by him rose to the level of law being the CMLA. The civil bureaucracy had no say in the formulation of policies. G.W. Chaudhary says that he met General Peerzada and during the talks I found there lurked in him antagonism and personal scores against the ‘bloody civilians’. He said that he was removed unceremoniously from the post of Military Secretary of General Ayub Khan not because of his ailment but it was consummated by a conspiracy hatched by the civilian bureaucrats against an army officer.

The East Pakistanis took an implication of imposition of Martial Law by Yahya Khan as a conspiracy to sabotage their demands. Most of them had a belief that it was imposed when most of their demands were ready to be accepted. Most of the Bengali civil servants believed that there was no regional autonomy and that must be

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6 PLD 1969 Provisional Constitutional Order.
7 PLD 1969 Central Statutes 41.
9 G.W. Chaudhary, The Last Days of United Pakistan, p82.
accorded to them as per their demands. With the dismissal of huge bulk of Bengali civil servants from their jobs led to further deterioration of their representation in civil services.

The pity of nation is that the Pakistanis were promised general elections but they were not held. During the era of General Ayub Khan (1958-1969), the elections were although conducted, yet they were not representative in character as they were indirectly arranged. The voters were not a general public but the 80,000 basic democrats divided between the two wings that constituted an Electoral College. It was a good omen to hear from the Yahya Khan’s regime that the general elections would be conducted on the basis of adult franchise. These general elections were promised to be held on 5th October, 1970. From 1947 till 1970, there was no experience of such elections; therefore, it was difficult to predict the outcome of such elections. However, it proved later that the results of these elections were fateful for country.

Converse to it, the general elections on the basis of adult franchise were held in 1950 for the first time in India. In Pakistan, during the Ayub era, the representative system was bidden farewell in 1958. From 1958 till 1970 the political activities were controlled/suppressed. Now the Yahya regime provided an opportunity to an electorate to cast his vote in favor of his candidate in the general elections. The electorate was illiterate, uneducated, unenlightened and was easily driven by the political parties through emotions. The political atmosphere before the general elections was not made conducive to such activity which was carried out on national scale. The saner political climate before holding the general election was not ripened. The political forces were allowed to take the course of their own choice.

The election campaign for these elections remained in force for whole one year and it ensued in the month of Jan, 1970. The political scene was dominated by Sheikh Mujeeb-ur-Rehman of the Awami League who had to face tribulations on account of charges of sedition and mutiny against the State of Pakistan. His political campaign was based on rights for the East Pakistanis. He had rendered a charter of provincial autonomy which was in the form of six points. These points were at first

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10 The removed civil servants were later restored to their positions by the Government of the Bangladesh.
announced in March, 1966 at Lahore. His famous six points are enumerated hereunder;

a) Lahore Resolution is to be basis for the federal status of Pakistan. There should be a parliamentary form of government and adult franchise.

b) The Federal Government would deal with portfolios such as defense and foreign affairs.

c) The East Pakistan and the West Pakistan shall maintain two different currencies. If not, then, measures shall be introduced to stop the flight of capital from the East Pakistan the West Pakistan. For the Eastern province, a separate banking reserves and a separate fiscal and monetary policy be maintained.

d) The respective provinces shall be empowered to have exclusive jurisdiction to raise taxes. The center shall be given a share to maintain its own expenditures.

e) Both the wings shall maintain separate trade links with the foreign countries and they will have separate foreign exchange earnings accounts.

f) The East Pakistan shall have its own militia.

The Awami league had political field open with no opposition as Maulana Bhashani, the National Progressive League and Krishak Sramik Party boycotted the elections. There was political resurgence of Bengali nationalism in the campaign of Awami League. Provincial nationalism was aroused in this campaign which was found uncontrollable as witnessed in the results of elections of 1970. The traditional parties were swept and disappeared as the leaves fall in the autumn from trees. Jamat-i-Islami, Muslim league and Nizam-i-Islam Party were not spotted anywhere in these elections. The developments in the West wing were different. Zulfiqar Ali Bhutto who remained pupil of Ayub Khan had swept the elections. He aroused feeling of nationalism amongst the masses. He attracted the attention of people during the September war of 1965 between India and Pakistan. His political talent shone during the election campaign. He gave slogan of ‘Roti, Kapra aur Makkaan’ to the people under the banner of his newly created political party named as Pakistan People’s Party. This party carried political philosophy; Islam is our religion; Socialism is our
The PPP also made a promise to grant 12 acres of land to every landless farmer.

ZA Bhutto was well adept in making furious and passionate speeches. He aroused feelings of a common man and became voice of him. He had a gift of the gab. He was an orator and promised to make disclosures of Tashkent Declarations. He made a Clarion Call to the exploiters. People were moved by his histrionic attacks against the cheats. In a short time he touched pinnacle and left behind the traditional political parties and heavy weight individual politicians. He promised political change and economic uplift. He had ability to get closer to the masses.

The elections could not be held in time as the East Pakistan was hit by a cyclone which engulfed as many as one million people. It is considered as one of the worst hit natural catastrophes in the modern world. Mujib seized this opportunity as response of the Yahya’s government was very slow and insufficient aid was provided to the cyclone-hit people. However, the polls were held in the month of December, 1970. ZA Bhutto swept the elections in the Western wing. 138 seats were allocated to this province out of which 82 seats fell to the PPP of Bhutto. Bhutto failed to get any seat in the Baluchistan province and could manage only one seat in the NWFP (now KPK).

There were twenty four parties\textsuperscript{13} which participated in the election of 1970. The Election Commission allotted symbols to these political parties. It is a fact that in a country like Pakistan, the electorates are unable to read the names of political party. PPP was allotted the symbol of sword and Awami League was given the symbol of boat. 781 candidates were in field contesting the 162 seats of the East Pakistan, whereas for the 138 seats of the West Pakistan 800 candidates were hopeful. There were some insignificant parties whereas there were some other parties also in the political arena which had a long traditional\textsuperscript{14} political history, such as Jamat-i-Islami and Jammat Ulamma-i- Pakistan. These parties dated back to pre-independence. The most powerful political force in the East Pakistan was Awami

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\textsuperscript{14} G.W. Chaudhary, *The Last Days of the United Pakistan*, p.114.
League. In the West Pakistan, PPP was an emerging powerful force. Since 1950s, the communist parties were banned in Pakistan as it was an ally of the allies. However, there were some of the leftist parties which had their manifestos associated with the communist parties. The National Awami Party broke away from the Awami League on some foreign policy matters in 1956-57. It was further split into two groups, one was known as Pro-Peking group and the other was popularly known as Pro-Moscow group. There was a section which also broke away from the Indian National Congress and after the emergence of Pakistan it formed itself into Pakistan National Congress. Since 1960s, it didn’t exert any significant influence on the political horizon. It is unfortunate to point out that the political scene of the 1970s election was deprived of any political leader of a national stature. The results of these elections brought to surface the regional political leaders and regional politics. The Muslim League was split up into three factions, Jammat-i-Islami and Pakistan Democratic Party could not make their grounds in the East Pakistan. These parties lost their grounds in the West Pakistan to the PPP of Bhutto. The powerful Sheikh Mujib had no political base in the West Pakistan. It was the same case with Bhutto that he even didn’t dare to step in to the shoes of Sheikh Mujib. PPP had not a single candidate in the East Pakistan. It was really disheartening for the political unity of Pakistan to see that there was regional polarization.

It is worthy to mention that the political campaign of Sheikh Mujib was based on the Islamization of Constitution. It is needless to say that after the dismemberment of Pakistan it was the same Sheikh Mujib who imposed a “Secular Constitution” on the Muslims of Bangladesh. At several occasions, he made it abundantly clear that Pakistan is to stay and there is no force which can destroy it. He gave repeated assurances in his speeches and statements regarding the viability of the ‘Federal Government of Pakistan’. It was after the creation of Bangladesh that he said Bangladesh was in his planning since 1968. The struggle for independence of Bangladesh had started way back in 1948, 1952, 1954, 1962, 1969 and 1970. These pieces of evidence are sufficient to prove his real role in the break-up of Pakistan. He

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15 Bangladesh Documents, Ministry of Foreign Affairs, Government of Pakistan, Vol. 1. p.67-68. (the Manifesto of Awami League may be seen from these documents)
had a free hand to preach the Bengali nationalism and the ideal of Bangladesh. Governor Ahsan’s incompetence helped Sheikh Mujib to mislead the innocent Bengalis. G.W. Chaudhary says that Maulana Bhashani had told him that Sheikh Mujib’s campaign against the dismemberment was unchecked so; he also raised a slogan of ‘Independent East Pakistan’. This slogan was misunderstood in the West Pakistan. In fact, he didn’t want the break-up of Pakistan. He wanted to caution the Government. He further said that he knew the newly created State of Bangladesh would be a satellite state of New Delhi like Sikkim or Bhutan.

5.1 Power imbroglio between Bhutto and Mujeeb

The appeal of Mujib to a commoner of the East Pakistani was ‘Sonar Bengal’, it means a golden Bengal. This appeal touched a poor folk of 75 million population of the East Pakistan. The strategy of Mujib was similar to that of the Quaid in 1946 which ensured Muslims to have their own homeland replete with countless opportunities. In these circumstances how could a rural Bengali peasant desist the appeal of Mujib for the Sonar Bengal? Mujib had no fear from the leftists and the rightists and took a landslide victory.

There were different complexities in both the wings of Pakistan. The East Pakistan had homogeneity and the West Pakistan was struck with the heterogeneous culture. The smaller provinces wanted dissolution of one-unit and the Punjab wanted to retain it. Further Punjab was considered as the bastion of power in the West Pakistan, if not in the whole Pakistan. Bhutto was addressing the newly created have-nots by asking for the land reforms and Islamic Socialism. He also didn’t want to antagonize the business class and landlords.

Bhutto later claimed (when the civil war had broken) that he had told General Peerzada, a de facto Prime Minister of Yahya Khan that Sheikh Mujib’s designs are to secede from Pakistan. He had reiterated not to allow Mujib to openly preach his six points. But, Mr. Yahya replied that he has assured him that after the elections he will modify his points. G.W. Chaduhary says that he met Bhutto in Karachi and asked him why he does not go to the East Pakistan and tell people of the reality of the six points of Mujib. Indeed, it was he who had never exposed the reality of

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Mujib’s points in his political gatherings. He concentrated to capture great number of seats in the West Pakistan. Bhutto also cannot be absolved of the blame of giving free hand to Mujib to make his political canvassing on his notorious six points. Bhutto was more interested in gathering seats instead of maintaining the unity of Pakistan.

It was for the first time that the political leaders and parties were given an access to the radio and television\(^\text{19}\) to convey their messages to the people. Ayub Khan had not given in the past this opportunity to the COP but he had himself availed of it for his campaign of the President of Pakistan in 1965. In 1950s the access of the politicians to the radio for the provincial elections was not allowed. From Bhashani to G.M Syed, almost every politician spoke on these two mediums. Bhashani was not participating in the elections. However, his speech was taken on serious note in both the parts. From Dacca, he made his speech in Bengali and from the West Pakistan he spoke Urdu. Sheik Mujib Had attained the status of a Bengali leader. Bhutto’s speech was also heard with seriousness. Yahya Khan\(^\text{20}\) made a press conference in Dacca and promised more autonomy for the region under the federal government of Pakistan. Despite all such assurances, the dismemberment of Pakistan was in the offing. Mujib knew it but it was really naïve of the Yahya regime that they were oblivious of this fact.

The question arises whether any of either Ayub Khan or Yahya Khan was gifted with a stature to overcome crisis of the East Pakistan. Both of them unfortunately lacked political skill or statesmanship to resolve the problem in accordance with the aspirations of the people of East Pakistan\(^\text{21}\). The Economist commented that the Ayub Khan a ‘Muslim de Gaulle’ wanted what the French de Gaulle thought for France. Gaulle of France had to take a decision to set the Algeria free to get his own country locked in mire and dismay. He held referendum on the future of Algeria and 99.7% Algerians voted for the independence of Algeria. It was set free and became an independent country on 3\(^{rd}\) July, 1962. Perhaps, for Ayub Khan and Yahya Khan there was no other solution to the problem of the East Pakistan except what French de Gaulle did for his country. This is how the rest of


\(^{20}\) Morning News, Dacca, November 28, 1970

Pakistan (which was the West Pakistan) could be set free and make economically viable country. It was no less great failure of the both Generals and a part time President (as Yahya himself called) and also a disservice to the nation that they failed to understand the rising tide of Bengali nationalism.

The election results of the 1970 were astounding for the regime of Yahya Khan. These results threw the whole regime of the soldier-turned President into the unfathomable ocean of bewilderment. These results had wrapped a fatal crisis which perhaps none knew. The rightist parties were swept in the East Pakistan. The Awami League of Sheikh Mujib was all around.

The new factor in the politics of the West Pakistan was Bhutto who had surpassed all targets. It was the same East Pakistan which had made Fatima Jinnah to get majority in Dacca and Chittagong despite the maneuver of bureaucracy through the Basic Democrats. It also cannot be obliterated from memories that in 1954, it was the same East Pakistan where the Muslim League was completely routed in the provincial elections.

The Awami League had won majority seats in the election of 1970. Therefore, its right to form government could not be negated. Further the Legal Frame Work Order didn’t put any condition of bringing consensus of the provinces to agree on a constitution. Beside this, it was also not laid down in the LFO that some special majority is required to get the Constitution passed. In this situation, the Awami League could frame Constitution on its own. However, Yahya Khan was empowered to withhold the bill of constitution if it hurt any segment of society. The legitimate government in Pakistan, however, could only be of Awami League. Mujib was obsessed with his six points. The Agartala conspiracy case was still fresh in the minds of Army. Giving government in his hand would be that he would have framed the new constitution in accordance with his six points. He had not allayed the fears of the West Pakistanis. His six points in the West Pakistan were viewed as a secessionist designs. It was Yahya who had remarked that “they want a toothless center and country be divided in two parts. The defense forces of Pakistan should be rendered as impotent and the fabric of political unity of the West Pakistan is ended.”

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Wayne Wilcox remarks that Mujib took a stand on his six points and proved himself as the great nationalist in the same way as he did with Ayub khan. The six points could not find its way in the conference held in March, 1966 as all the politicians in the West Pakistan had opposed such designs. Besides this, it was the president of Awami League West Pakistan chapter Nawabzada Nasarullah who had also disagreed with such move. The PPP foundation documents were published in 1967. These documents also opposed the same demand of the Awami League.

Bhutto said that in country there were three parties or stake-holders. One was the army, the other PPP and third one was Awami League. The Awami League could show its muscles only when the National Assembly’s session was called. The power of PPP was outside and not inside. He had tactical advantage. The conflict\(^{23}\) between Awami League and the PPP arose because of the Yahya’s LFO granting power to the party to pass a constitution who enjoyed a simple majority and this is what the Awami League had. Bhutto was also watchful that some collusion between the Awami League and Yahya regime may not be struck so as to oust him from the corridors of powers. Bhutto had his apprehensions that both of them may arrive at some deal out of the assembly. His apprehension came true when, Yahya Khan soon after the elections called Mujib as the future Prime Minister of Pakistan\(^{24}\). The Generals of Army were in league with the Bhutto’s strategy of confrontation with Mujib. Professor Wayne Wilcox says that it was Bhutto who was more prepared to see a Pakistan without the East Pakistan\(^{25}\).

When Bhutto saw that he had gathered enough strength, he boycotted the assembly session which was due to be held in Dacca on 3\(^{rd}\) March, 1971. He stopped his party members from attending the same. He called the assembly\(^{26}\) as ‘slaughter house’ and repeated his demand for settlement out of the assembly. Bhutto and Yahya khan entered in dialogues. He demanded postponement of the assembly session. On 1\(^{st}\) March, 1971, the session of assembly was postponed for an indefinite period (sine

\(^{24}\) Robert Jackson, *South Asian Crisis* p.30.  
\(^{26}\) *Daily Jang*, 16th February, 1971.
die) by Yahya Khan. This announcement sent a wave of anger amongst the East Pakistanis. The announcement of postponement of assembly session seems to have been made without the consultation with Mujib. If it is so, then it is breach of trust. Mujib has not been consulted regarding this development. Was it not up to the regime of Yahya to see what impact this postponement would leave on the political arena and what would the East Pakistanis think of? It gave an impression to the Bengalis that Yahya and Bhutto are in league. Bhutto was a politician. He had his own political designs and he wanted the accomplishment of them, for the purpose he need some time which he was able to borrow from Yahya. The regime of Yahya was failed to understand the implications of the same that by borrowing time to Bhutto would be disastrous and they would fail to muster up the confidence of Bengalis.

The dismayed situation weakened Yahya Khan. Both the products of Ayub’s authoritarian rule Mujib and Bhutto were not ready to agree on a joint draft of the constitution. Bhutto had built up his muscles by rousing militant nationalism against India in the illiterate electorates and Sheikh Mujib had gathered up his political strength by exploiting the regional feelings against the Punjabi domination. Both of them flourished on negative appeals to the uneducated masses. The Generals in the GHQ were planning to impose Turkish type ‘civilian-Military regime’. Yahya was betrayed by Mujib. There was an understanding which was developed over a period of two years and when the post-election period started, Mujib did keep his promise to show him his draft constitution. It was depressing for Yahya as he had relied on him and didn’t agree with his colleagues not tot trust Sheikh Mujib. G.W. Chaudhary says that he asked Hafizud-Din a member in cabinet and related to Mujib to ask him to show a draft constitution. Mr. Tajud-din second in command replied that there was no pledge and there is no requirement to show any draft constitution. It is reported that Tajud-din was in communion with India to get the other designs accomplished.

5.2 Towards Dismemberment

Yahya had been disappointed over his meeting with Mujib in Dacca where he refused to negotiate his six points. Having dismayed with this situation, he made a tour to Larkana. He was accompanied with General Hamid and Peerzada. Peerzada had close associations with Bhutto. The hospitality of Bhutto and colorful evenings elevated the mood of somber Yahya at Larkana.
The press statement issued at Larkana showed its concern over the six points. Now, it was Bhutto’s turn to visit Dacca and see Mujib after Yahya. The press reported that the talks between both the leaders were conducted in cordial manners. However, it was Mujib who was insisting to call the session of assembly. He had made it unequivocally clear that the future constitution would be based on his six points. In fact, Mujib was suspicious of Bhutto. He took him as agent of the military junta. He had never trusted him.

In the middle of February, 1971, the military junta formally met at Rawalpindi. It was decided to challenge Mujib if he didn’t change his stance. However, Bhutto had impunity to give provocative statements. The hawkish Generals like Omar, Gul Hassan, Hamid and a dear friend of Bhutto Peerzada considered Bhutto as the defender of the national interests. The cabinet was decided to be dissolved as the task entrusted to it was completed which was to hold elections in country. Instead of Ministers, Yahya decided to have council of advisers. Cornelius stayed in the cabinet. Ahsan left as the Governor of the East Pakistan and General Tikka was sent at its place. Yahya announced on 13th Feb, 1971 that assembly would meet on 3rd March, 1971 at Dacca. Bhutto protested and asked first to settle the issue of constitution. He threatened revolution from Khyber till Karachi if session was convened. Bhutto gave this threat because he had grown powerful and further the military junta was at his back. Yahya Khan’s grip on his rule was getting weakened. It was General Hamid who had the reins under his control. The cancellation of assembly was done at the behest of Bhutto along with the inner cabinet of Yahya. The inner cabinet (meaning Military Generals) was powerful as compared to the civilian cabinet of Yahya. They retained General Yahya as the President only to avoid international pressure. It was Richard Nixon who had assigned Yahya the important task to establish a liaison between Peking and the White House. Yahya made his best to persuade Bhutto to attend assembly session. He assured him if Mujib tried to thrust his six points on constitution then he may prorogue the session of assembly.

G.W. Chaudhary says that he prepared a mild statement which was replaced by a provocative statement by Bhutto in collusion with his hawkish Generals of inner cabinet. This statement was full of fury and sent a wave of shock. There were protests

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on massive scale. Mujib ran into open revolt. He declared and independent state of Bangladesh. From 3rd March till 25th March, 1971, the federal government of Pakistan had no control in the East Pakistan. Amidst the revolt the negotiations between Mujib and Yahya Khan were still going on. The assembly was promised by Yahya to be called on 25th March, 1971. Mujib put certain conditions to attend the session of assembly. One that the Martial Law be lifted; second the judicial inquiry be made in the loss of life; Army should return to barracks; and immediate transfer of power before the Constitution could be framed.

On 15th March, 1971, the visit of Yahya seemed an endeavor to instill a new lease of life into the dying patient. Yahya’s visit to Dacca was announced as the ‘guest of Bangladesh’. An independent state had been declared by Sheikh Mujib-ur-Rehman. He issued directives to the government offices and other people belonging to different segments of life not to communicate with the West Pakistan. The foreign correspondent29 said that it seems the independence has been declared by the East Pakistan and named it as Bangladesh. There were other international newspapers30 which wrote that ‘Pakistan as it stands today is finished’.

It is interesting to mention that the development on the Indian side which further deepened he crisis as the links between both the pats of Pakistan terminated. Pakistan was alleged to have hijacked an Indian plane. On the basis of it, the Indian authorities banned all Pakistani flights commuting from the West Pakistan to the East Pakistan. The Pakistan Government approached all the friendly countries like US, Soviet Union and Great Britain to persuade India to allow the movement of planes when the integrity of country was at stake. But, the India refused to pay heed to anyone. Mujib termed this incident as the Pakistan’s government conspiracy to delay transfer of power. Bhutto being caught by the mental bankruptcy termed it as the ‘heroic act of the national heroes’. Yahya was sincerely making his efforts to get the route open. Bhutto said if power is to be transferred before the constitutional settlement, then it should be transferred to the majority party in the East Pakistan and

to the majority party in the West Pakistan. He further said that the rule of majority does not apply where the distance between two parts is large³².

Yahya Khan in a sincere bid to maintain unity of Pakistan landed in Dacca on 15th March, 1971. It was time when Mujib had almost declared the independence of Bangladesh. Bhutto was favoring two governments in Pakistan. It was the smaller parties and yahya Khan who was still bent upon protecting the unity of Pakistan. Bhutto was asked to see Mujib in Dacca but he declined saying that there was no point in seeing him when he had already declared the independence of country. He now seemed more interested to receive twenty-one gun salute from a smaller Pakistan instead of maintaining its unity.

By now, the time for direct confrontation had arrived. The two sides were preparing for the onslaught. The Pakistan Army was being reinforced through a circuitous way of 3000 miles route to the East Pakistan as the India had put ban on its air route for the Pakistan flights. Mujib had appointed Colonel Usmani as the Commander of the ‘Revolutionary Forces’. The East Pakistan Rifles, the East Bengal Regiment and the Police force were all showing their allegiance to Mujib. The radio, television and the press was in all support of the independent Bangladesh and was at beck and call of Mujib. When Mujib reached Dacca on 16th March, 1971, he was sent to the President House in a car with the symbol of Bangladesh and flying a black flag to commemorate the deaths of people. Mujib put forth his conditions. Before Yahya Khan he had two options either to accept the de facto Bangladesh or supervise the dismemberment of Pakistan as its President. There was yet another option to hit the Mujib forces hard with the military action.

The hawkish Generals of Yahya Khan had set a stage to hit the Bengalis with gun, whereas, Mr. Yahya Khan was still imploring the unity of Pakistan from Mujib. Mujib had also hawkish elements that were bent upon having an independent Bangladesh. It is no denying a fact that the ease which Yahya Khan had provided Mujib to canvass his election campaign for a yearlong on the basis of his six points aroused Bangali nationalism. Mujib had no difficulty during his political campaign to preach his gospel of Bangladesh. Now, it was a time for Yahya Khan to reap fruit what he had allowed unchecked. The tree of nationalism and independent Bangladesh

which had grown into a tree was impossible to be chopped off by Yahya Khan and his hawkish Generals.

The cordiality between Mujib and Yayha Khan led to believe that some rapprochement had been arrived. The East Pakistan and the West Pakistan would work under the Constitution. The press also gave news that constitutional arrangements have been agreed in the light of Mujib’s six points. On 20th March, 1971, the press reported that some formula had been struck between Mujib and Yahya Khan. The dialogues were between Yahya Khan and Mujib. Yahya Khan was aided by General Perrzada, Justice A. R. Cornelius, Col Hassan Legal Expert at the GHQ, Rawalpindi and M.M. Ahmed. The talks were regarding relationship of the national government and the state of Bangladesh (a province). While, Yahya Khan was giving concessions to Mujib, the hawkish Generals warned Yahya Khan of weakening the national government. They were, perhaps ignorant of this fact that such pieces of advice would lead to the doomed fate. Since 1950s, the Pakistan Army under Ayub had thought of itself as the sole guardian of the national interests of Pakistan. The Pakistan Army Generals are obsessed with the notion that they are assigned with the prime duty to protect the ‘Izzat’ (honor) and ‘Ghairat’ (respect) of country.

The majority of military men and common people in both the West Pakistan and the East Pakistan had never thought of dismemberment of Pakistan. The main concern of an average majority Bengalis was regional autonomy and economic improvement. Mujib had dreamt them of ‘sonar Bengal’. The fate of country’s 120 Million populations was in the hands of civil servants, the big businessmen and the hawkish Generals. A common citizen of the East Pakistan had never thought that the newly created independent country of Bangladesh may become a satellite state of New Delhi. Muhib was also aided by his hawkish fellows like Taj-ud-din, Mansoor, Qamaruzzaman and Nazrul-Islam. Dr. Kamal Hossein was a legal expert who later became a Law Minister of Bangladesh and had drafted its constitution in 1972. The economists were not directly aiding Mujib. They were at the beck and call of foreign

economists like Ford Foundation. These economists may be held responsible for the failure of Dacca Dialogues.

23rd March, 1971 was a tragic day in the history of the United Pakistan. In Dacca, it was celebrated as the ‘Resistance Day’. In the united Pakistan and now, this day is observed as a ‘national day’ with solemnity and dignity. In the same breath, 26th January is celebrated by India. On the resistance day in Dacca, the flag of Bangladesh flew everywhere. The Pakistan flag was burnt and insulted. This flag was seen hoisted at the President House where Yahya Khan was staying and at the Provincial Government House.

On 23rd March, 1971 the Awami League finally submitted its draft constitution. It asked for two constitutions of two sovereign governments under the so-called ‘confederation of Pakistan. It rejected the offer made by Yahya Khan which granted full regional autonomy on the basis of six points of Mujib minus dismemberment of Pakistan. The new proposal of Mujib was presented by Dr. Kamal Hussian ending the virtual unity of Pakistan. The interim arrangement was that the center would have only powers of defense and some matters pertaining to foreign affairs. Yahya was ready to accept the center to have three powers with regard to the East Pakistan or the Bangladesh. Mujib was clever enough not to give these three powers in reality but only on paper. The trade between East Pakistan and the West Pakistan was on the same level as that of foreign trade. Within one country two regions would have traded like two separate countries. When Yahya pointed out that the institutions like World Bank don’t deal with the constituent units of a country they need a sovereign guarantee. In response to this the Awami League replied that ‘we are quite competent to look after our economic policies and problems’. The article 16 of Mujib Plan asked for establishment of separate Reserve Bank for the State of Bangladesh. The State Bank of Pakistan and its branches working in Dacca and other parts of the East Pakistan were to be designated as the Reserve Bank of the Bangladesh. This proposal would have far-reaching implications as it would have undoubtedly established a separate entity of the state of Bangladesh.

Under Bhutto, General Tikka was the Commander-in-Chief of the armed forces of new Pakistan. He was appointed to carry out the military operation in the East Bengal. General Tikka described the situation of East Bengal in the first week of March, 1971 while talking to an Egyptian journalist Mohammad Hasnain Haykal. We were like blind men in the Eastern region. Mujib had incited the military and paramilitary forces on mutiny. Hakay says that Mr. Tikka was perhaps, oblivious of the fact that this revolution arose from deep-rooted national aspirations. On 26th March at 1.30 A.M. the gun awoke everyone and fired around the Dacca University, the Headquarters of Police in Motijeel, and the East Pakistan Rifles in Palkanna. The two large dormitories namely Iqbal and Jaganath Halls gutted with the students were killed. The East Pakistan Rifles and the Police resisted against the Pakistan Army. Major General Fazal-e-Moqeem, the official historian of the Pakistan Army says that the heroic performance of the Pakistan Army is applauded on the midnight of the 25th and the 26th March, 1971. It is sad to point that the West Pakistan so-called ‘liberal’ authors were fed by the Indians with the fake stories of genocide and pogrom. During the operation, most of the foreign correspondents were dragged out of the East Pakistan. However, still some were left. Simon of the Daily Telegraph was one of them. He published a story on 30th March, 1971 which was titled as ‘How Dacca paid for a united Pakistan’. There was another report which was published by The New York Times regarding a visit of Mr. Hendrick of the IBRD in June, 1971.

There was one worrying factor and that was the growing involvement of India in the crisis. Pakistan was in the verge of annihilation and for India it meant the realization of their long cherished dream. The reversal of the victory of the West Pakistan Army had started as there was a large number of military men being killed. The death toll had started rising. It was a re-mustering of the Mukhti Bahinis being done by the Indian Army. Pakistan’s economic situation was despicable. There was serious dearth of foreign exchange flow. All foreign loans and aid for development had been stopped. The US had announced a ban on the arms and ammunition supplies to Pakistan. The military Junta of the Yahya regime was perhaps, yet unaware of the fact that their military operation had led them into ‘blind alley’. During the mid of

37 Haykal, Muhammad Hasnain, The General who was Defeated, Weekly Frankly Speaking Articles in Arabic Language, MENA, Cairo, 19th April, 1973. (This reference has been quoted in the Book of G.W. Chaudhary titled as The Last Days of the United Pakistan)
May, 1971, G.W. Chaudhary says that he came to Pakistan from London and met the Generals in command of the Operation of the East Pakistan. He said\(^{39}\) that it was shocking to see their attitude towards the situation. In their opinion ‘at first the rebels must be crushed and then we talk of any political settlement’. The General of the West Pakistan Army were quite confident to face the Indian threat and the secessionist challenge from the East Bengal. These Generals had thought that they had crushed the uprising in the East Pakistan but, they were ignorant of the international implications of the crisis. Meanwhile, there was a talk of political settlement for the East Pakistanis. Justice A.R. Cornelius was asked to frame a draft Constitution. The constitution committee was headed by the Rasputin General Peerzada. This draft was considered worse than Ayub’s Constitution of 1962. Yahya said that the Cornelius Constitution was prepared to deal with Bhutto who had been demanding that his party should be effective power being the second largest group in the NA. As regards Bhutto, he had bad impression amongst the Bengalis. He was considered as the one who had given height to the crisis in collaboration with the hawkish Generals. By this time Bhutto had started behaving as if he is the PM of country. Further, there is no denying a fact that the Generals like Omar, Gul Hassan and Peerzada were in communion with Bhutto\(^{40}\). It is pitiable to say that the Bhutto and the Generals of the Yahya regime were busy in romance; the East Bengal was on the verge of collapse. The ruling elite were in deep illusion. They were busy talking of granting controlled autonomy to the Bengalis.

G.W. Chaudhary says\(^{41}\) that Henry Kissinger came to Rawalpindi via Peking after finishing off his secret visit to China. He informed Yahya Khan of the armed preparations of the Indian forces in the East Pakistan. He said that he had informed the Indian Ambassador that if India Intervenes then China would attack India and US wouldn’t come to her help as it did in 1962 and 1965. The Sino-US détente was a perplexing factor for the Indians. The Sino-US rapprochement altered the international scenario in which, for India, it was not easy to conduct military intervention in the East Pakistan\(^{42}\). Having struck with such circumstances, India signed the treaty of Peace, Friendship, and Cooperation with the Soviet Union. After


getting umbrella of security against the Chinese attack, it injected the Indian armed forces personnel in the Mukhti Bahinis. It was not possible of the untrained Mukti Bahinis men to submerge the Pakistani Ships at the Chittagong sea-port and also destroy the bridges.

The International Jurists in Geneva have commented on the role of India in Bangladesh crisis. As per international customary law it was the first duty of the India to maintain neutrality. It was not allowed to interfere in the hostilities. On 6th December, 1971, India recognized Bangladesh as an independent country. It was rather more serious to provide military assistance to the rebels of the East Pakistan. These guerillas were trained on the soil of India.43

The conflict of Bangladesh was not merely a conflict between the Pakistani nationalism and the Bengali nationalism. It was the powerful neighbor which took advantage of the internal strife, instability and tension in a country. Even if Pakistan was mired into such deep rooted ethnic, linguistic, cultural and racial issues, India had no justification to invade and dismember another country.44 The Indian Scholar on the role of Soviet-Union says that its objective was to provide security to the Indian military action in the East Pakistan. He further says that ‘Kosygin supported the Bangladesh movement despite its legal and theoretical snags.45

In the given circumstances, it was a foregone conclusion that the Pakistan Army would lose the war in the East Pakistan and India would have easy victory. The local population didn’t support the demoralized army and further it lacked the air power by then. India sat on wings of the Soviets and then captured Dacca. The diplomatic support of Peking and the US was of no help for Pakistan as it didn’t receive any military help from both of these powers. The victory boosted the morale of India which its forces had lacked in the 1962 border skirmishes with the China and the 1965 indecisive war with Pakistan. India was able to dismember it number one enemy an also it was a diplomatic defeat thrust upon China.

It might, indeed, be true to state that constitutional problem has been the constitution making rather than its working. Unfortunately, the image of Pakistan has

45 Naik, J.A, India, Russia, China and Bangladesh, New Delhi, 1972. p.50.
been instability and controversy\textsuperscript{46}. Dr. Spear has talked about the adventure which Ayub Khan did in the field of democracy. It was a blended democracy with discipline. Ayub Khan had a notion that the people of Pakistan were not used to ‘self-rule’, therefore he thought to release it in installments. This attitude was that of a colonial ruler. The people who had laid great sacrifices to get independence from a foreign domination and obtained it in a democratic way were not ready to accept the undemocratic style of Ayub Khan and his authoritarian rule.

In 1964, the COP and people both from the East and the West Pakistan got together under one banner and supported a non-Bengali. But the Ayub’s political order didn’t allow a free expression to the unity of people. The constitutional path was discarded. The era of agitational politics ushered in. Further the bullets replaced the ballots. Patriotism emerged during the 1965 war. But the attitude of Mujib and business men of the East Pakistan seeking allegiance with India had no sympathy for Pakistan. It was Mujib who uttered remarks at the Dacca Government House were cognizant of a high treason. There were reports that some of the politicians of the Awami League were siding with the Indians during the war. The 1965 war didn’t bring victory for India. However, India found Mujib to serve their purpose and consummate their wish to dismember Pakistan. This is what Mujib presented his famous six points plan of presumably the agenda for regional autonomy. It\textsuperscript{47} was said that the 65 Million Bengalis were left empty handed to be looked after by one division army. The border of the East Pakistan was surrounded by India. For the sake of five million Kashmiris there were the US tanks and aircrafts in the battle-field. During the political confusion Ayub Khan had to withdraw the Agartala conspiracy case against Mujib. This act of Ayub made Mujib hero of the Bengalis and his mischievous acts of working against the solidarity of Pakistan could not be exposed.

Whatever the character of Yahya Khan and his blunders and fantasy, but above all he was the military ruler who had genuinely tried to resolve the outstanding issues of the Bengalis. He conceded to almost all demands of the Bengalis. But this is true that Mujib was not sincere and wanted dismemberment of Pakistan under the garb of his famous six points and he didn’t want regional autonomy. Yahya was

\textsuperscript{46}The Times London, August, 1963. (The article has been contributed by Percival Spear on supplement of Pakistan. The article is titled as “First Steps of a Nation”.)

\textsuperscript{47}The New York Times, 21\textsuperscript{st} April, 1966.
sincere with Mujib that he allowed him to canvass his political campaign on the basis of his six points and later Mujib didn’t keep his words which he had promised with him that he would change his six points after the election campaign in 1970. Bhutto’s crime is unpardonable in this regard. He refused to attend the NA in Dacca. He was interested to grab power. He wanted to rule in the remaining Pakistan with which he succeeded after its dismemberment. The veiled secession of Mujib could have been exposed if Bhutto had agreed to attend the assembly session in Dacca.

On 15th December, 1971, Bhutto was in the UN to give theatrical performance. He tore off his notes and rushed out of the UN Security Council debate. Bhutto was giving dramatic performance and uttering a dialogue that they would fight for thousands years and the Dacca fell in the hands of Indian troops. The military regime was in search of the US aids. There was confusion all around. The UN didn’t give any certain picture. Earlier, Yahya Khan had reconstituted cabinet. Nurul-Amin was made as the nominal Prime minister. Z.A. Bhutto was made as the deputy PM and the foreign minister. His role in the given circumstances didn’t bear any fruit. On 16th December, 1971, the Eastern Command surrendered. A great number of Pakistanis became the prisoners of war. The strength was 90,000/- in total. The civilians inclusive of women, children counted at 20,000/-

The emergence of Bangladesh and dismemberment of Pakistan have not solved the tensions and conflicts in the region. It is wrong to say that the Jinnah’s Two Nation theory has been proved wrong. In the secular State of Bangladesh there are anti-Hindu and anti-Indians feelings as great as ever when it was part of the Islamic Republic of Pakistan. The Indians have been struck with hunger and poverty. Its vanity to become the leader of the South Asia is a dream that has gone sour so far. The Bangladeshis are not free from the clutches of the Calcutta elite.

**5.3 Constitutional Developments**

The constitutional developments during the period of Yahya Khan are worth-mentioning. The case of Mir Hassan is worthy to note which forced the military regime to issue Jurisdiction of Courts (Removal of Doubts) Orders, 1969. The Special Judge Rawalpindi summoned Mir Hassan and others for a trial. They filed a petition before the High Court for quashment as the allegation leveled against them didn’t
constitute an offence. This matter was pending before the single bench when the Martial Law Administrator ordered to transfer cases to the special military court. It was argued before the High Court that these cases could not be transferred from a Special Judge to the Special Military Court. The single bench referred a case to the Chief Justice to constitute full bench comprising three judges of the High Court. The full bench passed a chivalrous and courageous judgment and upheld the contention of petitioners saying that the order for transfer of the cases to the military special court is defective and without jurisdiction. It was stated in the Judgment of the full bench that the Martial Law regulation no. 42 didn’t curb the powers of the High Court. The Provisional Constitutional Order was not subjected to the martial law regulations. Article 6 of the PCO has recognized the jurisdiction of the superior courts of the country. It was further stated in the judgment that the Article 2 of the Constitution of 1962 says that any order of the military authority which lacked the backing of constitutional provision would be invalid. Following is a text reproduced in verbatim:

“Martial Law arises from State Necessity, and is justified as the common law by necessity, and by necessity alone, quod necessitate as cogit, defendit (what necessity forces, it justifies), where the case is a riot rather than the case of rebellion, as the necessity is less, so the discretion of these concerned is limited. Where he courts are sitting, there is no doubt that (i) it is time of peace (ii) they are sitting in their own right, and (iii) 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 Constitutional Order is in addition to the provisions of the proclamation and neither in derogation of it nor subject to it. It can, therefore, not be amended by a martial law regulation or order but by amendment of the provisional constitutional order itself. Whether the President and the Chief Martial Law Administrator, who is not himself above law, can now at all is a question which will be answered when the time comes to do so.

A general and recognized rule of law is that 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

48 Mir Hassan vs. The State PLD 1969 Lahore 786.
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.”


The Legal Frame work Order was issued to lay down the basic principles for the constitution of Pakistan in future. By the 1st July, 1970 the system of one unit was ended in the West Pakistan. The National Assembly was to comprise of 313 members of which 13 seats were reserved for the women. During the broadcast, Yahya Khan declared that his objective was the peaceful transfer of power to the people of Pakistan. The LFO49 laid down the following fundamental principles;

1. It was also stated in the LFO that each province shall enjoy a provincial assembly, the seats of which were to be filled through general election and some of the seats were also reserved for women. East Pakistan provincial assembly was given 300 seats and 10 seats for the women. 180 seats were allocated to the Punjab province and 06 seats were reserved for the women. Sindh got 60 seats in its provincial legislature and 02 seats were for women. The Baluchistan legislature could get 20 seats and it was given 01 seat for the women. 40 seats were allocated to the NWFP province and it had 02 seats for the women.

2. 5th October, 1970 was the date fixed for the election of NA and polling for election to the Provincial assemblies.

3. Pakistan would be a federal republic and known as the Islamic Republic of Pakistan.

4. The Islamic theology is the basis of creation of Pakistan and it would be preserved.

5. A Muslim can be the Head of state.

6. Regular elections to the NA and the provincial assemblies would be held so as to adhere to the principle of democracy. The elections would be held on the basis of adult franchise and population.

7. The fundamental rights of citizens would be ensured and guaranteed in the constitution.

8. The arrangements shall be made to ensure the independence of judiciary.

9. The legislative, administrative and financial powers would be distributed between Federation and the provinces in such a fashion that the provinces shall enjoy maximum autonomy.

10. It would be ensured that the people of Pakistan are provided with the opportunities that they participate in all forms of national activities.

11. The statutory and other means would be adopted to eradicate disparities between different provinces and different areas in a certain province.

12. The constitution of Pakistan shall guarantee each Muslim to order his individual and collective life according to the teachings of the Holy Koran and the Sunnah of the Holy Prophet (S.A.W).

13. The minorities would profess their religion freely as per their religion. They may enjoy their rights, privileges, as citizens of Pakistan.

14. The National Assembly would frame a constitution bill from the first day of its meeting within the period of 120 days. If it fails to achieve this objective it would stand dissolved.

15. There were certain provisions in the LFO regarding the summoning of the NA after elections. It also talked about the privileges of its members, Speaker and the Deputy Speaker.
16. The provisions were also made regarding the qualification and disqualification of the members of the NA.

17. The political parties contesting the elections were required to contest the elections within the limits of the LFO.

18. The manifestoes of the political parties with in the four corners of this law and not in contravention of it.

5.4 Zulfiqar Ali Bhutto and the Remaining Pakistan

Z.A. Bhutto was 30 in October, 1958 when he started his political career. He was in the cabinet of Iskander Mirza and when Iskander was forced to leave the corridors of powers, Field Marshal Muhammad Ayub Khan retained him as the minister in his cabinet. Bhutto was replete with the strong political background. He was a son of Sir Shah Nawaz Bhutto who was the President of the District Board of Larkana. He had inherited a large tract of land from his father. The Bhutto clan had, before the 1959 land reforms, is said to be in possession of 40,000 to 60,000 hectares of productive land in the districts of Larkana, Jacobabad, Thatta and Sukkur. His father was an active politician. He did great efforts to separate Sindh from the Bombay residency. Sindh was the majority Muslim population area. To exacerbate his efforts in this regards, Mr. Shah Nawaz attended the round table conference in 1931-1932. He also remained as the minister in the Bombay Government. Before the independence of Pakistan, he was Diwan of the Nawab of the Junagadh. It was princely state off the coast of Kathiawar. On the direction of Quaid he played his role to secure the accession of that State to Pakistan by its Muslim ruler.

Z.A. Bhutto served in the Ayub cabinet for about eight years. He also served as the foreign minister of Pakistan after the demise of Muhammad Ali Bogra in 1963. On the Tashkent declaration, he developed serious differences with Ayub Khan and left his cabinet. At first he maintained his silence and then broke it. In 1966, he sided with Mujib Khan on his six points. Earlier, he had challenged Mujib Khan and asked for debate on these points.

Bhutto thought of his own political party. His recruits were the eager students. In the month of Oct, 1967, he developed a program which resembled with the socialist

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manifesto. He said in the press conference that the banks, insurance companies, heavy industries and public utilities would be nationalized. He insisted on withdrawal of Pakistan from the pacts like SEATO and CENTO. He further said that the closer links would be established with Muslim countries.

On 20th December, 1971 Bhutto took over the reins of the remaining Pakistan. There was dismay, despondency and dejection all around. More than 90,000 people had had been made prisoners of war. The army was demoralized and disgraced. The economy was devastated. Bhutto took the credit of re-building Pakistan with courage and determination. He inspired confidence in the people at large. He addressed to people of the West Pakistan and asked for help and cooperation. He said that the nation had been failed by its leadership time and again. He wanted the things to be put on the straight path. He promised to the people of remaining Pakistan that he would not fail them. He earned reputation of a nationalist who had flair of appeal for the youth. From 1966 and onwards he earned a wide popularity as a national leader\textsuperscript{51}.

J.A. Rehman\textsuperscript{52} drafted the manifesto of his party. Islam is our faith, Democracy is our Polity, Socialism is our economy and power belongs to people. He clinched both the posts as the CMLA and the President of Pakistan. The Chief Justice Hamood-ur-Rehman was appointed to look into the military debacle in the East Pakistan. He ordered to seize the passports of the leading industrialists and their families and stopped them from going abroad. To monitor the ambitious army officers, opponents and his own party men he set up an intelligence organization. He victimized his old rivals inclusive of the industrialists, military men and bankers and imprisoned them without showing any reason. He arrested Altaf Gauhar, the Editor of the Dawn for criticizing him. Many of the Generals were retired and General Gul Hassan was appointed as the Army Chief. Meanwhile, Yahya Khan was put under the house arrest.

Bhutto released Mujib from prison on 8th January, 1972. His release was dramatic as was the address and theatrical performance of Bhutto at the UN Security Council. On 3\textsuperscript{rd} Jan, 1972, Bhutto\textsuperscript{53} was addressing a public rally when he asked the crowd whether they wanted to release Mujib or not. If they refused his release I will

\textsuperscript{52} Rahim, J.A, later, served as the Minister in the Cabinet of Bhutto.
\textsuperscript{53} Dawn, 4\textsuperscript{th} Jan, 1972.
not release him. The crowd was managed who said yes to release Mujib. In fact, it was already planned to release him from the prison. It was indeed a gimmick to befool innocent folks. Bhutto had held secret meetings with Mujib and his release was necessary to give an end to the chapter of the dismemberment of Pakistan and establish the State of Bangladesh. Mujib was flown to London, from where then he flew to the Dacca.

Bhutto during his reign and in order to fulfill one of the objectives of his manifesto announced the Economic Reforms Order. On 2nd Jan, 1972, he said that the industries such as iron, steel, heavy electrical and manufacturing of motor vehicles etcetera would be nationalized by the State for the benefit of people of Pakistan. In each of an industry a managing director was appointed. The Economic Reforms Order could not be challenged in any of the court of law. The central government and the MDs were indemnified from any of the act done in good faith. Had this step taken in organized manner the national loss could have been avoided. It is sad to point out that there was a huge pilferage during the taking over of these industries by the MDs. The nationalized industries were deprived of the millions of rupees of raw material from their inventories. The MDs of these industries were generally bureaucrats who were corrupt to the core and hardly cared about the health and profitability of these industries. Before nationalization of the industries, a trained and dedicated national cadre could have been raised who would have worked selflessly in the national interest. Wali Khan perhaps aptly remarked that it was not the nationalization but the bureaucratization of the industry. Overall, this nationalization of industries by the Bhutto regime in fact created a stumbling block in the due process of the industrialization and resulted in the flight of capital and entrepreneurial skills abroad.

Land Reforms Regulations were also introduced on 11th March, 1972. The ceiling was reduced from 500 acres of irrigation land to 150 acres. In terms of Produce Index Unit it was reduced from 36000 to 15000. There was however a provision that land could be transferred to kith and kins. The land could be given to a tenant in case if he was given for tilling and free of charge. The first right of pre-emption was given to a tenant. As regards these reforms, the courts were stopped to interfere. Further, the indemnification was also granted to the governments and the

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54 Dawn, 5th Jan, 1972.
others acting as such. These reforms failed to produce any intended result. It was easy to manipulate the condition of PIUs. Through the connivance of the corrupt revenue officials, low PIUs were attached to the highly irrigated lands. 15000 PIUs could easily cover up as much as 800 acres of agricultural land. The strangle hold of the feudal and big landlords could not be broken in the wake of these land reforms. It was destined to fail as Bhutto himself was the biggest landlord.

There was yet another reform introduced by Bhutto and it was carried out in the educational sector. The private schools and colleges were nationalized under a martial law regulation\(^\text{56}\)gazette on 1\(^{st}\) April, 1972. The move was initiated to stop the exploitation of the teaching staff at the hands ‘of private school owners. There were cases when the teachers were given less salaries but they were forced by their owners to sign for receiving high salary. It was also argued that these private owners were evading huge income tax to the public exchequer. The educational institutions which were caught a prey to this Martial Law Regulation were not only the exploiters but also of the high ranking educational institutions. The courts were stopped to interfere in the matters pertaining to the nationalization of these institutions. Beside this indemnity was also granted to the governments and person connected there with too. This regulation did a great damage. The reputation of the afore-mentioned institutions for imparting a high quality of education and maintaining a high standard was put at stake.

Meanwhile, Bhutto took cudgels against the corrupt, inefficient officials. As many as 1300 officials were removed from service under a Martial Law regulation\(^\text{57}\)which was made effective on 10\(^{th}\) March, 1972. The proceedings under this regulation may be initiated if he was corrupt or known to be corrupt, guilty of misconduct, inefficient or engaged in subversive activity. Likewise the dismissal was unchallengeable in any court of law.

The Martial Law still prevailed in country, despite the fact that this Martial Law didn’t wear any uniform and it was in civil dress. However, it was a Martial Law and the democratic and political forces were perturbed by this factor. The framing of constitution was still uncertain. Earlier, country had to bear a constitution framed by

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\(^{56}\)Martial Law Regulation No. 118 PLD 1972 Central Statutes 441.
one man which proved fatal for the people of Pakistan. Now country was not in a position to bear another such experiment. The idea of phased democracy of Bhutto was disapproved and Wali Khan of National Awami Party emphasized to do away with the Martial Law. Bhutto’s decision on 30th Jan, 1972 was viewed queer as the he decided to withdraw from the common wealth. It was a grotesque decision taken at the dictates of whims. Bhutto rendered reason for the decision that the Britain had joined the ECM European Common Market. This decision created enormous difficulties for the Pakistani living in the United Kingdom as they were deprived of the status of a country which had no commonwealth membership. Mr. Wali Khan of NAP on 6th Feb, 1972 gave an ultimatum for lifting of Martial Law and initiation of mass movement.

It was again viewed with astonishment when Bhutto removed General Gul Hassan as the COAS and appointed General Tikka Khan as the new COAS. Besides this, he also made changes in the Air Force. He advanced reason for such abrupt change that the Bonapartist elements required cleansing. In fact he had removed threat which was being nurtured in the Armed Forces of Pakistan. Bhutto reached an agreement with the NAP and JUI that the interim constitution would be given on 17th April 1972 and the Martial Law would be lifted on 14th August, 1972. Later he announced to lift Martial Law on 21st April, 1972. Under the interim constitution on 21st April, 1972, he was sworn in as the President.

The Defense of Pakistan Rules and Martial Law Regulation No. 78 were applied to Malik Ghulam Jillani and Altaf Gauhar of Dawn. Under these laws they were arrested and in preventive detention. The petitions of the both were dismissed. In the case of Jillani, the Lahore High Court, Lahore relied on the decision of SC in the case of State vs. Dosso. As regards the case of Altaf Gauhar, the Sindh High Court held that it had no jurisdiction to grant relief against the Martial Law Orders. The SC had a question whether the doctrine enunciated in the case of State vs. Dosso was correct and applicable. The Supreme Court further said that the Chief Justice while the deciding the case proceeded on certain assumptions. The doctrines of legal

58 Dawn, 16th Jan, 1972.
60 Dawn, 31st Jan, 1972.
positivism were firmly accepted that the whole science of modern jurisprudence rested upon them. The political change which is beyond the contemplation of the constitution amounts to revolution, provided no one opposes it. As regards these justifications, the SC held that they were not justified. Kelsen’s theory of pure law was not universally accepted. It could not claim to have become the basic doctrine of the science of modern jurisprudence. The Kelsen’s theory also didn’t formulate any theory which engenders totalitarianism.\(^{63}\)

The SC held that the ground norm of the Pakistan was available in the Objective Resolutions of 1949. It preconditions that the sovereignty over the entire universe belongs to Allah the Almighty. It is a sacred trust which has been enjoined to the people of Pakistan who will exercise this authority within the limits prescribed by Allah. The functional head of State will be chosen by the community and have his assistance from the council who will be accountable to the public. Only in this case it would form a government of laws and not of men. Therefore, the principle formulated in the case of Dosso is not a good piece of law. The Supreme Court re-visited the events from 24\(^{th}\) March, 1969 and observed that Ayub had no power to hand over the reins of government to another dictator under the Constitution of 1962. He could have handed over the charge to the Speaker of the NA and himself tendered resignation for the post of President of Pakistan. The proclamation of Martial Law does not amount that the Commander of the Armed Forces must abrogate the Constitution. He has taken oath to defend it rather abrogate the same. As regards Yahya Khan Martial law, the Court said that he made the constitutional machinery dysfunctional. He usurped the functions of government and started issuing different Martial Law regulations Presidential Orders and Ordinances. The presidential order which barred the jurisdiction of the courts, being the sub-constitutional legislation, had no power to curtail the jurisdiction of High Court and the Supreme Court of Pakistan under the Constitution of 1962. This jurisdiction was rather preserved by the Provisional Constitutional Order. The court struck down the Martial law Regulation No. 78 since it was made by an incompetent authority and it lacked the attribute of legitimacy.

\(^{63}\)Asima Jillani vs. The Government of Punjab, PLD 1972 SC 139
The court had declared all the acts of Yahya Khan as illegal. This declaration would have ushered in the total disaster and ruined the social order of country. Therefore, the SC had to resort to the doctrine of Necessity. The Court had come to a logical conclusion that the usurper acted illegally and unlawfully, now a question cropped up as to which acts legislative or otherwise may be condoned or maintained in the general interests of public. The court condoned all the past and closed acts. The legislative acts taken under the abrogated constitution of 1962 were also condoned. The acts done for the ordinary running of State or leading to the establishment of the objectives mentioned in the Objectives Resolution of 1949 were also condoned.

The judgment rendered in the case of Asima Jillani was a departure from the case of Dosso. This judgment also invited criticism as it was tendered after the usurper was ousted from power. The courage of the SC judges must be recorded by a historian if this judgment would have appeared when the usurper was in saddles. However, despite all this case served as a mile stone in the annals of the judicial history of Pakistan.

On 21st April, 1972, the interim Constitution of Pakistan was passed by the NA. This National Assembly was elected in the wake of the election of the December, 1970. This could have been considered as the constituent assembly as the elections were conducted on the basis of all Pakistan. Had it not been better to hold fresh elections in the West Pakistan for a constituent assembly on the basis of change in political and constitutional scenario? In this way this assembly would have fresh mandate to give a new constitution to the left over Pakistan. The new elections were avoided. The avoidance may be a fear which lurked in the PPP that after December, 1970. The parties with small electorates also avoided the fresh elections as they thought they might lose whatever little was available to them.

On 23rd March, 1972, Bhutto issued a National Assembly Order, 1972 to provide that it was the NA which has been mentioned in the Legal Frame Work Order, 1970. The business of the assembly was restricted to a vote of confidence in the President of Pakistan. The NA had also a business that it would frame an interim constitution and Martial Law would be continued till 14th August, 1972. The Government of the India Act, 1935 has served as the role model for the passing of

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64 PLD 1972 Central Statutes 433.
financial bills. The constitution of 1956 served as a working paper for the future constitution such as the Constitution of 1962, the interim constitution and the permanent constitution of 1973. These conditions have differed on certain things such as form of government and distribution of subjects’ etcetera.

The interim constitution made a provision for the Presidential form of government. The president enjoyed both the positions as the Head of State and the Head of Government. The President of Pakistan was required to be Muslim. The age was determined at forty and otherwise he should qualify to become member of the NA. Under the Constitution of 1962 the age of President was fixed at 35. In the constitution of 1973\(^6^5\) it as determined at 45 as Bhutto in 1973 had turned 45 years of age. Interestingly as per the interim constitution the age of President was fixed at 40, so, Bhutto was by then at 44. President was made the Supreme Commander of the Defense Forces of Pakistan. He had power to appoint the Chiefs of the Chiefs of the three forces\(^6^6\). The President could promulgate the Ordinances when the assembly was not in session or it was dissolved and also enjoyed legislative powers. The interim constitution provided for the unicameral legislature. The federal legislature consisted of one House. The federal legislature was empowered to legislate in any matter pertaining to the federal and concurrent legislative lists. When some bill was sent to the President he would either give his assent to the bill or send it back to the House for reconsideration. If it was sent again to the President with maximum majority of the House without amendment then it was considered to have received the assent of the President. The parliamentary form of government was introduced by the interim constitution at the provincial level.

The interim constitution was adopted on 17\(^{th}\) April, 1972 and on the same day NA appointed a committee to prepare a draft constitution which later was known as the 1973 Constitution and which is still in force braving many amendments and suspensions due to imposition of Martial Laws. There was a controversy regarding the introduction of presidential or the parliamentary form of government. Further to this conflict also cropped up as regards division of powers between the center and the provinces. It was well known that Bhutto had great liking for the presidential form of government.


\(^{66}\) Articles 55 & 56 of the 1973 Constitution of Pakistan.
government with the powerful and stable executive. In order to meet the demands of different regions it was hour of the need to have a parliamentary form of government instead of the presidential form of government. There was a psychological disapproval for the presidential form of government as the Ayub’s Presidential system and one-unit didn’t leave behind good memories. Despite all hardships, an accord was signed by almost all the political parties inclusive of PPP, Muslim League (Qayyum group), JUI, Council Muslim League, JUP, JI. NAP and JUI didn’t participate as they had boycotted the session. The Bhutto regime had dismissed the JUI-Nap government in the Baluchistan province. Beside this the NAP-JUI government was forced to tender its resignation. The Constitution of 1973 was passed by the NA without any dissent, but it lacked unanimity. The President accorded his assent to the Constitution of Pakistan 1973 on 12th April, 1973. A federal parliamentary system was introduced with the bicameral legislature. It was made almost impossible to bring a vote of no-confidence against the PM for ten years as it required that the conditions should satisfy for the introduction of vote of no-confidence. The NAP-JUI showed big heart and dropped its protest in the larger interest of the Constitution. The role of Jamat-i-Islami is also commendable as it had also displayed a sense of accommodation.

The passing of the Constitution of Pakistan 1973 may be regarded as a way forward in the right direction. It was a consensus constitution of the directly elected representatives of the people. The Constitution of 1956 was passed by the constituent assembly which was indirectly elected. As regards the Constitution of 1962 it is owed to the will of single man and provided of the indirect elections. The Constitution of 1973 stood out for it was framed by the representatives of people who were directly elected. For the election of national and provincial assemblies it provided for the elections on the basis of adult franchise. It took politicians fifteen years to stage a comeback in the corridors of power. Bhutto was the chief executive of the country left over after the dismemberment of Pakistan that came in to being on 14th August, 1947. It struck as if the new leader in vision, ability and resolution was capable of the task of creating democratic order and bringing prosperity in Pakistan. The foundation was required to be built. The authoritarian rule could not usher in the representative system based on the adult franchise.

The basic institutions were on the verge of decline as a result of the military rule in country. It was felt that the democratic traditions require new values and traditions. The period of Bhutto has a remarkable feature and that is giving to the country a consensus constitution. His five years are otherwise, full of follies, repression and despotism. He was a dictator in a civil dress. He didn’t bear any opposition and wherever he found it, he chopped it off. He knew how to terminate his enemies. He was a dictator of the first waters. The constitution of promulgated and within few hours of its promulgation, he suspended the fundamental rights and enforced emergency.

Bhutto never tried to develop the leadership at local level. The system of local government remained absent in the times of Bhutto as it was a futile exercise of BDs which was done during the time of Ayub Khan. The leadership at the every tier was nominated. There were no party elections. The PPP didn’t bother at the organization of party.

The land reforms were carried out by Bhutto but they were failed to produce any positive result. These reforms although created some sort of self-respect amongst the peasants, farm-workers and tenants yet they failed to break the traditional power of the feudal class. Bhutto also failed to infuse public spirit amongst the civil servants. His reforms didn’t make them just and independent. There started likes and dislikes and pick and choose for key positions. Only the loyalists’ civil servants were given promotions in their services. Bhutto also introduced a lateral entry system as per which as many as 5000 officers were recruited from the private sector. The criteria for their selection were on a majority political consideration. Police had been empowered to unleash a wave of terror on people. The State of emergency and the Defense of Pakistan Rules gave powers to detain any one. Under these detention laws, the political leaders were detained and subjected to torture, indignity and violence.

Bhutto nationalized the industries and financial institutions of country. The rationale behind such nationalization was the command of the economy belongs to the people of Pakistan and the economic system should be subordinate to the social and political objectives. The political considerations further accentuated the lethargy of the bureaucracy in charge of the nationalized economic sector. From 1971 to 1973 the

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average growth rate\textsuperscript{69} dwindled to 4.6%. In these circumstances the private sector became shy of investing in country and there was a flight of capital.

The emergency powers which Bhutto had inherited from Yahya Khan remained in operation even during his tenure. He didn’t do away with this power. The proclamation of emergency helped him to control the life, person and property of citizens. The fundamental rights under the constitution remained suspended. The emergency powers were to be ratified from the parliament after every six months. The constitution was amended to this effect that the emergency would continue in country unless the parliament does not approve of its continuance with a negative vote. This amendment also extended the powers of preventive detention of the executive. The government was empowered to detain someone without trial for an indefinite period of time. The fourth amendment in the constitution was introduced which disabled the High Courts to hear any case of the preventive detention law\textsuperscript{70}. The powers of High Courts were further trimmed by excluding various numbers political offences from its jurisdiction. The Bar Council Act was also amended to the effect that for a person to qualify as the Advocate of a court, prior to his application he must have lived in Pakistan for more than one year.

The populist authoritarians had a tight grip in the provinces of the Punjab and the Sindh. The new order fashioned by Bhutto had firmly settled down by a machination of repression against the political opposition and a popular hold over the masses. By now in year 1974, the discontent amongst the masses had risen. The universities found the disenchanted groups of students. The public rallies had dwindled to a great extent to which Bhutto had addressed himself.

In 1976, there was yet another incident which could perturb the Bhutto regime and it was to declare the Ahamdis as non-Muslim minority\textsuperscript{71}. The religious element heightened the issue to gain political mileage. The Ahamdis had rendered precious services to Mr. Bhutto in winning the elections. It seemed difficult for the Bhutto regime to favor the community which had international affiliations or discard it. But,

\textsuperscript{70} The FSF of Bhutto demonstrated its high handedness while the enactment was in progress in Parliament.
\textsuperscript{71} Constitution (2\textsuperscript{nd} Amendment) Act, 1974 PLD 1974 Central Statutes 425
it came as a surprise for the politicians who thought to bring Bhutto in a blind alley. In the National Assembly, resolution was passed to declare Ahamdis as the non-Muslim minority. Bhutto took credit for an act which had eluded the politicians in the past. He had ingenuously satisfied the religious element. Bhutto did his best to make the institutions of State to serve the needs of an authoritarian rule. The executive authority was used to bring the opposition to its toes. The resources of nation were unscrupulously used to win the allegiance of men.

The assemblies were dissolved on 7th Jan, 1977. 7th and 10th March were the dates fixed for the elections of the national and provincial assemblies. Reacting to the announcement of the dates of general elections, nine opposition parties met in Lahore on 10th January, 1977. The meeting ended with the formation of Pakistan National Alliance. The PNA was composed of Muslim League, Tehrik-i-Istiqlal, Jamat-i-Islami, Jamait Ulema-i-Islam, Jamait-Ulema-i-Islam, Pakistan Jamhoori Party, National Democratic Party, Khaksaar Tehrik and the Muslim Conference of Azad Kashmir. The get-together of the opposition parties was not an unusual activity. The formation of alliance by the opposition parties was expected as they were already working together against the despotism of the Bhutto regime. The political parties in the PNA had wide persuasions. The NDP had socialist bent of mind whereas the Orthodox Jamaat-i-Islami was known for its stance. All such parties were together on one platform and their common cause was to win elections against Bhutto regime.

5.6 Bhutto Regime faces a Political Turmoil

The silence was too long. When it broke there were meetings, processions and debates in every nook and corner of country. Bhutto had a tight control on the political activities. There was outburst of criticism against Bhutto. The press was also in communion with the forces who were out to criticize Bhutto for his despotic policies. This upsurge credited the PNA. This widespread disaffection was due to the economic woes. Bhutto regime had nationalized the industries and rest of the other

73 Zindagi, 17th December, 1972.
financial institutions. This engendered the economic failure all around. The growth rate went down as the employees got the job security and there was no check on their performance. The factory workers were lethargic and undisciplined. Their performance didn’t match with their output. The investment fell sharply. Inflation eroded the savings of the people. However, Bhutto’s period is marked with the export of labor to the Middle Eastern countries. They remitted money to their homeland. But the foreign exchange earned by them was of little use. It rather helped in increasing the inflationary pressure. The life of a common man became miserable due to oil price rise and deficit financing to cover the budget deficit. A common trader was also affected by the process of nationalization of flour mills, cotton ginning and rice husking units.

The Bhutto regime was on the defensive due to electioneering assaults by the PNA. The efforts were made to secure unopposed seats. The tactics were employed in a manner that the rival candidates were removed from the contest. The face saving was ensured for the senior politicians. Their seats were snatched unopposed. As many as 69 seats of the provincial assemblies were managed by the PPP election managers till 23rd Jan, 1977. Besides this 25 seats of the NA inclusive of Bhutto were also managed unopposed. Such machinations to get unopposed candidate had indeed eclipsed the whole process of electioneering.

The results of the elections were not unexpected. The PPP won 154 NA seats as per the announcement made on the 7th March, 1977. The PNA could manage to get only 38 seats. With such announcement, it was also ensured that the restriction be imposed on the assembly of five or more persons as per available in the Section 144 of the Cr. Pc. The victory was expected by the PPP but the landslide victory was perhaps not really expected. The anti-climax of the PNA also started and its defeat was viewed with disbelief. PNA lamed for rigging on massive scale. The demand which the PNA raised was holding of fresh elections under the auspices of the Army and Judiciary. It was asked to get the resignations of the Prime Minister Bhutto and the Chief Election Commissioner. It is worthwhile to state here that Mr. Bhutto while

75 Akhtar, Rashid, Elections 77 and Aftermath: A Political Appraisal, P.R.A.A.A.S Publishers, Islamabad, p.11.
76 The Pakistan Times, 08th March, 1977.
he was in prison contended that he didn’t have a look at the election plan which a Sindhi politician had brought to him for signature\textsuperscript{77}.

The stand of PNA was reinforced on number of factors. The unopposed election was viewed with skepticism. The bye-elections were also re-enactment of the original play of election drama of March, 1977. The administration was partial and government facilities were misused by the PPP to manage their victory in the elections. The scenes of rowdyism and intimidation of the PNA candidates were witnessed by many people. The PNA\textsuperscript{78} gave a call for the protest from the 14\textsuperscript{th} March, 1977, if its demands weren’t met. Bhutto was in a state of to be or not be. If he had conceded to their demands it means that he had rigged the polls. This admission might have been difficult for a person like Bhutto who had intense pride as a democratic leader. There was yet another choice and it was the suppression of the subversive activities of the people opposing him and creating political troubles for him in the way of his governance. The four months after that were troublesome for the whole nation. The civilians of Pakistan had stood up against a regime which was hell bent to stay in power, come what may. The arrests of leaders and their workers by the Bhutto government\textsuperscript{79} were widespread. The mosques had turned out to be fortress of resistance. The efforts to control the activities, hence on 19\textsuperscript{th} April, 1977, there was no option left except to invite the army\textsuperscript{80} to suppress the agitating people. The PNA had given a call for a Wheel Jam strike on 21\textsuperscript{st} April, 1977. The businesses would have come to a standstill. In the meantime, on 26\textsuperscript{th} April, 1977, the Martial Law was imposed in Karachi, Hyderabad, Lahore, whereas the other important cities were put under the curfew\textsuperscript{81}. This Martial Law was challenged before the Lahore High Court, Lahore and the full bench declared it unconstitutional\textsuperscript{82}.

The mediations between Bhutto and the PNA were intervened by the international forces. Shah Khalid of the Saudi Arabia and the Sheikh Sultan Zaid Bin Alnihyan of the UAE offered their good offices for mediation between the both parties. There were five points from the PNA and about thirty-two proposals. The last

\textsuperscript{77} Bhutto, Zulfiqar Ali, \textit{If I am assassinated}, 1979, Vikas Publishing House Pvt Ltd, New Delhi, p. 70.
\textsuperscript{78} The Daily Dawn, 09\textsuperscript{th} March, 1977. The press Conference of Asghar Khan.
\textsuperscript{80} The Daily Nawa-i-Waqt, 22\textsuperscript{nd} April, 1977.
\textsuperscript{81} Dawn, 27\textsuperscript{th} April, 1977.
\textsuperscript{82} \textit{Darvesh Advocate vs. Federation of Pakistan}, PLD 1977 Lahore. p 846.
point of demands of the PNA pertained to the resignation of PM Bhutto. Due to insistence on the point of resignation, the talks were halted. The PNA when found inflexibility in the Government quarters stopped further talks with the Bhutto regime. Bhutto said that the circumstances don’t warrant that for holding fresh elections. It may lead serious polarization in society. Bhutto was of opinion that for this purpose the constitution is amended at first and referendum be held in this regards. The PNA rejected the proposal of referendum. A new wave of repression was unleashed. The PNA leaders were arrested and they were shifted from Sihala to an undisclosed place. Success in referendum would have led to the approval of government in a way.

There are strong presumptions that the talks were on the anvil of success when the generals thought of executing their plans as they were tired of hearing the talks of success in the dialogues of the politicians. It would not be out of place to mention here that COAS General Muhammad Zia-ul-Haq had assured Bhutto of his support. In one cabinet meeting, General Zia was present himself. There he stood up and had his both hands on his chest and said that “please rely on us; we are your strong arm”. Despite all these assurances, Bhutto was apprehensive of the military coup. On 4th July, 1977 in the evening he made up his mind to make settlement with the PNA. In this regards, he consulted Abdul Hafeez Peerzada, Mumtaz Bhutto and Ghulam Mustafa Jatoi. He held press conference at 11:30. He said that the PNA leaders brought ten points of demands apologetically. They said that they were helpless and so they did. He said that he was not helpless and he is ready to sign an accord with them tomorrow. But before he could sign the accord the other day with the PNA, the Martial Law was proclaimed by General Muhammad Zia-ul-Haq. On the night of 4th and the 5th July, 1977, General Zia had overthrown Bhutto regime.

The matter of rigging the elections in Pakistan is not new. It happened before during the times of Ayub Khan in 1965 and elections to the provincial assemblies in 1950. It is question why people reacted with great resonance in rigging of the elections of 1977. The reason may be that the mindset of people had changed a lot by 1977 as compared to 1950 and 1965. Bhutto might have polarized the people. They believed that his party won the election dishonestly, whereas his supporters, the silent

majority, had a different view. The party could not mobilize them as the PPP lacked the organizational capacity. It may be analyzed from a fact that the party convention in Multan was in such disarray that the rival factions threw chairs on each other. It is not worthwhile to mention here that Bhutto negotiated with the PNA from a position of political weakness and this is what the Generals knew it very well.

General Zia knew it well that Bhutto was ready to make settlement with the PNA. Despite his knowledge of the fact he removed Bhutto and didn’t let the agreement strike between Bhutto and PNA. The reason may be that he didn’t want it happen in this fashion. By the April, 1977 he had thought of imposing Martial Law in the country when he had in communion with his Corpse Commanders had decided to clamp Martial Law in Hyderabad, Lahore and Karachi. The stage had already been set in. He had already made certain arrangements to take a control from the civil government. It is a known fact that General Zia was a pious man and he had his leanings towards the Jamat-i-Islami. He knew that Bhutto was a liberal man with great disposition for the ethereal pleasures of life. Further he knew that Bhutto had executed some of the JI leaders. General Zia was an artist who had remarkably kept two faces. He settled with his own disapproval for Bhutto and kept it hidden and also worked clandestinely on his designs to take over the control of civil government.

Bhutto could have survived his rule, had he entered into dialogues with the opposition parties. But in Pakistan, it is a tradition that the ruler dose not bow immediately to the demands of opposition. In the case of Ayub Khan, when the opposition parties exhausted their agitation then the concessions came. Bhutto might have settled the things with the PNA in the month of April. If it was too early then he could have done it in the month of May and still the month of June was not too late. Whatever, he was deceived by the ‘pseudo-loyalty’ gestures and words from General Zia. Till last he was assured by General Zia that he would support him and would not let fall his rule. This is however a fact that the military junta, the media and the political opponents could not dull the appeal for the charisma of Bhutto. None could extinguish the embers of fies he had lit up. He called the poor as the fountain of power. His economic policies were failed to produce any significant economic

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impact, however, to certain extent ameliorated the sufferings of poor. While he was in power, he had toured throughout country carrying a message, “Zulfiqar Ali Bhutto is the savior and friend of poor”. This message of Bhutto was widely spread in every nook and corner of country and it was also truly believed. Shahid Javed Burki has commented in his book “Pakistan under Bhutto 1971-1977” that Bhutto had lost the support of middle class which is considered as the politically articulate electorate.

5.6 Operation Fair Play of General Zia and Eleven Years

The operation ‘fair play’ of General Zia cost the Pakistani nation more than eleven years of his rule. In the midnight of 4th and 5th July, 1977, General Zia took over the reins of country. Bhutto and his associates along with the PNA leaders were kept under custody. The Martial Law was clamped throughout the country by dissolving the National and Provincial assemblies. He addressed the nation on 5th July, 1977 and announced that he had his belief in democracy and the elections would be held within ninety days. He also said that the Army believes in soldiering and is devoid of any political ambitions. He came to fill in the vacuum created by the politicians. He is the true soldier of Islam. The ‘Operation Fair Play’ was codename as per which the country’s civil administration was exterminated and the General Zia’s Military took over the administration of country. President Chaudhary Fazal Elahi was allowed to continue in the office of President till September, 1978.

The Martial Law of General Zia has great significance as it was the longest military rule. It is to be believed that in the beginning he posed himself to be a reluctant coup maker. Later years, the nation saw that he held the power with great tenacity. He remained as the Chief Martial Law Administrator from 1977 to 1985 and enjoyed absolute power. Although the nation also witnessed a sojourn from 1985-1988 when the civilian government was inducted under the guidance and the tutelage of Army. The elections were held but they were party-less. During this period he swayed the whole scene under the revived constitution with the magic wand of the 8th amendment. While the Bhutto’s government was being wound up, the Martial Law was clamped in a limited form by the civilian government in cities such as Lahore, Hyderabad and Karachi. This Martial Law was a harbinger of military rule in the

country. The powerful civilian government of Zulfiqar Ali Bhutto was sent home in which the politicians were found supreme for the first time in the political history of Pakistan.

The military takeover of General Zia was different as in the case of previous two Martial Laws. As result of long contemplation, General Ayub Khan seized the power in the year 1958. General Ayub Khan took the charge of country’s administration from General Ayub Khan in 1969. There was a transfer of power from one General to another General. In the third Martial Law, the opposition had led the protests against the civil government. The country was almost at the verge of civil war. The Army remained a silent spectator for a considerable length of time but for how long it could. It may however continue to be a passing audience or it could decide to intervene in the matters and protect the country from the ravages of lawlessness. There was call from the politicians who had demanded the military to intervene. It was the chief of the Tahrik-i-Istiqlal Mr. Asghar Khan, a part of the PNA who addressed an open letter to the three Services Chiefs to intervene in the political matters of the country\(^9^9\). There is not an even of iota of doubt that the PNA leaders like Air Marshal Asghar Khan’s letter to the Services Chiefs proved a last nail in the coffin. It was an inability and obduracy of Bhutto which stopped him to make compromise with the opposition so as to keep the military out of the corridors of power. The political repression wrought by the Bhutto junta on the politician bound them together in the form of PNA. The disenchanted business community coupled with the urban middle classes stood behind the agitating mobs. The above factors all together ended in the form of decade long military rule in the country.

General Zia didn’t abrogate the Constitution of Pakistan 1973 rather it was held in abeyance\(^9^0\). In order to administer the affairs of country, Laws (Continuance in Force) Order 1977 was brought in vogue as it was done in the Martial Law of Ayub Khan\(^9^1\). It was also said that the country would be run as close as possible to the constitution of 1973. The courts were to function in a routine manner; however, their power as regards the Article 199 to issue the Writ was withdrawn. The High Courts were allowed to issue writs as per Order 2 of 1977 of CMLA, but they were stopped

\(^9^0\) PLD 1977 Central Statutes 326
\(^9^1\) PLD 1977 Central Statutes 325
from issuing writs against the CMLA or any MLA authority\textsuperscript{92}. The courts were rendered toothless as regards questioning the proclamation of the Martial Law Regulation, Order or Ordinance.

It is true that General Zia had cordial relations with Bhutto and he could have as it was Bhutto who had appointed him as the COAS by neglecting the seven or eight Lieutenant Generals. Such furious speeches against the Martial Law regime made them to teach Bhutto a lesson. In the meantime, Ahmad Raza Kasuri and his family members had revived the case of Nawab Muhammad Ahmed Khan. On 27\textsuperscript{th} August, 1977 the Lahore High Court was duly informed that the State would present a challan against Bhutto on 29\textsuperscript{th} August\textsuperscript{93}, 1977. It was now clear that the military junta had come openly against Bhutto. Bhutto was arrested on 3\textsuperscript{rd} September, 1977 in Karachi. He was presented before the Lahore High Court. On 13\textsuperscript{th} September, 1977 Bhutto was granted bail by the LHC Judge KMA Samdani on the ground that only the circumstantial evidence was brought before him. After the bail, Bhutto became more aggressive against the military junta. People took him to their arms and he was received with even greater degree of warmth as before. The military became more fearful from and they decided to get rid of him once and for all. Bhutto was again arrested on 17\textsuperscript{th} September, 1977 under the Martial Law Order\textsuperscript{94}.

The election campaign was in full swing. The contest became evident between the PPP and the PNA. On the other hand, military junta also didn’t want to see Bhutto again into the corridors of powers. The PNA was witnessed with cleavages in its ranks. They were failed to finalize the lists of their candidates. There were differences in the ranks of PNA as regards the postponement of elections. Asghar Khan of the Tahrik-i-Istiqlal wanted the general elections to be postponed. Mufti Mahmood favored the elections on time. On 3\textsuperscript{rd} September, 1977 General Zia also supported the postponement of elections if the politicians were ready to do this. The Martial Law regulation No. 21 was also issued to make an inquiry into the assets of PPP’s members of the NA and the provincial assemblies. The move was initiated to disqualify the politicians to take part in the elections. In the meantime, a writ petition of habeas corpus was lodged in the SC and the same was also admitted. As a result of

\textsuperscript{92} PLD 1977 Central Statutes 325 Laws (Continuance in Force) (Amendment) Order, 1977


\textsuperscript{94} The Daily Nawa-i-Waqt, 28\textsuperscript{th} August, 1977.
this admission, the Chief Justice Yahkub Ali Khan had to lose his office and he was replaced by CJ Anwar-ul-Haq. On 1st October, 1977 the elections were postponed and the PNA leaders sat in the lap of the military junta. The PNA knew that they would fail to have a victory in the elections as after the arrest of Bhutto, the PPP was being led by Begum Nusrat Bhutto whom people had responded with the same jubilation as was the case with the Bhutto.

There came a test of the Judiciary when Begum Nusrat Bhutto filed a petition in the Supreme Court of Pakistan against the detention of her husband Mr. Z.A Bhutto and the ten other leaders of the PPP. It was a test of the SC in a way as if it would establish the superiority of the civilian over the military in pursuance of its own judgment in the case of Asima Jillani. Bhutto had pleaded most passionately in his rejoinder to the SC that

“My Lords in your hands lays the decision whether to make or mar. The voice of the people has been silenced. The pen you hold is mightier than the sword”. Mr. Yahya Bakhtiar was representing Bhutto. He placed his reliance on the Asima Jillani’s case. They had their contention that the Martial Law of General Zia is treason under the Article 6 of the Constitution of 1973. Laws (continuance in force) and the other MLOs were issued without the lawful authority. A.K. Brohi and Sharif-ud-Din Peerzada were representing the military junta. They had their reliance on Dosso Case. The SC in its judgment said that there was massive rigging on 7th March, 1977. As a result of which the agitations sprung up from Karachi to Khyber. The civil administration failed to control the situation. The disturbances caused heavy losses of life and property. The country was on the verge of civil war. The SC held in view of its finding that the Martial Law on 5th July, 1977 was inevitable and it was clamped under the state of Necessity and also for the welfare of people. The Constitution of 1973 was declared to be supreme of land. The CMLA had taken power rightly to restore law and order and also for the welfare of the people. The view which the SC took in the case of Asima Jillani was not reversed. Besides this the SC also didn’t revert to the Dosso case. The SC was so benevolent in this case that it desisted from

96 *Begum Nusrat Bhutto vs. Chief of the Army Staff* PLD 1977 SC 657
97 The military takeover by Ayub Khan in October, 1958 was validated in the case of Dosso. The doctrine applied in this case was that the successful revolution supplied its own justification. The SC reversed its decision in the case of Asima Jillani. The Martial Law of General Yahya Khan was
giving any time schedule to the CMLA for holding free and fair elections. It was considered enough by the SC that the military dictator had made a pledge that the period of constitutional deviation shall be of short duration.

General Zia and his associates in the uniform found Bhutto making furious speeches thought to remove this irritant from the politics once and for all. Bhutto was being tried in the court of law for having ordered the murder Nawab Muhammad Ahmed Khan. It took one and a half year to hang Bhutto till death. The public had remained engaged in the case of Bhutto until he killed by the order of Supreme Court. Later in the recent years, during the Government of PPPP led by ZA Bhutto son-in-law Mr. Asif Ali Zardari, petition was filed in the SC to declare the hanging of Bhutto as the judicial murder. Bhutto was alleged for the murder of Nawab Ahmed. It was the night of 10th and 11th November, 1974 when Ahmed Raza Kasuri and his father Nawab Muhammad Ahmed and mother were returning from a marriage procession in the Shadam colony in Lahore. His car was fired at and his father Nawab Muhammad Ahmed died at the spot. The FIR was lodged in the Ichraa police station. He said that Bhutto had said in the NA that he would not tolerate him anymore. The case was filed as untraced in October, 1975 after making investigation on the guidelines given by Justice Shafi-ur-Rehman’s special tribunal. The closed file of Nawab Muhammad Ahmed was reopened when the Martial Law was clamped on 5th July, 1977. ZA Bhutto was tried along with five other accused of the FSF (Federal Security Force). The list of accused included the DG FSF Masud Mahmood and Inspector Ghulam Hussain. Both of them became approvers and they were granted pardon. The Chief Justice of the LHC Maulvi Mushtaq Hussain and other judges of the full bench awarded death sentence to ZA Bhutto and five other co-accused98. An Appeal arose to the SC and four judges maintained the death sentence awarded by the LHC against the three judges99.

The maintenance of the death sentence by the SC was subject to criticism by the circles inside the country and abroad100. The judges’ competence can hardly be

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99Zulfiqar Ali Bhutto Vs. The State PLD 1979 SC
100The Bhutto Trial, National Commission on History and Culture, Islamabad, 1996.
subject to criticism as they have spent almost the whole life in administration of justice. But, this is a fact which can hardly be ignored that judiciary’s working is affected when it works under the clamps of Martial Law. General Zia as the President of Pakistan had prerogative to reprieve the death sentence of ZA Bhutto into life imprisonment if appeal for clemency was filed to him. Most of the countries of world asked to General Zia to show clemency to Bhutto. It was Saudi Arabia which went to this extent to exile Bhutto in Riyadh where they would have housed him. Zia remained stubborn and hanged Bhutto till death on 4th April, 1979.

Bhutto’s unnatural death made him a hero. The tears rolled in every one’s eyes. There was despair all around. It was merciless stroke of pen that Gen Zia killed Bhutto. The candle of hope was extinguished. The largest section of masses in their silent sorrows looked for someone on whom they could place the mantle of Bhutto and with whom they could pin up their hopes. The verdict of SC was split up and there was a bare majority to sentence him death. The pen of cold General Zia never commuted his death penalty into life imprisonment. Those who were mourning the death of Bhutto developed hatred for General Zia in their hearts. He sealed his future for good. He postponed elections and with gimmicks remained in the corridors of powers never to retire from the political scene.

5.7 General Zia comes to Power

General Zia was known to be a professional soldier. He was humble in his demeanor and religious true to his heart. He had a reputation of desisting from the ways of life which generally his peers had pursued. He had meager followings in the Pakistan Army as he didn’t belong to the traditional Martial race. He rose in the Army owing to his professional commitments and ever submitting obedience to his superiors. He had inherited orthodox religious environment from his home and imbibed cultural atmosphere of a lower middle class.

Zia made promises with the nation to hold general elections but he dishonored and dejected the whole nation. He said he would hold elections on 17th Oct, 1977, but the same were postponed. Once again he made the nation to believe that the elections would be held on 17th September, 1979 but the same were called off again. His credibility was shattered. The Highest Court of land had validated his Martial law on
the basis that his stay in the civil office would be of short duration and he would conduct the elections in a short time. In order to legitimize his rule he started implementing the Islamic punishments for certain offences. To mitigate the despondency of nation for postponing the elections, he held the non-party elections of local government on adult franchise basis. This step served two purposes. One that it reduced the demand for general elections and localized politics and the other, military could have found the local leadership without any political affiliation. The non-party basis elections could not serve the purpose as the great number of local government candidates were selected who had their leaning towards the PPP.

General Zia-ul-Haq had started unfolding his political designs. Some of the PNA leaders\textsuperscript{101} sat in the lap of General Zia. The Jama’at-i-Islami leaders occupied important positions in the cabinet of General Zia. The military regime had given an impression that it was with the right wingers. The military regime of Zia had gained strength with joining of the politicians and the political parties. However, this measure lost their political and moral basis. The socio-economic problems of the nation remained unresolved and the introduction of Islamic punishment for some offences was not a solution for the ailments of society. Zia had no policy of his own to pursue on the foreign front. He had to follow whatever was being pursued by the previous government of Bhutto.

27\textsuperscript{th} December, 1979 was the day when 80,000 Russian troops entered in the Afghanistan presumably on the invitation of Hafizullah Amin who was by then the President. He was killed and his successor Babrak Karmal was installed as the President of Afghanistan. The religious elements of the Afghanistan took it as their holy duty to get their homeland free from the foreign invasion\textsuperscript{102}. The influx of refugees from Afghanistan in the wake of Soviet forces rushed in Pakistan. As regards, reaction of the world, they were astonished to see Soviets making physical occupation of territory ever since the World War-II. The expansionist designs of the Russians were evidenced as it was eyeing on the warm waters. This situation posed a serious threat to the security of Pakistan. There existed a treaty of friendship and cooperation between the USSR and India as per which the India was helped by

\textsuperscript{101} Asghar Khan of the Tehrik-i-Istiqlal, Nawabzada Nasrullah of the Pakistan Democratic Party and the Khan Abdul Wali Khan of Awami National Party declined to join the cabinet of Zia.

Russians to enter its armies in the East Pakistan and resultantly dismember it. Now, it was alarming that the USSR was standing at the doorstep of Pakistan and this could be another good opportunity for India to harm its enemy i.e., Pakistan. Having confronted with this despicable situation, General Zia thought to internationalize the issue. It was able enough to get the resolution passed by the UN General Assembly, OIC the Organization of Islamic Conference and the NAM Non-aligned Movement.

The US in this situation did not remain aloof. It thought of helping the Mujahideen (warriors of the faith). Iran had fallen to the Khomeni and Pakistan had attained a significant strategic position. The US President Carter’s economic assistance package was refused by the Zia administration in Pakistan as Peanuts. However, generous package was offered by the Regan administration which was accepted. Regan had less amenable posture towards New Delhi as it had refused to denounce the Soviet’s occupation of Afghanistan. Between the US and Pakistan security assistance pact was signed in June, 1981 worth $3.2 billion. Now, Pakistan came to the fore front and moved out of the isolation.

The Afghanistan invasion by the Soviets helped his sagging position and he was able to get legitimized and extended his rule. It is generally criticized that he made Pakistan a frontline state as it fought a proxy war of the US in return of military and economic assistance. Zia’s political position was strengthened as the image of Pakistan was enhanced internationally owing to the Afghanistan issue. The image of Zia in the West as the hangman of Bhutto and a medieval ruler was replenished. Professor Robert Wirsing analyses the Afghan policy of Zia as to resist the Soviet military intervention and to keep limited engagement of Pakistan in the Afghan war. The war that gave furtherance to the rule of Zia left indelible impact on Pakistan. The drug pedaling became a way of life in Pakistan. There was a massive flow of arms and ammunitions. The national life was spoiled by the drug money and violence. General Zia was in receipt of the US economic and military aid by the year 1981. This aid boosted his confidence to tackle the issues which he was confronting at the domestic front. His disapproval for the political parties was evident. His leanings towards the process of Islamization were open. Hassan Askari Rizvi says that the military regime had certain goals to accomplish. The ideological frontiers of country

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103 Wirsing, Robert, *Pakistan and the War in Afghanistan*, Asian Affairs, 1987
were to be protected. Element of decency was required to be introduced in the politics. The Islamization was to be launched in the country. In this background, one really wonders as regards the sole objective of General Zia to hold general elections in the country. His Martial Law was validated by the Supreme Court of Pakistan on the promise that the military would have a sojourn till the resumption of the civil government. The authoritarian rule with the assistance of ever ready bureaucratic machinery was in full swing by the year 1981. But, there sprung up some resistance to the military establishment of General Zia in the form of MRD movement for restoration of democracy.

When Zia gained enough strength in the corridors of civil power he proclaimed a provisional constitutional order on 24th March, 1981. This order carried many articles of the constitution of 1973. The reason for passing the PCO was to end the friction between the Martial Law courts and the civil courts. The judiciary was entertaining the writs against the orders passed by the CMLA courts. By the 11th October, 1979 the parties which were not registered with the CEC stood dissolved and their properties was confiscated104. Hence the PCO of Zia abolished the PPP and the other components of MRD. The PCO also empowered the President and the CMLA to amend the constitution. Mujlis-e-Shoora was another tool carved by the PCO. In order to bring the judges of the superior judiciary under the subordination of the military regime, they were asked to take oath on the prescribed format105. Those who were failed to take such oath or were not called to take oath ceased to hold their office.

The Supreme Court had helped the President and the CMLA Zia to get legal sanctity for his rule. He was given a sword but it was powerless. People can’t be made under subjugation for a long. He needed to make his rule popular. Therefore, he had to exert his efforts towards the process of Islamization and win over the people of Pakistan. The Majlis-e-Shoora of Zia was created under the PCO. Its membership was aimed at 350. The representation was to be given to the Ulemas, women, labourers, educationists, minorities and the Mashaikh. 288 members of this Shoora were nominated by Zia himself. 60 were from PPP and the 30 members were Ulemas. The MRD didn’t accept the Zia’s Majlis-e-Shoora / Federal Council. Instead, it demanded holding of the general elections and restoration of the Constitution of 1973. This body
failed to gain any popularity amongst the masses. It was a powerless body. The influential people had joined it to take benefit of worldly gains and politicians changed their loyalties to get political advantages.

Zia needed legitimacy and for this he used the tool of Islamization. He himself had great leanings towards religion. He was an orthodox religious man. So, he thought of reordering the society on Islamic footings which to his opinion was correct. General Zia invoked Islamic punishments for the offences such as drinking, adultery, theft and false allegations. The Shariat Bench was constituted in the every court of law up to the level of the High Court. It had a duty to declare any law as repugnant to the injunctions of the Holy Koran and the Sunnah. Later in the year 1980, the FSC Federal Shariat Court was established. The appeal lay with the Shariat Bench of the Supreme Court. However, the fiscal laws were kept out of the jurisdiction of the FSC. The Zakat and Ushr Ordinance, 1980 was promulgated to deduct the Zakat at the rate of 2.5% from the deposits of banks and the financial institutions. The compulsorily deducted zakat was planned to be redistributed to the poor and the needy. For this purposes 32000 Zakat committees were established throughout the country. The Shias were declared exempt from such deduction. In furtherance to the process of Islamization, the word interest was replaced with mark up. Interest free banking hinged upon the capital and the entrepreneurship named as modarba. The council of Islamic ideology was set in motion. The Islamic University was established in Islamabad. The subject of the Islamic Studies was made compulsory in the educational syllabuses and the competitive examinations. The degrees awarded by the religious schools were equated with the MA Islamic Studies and Arabic. At the public places offering of Namaz/ prayer was made compulsory and for this purpose Nazimmen-i-Sallats were appointed. The women appearing on the TV screen were required to take dupatta/head dress. Despite all such measures, General Zia failed to enjoy the popularity and get legitimacy of his rule. Pakistan unfortunately portrayed as the country with the religion enforcing harsh punishments. It was a disservice to depict a religion concerned with welfare as the one pertinent only with the penal code of the crime and punishment\textsuperscript{106}. The Islamization program of Zia was chained it in the strait jacket of orthodox conformity.

General Zia skillfully occupied the office of COAS and the President of Pakistan. His mainstay was the physical force which he had gathered from the Army. He extended incentives to them so as to win their loyalties. He allotted them expensive plots and houses. The military officers were inducted into the civil services of Pakistan. The Army officers were given important positions after their retirement. The Generals were coaxed with heavy emoluments, perks and privileges. He managed the threat of PPP revival in a way as the local government was not allowed to function for a long. Zia also survived as he maintained the status quo. He built his relationships with feudal classes, the industrialists, businessmen, Ulemas and bureaucracy in such adroit manner as they erected a strong fence against Zia. He found himself in the protective shield built by the afore-referred classes. General Zia was able to continue his rule as the Russian intervention in the Afghanistan helped him to attract the US support. He fought a proxy war of the US. In return he was ensured his rule in Pakistan. Arms flew in country unrestricted. In a common parlance it was known as “Klshinikove Culture”. There was another device employed by Zia to break the electorate of PPP. He created Mohajir Quami Movement in Karachi. Further Zia also took himself identical to the rulers of medieval ages. The medieval rulers were humble, pious and pragmatic and alive to any threat. General Zia also equated himself to the level of these medieval rulers.

During the military regime of Zia the economy grew steadily. The growth rate stood at 6.5%. GNP inched from 1.87 billion rupees to 4.45 billion rupees. The agricultural sector also showed improvement. The remittances from the Pakistanis working abroad sent $ 2.278 Billion in 1986-87 as compared to 1976-77 at $399 Million107. This is also worth mentioning that the black money entered in the economy generated by trading in drugs and weapons. The middle class grew. The farmers from the Southern Punjab to the Central Punjab also turned prosperous. The question was as how the representative system be launched and what safeguards to be provided to General Zia. He108 was addressing the Majlis-e-shoora on 12th August, 1983 when he proclaimed his constitutional proposals. He made sure that he would occupy the position as the President of Pakistan. The President was deemed as the powerful that could dissolve the NA and appoint the governors and take part in the

legislation. He further claimed that the Martial law government was a constitutional and also the Islamic. It was now the responsibility of the people to follow the principles of Islam. He also enunciated his plan that the elections to the National and the provincial assemblies would be conducted in March, 1985.

General Zia’s announcement of election plan didn’t create any enthusiasm amongst the masses as there were yet 18 months to go. Further, Zia was known for breaking of his pledges. The alteration in the constitution proposed by Zia wrecked the fundamentals of the Constitution of 1973. The MRD gave a call for the agitation against the proposed changes in the constitution by Zia. The eleven party alliance leaders were put under detention and selective use of force was applied. The MRD was restrained to the province of Sindh practically. Sindh’s contribution in the movement for Pakistan is significant. Karachi was made as the first capital of Pakistan. By the year 1983, this province was the most alienated. It may be as the 40% land surrounding the Guddu and GM Barrage was allotted to the non-sindhi bureaucrats, judges and the military men. Further, regional self-expression was also denied owing to the long authoritarian rules of General Ayub and Yahya Khan. The ethnic unity of the province was broken when the demographic change was made due to the exodus of Urdu speaking immigrants from the India.

25th February and the 28th February were the dates finalized for elections to the national and the provincial assemblies. These elections were scheduled on a non-party basis. But, before these elections could be held Zia thought to secure his political position, he devised a wonderful way to constitutionalize himself. He announced referendum 109 for the post of president of Pakistan. Question was posed to the people of Pakistan whether they wanted the Islamization of all laws in accordance with the injunctions of the Holy Koran and the Sunnah and also supported the Islamic ideology of Pakistan. If the people had their answer to this question in affirmative, then it was deemed that they had elected General Zia for the next five years in the office of the President of Pakistan. For the sake of referendum, General Zia had toured around the whole Pakistan. His novel idea of referendum was mocked but for Zia it was a serious business, because by winning the referendum he would have

voyaged on the path of Constitutionalism. The MRD boycotted the referendum of General Zia.

General Zia kept his words for the first time. The elections were held as per schedule. There were 200 seats of the NA and the candidates contesting the election were more than 1200. For the 460 seats of the provincial assemblies there were 3600 candidates in the field. The turnaround was satisfactory. For both the elections, it was around 52% of the registered voters who voted. The MRD had boycotted these elections. They had thought that the voters turn around was dismal for the referendum. Their boycott helped the military regime. The elected assembly reached the NA and Muhammad Khan Junejo was nominated as the PM by the military regime to whom vote of confidence was ensured. Junejo was a Sindhi and less prominent politician. He had held a position of provincial minister during the time of Ayub Khan. He was a humble and polite in disposition. General Zia also issued an RCO revival of constitution order, 1985. The RCO proposed a powerful President who could send the whole legislative assemblies home with a stroke of open. The President was give power to make important appointments. The NA passed the infamous eight amendment to the Constitution of Pakistan 1973 as per which the Martial Law was lifted and the constitution was restored. The justification for powerful President was rendered as in 1977 the President was impotent. The eight-amendment indemnified General Zia and the coup of 1977 was also legitimized. General Zia was allowed to hold both the offices of the President of Pakistan and the COAS.

The eight-amendment was a piece of constitutional engineering. It provided a way for transition from the military rule to the civil rule. This amendment also helped Zia to have safe position after the post martial law constitutional arrangements. Now General Zia was in saddle. He was enjoying the real power and the civilians were merely dancing to the tune of military man. He had thought that the civilian government would be subservient to him. But Zia as an architect failed to foresee what lied ahead. Junejo as his PM declared that the dictatorship and the democracy could not go hand in hand. He said the parliamentary system largely depended on the party system. General Zia hated the party system and Junejo said that he would

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\(^{10}\)The Daily Jang, 1\(^{st}\) March, 1985.
provide every opportunity to the political parties to prepare for the next elections. On 10\textsuperscript{th} January, 1986, Junejo became the President of the PML after its reconstitution. Benazir Bhutto and her family had left the country when her father was hanged by General Zia. She was in self-exile in London. Junejo had allowed the liberalized political environment. She thought to seize the opportunity and command the PPP in Pakistan as Chairperson of her party. She had a triumphant entry in Pakistan on 10\textsuperscript{th} August, 1986. From airport to the Iqbal Park venue more than half a million people had gathered to welcome her. She made public addresses in all the nooks and corners of the country. Under the political arrangements of Zia, she failed to delineate the role of her party. For her General Zia was unpardonable as he was murderer of her father and the PM of Pakistan. Zia had lifted Martial law and put in place a civilian government. Benazir had unfaltering belief that the government of ZA Bhutto was illegally thrown by Zia. Unfortunately she was not willing to believe that the military regime had given relief to people over the passage of time. Further, Zia had cleverly employed wearisome maneuvers to prolong his rule.

During the era of Junejo, the political atmosphere was eased. The political activities were allowed. The political parties were registered with the CEC. Fundamental rights were restored the press was set at liberty. Junejo made appointments of the civilians to the posts of ambassadors instead of the military men. The actions of Junejo were beyond the limits Zia had thought of. But he remained silent, because both had belief in the system of pulling on the strings of boat of which both were riding. Junejo had tried to make compromises with the military regime. He took Sahibzada Yaqoob Ali Khan as the foreign minister in his cabinet, a nominee of the Zia regime. He also allowed the ISI to handle exclusively the Afghan issue.

On 10\textsuperscript{th} April, 1988 Geneva accord was signed under the auspices of the UN. Pakistan, US, Soviet Union and the Afghan Government of Najibulla signed this accord. So as to achieve a national consensus on the Afghan issue he called meeting of the leaders of all the political parties inclusive of Benazir Bhutto. The accord reached by the Junejo government said that Pakistan would stop supplying the arms to the Mujahideen directly and indirectly. The Soviet Union was required to pull out its forces and the Najibullah government was to stay. This decision was against the wishes of General Zia. There is no denying a fact that Zia was sidestepped in this
process of Afghan settlement. Junejo wanted to establish his authority as a PM and also thought to have firm roots of the democratic traditions. While thinking so perhaps he had obliterated a fact that he wished all such things serving under a dictator who was in uniform and also equipped with the power to dissolve the highest legislative body. The PML which he gave birth could be seen amongst the top echelons and it had yet to take its roots amongst the masses. His wish for ascendancy was perhaps too early.

The government of Junejo was under pressure from the World Bank. It asked to take austerity measures so as to reduce the budgetary deficit. Junejo struck an idea to put the government officials including the military officers in the Suzuki cars. This idea earned hostility from military. Traditionally the military men consider themselves as the best judge of the security requirements of country. In May, 1980, an unfortunate incident took place at the Ohjri camp where the arsenals for the Afghan Mujahideen were dumped in a military depot. The casualties were in thousands. The political government of Junejo thought of taking the military to task. The parliamentary committee, it is said, had recommended action against the former DG ISI who was later Chairman Joint Chiefs of Staff Committee. Further it is also said that Junejo had also thought of a plan to strip General Zia of his post of the COAS. These circumstances forced the boss of Junejo to send him home. On 30th May, 1988 General Zia got rid of Junejo government by dissolving the National assembly. It was a single stroke of pen that Zia played havoc with the fate of hundreds of legislators who were elected by the votes of the people of Pakistan. Haji Muhammad Saifullah Khan filed a petition before the LHC. The action was held as unsustainable in the eyes of law. However, the government of Junejo was not restored. The SC of Pakistan also upheld the decision of the LHC.

Junejo as person was a down-to-earth. He had no arrogance. He had enough courage to stand up against General Zia. He took his cabinet members as a team. He showed respect for everyone. The culture of tolerance was a hallmark during his tenure. The norms the acceptance of which he ensured were adherence to the constitution, freedom of press and restoration of fundamental rights. He ensured that

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112 Article 58(2) (b) of the Constitution of Pakistan, 1973. (It is popularly known as the eight-amendment)
the democracy was a workable notion in Pakistan. By packing the government of Junejo, Zia didn’t suspend the Constitution of Pakistan 1973. He said that the democracy didn’t fail; it was the Junejo government which failed to deliver. The charges leveled against his government were lawlessness, corruption and slow pace of Islamization in Pakistan. 30th November, 1988 was the date fixed for the next elections by the Zia government. Before these elections could be held, General Zia along with other senior military officers and their US ambassador was killed in the C-130 air crash near Bahawalpur.

The death of General Zia made Ghulam Ishaq Khan as the acting President of Pakistan. He was by then serving as the Chairman Senate of Pakistan. Meanwhile, the SC gave its judgment as per which the political parties were allowed to contest the elections without the requirement of registration with the CEC. This requirement was in contravention with the fundamental rights. The PPP emerged as the single largest party in the elections. The IJI Islami Jamhoori Ittehad was formulated hastily which had its majority in the Punjab.

Zia had intervened when country was facing severe civilian strife. His years in the political office are usually marked as a sad period of political retrogression. He made false pledges with the nation and always failed to keep his words. He lacked moral foothold. He remained in the quest of legitimacy and for this purposes he had to rely on tactics like Islamization. He survived for more than a decade, but his survival cost a lot to the nation as the decaying institutions of state further decayed due to their subordination to the whims of dictator. The West opposed but General Zia continued with the nuclear program. He was known in the world due to the Afghan issue. He fought a proxy war and showed courage to face Russian invasion of the Afghanistan. He was perhaps obliterating of the fact his Afghan policy would engender in Pakistan a culture of drugs, ammunition, kidnapping, crime, violence and lawlessness.

5.8 Conclusion

It may safely be concluded that the Martial Law of Ayub Khan, although gave some economic prosperity bubble but on account of political front it further widened the ever increasing gulf between the East Pakistanis and the West Pakistanis. Sheikh

113Benazir Bhutto Vs. The Federation of Pakistan, PLD 1989 SC p.65.
Mujeeb type characters took upsurge and filled the political vacuum. It ultimately ended in dismemberment of Pakistan in 1971. The Superior Judiciary showed a resolve by distancing itself from the Doctrine of Necessity in Asima Jillani Case. But, in the case of General Zia’s Martial Law, the same Supreme Court was bent to adopt a middle course. The Military rule of General Zia was legitimized by declaring it constitutional deviation. However, this time again the doctrine of necessity was used prodigally by the learned judges of the Supreme Court of Pakistan.
CHAPTER 6

MAJOR POLITICAL DEVELOPMENTS AND LAW OF NECESSITY
(1988-2007)

General Zia left a Damocles sword in the form of 8th amendment in the hands of the President. After Zia’s tradition of dissolving the NA and provincial assemblies four times, the tool of 8th amendment was used to dissolve the legislative assemblies from 1988 to 1997. During this period three elected governments were sent packing. There were four general elections conducted during this period and interestingly, the year of 1993 saw five PMs and three Presidents of Pakistan. It struck as if the democratic order was being built on the shifting sands. This chapter discusses the political bickering between Nawaz Sharif and Benazir Bhutto and meddling by the military men. It ended in Martial Law of General Musharraf in 1999 which was again legalized by the Supreme Court of Pakistan. This time the judges were really generous as they granted power to a military dictator to make amendments in the Constitution of Pakistan 1973. The plane crash of military ruler General Zia led Benazir Bhutto to capture the illustrious office of the Prime Minister of Pakistan in 1988 after the hanging of her father ZA Bhutto.

Despite hard efforts launched by the junta of General Zia to vanquish the PPP during 1977-1985 failed to bear any fruit. The PPP had boycotted the party-less election held in 1985 under the banner of the General Zia’s regime. Muhammad Khan Junejo was made as the PM under the expected subordination of Zia. He tried to consolidate his political position. When he failed to come up to the expectations of the Military Junta, Zia dissolved his government on 29th May, 1988. Later, Zia met a death in an air crash which paved a way for the party based elections on 16th November, 1988. The PPP emerged in these elections as the single largest party in the NA. It was a momentous occasion for the followers of the PPP when they saw their leader Mohtarma Benazir Bhutto taking oath of the office of the PM on 1st December, 1988 in the President’s House. She had to endure pangs and grief over the trial of her father Mr. Z.A. Bhutto. She took a stand against the Martial Law of General Zia courageously and bravery\(^1\). She was gifted with the gab. She was articulate, bright and enthralled with the wealth of confidence. Benazir Bhutto as the PM was required to

share power between herself and the President of Pakistan as per the prescribed Constitution of Pakistan amended by Zia. The PM had no restriction as regards the discharge of her function in governmental affairs. The President was empowered with blessings of the 8th amendment to make appointments to the important positions of the defense services and governors of the provinces. Above all he had the discretionary power to dissolve2 the legislative assemblies.

General Zia had carved this power to strengthen his own position. Now it was Mr. Ghulam Ishaq Khan, the President of Pakistan was unwilling to relinquish such power. There was another hard reality which Benazir Bhutto was forced to eschew. The military had formed the third angle of the power triangle, which was known as the ‘troika’. The COAS became an important angle of the troika owing to his command over the physical forces and also that the military had traditionally remained in power for long time vis-à-vis the civilian rulers.

There was yet another interesting poll result of the election of 1988, as per which the PPP could not manage a clear win in the center. It could win only 92 seats out of the 207 seats of the NA. It required the support of another political party to make its government in the center. In the province of Punjab, it failed to make its own government as it could win only 94 seats and the IJI enjoyed 111 seats. The IJI also failed to have clear majority in Punjab. It also needed the support of some of the MPAs to have its own government3. The PPP had lacked any support in the Senate of Pakistan as it didn’t dissolve and had members from the Muslim League of Junejo.

Benazir Bhutto was in the office of the PM of Pakistan. The PPP electorate’s long desire to see the PPP back in the government was consummated. They had seen the authoritativeness of the Bhutto government. Now they had thought of the same from the daughter of ZA Bhutto. Benazir was educated from the foreign institutions. She was graduated from the Harvard and the Oxford. It was what the PPP called the judicial murder of their favorite leader ZA Bhutto and father of Benazir which forced her to come into politics. Now the time when she took reins, the situation had drastically changed. There was an understanding that the Benazir government would not interfere in the affairs of military and management of the Afghan Policy, support

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2 *The Constitution of Pakistan, 1973* Article 58(2) (b). Now, this power of the President of Pakistan has been done away with.

3 *The Daily Jang, 3rd December, 1988.*
Ghulam Ishaq Khan in his election to the office of the President of Pakistan, and maintain the constitutional framework and respect for the powers of the President. She was welcomed by the West and overawed by the electoral victory. This factor made her government to be deflected from the main task of socio economic reconstruction which many had hoped from her.

Benazir Bhutto remained in the office of the Prime Minister of Pakistan for twenty months. Her tenure was marred by the political confrontation. She censured the 8th amendment to the Constitution of Pakistan 1973. Her criticism against the amendment was not in consonance with the understanding she had given to the establishment at the time of her taking the office of the Premiership of the country. Further, it was also at variance with the support which she had lent to Ghulam Ishaq Khan to become the President of Pakistan instead of Nawab Zada Nasrullah Khan, Chief of the National Democratic Party and her companion of MRD. She lacked two-third majority to do away with the amendment. On the one hand the PPP was raising clamor against the 8th amendment, while on the other hand it had opened a chapter of confrontation with the IJI government in the Punjab. The PPP yelling at the infamous 8th amendment proved to be counter-productive as it hardened Ghulam Ishaq Khan. He took it as a move to undermine his authority. The confrontation between the GIK and Benazir Bhutto turned intense on the issue of retirement of Chairman Joint Chiefs of Staff Committee (JCSS) Admiral Iftikhar Ahmed Sirohey. The PPP government issued the notification of his retirement and the President of Pakistan GIK empowered with the power of appointment hinted that Sirohey would continue to serve as the JCSS. The confrontation between the PM and the President was also seen as regards the appointment of judges of the High Court which he appointed when he was acting as the President of Pakistan without seeking the advice of the PM. The High Court upheld the validity of the appointment. It proved that the sharing of power between the office of the President and the Prime Minister as envisaged in the 8th amendment engendered tension between the two.

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4 Ghulam Ishaq Khan was a civil servant. When he retired from the civil service, he was taken as the Finance Minister by the General Zia. Afterwards, he became as Senator and later risen to the level of Chairman of Senate. When General Zia died in air crash, he became the acting President of Pakistan. It was he who used the article 58(2) (b) to dissolve the NA and disrupt the rule of Benazir Bhutto in1990.

5 M.D. Tahir Vs. Federation of Pakistan PLD 1988 LHR.
The PPP government had a bad taste in the province of Baluchistan. Governor Lt. General (retired) Musa Khan had dissolved the provincial assembly after two weeks of its inception on the advice of Chief Minister Mir Taj Muhammad Jamali from the IJI. It was considered as the PPP government had hand in the political chaos. The Baluchistan High Court declared this dissolution illegal and the federal government didn’t challenge it. Later, Nawab Akbar Bugti was able to manage the majority in his favor and he became the Chief Minister of Baluchistan.

The Centre-Punjab had no cordiality in their relationship. It would be rather better to say that both were at the daggers drawn in their relations. The PPP had belief that the IJI had managed its win in the Punjab province by rigging the elections as it had its own care-taker government in Punjab during the elections. The hopes of the ardent PPP electorates were dashed to the grounds as they had hoped for the landslide victory. The associates of Benazir called the utter subordination during the seventies and in this connection they had believed that the IJI government would not survive longer as it requires support in matters pertaining to the finance, bureaucracy and institutional. Further the center had control over the funds and without it the Punjab government would have dislodged. Besides this the PPP government had urgently needed its government in Punjab as the MPAs/MNAs were mostly from Punjab and they lacked support in their constituencies from the provincial administration. In this background the hardliners wanted speedy demolition of the IJI government in Punjab. It is also a fact worth-consideration that Mian Nawaz Sharif was raised under the tutelage of General Zia and Benazir Bhutto had struggled against the dictatorship of General Zia.

The rift between the both brought Mian Nawaz Sharif closer to the President Ghulam Ishaq Khan. He had tacit approbation from presidential circles. The Punjab operation of the PPP failed to yield any result. The political stature of Nawaz Sharif rose. At this juncture, an unfortunate political culture known as ‘horse trading’ was nurtured. Despite hard efforts, the independent MPAs could not be bought and the government of Nawaz Sharif remained intact. The move of central government was also thwarted when it tried to dislodge the officers of the central government from the province of Punjab. The Punjab government started filling the posts with the PCS officers. There was yet another setback which the federal government tried to give to
the IJI government in Punjab. It had denied any financial support from a financial institution or a bank. As a result, the Punjab government had to resort to the establishment of its own bank which was named as Punjab Bank. Besides this step, the Punjab government also resorted to the establishment of NFC\(^6\) and asked for the session of CCI. A provincial government which was dissatisfied with the decision of CCI\(^7\) could refer the matter to the joint sitting of the Parliament whose decision in the case would stand finality. The PPP government lacked a clear majority in the Parliament and it was feared that it might not be able to muster such support. The PPP government also feared as regards the constitution of NFC as it would have been bound to distribute the revenues as per the award of the NFC.

The Peoples Works Program launched by the PPP was hindered by the governments of Punjab and the Baluchistan on a premise as they contended that they themselves would carry put this project. Further, they also sought the permission of the federal government to have their own TV network as the PTV was unleashing propaganda against the government of the IJI in Punjab. Every effort was made to assert the provincial autonomy. The center-province conflict marred the political life in Pakistan. There seemed no commitment to the democratic practices and welfare of the people suffered in the bargain.

The tension between the IJI and the PPP culminated when no confidence motion was brought on the floor of the NA. The struggle started on winning the MNAs of both sides. The trading ensued in order to buy the loyalties of MNAs by both the sides. The cash flow was seen at an enormous pace. The sold out/bought MNA was kept in the safe houses in Murree, Islamabad and Lahore under strict control of the police. The PPP government also took part in this trading with great zeal and fervor. The bought horses were presented on the day of counting. The counting started and the IJI despite its strenuous efforts in buying the stocks could manage to make the number at 107 only. It required 119 votes and it was still short of 12 votes. No confidence motion was tendered in the short democratic history of Pakistan, but, unfortunately it was ridiculed on the political horizon the way it was conducted.

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The PPP government earned goodwill but unfortunately it was lost into the political confrontation. It was surrounded by the elements of hostile forces. It failed to pay heed towards socio-economic development of country and its constitutional and legislative obligations. The PPP government however had its credit the popularity as the Martial Law of General Zia could not obliterate name of Bhutto from the memories of masses. She had carried a charisma of her personality and it lent a glitter to the status of a Prime Minister. The large crowds of people were enthralled by the eloquence of her voice. There was refreshing break after a decade long military rule of Zia. Freedom of speech, person and assembly was at prodigally allowed. The record of PPP government pertaining to the human rights drew international praise. The political life had been marred by the religious fanaticism, bigotry ended. The PPP proved to be party which stood for a change and a representative of the under-dogs.

Benazir did not have any experience of running the government affairs. She was young and inexperienced winch. Her style of governance didn’t suit the efficiency of government. She kept under her own control the ministries of foreign affairs, finance and the defense. Her mother, Begum Nusrat Bhutto was the co-chairperson of the PPP. She took the slot of senior minister. She was under obligation to accommodate the senior stalwarts of the PPP. Therefore they were given the appointments of the advisors of the PPP. Most of them got themselves involved in the executive responsibility and remained unaccountable to the house. The bureaucracy was in shuffle. Most of the bureaucrats were turned OSDs. This treatment sent a wave of discontentment amongst the bureaucracy. The lot sale fair of job was ensued by the PPP and awarded 26000 jobs setting aside the authority of the public service commission. The regime of PPP however managed to keep some economic indicators\(^8\) in appreciable position. In the year 1989-90 the fiscal deficit was brought down to the level of 6.5 % as compared to the 7.4% in the previous year. The inflation was also controlled and the CPI was kept at 6.04 as against 10.40% in the previous year.

Benazir had to face disenchantment from the Sindh province. It was this province which had to face brutal action of the General Zia’s government as it was the center of MRD movement. This province was also alienated after the overthrow of

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ZA Bhutto’s government in 1977. She wanted to bring the Sindhis into the main political stream. But this province was marred by the ethnicity and the bad situation of law and order. Benazir government had another challenge in the form of MQM (Muhajir Qaumi Movement) which had dominance in the urban areas of the Sindh province. For military government of General Zia, it was a welcome development that MQM was taking surge. The military regime found an opportunity to counter the influence of PPP in Sindh, that’s why it was allowed to grow unhindered. This organization had the ethno-linguistic identities with the Urdu speaking immigrants. This sub-cultural group had its roots in the cities like Karachi and Hyderabad. Altaf Hussain, a student leader, was known for his fiery speeches. He was endowed with the gift of legend and fiction. He was bestowed with the charismatic personality. The lawless elements were replete with in the MQM and they had free aces to the arms and ammunition of the Afghan Jihad. The central government of the PPP was confronted with the question of restoring peace and tranquility in the province, on the one hand and the on the other hand it had to amicably settle the question of power sharing between the MQM and itself. The PPP had although formed a coalition government with the MQM in Sindh yet the tension loomed large. The cities of Karachi and Hyderabad were in tight grip of ethnic clashes. The strikes and lock-outs had marred the pace of city. Riots, kidnapping, ransom, indiscriminate killings were the hallmarks of that era. It felt as if the police was toothless. The Army wanted a free hand to terminate the unrest of both the cities. It was this backdrop and the Gulf War which forced the President of Pakistan Mr. Ghulam Ishaq Khan to use the infamous article 58(2) (b) of the Constitution of Pakistan, 1973. The government of Benazir Bhutto was caught a prey to this article and the legislative assemblies were dissolved on 6th August, 1990. Benazir didn’t challenge it in the court of Law. However, it was Khawaja Tariq Rahim who had challenged it in the Lahore High Court. The Court termed the dissolution valid and it was upheld by the Supreme Court of Pakistan also.


The government of Benazir was removed and in its place caretaker government of Mr. Ghulam Mustafa Jatoi was formed. He had responsibility of holding general elections. Mian Mohammad Nawaz Sharif was appointed as the care-

9Khawaja Ahmed Tariq Rahim Vs. The Federation of Pakistan  PLD 1991 SC
taker Chief Minister of the Punjab province. The general elections were held on 24th October, 1990, in which the PPP had to suffer defeat. It had formed alliance with the TNFJ (Tehrik Nifaz Fiqa Jaafria) and Tehrik-i-Istiqlal. The alliance was known as the PDA- Pakistan Democratic Alliance. The PPP could manage to win 46 seats out of 207 seats of the NA and only 13 seats of the Punjab assembly out of 240 seats. Mian Nawaz Sharif of the Muslim League was in contested elections under the banner of IJI Islami Jamhoori Ittehad. It was able to win 105 seats of the NA and the 208 seats of the Punjab Assembly. It was an unprecedented act that the government in center was able to form its own government in all the four provinces.

The PPP clamored that the election was stolen. They raised their voice that the rigging was carried out on massive scale. The gap was too wide between the two parties regarding the election results. However, it appeared as if the election of 1988 was made beneficial for Benazir Bhutto and the election of 1990 was for Mian Nawaz Sharif. The bias of the caretaker government also helped IJI in winning the elections of 1990. This is what the PDA paper had claimed. Perhaps the PPP had thought of Punjab as it had reacted during the seventies, but, now the things had changed a lot in the nineties as Mian Nawaz Sharif under General Zia had settled in Punjab province and prospered. It was a fact that the province Punjab revolved around the Chief Minister Nawaz Sharif. The PPP perhaps was unwilling to eschew a fact that this province was no more its strong foothold.

The two party-systems although evolved, yet the political confrontation didn’t end. The reference-cases for corruption were filed in different tribunals against the corruption of PPP ministers. Mr. Asif Ali Zardari, husband of Benazir Bhutto was also persecuted on different allegations. Chief Minister Sindh Jam Sadiq Ali did his best to vitiate the political environment and also brought both parties on path leading to rivalry and hatred. The 8th amendment was projected as the safety valve but it served as the power bully for the presidential camp. The power was now captured by Mian Nawaz Sharif who was taking revenge upon the PPP which he had to bear while he was serving as the CM of Punjab and the center was giving him financial and political jolts. Mian Nawaz Sharif unlike Benazir Bhutto did not belong to the feudal class which hitherto in Pakistan the political power was presumed to be the baby of this class. He was a business man whose ancestors at the time of partition had a
modest start as steel miller and later turned as a steel magnate. Nawaz Sharif was reared in the political field by the military regime.

Being a business-man himself, Mian Nawaz Sharif’s government prepared economic reforms package. The prime importance was given to the privatization process. This process was put in gear way back in the year 1977. Some agro-based industries were denationalized and foundries were also handed over to their original owners. Afterwards, the government of Benazir Bhutto also initiated the process of privatization and denationalization. It sold out the ten percent shares of the PIA but failed to proceed further owing to the opposition of labor and lack of follow-up.\textsuperscript{10}

The government of Nawaz Sharif pursued the policy of privatization with great fervor and zeal. His government pointed out 115 industrial units for privatization. It was able to privatize total of 65 units by the year 1992-93. The MCB-Muslim Commercial Bank- and the ABL, Allied Banks, were also privatized. It was tried that the monopoly of public sector should be minimized. The banking sector, power generation, airlines shipping, telecommunications, and road construction were taken out of the public sector control and handed over the private sector. People were allowed to maintain the FCA foreign currency accounts. Import and export of the foreign exchange was allowed. Foreign investors were allowed to have 100% equity in a business venture, besides this they were also allowed to buy equity in the running industrial units. The government removed maximum regulatory control on the industrial units and its sanction in the private investment was also ended. For the generation of self-employment scheme, the government initiated the yellow cab scheme and also extended the self-employment loan. These schemes derived a lot of public criticism as the government revenue involved in it became irrecoverable. The people never returned these loans and the yellow cabs were misused. The Nawaz Sharif government also spent billions\textsuperscript{11} of rupees on the expensive motorway project. The first such program was completed on Islamabad-Lahore motorway. These projects put heavy burden on the already leaned exchequer. These pompous projects gave a heavy blow to the debilitating economy of Pakistan. The fiscal deficit rose high as compared to the GDP. The CPI was 6.04 % in the year 19990-91 and in the year 1992-93 it touched at 9.83%. The domestic borrowing of government was 381

billion in the year 1990 and it touched at 711 billion\textsuperscript{12} in the year 1993. However the government of Nawaz Sharif was successful in arriving at the agreement between center and the provinces as regards the apportionment of Indus River water which was pending for almost seventy years. Further, it was also successful to hammer out the NFC award which was in limbo since 1975.

Ghulam Ishaq Khan gave a moral support while Nawaz Sharif was the CM of Punjab against the pangs given by the PPP government in the Center. Now it was Mian Nawaz Sharif who had managed to come in the center and GIK’s presence in the office of President of Pakistan gave him a psychological satisfaction. He was considered as the man who could usher in the era of 21\textsuperscript{st} century owing to his economic reforms package. He was becoming authoritative thinking that he had a heavy mandate. The President Camp wanted a domineering president under the 8\textsuperscript{th} amendment whereas the PM Nawaz Sharif was considering himself powerful. The power sharing was a bone of contention between the two under the 8\textsuperscript{th} amendment. The appointment of new COAS became a contentious issue after the death of General Asif Nawaz Janjua. The appointment of COAS was a prerogative of President under the 8\textsuperscript{th} amendment but Mian Nawaz Sharif wanted his role in its appointment. The President GIK wanted some army chief who would have helped him in his re-election as he held sway in the political affairs. GIK made General Abdul Waheed Kaakar as the COAS on 12\textsuperscript{th} January, 1993 superseding six Lt. Generals who were senior to him\textsuperscript{13}. When the PM Nawaz Sharif was stuck with this political situation, he decided to undo the 8\textsuperscript{th} amendment. He said that he wanted to be a PM as is in the United Kingdom so as to keep up the parliamentary practices in Pakistan. He was conscious of his growing popularity but he had to seek assistance of the PPP to manage the two thirds majority. Benazir Bhutto stung by GIK was also in distress with Nawaz Sharif. She adopted two track policies. She agreed with government to chair the NA foreign relations committee and sought release of her husband Mr. Asif Ali Zardari. On the other hand, she pursued a clandestine way of approaching the GIK and assured him of her support and also a help in the re-election as the President of Pakistan\textsuperscript{14}.

\textsuperscript{13}The Daily Dawn, 13\textsuperscript{th} Jan, 1993.
Nawaz Sharif was baffled by the political machinations. He\textsuperscript{15} made address to the nation on 17\textsuperscript{th} April, 1993 and said that the schemes were being made to undo all the good works he had done for the nation. The President GIK took it as a defiant posture adopted by the PM Nawaz Sharif.

On the other day of his televised address, Nawaz Sharif’s government was sacked by the GIK using his power as per enshrined in the 8\textsuperscript{th} amendment. The president of Pakistan leveled charges of non-transparent privatization program, harassment of the political rivals, corruption and implicit hand in the murder of Asif Nawaz Janjua COAS. The fresh elections to the legislative assemblies were announced on 14\textsuperscript{th} July, 1993. Mir Balk Mizari was appointed as the care-taker PM of the Pakistan.

Nawaz Sharif preferred to challenge the dissolution of the NA in the Supreme Court of Pakistan. The SC in this case tried to distance itself from the Maulvi Tmeez-ud-din Khan’s case. As it had earned a bad reputation in this case, perhaps the judicial bench of the SC headed by the Chief Justice Nasim Hassan Shah might have thought to wash its previous deeds for which the constitutional history of Pakistan laments. The SC headed by Nasim Hassan Shah declared the act of President as unconstitutional and illegal and restored the government of Nawaz Sharif\textsuperscript{16}. The judiciary had tried to send a message to the establishment that the Constitution of Pakistan stood supreme. There had been previously two dissolutions under the 8\textsuperscript{th} amendment. People had become aware of such machinations. Further, it was unlike in 1954 when people had no idea of legal battle going on in the Federal Court of law. Mian Nawaz Sharif had toured around the country and made people aware of the assault on their will. In the given situation it was expected that the President would quit his office honorably. The Constitution also required all authorities to act in the aid of Supreme Court\textsuperscript{17}. In later incidents, the President didn’t tender his resignation. Rather he himself along with Nawaz Sharif was forced by the COAS to tender their resignations\textsuperscript{18} and the assemblies were dissolved once again. The responsibility to

\textsuperscript{15}The Daily Jang, 18\textsuperscript{th} April, 1993.
\textsuperscript{16}Mian Nawaz Sharif vs. The President of Pakistan PLD 1993 SC
\textsuperscript{17}The Constitution of Pakistan, 1973 Article 90.
\textsuperscript{18}The Daily News, 19\textsuperscript{th} July, 1993.
hold the general elections in Pakistan was entrusted to the World Bank’s former Vice President Moeen Qureshi\textsuperscript{19}.

The eradication of another democratic government led people into the unfathomable ocean of despair, dejection and melancholy. The liberal economic policies took an end. The tussle between government and opposition and the prime minister and the president played havoc with the nascent democracy in Pakistan.

6.2 Benazir regains Power 1993-1996

The entry of Moeen Qureshi was skeptical. He was considered to enforce agenda of the World Bank/IMF in Pakistan. He was their representative and had never been found in the politics of Pakistan before. When asked about his Pakistani National ID card, he frankly replied that he didn’t have any Pakistan ID card before becoming the care-taker of PM of Pakistan. He published the list of bank defaulters who were not allowed to contest the general elections. He took certain steps to discipline the economy of Pakistan. He also introduced number of changes in the political and foreign spheres. He strongly reacted to the economic policies of Nawaz Sharif to which he had taken a pride. Mian Nawaz Sharif was also left alone in the field of politics. The MQM and Jamat-i-Islami had preferred to stay out of the Muslim League of Nawaz Sharif. The elections were conducted on 6\textsuperscript{th} October for the NA and the provincial assemblies. The PPP and the PML emerged as two major parties. PPP could bag 86 seats and the PML could win only 72 seats of the NA out of 207 total seats of the NA\textsuperscript{20}. In the largest province of Punjab, the PML of Nawaz could manage only 100 seats and the PPP with its ally PML Q 94+18 seats out of the total seats of 240. Besides this, the PPP could win only 56 seats in the Sindh province and the MQM could win 27 seats. The PPP had 22 seats in the NWFP and the ANP had 21 seats in this province\textsuperscript{21}.

The PPP was able to from its government in the center with the help of independents, PML (J) and some minorities. It was also able to form its government in the Sindh province. It had a weak government in the center. The PML (N) sat in the opposition. It failed to have its government in the Punjab province. It was the PPP

\textsuperscript{19} The Daily Nawa-i-Waqt, 20\textsuperscript{th} July, 1993.
\textsuperscript{20} The Daily Dawn, 07\textsuperscript{th} October, 1993.
\textsuperscript{21} The Daily Nation, 10\textsuperscript{th} Oct, 1993.
which was able to have its government in the Punjab and the PML (N) sat in the opposition in the center and Punjab, one time considered as its bastion of power. The PPP apparently had promised to help the GIK in his re-election as the President of Pakistan, but later it ditched him and brought his own candidate Mr. Farooq Khan Laghari. Against him was Wasim Sajjad who was lodged by the PML (N). The PPP had won the election and got Farooq Laghari installed as the President of Pakistan. Benazir apparently was in comfortable position as she had her own President who had publicly announced that he would not use his powers granted to him under the 8th amendment. She was able to have her government in Punjab but Mian Manzoor Wattoo had exacted a heavy price for it as he was installed as the Chief Minister of Punjab. She had an international image of a moderate and modernist political leader in the world of Islam. She started her second term in the office apparently with blessings of the American lobby.

The second term of Benazir in the office of the PM was unfortunate and it failed to come up to the expectations which were pinned up with her. The agitation and confrontation between the PML (N) and the PPP was on the height. The government of PML-N and the ANP was replaced with the tactics by PPP and the governor rule was invoked for more than two months. Mian Sharif the father of Mian Nawaz Sharif was arrested and it followed with the strikes, lockouts, protest, meetings, wheel jams, shut down of business and the boycott of the assemblies. This state of affairs was dismal and dejected and people were perturbed by the animosities between the two main parties. However, it was not all depressing and disturbing. Under the pressure from the IMF the Benazir government was able to keep the budget deficit low and there was increase in the foreign exchange reserves. The macro indicators performed well but at the micro level the position was despicable. The price hike was all around. The condition of an average Pakistani was in doldrums. The agriculture and industrial sector remained stagnant. Inflation soared and unemployment was rampant. Corruption was hallmark of the times.

This era of Benazir was portrayed a real picture of mis-governance. The cabinet didn’t decide, the special assistants and the advisers sitting in the PM secretariat were the real decision makers. The husband of PM, Mr. Asif Ali Zardari

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dominated the political scene. He was popularly known as Mr. Ten percent. He was a member of the legislative assembly and a minister. He dominated the scene of governance. The government institutions suffered a lot but above all the financial institutions were the worst hit. Unfortunately the president office was supportive to the government in its actions and the establishment was silent. The bureaucracy hardly remained as an independent civil service. The press was free from restrictions but it was ineffective. The Benazir government appointed judges on the basis of their political persuasions. The Supreme Court of Pakistan had to intervene and pass a judgment in the Al-Jehad Trust vs. Federation of Pakistan. It was held in the judgment that the independence of judiciary is maintained and Chief Justice be consulted as per requirement of the articles 177 and 193 of the Constitution of Pakistan before making an appointment of the judge of the Supreme Court and the High Court.

The government of the Benazir Bhutto also met the same fate as did the other governments. Her government was sacked on 5th November, 1996 as per powers granted by the 8th amendment by her own President Mr. Farooq Khan Leghari leveling the allegations of corruption, killing of Murtaza Bhutto, extra-judicial killings and non-compliance of the orders of the SC. The next date for the general elections was fixed 3rd Feb, 1997. Malik Khalid Meraj was considered as the veteran politician of PPP, he was made as the care-taker PM of Pakistan. It is interesting that the Supreme Court this time upheld the action taken by President as per article 58(2) (b) as justified by 6 to 1 as against the case of Nawaz Sharif when the CJ of SC Nasim Hassan Shah had declared the same act of President as illegal.

6.3 Nawaz Sharif re-enters Powers Echelons 1997-1999

The NA comprised 214 members and the PML-N led by Mian Nawaz Sharif had landslide victory as it attained 135 seats. In Punjab province it secured 211 seats out of 248 seats. The PPP had died in these elections as it could secure only 19 seats of the NA and in the Sindh province it could not win more than 36 seats out of the house having total of 109 seats. There are many theories forwarded for the dismal performance of the PPP in these elections. Perhaps the PPP voter was disillusioned

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23 PLD 1996 SC
24 Mohtarma Benazir Bhutto vs. President of Pakistan 1997 SCMR 353
with the poor performance of the PPP and the PML-N managed a come-back in the saddle. There was emergence of new political party named as Tahrik-e-Insaaf (movement for Justice). Imran khan was leading this party who had won fame as a cricketer and also name for the establishment of Shaukat Khanum Memorial Research Hospital. The Party failed to win even a single seat in these elections; however, it highlighted the issue of corruption and accountability in Pakistan.

The government of Nawaz Sharif had to confront issues\(^{25}\) like external and internal debt, high inflation, a stagnant economy and other like matters. In March, 1997, the external debt was hovering around 2150 billion rupees ($29 billion) and the internal debt stood at 986 billion rupees. Although with the introduction of 13\(^{th}\) amendment\(^{26}\) to the Constitution of Pakistan, 1973, there was sighing of relief from the power sharing by the President Camp, yet the Army as a major de-facto force in the body politic remained as a potent danger to the government of Nawaz Sharif. In later years of the Sharif governance, the COAS General Musharraf overthrew the throne of Mian Nawaz Sharif.

The Nawaz government was swollen with the pride of two-third majority in Parliament. It thought of passing a fourteenth amendment. Ever since the beginning of the process of civil governments in Pakistan after the end of Zia era, there was a necessity to eradicate the menace of defection which was witnessed in the Cases of no-confidence motion against the government of Benazir Bhutto in1989, overthrow of the Ghulam Hyder Wyne’s government in 1993 by the defection of Wattoo and the end of Sabir Shah’s government in the NWFP in 1994. Fourteenth amendment\(^{27}\) to the Constitution of Pakistan, 1973 was passed on 3\(^{rd}\) July, 1997 by inserting the Article 63-A.

As per this amendment, it has been laid down that if a member of any political party defects on whose ticket he has contested the election, then the head of that political party would issue him a show cause notice. If he remains dissatisfied then he may take disciplinary action against him and such decision would be communicated to the Speaker of the House concerned of which he is a member. The Speaker shall

\(^{26}\)This amendment was passed in April, 1997 which ended the power of the President of Pakistan to dissolve the NA and the other legislative assemblies.
\(^{27}\)PLD 1997 Central Statutes 324
communicate the same to the CEC Chief Election Commissioner of Pakistan. This amendment only helped the political parties to silence dissent within their parties. It didn’t help in the suppression of defection. The members of the Parliament were reduced to a status of rubber stamps as they were bound to toe their party-line. The government of Nawaz Sharif also passed\(^{28}\) the Ehtesab Act, 1997 from the Parliament. Saif-ur-Rehman was made its head. He was close confidant of Nawaz Sharif who kept aloof the cronies of Nawaz and Nawaz himself was safe from its clauses. This Act was used as a weapon to torture the members of opposition and others who had went against the government. The government of Nawaz Sharif recorded a history for its entanglement with the supreme judiciary. CJ Sajjad Ali Shah had paved a way for the government of Nawaz Sharif, in this sense he was their benefactor. The cordiality of relations between the both ended when the SC\(^{29}\) took the bail of officers of the WASA who were handcuffed at the spot at the orders of the PM. This was not only a matter of contention. Rather, the things further worsened between the Government of Nawaz and the Sajjad Ali Shah on the issue of enforcement of the Anti-Terrorist Law. Nawaz wanted to establish the parallel system of anti-terrorist courts as she wanted to accommodate the PML-N people as the judges of these courts. The High Court had no authority to hear appeal out of the judgments of these courts. The Special Appellate Courts could hear appeals against the ATCs. There lay no appeal in the SC against the orders of the Special Appellate Courts. The antagonism further excelled when the CJ Sajjad Ali Shah recommended five judges to the SC\(^{30}\) from the three different High Courts. It was already settled in the judges’ case that the recommendations of the Chief Justice are binding to the government to follow. Nawaz Sharif did not like the recommendations of such judges. One of the judges had made negative judgments against his industrial empire when he was not in saddles. The other judge was the federal law secretary during the tenure of Benazir Bhutto. There were personal and family interests which took precedence before Mian Nawaz Sharif and the national interest suffered in the bargain. The government wanted to foil the step taken by the CJ Sajjad Ali Shah for the appointment of Judges. It issued a notification as per the

\(^{28}\) PLD 1997 Central Statutes 397

\(^{29}\) Hamid Khan author of the book ‘Constitutional and Political History of Pakistan’ writes that when a Police Officer said in the ear of Nawaz Sharif that FIR was not registered against the accused therefore, they can’t be handcuffed. The PM Nawaz Sharif, to this replied that he didn’t care for the FIR.

\(^{30}\) The Daily Dawn, 29\(^{th}\) August, 1997
number of the judges of the SC were reduced from seventeen to twelve. The CJ Sijjad Ali Shah paid back in the same coin. The SC declared issuance of such notification as void ab-initio. The path on war was set. Nawaz was adamant to accept the recommendations of Sajjad Ali Shah. On the other hand, the attitude of the CJ Sajjad was also whimsical and unbearable. The SC also suspended the fourteenth amendment passed by the Parliament. On 30th Oct, 1997 the SC passed another judgment invoking the Article 190 of the Constitution of Pakistan, 1973 to get the appointment of the judges made by the President of Pakistan as the PM was reluctant to make such appointments. The whole nation remained tensed with the brawl ensued between the PM Nawaz and the CJ Sajjad. The President made such appointment and it became a victory point for Sajjad Ali Shah and it ended with the failure of Nawaz Sharif for whom the reasons for non-compliance of the SC CJ’s recommendations were merely personal.

The Chief Justice Sajjad Ali Shah had not only antagonized the government of Nawaz Sharif but he had also his entanglements with his colleagues in Judiciary. He had humiliated the judges by sending them to the registries. He didn’t bother to consult the senior judges on important issues. They were kept ignorant. He adopted a posture of intolerance and autocratic style. The Parliament was replete with uproar when the three judges’ bench headed by the CJ Sajjad Ali Shah suspended the operation of fourteenth amendment. The Nawaz Sharif circles declared this step of the SC as unconstitutional and illegal. There were furious speeches in the assembly. The remakes were passed against Sajjad Ali Shah. It was said that the order was volatile of the supremacy and the sovereignty of the parliament. The SC issued a contempt notices to Mian Nawaz Sharif and others. On 17th and 18th November, 1997 Mian Nawaz Sharif tendered his appearance before the SC bench of five judges’ headed by the CJ himself. Nawaz Sharif did not apologize but express his regrets over the remarks made in the parliament. CJ Sajjad adopted an uncompromising attitude at this stage, despite the fact that the same could have been dropped. In order to save the skin of PM from punishment of the contempt, the parliament passed the Contempt of Court (amendment) bill as per which the contempt punishment awarded by the SC was made appealable before another bench comprising of the remaining judges of court. The government approached the President of Pakistan to give his assent to the bill. He

31 The Daily Jang, 1st November, 1997
said that he was willing to give his assent provided the SC didn’t stop him from doing so. On receipt of signal from the President Camp the CJ passed a judgment as per which he was restrained from taking any action which amounts to giving assent to such bill under reference. It was further said in the judgment that if the President had signed the bill and becomes a law then it would amount to suspension. In this scenario and giving height to the Nawaz-Sajjad imbroglio, the attitude of the President was also unreasonable. As per law he could have averted the situation by sending the same back to the parliament for re-consideration instead of giving signals to the judiciary of caveat emptor. It is unprecedented in the judicial history of Pakistan that a law which has yet to take birth is stopped from its inception. When a law takes birth then the courts review whether it is passed in accordance with constitution of Pakistan or not, but, in this case CJ went a step further and in anticipation erected a barricade by refraining the president to pass any such orders. There are presumptions that there was some nexus between the president and the CJ of SC. At last, the military stepped in to grant some respite for the PM from the SC. The then COAS became an arbitrator and contempt cases were adjourned for a week time.

There was time for respite as granted with good offices of the COAS. The PML-N took advantage of it. They were well aware of the fact that the judges of the SC were disgruntled with the attitude of the CJ SC Sajjad Hussain Shah. PML-N by no was well adept in wheeling and dealing. In the registry bench at Quetta, a petition was filed on 18th November, 1997 in which it was prayed that the CJ SC Sajjad was not the senior most judges at the time of his appointment. Initially, an interim order was not passed. The petition was to be filed at the principal seat in Islamabad. However, the two-judge SC bench at Quetta entertained the same there by passed and interim order as per which he was restrained from performing his functions. As per this order Sajjad Shah was restrained to perform judicial and administrative functions and powers of the Chief Justice till further orders. This order led to the bad taste of happenings after wards. CJ Sajjad Shah suspended the order of the Quetta bench. It was paid back in the same coin as another SC Judge joined the two stalwarts at the Quetta rest house, where on the evening of 26th November, 1997, the three judges of the SC bench at Quetta suspended the suspension order of the CJ SC passed by him at

33 Asad Ali vs. The Federation of Pakistan 1998 SCMR 122.
Islamabad\(^{34}\). In Peshawar registry bench the two-judge bench passed similar order following their counterparts at the Quetta bench. They held the appointment of the CJ SC Sajjad Shah as illegal and he was stopped from passing judicial or administrative orders in his capacity as the Chief Justice of Pakistan Supreme Court\(^{35}\). On 28\(^{th}\) November, 1998 Justice Saeed-uz- Zaman Siddiqui himself assumed the charge of the acting CJ when the senior most Judge Ajmal Mian declined to act as the acting CJ of SC. He ordered for the composition of full fifteen member bench excluding Sajjad Ali Shah and Ajmal Mian.

Now it was a turn of Sajjad Ali Shah to throw the ball bowled by the group of the judges headed by Justice Saeed-uz-mZaman. On 27\(^{th}\) November, 1998, the five judges’ bench headed by the CJ SC Sajjad Ali Shah suspended the order passed by the Quetta bench by four to one. The court room of CJ Sajjad Ali Shah was jam-packed by the civilians turned lawyers. They were raising slogans that Sajjad had no authority to preside the bench when he was stopped to do so. The court room looked like a fish market. The decorum of the SC was ransacked by the PML-N workers and supporters. The political secretary of Nawaz Sharif was chieftain of the unruly crowd. The world witnessed the sacrilege of the apex justice dispensing body at the hands of PML-N people\(^{36}\). The hooliganism of PML-N was heightened in the SC on 28\(^{th}\) November, 1997 when the CJ SC Sajjad Ali Shah took up hearing of the contempt case against Mian Nawaz Sharif. The aim of the ruffians of the PML-N was to prevent it from hearing a case against the PM Nawaz Sharif. This assault on the SC is unprecedented in the judicial history. This unruly scene was directed by the government of Mian Nawaz Sharif. The MNAs and MPAs and Ministers brought their workers for such variety show for which the PML-N took pride as the SC raiders were served with the lunch in the Punjab House for their hard work at the SC Court room. The incident in the SC was stated by the CJ Sajjad Ali Shah that the unruly mob wanted to rush into the court room. Indeed, some of them did succeed in doing so. There was a big commotion and riot outside the court room which was raising the high-pitched slogans. They wanted the CJ to take into their custody. The court was left with no option except to adjourn the proceedings. The flurry of activities could be noticed.

\(^{34}\)Asad Ali vs. The Federation of Pakistan 1998 SCMR 15.
\(^{36}\)The Daily Jang, 28\(^{th}\) November, 1998.
The people were running hither and thither. Meanwhile, some of the policemen escorted the judges to their chambers. The CJ SC Sajjad Ali Shah asked the President to seek the help of Army in this matter. Besides this, he also asked him to send reference against five judges of the Quetta and Peshawar registry to the supreme judicial council for misconduct. The President sent this letter to PM, who ignored the same. Finally, the CJ himself addressed the COAS for intervention in the matter. The SC judiciary was split up as the two separate cause lists were issued, one by the five judges bench headed by the Sajjad Ali Shah and the other cause list was issued by the Saeed-uz-Zaman group.

The different Bar Councils of the High Courts and the SC approached the judges of the SC for rapprochement on 1st Dec, 1997. The group of five Judges headed by the Sajjad Ali Shah was mellowed down by now. This group was ready to sit with the other group and sort out the differences. The group led by Saeed-uz-Zaman Sidiqui was aggressive and unwilling to sit with them. However, both the groups sat together. The seventeen judges of the SC were in the same room on the persuasion of the bar councils representatives. Abid Hassan Manto, the then president of the Supreme Court Bar Council requested all the judges of the SC to save the image of court from being tarnished. He said that the CJ was Sajjad Ali Shah and he should be accepted by all of his colleagues. Sajjad Ali Shah was also requested to address the genuine grievances of his fellow judges. The step taken by the bar councils lowered tension for the time being. Further, to show homage to the bar councils no hearing was conducted that day.

It is indeed unfortunate to state that the judges of the SC were not divided on the difference amongst them; rather the pressures and affiliations were from the outside. The formula was worked, as per which the CJ Sajjad and five other judges were to hear the cases against the PM. There was a second bench also as per which it was decided that the Justice Saeed-uz-Zaman Sidiqui and other judges would hear the cases against the CJ. The third bench was framed to hear the other cases. There was an understanding as per which the Sajjad Ali Shah would adjourn the cases and Saeed-uz-Zaman was asked to dispose of the cases against the CJ Sajjad Ali Shah.

37 Muhammad Ikram Chaudhary vs. Mian Muhammad Nawaz Sharif 1998 SCMR 176
38 The Daily Dawn, 29th November, 1998
But, unfortunately it didn’t work as the Judges of the SC siding with the Mian Nawaz Sharif group asked the Sajjad Ali to adjourn all such cases for more than three months. To this Sajjad Ali was flared up. He took it as the dictation from rest of the other judges of the SC. He refused to accept such suggestions. It became an open secret that the judges were working on their respective agendas to advance the interests of their masters\textsuperscript{39}. There was yet a step taken by the CJ Sajjad Ali Shah which may be expected from a person of an unsound mind. Sajjad Ali Shah caught by such circumstances perhaps thought the only way out in restoration of the thirteenth amendment and again giving powers in the hands of President to dissolve the NA and the other provincial legislative assemblies\textsuperscript{40}. This order was held in abeyance by the rival group of judges headed by the Justice Saeed-uz-Zaman Siddiqui. A separate order was also made as per which Justice Ajmal Mian was asked to assume administrative and judicial powers and functions of the Chief Justice\textsuperscript{41}. In the midst of last onslaught of the SC judges versus the Nawaz government, President Laghari tendered his resignation from the office of President of Pakistan on 2\textsuperscript{nd} December, 1997.

The petition of Asad Ali was taken up by the ten member bench headed by the Justice Saeed-uz-Zaman. Justice Sajjad Ali Shah did another folly that he lent legitimacy to the proceedings initiated by the bench of Justice Saeed. He participated in these proceedings by sending his counsel. He could avoid these proceedings by taking a plea as coram non judice. This judgment was announced on 23\textsuperscript{rd} December, 1997. As expected, the judgment went against him. The government was asked to de notify Sajjad Ali Shah as the CJ of SC and notify the senior most judges as the CJ of SC. The orders made by Sajjad Ali Shah till 25\textsuperscript{th} Nov, 1997 as the CJ were declared valid on the basis of the de facto doctrine. On 23\textsuperscript{rd} December, 1997 Justice Ajmal Mian was notified by the government of Main Nawaz Sharif as the CJ of the SC.

Mr. Laghari as the President of Pakistan cannot go scot free in this high pitch drama played amongst the actors the government of Mian Nawaz, the judiciary and the legislature. The PPP nominated him as its President. He threw under the carpet the follies committed by the PPP minister and above all the husband of the PM Benazir


\textsuperscript{40} Syed Iqbal Haider vs. The Federation of Pakistan 1998 SCMR 181

\textsuperscript{41} Asad Ali vs. Federation of Pakistan 1998 SCMR 119
Bhutto. He himself started his career as Mr. Clean, but he was not as his sons were found in smuggling the vehicles from Afghanistan on the basis of their father holding the prestigious office of the President of Pakistan. Further, his name also appeared in the Mehran Bank scandal. When he developed some personal animosity with Benazir Bhutto he used article 58(2) (b) and dissolved the NA. The government of Benazir Bhutto was in this way overthrown. He made an understanding with Nawaz Sharif and lent him his administrative support and thus he managed overwhelming majority. When he found such a great number of PML-N members in the NA, he made recourse to the Army and the Judiciary to subdue the Nawaz heavy mandate. The army didn’t participate in his plan and it was Sajjad Ali Shah who withstood him till the last ball until he himself was stamped out. When he was shown the way of impeachment he tendered his resignation in utter disgrace. Chairman Senate Wasim Sajjad was made as the acting President of Pakistan.

On 15th December, 1997 Mian Nawaz Sharif disclosed to his cabinet that the next President of Pakistan would be Justice Rafiq Tarrar. He was a close family friend of Sharifs’ and it was his personal choice. His nomination papers were rejected by the acting CEC Justice Mukhtar Junejo on 18th December, 1997 for propagating adverse to the integrity and independence of Judiciary in Pakistan. He referred to his decision on the basis of evidence available in the form of press statements in which Rafiq Tarrar had called Justice Sajjad as the Judicial Terrorist. The LHC on appeal suspended the order of the CEC. The matter was then referred to the larger bench which comprised of the two junior most judges. It was again an unprecedented as the senior most judges comprise a larger bench in a matter of public importance. This bench extended the suspension order of nomination papers of Rafiq Tarrar. On 27th December, 1997 in a cautious bid Main Nawaz sharif replaced CEC Junejo with Justice Abdul Qadeer Chaudhary. Mr. Rafiq Tarrar won the Presidential election of 31st December, 1997 with huge margin. He secured 374 votes against the total of 457 votes.

Mr. Rafiq Tarrar had no prominence in the field of law. He was directly appointed as the District& Sessions Judge and then became as the additional judge of

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42 Hamid Khan, _Constitutional and Political History of Pakistan_, p.460.
43 The Article 63 (g) of the Constitution of Pakistan, 1973.
44 The Daily Jang, 30th December, 1997.
the LHC in 1974. In 1989, he became as the Chief Justice of the LHC. Later, he retired as a judge of the SC in 1994. Afterwards, he joined the PML-N and became senator on its seat in March, 1997. Apparently, it seems as if he was devoid of any traits but what struck to the Sharifs’ might be his unflinching loyalty to them and this trait surpassed all the rationales. This time the tradition was broken as the PM and the Presidents were both from the same province, whereas, earlier both the positions were from different provinces.

Chief Justice Ajmal Mian took up the case of contempt and rendered a monumental judgment on 2nd March, 1998 on this aspect taking into consideration the law of contempt of India, UK and the other countries. This judgment records a historical developments and radical changes which it has undergone over the period of time. All cases of the contempt of court were clubbed together so as to lay down the parameters of contempt law in the view of fundamental rights of freedom of speech, expression and press. The bench in this judgment stated that Nawaz Sharif and Benazir when out of power make reckless statements about the judiciary, because, certain judgments do not favor them. The judges cleared Mian Nawaz Sharif on the pretext that he felt dejection and felt sorry on the state of affairs in parliament. It was opinion of the bench that replies of Mian Nawaz Sharif don’t appear to be crossing boundaries of the constitution. The court took reply of Nawaz Sharif sufficient to drop the contempt proceedings against him. The contempt proceedings initiated against Benazir Bhutto were dropped owing to lapse of many years without action since filing of petition. The contempt speeches made by Asfand Yar Wali and Khwaja Asif were dropped taking that they made such speeches under mistaken belief that their wordings are protected under the article 66 of the constitution.

The Lahore High Court upheld the Ehtesab Act of 1997. The cut-off date as on 6th November, 1990 was also maintained by the LHC. This date marks the induction of the first government of Nawaz Sharif in the center. The LHC was also benevolent to give approval of the establishment of the Ehtesab Bureau in the PM Secretariat and there was due approval of the appointment of Saif-ur-Rehman as its Chairman by the LHC in its judgment. Under the Ehtesab Act, power was granted for arrest of an

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46 *Syed Masroor Ahsan vs. Ardeshir Cowasjee*, PLD 1998 SC 823
accused and also he was given an ultimate power to decide whether any reference is to be filed or not.

Nawaz Sharif personally did his best to improve his relations with India and he had developed cordiality with Inder Kumar Gujral, the Indian PM. But, in the wake of general elections, the BJP Bhartia Janata Party came to power, a Hindu nationalist party. It had 250 seats out of 545 seats of lok Sabha along with its other allies. It was an unstable government but had radical programs. It wanted to undo the special status of Kashmir as granted under the article 370 of the Indian Constitution. Its activists were involved in desecration of the Babri Mosque and insisted for the construction of Ram Mandir at the site of Babri Mosque.

Keeping in view this situation the political leaders like Imran Khan, Manzoor Watto and Farooq Khan Laghari filed their petitions under article 184(3) of the Constitution 1973 before the SC. The CJ SC Ajmal Mian took up the case along with seven judges. The judgment said that the President was justified to proclaim the emergency in Pakistan as the circumstances warranted. It was also adjudicated that the SC has power to review/reexamine the continuation of emergency at any later stage.

As regards the freezing of FCAs in Pakistan, a single bench of the LHC stated that the freezing of the FCAs under the Foreign Exchange Act, 1998 was ultra vires of the Constitution as unguided and excessive powers were granted to the DSBP officials. It was argued by the government that there were $11 billion US in the FCAs as on 28th May, 1998. The SBP had acquired them and more than 80% of these deposits had already been spent by the successive governments since 1991. It was little left in these FCAs to be returned to their original owners. The Nawaz government also made a novel way of establishing the military courts where civilians could be tried in a military court under the Pakistan Armed Forces Ordinance, 1998 enforced on 20th November, 1998. The law and order situation was and it was deteriorating with every passing day. The MQM was blamed for killing a renowned personality like Hakeem Muhammad Saeed. This political organization challenged this ordinance in the SC under the article 184(3) of the Constitution, 1973. The SC

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47 Sardar Farooq Khan Laghari and others vs. Federation of Pakistan and others, PLD 1999 SC 457
48 Shaukat Ali Mian vs. Federation of Pakistan, PLD 1999 CLC 607
49 The News, 21st November, 1998
declared the Ordinance under reference as unconstitutional and it was said that the punishments already awarded but not yet executed would be treated as transferred to the Anti-Terrorist Courts. However the punishments executed would be treated as past and closed transaction.

Nawaz government thought of another tool to strike down the constitution in vogue by introducing fifteenth amendment to the constitution in August, 1998. Article 2B was proposed to be inserted in the Constitution of Pakistan, 1973. As per this amendment the Holy Koran and Sunnah would be the supreme law of land. The Federal government was obliged to take steps to enforce Shriah, establish Salat, and administer Zakat and promote Amr bili maroof and nahi anil munkir (to prescribe what is right and forbid what is wrong). This bill sent a wave of panic amongst the political parties. Even the PML-N members had their reservations against the bill. The government stepped down to an extent that it withdrew clauses pertaining to the executive directives and amendment by a simple majority. The bill was passed in the NA by a favorable vote of 151 and 16 unfavorable votes. In the senate, the bill could not succeed as government didn’t have two-third majority.

From a view point of an independent observer, Mian Nawaz Sharif wanted to consummate his aspirations as his patronage General Zia to enjoy dictatorship in the name of Islam. There were already certain provisions in the Constitution as per which the existing laws could be brought in conformity with Islamic Injunctions. Through this amendment the center wanted to become more powerful and weaken the provinces. Indeed, it would have jeopardized the provincial autonomy. It would have aired the sectarianism in Pakistan and the Constitution would have been reduced to a meaningless document. The constitutional provisions would have been subdued to the orders of executives. The status of judiciary would also have been marred by the executive in the name of Islamic orders. The freedom of press and speech would have been affected and draconian censorship laws would have come to surface. The minorities would have felt insecure and their due rights would have been jeopardized. It was a brutal attempt by the Nawaz government to bring dictatorship in Pakistan on the basis of Fatwaas sought from their favorite Ulemas and Faqihs.

There was a demand to make the rioters accountable for desecrating the prestige of SC on 28th November, 1997. The CJ SC Ajmal Mian appointed Abdul-
Rehman, one of the judges of SC to hold inquiry. He held all those individuals responsible who broke into the SC to disrupt the peace of court room where contempt case against PM Nawaz Sharif was in progress. He recommended that such persons should be tried for contempt proceedings. The bench comprising Justice Nasir Aslam Zahid, Abdul Rehman and Munawar Ahmed initiated these proceedings. They recorded the statements of 53 witnesses and saw videos pertaining to hooliganism in the SC. Besides the common men some MNAs and MPAs were also found guilty. Finally seven persons were targeted and they were issued the show cause notices. The remaining persons were either reprimanded or postponed. The court came to conclusion that the action of attack on the SC was planned and not spontaneous. Despite all this the court acquitted all the accused\(^{50}\). It was further stated that the evidence is not sufficient to establish a case beyond a reasonable doubt. This judgment disappointed people of Pakistan. It was a contradictory and confused in reasoning. It however asked government to jealously guard the independence of judiciary. It would not be wrong to say that the SC weakened itself by giving acquittal to the persons responsible for the incident. In appeal the five member bench sentenced seven persons for one month simple imprisonment\(^{51}\).

By now Mian Nawaz Sharif had obsessed with grabbing limitless powers. The media had portrayed him as the most powerful PM of Pakistan since the creation of Pakistan. He was swollen with pride and from here his dénouement started. On 5\(^{th}\) October, 1998, COAS General Jehangir Karamat while addressing the Naval War College hit an idea of the establishment of National Security Council NSC. Main Nawaz didn’t like this idea. He forced him to tender his resignation from Army as the COAS. The rank and file in Army didn’t like the forceful resignation of their Chief. They took it as the humiliation of their institution. Main had by now mellowed down the parliament through fourteenth amendment and thirteenth amendment had stripped the president of his powers. It was to his credit that he had removed the CJ SC who had tried to entangle with him.

The civil-military relations dilemma ensued again after the Kargil debacle. There were rumors all around that the military chief General Pervez Musharraf is

\(^{50}\text{State vs. Tariq Aziz MNA and others 2000 SCMR 751}\)
\(^{51}\text{Shahid Orakzai vs. Pakistan Muslim League 2000 SCMR 1969}\)
being sacked and these rumors remained in air till the fateful day\textsuperscript{52} of the 12\textsuperscript{th} October, 1999. Lt. General Zia-ud-Din being a personal choice of Mian Nawaz Sharif (as was the President Rafiq Tarrar) wanted to install him as the COAS. His choice General Zia was the junior most in the hierarchy. The Army Corps Commanders resisted his installation as the COAS. They captured the important installations throughout country. The television went off the air for several hours. The plane carrying General Musharraf from Sri Lanka was diverted to Nawab Shah, but due to control of the civil aviation Karachi Airport by the army authorities his plane was safely landed at the Karachi airport. There came another Martial Law in country and it was known as the Martial Law/politically maneuvered era of General Musharraf which continued till the year 2008. The military government of General Musharraf had its own political/ judicial implications which will be discussed in the later pages of this doctoral thesis.

The government of Nawaz Sharif during his second term failed to perform well despite the fact that it commanded a heavy mandate. On political font it didn’t perform well. It estranged its relations with the ANP on the matter of change of name of province of NWFP as ‘Pakhtoonkhawah’. It was said that Nawaz Sharif had backed out of its promise of renaming the province of NWFP. The MQM and BNP of Akhtar Mengal also had their complaints against the PML-N. Then the government of Nawaz was confronted with lawlessness and sectarianism in country and especially in Karachi. The establishment of ATCs did a little help in checking such despicable law and order situation in country. His policies gave an impression that he strengthened the Punjab province and left a feeling of deprivation amongst the smaller provinces. The president of Pakistan, the PM and chairman Senate were all from Pakistan\textsuperscript{53}. It is generally believed that it was Nawaz Sharif who responsible to create schism amongst the judges of the SC. His economic policies failed to yield any result. He thought himself as the economic wizard but failed to eradicate the worst effects left on the economy during the Benazir era. It was he who had frozen the foreign currency accounts (FCAs) and the world lost its confidence in the Pakistani economic system.

\textsuperscript{52} The Daily Nawa-i-Waqt, 13\textsuperscript{th} October, 1999.
6.4 Military era of General Musharraf 1999-2008

General Pervez Musharraf announced on 13th October, 1999 that the government of Mian Nawaz Sharif had been done away with and the army had taken control of the affairs of country. It was also announced that the martial law would not be imposed. However, General Mushrraf proclaimed emergency throughout country and himself assumed the title of Chief Executive. The Constitution of Pakistan was put under abeyance and the office of the President was allowed to continue. The legislative assemblies were suspended. PCO Provisional Constitution Order was enforced, however, it was said that the affairs of country would be run as close to the Constitution as possible. The courts were allowed to function but they were stopped to pass any order against the Chief Executive. The fundamental rights were not to contradict the proclamation of emergency. The President was required to act upon the advice of Chief Executive. On 17th October, 1999, he appointed the six-member National Security Council comprising the three services chiefs and Chairman JSC, a specialist in Law, Finance, Foreign Policy and National affairs. The seven point agenda was also announced to the nation by General Musharraf. National cohesion and provincial disharmony; re-building of national confidence; revival economy; maintenance of law and order and speedy justice; devolution of power to grass root level and accountability were the salient features of his agenda which he outlined to nation during his tenure and described as the objective of military government.

The military government of Genera Musharraf had allowed the judges of the superior courts to perform their functions as per the Constitution and they were not required to take any fresh oath. On retirement of the CJ Peshawar High Court the question came up as to what oath should be administered to the new CJ. It was however; decided that he should take oath as per the prevalent constitution. The military government had to subordinate the judiciary also as the date for hearing of case filed under 184(3) by the PML-N people for the illegal dissolution by the army approached. There were strong rumors that the government of Nawaz Sharif would be restored. The military government had to panic. In a haste the Oath of Office

56 PLD 2000 Central Statutes 38.
(Judges), 2000 was promulgated which made the judges of superior courts mandatory to make decisions as per the Proclamation of Emergency and the PCO. The CJ of SC Said-uz-Zaman Siddiqui refused to take oath under the said Order as it would have compromised the independence of Judiciary. The judges who were not either invited to take oath or refused to do so were deemed to have ceased their offices. On refusal, Said-uz-Zaman Siddqui remained under the house arrest on 26th January, 2000 as it was feared that he might influence the other judges no to take oath. However, Justice Nasir Aslam Zahid, Wajeeh-ud-Din, Mamoon Kazi and Mansoor Alam followed the footsteps of Justice Said-uz-Zaman as they also refuse to take oath under the PCO. Justice Irshad Hassan Khan was made as the CJ of SC.

Justice Irshad Hassan khan heard the case57 of military takeover of the 12th October, 1999 and pronounced his judgment on 12th May, 2000 disposing of all the petitions. He said that there was sufficient corroborative and material evidence produced by the federal government as per it necessitated to take the extra constitutional measure by the Army on 12th Oct, 1999. The intervention was to be validated on the basis of the Doctrine of State Necessity and the principle of Salus Populi Suprema Lex as held in the Begum Nusrat Bhutto’s Case. The certain parts of the Constitution of Pakistan 973 were held in abeyance on the basis of state necessity. The judgment validated the assumption of power by General Musharraf through an extra constitutional step by proclaiming the Emergency and PCO. The Chief Executive was allowed to make any constitutional amendment if the constitution was silent on that matter. The military ruler also took license from the SC of CJ Irshad Hassan Khan to make any amendment in the fundamental rights in contravention to the articles 15, 16, 17 18, 19 and 24 of the Constitution. The SC also declared that the posts of COAS and the Chairman JCSC were the constitutional posts. The SC was as benevolent as it granted the Army Chief three years’ time to hold the general elections in country after redoing the electoral rolls.

The SC went all the way to grant legal sanctity to the military government. It perhaps obliterated a fact that the SC in a similar manner had granted the Zia government to make certain changes and he played havoc with the Constitution. Here

57Zafar Ali Shah vs. General Pervez Musharraf, PLD 2000 SC 869
again the SC having detached itself from the past granted the same liberty to another military man to make changes in the constitution to create convenience for his rule.

The SC had given strength to the military government of Musharraf after the pronouncement of judgment in the Zafar Ali Shah case. Musharraf promulgated the Ordinance of President Succession on 20\textsuperscript{th} June, 2001. In compliance of this Ordinance, the President Rafiq Tarar was sent home unceremoniously and he himself took oath of the office of President from the CJ SC Irshad Hassan Khan. Irshad Hassan Khan should have at least for a moment thought under which legal mechanism the oath was being administered to Pervez Musharraf as the President of Pakistan. This arrangement was not even discussed in the Zafar Ali Shah Case. This forceful change was introduced so as to grant some legal sanctity to General Musharraf as he was going to India for talks in Agra which didn’t bear any fruit.

Like his predecessor General Zia, Musharraf also found an opportunity to perpetuate his rule\textsuperscript{58}. The incident of world fame known as nine-eleven happened in the US. The blame was on Osama bin Laden whom the Taliban had hosted in Afghanistan and Pakistan was supporting the Taliban government in Afghanistan. This was an opportunity for general Musharraf to win the favors of Americans and he accepted all of their demands. He altogether changed his Afghan policy and handed over the bases to the Americans. He did everything at the expense of sovereignty and constitutional government in Pakistan. The American ‘War on Terrorism’ helped Musharraf to extend his stay in power indefinitely. The CJ of SC compromised on the independence of superior judiciary and slaughtered the conventions. He also didn’t bother to pay heed to the principle settled in the Judges’ case\textsuperscript{59}. Before his retirement he recommended elevation of three judges of the HC to the SC. The tradition was that the senior most judges of the HC were elevated to the SC, but he recommended the names of junior most judges for the SC. The Pakistan Bar Council and the Supreme Court Bar Association challenged these recommendations before the SC in its original jurisdiction. The CJ SC Sheikh Riaz Ahmed maintained these appointments taking the pale that the seniority for judge of SC is a sine qua non as per the Article 177 of the

\textsuperscript{58} The Daily Nation, 11\textsuperscript{th} September, 2001

\textsuperscript{59} Al-Jehad Trust vs. Federation of Pakistan, PLD 1996 SC 324
Constitution. It was held by the court that the seniority was neither a mandatory requirement for appointment nor had it attained the status of a convention\textsuperscript{60}.

Musharraf had the other norms of his previous military bosses whose traditions he had to follow in order to ensure prolongevity in the echelons of powers. One of such ploys was the ‘referendum’. His predecessor General Ayub Khan had used this tool in 1960 and General Zia in 1984 to enjoy office of the President of Pakistan for five years. On 30\textsuperscript{th} April, 2002, referendum\textsuperscript{61} was conducted on the question whether the people of Pakistan wanted to see General Musharraf to eradicate sectarianism and extremism and also establish democracy and local government. As expected 97\% people of Pakistan gave their answer to this question in affirmation despite the fact that the polling stations gave a deserted look. Beside this, the CEC had facilitated this referendum as no electoral list was provided at any PS so as the voter could poll as many times as like it. The scene was offensive when they saw Generals of Pakistan in uniform canvassing for the referendum of Pervez Musharraf. A judge of CEC had to hear the voice of his conscientious that he could not bear all such machinations of referendum and put up his resignation. The referendum had no legal ground. It was challenged before the SC. The Constitution had laid down a set procedure to hold referendum. It can’t be held to choose a President of Pakistan. The constitutional petition titled as Husain Ahmed vs. Pervez Musharraf\textsuperscript{62} was filed in which the SC declared that it was premature. It was further held that the SC was not the proper forum for this sort of petition and the not the proper time. The SC said that the referendum regarding the office of President was hypothetical, academic and purely presumptive. In the detailed judgment, the SC deviated from its previous short order. It said that it was purely democratic to approach the people of Pakistan for election to the office of President. It strikes as if the SC gave this judgment to appease their boss in the wake of farcical referendum to the office of President of Pakistan.

6.5 Musharraf Baptizes his Dictatorship

Musharraf needed to cleanse his dictatorship at the altar of democracy. Therefore, he brought in vogue the General\textsuperscript{63} Election Order, 2002 in February, 2002.

\textsuperscript{60}Supreme Court Bar Association vs. Federation of Pakistan, PLD 2002 SC 939
\textsuperscript{61}The Daily Dawn, 1\textsuperscript{st} May, 2002
\textsuperscript{62}PLD 2002 SC 853
\textsuperscript{63}PLD 2002 Central Statutes 193
It was scheduled to hold general elections to the national and provincial legislative assemblies. The PML-Q popularly known as the King’s party was created by the agencies comprising dissenters from the PPP and PML-N. The NAB and ISI’s political wing played an important role in twisting the loyalties of the politicians for the democratization of Musharraf military rule. The politicians who had agreed to join the PML-Q were either set free from their cases or their prosecution was delayed in the NAB courts. Similarly the bank defaulters who had consented to join the Musharraf dictatorship were given ample time to settle their outstanding bank loans. Besides the PML-Q another political alliance (National Alliance) was carved out comprising the six small parties headed by the Millat party of former President Farooq Khan Laghari. The NA and PML-Q joined hands together to facilitate Musharraf to have a so-called democratic government in Pakistan and legalize his illegal rule. A significant development can’t be escaped during these elections which after wards played important role in perpetuating the military rule of Musharraf. The MMA took birth which contested elections with slogan of anti-Americanism in Pakistan. This alliance consisted of all religious parties inclusive of Jamat-i-Islami, Jameat-i-Ulema-i-Islam and the others. These parties won in the provinces of Baluchistan and NWFP (now KPK) and had its government. The elections were massively rigged, engineered and maneuvered. The EC called these elections as ‘seriously flawed’ owing to the state interference in the voting process. The electoral turn out in these elections remained at 41%.

Despite all resources of the government machinery, the PML-Q and NA were failed to manage the requisite majority. The independents were influenced and made to join the King’s party, thus it helped the Musharraf regime to get extra seats of women and the monitores. But, the King’s party failed to manage the requisite majority. Hence, the ISI and the NAB had to break loyalties of the PPP parliamentarian’s MNAs. In return they were all offered the lucrative ministries in the federal government. These MNAs made a forward block in the PPPP. To facilitate the job forward blockers of the PPPP, the article 63 A of the constitution was suspended so that they may easily cross the floor. This facility was withdrawn on

66 The PPP participated in the elections of 2002 under the banner of PPP Parliamentarians.
31st December as the Mr. Zafarullah Khan Jamali took the vote of confidence. The fear was that they may not return back to their roots. Jamali became the PM of Pakistan on 24th November, 2002 securing 172 votes in a house of 342. It was the barest minimum strength of the MNAs required for the election of Prime Minster. Benazir helped in the division of PM. It took one year to have opposition leader Maulana Fazal-ur-Rehman in the NA when the seventeenth amendment was passed.

Jamali as the PM tried to enjoy the perks and privileges instead of asserting himself as the PM. In fact, he didn’t really want to Junejo by acting against the tide of military. He allowed Musharraf to become his boss and felt himself honored to behave as his subordinate.

The assembly could not meet after the notification of results. It met on 16th November, 2002, that is 36 days after the elections. The dispute still arose as regards the oath taking. The opposition members of the NA did not want to take oath under the LFO. They were willing to take oath under the constitution as it stood on 12th October, 1999. The assurance was lent by Illahi Bux Soomro that copy of the constitution didn’t include the LFO. The clamor didn’t stop in the NA. The opposition parties kept raising their voice against eh LFO. Consequently, the government held parleys with opposition on matters regarding constitutional amendments. After long deliberations, finally an agreement was struck between the opposition and the government on 24th December, 2003 as regards the constitutional amendment package. This package contained that the extension in the age of judges would be withdrawn. The discretionary power of the President of Pakistan as enshrined in the article 58(2)(b) to dissolve the NA was agreed to be made challengeable before the SC. General Musharraf was asked to seek the vote of confidence from the electoral college. There was another important point of this package and it pertained to giving up the office of the COAS by 31st December, 2004. Aitzaz Ahsan pointed out in the NA on 26th December, 2003 that the draft amendment bill should not contain the LFO. In order to satisfy the MMA, the government benches agreed to bring certain changes in the existing bill instead of bringing a new bill. On 29th December, 2003 the revised seventeenth amendment bill

was passed by the NA with 248 votes out of 342 votes. The ARD and other parties boycotted the session due to agreement reached at between government and the MMA. The MMA had tough stance in proceedings of the parliament on 26th December, 2003, but it is queer that they surrendered so fast within two days.

The seventeenth amendment is the replica of eight-amendment. By then General Zia had maneuvered the spineless parliament to consummate his wishes. The nonparty-based legislative assemblies did whatever the dictator had commanded. This time there was another dictator named General Musharraf who had twisted the rigged parliament despite brokered resistance from the religious and other political parties’ opposition headed by Maulana Fazalu-ur-Rehman. It establishes that before the might of military the democracy and democratic institutions are weak and subordinate. The will of people suffers in bargain before the power flowing out of the barrel of gun.

On 1st January, 2004 the Electoral College comprising 1170 votes was assembled to give the vote of confidence to General Pervez Musharraf as the President of Pakistan. He, however, was able to manage 658 votes. It was not easy for Musharraf to address both the houses of parliament as it was a mandatory requirement as per constitution for the Head of State. The opposition created a fuss during his address in the parliament on 17th January, 2004. They raised slogans and created disturbance for him. When General Musharraf finished his address he raised his fist against the opposition members.

Musharraf had made a great noise as regards the accountability of politicians’ but it remained a futile activity. It didn’t produce the desired results. Through NAB, draconian laws were enacted regarding the detention and bail. A serving General of Army was head of the NAB. The process of NAB accountability remained selective and it cast doubts. The recovery from bank defaulters also remained in doldrums as NAB was failed to produce any impressive results in this regards also. NAB had to run into plea bargain with the corrupt former generals, bureaucrats and politicians. They were allowed to enjoy the remaining plundered money after they made a fraction of payment from the nation’s wealth. In fact, the NAB worked for Musharraf

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70 The Daily Jang, 30th December, 2003.
to have his political hold. It created members for the King’s party. The politicians were arrested and cases were prepared against them. Those who had agreed to become passenger of political wagon of Musharraf they were let free from the prosecution of NAB.

Besides this the NAB Ordinance created parallel system of judiciary. The courts had no power to grant bail and the prosecution was allowed to detain the suspect for ninety days. Interestingly it denied the right of appeal and also it suspended the fundamental rights and other provisions of constitution. The SC in its judgment declared that the NAB Ordinance was not ultra vires of constitution. However, the judges of accountability court were to be the serving District & Session Judges appointed in consultation with the CJ of concerned High Court. The denial of grant of bail by the court was also declared ultra vires of constitution. It was held that the detention of an accused for 90 days was violative of personal liberty of citizens as guaranteed by the constitution. The burden of proof was shifted to an accused and the court duly held same. The authority of NAB Chairman to grant bail was declared the violation of principle of separation of powers. The NAB Ordinance was duly amended in the light of directions of the SC judgment\textsuperscript{73}.

6.6 Conclusion

The military, after the continuous eleven years rule of General Zia, had become enough sane not to meddle in the politics of Pakistan directly. The COAS General Beg was given the medal of democracy. The military, however, didn’t allow a free lunch to the inborn politicians. By this time, the terms such as controlled democracy and guided democracy were coined and put in practice. The rule of General Zia was, however, once again legalized on the basis of Doctrine of Necessity departing from the case Asima Jillani as it had showed a resolve that it wouldn’t resort to this infamous doctrine.

The young and inexperienced politicians like Nawaz Sharif and Benazir Bhutto kept playing tricks through-out the decade to oust each other from the political arena until another military dictator General Musharaf came to power.

\textsuperscript{73} PLD 2002 Central Statutes 81.
CHAPTER 7

ANALYSIS OF JUDICIAL DECISIONS BY THE SUPERIOR COURTS
(1954-2007)

The Superior Judiciary has played pivotal role in strengthening the applicability of Doctrine of Necessity. The military governments were legalized whenever they occupied the affairs of civil governments. Chief Justice Muhammad Munir’s services in this regards cannot be obliterated. The Constitutional history of Pakistan is incomplete without mentioning his deeds. He set a precedent upon which the later Supreme Court of Pakistan Judges legalized the military takeovers. The military takeovers of General Ayub Khan, General Agha Muhammad Yahya Khan, General Muhammad Zia-ul-Haq and General Pervez Musharraf were given legitimacy and allowed these rulers to make amendments in the Constitution of Pakistan, 1973. The rule of these military rulers left indelible impact on the political scenario of Pakistan particularly with reference to the democratic institutions and future of democracy in Pakistan. This chapter discusses the justification rendered by Chief Justice Munir for the use of Doctrine of Necessity in his book titled as Highways and Bye-ways of Life. Besides this, till 2007, judgements of the Supreme Court based on the Doctrine of necessity have also been discussed in detail.

The constituent assembly¹ was busy in drafting the constitution of Pakistan when the Governor General Ghulam Muhammad dissolved the assembly on 24th October, 1954. The proclamation read as follows:

“The Governor General having considered the political crisis with which the country is faced, has with deep regret come to 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 times as elections are held, the administration of 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 interest must be subordinate to the supreme national interest”.

Apparently, the Governor General Ghulam Muhammad gave a reason for the dissolution of assembly as it had become unrepresentative. The actual reason was that the assembly was ready to a new constitution which had clipped the powers of Governor General and it had made him unhappy. The politicians wanted to wrest the powers from the bureaucracy. The assembly had proposed Fifth Amendment bill in the Government of India Act, 1935. It was proposed to strip off powers of the Governor General to dismiss a ministry which enjoyed the confidence of the legislature. It was perhaps considered by the Prime Minster Muhammad Ali Bogra that the Governor General was too weak to take any action in this regards. Justice Munir remarked about Ghulam Muhammad “A declining man, but with the mental grooves of a seasoned bureaucrat and the eyes and nose of mountain hawk”.

The actions of assembly to strip the powers of Governor General have been recorded by Field Marshal Muhammad Ayub Khan\(^2\) in his book tiled as “Friends and not Masters”.

“a printed resolution was put in the pigeon-holes of the members of assembly. When they met in the morning as a constitution-making body, they revoked the Sections 9, 10, 10-A, 10-B and 17 of the Government of the India Act, 1935. The powers of Governor Genera were stripped. Within ten minutes the resolution was passed. By then the Governor General was convalescing in the Abbottabad”.

It is interesting to observe here that the constitution was acceptable to the representatives of people but it was not required to have been acceptable to the Governor General also. The act of the Ghulam Muhammad has been rightly termed as highhandedness and despotism for which the constitutional history had no such example. This act of him later in the political history set a way for the military dictators to follow the suit.

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\(^2\) Muhammad Ayub Khan, *Friends not Masters*, P.51.
7.1 Chief Justice Munir introduces Doctrine of Necessity

Maulvi Tameez-ud-Din Khan, President of the Constituent Assembly challenged the action of Governor General as unconstitutional and prayed the Sind Chief Court to issue the writ of mandamus against the proclamation\(^3\) of the Governor General issued on 24\(^{th}\) October, 1954. The Governor General had argued that the constitutional provision required not only passing by the constituent assembly but it also required the assent of the Governor General to become a law. It was also argued that Section 223-A of the Government of the India Act, 1935 which was enacted on 6\(^{th}\) July, 1954 had not become a law. Therefore, the Sind Chief Court had no jurisdiction to issue any writ in this regards.

The Sind Chief Court\(^4\) allowed the petition of Maulvi Tameez-ud-Din Khan and it was adjudged that the dissolution by the Governor General was a nullity in law. It was said in the Judgment that the assembly and office of the president of assembly were intact. Section 223-A was to read as under:

“Every High Court shall have power throughout territories in relation to which it exercises Jurisdiction to issue to any person or authority including in appropriate cases any Government within those territories, writs, including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari or any of them.

The judgment rendered by the Sindh Chief Court was appealed by the federal Government in the Federal Court of Pakistan. It was held that when the constituent assembly acts under the Indian Independence Act of 1947, then it becomes the legislature of Dominion. Therefore, it requires assent of the Governor General to for all legislations made by the legislature. The court had no jurisdiction to issue such writs as the Sind Chief Court issued the writs under the Section 223-A which was yet to become a law as it had lacked the assent of the Governor General. Therefore, the orders of the Sindh Chief Court were vacated as that court had no jurisdiction to issue the writs\(^5\).

The main judgment was delivered by Chief Justice Muhammad Munir. At first, he wrote about the Indian Independence Act, 1947 which had failed to address

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\(^3\) The Daily Imroze, 25\(^{th}\) October, 1954.
\(^4\) Maulvi Tameez-ud-Khan V. Federation of Pakistan PLD 1955 Sindh 96
\(^5\) Federation of Pakistan V. Maulvi Tameez-ud-Din PLD 1955 FC 240
the dissolution of the constituent assembly. He wrote in his judgment, the excerpts of which are reproduced in verbatim hereunder;

“There is, however, one obvious lacuna in the Indian Independence Act which is otherwise a masterpiece of craftsmanship – it contains no express provision as to what was to happen if the constituent assembly didn’t or was unable to make a constitution, or resigned en bloc, or converted itself into a perpetual legislature. It may be that any such contingency was beyond the imagination of the authors of the Act, but the more probable seems to be that they thought that any such contingency had ceased to be their headache and was purely a concern of the independent Dominion. So long as the responsibility for Government of the country was that of the Government in London, a provision to meet such a situation appeared in the constitution, but that responsibility having been disclaimed by the Indian Independence Act, the necessity for retaining any such provision also disappeared from the constitution if the breakdown came, it seems to have been thought, it was for the Dominion itself to reset the tumbled down machinery.”

He dilated further in his judgment that the power to dissolve the assembly lies with the royal Dom. He stated in his judgment that the power of royal Dom of dissolution was extended to the Governor General. His justification was pronounced in the following words;

“The Governor General of Pakistan is appointed by the Queen or King and represents him or her for the purposes of the Government of the Dominion (Section 5 of the Indian Independence Act). The authority of the representative of the King extends to the exercise of the royal prerogative insofar as it is applicable to the internal affairs of the Member State or Province, even without express delegation, subject to any contrary statutory or constitutional provision”.

A.R. Cornelius J. had enough courage to pronounce the daring judgment. He dissented with reasoning of the Chief Justice Muhammad Munir. He stated in his dissenting Judgment that the constituent assembly didn’t require assent of the Governor General as it was a supra legal body and it could make its own rules for assent. The main excerpts from his dissenting note are reproduced hereunder:

6 Ibid.
“It was stated from time to time in the course of arguments that the Constituent Assembly derives power to make laws for the Dominion from Section 6(1), but with great respect, it seems to me that the interpretation overlooks the fact that the Constituent Assembly was, as a body, not a creation of the British Parliament. It is, in my opinion, to be regarded as a body created by a supra-legal power to discharge the supra legal function of preparing a Constitution for Pakistan. Its power in this respect 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. The will of the people had, up to that time, been denied expression in this respect, through the presence, by virtue of conquest and cession, of the undisputed and plenary executive power in India of the British Sovereign, which was being withdrawn by unilateral act. That power did not owe its existence to any law, though its exercise may have, from time to time, progressively been reduced to regulation by laws of the British Parliament”.

Justice A.R. Cornelius, in his dissenting judgment also threw light on supremacy of the Parliament in the following words:

“Parliament is the supreme authority for interpretation of the statutes. Parliament has power to declare by statute the common law or the meaning of any prior statute and may declare wrong and repeal any judicial legislation effected by interpretation or misinterpretation of statutes, and may make the declaratory or repealing statute retrospective”.

The case of Maulvi Tameez-ud-Din created constitutional vacuum. The Emergency Powers Ordinance (IX 1955) was issued by the Governor General Ghulam Muhammad so as to validate the acts of the constituent assembly. This matter arose in the Usif Patel’s case. It was held by the Court that the powers of a legislature of Dominion as regards the constitution making can only be exercised by the constituent assembly. The Governor General had no power to issue an ordinance on constitutional matter. It was further stated by court if the Governor General is presumed to have the power to issue ordinance, then he may repeal whole of the Indian Independence Act and the Government of India Act and assume unto himself

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all powers of legislation. The court also amplified principle dictating the “validation”. It was said that the validation amounts to legislation. If one is bereft of the power of validation, then he is also deprived to legislate. Disappointment was also pronounced as the ordinance lacked reference to the elections. It was stated:

“It might have been expected that, conformably with the attitude taken before us by responsible counsel for the Crown, the first concern of the Government would have been to bring into existence another representative body to exercise the powers of the constituent assembly so that all invalid legislation could have been immediately validated by the new body. Such a course would have been consistent with constitutional practice in relation to such a situation as has arisen. Events however show that other counsels have since prevailed. The ordinance contains no reference to elections and all that the learned Advocate General can say is that they are intended to be held”.

The Governor General also made a reference\(^9\) to the Federal Court. Interestingly, the Court had delivered its verdict in the Maulvi Tameez-ud-Din’s case that the Governor General had power to dissolve the constituent assembly and further he was right to validate laws as per the law of state necessity. The court had gone to such extent that it allowed the new constituent assembly to work under the Constituent Convention Order, 1955 to exercise all powers enshrined in the Indian Independence Act, 1947. The court directed the Governor General to create a representative assembly and not a constituent convention. The Governor General was deprived of the power to nominate members of the constituent assembly. However, he was given power by the Federal Court to determine the process by which a member of the constituent assembly could be chosen. On 28\(^{th}\) May, 1955, the Constituent Assembly Order 1955 was issued and the Constituent Convention Orders 1955 was abrogated. The representatives of the East Pakistan and the four provinces of the West Pakistan could be elected by the members of the provincial legislative assemblies on proportional representation with a single transferrable vote\(^10\).

The Constitution of 1956 was abrogated before it could be enforced. The President Iskander Mirza dismissed the central ad provincial governments on

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9 Federal Court 435 PLD 1955
7th October, 1958. The political parties were abolished and besides this the national and provincial assemblies were also dissolved. The first martial law was proclaimed in the country and Genera Muhammad Ayub Khan was installed as the Chief Martial Law Administrator. The Supreme Court of Pakistan delivered a judgment on 27th October, 1958 in four criminal appeals. Interestingly, the SC headed by the Chief Justice Muhammad Munir had validated the imposition of Martial law even this matter was not brought before the Court. The Court on its own thought to extend legal recognition to the martial law imposed by the President Iskender Mirza. In this regard, the main excerpt of the judgment delivered by CJ Munir is reproduced in verbatim hereunder:

“That an abrupt political change not within the contemplation of the constitution…is called a revolution and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order. A revolution is generally associated with public tumult, mutiny, violence, and bloodshed but from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial.

A change may be effected by persons already in public positions.--- thus, a victorious revolution or a successful Coup d’ etat is an internationally recognized legal method of changing a Constitution.”

The Chief Justice of Pakistan SC Muhammad Munir gave a legal sanctity to the Coup d’ etat of Iskander Mirza as it had stood the test of efficacy and had attained the status of law. Therefore, the Laws (Continuance in Force) Order was declared as a valid law. For his judgment Muhammad Munir relied upon the theory advanced by Professor Hans Kelsen in his book titled as Theory of Law and State.

On 28th October the three cabinet members of the Prime Minister and Defense Minister of Pakistan General Muhammad Ayub khan had sent message through these Generals to advise Iskander Mirza to quit office of the President of Pakistan as he was closely associated with the persons who were responsible for the state of affairs in the country. Ayub Khan himself adopted the title of the President of Pakistan. It is worthy

11State V. Dosso  PLD 1958 S.C. 533
to cite hereunder the remarks of Justice Yaqoob Ali which he delivered in Asma Jillani case:

“The judgment in State v. Dosso set the seal of legitimacy on the Government of Iskander Mirza though he himself was deposed from office by Muhammad Ayub Khan, a day after the judgment was delivered on the 28th October, 1958, and he assumed to himself the office of the President. The judgments in the cases Maulvi Tameez-ud Din Khan, Governor General Reference No.1 of 1955 and the state v. Dosso had profound effect on the constitutional developments in Pakistan. As a commentator has remarked, a perfectly good country was made into a laughing stock. A country which came into being with a written constitution providing for a parliamentary form of government with distribution of State power between the executive, legislature and the judiciary was soon converted into an autocracy and eventually degenerated into military dictatorship. From now onwards people, who were the recipients of delegated sovereignty from the Almighty, ceased to have any share in the exercise of the State powers. An omnipotent sovereign now ruled over the people in similar manner as the alien commander of the army who has conquered a country and his ‘will’ alone regulates the conduct and behavior of the subjugated populace”.

The Chief Justice of Pakistan retired in May, 1959, but he remained baffled by delivering judgments in the above-mentioned cases. The democratic path was blocked and country was put on the track which led to despotism, despondency and dictatorship as of now in 2014. The future of democracy is always questioned after the democratically elected governments pass some years. The democracy is debilitated and fragile. It failed to take its roots in Pakistan. Until his death, Muhammad Munir kept rendering justifications for the use of ‘Doctrine of Necessity’ on one pretext or the other. On 22nd April, 1960, he said while addressing the Lahore High Court bar Association:

“But none of the afore-said litigation the Federal Court was confronted with more than once situations, unparalleled and unprecedented in the history of the world. The mental anguish caused to the judges by these cases is beyond description and I

12 Chaudhary, Nazir Hussain, Muhammad Munir, His Writing and Judgments, p.14 (It is quoted by Muhammad Dilawar Mahmood in his book titled as ‘The Judiciary and Politics in Pakistan)
repeat that no judiciary anywhere in the world had to pass through what may be described as judicial torture ------- 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, as long as the state of uncertainty lasts.”

The Chief justice Muhammad Munir rendered legal justification for the Coup d’ etat of Iskander Mirza and General Muhammad Ayub khan in the case of State v. Dosso. He said,

“When on the morning of 8th October, 1958, people woke up from their sleep and found that mad inspiration of history, as Tolstoy calls a revolution, had slept over the land. And with wind had gone the constitution, the Islamic Republic, the Law, the Courts and all legal authority. Only Pakistan had remained. So we stand where we were almost 13 years back, perhaps in a position of great uncertainty.”

General Muhammad Ayub Khan after removing Iskander Mirza, himself adopted the title of the President of Pakistan. He remained in the saddle of the Chief Marshall Law administrator of the Country till 8th June, 1962. Meanwhile, his cabinet had conferred upon the title of Field Marshall of Pakistan. The constitution of 1956 was abrogated and in its place Field Marshall Muhammad Ayub gave his own Constitution13 in 1962. It was a federal in character and introduced a presidential form of government. This constitution was authoritative and suited best to Ayub Khan. In the center and the provinces there was a unicameral legislature. The National Assembly was elected by the eighty thousands democrats. The President Ayub Khan was neither answerable to the NA nor he could be removed or impeached by the same. The president had immunity from any No Confidence Motion.

Chief Justice Munir cannot absolve himself of the responsibility of extending his cooperation to the military dictator General Muhammad Ayub in his military rule.

He played the role of an advisor and collaborator to Ayub Khan. Hereunder, a text is reproduced in verbatim from the book of General Muhammad Ayub\(^\text{14}\) to corroborate as regards the role of Muhammad Munir in strengthening the military rule in country.

“Meanwhile, the army’s legal experts came up with the opinion that since the Constitution had been abrogated and Martial Law declared, and a Chief Martial Law Administrator appointed, the office of President was redundant. That according to their light was the legal position. I said ‘Now, don’t you chaps start creating more problems for me. Why do you bother me? It will serve no useful purpose. Chief Justice Munir was there, I think, when this point came up for discussion. He had been advising Iskander Mirza about certain matters before the revolution. I called him and thought that I would see Iskander Mirza too. I asked Colonel Qazi to state his point of view. His position was that the President had no longer any place in the new arrangement, Monir disagreed. I told Qazi, I agree with Monir. This is final. Accept this as a decision.’ I then asked him to leave.”

The above text from the book of FM Ayub Khan renders ample evidence that the Chief Justice Muhammad Munir was fully involved in the overthrow of civil government and imposition of Martial Law. His involvement in the military set up is further strengthened after going through a rejoinder authored by Muhammad Munir which was published in the Pakistan Times under a caption of ‘Days I remember’.

“Some\(^\text{15}\) months before the 1956 Constitution was to come into force he (Iskander Mirza) casually mentioned to me that things were going from bad to worse and that he intended to assume supreme power by dismissing the Ministers and dissolving the assembly. He didn’t tell me that he intended to introduce Martial Law though he often used to say that the politicians were not to forget the army. He had not invited my opinion on the subject, he was contemplating and that he should have the elections held under the new Constitution.”

He further went ahead and helped the Governor Generals Iskander Mirza and Ghulam Muhammad in drafting the laws. He had his hand in drafting the Laws (Continuance in Force).


\(^{15}\) The Pakistan Times, 11\(^\text{th}\) November, 1968.
From the above-mentioned text it may easily be deduced that the Chief Justice Muhammad Munir validated the Laws (Continuance in Force) Order as head of the bench of the Supreme Court of Pakistan. It was the same law for which he had rendered his advice while it was in draft stage. It amounts to the mockery of justice and independence of judiciary was also compromised. It is worthwhile to reproduce some excerpts from the book authored by Air Marshall Retired Asghar Khan.  

“The following day or the day after, I attended a meeting presided over by Iskander Mirza at which Ayub khan, the Chief Justice of Pakistan and the newly appointed members of Ayub Khan’s cabinet were present. At this meeting the CJ Muhammad Monir was asked by Ayub khan as to how he should go about getting a new constitution approved by the people. Justice Monir’s reply was both original and astonishing. He said that this was a simple matter. In olden times in the Greek states, he said constitutions were approved by ‘public acclaim’ to which Justice Monir replied that a draft of the constitution, when prepared, should be published in the national newspapers. The answer, the CJ said, would definitely be in affirmative. This, he said was approval by ‘public acclaim’. Most of those present laughed the loudest. Although, this advice was not followed by Ayub Khan for approval of constitution, this is what the CJ of Pakistan Muhammad Monir had suggested in all seriousness. No wonder that Pakistan has found it difficult to shake off Martial Law ever since.”

It was perhaps, for these lofty ideas that FM Ayub Khan had appointed the retired Chief Justice of Supreme Court of Pakistan as his Law Minister. Maulvi Tameez-ud-Din Khan was elected as the unopposed Speaker of the NA during the Ayub era. Mohammad Ali Bogra was also member of the NA. They both had anguish in their mind which they had to bear due to the Judgment delivered by the then CJ Muhammad Munir who was now a Law Minister of Ayub Khan. It may be because of the severity of words exchanged by these leaders that CJ Muhammad Munir had to tender his resignation as a Law Minister of the Ayub khan’s government.

16 Khan, Muhammad Asghar, Generals in Politics, Vikas Publishing House, Lahore, p.8
7.2 Chief Justice Munir and his Justifications for use of Law of Necessity

Muhammad Munir former CJ of the Supreme Court of Pakistan kept giving justifications for the judgments which he himself termed as the ‘controversial judgments’. He captioned chapter 16 of his book as the Controversial Judgments in which he says that these judgments were called as ‘historic’ judgments by the jurists of international fame[17].

Muhammad Munir defended his judgments saying that the then Supreme Court of Pakistan was confronted with the legal and constitutional problems with which no country of the world had confronted and also no guidance was available in any corner of the world. He states in the abovementioned book as under;

“Though the judgments speak for themselves they have been subjected to some criticism by lawyers and laymen in their private discussion. After a judge has decided a case he becomes functus officio, leaving it to future judges’ lawyers and the general public to have their opinion about their accuracy or inaccuracy. But, when the criticism comes from persons who have not understood or are not capable of understanding the ratio decided or the principle underlying such judgments or the criticism is not honest”.

He made two groups of these judgments. In the first group, he keeps the cases of federation of Pakistan v. Maulvi Tameez-ud-Khan, Yousif Patel and others v. The Crown and Special Reference No. 1 of 1955. He has quoted Sir Ivor Jennings who has discussed the judgments rendered by CJ Munir in the above stated cases.

“The first case to reach the Federal Court, Federation of Pakistan v. Maulvi Tameez-ud-Din Khan, showed that the assembly had been misinterpreting for more than seven years the powers conferred on it by the Indian Independence Act, 1947. It had passed 44 Acts whose legal consequences were far-reaching and all of them were believed to be invalid because they had not received the assent of the Governor General. In the process of far-reaching the conclusion that such assent was required by Section 6 of the Act of 1947, the court found it necessary to examine the fundamental principles of democratic government as understood in the

commonwealth, the nature of Dominion status and the meaning of Independent Dominion, the royal prerogative in the common wealth and especially in territories acquired by cession or conquest, and the relations between statutory and prerogative powers”.

Chief Justice Muhammad Munir has quoted Sir Ivor Jennings commentary in the cases of Usif Patel and also in the Special Reference case. He has sought in him as a savior on whom he relies to offer justification for the judgments he pronounced in the four cases. He has also referred the same jurist as regards the Special Reference. He states in his book\textsuperscript{19} as under;

“In the process it was necessary for the court to discuss the nature of the prerogative powers to summon, prorogue and dissolve legislature and as in Maulvi Tamizuddin khan’s case the relation between the statutory and prerogative powers. Of even wider interest, because it appears to be unique in the legal history of the common-wealth, is the application of common law doctrine of necessity to the conditions of emergency created by the decision in Maulvi Tamizuddin Khan’s case”.

Chief Justice Munir has also referred another source in his defense of rendering the judgments based on the doctrine of necessity. He says that it was the Editor of “Major Governments in Asia” who has referred to first case of his judgments in the following words;

“The Supreme Court (formerly the Federal Court) has shown itself prepared to take issue with the powers of government at the height of an emergency. When the Governor General dismissed the first constituent assembly, the president of the Assembly sought redress from the courts. The Chief Court, Sind, granted an injunction against the Government that would have restored the assembly and invalidated the title to office of half the cabinet. The government appealed and the Federal Court handed down a series of historic judgments defining the relationship between the Crown and the elected legislature. Some of the citations went back as far as Bracton, and the sound of sonorous Latin seemed slightly incongruous in the court room at Lahore. The judgments, however, were contemporary in their application, and although the dissolution of the Assembly was permitted to stand, the Governor

\textsuperscript{19} Ibid.
General was told in strict terms that he had no title to proceed without a law-making Assembly”.

Chief Justice Munir contended that the judges were independent in rendering their judgments and he never influenced them in their judgments. It was S.A Rehman and Cornelius who enjoyed independence to write dissenting judgments. He further contended that the judges even didn’t discuss the judgments informally. He made another point in the defense of his judgments that it was in the local private discussions where the subject of discussion was my judgments as the Chief Justice. People have raised many objections but the international jurists didn’t disapprove of my judgments, rather they praised the judgments.

7.3 Chief Justice Munir discusses Ratio Decidendi

According to Chief Justice Munir, the matter of prime importance in the case of Maulvi Tameezuddin Khan was whether constitutional legislation passed by the Constituent Assembly required the assent of the Governor General. The answer to this question lied in the interpretation of provisions of the Indian Independence Act, 1947 pertaining to the powers and functions of the Governor General and the Constituent Assembly. As per Section 5 and 6 of the afore-referred Act, the Governor General represented His Majesty for the purposes of the government of the Dominion. In this way the Governor General being representative of the Majesty enjoyed the full power to give assent to any law of the legislature of the Dominion. From the provisions of the Section 5, 6 and 8 of the Indian Independence Act, 1947 he deduced the following principles:

1. That there was to be a legislature for Pakistan.
2. That the first legislature of Pakistan was the Constituent Assembly.
3. That the Constituent Assembly could exercise the powers of making provisions to the Constitution of Pakistan as well as the powers of the Federal Legislature under the Government of India Act, 1935, as in force in Pakistan, and further that in either case the Governor General, as in the case of all other dominions had full power to assent to the legislation whether it related to making any provision as to the Constitution or passing any law as Federal Legislature under the adapted Government of India Act.
The judgment in the case of Federation of Pakistan vs. Maulvi Tameezuddin Khan consisted of 86 printed pages. It said that the legislature was required to present all its laws to the Governor General for his assent. The Chief Court of Sind had not been granted the power to issue writs as the Constituent Assembly, had not presented the bill of writs to the Governor General for his assent. Therefore, the issuance of writs of mandamus and quo warranto by the Sind Chief Court was illegal and it had no jurisdiction to issue such writs. He had a point in his judgment that the Constituent Assembly was the legislature of the Dominion. He stated that Justice Cornelius also agreed in the ‘Special Reference case’ that the Assembly was the legislature of the Dominion which could be dissolved by the Governor General.

Chief Justice Munir has also kept the case of Yusuf Patel in the category of ‘first group’. He has also defended his judgment in this case. According to him, it was the most important case as it led to making of the Constitution of 1956. He says that he categorically directed that the Governor General had not title to proceed without a law making assembly.

The case of Yusuf Patel pertained to the Sind Control of Goondas Act, XXVIII of 1952. The Section 9 of the Indian Independence Act, 1947 had empowered the Governor General to make adaptations to the Government of India Act, 1935 till 31st March, 1948. It was extended by the Constituent Assembly till 31st March, 1949 by Section 2 of the Indian Independence Act which had yet to receive the assent of the Governor General. The Constituent Assembly by this Section had granted a power to the Governor General to authorize the Governor of a province to make laws for that province. The Governor of Sind had passed the Sind Goondas Control Act by virtue of such power.

The judgment in the Maulvi Tameez-uddin Khan case rendered large number of Acts invalid as they had yet to receive the assent of Governor General so as to become a valid piece of legislation. This judgment rendered the whole legal system of country into confusion and it became difficult to administer the country. In order to overcome this difficulty, the Governor General had to issue ordinance to give retrospective assent to the laws which had not yet received his assent to make them a valid piece of legislation. This Ordinance also said that the Governor General would himself make the constitution of country.
It was held by the Judges of the federal Court that the Indian Independence (amendment) Act, 1948 was not valid piece of legislation as the Governor General had yet to extend his assent to it. The result was that the Section 92-A was not validly added to the Government of India Act, 1935. It was in the same breath that the power devolved by the Governor General on provincial governors to make laws was also declared illegal. The Sind Control of Goondas Act, 1952 was, in this way, an illegal piece of legislation. It was also held that the Governor General had no power to declare valid some of the constitutional legislation as valid. It was not his power to grant validation rather it vested in the Constituent Assembly itself to extend these laws legality. The Sind Control of Goondas Act, 1952 was, in this way, an illegal piece of legislation. It was also held that the Governor General had no power to declare valid some of the constitutional legislation as valid. It was not his power to grant validation rather it vested in the Constituent Assembly itself to extend these laws legality. The Chief Justice Munir says that he in his Judgment had stopped the Governor General from exercising the right to frame a constitution of the country. This function could only be performed by the Constituent Assembly itself. For a support to his contention, he stated the paragraphs of his judgment which are reproduced in verbatim hereunder;

“The rule hardly requires any explanation, much less emphasis, that a legislature cannot validate an invalid law if it does not possess the power to legislate on the subject to which the invalid law relates, the principle governing validation being that validation being itself legislation you cannot validate what you cannot legislate upon. Therefore, if the Federal legislature, in the presence of a provision expressly authorizing it to do so, was incompetent to amend the Indian Independence Act or the Government of India Act, the Governor General possessing no larger powers than those of the Federal Legislature was equally incompetent to amend either of those Acts by an Ordinance. Under the Independence Act the authority competent to legislate on constitutional matters being the constituent assembly, it is that assembly alone which can amend those Acts. The learned Advocate General alleges that the Constituent Assembly has been dissolved and that therefore validating powers cannot be exercised by that Assembly. In Mr. Tamizuddin Khan’s case, we didn’t consider it necessary to decide the question whether the Constituent Assembly was lawfully dissolved but assuming that it was, the effect of the dissolution can certainly not be the transfer of its powers to the Governor General. The Governor General can give or withhold his assent to the legislation of the Constituent Assembly but he himself is not the Constituent Assembly and on its disappearance he can neither claim
powers which he never possessed nor claim to succeed to the power of that Assembly”.

Another excerpt from the judgment of Chief Justice Munir is reproduced in verbatim hereunder which he has mentioned in his book in support of his contentious judgments:

“This Court held in Mr. Tamizuddin Khan’s case that the Constituent Assembly was not a sovereign body. But that didn’t mean that if the Assembly was not a sovereign body the Governor General was. We took pains to explain at length in that case that the position of the Governor General in Pakistan is that of a constitutional Head of State, namely a position very similar to that occupied by the King in the United Kingdom. That position which was supported by Mr. Diplock is now being repudiated by the learned Advocate-General and on the ground of emergency every kind of power is being claimed for the Head of State. Let us clearly if we committed to say so in the previous case that under the Constitution Acts the Governor General is possessed of no more powers than those that are given to him by those Acts. One of these powers is to promulgate Ordinances in case of emergency but the limits within which and the checks subject to which he can exercise that power are clearly laid down in Section 42 itself. On principle the power of the Governor General to legislate by ordinance is always subject to the control of the Federal Legislature and he cannot remove these controls merely by asserting that no Federal Legislature in law or in fact is in existence. No such position is contemplated by the Indian Independence Act or the Government of India Act, 1935 any legislative provision that relates to a constitutional matter is solely within the powers of the Constituent Assembly and the Governor General is under the Constitution Acts precluded from exercising those powers.

The sooner this position is realized the better. And if anyone read anything to the contrary in the previous judgment of this Court, all that I can say is that we were grievously misunderstood. If the position created by the judgment in the present case is that past constitutional legislation cannot be validated by the Governor General but only by the legislature, it is for the Law department of the Government to ponder over the resultant situation and to advise the Government accordingly. The seriousness of
the implications of our judgment in the previous case should have been immediately realized and prompt steps taken to validate the invalid legislation”.

Chief Justice Munir after discussing his judgment of Usif Patel, discussed the Special Reference No.1. He contended that the constitutional and administrative machinery had broken down after the judgment of Usif Patel. In order to avoid such collapse, the Governor General summoned the constituent convention on 10th May, 1954 and issued a proclamation as per by which he assumed the powers as were required to validate and enforce certain laws. These powers were exercised by him subject to the Court’s opinion. The Governor General referred three questions to the Federal Court for its opinion under the Section 113 of the Government of India Act. These three questions are reproduced in verbatim hereunder:

“Question. No. 1. 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 the Governor General can by order or otherwise declare that all orders made, decisions taken and other acts done under those 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 land until the question of their validation is determined by the new Constituent Convention?

Question No. 2. Whether the Constituent Assembly was rightly dissolved by the Governor General?

Question No. 3. Whether the Constituent Convention proposed to be set up by the Governor General will be competent to exercise the powers conferred by Section 8 of the Indian Independence Act, 1947, on the Constituent Assembly?”

According to Chief Justice Munir, the case of Special reference was important in different perspectives. At first it made the Governor General to act constitutionally and stopped him to take any extra-constitutional political steps. The Chief Justice Munir asserted that his judgment in this case had helped the Governor General not to

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20 Ibid
rely on the Army for the solution of political crisis. The second perspective was that it was because of his judgment that the constitutional crisis cropped up and ushered in the Constitution of 1956. He takes credit for the introduction of the law of civil or State Necessity. He says in his book that the later Supreme Court of Pakistan followed the suit and it was not the case of Pakistan only rather the Courts of the other countries such as Rhodesia also followed his footsteps in application of the doctrine of necessity. He went a step further to quote the example of the Supreme Court of Cyprus which applied his doctrine to solve the constitutional crisis in its country in 1964. Sir Ivor Jenings has been quoted who has quoted in the preface of his book ‘Constitutional Problems in Pakistan’ regarding the reply to the Special Reference. Sir Ivor says in the following words:

“In the process it was necessary for the court to discuss the nature of the prerogative powers to summon, prorogue and dissolve legislature and as in Maulvi Tameez-uddin Khan’s case the relation between the statutory and prerogative powers. Of even wider interest, because it appears to be unique in the legal history of the Commonwealth, is the application of Common Law doctrine of necessity to the conditions of emergency created by the decision in Maulvi Tameez-uddin Khan’s case.”

Chief Justice Muhammad Munir advanced further arguments in favor of his judgment. He says that the Majesty had placed the prerogative for dissolution of assembly in the Parliament. The court held on the construction of the India Independence Act that parliament had parted with the prerogative of dissolution only conditionally, as that the Constituent Assembly would make the constitution within a reasonable timeframe. The Constituent Assembly could not be allowed to assume the role of an indissoluble Assembly. It was also understood that the Constituent Assembly would function within the precincts of the Indian Independence Act. As per the contention of Chief Justice Muhammad Munir both of these conditions were broken by the Constituent Assembly. The result was that the prerogative of dissolution was reverted to the Crown’s representative and it was the Governor General who acting as the representative became competent to exercise this prerogative. The novel way of argument is yet to come from the CJ Muhammad Munir. He said that before the Constituent Assembly of Pakistan, there were nineteen
Constituent Assemblies which had functioned in the different parts of the world. The Constituent Assembly of the United States took the longest time to frame a Constitution and the period it took was twenty one months. The Constituent Assembly of India which started functioning at the same time when the Constituent Assembly of Pakistan took a start. The Indian Constituent Assembly gave a Constitution to its country within thirty three months. It was the Constituent Assembly of Pakistan which took seven long years to form a constitution and still the result was in fiasco. People had become dissatisfied with the progress of the Pakistan Constituent Assembly. Its representative character was challenged. The court was therefore right to hold that the Governor General had rightly dissolved the Constituent Assembly which had failed to perform its duty of making a constitution as envisaged under the Indian Independence Act. He had a legal right to convene a fresh Constituent Assembly.

Further he wrote in his judgment that the Constituent Assembly had failed to seek the assent of the Governor General, when it acted as the legislature of the Dominion. It added some more members without seeking assent of the bill. In this way it ceased to be an Assembly as defined by the Indian Independence Act of 1947. This is how the power to dissolve was reverted to the representative of the Crown. The Governor General became entitled to dissolve the Constituent Assembly which broke away the promise. He has quoted the judgment of Cornelius another author of the Judgment. He also declared the Governor General’s power as unqualified and unconditional in dissolution of the Assembly and the Constituent Assembly was to him a legislature of the Dominion under the Indian Independence Act, 1947.

The Governor General in the Proclamation Order of 24th October, 1954 stated a reason that the Constituent Assembly had lost the confidence of its people and thereof it was not able to function any longer. As per the contention of Chief Justice Muhammad Munir, that the facts alleged in the Reference could not be investigated. It was in this background that the Court had to assume the correctness of the allegations that the Constituent Assembly had ceased to enjoy the confidence of the people. The correctness of this assumption manifested in elections of the Provincial Assemblies in 1957. The Constituent Assembly was formed by the members of the Provincial
Assemblies who had contested election in 1946 as no elections could be held to the Federal Legislature under the Indian Independence Act, 1947.

He further extended his arguments and said that the periodic accountability is the essential element of a democratic form of Government. The legislature of every democratic constitution fixes a certain period of time of the parliament after which it dissolves automatically. In a progressive society, the electorates get an opportunity to express their opinion as new problems keeps cropping up with the passage of time. A perpetual legislature is an antithesis with the representative government and anachronism. According to him the Constituent Assembly in question had completed its nine years at the time of dissolution as it was elected in the year 1946. Due to the principle of periodic accountability the members of the Constituent Assembly had lost their right to represent the electorates.

Section 8 of the Indian Independence Act 1947 meant that the power to make a constitution shall be exercisable within a reasonable time frame. The question was posed to Mr. I.I Chundrigar as if the Assembly didn’t make constitution within a time frame or transgressed its power then that Constituent Assembly be dissolved. He replied that a revolution was the only way to get rid of that Assembly. CJ Muhammad Munir contends that the Revolution is an avowed illegality and if Mr. Chundrigar meant a general uprising like a Civil war. It may be contended that by taking an Army Chief as Defense Minister and dissolution of Assembly amounted to a Revolution. For him the revolution does not have exact meaning and there are several ways in which it may happen.

The Governor General’s action to treat laws (which became invalid due to judgment in the Maulvi Tameezuddin Khan’s case) as valid was to avoid the State to run into danger of collapse. Muhammad Munir says that majority of the Judges like A.S.M Akram, S.A. Rehman and he himself affirmed that by applying the Common Law of civil or State Necessity, the Governor General took a right action. He applied the doctrine of state necessity to solve the political and constitutional deadlock covering thirteen pages of his judgment. He however, admitted that this doctrine cannot serve as the last refuge of political or military adventurer.
Chief Justice Munir has also dilated upon the word Revolution. He says that it is a legalized illegality if it succeeds. It is from its inception an avowed illegality as no constitution has a provision for its own overthrow by the violence. The situation that emerges is beyond the cognizance of law and law courts. The courts are bound to view the matter from legalistic perspective. If it confronts a *fait accompli* action then it would give an academic look only to the continued illegality. From a political angle the revolution is directed against the existing political institutions in a country. To overthrow the existing regime a revolutionist has to conceive a plan before taking any step. It is his duty to analyze what impact his action would leave on the public and also the chances of success he will have to measure. A revolutionist makes promises and condemns the old political system and also the politicians. The new order replaces the old order. He should be convinced of what he has done and also make the people believe in his change.

Chief Justice Muhammad Munir has also defended his judgment written in the case of State v. Dosso. He says that the general question asked in this case pertained to the new legal order. Whether the President’s Proclamation made on 7th October, 1958 which was unauthorized by the Constitution and dismissed the parliamentary institutions such as the National and the provincial. Further another question to be answered was whether the legislative authority set up under the revolution turned into a law giving organ provided the revolution was successful and effective? He gave answer in affirmative to all such questions posed to the Supreme Court of which he was a Chief Justice.

He says that he wrote a lading judgment in this case and won applause on the international arena. It was his reported judgment in all law reports. But in Pakistan this case won notoriety for him. His judgment was overruled in the Asima Jillani case. The territories which were subject to the administration of the Privy Council took his judgment with all seriousness and attained fame and became important for them. The result these territories derived from his judgment holds field. According to him the case was decided when Pakistan stood at the critical juncture of its history. The constitutional question which was adjudged in his judgment arose out of a

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21 *State v. Dosso* PLD 1958 SC 533  
22 PLD 1972 SC 139
historical phenomenon which took place in many countries and the same phenomenon may occur in any part of the world.

For the validation of the laws except the constitution, the President of Pakistan promulgated the Laws (Continuance in Force) Order, 1955. This proclamation restored the jurisdiction of all courts. The order further said that the country of republic of the Pakistan instead of the Islamic Republic of the Pakistan will be governed as nearly as possible in accordance with the constitution. There was another question which was reposed in the case of State v. Dosso whether the laws (Continuance in Force) Order, 1955 enforced by the President of Pakistan was valid and whether it took away the effect of fundamental rights. The test for the success of revolution laid down by the Supreme Court was that the people of Pakistan were required by the new regime to follow its laws. He has quoted Sir Ivor Jenings in support of his contention whose writings brought him to the remotest land of the African Continent. The High Courts of the Rhodesia and Uganda in Madzimmobute v. Lardner Burke23 (General Division) and Micheal Motovu24 quoted extensively and reproduced excerpts of his judgment. Further, Sir Udo Udoma Chief Justice of the Uganda supreme Court observed that the counsel who relied on the principle laid down in the Dosso’s case was “doubtless irresistible and unassailable.” The result arrived at in the Dosso’s case was upheld in the Madzimmobute v. Lardner Burke25. He has referred to judges like Lord Reid, Lord Morris, Lord Pearson and Lord Wilberforce made observations which establish the case of Muhammad Munir. The observations of these judges are reproduced in verbatim hereunder;

“It is historical fact that in many countries there are new regimes which are universally recognized as lawful but which derive their origins from revolutions or Coup d’ etat. The law must take account of that fact”.

The CJ Muhammad Munir referred to the judgment of Sir Udo Udoma, Chief Justice of Uganda where after describing ‘in law as a revolution ‘proceeded to say that

“Our deliberate and considered view is that the 1966 Constitution is a legally valid Constitution and the Supreme Law of Uganda and that the 1962 Constitution

231960 RLR 756
241964 CLR 195
25(1968) 3 AII ELR 561
having been abolished as a result of victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of de facto and de jure validity. Pakistan affords another recent example. In the State v. Dosso the President had issued a Proclamation, annulling the existing Constitution. This was held to amount to a revolution.

The CJ Uganda Sir Udo further quoted the CJ Muhammad Munir in his judgment. The excerpts from his judgment are reproduced in verbatim hereunder;

“It sometimes happens, however, that a Constitution and the national order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order. Their Lordships would not accept all the reasoning in these judgments but they see no reason to disagree with the result. The Court accepted the new Constitution and regarded itself sitting under it. Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change”.

The judgment in Asima Jillani case was reduced to 113 pages and overruled the Dosso case by a bench of five judges. Chief justice Munir has pointed out the following questions from the judgment of Asima Jillani which contradicted the principle of law of necessity as adopted by him in his previous judgment to give protection to the action of Governor General and later the legality of Martial law. His deliberations are as under;

1. The authorities established by the successful revolution have become a law giving organ as held in the Dosso case of which CJ Munir was the author. The criterion of success was the efficacy of the change. He says that the judges of Asmia Jillani overlooked the historical phenomenon and they think that there can never be a revolution in a legal sense. The Rhodesian case cites instances of revolutionary regimes from the annals of the history. It has been stated that “it is historical fact that in many countries there are new regimes which are universally recognized as lawful but which derive their origins from revolutions or Coup d' etat”. The question arises what about the fate of coup d etats
or forcible seizure of power in many African countries where the revolutionary regimes are still the law-givers of their countries. The case of Asima Jillani cannot deny this historical fact. This historical phenomenon was not in the minds of the judges who authored judgment in the Asima Jillani case. This is what the CJ Muhammad Munir has asked regarding the judgment of Asmia Jillani so as to defend his judgments which are subject to criticism due to the liberal and novel use of the doctrine of the Necessity.

2. The CJ Munir poses another finding that the law laid down in the case of Dosso is still applicable law in countries subject to the jurisdiction of the Privy Council.

3. The judges of the Asima Jilani case perhaps thought that the revolution is not a legal concept except that it meant extending the punishment to the participants of the revolution and then meeting a fiasco.

4. Further, the Hans Kelsen on whose theory of State Necessity the Judges have authored their Judgments didn’t change his theory in the later edition of his book. The CJ Munir raises this question from the authors of Asmia Jillani case.

5. The CJ Munir has quoted in his book the case of the East Pakistan on whom a former Chief Justice of Pakistan has tendered his following observations;

“East Pakistan today provides a classic example of a successful Revolution which destroyed the national legal order and became a new law creating fact. East Pakistan has declared its independence and become a separate State under the name of Bangladesh. Pakistan claims that East Pakistan is a part of Pakistan but a large number of States have already recognized it as an independent State. New Courts and government services have been constituted in Bangladesh which doesn’t operate under the legal order of Pakistan”. Efforts have been made to find the similarities between the Dosso case and the independence of Bangladesh. The Pakistan Army surrendered in Bengal and the international community recognized it as an independent state. Therefore, it came into existence after a successful revolution. In
Dosso case it has been upheld that the Revolution is an internationally recognized way of changing a government.

Chief Justice Muhammad Munir summed up the arguments in his defense of the judgments introducing the law of “State Necessity”. The Oxford\textsuperscript{26} Essays published under the title of ‘Principles of Revolutionary Legitimacy’ establishes that the principle laid down by the four Commonwealth tribunals viz, Pakistan (Dosso Case), Uganda, South Rhodesia and the Privy Council is the correct principle of law.

7.4 Law of Necessity and its Application in Pakistan

The doctrine of Necessity was evolved through its use in the different judgments by the Supreme Court of Pakistan. These cases will be discussed at length. The facts and the law laid down in these cases will be dilated so as to reach at the better understanding as why the law of Necessity was used by the Supreme Court of Pakistan by deviating from the normal course of law.

(i) Maulvi Tameez-ud-Din Khan Case\textsuperscript{27}

The Governor General had issued a proclamation on 24\textsuperscript{th} October, 1954 as per which the Constituent Assembly stood dissolved and a new Council of Ministers was set up\textsuperscript{28}. The power of the Governor General of Pakistan to dissolve the Constituent Assembly was disputed by the President of the Constituent Assembly and filed a writ petition. The Sind High Court was prayed that the writ of mandamus be issued against the Federation of Pakistan and the re-constituted Council of Ministers under the Section 223-A of the Government of the India Act, 1935. It was also prayed compliance of the proclamation be restrained and office of the President of the Constituent Assembly Mr. Maulvi Tameez-ud-Din Khan be restored. The writ of Quo Warranto was also prayed in order to determine the validity of members of the newly re-constituted Council of the Minsters. The petition of Maulvi Tameez-ud-Din Khan was resisted. The argument was advanced that the Chief Court Sind had no jurisdiction to issue writ as the Section 223-A of the Government of India Act, 1935 had not received the assent of the Governor General. Therefore, it didn’t become a valid law. The dissolution by the Governor General was a right step legally speaking.

\textsuperscript{26}EeKlaar, I.M., Oxfrod Essays on Jurisprudence, 1972.
\textsuperscript{27}PLD 1955 FC 240
\textsuperscript{28}PLD 1955 Sind 96. P.102.
The Chief Court of the Sind termed the action of the Constituent Assembly right when it didn’t seek the pleasure of the Governor General for Section 223-A to become a part of the Government of the India Act, 1935 as the assembly functioning as the Federal legislature required the assent of the Governor General and not the Constituent Assembly. The Chief Court after due deliberation declared the action of the Governor General to dismiss the Prime Minister and Constituent Assembly as illegal and unconstitutional.\(^{29}\)

The Constitutional Civil Appeal No. 1 of 1955 was filed by the Governor General against the judgment passed by the Chief Court of the Sind. The ground taken by the Federation of Pakistan and the reconstituted Council of Ministers was that the Sind Chief Court had no jurisdiction to issue writs under the Government of India Act, 1935 Section 223-A which had not received the assent of the Governor General.\(^{30}\) The appellant had their argument that for any bill to become a law the assent of the Governor General was essential. The Federal Court of Pakistan accepted the appeal of the Governor General and members of the reconstituted Council and set-aside the decision made by the Chief Court of the Sind. It was held by the Federal Court that the Sind Chief Court had no jurisdiction to issue writs under the Section 223-A of the Government of the India Act, 1935 as it had not received the assent of the Governor General to become law. The Federal Court stated in its judgment which is reproduced in verbatim hereunder:

“The Constituent Assembly when it functions under Sub-Section (1) of the Section 8 of the Indian Independence Act, 1947 acts as the legislature of the Dominion within the meaning of Sec 6 of that Act, and under Sub-Section (3) of the latter Section the assent of the Governor General is necessary to all legislations by the legislature of the Dominion since Sec. 223-A of the Government of India Act, 1935 under which the Chief Court of the Sind assumed the jurisdiction to issue the writs didn’t receive such assent, it was not yet law and therefore the Chief Court had no jurisdiction to issue the writs”

The former Chief Justice of the Federal Court of Pakistan Muhammad Munir stated in his book that when he read the arguments of Mr. Yahya Bakhtiar, he was

\(^{29}\) PLD 1955 Sind 96 p. 107.  
\(^{30}\) PLD 1955 FC 240 p.251.
taken aback as they were all full of misstatements, irrelevancies, innuendoes and inconsistencies. He said during the course of his arguments that the country of Pakistan had to pass through the misfortunes from 1954 in the case of Maulvi Tameez-ud-din Khan to Asima Jillani case. As regards the case of Maulvi Tameez he stated the following questions;

“What is understood in England by the Parliament? Is not the King an integral part of Parliament and are not all Acts enacted in his name? Can any bill passed by the both House of Common and the House of Lords become law without the Royal assent? Is not the King represented in all independent dominions of the Common Wealth by a Governor General or a Governor and is not the assent of the King’s representative as necessary in the dominions as that of the King’s representative as necessary in the Dominion as that of the King in England? Was not Pakistan an independent dominion in the Commonwealth and did it not have a Governor General to represent the King, having the power to give assent to the legislation of the dominion? Was not the Constituent Assembly legislature of the dominion of Pakistan? Did Pakistan at that time have any special status different from all other dominions? Was not there the Indian Independence Act a provision relating to the power of the Governor General to give assent to the bills of the legislature of the Dominion?”

The argument rendered by the Chief Justice Muhammad Munir after posing the above questions in support of his use of the Doctrine of Necessity further argues that the Constituent Assembly of Pakistan had failed to bring the Constitution for country took for seven long years. In the world 19 countries had already made their constitutions and it was India which took only two years and ten months to give the world longest constitution. Further, there was a justification to dissolve the Constituent Assembly as it had lost the confidence of the majority of the people of Pakistan as in the elections of the 1954 in the East Pakistan, the ruling party of Muslim League lost majority. The defeat in elections served ample proof to declare dissolution by the Governor General as legal action.

31 Ibid.
(ii) Usif Patel and others vs. The Crown

The District Magistrate had declared Usif Patel and two others as the goondas as per the Sind Control of Goondas Act (Governor’s Act xxxviii of 1952). They prayed that their detention was illegal and requested for issuance of the writ of the habeas corpus as per Section 491 of the Criminal procedure Code, 1898. Their petition to set them at liberty was dismissed by the Chief Court of Sind holding their detention as legal. It was contended by the appellants that the Act in question was invalid as it was passed by the Governor of Sind in exercise of the powers conferred by the proclamation of the Governor General as per the Section 92-A of the Government of the India Act, 1935. Further, this Section had been inserted in the Government of India Act by an order of the Governor General under Section 9 of the Indian Independence Act. Section 92-A was the ultra vires of the provision of the Section 9 of the Indian Independence Act. This contention of the appellant was repelled by the Chief Court of the Sind.

The appellants were aggrieved; therefore, they preferred appeal before the Federal Court of Pakistan. The validity of the Section 92-A was challenged. It was also argued that this action was taken after the expiry of the original date fixed by the Sub-Section 5 of Section 9 of the Indian Independence Act. 31st March, 1948 was the date before which the orders could be made under the Section 9 of the Indian Independence Act by the Governor General, but the date was altered to 31st March, 1949 by Section 2 of the Indian Independence (Amendment) Act, 1948. This amended Act should have been presented before the Governor General for his assent. The appeal of appellant was accepted by the Federal Court and the detainees were freed. The Federal Court tendered the following observations in its judgment:

“The question involved in the present case is whether the Indian Independence (Amendment) Act, 1948 by which the date mentioned in Section 9 (5) of the Indian Independence Act was altered to 31st March, 1949 was law when on 19th July, 1948 the Governor General added Section 92-A to the Government of India Act, 1935. On the authority of Maulvi Tameez-ud-Din Khan’s case the answer to this question must be in the negative, with the result that the addition of Sec. 92-A to the

32 PLD 1955 FC 240 p.390.
Government of India Act, 1935 being unauthorized, the Sind Goondas Act which was passed by the Governor of Sind in exercise of the authority derived by him from a proclamation of the Governor General under Section 92-A must be held to be invalid and the proceedings taken there under void and inoperative.

The rule hardly requires any explanation, much less emphasis that a legislature cannot validate an invalid law if it does not possess the power to legislate on the subject to which the invalid law relates. If the Federal legislature, in the absence of a provision, expressly authorizing it to do so, was incompetent to amend the Indian Independence Act or the Government of India Act, the Governor General possessing no larger powers than those of the Federal legislature was equally incompetent to amend either of those acts of an ordinance. Under the Indian Independence Act the authority competent to legislate on constitutional matters being the Constituent Assembly, it was that Assembly alone which could amend those acts. On its disappearance he can neither claim powers which he never possessed nor claim to succeed to the powers of that Assembly.”

The Federal Court in this regards further observed that in the given circumstances the Government should concentrate on bringing the new representative body in order to exercise the powers of the Constituent Assembly so as to validate the invalid legislation.

(iii) Reference by his Excellency the Governor General

It was held by the Federal Court in the case of Maulvi Tameez-ud-Din Khan that all laws passed by the Constituent Assembly required the assent of the Governor General to this effect, an ordinance titled as the Emergency Powers Ordinance IX of 1955 was passed by the Governor General in order to give the retrospective approval. This ordinance was issued under Section 42 of the Government of India Act, 1935. It is worthwhile to state that the Federal Court in the case of Usif Patel had mentioned that the Acts given in the schedule of that ordinance could not be validated under Section 42 of the Government of the India Act, 1935. Further, the retrospective effect to any of the act was also banned. Since the

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34 PLD 1955 FC 435 p.438-440
35 PLD 1955 FC 240
Constituent Assembly was ceased to function as it was dissolved by the Governor General and there was no legislature in place which could validate these Acts\textsuperscript{36}.

The Governor General made a Special Reference No. of 1955 under Section 213 of the Government of India Act, 1935 to the Federal Court which was heard by the judges of the same bench which had adjudicated upon the cases of Maulvi Tameez-ud-Din Khan and Usif Patel. The Bench gave its verdict on this Reference on 16\textsuperscript{th} May, 1955. The following questions were referred to the Federal Court by the Governor General for its opinion. They are reproduced in verbatim hereunder;

1. What are the powers and responsibilities of the Governor General in respect of the Government of the Country before the new Constitution 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 Governor General can by order or otherwise declare that all orders made, decision taken, and other acts done under 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 Governor General will be competent to exercise the powers conferred by the Section 8(1) of the Independence Act, 1947 on the Constituent Assembly?"

To this the Chief Justice Muhammad Munir gave following observations;

\textsuperscript{36} PLD 1955 FC 387
“We have come to the brink of a chasm with only three alternatives before us: to turn back the way we came by; to cross the gap by a legal bridge; to hurtle in to the chasm beyond any hope of rescue”.

The basis of the new proclamation was not the emergency powers granted to the Governor General by the Government of India Act, 1935 (Section 42 and 102) but the doctrine of the ‘State Necessity’. It was this Doctrine that gave an opportunity to “cross the gap by a legal bridge”.

The Federal Court of Pakistan in this case invoked the “Doctrine of Necessity”. The Chief Justice Muhammad Munir gave following observations:

“The point that arises is whether in an emergency of the character described in reference, there is any law by which the Head of the State may, when the legislature is not in existence, temporarily assume to himself legislative powers with a view to preventing the state and society from dissolution. In seeking an answer to this question resort must necessarily be had to analogies and first principles for there is no direct answer to the precise question which today confronts the judiciary of Pakistan. The Governor General claims in the proclamation that he has acted in the performance of a duty which devolves on him as Head of a State to prevent the State from disruption, and the preliminary question that has to be considered is whether we are still in the field of law or in a region out of bounds to lawyers and Courts. I have come to the conclusion that the situation presented the Reference is governed by rules which are part of Common Law of all civilized people takes for granted. This branch of law is the law of civil or “State Necessity”. The Chief Justice Muhammad Munir further stated that the principle that emanates from the address of Lords Mansfield that the act which otherwise is illegal becomes legal if that act is done bona-fide under the state of necessity provided it is subject to the condition of absoluteness, extremeness and imminence. The necessity should have been to preserve the constitution, state, society or prevent it from getting it dissolute. Chitty’s statement is affirmed that the necessity knows no law. Bracton has cited a maxim that necessity makes lawful which otherwise is not lawful. It is the right of a private person to act in

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38 *Reference By His Excellency The Governor General* PLD 1955 FC 435 p.435.
necessity. For a Head of State, justification to act must a fortiori be clearer and more imperative.

The chief justice Muhammad Munir further stated in his judgment which is reproduced in verbatim hereunder;

“The disaster that stared the Governor General in the face, consequent of the illegal manner in which the Constituent Assembly exercised its legislative authority, is apparent from the results described in the Reference as having followed from this Court’s decision in Mr. Tamiz-ud-Din Khan’s case and the subsequent case of Usif Patel. The Governor General must therefore, be held to have acted in order to avert an impending disaster and to prevent the state and society from dissolution. His proclamation of 16th April, 1955 declaring that the laws mentioned in the schedule to Emergency Power Ordinance, 1955 shall be retrospectively enforceable, is accordingly valid during the interim period. i.e. until the validity of these laws is decided upon by the new Constituent Assembly. Needless to say that since the validity of these laws during the interim period is founded on necessity; there should be no delay in calling the Assembly”.

The Governor General’s reference was replied as under;

1. As regards the first question it was not answered as it was general in nature.
2. During the interim period, the Governor General was empowered under the Common Law of Civil or State Necessity to validate retrospectively acts stated in the schedule to the Emergency Powers Ordinance.
3. The Governor General was empowered to dissolve the Constituent Assembly in the given circumstances as stated in the Reference.
4. It was answered that the new assembly carved under the Constituent Convention Order, 1955 would be competent to exercise all powers conferred by the Indian Independence Act, 1947 on the Constituent Assembly including those under Section 8 of that Act.

This is how the Reference of Governor General was replied by the federal Court of Pakistan headed by the Chief Justice Muhammad Munir.
(iv) The State vs. Dosso & Others

The Constitution of Pakistan was annulled on 7th October, 1958 by the President Iskander Mirza who also dismissed the central and provincial legislative assemblies. The Martial Law was imposed and administrative/legislative machinery was taken over. Laws (Continuance in Force) Order in 1958 was enforced. The result of which was that the laws before the take-over of the Martial Law authority were extended the legal cover except the Constitution of 1956.

As per Section 11 of the Federal Crimes Regulation, Act III of 1901 Dosso and others were convicted and their cases were also referred to the Council of Elders under this Act. The legality of the said orders was also challenged before the benches of the West Pakistan High Court through the Constitutional petitions under Section 170 of the 1956 Constitution. The impugned orders were declared null and void by the High Court holding them as contradictory of the fundamental rights as contained in the Article 5 of the afore-referred Constitution. The order of the High Court gave birth to the four appeals which pertained to the Article 1(7) of the Laws (Continuance in Force).

Chief Justice Muhammad Munir heading the Federal Court by then gave his verdict that Article 5 of the Constitution of 1956 had disappeared from the new legal order; the Frontier Crimes Regulation 1901 was still in force by virtue of Act IV of laws (Continuance in Force) Order 1958. The convictions recorded and references to the Council of Elders were upheld as a valid step by the Federal Court.

While delivering judgment, reliance was placed on the Pure Theory of Law of Kelsen. It was held that the Constitution could be validly changed by a victorious revolution or successful coup d’ etat as it is an internationally recognized legal method of changing a constitution. After the change had taken place under this method then the new national legal order for its validity depended upon new legal creating organ. The courts have to lose their jurisdiction and depend upon the new order for its functioning. Further, it was also held that if the territory and people remain the same then the according to the international law the Revolutionary Government and the new Constitution are the legitimate Government and the new
constitution by the revolutionary government would be the valid constitution of the state.

It was further held by the court of Chief Justice Muhammad Munir that if the revolution is successful then it passes the test of its efficacy and it becomes a basic law fact. On the basis of this analogy it may be presumed that the Laws (Continuance in Force) Order was a new legal order whatever the case may be whether perfect or imperfect in nature. The validity of laws and correctness of judicial decisions have to be in the light of new legal order.

(V) Miss Asima Jillani vs. The Government of Punjab

Malik Ghulam Jillani was arrested in Karachi on 22nd December, 1971 under the rule of Defense of Pakistan Rules, 1971. The order was admitted by the Lahore High Court, Lahore for regular hearing and notice was accordingly issued to the Government of Punjab for the 31st December, 1971. A day before the regular hearing, the Martial Law Administrator Zone-C issued another Order under the powers conferred upon him by the Martial Law Regulation No. 78. The validity of the order of detention of her father was challenged by Miss Asima Jillani, daughter of the detenu. The Government of Punjab vehemently resisted the petition of Miss Asima Jillani.

Chief Justice observed in the following manner as regards the events of March 1969:

“It is clear that under the Constitution of 1962, Field Marshal Muhammad Ayub Khan has no power to hand over power to anybody. He could have resigned from his office. He could also have proclaimed emergency and may be for the present purposes that he could also proclaim Martial Law if the situation was not controllable by the civil administration. It is difficult, however, to appreciate under what authority a Military Commander could proclaim Martial law. Even in 1958 the Martial Law was proclaimed by the president. The Military Commander had no power to also to abrogate the Constitution”.39

39 Ibid p. 158.
Supreme Court Passes Verdict against the Doctrine of Necessity

In the landmark judgment rendered by the Supreme Judiciary headed by the Chief Justice Hamood-ur-Rehman reversed the use of Doctrine of Necessity. The excerpts from the judgment of Chief Justice Hamood-ur-Rehman are reproduced in verbatim hereunder;

“The assumption of power by Agha Muhammad Yahya Khan as Chief Martial Law Administrator and later as President of Pakistan was an act of usurpation, and was illegal and unconstitutional. All the legislative and administrative measures taken by this unauthorized and unconstitutional regime cannot be upheld on the basis of legitimacy, but such laws and measures which are protected by the Doctrine of Necessity, that is to say which were made for the welfare of the nation and for the ordinary orderly administration of the country, can be deemed to be valid. Martial Law Regulation No. 78 of 1971 under which the two detenus were held is an illegal regulation which cannot enjoy the protection of a rule of necessity.40.

The Court felt bound to consider the legal recognition that had been given to ‘successive maneuverings’ for usurpation of power under the pseudonym of Martial Law by the decision in the State vs. Dosso. It was also held that in laying down such a novel juristic principle of such a far-reaching importance, the Chief Justice in the case of The State vs. Dosso proceeded on the basis of certain presumptions viz, 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; that any abrupt political change not within the contemplation of the constitution constitutes a revolution, no matter how temporary or transitory the change, if no one has taken any step to oppose it: and, that the rule of international law with regard to the recognition states can determine the validity also of the states’ internal sovereignty.

These assumptions were not justified. Kelsen’s theory was by no means a universally accepted theory, nor was it a theory which could claim to have become a basic doctrine of modern jurisprudence. Kelsen was only trying to lay down a pure theory of law as a rule of normative science, a theory of law as a mere jurist’s

proposition about law. He was not attempting to lay down any legal norm or legal norms which are the daily concern of the judges, legal practitioners or administrators. The recognition of a state under the international law had nothing to do with the internal sovereignty of the state, and this kind of recognition of state must not be confused with the recognition of the head of a state or government of a state. An individual does not become the head of a state through the recognition of other states but through the municipal law of his own state.

With the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice not only misapplied the doctrine of Hans Kelsen, but also fell into error in thinking that it was generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone. The Chief Justice Hamood-ur-Rehman further went to say in his judgment,

“I am with the utmost respect for the learned Chief Justice, unable to resist the conclusion that he erred both in interpreting Kelsen’s theory and applying the same to the facts and circumstances of the case before him. The principle enunciated by him is, in my humble opinion, wholly unsustainable, and I am duty bound to say it that it cannot be treated as good law either on the principle of Stare decisis or even otherwise”.

It was further held by the Chief Justice Hamood-ur-Rehman;

“Recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself but I respectfully beg to disagree with the view that it is a doctrine for validating the illegal acts of usurpers. I would call this a principle of condonation and not legitimization. I would condone all transactions which are past and closed for no useful purpose can be served by opening them; all acts and legislative measures which are in accordance with, or could have been made under, the abrogated constitution or previous legal order; all acts which tend to advance or promote the good of the people; and all acts required to be done for the ordinary running of the state and all such measures as would establish or lead to the establishment of, in our case, the objectives mentioned in the Objective Resolution of 1954. Martial Law Regulation No. 78 was (not) necessary for the ordinary orderly running of the state nor for
promoting the good of the people of West Pakistan. This Regulation cannot thus in my opinion, be justified even on the ground of necessity 41.

Another Judge of the Supreme Court of Pakistan in this case wrote his judgment in the following words;

“A person who destroys the national legal order in an illegitimate manner cannot be regarded as valid source of law-making. May be, that on account of holding coercive apparatus of the state, the people and the courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and courts will not recognize its rule and act upon them as dejure. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper; he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would be adventures.

The Supreme Court verdict which was headed by the Chief Justice Hamoodur-Rehman reversed the decision made in the case of State vs. Dosso and others.

(VI) Begum Nusrat Bhutto vs. Chief of the Army Staff and the Federation of Pakistan

The Dacca fell in December, 1971 and on this juncture the President of Pakistan General Agha Muhammad Yahya Khan handed over the control of the reaming Pakistan to the Leader of the majority party Mr. Zulfiqar Ali Bhutto. He enjoyed command of the West Pakistan as the Chief Martial Law Administrator, President and later as the Prime Minister of Pakistan.

In 1977, the elections were held but to the utmost chagrin of the PNA, the PPP of Zulfiqar Ali Bhutto made a landslide victory in these elections. The PNA raised a hue and cry that the elections were rigged massively. The protests were launched throughout the country. The constitutional machinery in the country broke down due to the political impasse between the PNA and the PPP. It was in this background that the Chief of Army Staff General Muhammad Zia-ul-Haq had to intervene so as to save the country from ruin, bloodshed and chaos and protect the integrity and

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41 Ibid. p.207
sovereignty of the country. The Army apparently also intervened to separate the warring factions which had brought the country to the brink of disaster.

General Zia-ul-Haq imposed Martial Law throughout the country and took over charge as the Chief Martial Law Administrator. The Constitution of Pakistan 1973 was held in abeyance. The legislative assemblies were dissolved. The Prime Minister, cabinet members and the other leaders of the opposition were kept under the protective custody. The President of Pakistan was allowed to continue in his office as the titular head. The Chief Justices of the High Courts were asked to work as acting Governors of their provinces.

The petition was made in the Supreme Court of Pakistan by Begum Nusrat Bhutto under the Article 184(3) of the 1973 Constitution to make an order if it he nature mentioned in Article 199 of the Constitution, “if it considers that the question of public importance with reference to the enforcement of the fundamental rights conferred by the Chapter 1 of the Part II, the Supreme Court may make an order.” The detention of Zulfiqar Ali Bhutto and others was challenged on the ground that the Chief of Army Staff had no power to impose Martial Law in the country as per the Constitution of Pakistan, 1973. It was said that the act of the COAS was cognizable by Article 6 of the Constitution as high treason act. The Proclamation of Martial Law dated 5th July, 1977, the Laws (Continuance in Force) Order, 1977 and the Martial Law Order No. 12 were all issued without the lawful authority (within the meaning of Article 199 of the Constitution of Pakistan, 1973).

It was further stated in the petition that the leaders of the PPP and Zulfiqar Ali Bhutto were arrested in the early hours on 17th September, 1977. The COAS leveled unfair and incorrect charges against the detenus of the PPP leaders to explain their arrest and detention.

Petition was agitated by the Federation of Pakistan and action of the CMLA was duly defended. The Supreme Court of Pakistan heard the arguments of parties which are discussed hereunder:

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44 PLD 1977 SC 657 p.672.
Arguments of Mr. Yahya Bakhtiar (Counsel for the PPP)

The reliance was mainly placed on the case of Miss Asim Jillani vs. The Government of Punjab and another. Mr. Yahya Bakhtiar contended that the COAS had no authority to impose Martial law in the country. It attracted the initiation of proceedings under the Article 6 of the Constitution of Pakistan, 1973. The regulations issued by the CMLA were without the lawful authority. Even if it is justified on the basis of the Doctrine of Necessity, yet the arrest and detention of the top leaders of the PPP is not justified. It has been designed to oust the PPP out of the general elections. Detention of the detenus was in utter violation of the fundamental rights as contained in the Chapter 1, Part II of the Constitution. He contended that this was a case requiring redress by the Supreme Court of Pakistan as per Article 184(3) which empowered the SC to enforce fundamental rights if the Court considered that a question of public importance was involved.

Arguments of Mr. A.K. Brohi (Counsel for the Federation of Pakistan)

Mr. A.K. Brohi argued that till 5th July, 1977 the state of Pakistan was being governed by the Constitution of 1973 under an old legal order but afterwards a new legal order had been put in place as per the proclamation issued by the Chief of Martial Law Administrator. The validity of any legal action after the 5th July, 1977 can be tested against the guidelines provided by the new legal order. The grundnorm of the old legal order was based the Constitution of Pakistan which was temporarily suspended and this order was replaced by the new legal order which took source for its validity from the proclamations of the CMLA and the Laws (Continuance in Force) Order. It had altered the jurisdiction of the Superior Courts. It was further argued by Mr. A.K. Brohi that the change was brought by the new legal order which was not provided by the Constitution of Pakistan, 1973; therefore, it constituted a meta legal or extra constitutional fact, attracting the Doctrine of the ‘Revolutionary Legality’.

Mr. A.K. Brohi contended that whenever an existing legal order or Constitution was disrupted by the political upheavals which were not contemplated by the constitution. Such change amounted to a revolution and it is also termed as the Coup d’ etat. Under such circumstances, the court has to analyze the constitutional
facts which lead to the existence of the legal order within the frame work of which the court itself exists and functions. If court finds that all institutions of the State have accepted the new legal order then all questions of legality and illegality would be determined with in the perspective of the new legal order.

It was further argued by learned counsel of the Federation of Pakistan that the Court should adopt a viable alternative between the two extreme positions adopted in the cases of Dosso and Asima Jillani. As it was held in the Dosso case that every successful revolution was legal and the other case decided that the revolution of all kinds was illegal. The Court could have decided in the case of Dosso that the constitutional facts forced that a new legal order be brought in vogue and issue in question be decided by reference to the new legal order which had attained the effectualness. The case of Asima Jillani made court to reject the Kelsen’s pure theory of law as it failed to provide any guidelines as to what law the courts should apply in case a revolution became effective by suppressing or destroying the old legal order.

In view of such circumstances, the Court should decide that the new legal order had effectively emerged in Pakistan through the meta-legal or extra constitutional means. Further the court should decide that for the time being and any issue cropped up before the court would be decided within the frame work of the new legal order. It was argued by Mr. Brohi that the job of court was not to either side with the revolution nor negate it. It should see the events cropping up as constitutional facts in the light of their effectiveness and enforceability. Further the court should also see the viability of the new legal order.

Mr. Brohi discussed the necessity of imposing the Martial law on 5th July, 1977 due to the unconstitutional and illegal governance of country by the detenus and their associates. It was also contended by Mr. Brohi that massive rigging took place during the elections of 1977 at behest of the then Prime Minister Zulfiqar Ali Bhutto. As a result of massive rigging the government of Z.A. Bhutto lost credibility due to the violation of constitution to hold fair and free elections. There were widespread demonstrations throughout the country and it amounted to the repudiation of Mr. Bhutto’s authority to rule the country. The dialogue between PNA and between

45 PLD 1958 SC 533. *The State vs. Dosso and others*
46 PLD 1972 SC 657
governments was procrastinated in a way that ZA Bhutto brought the country at the brink of the civil war.

It was rightly felt that until the levers of powers are wielded by ZA Bhutto, there could be no expectations to get fair and free elections in the country. The demand from public was widespread that army should intervene and take the control of holding fair and free elections in country. Hence the Martial Law was imposed in country on 5th July, 1977. It was also argued by Mr. Brohi that law and order in country had been restored within the three months of imposition of Martial Law and collapsed economy was back on track to normalcy. The health of sickening government had started improving and the country’s foreign policy was being run as per national interest instead of the projection and personal aggrandizement of Mr. Bhutto. Mr. Brohi further contended that Martial law was imposed not to displace the constitutional machinery but to provide the country a path of the constitutional rule.

Arguments of Mr. Sharif-ud-Din Peerzada (Attorney General of Pakistan)

Mr. Sharif-ud-Din Peerzada appeared before court as the Law Officer. He supported the argument of Mr. Brohi as the Martial Law of 5th July, 1977 didn’t amount to usurpation of power by the Chief of Army Staff. The move was intended to oust the usurper who had illegally occupied the throne as a result of massive rigging of the elections of 7th March, 1977. The army also took over to displace the illegally constituted national and provincial assemblies as majority of the members of these assemblies were elected through corrupt means and criminal practices. He went on to say in the court that the cases of Dosso and Asima Jillani were not pertinent in the situation of case in question as the circumstances were entirely different as the change brought about by the military in the previous referred cases was permanent in nature but in the present case the military had come to stay for a while so as to hold fair and free elections.

Supreme Court renders Judgment

The Supreme Court distanced itself from the Henry Kelsen’s pure theory of law. It said that a successful revolution satisfies the test of efficacy and becomes a basic law. The main excerpts are reproduced hereunder;

47PLD 1977 SC 672.
“Kelsen’s theory is open to serious criticism on the ground that by making effectiveness of the political change as the sole conditioned or criterion of its legality, it excludes from consideration sociological factors of morality and justice which contribute to the acceptance or effectiveness of the new legal order. It must not be forgotten that the continued validity of the grundnorm has an ethical background, in so far as an element of majority is built in it as part of the criterion of its validity”.

It was further said in the judgment by the Supreme Court that;

“it follows, therefore, that the legal consequences of an abrupt political change of the kind with which the court is dealing in this case, must be adjudged not by the application of an abstract theory of law in vacuum, but by a consideration of the total milieu in which the change is brought about, namely the objective political situation prevailing at the time, its historical imperatives and compulsions the motivation of those responsible for the change, and the extent to which the old legal order is sought to be preserved or suppressed. Only a comprehensive view of all these factors can proper conclusions be reached, as to the true character of the new legal order. On last comment may also be offered in this behalf, namely, that the theory or revolutionary legality, as propounded by Mr. A.K. Brohi can have no application or relevance to a situation where the breach of legal continuity is admitted, or declared to be of a purely temporary nature and for a specified limited purpose. Such a phenomenon can more appropriately be described as one of constitutional deviation rather than of revolution. It will indeed be highly inappropriate to seek to apply Kelsen’s theory to such a transient and limited change in the legal or constitutional continuity of a country, thus giving rise to unwarranted consequences of a far-reaching character not intended by those responsible for the temporary change.

(VII) Syed Zafar Ali Shah and others Vs. General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869)

The brief facts leading to this case are:

That on 12th October 1999, Army took over civil government in Pakistan. The coup d’état ensued Proclamation of Emergency in the country. The petitioner challenged the army take over on a number of grounds. The main ground was that the sacked government which was an elected government in accordance with the
Constitution had a legal right to complete its tenure. It was unconstitutional act to take over a democratically elected, constitutional government.

Another ground of case was that General Pervez Musharraf and his colleagues had not only violated the oath taken by them under Constitution of Pakistan but they had also committed the offence of high-treason by holding the Constitution in abeyance.

The Supreme Court judges presided by CJP, Irshad Hassan Khan, validated the coup on the basis of ‘doctrine of necessity’.

It was held by the superior judiciary that General Musharraf had validly assumed power. According to the Court, the situation that arose on October 12, 1999 was one for which the Constitution provided no solution and an extra-constitutional measure became inevitable. The coup was legitimized on ground of the doctrine of state necessity, and the principle of ‘salus populi suprema lex’ was pressed into service by the apex court.

It was further held by the Court that the 1973 Constitution would be supreme law of the country, but certain parts of the constitution would be held in abeyance by force of ‘state necessity’. The operative part of Order passed by the apex court included, interalia, as under:

i) That General Pervaiz Musharaf, through Proclamation of Emergency dated October 14, 1999, followed by PCO 1 of 1999, and had validly assumed power through extra-constitutional measure which was aimed at welfare of the state and the people therein. Therefore he was deemed constitutionally fit to promulgate all legislative measures namely: a) acts pertaining to the good of the people b) acts necessary for the orderly functioning of the state c) all such measures which might be necessary for the actualization of the objectives of the Chief Executive (General Pervaiz Musharaf).

ii) That the constitutional amendments by the Chief Executive could only be pre-emptive in case the Constitution of Pakistan is not conducive to the declared objectives of the Chief Executive.

iii) That the Chief Executive was not permitted to make amendments in the salient features of the Constitution i.e. independence of Judiciary, federalism, and parliamentary form of govt.
iv) That the Fundamental Rights, being inalienable rights, should remain intact but any executive order in deviation of Articles 15, 16, 17, 18, 19 and 24 could be passed by the Chief Executive.

Upholding the coup’s legitimization arguments, the Supreme Court wilfully ignored the Oath of Office Judges’ Order 2000, and seemed to have endorsed tacitly the March 2000 ban on public rallies.

Surprisingly enough, the apex judiciary was seen to have held that the people of Pakistan in general, including parliamentarians, had consented to the imposition of martial law in the country as the people did not resort to launch any protests against the coup d’état.

It is worthwhile to note that the superior court not only validated the non-constitutional act, but she also bestowed extensive powers on the army government which included:

a) To unilaterally amend the 1973 Constitution to actualize the objectives of the Chief Executive

b) To enact new laws without the force and approval of the Parliament.

In consequence whereof, General Musharaf was given judicial mandate to run and rule the country for 3 years. Strange isn’t it that the privilege to run the country for a period of 3 years was neither prayed in the petition, nor such was contested by the government’s counsel during the whole proceedings of the case?

(VIII) Tikka Iqbal Muhammad Khan Vs. General Pervaiz Musharaf (PLD 2008 SC 178)

Background to the Case:

On November 3, 2007 General Pervaiz Musharaf, the then chief of Army Staff and proclaimed President of the country, declared a state of emergency in the country. By force of PCO 2007, only those judges of the apex judiciary would continue to hold office whoever made oath under the PCO. As a result, CJP, Justice Iftikhar Muhammad Chaudhry together with a 7-member Bench of the Court issued an interim restraint order. The said restraint order was supposed to preclude the Judges of the Supreme Court and the High Courts to make oath under PCO, as it amounted to an unconstitutional act. However, in contravention of the restraint order passed by the
Supreme Court, all the judges were virtually prevented to perform their constitutional functions, and thereafter placed under house arrest.

One of the judges, Justice Abdul Hameed Dogar, made oath under PCO, and eventually General Musharaf installed him in the office of Chief Justice of Pakistan. Four other judges also submitted to the PCO, and therefore they occupied the office of the judges of the apex court.

**Brief Facts Leading to the Validation**

One Tikka Iqbal and Watan Party challenged the legality of the actions taken by the COAS. The then CJP, along with other judges validated the action taken by General Pervaiz Musharaf. This time also, the law of necessity was pressed into service to validate the dictatorial act by the dictator. In brevity, the Proclamation of Emergency along with other ultra vires instruments of the 3rd November, 2007 was validated by the then Supreme Court. To put it in another way round, the 7-member SC bench in Tikka Iqbal case revived the ‘doctrine of necessity’ already buried by the 9-memebr bench of the same court in *Sheikh Liaquat Case*.

**Repercussions of the Case:**

The actions of Nov., 3, 2007, so validated by the Supreme Court, had serious repercussions for the politics in Pakistan. In the wake of the mandate given by the apex court, General Musharaf assumed the Office of President of Pakistan. As a result of general elections in the country, the Parliament and Provincial Assemblies came into being. Moreover, the Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry, and other deposed Judges were restored to the position that they held prior to Nov., 3, 2007.

**Aftermath of the Case:**

In Sindh High Court Bar Association vs. Federation of Pakistan (PLD 2009 SC 879), the validity of the Proclamation of Emergency, 2007, as well as judgments and orders passed by Justice Dogar and other PCO judges were challenged. This case was instituted in 2009 under Article 184 of the Constitution of Pakistan. On 31st July, 2009, the 14-member bench of the Supreme Court headed by CJP, declared unconstitutional the Proclamation of Emergency and other measures taken by General
Musharaf on 3rd Nov., 2007. The court held that the Constitution could not be held in abeyance, and thereby it was an ultra vires act. As a result, all the amendments which were input into the Constitution as well as other statutes were declared to be unconstitutional and null and void. As the said amendments were unconditionally validated by the Dogar Court in Tikka Iqbal Muhammad Khan’s case, therefore, all the instruments and measures including the judgments in Cases titled as Tikka Iqbal Muhammad Khan vs. General Pervaiz Musharaf (PLD 2008 SC 6 and PLD 2008 SC 178) and Review Petition (Tikka Iqbal Muhammad Khan vs. Gen. Pervaiz Musharaf: PLD 2008 SC 615) were set aside, being per incuriam of the law laid down in Zafar Ali Shah Case (PLD 2000 SC 869).

Yet, it might sound interesting to note that Supreme Court in the interest of justice was lenient enough to give protection to the judgements and orders passed by the Justice Dogar court in Cases of the ordinary litigants. All the Ordinances promulgated by the President and the Governors before 3rd Nov. 2007, and from 3rd Nov., 2007 to 15th December, 2007 were directed to be validated by the Parliament and respective legislatures in accordance with the Constitution.

Strangely enough, the same judgement not only gave protection to the 3rd Nov., 2007 Act of Proclamation of Emergency, but it also gave assent to the steps taken thereafter by General Musharaf. This could be a precedent of how one erroneous act reinforced the other wrongful act for mutual continuation in the absence of mutual remediation.48

The above-mentioned cases portray the course adopted by the Superior Court of country to constitutional conundrums. It would not be out of place to say that its role had been to launder egregiously extra constitutional acts of both military and civilian leaders to make them clean and constitutional. It requires considerable judicial creativity, implicit compromises or deals with the military leaders. It adopted the course of least resistance so as to avoid the legal chaos.47 On the other hand it showed its backbone when declared the executive acts extra constitutional eloquently and boldly but too late to do anything.

7.5 Conclusion

The Pakistani Courts in the constitutional cases such as Maulvi Tamiz-ud-Khan, Dosso and others have tried to sort out the conflicting notions of territoriality, nationality, ethnicity, franchise and state-authority but ended to combine them in the Doctrine of Necessity. In Dosso case the same Justices of the Federal Court justified a military coup d’etat by imposing a new centralism on state through the Doctrine of revolutionary legality.

The Superior judiciary cannot itself absolve the responsibility of weakening structure of democratic institutions. But, Mr Dorab Patel, a Judge of the Supreme Court was perhaps, right when he said that, ‘how do you expect five men alone, unsupported by anyone, to declare Martial Law illegal?’ The Supreme judiciary of Pakistan continued using this infamous doctrine to extend immunity to the military dictators till 2007 and even in the year 2015 (report of Judicial Commission).

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50 Newberg, Paula R, *Judging the State Courts and Constitutional Politics in Pakistan*, p 218
CHAPTER 8

CONCLUSION

Pakistan’s political history has had a mélange of constitutional breakdowns, and army coups which left political stability as elusive phenomena in the country. In retrospect, the army dictators resorted to ultra-constitutional tools to assume political control of the government which had serious repercussions on the political horizon. In the light of foregoing constitutional developments, and analysis of the jurisprudential body of information, it might be true to say that constitutional aberrations have always put Pakistani courts into a dicey situation and a strange predicament. Yet the apex courts in Pakistan cannot absolve of the liability when the judges are seen succumbing to the will of the dictator and legitimizing an ultra-constitutional act which otherwise may be deemed ultra vires and void ab-initio.

Before giving results/findings, it seems quite pertinent to briefly discuss and analyse the jurisprudence of the apex judiciary so as to reach some final conclusions.

In order to ascertain as to what extent the application of ‘doctrine of necessity’ by the apex courts has had repercussions in the political arena, it is quite pertinent to briefly analyze the historical jurisprudential legitimization of the ultra-constitutional acts by the superior courts.

Going back to the early days of Pakistan’s political history, the earliest instance is Maulvi Tamizuddin case. The members of the Assembly moved Sindh High Court in the wake of the dissolution of the first Constituent Assembly. Stated in brevity, the Court decided in favor of the legislative supremacy which was a politically progressive view. However, to resolve the political deadlock which ensued as a result of the decision, the Governor General sought for an advisory opinion from the Federal Court in the case of Reference. Chief Justice Munir engaged in a judicial deliberation on the doctrine of necessity, and the court validated the actions of the Governor General by resorting to the principle ‘salus populi suprema lex’. Although this was the first ever use of the doctrine of necessity, it was destined to become an integral part of Pakistan’s jurisprudential history.
In The State v. Dosso, the Court relied on Kelsen’s theory of revolutionary legality. The Supreme Court ruled on the legality of the usurpation of power, while scrutinizing the scope of extra-constitutional power. Hence, the court ruled that the abrogated 1956 Constitution was not governing the country anymore, so the new order was quite legitimate. In the aftermath of the mandate of validity by the Supreme Court, the then military regime drafted a new Constitution for the country.

We can see that in Asma Jilani Case, the Supreme Court was of the view that Kelsen’s thesis on successful revolutions was not a good option to invoke in Pakistan. So, we witness the apex judiciary reversing The State v. Dosso. Now, in Asma Jilani Case, we see the Court relying on the validity of the revolutionary legality doctrine. However, the merits of Asma Jilani Case lie in non-reliance on the doctrine of revolutionary legality, and overruling of Dosso Case.

In Nusrat Bhutto Case, the Supreme Court refused to resurrect Dosso, and ruled that the general’s assumption of power was an act of state necessity which amounted to the welfare of the people. The court also termed the new legal order ‘a phase of constitutional deviation dictated by necessity’. It is noteworthy that the Court gave mandate to the martial law regime to perform all such acts and promulgate laws within the ambit of the doctrine of necessity. The Court also bestowed on the dictatorial regime the power to amend the Constitution.

In the case of Zafar Ali Shah, the Supreme Court gave legitimacy to the army take-over. The army take over was validated by resorting to the doctrine of necessity, and the principle of ‘salus populi suprema lex, as pronounced in the case of Nusrat Bhutto. The apex court gave the COAS three years period to fulfil his agenda, and also granted permission to amend the Constitution. Here Supreme Court seems to have forgotten the history when General Zia was granted the permission to amend the Constitution. Upon having been granted permission to amend the Constitution, General Zia amended as many as sixty-five Articles of the Constitution. So, it was an instance of political amnesia

From the on-going discussion, it can be inferred that the judgments legitimizing the dictatorial regimes manifest lack of faith and credibility in the democratic process. This sort of plight becomes quite visible when courts suggest the
resumption of civilian rule, showing tremendous faith in the dictators. The instance of this sort of situation can be had from the judgment passed by Justice Dogar’s Court in Tikka Iqbal Case.

Not only do such judgments describe Pakistan as a non-democratic state but they also have political repercussions for the country. As a result, our judiciary is seen susceptible to whims and caprices of the military-political establishment.

The purpose of this study was to explore as to what extent the decisions made by the superior judiciary contributed to undermine the democratic institutions in Pakistan. To put the same hypothetically: if the Supreme Judiciary had withstood pressures from the then military dictators/rulers, the democratic institutions would have flourished.

Moreover, the research was also aimed at ascertaining the onus of responsibility of Pakistani politicians in giving Army the mandate to undermine the authority of civil governments. So, the hypothesis framed was: if the politicians during the initial years after the birth of Pakistan had demonstrated maturity, the High Command of Pakistan Army (supported by the Supreme Judiciary) would never have the opportunity to make an ingress and interfere with the working of the civil governments which led to the undermining of the authority of the civil governments, their loss of credibility and the eventual total collapse.

Reflecting on the above-given hypotheses, the research findings seem to develop a nexus or correlation with them. Thereby the specific research findings testify to the fact that superior courts’ refusal to validate ultra-constitutional regimes would have precluded the army take over subsequently, and could improve the political development in the country.

Furthermore, the findings are particularly consistent with the fact that the politically fragile condition in the country almost always provided a fillip to top army brass to take over civilian governments in the country. Yet the civilian governments cannot be held fully responsible for the imposition of the martial laws, and/or proclamation of emergency in the country.

While elucidating the results of the research, the findings can be divided into two categories:
General Findings; and

Specific Findings

- In the category of general findings, it can be pointed out that the doctrine of necessity is an evolutionary process which is aimed at circumventing the prevailing exigencies. Not only does the Anglo-Saxon law support the application of this doctrine, but Islam has also recognized the validity of the acts done under stress of necessity.

- From the literature review, it can be seen that Pakistan is the first ever country to have validated unconstitutional action by the superior judiciary. It can be further pointed out that politicians' tussle brought country to the verge of collapse which invited the Pakistan Army to muddle in the political and civil affairs of country in order to save it from failure. Eventually, the democratic process in the country was marred by such stop-gap constitutional arrangements as LFOs etc.

- Owing to the deteriorating condition of political economy, the army ruled this country for nearly four decades. It has been observed that the military governments were more successful regarding governance, improvement in economy, control of corruption and service delivery to the people as compared to the civilian elected governments.

- Another general finding is that the judicial decisions taken by the supreme court of Pakistan had both positive and negative effects, and thereby they left indelible imprints on the political scenario of Pakistan.

The Kelsen theory under discussion has been misapplied and misinterpreted by apex judiciary in Pakistan. The same observation was made by the Supreme Court in Asma Jilani case. The repercussion of the wrong application of ‘doctrine of necessity’ was that the adventures of usurpers did not stop in the political years to come.
Besides the general findings noted above, the research results specifically indicate the following:

- Historically, whenever the question of the validity and scope of extra constitutional power came up before the apex judiciary, the courts have swung between Kelsen’s theory of state necessity and Hugo Grotius’s concept of legality.

- The reluctance and judicial failures on the part of the apex judiciary to challenge the post-coup scenario have been instrumental to deteriorate the political situation in Pakistan.

- In light of this historical jurisprudential validation of the extra constitutional acts of the various dictatorial regimes in Pakistan, we can say that the institutionalization of dictatorial regimes slackened the power and scope of the apex courts in the country.

- It can be specifically found that apex courts’ refusal to validate ultra-constitutional regimes would have precluded the army take overs subsequently, and could improve the political development in the country. In case of successful coup, the best that the apex courts can do is to utter ‘no’ to legitimacy to the dictatorial act.

Based on the data, scholarly writings, and the chosen cases of the apex courts in Pakistan, it can be seen that the country has witnessed praetorian rule which was established through varied dictatorial regimes. Such authoritarian rules always ushered in country’s political instability, befuddling social and political scenario. Many a coup has been validated by Supreme Court’s questionable jurisprudence.

The use of ‘Doctrine of Necessity’ by the superior judiciary to grant legal cover to the unconstitutional and illegitimate rule and steps by the military men and bureaucrats have had serious repercussions on the political scenario, particularly with reference to the democratic institutions and future of democracy in Pakistan.
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