

**CRITICAL STUDY OF THE FACTORS UNDERMINING  
INDEPENDENCE OF THE SUPERIOR  
JUDICIARY IN PAKISTAN**



**BY**

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## **DEDICATION**

My this research work  
is dedicated to Chief Justice Iftikhar  
Muhammad Chaudhry and other Judges who  
rejected the Proclamation of Emergency and Provisional  
Constitution Order of November 3, 2007 and sacrificed their  
prestigious jobs in a bid to uphold independence of the judiciary;  
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who march on roads and streets, demanding  
restoration of the deposed judges,  
independence of the judiciary  
and rule of law.

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## LIST OF ABBREVIATION

AIR	-----	All India Reports.
CMLA	-----	Chief Martial Law Administrator.
COAS	-----	Chief of Army Staff.
FC	-----	The Federal Court.
FSC	-----	The Federal Shariat Court.
NWFP	-----	North West Frontier Province
PCO	-----	Provisional Constitution Order.
PLD	-----	All Pakistan Legal Decisions.
PLJ	-----	Pakistan Law Journal.
SC	-----	The Supreme Court of Pakistan.
SCMR	-----	The Supreme Court Monthly Reports.
UNO	-----	The United Nations Organization.

## **Chapter I: INTRODUCTION.**

Independence of the judiciary has become a phrase as judiciary without independence is inconceivable. In the words of a jurist, 'independence is divine virtue of a judge'.<sup>1</sup> Judicial independence means a judiciary that impartially and fairly applies the facts of a case to the applicable law; a judge's ability to interpret and apply the laws without fear or favor. The Supreme Court of Pakistan has given a very comprehensive definition to the phrase 'Independence of Judiciary' which states:

- a) That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of law without improper influences, inducements or pressure, direct or indirect, from any quarter or for any reason; and
- b) That the judiciary is independent of the Executive and Legislature, and has jurisdiction, directly or by way of review, over all issues of the judicial nature.<sup>2</sup>

The importance and need of independence of judiciary in modern state can hardly be over emphasized as the role of the court has been changed. In the earlier period of history, the Court was to settle disputes mostly of civil nature between private citizens or to determine the guilt of the persons accused of offences and the punishment to be imposed upon them. One of the essential functions of the modern Court is as the arbiter of disputes between the states and the individuals. Due to the multifaceted function of the government, it is acquiring more and more powers. Acquisition of most powers by any human institution including a government which too operates through a human agency is always connected with the danger of abuse of power. The liberties of the individuals face real danger from the abusing of powers by the government machinery. The universally known quote of Lord Acton,

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<sup>1</sup> M. Dilawar Mahmood: "Independence of Judiciary", PLJ Magazine 1993, P-2.

<sup>2</sup> Govt. of Sindh Vs Sharaf Faridi, PLD 1994, SC – P-105.

“power tends to corrupt and absolute power tends to corrupt absolutely”<sup>3</sup> is true even today as was in past and it applies to every nation, every government and every society. It, therefore, has become essential that most of the government’s power in modern society must be cushioned with safeguards for an individual’s rights.

Consequently the judiciary must be vested with power to ensure the protection of those rights of the individuals and to see that the powers by the government are not abused and such powers are exercised in accordance with the laws enacted for the purpose. As Alexander Hamilton pointed out limitation on government “can be preserved in practice in no other way than through the medium of courts of justice.....without this all reservations of particular rights or privileges would amount to nothing”.<sup>4</sup> This vital jurisdiction of the court can effectively and properly be exercised by an independent judiciary. Independence of judiciary has now become to be accepted as an essential trait of free democratic society. A former judge of Indian Supreme Court has very well said, “independence of the judiciary is the most vital and indispensable condition for keeping alive and meaningful the rights enshrined in the constitution. Unless you have independent courts, you might as well erase and repeal that part of the constitution which provides for fundamental rights.” He further elaborates, “Rule of law in its turn depends upon the existence of independent courts. It is indeed difficult to visualize a truly democratic state which does not provide for the independence of judiciary, for it is the presence of an independent judiciary which guarantees the rule of law and ensures that the rights of the minorities and those in opposition, guaranteed by the constitution, shall not be trampled upon by the majority and those in seats of power without such independence, the courts would

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<sup>3</sup> [www.phrases.org.uk/meanings/288200.html](http://www.phrases.org.uk/meanings/288200.html)

<sup>4</sup> Alexander Hamilton ‘The Federalist No: 78’ quoted by the Hon Judge (Retd) Clifford Wallace, ‘Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives’ California Western International Law Journal, 28 p-341, 1998.

not enjoy or deserve to enjoy the confidence and faith of the people”.<sup>5</sup> Justice Clifford Wallace is of the same view that independence of judiciary is vital for preserving a system of liberty and rule of law.<sup>6</sup>

Moreover, judicial independence has been recognized as a universal human right: “Every one is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in determination of his rights and obligations and of any criminal charge against him.”<sup>7</sup> The seventh UN Congress on the prevention of crime and the treatment of offenders, held at Milan in 1985, formulated and adopted 20 Basic Principles to assist the member states in their task of securing and promoting the independence of the judiciary. These Basic Principles on Independence of Judiciary were endorsed by the General Assembly Resolutions 40/146 of December 13, 1985. The first principle declares that “the independence of the judiciary shall be guaranteed by the state and enshrined in the constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary”.<sup>8</sup> Article 14 (1) of International Convention on Civil and Political Rights reiterates the independence of the judiciary in these words: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.<sup>9</sup>

International Commission of Justices emphasized on the principle of independence of judiciary in its New Delhi deliberations in January 1959, by stating that “an independent judiciary even though appointed by the Head of the State, is an indispensable requisite of a free society under

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<sup>5</sup> Justice (Retd) H.R. Khanna, ‘Judiciary in India and Judicial Process’ pp- 19-20.

<sup>6</sup> Supra note 52.

<sup>7</sup> Universal Declaration of Human Rights 1948, Art. 10 at [www.un.org/overview/rights.html](http://www.un.org/overview/rights.html)

<sup>8</sup> UNO’s Basic Principles on the Independence of Judiciary at [www.unchr.ch/html](http://www.unchr.ch/html)

<sup>9</sup> At [www.unchr.ch/html/menu3/b/a\\_opt.htm](http://www.unchr.ch/html/menu3/b/a_opt.htm)

the rule of law”.<sup>10</sup> So an independent and impartial judiciary is universally recognized as a basic requirement for the establishment of the Rule of Law, an inevitable and inseparable ingredient of a democratic and civilized way of life. It is, now, not only domestic requirement but an international obligation also of the governments to provide and preserve the independence of judiciary.

Independent judiciary is not only essential for protection of fundamental rights but it is in itself a fundamental right. “The right of access to impartial and independent court/ tribunal is a fundamental right of every citizen. The existence of this right is dependent on the independence of judiciary” was the view of the Full Bench of the Sindh High Court in the case of Sharaf Faridi,<sup>11</sup> which was upheld by the Supreme Court of Pakistan in the Al-Jehad Trust case,<sup>12</sup> commonly known as “Judges Case”.

Thus the need for judicial independence is not for judges or the judiciary per se, but for the people, so that the Rule of Law is ensured, the rights and liberties guaranteed by law are protected, the abuse or misuse of powers by the government machinery is checked, political victimization is disallowed and so on. It is a fundamental principle that no judiciary can function effectively unless their tenures and conditions of services, their salaries and privileges are guaranteed either by constitution or statute. To check unauthorized exercise of powers effectively judges must be beyond the reach of those who would transfer or remove them because of their decision. Similarly judges must have legal immunity for their judicial action being called in question by an authority other than a judicial authority.

An independent judiciary is sine qua non for any democratic polity. It is, nevertheless, true that judicial independence has come to be

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<sup>10</sup> Quoted by Justice (Retd) Anwar-ul-Haq, ‘Revolutionary Legality in Pakistan’, p-105.

<sup>11</sup> PLD 1989 Karachi, P- 404.

<sup>12</sup> PLD 1996 – SC- P-324.

recognized as essential for democratic development and stability.<sup>13</sup> Constitutional supremacy presupposes the existence of a strong neutral organ, which would be able to prevent unconstitutional onslaught by the executive and legislature. When democracy is in danger or the executive tramples rule of law, then judiciary, people expects, will stand with vigorous effort to save democracy and rule of law though the deposed executive or the dissolved legislature do not come forward.

The judiciary in Pakistan does not have an edifying history. Most jurists agree that its weak-kneed responses to the excesses of the executive early in the country's history have gone a long way in impeding the progress of democracy in Pakistan as well as erosion of the people's confidence in the judiciary. Its crucial judgments only tended to serve the despots and the usurpers as license for even worse excesses.

In the words of Hamid Khan, "the independence of the judiciary has been a myth rather than a reality. Successive governments and members of the judiciary have caused incalculable harm to the institution. The role of the judiciary has at times been relegated from that of an organ of the state to that of a department of government. It has been the object of manipulation by the executive and is perceived by the people as docile."<sup>14</sup>

The main issue to be critically examined by this study is why the independence of judiciary could not be "fully secured" as envisaged by the Objectives Resolution of 1949 and what are the factors/actors responsible for keeping the judiciary under pressure/influence, in violation of the Objectives Resolution? The Objectives Resolution of 1949 that has been made a substantive part of the Constitution of Pakistan by article 2-A,<sup>15</sup> fully secures the independence of the judiciary. But the Chief Justice Sajjad Ali Shah feels no hesitation in saying that "in Pakistan the Judiciary always remained under the pressure of the

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<sup>13</sup> Hina Jilani: "Human Rights and Democratic Development in Pakistan." P-77.

<sup>14</sup> Hamid Khan, "Constitutional and Political History of Pakistan" P- 876.

<sup>15</sup> The Objectives Resolution of 1949 remained Preamble to all Constitutions of Pakistan. It was made a substantive part of the present Constitution by General Zia, adding a new article 2-A by Presidential Order no: 14 of 1985.( See the Constitution of Pakistan 1973 by Justice ® M. Munir. P- 168)

Executive and the Government.”<sup>16</sup> Hina Jilani, while discussing the judicial system of Pakistan, has come to the conclusion that “failure of the judicial system to dispense justice has eroded respect for the rule of law. This has led to a tendency in the general public to circumvent the law. The perception that the judicial system does not work has become common, and is used to justify excess by the executive branch of the government.”<sup>17</sup>

The public confidence in the independence of judiciary is perceived by many to be in dangerous state of decline, so much so that once the President of Supreme Court Bar Association showed his lack of confidence even in the Superior Judiciary of Pakistan. In an unprecedented move, the then President of Supreme Court Bar Association, Hamid Khan, appeared before the apex court of Pakistan (Supreme Court) in the review petition relating to the appointment of Judges in the Supreme Court and filed a “Statement at Bar”. This was filed on behalf of the Supreme Court Bar Association and also represented the views of other bar associations, including the Pakistan Bar Council. The President of the Bar submitted that they had no confidence in the independence of the Supreme Court in its present composition and therefore the association refused to argue the review petition before the court.<sup>18</sup>

No country can realize the ideal of stable and prosperous polity without an efficient and independent judiciary. Pakistan has been lacking in this area since its independence. The role of judiciary in Pakistan in up holding the Constitution and rule of law has not been impressive. That is why there is not only frequent violation of the constitution but general decline in the integrity and performance of the judiciary, which ultimately affect every segment of the society. A critical analysis of the dynamics of

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<sup>16</sup> Chief Justice @ Sajjad Ali Shah: “Law Courts in a Glass House” P- 686.

<sup>17</sup> Hina Jilani: “Human Rights and Democratic Development in Pakistan.” P-156.

<sup>18</sup> “Dawn” November 7, 2002

the judiciary will be helpful in identifying the various incidents and factors and their consequences for the independence of the judiciary.

This study is limited to examine the independence of superior judiciary in Pakistan which includes the Supreme Court, the High Courts and the Federal Shariat Court. Though district courts (lower courts) are excluded from this study, yet where a reference to them seems necessary, proper attention is given to them.

The statement that ‘the roots of the present lie deep in the past’ is also true in the case of the development of the judicial system of Pakistan. The judicial history of Pakistan is full of surprising and shocking events. That is why chapter II of the Thesis tells about the historical background of the judicial system and independence of judiciary in Pakistan. This chapter covers the judicial history since the foundation of the judicial system in pre-partitioned India by the British till December 2007. Though this research is limited to study the factors undermining independence of the judiciary in Pakistan, yet all relevant issues are referred to in the historical background. This chapter briefly narrates the development of the judicial organization, making and unmaking of several constitutions of Pakistan, imposition of martial laws, transition periods of democracy, dissolutions of assemblies, extending and curtailing the judicial powers of the courts, appointment and removal of judges of the superior courts etc.

Chapter III describes the organization of the judiciary in Pakistan. Though this research is limited to superior judiciary, yet the whole organization of the judicial system is provided in this chapter. The powers and jurisdictions of the various courts are discussed in chapter IV.

One jurist says “when the integrity and independence of the judiciary are at stake, all other questions become unimportant. When the sappers and miners are at work, undermining the foundations of our judicial structure, it is idle to discuss questions of details of construction or reconstruction of the edifice.”<sup>19</sup> The main theme of this research is to

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<sup>19</sup> Muhammad Anum Saleem: “Saga of Judicial Independence in Pakistan” PLD Journal 2003. P- 41.

critically discuss and examine all those factors which undermine the independence of the judiciary in Pakistan. Four chapters of this Thesis (from chapter v to viii) deal with those factors/actors which made inroads in the independence of the judiciary. This research covers only those factors which are detrimental to the independence of the judiciary. There are certain other factors like strong public opinion, independent and responsible media etc which may be helpful in improving and maintaining independence of the judiciary but they are not included in this study. Hence such factors are not detrimental to the independence of the judiciary; so they are excluded.

The factors affecting the independence of the judiciary may be classified into four groups, namely structural factors affecting the independence of the Judiciary; judicial commitment to independence of the judiciary; role of the lawyers in protecting and preserving the independence of judiciary; and the impact of the executive on the independence of judiciary. Chapter V examines the structure of the judiciary, the relevant provisions of the Constitution, the procedure of the judges' appointment as well as their removal, legal protection and immunity available to judges and the process of judicial accountability in Pakistan. Chapter VI discusses the judges' commitment to independence of the judiciary in Pakistan. This study includes role of the judiciary during constitutional and legal crisis of Pakistan, collective role of the judges, integrity and character of the individual judges. Chapter VII studies the culture of the legal profession and its impact on the independence of the judiciary. This study includes the general relation between bench and bar, importance of bar for judicial independence, Pakistani bar's role in protecting and preserving independence of judiciary in Pakistan

The powerful executive is always the biggest impediment in the way of achieving judicial independence in Pakistan. The impact of the executive, both military and civilian governments, on the independence of

the judiciary is examined in chapter VIII which covers several aspects of this topic such as the executive role in the appointment and removal of the judges, harassment and intimidation of the judges, executive's interference in the affairs of the judiciary, manipulation of the judges for getting favorable decisions, curtailing the powers and jurisdictions of the courts, the executive's dishonor and disregard for the judiciary etc.

In the concluding chapter IX, on the basis of this study, the impediments in the way of independent judiciary are identified, the weaknesses in the judicial system are pointed out and those constitutional provisions and other relevant laws which are detrimental to judicial independence are highlighted. Recommendations are presented to make the "independence of the Judiciary fully secured" as envisaged by the Objectives Resolution 1949.

## **Chapter II: PAKISTAN'S JUDICIAL HISTORY.**

The existing judicial system of Pakistan has evolved over a long period of time. The legal history of Pakistan can conveniently be divided under four periods - Hindu era, Muslim period including the Mughal dynasty, British colonial period and post independence period. The system has evolved through a process of reform and development, passing through four important stages of historical development, namely, Hindu Kingdom, Muslim Rule, British Colonial Rule and the partition of India.

The personal laws of Hindus and Muslims as well as customary law have been developed in the first two stages, i.e. Hindu period and Muslim era, whereas other laws enforced in Pakistan, particularly procedural laws and organization/structure of the judicial system enacted in the third stage, namely, the British colonial period. That is why this third period will be discussed in details. In the fourth period, that is, post independence period, Pakistan continued to utilize the judicial system practiced in the British colonial period without any substantial change or major disruption, indeed making amendments/changes in the jurisdiction and procedural laws as per needs/requirements of the time.

Although the present study is to discuss and examine the several factors detrimental to judicial independence but in this chapter, for better appreciation of the issue, other aspects of the judiciary such as organizational set up and powers of the judiciary during the various phases of Pakistan's constitutional history are also discussed. The first two periods i.e. The Hindu era and the Muslim period are skipped over and the judicial history of Pakistan is started from the middle of British Rulers when they started establishing the judicial system in India which Pakistan inherited at the time of independence.

## **2.1: THE BRITISH PERIOD.**

When the English people came to India they found two distinct legal systems<sup>1</sup> working at the same time. The British did not bring about abrupt and material changes in the judicial system which had already been established by the Mughals. Gradual changes were made by the British aimed at making improvements in the existing judicial system as necessitated by the changed circumstances without destroying its basic structure and pattern.<sup>2</sup> According to Justice Khanna, even in procedural law which was codified by the foreign rulers in India, the basic principles of fair and impartial trial, which were well known to their predecessors, were adhered to. In the matter of substantive law also the British did not wholly bring in the Western concepts. The personal law of various communities living in India remained the determining factor in questions like succession, marriage, inheritance, religious matters etc. New laws were enacted to provide for matters which were either not fully covered by the indigenous law or where such laws were not clearly defined or ascertainable or otherwise were not acceptable to the modern way of thinking.<sup>3</sup> However the system of the administration of justice and laws as we have today is the product of well thought out efforts on the part of the British Government.

English people came to India in the beginning of 17<sup>th</sup> century as a body of trading merchants. They formed East India Company “to trade into and from the East India”.<sup>4</sup> The aims of the Company at the beginning were essentially commercial but the subsequent developments changed the character of the Company from purely a trading concern into a territorial power. Charter after charter was granted by the British Monarch to the

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<sup>1</sup> Hindu Judicial System in the areas under the control of Hindu ruler and Muslim Judicial System in the areas ruled by Muslims.

<sup>2</sup> See for details the Report of Pakistan Law Reforms Commission 1967 – 70.

<sup>3</sup> Justice (Retd) H. R. Khanna, “The Judicial System” P-14.

<sup>4</sup> V.D. Kulshreshtha, “Landmarks in Indian Legal and Constitutional History” 7<sup>th</sup> Ed P 30.

Company and each subsequent charter further expended the powers and jurisdiction of the Company.

After making several experiments to improve the justice system in India it was in 1772 that the Governor of Bengal Warren Hastings introduced a new system of courts known as Adalat System in Bengal. It was basically this system in India on which the present judicial systems of Pakistan and India stand.

Under the judicial plan of 1772 the three provinces Bengal, Bihar and Orissa were divided into Districts and each District had an English officer called the Collector.<sup>5</sup> The main function of the Collector was to supervise and control the collection of revenue. Two types of courts were established at each District (i) the *Diwani Adalat* that is a civil court and (ii) the *Faujdari Adalat*<sup>6</sup> that is a criminal court. The Collector presided over the *Diwani Adalat* which was empowered to decide all civil cases relating to real and personal property, marriage, inheritance, partnership, rent, caste and debts. The *Diwani Adalat* was to decide all civil cases according to the personal laws of Muslims and Hindus. The *Faujdari Adalat* was to hold the trials of all criminal cases. The *Qazi*<sup>7</sup> and *Mufti*<sup>8</sup> of the District with the help of two *Moulvis*<sup>9</sup> were to apply and expound the Muslim law in all criminal cases. The Muslim criminal law was still the law of the land. The *Qazi* and *Mufti* were the presiding officers of the *Faujdari Adalat*. The Collector was authorized to supervise the working of the courts.

Superior courts were established at the seat of government-Calcutta. They were called *Sadar Diwani Adalat* (superior civil court) and *Sadar Faujdari* (also called *Nizamat*) *Adalat* (superior criminal court).

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<sup>5</sup> Even today the office of the Collector at the District exists in Pakistan.

<sup>6</sup> The terminology of the *Diwani Adalat* and the *Faujdari Adalat* is still in practice in Pakistan for civil court and criminal court respectively, though it does not exist in the law books. Similarly civil case and criminal case are also termed as Diwani case and Faujdari case respectively by the common people as well as by the advocates of lower courts.

<sup>7</sup> *Qazi* is an Arabic word which means Judge.

<sup>8</sup> *Mufti* means a scholar of Islamic law (Shariat) who has the authority to interpret the Islamic law.

<sup>9</sup> *Moulvi* means a scholar of Islamic theology.

The *Sadar Diwani Adalat* consisted of the Governor and members of the council and heard appeals from the District *Diwani Adalat*. The *Sadar Nizamat Adalat* consisted of an Indian judge known as the *Darogha-i-Adalat* who was assisted by the Chief *Qazi*, Chief *Mufti* and three *Moulvis*. These officers were formally appointed by the Nawab on the advice of the English Governor. This court was to hear appeals from the District *Faujdari Adalat* and to control their working. The court revised important proceedings of the District *Faujdari Adalat*. The District *Faujdari Adalat* had no power to pass capital punishment without the approval of the *Sadar Nizamat Adalat*.

The scheme of 1772, though it had many defects,<sup>10</sup> was the first of its kind for the administration of justice within the frame work of the country. It provided for dividing the jurisdiction in civil and criminal cases. The judicial plan 1772 started the beginning of the new era of the Anglo-Indian law that gradually developed.

During the interval period between the establishment of Adalat System in 1772 and the Indian High Courts Act 1861 many reforms were carried out to make the Adalat System more workable. The criminal courts the *Faujdari Adalat* were brought under the control of the English authorities and the Muslim law of crime was entirely changed through regulations of the Company's government. It was made suitable to serve the British notion of criminal justice.

A significant point of this period (1772-1861) was that two distinct judicial systems existed. The English courts at the three presidency towns (Bombay, Calcutta and Madras) and the Adalat System in the mofussil area. The English courts derived their authority from the British Parliament and the Adalat courts from the local laws called regulations or Acts of the Company. The laws applicable to these two sets of courts were also different. The Supreme Court (the English court) applied English law

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<sup>10</sup> See for detail V.D. Kulshreshtha, "Landmarks in Indian Legal and Constitutional History" 7<sup>th</sup> Ed. Pp-80-81

whereas the Company's courts applied regulations of the government, personal laws of the Indians and Muslim criminal laws. English law was not applied by the Company's courts.

Efforts were made to unite the two sets of courts and to introduce basic uniformity in the laws according to which justice was administered. As stated earlier the English courts and the Company's courts were applying different laws. To achieve this objective the British parliament passed an act namely the Charter Act of 1833. It was one of the most important charters which played an important role in shaping the future course of the legislative and judicial development of India.<sup>11</sup> The Act of 1833 established an All India Legislature with general and wide powers to legislate. The Governor General at Calcutta was made the Governor General of India.

Meanwhile certain important political and historical events took place. In 1857 the Indians fought the first war of their independence. The Company's forces supported by Royal Forces succeeded in defeating the freedom fighters. The Company won the battle but lost the Empire. In 1858, the Queen Victoria took over the administration of the Indian government and the East India Company was abolished. The Crown's assumption of direct responsibility of the government of India by the Crown made the problem of uniting the two sets of courts much easier. As stated earlier uniform codes were passed and the next step was to bring uniformity in the administration of justice. The object was achieved by the Indian High Courts Act of 1861. The two distinct systems of courts were merged under the Indian High Courts Act of 1861. The Act empowered the Crown to establish by Letters Patent, High Court at Calcutta, Madras and Bombay abolishing the Supreme Courts and the courts of *Sadar Diwani Adalat* and *Sadar Nizamat (Faujdari) Adalat*. Each High Court was empowered to have supervision over all courts subject to its appellate jurisdiction. The High Courts were given both original and

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<sup>11</sup> V.D. Kulshreshtha, "Landmarks in Indian Legal and Constitutional History" 7<sup>th</sup> Ed. P-155

appellate jurisdiction in civil as well as in criminal matters. The High Court was also given powers to call for returns, to transfer any suit or appeal from one court to another and to make general rules. An appeal in any matter not criminal matter from the decision of the High Court was allowed to the Privy Council in London provided that the value of the issue was not less than Rs. 10,000/-. The Act of 1861 also provided for number of judges, their qualifications, their appointment and their tenure. The judges were appointed by the English Crown and held office during the Crown's pleasure which was detrimental to the independence of the judiciary.

As the English colony in India expanded and new territories came under the control of the English Government with passage of time, more High Courts were established by the Crown. High Court at Agra which shifted to Allahabad in 1875, High Court at Patna, High Court at Lahore and High Court at Nagpur were established in the year of 1865, 1916, 1919 and 1936 respectively.

The organization and jurisdictions of the lower subordinate judiciary were provided in the codes. The principal classification of criminal courts under the criminal procedure code of 1882 was the following:

- a) The Court of Session having both original and appellate jurisdiction.
- b) The court of Presidency Magistrate exercising original and appellate jurisdiction.
- c) The Courts of Magistrate First, Second and Third class having original jurisdiction.

The CrPC (Criminal Procedure Code) of 1882 was replaced by CrPC of 1898.<sup>12</sup> The code of 1898 also retained the above organization of the subordinate criminal courts.

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<sup>12</sup> The CrPC of 1898 is still in practice in Pakistan and India.

The Civil Procedure Code (CPC) of 1908<sup>13</sup> replaced all the previous codes and regulations relating to civil procedure. The principal civil courts under the code comprised of: (a) The Court of District Judge (b) the Court of Additional District Judge (c) the Court of Civil Judge First, Second and Third class (d) the Court of Munsif and (e) in some cities Small Cause Courts also existed.

Various judicial and Constitutional Acts were enacted but the judicial set up as discussed above remained the same without any distinct change. As already stated the highest court of appeal in the British India was the High Court. An aggrieved party from the decision/order of the High Court had no forum of appeal in India. Appeal against High Court was allowed - not in criminal case- to the Judicial Committee of the Privy Council. This opportunity of appeal was rarely exercised by the Indians due to the high cost of litigation, long distance and delay in the disposal of appeals. The creation of Court of Appeal in India against the judgment of High Court was a long standing demand of the Indians. The British Parliament enacted the Government of India Act 1935 which provided for the establishment of the Federal Court of India.

Under the Government of India Act 1935 the Federal Court was given three kinds of jurisdictions namely original, appellate and advisory. Original jurisdiction of the Federal Court was confined to disputes between the Federation and Province/Federated States or between Provinces/Federated States.<sup>14</sup> Section 205 of the Government of India Act 1935 made provision for an appeal to the Federal Courts from any judgment, decree or final order of a High Court if the High Court certified that the case involved a substantial question of law. Section 213 of the Act of 1935 empowered the Federal Court to give advisory opinion to the Governor General.

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<sup>13</sup> The same CPC of 1908 was adopted by Pakistan Legislative Assembly after Independence and is still in practice.

<sup>14</sup> See for detail the Government of India Act 1935, Section 204.

The Act 1935 retained all the High Courts already established and working. The judges of the High Court and the Federal Court were appointed by the British Monarch. Their salaries, appointment, removal and tenure of their office as well as the original and appellate jurisdiction of the High Courts and the Federal Court were provided by the Act in detail. The salaries of the judges were fixed by the Act itself and were charged on the consolidated fund of India.

The judges could only be removed for misbehavior or infirmity of mind or body reported by the Judicial Committee of the Privy Council on a reference by his Majesty.<sup>15</sup> This gave security of tenure to the judges and it was a big step forward towards the independence of Judiciary.

Sections 254, 255 and 256 of Act 1935 provided the provisions for the appointment, posting, promotion, control and supervision of the subordinate judiciary. The District Judge was to be appointed by the Governor of the Province, exercising his individual judgment and the High Court was to be consulted in this regard before the recommendation was to be submitted to the Governor. The Governor of each Province was, after consultation with the Provincial Public Service Commission and the High Court, to make rules regarding qualifications for the persons to be appointed in the subordinate civil judiciary and the Provincial Public Service Commission was to hold examinations for that purpose.

The same structure of the judicature continued up to August 15, 1947, the date on which independence was granted to British India.

## **2.2. POST INDEPENDENCE PERIOD:**

The Indian Independence Act 1947 provided for the partition of India and established two independent dominions to be known as India and Pakistan with effect from 15th August 1947. Until such time that Constitution was framed by the Constituent Assembly of Pakistan, the

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<sup>15</sup> See Sections 200,201,220 and 221 of the Act 1935.

country (Pakistan) was to be governed by the Government of India Act 1935.<sup>16</sup> Section 18 of the Indian Independence Act 1947 made it clear that all laws enforceable in the pre partition India would continue as valid laws for the new dominions subject to the adaptation and any amendments by their respective legislature according to their requirements and circumstances.

Pakistan adopted the Government of India Act 1935 as its Provisional Constitution.<sup>17</sup> The government machinery including the Judicature remained more or less the same. Thus Pakistan inherited the well organized judicial set up from the British. The Federal Court of India was re-constituted under the Federal Court Order 1947.<sup>18</sup> A Federal Court of Pakistan was established in 1949 and was to be deemed to have been established under the Government of India Act 1935. The powers and jurisdiction of the Federal Court of Pakistan remained basically the same except for the alteration warranted by the new Constitutional and legal position of the country, for example the words “India” and “His Majesty” were replaced by Pakistan and Governor General.

As already stated the judicature remained more or less the same as it was before the partition in 1947. So Pakistan inherited the High Court at Lahore for Punjab province, the Chief Court at Karachi for Sindh province and Judicial Commissioners for North West Frontier Province (NWFP) and Baluchistan province. A new High Court<sup>19</sup> for East Bengal<sup>20</sup> was set up at Dacca.

The Legislature of Pakistan passed the Privy Council (Abolition of Jurisdiction) Act 1950. This Act abolished the appellate jurisdiction of

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<sup>16</sup> The Indian Independence Act 1947, Section 8.

<sup>17</sup> The Pakistan (Provisional Constitution) Order, 1947.

<sup>18</sup> Governor General Order 3, 1947.

<sup>19</sup> The High Court of pre-partitioned Bengal was functioning at Calcutta which became part of India. Hence a new High Court was set up under the High Court (Bengal) Order 1947.

<sup>20</sup> The Province of Bengal in British India was partitioned by Indian Independence Act 1947, into two provinces, namely West Bengal and East Bengal. East Bengal became a part of Pakistan. Its name was changed into East Pakistan in 1955.

the Privy Council.<sup>21</sup> Consequently all pending appellate cases were transferred to the Federal Court. Thus it became the highest court of appeal in Pakistan in place of the Privy Council. It also retained its original, appellate and advisory jurisdiction of the pre-independence days.

Pakistan could frame its own constitution in 1956 after nine long years. It came into force on March 23, 1956 commonly known as the Constitution of 1956.

### **2.2.1: The Constitution of Pakistan 1956.**

The Constitution of 1956 was framed on the model of the Government of India Act of 1935 and the greater part of it consisted of provisions similar to those contained in that Act. There were, however, some significant differences between the two documents. As for jurisdictions and powers of the courts in Pakistan, the Constitution of 1956 made no fundamental change in the existing judicial system. The Federal Court became the Supreme Court at the apex of the hierarchy of the courts with one High Court in each of the two provinces of the country.

The Constitution of 1956 however departed from the principle of parliamentary supremacy which existed in England and accepted the principle of judicial review. The Supreme Court was entrusted with the specific power to adjudicate on the interpretation of the Constitution and to enforce the fundamental rights. The Constitution was made the supreme law of the land and the judiciary was made the guardian of the Constitution. The judicial review power was available to the Supreme Court under the Constitution of 1956 in addition to its original appellate and advisory jurisdictions.

Under the Constitution of 1956 there were two High Courts - High Court for East Pakistan and High Court for West Pakistan. The High Court

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<sup>21</sup> The Privy Council possessed only appellate jurisdiction.

for the province of East Pakistan (former East Bengal) was constituted immediately after the creation of Pakistan.<sup>22</sup> The High Court for West Pakistan<sup>23</sup> was established after the unification of the various units of West Pakistan into a single province in 1955.<sup>24</sup> The West Pakistan High Court created under the pre-Constitutional instrument was then to be deemed as the High Court of West Pakistan under the Constitution.

The jurisdictions and powers of the two High Courts under the pre-existing law which includes “Letters Patent” of a High Court were kept alive and continued under article 224 of the Constitution of 1956. The Constitution conferred only two additional powers on the High Courts:

- a) power of the High Court to issue certain writs which was introduced in July 1954, was retained under Article 170 of the Constitution and
- b) the power of the High Courts to transfer cases to itself from subordinate courts involving a substantial question of law as to the interpretation of the Constitution (Article 171).

Each High Court was given superintendence and control over all courts subject to its appellate or revision jurisdiction. High Courts were also authorized to make general rules and to prescribe forms for regulating the practices and procedure of such courts.<sup>25</sup> The High Court in the exercise of these powers virtually became a court of fundamental importance.

Independence of the judiciary was sought by incorporating similar provisions as were found in the Government of India Act 1935. The salaries of the Supreme Court and High Court Judges were fixed by the Constitution itself.<sup>26</sup> A Judge of the Supreme Court could hold office until the age of 65 years<sup>27</sup> and that of the High Court until the age of 60

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<sup>22</sup> See the High Court (Bengal) Order 1947, dated August 11, 1947.

<sup>23</sup> The Establishment of West Pakistan High Court Order, 1955.

<sup>24</sup> Under the Establishment of West Pakistan Act, 1955.

<sup>25</sup> See Third Schedule to the Constitution 1956.

<sup>26</sup> See Third Schedule to the Constitution 1956.

<sup>27</sup> The Constitution 1956, Art.150

years.<sup>28</sup> A Judge of the Supreme Court could only be removed on a motion in the National Assembly and such a motion could only be based on proved misbehavior or bodily or mental infirmity and could only be passed by a two third majority.<sup>29</sup> Similarly the remunerations and conditions of service of the judges of the Supreme Court and of the High Courts could not be altered to their disadvantage after appointment and their official conduct could not be discussed in any legislature except when a judge was to be removed.<sup>30</sup> A High Court judge could be removed on the same ground as a judge of the Supreme Court but after enquiry and report by the Supreme Court on reference being made to it by the President.<sup>31</sup>

Unlike the Government of India Act 1935 which had made special provisions with regard to judicial officers of the subordinate judiciary,<sup>32</sup> the Constitution of 1956 did not make any special provision for subordinate judiciary. It appeared that all these matters were to be governed by ordinary law to be enacted for the purpose by the National and Provincial Legislatures, and until these laws were so made the conditions of subordinate judicial service were to be regulated by pre-Constitutional legislative provisions.<sup>33</sup>

The 1956 constitution survived only a period of two and half years and in October 1958, it was abrogated.

### **2.2.2: First Martial Law of 1958:**

On October 7, 1958 the President of Pakistan Iskandar Mirza by issuing a Proclamation abrogated the Constitution, dismissed the Federal and Provincial Governments, dissolved the Central and Provincial

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<sup>28</sup> Ibid, Art. 166.

<sup>29</sup> Ibid, Art. 151

<sup>30</sup> Ibid, Art. 175.

<sup>31</sup> Ibid, Art. 169.

<sup>32</sup> See Sections 253, 254, 255 and 254 of the Act 1935.

<sup>33</sup> The Constitution 1956, Art.232.

Legislatures, banned all political activities placed the whole country under Martial Law and appointed General Muhammad Ayub Khan as the Chief Martial Law Administrator. Thus Pakistan entered into a new phase of its extra constitutional period.

Three days after the Proclamation, the President promulgated the Laws (Continuance in Force) Order 1958, the general effect of which was the restoration of law in force before the Proclamation, of the jurisdiction of all courts including the Supreme Court and the High Courts, and of other public authorities. The Order 1958 further directed that the country was to be governed as nearly as might be in accordance with the provisions of the late Constitution.

The Laws (Continuance in Force) Order 1958 which was the principal constitutional document for the period of Martial Law provided that subject to the Martial Law Regulations and Orders, all courts would continue in being and would exercise the same powers and jurisdictions as before but they could not challenge the martial law authorities.<sup>34</sup> No court in Pakistan could call in question the Proclamation, any order made in pursuance of the Proclamation, any Martial Law Order or Regulations or any finding, judgment or order of a Military Court.<sup>35</sup>

Military Courts of criminal jurisdiction were set up by Martial Law Regulation No: 1-A. These courts were to be parallel to the existing courts in the country. The Military Courts were empowered to punish any persons for the violation of Martial Law Regulations or Orders and also for offences under ordinary law. Similar powers were conferred on the ordinary criminal courts as well.

Elaborate provisions were made for the trial of offences under the Martial Law Regulations barring appeals and ousting the jurisdiction of all courts including the Supreme Court and High Courts from calling in question the proceedings of the Military Courts. Revision of sentences

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<sup>34</sup> The Laws (Continuance in Force) Order 1958 Para 1.

<sup>35</sup> Ibid, Para 3.

imposed by Magistrates and confirmation of sentences imposed by the Special Military Courts were provided.<sup>36</sup>

A new Constitution was devised by the military government under the supervision of the Chief Martial Law Administrator cum President Ayub Khan, which was promulgated on March 1, 1962, to enable elections to the assemblies to be held and other essential things to be done in this behalf. The whole Constitution came into force on June 8, 1962 when the first meeting of the National Assembly was held at Rawalpindi and the martial law was also lifted on the same date.

### **2.2.3: The Constitution of Pakistan 1962:**

The Constitution of 1962 made very few changes to the judiciary. In certain cases powers of the existing courts were curtailed. The jurisdiction of the Supreme Court was less extensive than under the 1956 Constitution. It had lost its former original jurisdiction to issue writs to protect the fundamental rights. Most of the fundamental rights guaranteed under the 1956 Constitution were maintained in the 1962 Constitution as the “Principles of Law-Making”. These “Principles of Law-making” were, in the words of G.W. Chaudhry, merely pious declaration.<sup>37</sup> These “Principles of Law-making” were not justiciable. The Supreme Court had appellate jurisdiction in some matters; its original jurisdiction was restricted to settling disputes between the governments. It had an advisory jurisdiction on matters referred to it by the President for its opinion.

The “judicial review” power was denied to the judiciary under the 1962 Constitution. No law could be challenged in a court on the grounds that the legislature by which it was made lacked the necessary powers. Art 133 of the Constitution laid down that the responsibility for deciding whether a legislature had power under the Constitution to make law was

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<sup>36</sup> Martial Law Regulation No: 61.

<sup>37</sup> G.W. Chaudhry, “The Constitutional Developments in Pakistan”, P- 240.

that of the legislature itself. This was an acceptance of the principle of the parliamentary supremacy as exists in UK and it was a departure from the system of judicial review that exists in USA. Under the Provisional Constitution and the 1956 Constitution, the judiciary had power to adjudicate upon the wires of the legislature. The 1962 Constitution was amended in March 1963. This first constitutional amendment, however, greatly changed this position. The judicial review power was restored and the fundamental rights were made justiciable; even the court was empowered to declare any law passed by any legislature null and void on the ground that the law in question was repugnant to any fundamental right. Thus the amendment sought to make the courts rather than the legislature the custodian of the Constitution and fundamental rights. The judiciary was then rested with full power to pass judgment over the wires of the legislature. Judicial control over the executive from the inception of 1962 Constitution had been fully maintained.

The method of removal of judges of the superior courts was however made different from that of 1956 Constitution. Under the 1962 Constitution the President was to appoint a council to be known as the Supreme Judicial Council consisting of the Chief Justice and two most senior judges of the Supreme Court and the Chief Justice of each High Court. If on information received from the Supreme Judicial Council or from other sources the President was of the opinion that a judge of the Supreme Court or of a High Court might be incapable of performing the duties of his office by reason of physical or mental incapacity or might have been guilty of gross misconduct, he was to direct the Council to enquire further into the matter and to remove the judge from office if the Council recommends so.<sup>38</sup>

The 1962 Constitution provided for issuing of directions and orders by the High Courts to any person or authority in their respective territorial jurisdiction prohibiting from doing, commanding to do, calling

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<sup>38</sup> The Constitution of 1962, Art. 145.

in question acts done or intended to be done by such person or authority in specified circumstances.<sup>39</sup> Thus the substance of the former writ jurisdiction under the Provisional Constitution (the Government of India act 1935) and the 1956 Constitution, which was greatly valued and cherished in Pakistan, had been preserved under the article 98 of the 1962 Constitution, though Latin names which were used in previous Constitutions of habeas corpus, mandamus, certiorari, prohibition and quo warranto had not been mentioned. The effect of the omission of the traditional name of the writs has been calculated to give the court a wider scope to issue a particular direction because the court would not be bound in the issuance of such direction to restrict itself to the rigid rules applicable to prerogative writs.

Other provisions relating to the judiciary regarding appointment of the judges including Chief Justices of the superior courts, their qualifications, their retirement age, transfer of judges and their remuneration were identical or similar to the provisions of the 1956 Constitution.

The direct and open assault on the independence of Judiciary was first made by General Ayub Khan's government when he started the practice of interviewing the judges before appointment to the High Courts. The Governor of West Pakistan, General Musa and the Federal Law Minister were to assist General Ayub Khan while interviewing Judges.<sup>40</sup> The interview was arbitrary and subjective.<sup>41</sup>

The Constitution of 1962 lasted for seven years. Due to nation wide agitations and strikes, President Ayub Khan stepped down as President of Pakistan on March 25, 1969 and handed over the reins of power to Army Chief General Yahya Khan who placed the country under martial law with

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<sup>39</sup> Ibid Art. 98.

<sup>40</sup> Chief Justice (Retd) Nasim Hassan Shah, "*Ahad Saz Munsif*" P- 49. He himself was interviewed and selected by this Board of Three.

<sup>41</sup> See 'Judicial Appointments in the Perspective of Independence of Judiciary' a paper read by Hamid Khan, Member, Pakistan Bar Council at 6<sup>th</sup> SAARC Law Conference at Karachi, October 3-5, 1997.

immediate effect. Thus Pakistan once again came under the black shadow of martial law.

#### **2.2.4: Second Martial Law of 1969.**

The proclamation of martial law issued by General Yahya Khan on March 25, 1969 abrogated the 1962 Constitution, the National Assembly and the Provincial Assemblies were dissolved and the central and provincial governments were dismissed. General Yahya assumed the office of Chief Martial Law Administrator (CMLA). On April 1, 1969 General Yahya assumed the office of the President. The Provisional Constitution Order 1969 was issued on April 4, according to which the country was to be governed as nearly as may be in accordance with the abrogated Constitution of 1962, subject, of course, to any regulation or order made by the CMLA. The CMLA was also the President of Pakistan and would perform all functions assigned to the President under the late Constitution or any other law. The fundamental rights were specifically abrogated and all pending proceedings in this regard were to abate. The orders of martial law authorities could not be questioned in any court nor the proclamation or any regulation or order there under could be challenged in any court. All other courts including the Supreme Court and the High Courts and all other tribunals in existence were left intact with all their powers and jurisdictions and all the laws in force before the Proclamation were to continue to be in force and the courts to continue to function normally. However, same as under martial law of 1958, a system of military courts parallel to the existing criminal courts were established.

The courts functioned not under the 1962 Constitution but under the provisions of the proclamation of martial law and the Provisional Constitution Order 1969 and derived their powers and authority from the same. The powers of the Judges of the Superior Courts were taken away

almost completely under the Jurisdiction of Courts (Removal of Doubts) Order 1969.

As if to cut the judiciary to size a Presidential Order<sup>42</sup> was passed for the judges of the superior courts requiring them to declare their assets. Every judge was to submit to the Supreme Judicial Council a statement of his properties and assets on a prescribed form. It was under this Presidential order that the Supreme Judicial Council held enquiries into the financial affairs of the judges and some judges were found delinquent. One of them resigned while full- fledged proceedings for misconduct were held against another who was found guilty and his removal from office was recommended.<sup>43</sup>

As result of the General Election held in 1970. Awami League, East Pakistan based party, came out of the election as a majority party. But Awami League was not allowed to form government. Consequently it started agitations. Army of Pakistan took action to control the deteriorating law and order situation. India launched an attack on the East Pakistan under the pretext of helping the people of East Pakistan. General Yahya, after losing East Pakistan to Indian army, stepped down and handed over power to Mr. Zulfikar Ali Bhutto as the leader of the majority in the remaining Pakistan (West Pakistan).

### **2.2.5: The Civilian Martial Law and Interim Constitution of 1972.**

Zulfikar Ali Bhutto assumed the office of the President as well as the Chief Martial Law Administrator. He called the session of National Assembly and an Interim Constitution was passed, which ended the second martial law in Pakistan. This came into force on April 21, 1972 and was to

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<sup>42</sup> Judges (Declaration of Assets) Order, 1969. President's Order No: 4 of 1969. PLD 1969 Central Statutes. P- 120.

<sup>43</sup> Justice Fazle Ghani of Lahore High Court resigned. Justice Shaukat Ali of the same court was held guilty of misconduct and was removed. See for details President V. Shaukat Ali, PLD 1971, SC 585.

remain in force for one year within which the National Assembly was to frame the permanent Constitution of the country.

The Interim Constitution was largely an adoption of the Constitution of 1962 with certain provisions similar to those of the 1956 Constitution. The judiciary was established on the pattern of 1962 model.

President General Yahya Khan had by order as stated earlier split the province of West Pakistan into four provinces, as they existed before 1955. Therefore the Interim Constitution provided for a High Court for each province and any two provinces could also establish a joint High Court. Consequently the provinces of Sindh and Baluchistan did establish a joint High Court at Karachi. The other High Courts were at Lahore for Punjab and at Peshawar for NWFP.

New provisions relating to the judiciary in the Interim Constitution were that minimum age for a judge of a High Court was fixed at 40 years for the first time and the age of retirement for a judge of a High Court was raised from 60 to 62 years.

The National Assembly of Pakistan passed unanimously with a few abstentions the Constitution of Pakistan on 10<sup>th</sup> April 1973, which came into force on August 14, 1973.

#### **2.2.6: The Constitution of Pakistan 1973.**

Most of the provisions, relating to the judiciary, of the 1973 Constitution are similar to those of the earlier Constitutions of 1956 and 1962. However there are two significant provisions in the new Constitution, which were not available in the previous Constitutions. One provision curtails the powers and jurisdiction of the superior courts while the second provision is considered a step forward to the independence of the judiciary.

To confine the powers and jurisdiction of the superior courts it is clearly stated, “No court shall have any jurisdiction save as is or may be

conferred on it by the Constitution or by or under any law.”<sup>44</sup> Thus the courts cannot assume unto themselves any jurisdiction or powers, which are not expressly conferred on them by the Constitution or a law. This provision is clearly meant to whittle down the concept of inherent powers and jurisdiction of the superior courts. The second significant provision is that “The judiciary shall be separated progressively from the executive within three years from the commencing day”.<sup>45</sup> In the original Constitution, the period given for the process of separation was three years, which was extended to five years through Fifth Amendment in the Constitution in 1976. Again the “four” years were substituted by “fourteen” years through Presidential Order No.14 of 1985. It means the government was bound to separate judiciary from executive up to 1987 as per the command of the clause 3 of Article 175 of the Constitution. The judiciary at higher level was already separated from the Executive but it was not separated at magisterial level. Administration of justice particularly criminal justice at the lower level was being carried out by Executive Magistrate under the control and supervision of the home department of the Provincial government.

In spite of expiry of the period fixed in the Constitution, no steps were taken by the government for separation of the judiciary from the executive. A petition was filed on February 6, 1989, by Karachi High Court Bar Association, before the Sindh High Court through its president, Sharaf Faridi and other members of the Bar.<sup>46</sup> Amongst others, the main plea was that the government was bound under Article 175 (3) to separate the Judiciary from the Executive within the stipulated period as provided in clause (3) in which the Government failed; therefore the court was requested to direct respondent number 1 (the Federal Government) to implement the mandate ordained under clause (3) of Article 175. Another

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<sup>44</sup> The Constitution of Pakistan 1973, Art. 175 (2)

<sup>45</sup> Ibid Art. 175 (3)

<sup>46</sup> Sharaf Faridi V. Federation of Pakistan and others. PLD 1989 Karachi 404.

similar petition was filed in the Baluchistan High Court by the President of the Baluchistan Bar Association.<sup>47</sup>

The Sindh High Court also noted that apart from Article 175, there was Article 203 of the Constitution, which provides that each High Court shall supervise and control all courts subordinate to it. A full bench of the Sindh High Court, after thoroughly examining all the issues, reached to the conclusion (by majority of 5 to 1) that that the Constitutional obligation contained in Article 175(3) had, indeed, been disregarded and that appropriate directions could be issued by the High Court. The High Court, *inter alia* directed that the Government of Pakistan should initiate all legislative administrative steps to bring the existing laws relating to or affecting the judiciary in accord with Articles 175 and 203 of the Constitution within a period of six months from the date of order. Appeals against the judgment of the Sindh High Court were filed in the Supreme Court of Pakistan, by the Federation of Pakistan and the Government of Sindh. The Supreme Court, dismissing the appeals, upheld the decision of Sindh High Court by making certain clarifications and issuing instructions so that orders of the High Court could be carried out in such a manner that administrative chaos be avoided.<sup>48</sup> Thus judiciary was separated from the executive on the lower level also in March 1996.

The independence of the judiciary was greatly undermined by Z. A. Bhutto's government. Several amendments were made in the constitution to control the judiciary. The First Amendment in the Constitution (notified on May 8, 1974) made provision for the transfer of a judge from one High Court to another without his consent. The Fourth amendment (notified on November 25, 1975) curtailed the jurisdiction of High Courts in the matter of granting bail in detention cases. The Fifth Amendment (notified on September 15 1976) limited the tenure of the Chief Justices of the Supreme Court and High Court to five and four years

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<sup>47</sup> President Baluchistan Bar Association and others V. the Government of Baluchistan through the Chief Secretary, Baluchistan. PLD 1991, Quetta –7.

<sup>48</sup> Government of Sindh V. Sharaf Faridi. PLD 1994, SC – 105.

respectively. They were given, thereafter, the option either to retire from office or to assume the office as senior most judge of the court. As per the same Amendment, a judge of the High Court who did not accept an appointment as judge of the Supreme Court would be deemed to have retired from office. In this Amendment further curbs were placed on the powers of the High Court to grant bail. The Fifth Amendment was made just to remove the Chief Justice Sardar Muhammad Iqbal of Lahore High Court who declined to accept an appointment as judge of the Supreme Court.<sup>49</sup> The immediate outcome of the Amendment was that “a young and brilliant Chief Justice” of Lahore High Court (Sardar Muhammad Iqbal) bowed out of the office although he could have opted to serve as senior judge of the Court but in his wisdom he chose the alternate course.<sup>50</sup> The Sixth Amendment (notified on January 4 1977) laid down that the Chief Justice of the Supreme Court might continue to be in office although he had attained the age of 65 years<sup>51</sup> and that he would retire only after he completed the term of five years in office. This Amendment was passed to enable Chief Justice Yaqoob Ali of the Supreme Court to retain his position even after the age of 65 years. Seventh Amendment (notified on May 16 1977) deprived the High Court of its constitutional jurisdiction under Article 199 in relation to any area in which the Armed Forces of Pakistan were acting in aid of civil power.

Election to the National Assembly was held on March 7, 1977. The sitting Prime Minister's party- Pakistan Peoples Party- won the election but the alliance of the opposition parties- Pakistan National Alliance (PNA) refused to accept the results, charged that the election was rigged by the government of Zulfikar Ali Bhutto. PNA, boycotting the provincial assemblies' election scheduled to be held on March 10, 1977, started country-wide strikes and agitations and demanded fresh election under the

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<sup>49</sup> Justice (Retd) Javid Iqbal, 'The Judiciary and Constitutional Crisis in Pakistan' in "Pakistan: Founders' Aspirations and Today's Realities" Ed by Hafeez Malik. P- 69

<sup>50</sup> Justice (Retd) Shamim Hussain Kadri, 'Judges and Politics' P-83.

<sup>51</sup> A judge of the Supreme Court is retired on attaining the age of 65 years.

supervision of judiciary. Tension escalated and during the night between July 4 and 5, the armed forces led by the Army Chief General Muhammad Zia-ul-Haq, took over the administration of the country.

### **2.2.7: Third Martial Law of 1977.**

.General Zia imposed third martial law in Pakistan on July 5, 1977. Unlike the previous two martial laws, the Constitution was not abrogated but was only held in abeyance, due to the fear of Article 6 of the Constitution. Article 6 very clearly provides, “Any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or show of force or by other unconstitutional means shall be guilty of high treason”. The offence of high treason is punishable with death or life imprisonment.<sup>52</sup> In spite of the repeated violations of Article 6 of the Constitution, so far, unfortunately, no conviction has been made. According to Dr Faqir Hussain the courts in Pakistan so far have not been able to deal with the crime of treason and produce any conviction. But this is not to say that treason has not been committed. Apart from several aborted attempts and conspiracies the successive acts of abrogation of the Constitution and the toppling of Government and their replacement by the Military Regime were clearly instances of High Treason.<sup>53</sup>

Laws (Continuance in Force) Order 1977 was promulgated to administer the affairs of the country. It repeated expression used in the Laws (Continuance in Force) Order 1958 and the Provisional Constitution Order 1969 that “Pakistan shall subject to this order and any order made by the President and any regulation made by Chief Martial law Administrator (CMLA) be governed as nearly as may be, in accordance

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<sup>52</sup> Section 2, High Treason Punishment Act 1973.

<sup>53</sup>Dr. Faqir Hussain, ‘Review of Begum Nusrat Case’, Journal of Law and Society Vol: VIII, July 1989, p-13, University of Peshawar, Pakistan.

with the Constitution.”<sup>54</sup> The courts were allowed to function but no court or tribunal or other authority could call in question the proclamation of martial law or any order, ordinance or material law regulations made in pursuance thereof and no judgment, decree, write, order or process could be passed or issued in this behalf. The fundamental rights under the 1973 Constitution and all proceedings pending in the courts regarding their enforcement were suspended.<sup>55</sup>

President’s Order No.1 was passed on July 07, 1977 requiring all High Court judges to take a fresh Oath as prescribed therein with the omission of the words to “preserve, protect and defend the Constitution”.<sup>56</sup> It is noteworthy that in this order the Chief Justice of Pakistan and other judges of the Supreme Court were not mentioned. The Chief Justice of Pakistan Justice Yaqoob Ali Khan was not willing to take a fresh oath.<sup>57</sup> Thus General Zia started a new practice of asking judges of the superior courts to take fresh oath under martial law. This innovation caused irreparable damage to the dignity and independence of the judiciary. This inroad in the independence of judiciary has been further intensified by successive military governments.

Begum Nusrat Bhutto moved the Supreme Court under Article 184 (3) of the Constitution<sup>58</sup> against the detention of her husband Z.A. Bhutto under a marital law order. On September 20, 1977 the Supreme Court presided over by the Chief Justice Yaqub Ali, ordered the admission of the petition and adjourned the case to September 25, 1977. The Military junta must have sensed that the Chief Justice was not going to play their game. General Zia retaliated through CMLA’s Order number 6 of 1977 issued on September 22, which amended the Constitution so that the Fifth and Sixth amendments incorporated therein were withdrawn and the

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<sup>54</sup> Chief Martial Law Administrator Order 1, 1977, PLD 1977, Central Statutes P- 327.

<sup>55</sup> Laws (Continuance in Force) Order 1977.

<sup>56</sup> High Court Judges (Oath of office) Order, 1977 , PLD 1977 Central Status P-325

<sup>57</sup> Chief Justice (Retd) Sajjad Ali Shah, ‘Law Courts in a Glass House’, P-102.

<sup>58</sup> Under article 184 clause 3 of the Constitution, the Supreme Court has the original jurisdiction to take cognizance of any matter which involves a question of public importance with reference to enforcement of any of the Fundamental Rights conferred by the Constitution.

provision for a Chief Justice to serve his term of office after reaching the age of retirement was set to naught. The net result of this amendment by the CMLA's Order No.6 was that Chief Justice Yaquab Ali, who had crossed the age of retirement, ceased to hold office.<sup>59</sup>

The office of the Chief Justice of Pakistan became vacant as a result and Justice Anwer-ul-Haq was appointed to the office and he took over. The entire Supreme Court accepted it and the transition went smoothly. On the same day (September, 22), the order regarding the new oath for the High Court Judges was amended, saying that the High Court Judges who had not yet taken the oath were required to take it within 24 hours. It was provided that if a judge failed to do so, he would cease to hold office.<sup>60</sup> Another similar President's Order was passed on the same date, for the Supreme Court judges to take a fresh oath. It was similar to the one taken by the High Court judges, omitting the words "to preserve, protect and defend the Constitution".<sup>61</sup>

To purge the judiciary from unwanted judges, a President's Order was passed for scrutiny of High Court Judges who had been appointed between January 1, and July 5, 1977.<sup>62</sup> The judiciary went along with the martial law in weeding out those judges who had been appointed after January 1, 1977. The Supreme Judicial Council<sup>63</sup> was vested with the power to securitize the appointments. The Council started its proceedings and forced three judges of the Lahore High court and two judges of the

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<sup>59</sup> Both amendments were made by Bhutto's government and were regarded as detrimental to the independence of judiciary. General Zia also withdrew it with mala-fide intention, just to serve his ulterior motives. One of the provisions of the 5<sup>th</sup> Amendment Act 1976 was that the Chief justice of the Supreme Court, unless he retired earlier on attaining the age of 65 years, would hold office for the period of five years. In the same manner the Chief Justice of a High Court would hold office for a period of four years. The 6<sup>th</sup> Amendment Act 1976 provided that the Chief Justice of the Supreme Court and a Chief Justice of a High Court who had attained the age of retirement of 65 and 62 years respectively, and had not completed their term of office of five and four years respectively, would continue to hold office until the completion of their respective term of office, as the case may be.

<sup>60</sup> High Court Judges (Oath of Office) (amendment) Order 10, of 1977. PLD 1977, Central Statutes, P- 437.

<sup>61</sup> Supreme Court Judges (Oath of office) Order, 1977, PLD 1977, Central Statute, P-436.

<sup>62</sup> High Court Judges (Scrutiny of Appointment) Order, 977, PLD 1977, Central Statutes, P-455.

<sup>63</sup> See for the organization and functions of the Supreme Judicial Council, chapter V of the Thesis.

Sindh High Court to resign. One judge of the Lahore High Court was relegated to the position of a Sessions judge.<sup>64</sup>

The case of Begum Nusrat Bhutto was heard by a full court consisting of nine judges. The Supreme Court delivered its judgment on November 10, 1977. Begum Nusrat Bhutto's petition challenging the detention of Z.A. Bhutto and others under Martial Law Order No.12 was dismissed as incompetent. The Supreme Court in its unanimous verdict validated General Zia's martial law under the doctrine of state necessity and the Chief Martial Law Administrator, General Zia, was empowered to take all legislative measures under the law and Constitution including amending it. The court held that it had the full power of judicial review available under Article 199 of the constitution but this jurisdiction was taken away by the military regime through amendments in the constitution and finally all constitutional jurisdictions were virtually removed by the Provisional Constitution Order 1981.

Regarding the exercise of power of judicial review, the judiciary was cautious. Martial law regulations and orders were not generally touched in exercise of judicial review. The judges did interfere with the sentences of the military courts and detention cases under the martial law regulations, where there was either no evidence or evidence of independent nature was not there. It is generally believed the relief was granted in about 10 percent of the cases brought before the superior courts.<sup>65</sup> The judges were careful not to annoy the military regime.

Even such limited selective interference by the superior courts was an irritant for the martial law authorities who did not want any check on their arbitrary powers. Ultimately the step was taken and the power of the judicial review of the acts and orders of the martial authorities and military courts was put to an end by adding Article 212-A to the Constitution through an amendment which provided that no court,

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<sup>64</sup>Hamid Khan, "Constitutional and political History of Pakistan", (2001) P-621.

<sup>65</sup>Hamid Khan, "Constitutional and political History of Pakistan", (2001) P-622.

including a High Court, could grant an injunction, make an order, or entertain any proceedings in respect of any matter to which the jurisdiction of the military court or tribunal extended.<sup>66</sup>

This constitutional amendment and martial law regulation number 48 banning all political parties were challenged before the Lahore High Court by Asghar Khan (Retd. Air Marshal), leader of a political party – Tehrik-i-Istiqlal- A rumor was there that the Lahore High Court was going to give a verdict against the federal government in Asghar Khan’s case.<sup>67</sup>

The martial law government reacted quickly and strongly to the rumor and before the Lahore High Court could announce the judgment, a Constitutional Amendment was promulgated on May 27, 1980 barring the High Courts from making any order relating to the validity of martial law regulation or martial law orders.<sup>68</sup> It restricted the writ jurisdiction of the High Courts. The Constitutional amendment deprived the superior judiciary of its powers to review the decisions of military courts, the legality of martial law or any order issued by any marital law authority. Along with this amendment, very severe action was taken against the Chief Justice Moulvi Mushtaq who headed the bench in Asghar Khan’s case. He was summarily removed and dispatched to the Supreme Court as an Acting Judge.<sup>69</sup> Nothing more was heard of the case of Asghar Khan. The new Acting Chief Justice of the Lahore High Court had made it sure that it was not re-listed or re-heard, perhaps, that was important for his own survival.<sup>70</sup>

Another significant step of General Zia, detrimental to the judicial independence, was the establishment of the Federal Shariat Court for the purpose of Islamization of laws in Pakistan. A constitutional amendment was made on February 7, 1979, through a President’s Order confirming jurisdiction on the High Courts to examine any law or provision of law

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<sup>66</sup> Constitution (Second Amendment) Order, 1979, PLD 1979, Central Statutes P- 567.

<sup>67</sup> Hamid Khan, “Constitutional and Political History of Pakistan”, (2001) P-637.

<sup>68</sup> Constitution (Amendment) Order 1980. PLD 1980 Central Statutes P- 89.

<sup>69</sup> Hamid Khan, “Constitutional and Political History of Pakistan”, (2001) P- 628.

<sup>70</sup> Ibid P- 640.

whether the same was repugnant to the injunctions of Islam as laid down in the Holy Quran and the Sunnah.<sup>71</sup> Another Constitutional (Amendment) Order 1980 was issued whereby establishing a new and a parallel superior court - the Federal Shariat Court.<sup>72</sup> The powers of the Shariat Bench of the High Courts under Constitution (Amendment) Order, 1979, to declare any law or provision of law invalid if repugnant to the injunctions of Islam, were withdrawn and vested in this newly created court. Appeal was provided to the Shariat Appellate Bench of the Supreme Court. The Federal Shariat Court was to consist of five members including the chairman, to be appointed by the President. A constitutional amendment was made for introducing three “Ulema”<sup>73</sup> into the Federal Shariat Court in addition to five judges. The Ulema members were to be chosen from a panel of Ulema to be drawn by the President in consultation with the Chief Justice of the court.<sup>74</sup>

On March 24, 1981, General Zia-ul-Haq in the capacity of CMLA, issued an order, namely the Provisional Constitution Order (PCO) 1981, which was to serve as the Constitution of Pakistan for years to come. It came into force with immediate effect. The important features of the PCO relating to the judiciary were as under:

1. All fundamental rights under the 1973 Constitution and the provisions for their enforceability were taken out.
2. The Supreme Court could transfer cases from one High Court to another High Court.
3. Martial law authorities and military courts and their acts and orders were placed beyond the limits of the writ jurisdiction of the High Courts.

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<sup>71</sup> Constitution (Amendment) Order 1979, PLD 1979 Central Statutes P-31.

<sup>72</sup> Constitution (Amendment) Order 1980, PLD 1980 Central Statutes P-89

<sup>73</sup> “Ulema” is plural of Aalim which means a religious scholar of Islamic theology and Shariat (i.e. Islamic Law.)

<sup>74</sup> Constitution (Amendment) Order 1981, (President Order NO: 5 of 1981) PLD 1981 Central Statutes P-251

4. A High Court judge could be transferred from one High Court to another for a period of up to two years without his consent and without consultation with the Chief Justices of the High Courts concerned.
5. All judges of the Supreme Court, the High Courts, including the Chief Justices, were required to take fresh oath under the PCO. However, the taking oath was not left to the choices of the judges alone; the President had the option not to give oath to any judge. Those judges, who did not take oath or were not given oath, were to cease to hold office.
6. Judges, who took the oath under the PCO, were to be bound by the provisions of the PCO and could not call into question the validity of its provisions.

The PCO fell heavy on the judiciary and drastically curtailed its powers and jurisdictions. The judiciary was already under fire but whatever little independence was left, was finally done away with under the PCO. It was made sure that even a remote chance of a challenge to the martial law authority from the judiciary was completely neutralized. Former Chief Justice A.R. Cornelius, commenting on the unfortunate episode called it “the rape of the judiciary”<sup>75</sup>.

Three judges out of ten of the Supreme Court including the Chief Justice refused to take oath under the PCO and another judge of the Supreme Court was not given oath.<sup>76</sup> The remaining six judges of the Supreme Court took the oath. Six judges of the four High Courts refused to take oath under the PCO while seven judges of the High Courts were not invited for the oath. Thus thirteen judges of High Courts including one Chief Justice of Baluchistan High Court and 4 judges of the Supreme Court including the Chief Justice lost their services.

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<sup>75</sup> Quoted by Hamid Khan, “Constitutional and Political History of Pakistan” (2001) P- 651.

<sup>76</sup> The three judges who refused to take new oath were Chief Justice Anwer-ul-Haq, Justice Dorab Pate and Justice Fakhruddin G. Ibrahim. Justice Moulvi Mushtaq Hussain was not invited to the oath.

General elections to the National and Provincial Assemblies were held on non-party basis, in February, 1985. No political party was allowed to nominate candidates in the elections. Before the parliament could meet on March 23, 1985, the Constitution, being held in abeyance since July 4, 1977, was restored after comprehensive amendment, through a President's Order No: 14 on March 02, 1985. This President Order No: 14 is also known as Revival of the Constitution of 1973 Order 1985 (RCO).

The civilian cabinet under Junejo – the Prime Minister of Pakistan – demanded the lifting of martial law whereas General Zia, before lifting martial law, wanted the Parliament to endorse all amendments made by him in the Constitution through Revival of Constitution of 1973 Order 1985. It was in these circumstances that Constitution (Eight Amendment) Bill was moved in the Parliament which validated all measures taken General Zia's Government. As per deal with the cabinet, after Eight Amendment in Constitution, General Zia lifted martial law on December 30, 1985. It had continued for eight and a half year. General Zia retained with himself both offices, that is, the President of Pakistan as well as, the Chief of Army Staff in clear violation of the provision of the Constitution.<sup>77</sup>

The civilian government of Junejo was dismissed and the National Assembly was dissolved by General Zia on May 29, 1988. Election was announced to be held in November 1988. In the meanwhile General Zia was killed in an aeroplane crash on August 17 1988. Elections were held and Benazir Bhutto formed government at the centre on December 01 1988.

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<sup>77</sup> Article 41, clause 2 and Art 63, Clause 1, Sub-clause D of the Constitution of Pakistan which say that the President shall not hold any office of profit in the service of Pakistan.

### **2.2.8: Judiciary under the Civilian Governments of Benazir Bhutto and Nawaz Sharif:**

During the interval period of less than 11 years between two military regimes, four civilian governments were formed and removed/dismissed; three times by the President of Pakistan supported by army and the fourth time by army's direct taking over. Benazir Bhutto and Nawaz Sharif both became Prime Ministers twice by turn from December 1988 to October 1999.

The civilian governments of Benazir Bhutto and Nawaz Sharif were also on the path of encroaching upon the independence of the judiciary, politicizing it, converting it into a subservient institution and victimizing all non-friendly judges of the superior courts.

During Benazir's second tenure (1993-96), some important decisions relating to the judiciary were taken which had far reaching adverse effects on the independence of the judiciary. The first was the non-confirmation of those High Courts Judges who were appointed during Nawaz Sharif's first tenure. The reason was given that these appointments were made for political reasons, and were not based on merit.

The second detrimental step of Benazir's government was that the permanent Chief Justices of the Lahore and Sindh High Courts were removed and appointed as judges of the Federal Shariat Court in April 1994. The Chief Justice of the Sindh High Court accepted the humiliating appointment, but the Chief Justice of the Lahore High Court refused to accept the appointment and got retirement. They were replaced by two newly appointed Supreme Court Judges who were appointed as acting Chief Justices of the two High Courts. In Sindh, Justice Abdul Hafiz Memon was first appointed as a judge of the Sindh High Court and subsequently as an acting Chief Justice of the same High Court, but immediately after taking oath, it was discovered that soon, as Chief Justice, he would be attaining the age of sixty two years, which was the

age of superannuation in the High Court. The Federal Government changed its mind, and after resending previous notifications, another notification was issued under which he was appointed as a Supreme Court Judge and then was sent as the acting Chief Justice of the Sindh High Court.

The Lahore High Court suffered a similar fate. After the removal of the Chief Justice, the Benazir's government brought back a retired judge of the Lahore High Court, Justice Muhammad Ilyas, who was then serving as a judge of the Federal Shariat Court. He was appointed as a judge of the Supreme Court and then sent as an acting Chief Justice to the Lahore High Court. The Peshawar High Court was also headed by an Acting Chief Justice not drawn from the Supreme Court.

The third decision of the Benazir's government which adversely affected the independence of judiciary was the appointment of Justice Sajjad Ali Shah as the Chief Justice of Pakistan deviating from the convention of appointing the senior most judge of the Supreme Court as the Chief Justice of Pakistan. Thus a forty years old practice and precedent was arbitrarily dispensed with as justice Sajjad Ali Shah was fourth on the seniority list. Justice Saud Jan was denied the office of the Chief Justice of Pakistan, according to Justice Ajmal Mian, because he had independent views about administrative and judicial matters, seemingly not in line with the government in power.<sup>78</sup>

With three High Courts out of four headed by acting Chief Justices, the government was then, at ease to carry out next plan of packing the High Courts with political appointees. Acting Chief Justices of the High Courts “were made simple rubber stamps, recommending all that the government designed. They had virtually abdicated their role as judicial consultees under the Constitution.”<sup>79</sup>

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<sup>78</sup> Chief Justice (Retd) Ajmal Mian, “ A Judge Speaks Out” P- 163.

<sup>79</sup> Hamid Khan, ‘Constitutional and Political History of Pakistan,’ (2001) P- 785.

The fourth crucial decision of the Benazir's government was the appointment of the judges in the superior courts apparently without giving any weight to merit. In 1994, twenty additional judges in Lahore High Court and nine judges in Sindh High Court were appointed against the advice of the then Chief Justice of Pakistan., Justice Sajjad Ali Shah<sup>80</sup> According to Chief Justice Shah, there were some controversial names in the list of the appointees, particularly from bar, whom he had never heard of, and he told the Prime Minister that they had never appeared in the High Court.<sup>81</sup> Two out of the nine appointees in Sindh High Court were from amongst the list of sessions judges, namely, Agha Rafiq Ahmad who was number thirty-four, seniority-wise, in the list of total of thirty-seven sessions judges, in the province of Sindh,<sup>82</sup> and Shah Nawaz Awan who was number thirteen on the same list.<sup>83</sup>

The helplessness of the Chief Justice of Pakistan and the acting Chief Justice of the Sindh High Court has been very beautifully narrated by the Chief Justice of Pakistan himself: "I then received a copy of the letter from the Chief Justice of the Sindh High Court (Justice Memon) with the revised proposal for appointment of judges. I found that Agha Rafiq Ahmed and Shah Nawaz Awan had been recommended besides some members of the Bar, whose recommendation were equally controversial. I spoke to justice Memon on telephone, who expressed his helplessness and said that he made those recommendations because of the pressure that was brought to bear upon him". "I felt terribly disappointed and wrote a letter in which I opposed the recommendations of Agha Rafiq Ahmed, Shah Nawaz Awan and some other members of the Bar. Finally a summary was prepared which was placed before the Prime Minister, and after she had made her recommendations, it was sent to the President, who signed it. No

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<sup>80</sup> Chief Justice (Retd) Sajjad Ali Shah , 'Law Courts in a Glass House' P- 215.

<sup>81</sup> Ibid P- 231

<sup>82</sup> Ibid P- 229.

<sup>83</sup> Ibid P- 232

weight was attached to the recommendations of the Chief Justice of the Supreme Court”.<sup>84</sup>

Even the Supreme Court was packed with as many as seven acting and ad hoc judges against the ten permanent judges including the Chief Justices of Lahore High Court and Sindh High Court (as stated above). Thus the permanent judges and ad hoc judges in the Supreme Court were nearly equal in number at the time.<sup>85</sup>

It was against this background that Habib Wahab-ul Khairi, an advocate in the Supreme Court, filed a direct constitutional petition (No. 29/1995)<sup>86</sup> in the Supreme Court on behalf of Al-Jehad Trust challenging the appointment of Justice Saad Saud Jan as acting Chief Justice of the Supreme Court in April 1994 and sought his confirmation as permanent Chief Justice. He also sought interpretation of the articles of the constitution relating to the judiciary. Another petition for leave to appeal was also filed in the Supreme Court by the same petitioner against the judgment of the Lahore High Court, whereby three constitutional petitions filed by the petitioner challenging the appointment of twenty additional judges to the Lahore High court, non-confirmation of the six additional judges and the appointment of acting Chief Justice of Lahore High court, were dismissed.

A larger bench of five judges headed by the Chief Justice was constituted for hearing of the stated petitions. The constitutional petition and the appeal were heard on 27 court working days from November 5, 1995 to March 13, 1996. On March 20, 1996, the Supreme Court announced a majority judgment of four to one.<sup>87</sup> The Supreme Court, interpreting various articles of the constitution, in this historic case (commonly known as Judges’ case) gave the following rulings:

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<sup>84</sup> Ibid P- 232.

<sup>85</sup> Chief Justice (Retd) Ajmal Mian, ‘A Judge Speaks Out’ P- 163.

<sup>86</sup> This petition was filed in May 1994 but it was fixed for hearing on July 16, 1995. See Justice Ajmal Mian, ‘a Judge Speaks Out’ P- 176.

<sup>87</sup> The dissenting Judge, Justice Mir Hazar Khan Khoso, was the only ad hoc judge in the Bench and his appointment as such was being adversely affected by the verdict of the majority.

1. Appointment of ad hoc judges against permanent vacancies of the Supreme Court violates the constitution.
2. Appointment of acting Chief Justices can only be a stop-gape arrangement for a short period and not, in any case, exceeding a period of ninety days.
3. An acting Chief Justice cannot be a consultee for the purpose of appointment of judges, and the appointments made on the recommendation of an acting Chief Justice were invalid and un-constitutional.
4. An additional judge of a High Court acquires a reasonable expectancy to be considered for appointment as permanent judge, and if he is recommended by the Chief Justice of Pakistan, he is to be appointed as such in the absence of strong reasons to the contrary to be recorded by the President/Executive which would any way be justiciable.
5. All permanent vacancies in the judiciary particularly those of the Chief Justices, should be filled in advance if they are normal ones (like arising out of retirement) and in any case, not later than 30 days after their occurrence. If a vacancy occurs on account of death or for any unforeseen cause, it should be filled, at the most within 90 days.
6. The senior most judge of a High Court has a legitimate expectancy to be considered for appointment as Chief Justice. He is entitled to be appointed as Chief Justice of that court in the absence of very strong reasons to the contrary to be recorded by the President/Executive.
7. That sending of a Supreme Court judge to a High Court as an acting Chief Justice would be undesirable.
8. The words “after consultation” occurring in Articles 177 and 193 of the constitution involve a participatory consultative process between the consultees and the Executive. It should be effective, meaningful, purposive, and consensus oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justices as constitutional consultees was held to be binding on the Executive and if the Executive disagreed with the view of the Chief Justice of Pakistan and

the Chief Justice of a High court, it should record strong reasons to be justiciable.

9. The power to transfer judges from one High Court to another High Court cannot be invoked by the President/Executive for any purpose other than public interest and that too, only after consultation with the Chief Justice of Pakistan.<sup>88</sup>

The judgment was acclaimed as a landmark judgment at home and abroad. The Federal Government under Benazir Bhutto was shaken and instead of accepting in good grace, it vehemently denounced the judgment. One Federal Minister even described it as an act of treason and harsh statements were made inside and outside the parliament.<sup>89</sup>

The relation between the President and the Prime Minister were also strained and differences between the two grew to such an extent that in November 1996 the former dissolved the National Assembly and dismissed the government on the grounds of corruption and demeaning the judiciary.

Nawaz Sharif's party won the election and formed a government in Feb 1997, for second tenure. Differences soon arose between the Chief Justice of Pakistan, Justice Sajjad Ali Shah and the new Prime Minister, Nawaz Sharif over a new Anti-Terrorist Law which was strongly opposed by the former. The Anti-Terrorist Law established special courts. Appeals against their decisions/judgments were allowed before a special appellate court consisting of High Court judges, but not to the High Court. Since the appellate forum was not the High Court, no further appeal was allowed before the Supreme Court. Chief Justice Sajjad's stand was that "setting-up of special courts for trial of classified cases would run counter to the independence of the judiciary". He was opposed to "a parallel judicial system".<sup>90</sup>

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<sup>88</sup> Al-Jehad Trust Vs Federation of Pakistan, PLD 1996, SC. P-324.

<sup>89</sup> Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' P-184.

<sup>90</sup> Chief Justice (Retd) Sajjad Ali Shah , 'Law Courts in a Glass House' P- 338

The differences between the judiciary and the executive were further deepened by the succeeding events and were converted into a very serious judicial crisis culminating on the attack on the Supreme Court by the political activities of the PM's political party, (Pakistan Muslim League).

In the 3<sup>rd</sup> week of August 1997, Chief Justice Sajjad Ali Shah recommended five judges from three High Courts for elevation to the vacant permanent seats of the Supreme Court. As per the Supreme Court's ruling in the Judges' case the recommendation of the Chief Justice for appointment of judges, was binding on the executive and in the case of disagreement, the executive should record strong reasons which would be justiciable. The executive particularly the PM himself was opposing and resisting the appointment of the recommended judges because two of the recommended judges from Lahore High Court were not acceptable to him.<sup>91</sup>

On receipt of the Chief Justice's recommendations, the Federal government immediately issued a notification, dated August 21, 1997, from the President under Article 176 of the Constitution reducing the Supreme Courts judges from 17 to 12. The notification was suspended on September 5, by a bench of three members headed by the Chief Justice in a petition filed by the Supreme Court Bar Association, and on September 16, the government withdrew the notification, with the result that the original strength of seventeen was restored. But the recommendations of the Chief Justice were yet to be implemented. The government adopted delaying tactics.

The government passed the Fourteenth Constitutional Amendment which added a new Article 63-A in the Constitution for disqualification of the members of the parliament on the ground of defection. This amendment was challenged in the Supreme Court by a group of lawyers

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<sup>91</sup> Hamid Khan, "The Judicial Organ", P- 141.

named “*Wukala Mahaz Barai Tahfuz-i-Dastoor*”<sup>92</sup> on October 24, 1997.<sup>93</sup> A three judges’ bench of the Supreme Court headed by the Chief Justice suspended the constitutional (Fourteenth Amendment) Act 1997. The suspension of the amendment by the Court was criticized in extremely intemperate language by the Prime Minister, his Cabinet members and members of the Parliament from the PM’s party and his allied parties. They did criticize the Supreme Court as well as the Chief Justice of Pakistan inside the parliament and outside the parliament. In his press conference the PM called the short order of the Supreme Court, suspending the said amendment, ‘illegal’ and ‘unconstitutional’. He ‘accused the chief Justice of Pakistan of reviving horse trading in the country.’<sup>94</sup> Contempt of court proceedings against the PM and some members of the Parliament were started before the Supreme Court on the application of Chaudhry Muhammad Akram Advocate. The PM, Nawaz Sharif, appeared before the bench of five judges headed by the Chief Justice himself on November 17 and 18, 1997 and he expressed his regrets in a written statement over the remarks made. Although it was not an unqualified apology but the matter could have been dropped at this stage because Nawaz Sharif was the first Prime Minister in history of Pakistan<sup>95</sup> who personally appeared before the Court in a contempt proceedings. Moreover the Chief Justice could not understand the practical limitations to his power and could not foresee the unfortunate consequences of the tussle with the Executive in the political set up of Pakistan.

Any order passed by the Supreme Court in contempt proceedings was not appeal able. It was debated and speculated by public that the PM might be convicted by the court and after conviction he would be unseated

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<sup>92</sup> May be translated into English as “Lawyers Front for Protection of the Constitution.”

<sup>93</sup> Chief Justice (Retd) Ajmal Mian, ‘A Judge Speaks Out’ P-231.

<sup>94</sup> The Muslim, (English Daily) Islamabad, October 30, 1997.

<sup>95</sup> Cases of contempt of court were filed against two other Prime Ministers (Zulfiqar Ali Bhutto and Benazir Bhutto) also but neither of them ever appeared in the court in proceedings against them.

and disqualified to hold his office.<sup>96</sup> In order to protect the Prime Minister from punishment in the contempt proceedings, Parliament passed the Contempt of Court (Amendment) Bill on November 18 1997, making any order of punishment for contempt of court by a Bench of the Supreme Court appeal able before another Bench comprised of the remaining judges of the Supreme Court. It was also provided that such a sentence would not be effective for thirty days, during which an appeal could be filed and further that the sentence would automatically be suspended till the final decision of the appeal. The bill was sent to the President of Pakistan, Farooq Laghari for assent. An application was made to the Supreme Court and submission was made that the President be asked not to sign the bill. A Supreme Court Bench headed by the Chief Justice issued an interim order on November 20, 1997, restraining the President from signing the bill and directing that if the bill were signed into law, it should be considered suspended. The order of the Supreme Court restraining the President from giving assent to the bill was also an unusual step. There is no precedent for restraining the President from giving assent to a bill passed by a parliament, although the court can review it judicially once it becomes a law to test its constitutionality.

Due to intervention of the Chief of Army Staff, the contempt case and other cases against the Prime Minister were adjourned by the court for about a week, i.e. from November 21 to 28, 1997.<sup>97</sup> The government used the respite of one week to its full advantage. On November 26, a petition by Malik Asad Ali was presented under Article 184 (3) of the Constitution before the Registry of the Supreme Court in Quetta,<sup>98</sup> challenging the appointment of Justice Sajjad Ali Shah as Chief Justice. A Supreme Court Bench of two judges (Justice Irshad Hassan

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<sup>96</sup> Justice (Retd) Javid Iqbal, 'The Judiciary and Constitutional Crisis in Pakistan' in "Pakistan: Founders' Aspirations and Today's Realities" edited by Hafeez Malik, P-78

<sup>97</sup>Hamid Khan, 'Constitutional and Political History of Pakistan' (2001) P- 824; and Justice Ajmal Mian, 'A Judge Speaks Out' P- 236 and Justice Sajjad Ali Shah, ' Law Courts in a Glass House' PP- 485-6.

<sup>98</sup> The permanent seat of the Supreme Court is at Islamabad. There are four other places where Supreme Court holds Court apart from Islamabad i.e. Lahore, Peshawar, Quetta and Karachi.

Khan and Justice Khalil-ur-Rehman) in Quetta entertained the petition and also passed an interim order restraining the Chief Justice from performing his functions till further order.

This interim order from the Supreme Court Bench in Quetta was not less than a severe earth quake in the Superior Judiciary which jolted every segment of Pakistan. Basically even the entertainment of a constitutional petition in the Quetta Registry was against Order XXV of the Pakistan Supreme Court Rules 1980 which says: “All constitutional petitions and applications can be entertained and registered only in the main Registry at Islamabad”. It is widely believed in Pakistan that the interim order of Quetta Bench was obtained by manipulation of the government. Two retired judges of the Supreme Court and the then Chief Minister of Punjab (Shahbaz Sharif, younger Brother of Nawaz Sharif) flew in to Quetta on November 25, 1997, on a special plane and that Advocate Sharifuddin Pirzada, privy to the whole plan, was also present there.<sup>99</sup> S.M. Zafar who was the leading lawyer of Nawaz Sharif in the contempt case states that one group of the government was busy exploiting and getting benefit from the differences between the judges of the Supreme Court.<sup>100</sup> Ardshir Cowasjee – a critical analyst- writes in an article that Justice (Retd) Rafiq Ahmad Tara was dispatched to Quetta by Nawaz Sharif in a special flight which landed at night. The security man on duty was reported to have noted in his log: “Instructions have been received from Islamabad that the details of the special flight carrying the visiting dignitary, Senator Rafiq Ahmad Tarar, must be kept confidential and not reported.”<sup>101</sup> The same man (Tarar) was accused by a former President of Pakistan (Laghari) of “taking briefcase of money” to bribe other judges in this famous 1997 case.<sup>102</sup>

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<sup>99</sup> Chief Justice (Retd) Sajjad Ali Shah , ‘Law Courts in a Glass House’ P- 497; and Hamid Khan, ‘Constitutional and Political History of Pakistan’ PP 825, 844.

<sup>100</sup> S.M. Zafar, ‘*Adalat main Siyasat*, P – 77.

<sup>101</sup> Ardshir Cowasjee, “Laughing at ourselves” published in DAWN dated November 5 2000.

<sup>102</sup> Ibid.

Chief Justice Sajjad sitting in Islamabad suspended the order of the Quetta Bench through an administrative order. This led to another proceedings at the Quetta Bench the same evening in which a third judge joined in and suspended the suspension order of the Chief Justice in the evening of November 26 1997, at the Judges Rest House in Quetta. The petition of Asad Ali was fixed for hearing on November 28, before the three judges' Bench. Advocate Sharifuddin Pirzada, who then was working behind the scenes, now surfaced as *amicus curiae*.<sup>103</sup>

Simultaneous to the events in Quetta, a similar petition was presented before the Supreme Court Bench of two judges at Peshawar. The Bench at Peshawar entertained the petition on November 27 1997 under Article 184(3) of the Constitution and dispensed with the rule requiring the presentation of such a petition at the main registry in Islamabad. It passed an interim order restraining Justice Sajjad from passing any judicial or administrative order in his capacity as the Chief Justice of Pakistan. The Bench consisting of Justice Saeeduzzman Siddiqui and Justice Fazal Illahi Khan also directed the Registry of the Supreme Court to take immediate steps and place the matter forthwith before the senior judge, Justice Ajmal Mian, in Karachi and obtain appropriate instructions of the Bench for hearing such cases<sup>104</sup> (entertained in Quetta and Peshawar).

Subsequently, on November 28 1997, Justice Saeeduzzman Siddiqui, after being informed that the senior-most judge, Justice Ajmal Mian, had declined to assume the office of Acting Chief Justice, assumed unto himself the administrative powers of the Chief Justice and ordered the constitution of a full Bench of fifteen judges (excluding the Chief

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<sup>103</sup> *Amicus curiae* means a friend of the court, that is a person, whether a member of the bar not engaged in the case or any other by stander, who calls the attention of the court to some decision, whether reported or unreported or some point of law which would appear to have been overlooked. (The Dictionary of English Law by Earl Jawitt).

<sup>104</sup> Akhunzada Behrawar Saeed Vs Sajjad Ali Shah, 1998 SCMR P-115

Justice and Justice Ajmal Mian) in Islamabad to hear the petition against the Chief Justice on December 1 1997.<sup>105</sup>

On the other side, on November 27 1997, a five-member Bench in Islamabad headed by the Chief Justice Sajjad himself, suspended by majority four to one, the Quetta decision of the three judges passed on the evening of November 26 1997. Some of the PM's party (PML) lawyers who were also members of the Parliament disrupted the court proceedings.<sup>106</sup>

Friday, November 28 1997, is remembered as the blackest day in the judicial history of Pakistan. On this date the Supreme Court Bench headed by the Chief Justice took up the contempt case against the Prime Minister. Under a pre-planned move, PML workers stormed the Supreme Court building, thus preventing the Bench from continuing the hearings. It was one of the most deplorable assaults on the courts in judicial history of Pakistan, obviously sponsored by the government and led by its ministers and members of Parliament and provincial Assemblies.

Two separate cause lists were issued for Supreme Court hearings for the week beginning on December 1 1997. One was issued by the Chief Justice and the other by Justice Saeeduzzaman Siddiqui, in which it was stated that the case regarding the appointment of the Chief Justice of Pakistan was to be heard by fifteen Supreme Court judges at Islamabad. On December 2 1997, the Supreme Court committed collective suicide and rival Benches met in the Supreme Court building. The Chief Justice heading the three-member Bench suspended the Thirteenth Amendment in the Constitution without adequate hearing, thus restoring the President's powers to dissolve the National Assembly. The Attorney General of Pakistan upon hearing the announcement of this order, dashed to the adjacent court room where the rival bench was holding court and 'moved

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<sup>105</sup> Ibid PP 118—19.

<sup>106</sup> Chief Justice (Retd) Sajjad Ali Shah, 'Law Courts in a Glass House' P-501; and Hamid Khan, 'Constitutional and Political History of Pakistan', (2001) P- 826.

an oral motion to suspend the interim order passed' by the Bench headed by the Chief Justice. This was entertained and the interim order was suspended.<sup>107</sup> In a separate order on the same day it was held by the rival Bench headed by Justice Siddiqui that Justice Ajmal Mian should immediately assume the administrative and judicial powers and functions of the Chief Justice. President Farooq Laghari resigned on December 2 1997 in protest against what he termed in his press conference 'unconstitutional demands' of the government to denotify the appointment of the Chief Justice Sajjad Ali Shah and appoint Justice Ajmal Mian as the acting Chief Justice.<sup>108</sup> Wasim Sajjad (Senate Chairman) assumed the office of acting President after the resignation of President Laghari and approved the summary of appointment of acting Chief Justice of Pakistan. Justice Ajmal Mian took the oath of acting Chief Justice of Pakistan on December 2 1997.

Soon after, the ten-member Bench of the Supreme Court headed by Justice Siddiqui commenced the hearings of Malik Asad Ali's case. Surprisingly Justice Sajjad decided to participate in the hearings by appointing counsels to defend him. He could have easily stayed out of these proceedings by denouncing them as illegal, unlawful, without lawful authority on the plea that the Bench not being competently constituted under the authority of the Chief Justice<sup>109</sup>, but he lent legitimacy to these proceedings by his participation. He made a big mistake by accepting the proceedings as he himself when he was Chief Justice of Pakistan, had given several rulings against the constitution of the same Bench of ten judges headed by Justice Siddiqui declaring it illegal and without lawful authority. The judgment was announced on December 23 1997. The Supreme Court held that the senior most judge of the Supreme Court of Pakistan, in the absence of any concrete or valid reason, has to be

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<sup>107</sup> Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' P- 249.

<sup>108</sup> See the Newspapers: Dawn, Jang, The News, The Muslim, The Nation, Frontier Post December 2 1997.

<sup>109</sup> It is the exclusive prerogative and function of the Chief Justice to constitute Benches. For rulings of the Supreme Court on the matter see Malik Hamid Sarfaraz V Federation of Pakistan, PLD 1979, SC. 991 and Supreme Court Bar Association through its President V. Federation of Pakistan PLD 2002 SC. 939.

appointed the Chief Justice on the basis of convention. The appointment of Justice Sajjad as Chief Justice, superseding three judges of the court who were senior to him, was made without any concrete or valid reason. Such appointment was therefore unconstitutional, and illegal. The Court ruled that Justice Sajjad would cease to hold office of the Chief Justice of Pakistan and ordered his reversion to the position of a judge of the Supreme Court in accordance with his seniority among the judges of the Supreme Court. The federal government was directed to denotify the appointment of Justice Sajjad as Chief Justice and notify the appointment of the senior most judge of the Supreme Court as the Chief Justice of Pakistan forthwith.<sup>110</sup>

On December 23 1997, the federal government denotified Justice Sajjad as Chief Justice and notified Justice Ajmal Mian as the Chief Justice of Pakistan who took oath on the same day.

Differences between Prime Minister Nawaz Sharif and General Pervez Musharraf (COAS) were raised over Kargal war with India. On October 12 1999, the Prime Minister Nawaz Sharif removed the Chief of Army Staff (COAS) General Pervez Musharraf when he was on a foreign visit to Sri Lanka and appointed a new COAS, but the army did not accept this change and very swiftly took over the control of the country. Nawaz Sharif and some his cabinet members were arrested.

### **2.2.9: Judiciary under Fourth Military Dictator: (From 1999 to 2007):**

This time martial law was not imposed but a new set-up was arranged. On October 14, General Pervez Musharraf proclaimed emergency through out the country and assumed the office of Chief Executive. Constitution was held in abeyance, National Assembly, Senate and all four Provincial Assemblies were also suspended but the President of Pakistan was allowed to continue in office. Provisional Constitution

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<sup>110</sup> Malik Asad Ali Vs Federation of Pakistan SCMR 1998 P- 119 and PLD 1998 SC- P- 161

Order was promulgated which provided that notwithstanding the abeyance of the provisions of the Constitution, Pakistan, subject to PCO and other orders made by the Chief Executive, would be governed, as nearly as may be, in accordance with the Constitution. All courts in existence would continue to function and to exercise their respective powers and jurisdiction provided that no court would have the power to pass any order/judgment/decreed/writ/process against the Chief Executive or any person exercising power under him. The President was to act on the advice of the Chief Executive. The judges were not initially touched by the change. They were not required to take new oath under the PCO and were allowed to continue to perform their functions and exercise their jurisdiction under the Constitution and law subject to the provision stated above.

This situation was not to stay for long. A number of petitions had been filed by Nawaz Sharif and other PML leaders in the Supreme Court under Article 184(3) of the constitution challenging the military take over on October 12, 1999 and seeking restoration of Assemblies. All these petitions were entertained and fixed for hearing on January 31, 2000. On January 25, 2000, Oath of Office (Judges) Order 2000, was promulgated in which all the judges of the superior courts were required to make oath to the effect that they would discharge their duties and perform their functions in accordance with the Proclamation of Emergency of October 14, 1999 and the PCO as amended from time to time. It was also provided that if a judge would not take or would not be given oath within the fixed time, he would cease to hold office. The Chief Justice of Pakistan Justice Saeeduzzaman Siddiqui refused to take the new oath under PCO. On his refusal to take oath he was virtually put under house arrest till 11.00 AM on January 26, 2000, so that he might not influence those judges who were willing to take oath.<sup>111</sup> Five other judges of the Supreme Court refused to take oath. All the judges of the Supreme Court who refused to take oath

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<sup>111</sup> Hamid Khan, 'Constitutional and Political History of Pakistan', (2001) P- 935.

belonged to Sindh province except Justice Khalil-ur-Rehman who belonged to Punjab. Two judges of the Lahore High Court, three judges of the Sindh High Court, and two judges of the Peshawar High Court were not given oath and thus they ceased to hold office. None of the judges of the High Courts refused to take oath voluntarily.

The newly constituted Supreme Court validated the coup of General Musharraf and granted him tenure of three years. He was also authorized by the court to take legislative measures including amending the Constitution.<sup>112</sup> As the tenure of three years was to expire on October 12 2002, General Musharraf got himself elected as President of Pakistan for five years through a controversial referendum in April 2002.<sup>113</sup> Before revival of the constitution, General Musharraf promulgated the Legal Framework Order (LFO) 2002. Through this LFO 2002 extensive amendments were made in the Constitution in order to perpetuate his personal rule. Some 80 articles of the constitution were amended. The legal fraternity condemned and rejected both steps of Musharraf, i.e. Referendum and LFO as unconstitutional and negation of rule of law. LFO was challenged in the Supreme Court by Barrister Zafarullah Khan. The Supreme Court rejected his petition on the ground that he had no locus standi. Lawyers continued their protests against LFO. Besides resolutions from the bar associations, the lawyers boycotted from the courts' proceedings on various dates. Lawyers' conventions at national level, to mobilize public opinion against LFO, were held at various cities of Pakistan. Though their movement could not achieve success and the Parliament adopted LFO 2002 through Seventeenth Amendment in 2003 but they did leave an imprint on history. The roots of the current unprecedented movement of the lawyers may be traced back to their struggle against LFO in 2003-04.

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<sup>112</sup> Zafar Ali Shah and others V. General Pervez Musharraf, PLD 2000 SC 869.

<sup>113</sup> For this farce referendum see Mian Raza Rabbani, 'LFO: A Fraud on the Constitution'

In March 2007, General Musharraf decided to remove the Chief Justice of Pakistan. The issues that apparently led to General Musharraf's estrangement with Chief Justice Iftikhar were all politically explosive and were being debated openly. Whether it was canceling of the Steel Mills privatization, his verdict on the New Murree Project, or cancellation of the mini Golf Club plan in Islamabad on a public park, mega money was involved in all, and the list of beneficiaries of such deals all belonged to the ruling clique's close circles. Chief Justice had been very active in supporting the release of the people abducted by the intelligence agencies who denied even knowing the whereabouts of them. The same goes for police high-handedness, which the chief justice dealt with brashly but effectively through suo moto notices, forcing high-ranking officers to line up in his court and produce results on his instant command.

But the breaking point in General Musharraf's patience came not on account of the stream of complaints coming from police officials, intelligence representatives, land and money dealers and top politicians whose family and business connections spread across different institutions. According to sources close to the chief justice, in his estimation, the final decision to knock him off had something to do with his remarks about General Musharraf's uniform, which he had said, could be decided both in the Supreme Court and in Parliament. General Musharraf saw this as part of a more elaborate attempt to destabilize him. Later intelligence assessments that were brought before General Musharraf to take a final decision on the chief justice concluded that Justice Iftikhar could not be relied upon any longer and posed a danger to the system's stability.<sup>114</sup>

On March 9, 2007, the President General Musharraf summoned the Chief Justice of Pakistan, Justice Iftikhar, to his Army Office and asked him to resign, on grounds of alleged misconduct, in the presence of

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<sup>114</sup> Syed Talat Hussain, 'Justice Courageous' News line, Karachi, dated March 20, 2007.

Prime Minister and six other uniformed Generals. The Chief Justice's refusal resulted in his virtual suspension and soon after an acting Chief Justice was sworn-in while Justice Iftikhar was detained in army office. President General Musharraf also invoked his authority under Article 209 of the Constitution to refer the alleged misconduct by the Chief Justice to the Supreme Judicial Council for conducting inquiry. Justice Iftikhar was kept under house arrest.<sup>115</sup>

The Chief Justice's refusal unleashed an unprecedented movement by Pakistani Lawyers in support of Justice Iftikhar with slogans of 'independence of the Judiciary and rule of law'. The Lawyers' bodies organized protests and processions through out Pakistan. The Lawyers' movement, fully supported by Pakistani media, also generated public protests. Civil society organizations actively participated in the movement. Some opposition political parties also extended their support. This was the first time in Pakistan's history that lawyers had dropped their conflicting political affiliations and forged an unprecedented professional unity to fight for independence of judiciary, rule of law and restoration of Chief Justice Iftikhar. The inspiring and encouraging element in the lawyers' resistance was the participation of the civil society in the movement. According to a columnist, the civil society in Pakistan had never been so outraged. In every place, in every gathering, there was nothing but condemnation for what happened to Chief Justice Iftikhar.<sup>116</sup>

The lawyers' movement set three objectives, namely, independence of judiciary, rule of law and restoration of Justice Iftikhar. The movement succeeded in achieving the last objective and Chief Justice Iftikhar was restored on July 20, 2007 through a "historic decision" of the Supreme Court. The suspension of the Chief Justice and the reference

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<sup>115</sup> For details see The NEWS, Dawn, The Nation, Daily Times and The Frontier Post dated March 10, 2007.

<sup>116</sup> Shafqat Mahmood, 'A Storm is Brewing' The NEWS dated March 16, 2007.

against him were challenged in the Supreme Court through twenty three constitutional petitions including the petitions by the Pakistan Bar Council, Supreme Court Bar Association, four High Court Bar Associations and Chief Justice Iftikhar himself.

After restoration of the Chief Justice, the lawyers' bodies declared that they were determined to continue their struggle for the complete independence of judiciary and rule of law in Pakistan. The stand of lawyers' community had been since long that General Pervez Musharraf was unconstitutional President, as not elected through constitutional procedure, and being Chief of Army Staff, was not eligible to contest the Presidential election of October 2007. They fielded Justice (Retd) Wajihuddin as their candidate in the Presidential election just to create locus standi for challenging the eligibility of General Musharraf. Lawyers challenged the eligibility of General Musharraf before the Chief Election Commissioner of Pakistan. Their objections were over-ruled and General Musharraf's nomination papers were accepted. Several petitions including a petition by Wajihuddin were filed in the Supreme Court challenging the eligibility of General Musharraf. The petitioners requested the bench to stay the process of the Presidential election. A larger bench of the Supreme Court allowed the holding of the Presidential election as per schedule, i.e. on October 6 2007, but barred the Election Commission from issuance of notification of the result till a final decision on the petitions and the hearing of the petitions was adjourned till October 17 2007.<sup>117</sup>

The hearing of the petitions was at the concluding stage and there was a fear in the government circle based on the remarks of the judges on the bench that the court might disqualify General Musharraf.<sup>118</sup> On November 3, 2007, General Musharraf, to preempt the Court's verdict, declared Extra-Constitutional Emergency and promulgated Provisional

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<sup>117</sup> The NEWS, Dawn dated October 6, 2007.

<sup>118</sup> President Musharraf claimed in a press conference on December 11 2007 that the Chief Justice was trying to remove him illegally. See Dawn, The NEWS dated December 12 2007.

Constitution Order (PCO) 2007. Constitution was suspended, judges of High Courts and Supreme Court were asked, on the basis of choose and pick, to take new oath under PCO 2007. In an unprecedented move, seven judges of the Supreme Court headed by Chief Justice Iftikhar immediately assembled in a court room and overturned the PCO. The court restrained the Chief of Army Staff, Corps Commanders, Staff Officers and other civil and military officers from acting under PCO. The court directed the President Musharraf and Prime Minister Shaukat Aziz not to take any action contrary to the independence of the judiciary and asked the judges of the Supreme Court and the High Courts, including their Chief Justices, not to take an oath under the PCO or follow any other extra-constitutional step.<sup>119</sup> About four dozens judges of the superior courts including 12 judges of the Supreme Court refused to accept PCO. However, the reconstituted Supreme Court under PCO validated, on November 23, 2007, the imposition of emergency and the promulgation of the Provisional Constitution Order issued by the Chief of the Army Staff General Pervez Musharraf, and justified all the steps taken after the emergency on November 3, 2007.<sup>120</sup>

All refusing judges were kept under house arrest. Thousands of lawyers, members of civil society and political activists were arrested. Lawyers' leaders including President of Supreme Court Bar Association, Aitzaz Ahsan were under house arrest till the end of February 2008. The deposed Chief Justice Iftikhar Muhammad Chaudhry was under house arrest till March 21, 2008. His detention came to an end when the New Prime Minister of Pakistan, Yusuf Raza Gilani announced freedom for all arrested judges after his election from the National Assembly as Prime Minister of Pakistan.

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<sup>119</sup> Dawn, the NEWS, the Nations dated November 4, 2007.

<sup>120</sup> Dawn, the NEWS; the Nation dated November 24, 2007.

### **Chapter III: ORGANIZATION OF THE JUDICIARY IN PAKISTAN.**

The Courts in Pakistan are broadly divided into three groups: Constitutional Courts, Ordinary Courts and Special Courts. Constitutional Courts are three, namely the Supreme Court, the High Courts and the Federal Shariat Court. These Courts, also known as Superior Courts, have been established and their jurisdictions determined by the Constitution where as ordinary Courts have been originated and their jurisdictions defined by ordinary laws. Ordinary Courts, also called sub-ordinate judiciary, include the District and Session Judge; the Additional District and Sessions Judge; the Senior Civil Judge; the Civil Judges class First, 2nd & 3rd; the Judicial Magistrate Class First, 2nd & 3rd; Family Courts and Revenue Courts.

The Constitution authorizes the Federal Legislature to establish administrative Courts/Tribunals for dealing with federal subjects.<sup>121</sup> Consequently several special Courts/Tribunals have been created which operate under the administrative control of the Federal Government. Such Courts/tribunals include the Special Banking Courts, Special Court of Custom and Taxation, Income Tax (appellate) Tribunal, Anti-corruption Court, Accountability Court, Anti-terrorist Court etc. The judicial officers over these Courts are appointed on deputation from the provincial judicial cadre.<sup>122</sup> Similar powers are available to the Provincial Assemblies also to establish special courts, dealing with provincial subjects within their respective provinces.<sup>123</sup>

Though this research is limited to superior judiciary, yet the whole organization of the judicial system is provided in this chapter. The organization of the subordinate judiciary is included in this study due to

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<sup>121</sup> See item 14 of the Federal Legislative List, Part 1 in the 4<sup>th</sup> schedule, the Constitution of Pakistan.

<sup>122</sup> Dr. Faqir Hussain, Judicial System in Pakistan, P- 11 available at [www.ljcp.gov.pk](http://www.ljcp.gov.pk)

<sup>123</sup> The Constitution of Pakistan, Article 142.

certain reasons. First Pakistan has adopted a single judicial system having an inter-connected hierarchy from the Supreme Court to the Civil Judge of Class III. Secondly some district judges are appointed as judges of the High Courts. Thirdly, the subordinate judiciary works under the direct control and supervision of the High Court. Fourthly, certain decisions/orders of the subordinate judiciary are subject to the High Court's revision. Fifthly appeal against certain judgments/orders of the lower courts is allowed in the High Court. Due to these reasons it seems necessary to discuss the organization and powers of the subordinate judiciary also.

### **3.1 The Supreme Court of Pakistan.**

The Supreme Court of Pakistan is a creature of the Constitution and it derives its powers and jurisdiction entirely from the Constitution.<sup>124</sup> According to Article 176, the Supreme Court of Pakistan consists of a Chief Justice to be known as the Chief Justice of Pakistan and such number of other judges as may be fixed by an Act of Parliament, and in the absence of any such law, by the President. At present the Supreme Court of Pakistan consists of seventeen judges including Chief Justice of Pakistan. This size of the Court was fixed by the Parliament after a very serious tussle between the executive and the judiciary in 1997.<sup>125</sup>

The strength of the Supreme Court was always determined by the President till November 6, 1996 when Parliament enacted a law to fix the size of the Court. The number of seventeen judges of the Supreme Court was determined by the President in 1986 and the same number was retained by the Parliament. An ad hoc judge can be appointed under Article 182 of the Constitution. This article provides that if at any time it is not possible to hold or continue sitting of the Supreme Court for

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<sup>124</sup> The Constitution of Pakistan, Article 175.

<sup>125</sup> Detail discussion is available in chapter II of the Thesis.

shortage of judges, or for any other reason it is necessary to increase temporarily the number of judges of the Supreme Court, the Chief Justice may, with the approval of the President, request any retired judge of the Supreme Court or a judge of a High Court with the consent of the Chief Justice of the concerned High Court to attend sittings/proceedings of the Supreme Court as an ad hoc judge for such period as may be necessary, and while so attending an ad hoc judge shall have the same power and jurisdiction as a judge of the Supreme Court. At the moment there are seventeen permanent judges including the Chief Justice and two ad hoc judges. All judges, including acting/ ad hoc judges, of the Supreme Court exercise same jurisdiction and powers. Administrative matters are decided by the Chief Justice.

According to article 181 of the Constitution, at any time when the office of a judge of the Supreme Court becomes vacant or a judge of the Supreme Court is absent or is unable to perform the functions of his office due to any other cause, the President may appoint a judge of a High Court including a retired judge of a high Court as acting judge of the Supreme Court if he is qualified for appointment as judge of the Supreme Court.

Although Articles 181 and 182 provides different grounds but the language of both Articles indicates that they provide for appointment of judges to meet the temporary situation.

### **3.1.1: Qualifications and Appointment of the Supreme Court Judges:**

For the appointment of a judge of the Supreme Court, Article 177 of the Constitution provides the following qualifications/conditions that a person/candidate must be:

- (i) A citizen of Pakistan.
- (ii) A judge of the High Court, who has been judge for not less than 5 years: or
- (iii) An advocate of a High Court, who has been advocate of a High Court for not less than 15 years.

As per interpretation and ruling of the Supreme Court, an advocate of a High Court, for the purpose of appointment as a Judge, means a practicing advocate of a High Court. Mere enrollment as an advocate is not enough.<sup>126</sup>

Under Article 177, the Chief Justice of Pakistan is appointed by the President of Pakistan. Other judges of the Supreme Court are also appointed by the President after consultation with the Chief Justice of Pakistan.

A principle of seniority has been followed in the appointment of Chief Justice of Pakistan except in two occasions. On June 28, 1954 Justice Munir was appointed as a Chief Justice of the Federal Court of Pakistan<sup>127</sup> by passing the most senior judge, Justice A.S.M. Akram. Thereafter, the rule of seniority was followed consistently for forty years until the appointment of justice Sajjad Ali Shah, superseding three senior judges, as the Chief Justice of Pakistan on June 5, 1994. The appointment of Justice Sajjad Ali Shah was challenged, in controversial situation, in 1998.<sup>128</sup> The Supreme Court held that the senior most judge of the Supreme Court must be appointed as the Chief Justice of Pakistan unless there are some cogent and strong reasons, to be recorded by the President, to ignore the seniority.<sup>129</sup> Hence it is mandatory for the President to appoint the senior most judge of the Supreme Court as Chief Justice of Pakistan in the absence of any strong and cogent reasons.

The term “consultation” in Article 177 and Article 193 for the purpose of appointment of judges of the Supreme Court and judges of High Courts respectively has been interpreted by the Supreme Court. The “consultation” under Articles 177 and 193 cannot be treated lightly as a mere formality. The concluding words of the Court’s ruling are reproduced: “consultation in the scheme as envisaged in the Constitution

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<sup>126</sup> Ibid

<sup>127</sup> The Federal Court of Pakistan was the apex Court of Pakistan under the Government of India Act 1935 which was its Interim Constitution till 1956.

<sup>128</sup> Detail discussion is available in chapter II of the Thesis.

<sup>129</sup> Malik Asad Vs Federation of Pakistan, PLD 1998, Sc, 161.

is supposed to be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded in writing by the President / Executive.”<sup>130</sup>

The word ‘consultation’ was also discussed by the Indian Supreme Court in 1994, in connection with the appointments of Judges of High Courts. The Court laid down in very specific terms the concept of the word “consultation” vis-à-vis powers of the President and Chief Justice of India in respect of appointments in the superior judiciary in nutshell, the main conclusion is that in the process of consultation the opinion of the Chief Justice of India has primacy.<sup>131</sup>

In 1996 differences between the President and the Prime Minister appeared over the appointment of the judges in the superior judiciary. The President filed a reference known as reference No.2/1996, under Article 186 of the Supreme Court on the question “whether the advice of the Prime Minister under Article 48 (i) of the Constitution was mandatory for the appointments of the Chief Justices and the judges of the superior Courts”.<sup>132</sup> More or less at the same time a lawyer, Wahab-ul Khairi, filed a Constitutional petition, on behalf of Al-Jehad Trust under Article 184(3) of the Constitution directly in the Supreme Court, seeking a declaration that the President was the appointing authority for the judges of the Superior Courts, and that the advice of the Prime Minister under Article 48(1) of the Constitution was not required. It would be pertinent to mention that Article 48(1) envisages that in exercise of his functions, the President shall act in accordance with the advice of the cabinet or the Prime Minister.

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<sup>130</sup> Al-Jehad Trust Vs Federation of Pakistan PLD 1996, SC, P-405

<sup>131</sup> Supreme Court Advocates-on-Association Vs Union of India, AIR 1994, SC- 84.

<sup>132</sup> Justice (Retd) Ajmal Mian, “A Judge Speaks Out”, P- 203.

The Court concluded that the President is bound by the advice of the Prime Minister in respect of appointment of Judges of the superior judiciary under Articles 177 and 193.<sup>133</sup> The above referred three judgments of the Supreme Court in *Al-Jehad Vs Federation of Pakistan* 1996; *Al-Jehad Vs Federation of Pakistan* 1997 and *Malik Asad Vs Federation of Pakistan* 1998, qualified and curtailed the powers of the President to appoint the judges of the superior courts. In the first case consultation with the Chief Justice by the President was declared to be “effective, meaningful, purposive and consensus-oriented, leaving no room for complaint, or arbitrariness or unfair play.”<sup>134</sup>

### **3.1.2: Oath of the Judges:**

Every judge of the Supreme including the Chief Justice of Pakistan, before entering upon the office, shall take oath to discharge his duties honestly and faithfully in accordance with the Constitution and the law of the country; and to “Preserve, protect and defend the Constitution”.<sup>135</sup>

### **3.1.3: Retirement of the Judges:**

A Judge of the Supreme Court retires at the age of 65 years, therefore, till he reaches this age he continues to hold office unless he resigns or is removed from his office in accordance with the Constitution.<sup>136</sup>

### **3.1.4: Seats of the Supreme Court:**

The permanent seat of the Supreme Court is at Islamabad. But Supreme Court may sit in such other places as the Chief Justice of Pakistan may appoint with the approval of the President.<sup>137</sup> At the moment, there are four other places where Supreme Court holds Court apart from Islamabad i.e. Lahore, Peshawar, Quetta and Karachi.

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<sup>133</sup> *Al-Jehad Trust Vs Federation of Pakistan*, PLD 1997, SC-84.

<sup>134</sup> See above reference No: 11

<sup>135</sup> The Constitution of Pakistan, Article 178. The form of oath is set out in the Third Schedule of the Constitution.

<sup>136</sup> The Constitution of Pakistan, Article 179.

<sup>137</sup> *Ibid* Article 183.

### **3.1.5: Kinds of Benches.**

The Supreme Court as well as the High Courts work in benches; four types of benches namely Single Bench (SB), Double Bench (DB), Full Bench (FB) and Full Court. Single Bench is presided over by a single judge and Double Bench means a bench having two judges. Full Bench is a bench having more than two judges, it may be of three or four or five etc. Usually the Full Bench consists of odd numbers so that in case of difference of opinion among the judges, the decision may be made in the form of majority judgment. The presiding judge for FB is appointed by the Chief Justice of the concerned court; usually the most senior among the member judges of the bench is appointed as presiding judge. When all judges of the Supreme Court or of a High Court sit collectively to hear a particular case, such sitting of the court is known as Full Court. Only cases of public importance are heard by Full Court.<sup>138</sup> The Full Court is presided over by the Chief Justice of the concerned court except where the Chief Justice himself is a party in a case, such as Justice Iftikhar's case in 2007 (Chief Justice of Pakistan).

The formation of the various benches in the Supreme Court and High Courts and assignment of cases to the benches (technically called Roaster) are made on weekly basis by the Chief Justice of the concerned court. As per a ruling of the Supreme Court, it is the privilege and duty of the Chief Justice, whether of a High Court or of the Supreme Court, to constitute Benches for the hearing and disposal of cases coming before the Court and no litigant or lawyer can be permitted to ask that his case be heard by a Bench of his choice.<sup>139</sup> The said privilege of the Chief Justice has been discussed in detail in another case. The concluding paragraph of the relevant portion of the said judgment is reproduced: "We reiterate here that this Court not once but on a number of occasions has

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<sup>138</sup> Such as, Tamizuddin Khan's case 1954-5, The Governor General Reference 1955, Dosso case 1958, Asma Jilani's Case 1972, Nusrat Bhutto's Case 1977, Nawaz Sharif case 1993, Chief Justice Iftikhar's case 2007 etc.

<sup>139</sup> Malik Hamid Sarfaraz V Federation of Pakistan, PLD 1979, SC. 991.

laid down that it is the sole prerogative of the Chief Justice of Pakistan to constitute a Bench of any number of Judges to hear any particular case and neither an objection can be raised nor is any party entitled to ask for condition of a Bench of its own choice.”<sup>140</sup>

### **3.2: The Federal Shariat Court.**

The Federal Shariat Court was established by a military dictator General Zia-ul-Haq in 1980 by inserting a new chapter- namely Chapter 3-A in the Constitution.<sup>141</sup> The apparent purpose was Islamization of laws in Pakistan. The Federal Shariat Court was assigned a function to examine any law or provision of law whether the same was repugnant to the injunctions of Islam as laid down in the Holy Quran and the Sunnah. The Federal Shariat Court, as per Article 203C (2) of the Constitution, consists of not more than eight Muslim judges including the Chief Justice of the Court, to be appointed by the President. The Chief Justice of the Federal Shariat Court shall be a person who is, or has been or is qualified to be a judge of the Supreme Court or who is or has been or is qualified to be a judge of a High Court. Out of the remaining seven judges not more than four shall be persons each one of whom is or has been or is qualified to be a judge of a High Court and not more than three shall be Ulema<sup>142</sup> who are well versed in Islamic law. The term of the Chief Justice as well as of the Judges of the Federal Shariat Court shall not be more than three years which is further extendable. Under this provision of Article 203C of the Constitution the President possesses sole and tremendous power over appointment of judges of the Federal Shariat Court. But this power has been qualified by a ruling of the Supreme Court in a case.<sup>143</sup> In view of

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<sup>140</sup> Supreme Court Bar Association through its President V. Federation of Pakistan PLD 2002 SC. 939.

<sup>141</sup> Constitution (Amendment) Order 1980, (President Order NO: 1 of 1980) PLD 1980 Central Statutes P-89

<sup>142</sup> “Ulema” is plural of an Aalim which means a religious scholar of Islamic theology and Shariat (i.e. Islamic Law.)

<sup>143</sup> Al Jihad Trust V. Federation of Pakistan reported in PLD 1997, SC 84.

the judgment of the Supreme Court, the President is to appoint the judges including the Chief Justice of the Federal Shariat Court on the advice of the Prime Minister.

The Chief Justice and judges of the Federal Shariat Court take oath before the President or before a person nominated by the President, in the form set out in the Third Schedule of the Constitution. Under Article 203 C (9) the Chief Justice of the Federal Shariat Court is entitled to the same salary, allowances and other privileges as are given to a Judge of the Supreme Court and a Judge of the Federal Shariat Court is entitled to the same salary, allowances and other privileges which are given to a Judge of a High Court.

The principal seat of the Federal Shariat Court is at Islamabad but the Court can sit at other place in Pakistan as the Chief Justice with the approval of the President may consider appropriate.

### **3.3: THE HIGH COURTS.**

According to Article 192, a High Court consists of a Chief Justice and so many other judges as may be determined by law or, until so determined as may be fixed by the President. The present number of judges, including Chief Justice, fixed for the Lahore High Court is fifty, for the High Court of Sindh is twenty eight, for the Peshawar High Court is sixteen and for the High Court of Baluchistan is nine. All the judges exercise the same jurisdiction and powers. Administrative matters are decided by the Chief Justice. It is prerogative and duty of the Chief Justice to constitute Benches for the hearing and disposal of cases coming before his Court. In case a Chief Justice is unable to perform his functions or office of the Chief Justice is vacant, Constitution provides for appointment of Acting Chief Justice under Article 196, who performs the functions of the Chief Justice. In Pakistan there are instances that Acting Chief Justices, particularly of High Courts, were appointed for very long

time.<sup>144</sup> It was never approved by the Bar Associations. The Supreme Court also took notice of the said practice, therefore, it was held, “In all fairness, the period for such acting appointment should not be more than ninety days during which Acting Chief Justice may perform functions of routine nature excluding recommendations in respect of appointment of Judges .....Acting Chief Justices are supposed to be functioning for a short time and, therefore, it would not be fair to allow them to interfere with policy making matters and appointments in the judiciary which should be left for permanent incumbents”.<sup>145</sup>

### **3.3.1: Benches of the High Courts:**

The Constitution says that each Province shall have a High Court.<sup>146</sup> As four Provinces are included in the federation of Pakistan, hence, we have four High Courts, namely Lahore High Court, Sindh High Court, Peshawar High Court and Baluchistan High Court, having their principal seats at Lahore, Karachi, Peshawar and Quetta respectively.<sup>147</sup> Clause (3) of Article 198 provides that Lahore High Court shall have a bench each at Bahawalpur, Multan and Rawalpindi; the High Court of Sindh shall have a Bench at Sukkur. The Peshawar High Court shall have a Bench each at Abbotabad and Dera Ismail Khan; and the High Court of Baluchistan shall have a Bench at Sibi.

No provision was given in the original Constitution for the High Courts to have Benches at other places in addition to their principal seats. The Benches of the High Courts at the above mentioned places other than the principal seats were, for the first time, allowed/established by a military government of General Zia. On January 1, 1981, permanent Benches of the Lahore High Court were created at Bahawalpur, Multan

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<sup>144</sup> Detail discussion is available in chapter II of the Thesis.

<sup>145</sup> Al-Jehad Trust Vs Federation of Pakistan, PLD 1996, SC – 324.

<sup>146</sup> Ibid Art. 175

<sup>147</sup> Ibid Art. 198

and Rawalpindi under High Courts (Establishment) Order (Punjab Amendment) Ordinance 1981.<sup>148</sup>

The permanent Benches of the High Courts were given a “semi-Constitutional”<sup>149</sup> position under the Provisional Constitution Order 1981, which provided for permanent benches of:

- (i) the Lahore High Court at Bahawalpur, Multan, and Rawalpindi;
- (ii) the High Court of Sindh at Sukker;
- (iii) the Peshawar High Court at Abbotabad and Dera Ismail Khan and
- (iv) the High Court of Baluchistan at Sibi.

The same was incorporated in the Constitution in 1985.<sup>150</sup> In addition to these benches of the High Courts, it is further provided that each of the High Courts may have benches at some other places as the Governor of the province may determine on the advice of the provincial cabinet in consultation with the Chief Justice of the concerned High Court.<sup>151</sup> Under this provision of the Constitution, the Sindh High Court has also a bench each at Hyderabad and Larkana.

The territorial jurisdiction of the various benches of the High Courts is specified and determined by the Governor in consultation with the Chief Justice of the concerned High Court.<sup>152</sup>

### **3.3.2: Appointment of the High Court Judges:**

As per Article 193 (1) of the Constitution, the Chief Justice and judges of a High Court are appointed by the President after consultation with:

- (a) the Chief Justice of Pakistan,
- (b) the Governor of the concerned province, and

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<sup>148</sup> Ordinance 1 of 1981 PLD 1981 Punjab statutes 1

<sup>149</sup> Hamid Khan, *Constitutional and Political History of Pakistan*, (2001) P-643.

<sup>150</sup> Through President Order No; 14, 1985 (Revival of the Constitution Order 1985)

<sup>151</sup> The Constitution of Pakistan, Art. 198.

<sup>152</sup> Ibid

(c) the Chief Justice of the concerned High Court, except where the appointment is that of the Chief Justice.

As discussed above presently the President is bound by the advice of the Prime Minister in respect of appointment of Judges of the High Courts. Under Article 193 (2) a citizen of Pakistan, not less than of 45 years of age, is qualified to be appointed as a judge of a High Court if he fulfills any of the following three requirements:

- a) He has been an Advocate of a High Court for ten years; or
- b) He has been a member of civil service for ten years and has served or exercised the functions of a District Judge for a period of three years; or
- c) He has held a judicial office for a period of ten years.

### **3.3.3: Oath of the Judges:**

Every judge of a High Court including the Chief Justice, before entering upon the office, shall take oath to discharge his duties honestly and faithfully in accordance with the Constitution and the law of the country; and to “preserve, protect and defend the Constitution”.<sup>153</sup>

### **3.3.4: Retirement of the Judges:**

A Judge of a High Court including the Chief Justice continues to hold office till he attains the age of 62 years, unless he resigns or is removed from his office in accordance with the Constitution.<sup>154</sup>

## **3.4: Subordinate Judiciary:**

The subordinate judiciary may be broadly divided into two classes; i.e. (i) civil courts, established under the West Pakistan Civil Court Ordinance 1962 and (ii) criminal courts, created under the Criminal Procedure Code 1898. In addition, there also exist other courts and tribunals of civil and criminal nature, created under special laws and

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<sup>153</sup> The Constitution of Pakistan, Article 194. The form of oath is set out in the Third Schedule of the Constitution.

<sup>154</sup> The Constitution of Pakistan, Article 195.

enactments. Their jurisdiction, powers and functions are specified in the statutes creating them. The decisions and judgments of such special courts are assailable before the superior judiciary (High Court and/or Supreme Court) through revision or appeal.

Pakistan has adopted a federal system, having four provinces. Each Province has been divided into Sessions Divisions, each headed by a District and Sessions Judge. The hierarchy of the subordinate Civil Courts from top to bottom is. District Judge, Additional District Judge, Senior Civil Judge, Civil Judge First class, 2<sup>nd</sup> class and 3<sup>rd</sup> class. Similarly, the hierarchy of criminal courts is Sessions Judge, Additional Sessions Judge, Judicial Magistrate First class, 2<sup>nd</sup> class and 3<sup>rd</sup> class. Law fixes their pecuniary and territorial jurisdictions. Appeal against the decisions of civil courts lie to the District Judge and to the High Court, if the value of the suit exceeds specified amount. Similarly, in keeping with the quantum of penalty, appeals against criminal courts lie to Sessions Judge or High Court.

The subordinate courts (civil and criminal) have been established and their jurisdiction defined by law. They are supervised and controlled by the respective High Court. The administration of justice, however, is a provincial subject and thus the subordinate courts are organised and the terms and conditions of service of judicial officers determined under the provincial laws and rules. The issues of recruitment, promotions and other terms and conditions of service together with disciplinary proceedings, etc are dealt with under the provincial civil servants acts and the rules framed there under. Until recently the appointing authority for judicial officers happened to be the provincial government but with the separation of the judiciary from the executive, such authority has been transferred to the High Court.

Initial recruitment as Civil Judge-cum-Judicial Magistrate is made through the Provincial Public Service Commission with the active involvement of the High Court. For the provinces of Punjab and NWFP,

recruitment is made through a competitive examination consisting of a written test and viva voce. In Sindh and Baluchistan, however, such recruitment is made only through a viva voce. The Viva Voce Committee consists of the members of the Public Service Commission as well as judges of the High Court.

A selection committee, consisting of the judges of the High Court, decides the issue of promotion of judges. For appointment as Additional District & Sessions Judge, quota is fixed for service personnel as well as induction from the Bar. Appointment as District & Sessions Judge is by promotion on the basis of seniority-cum-fitness from among the serving judicial officers.

After appointment, the civil judges are usually attached for a few weeks to the Court of Senior Civil Judge/District & Sessions Judge to get practical training. They also receive specialised training at the Federal Judicial Academy Islamabad and in the respective provincial academies. Such training is comprised of education in various substantive laws, court management, case processing and judicial procedure, etc.

#### **3.4.1: Revenue Courts:**

Besides the civil courts, revenue courts exist and operate under the West Pakistan Land Revenue Act 1967. The revenue courts may be classified as the Board of Revenue, the Commissioner, the Collector, the Assistant Collector of the First Grade and Second Grade. The provincial government that exercises administrative control over them appoints such officers. Law prescribes their powers and functions.

#### **3.4.2: Special Courts:**

The Constitution authorises the federal legislature to establish administrative courts and tribunals for dealing with federal subjects.<sup>155</sup> Consequently, several special courts/tribunals have been created which

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<sup>155</sup> Item 14 of the Federal Legislative Act, Part I in 4<sup>th</sup> Schedule

operate under the administrative control of the Federal Government. Most of these courts function under the Ministry of Law & Justice, however, certain courts also operate under other ministries/departments. Such courts/tribunals include the Special Banking Court, Special Court Custom, Taxation and Anti-corruption, Income Tax (Appellate) Tribunal, Insurance Appellate Tribunal, etc. Usually the juridical officers operating in these courts are appointed on deputation from the provincial judicial cadre.

#### **3.4.3: Service Tribunals:**

Under Article 212 of the Constitution, the Government is authorised to set up administrative courts and tribunals for exercising jurisdiction in matters, inter alia, relating to the terms and conditions of service of civil servants. Accordingly, service tribunals, both at the centre and provincial level have been established and are functioning. The members of these tribunals are appointed by the respective Government. Appeals against the decisions of the Provincial Service Tribunal and the Federal Service Tribunal lie to the Supreme Court.

## **Chapter IV: POWERS AND JURISDICTIONS OF THE SUPERIOR COURTS:**

As discussed in the preceding chapter No: III, there are three types of courts in Pakistan, namely, constitutional courts, ordinary courts and special courts. All constitutional courts derive their powers and jurisdiction from the constitution. Ordinary courts are originated and their jurisdictions and powers are defined by ordinary laws. Special courts are established and their powers are provided under special laws.

The general rule regarding the jurisdiction and powers of all courts is that no court has any jurisdiction except such jurisdiction as is conferred on it by the constitution or by any law.<sup>1</sup> Parliament has the authority to determine the jurisdiction and powers of all courts, with respect to matters in Federal List, including the High Courts but not the Supreme Court which derives most of its powers from the constitution but even in the case of the Supreme Court its jurisdiction may be enlarged and supplemental powers may be conferred on it by parliament to such extent as is expressly authorized by or under the constitution.<sup>2</sup> But the jurisdiction that is conferred on the Supreme Court by the constitution cannot be cut down by parliament except by an amendment of the constitution. The same principle holds good regarding the jurisdiction and powers of the Federal Shariat Court and the High Courts which the constitution confers on them.

### **4.1: Powers of the Supreme Court:**

The Supreme Court of Pakistan is established by the constitution and derives its powers from the constitution.<sup>3</sup> It is the apex court of ultimate jurisdiction in the country. It is the final arbiter of the

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<sup>1</sup> The Constitution of Pakistan 1973, Article 175 (2).

<sup>2</sup> Item No: 55 of the Federal List, Fourth Schedule, the Constitution of Pakistan.

<sup>3</sup> The Constitution of Pakistan, Articles 175 & 176.

constitution and the law; and its decisions are binding on all courts in Pakistan.<sup>4</sup> All executive and judicial authorities in Pakistan are required to act in aid of the Supreme Court.<sup>5</sup> The constitution confers fairly wide powers on the Supreme Court. It exercises several powers including original, appellate and advisory jurisdictions.

#### **4.1.1: Original Jurisdiction of the Supreme Court:**

A court is said to have original jurisdiction when it has the power to hear and adjudicate upon the matter or issue in the first instance. It is said to have exclusive jurisdiction when it has power to try and determine a case to the exclusion of any other court, tribunal, or authority.

Under article 184 of the constitution, the Supreme Court has original jurisdiction only in two instances, i.e. to decide inter-governmental disputes and to enforce Fundamental Rights of public importance.

According to clause (1) of Article 184, the Supreme Court has original and exclusive jurisdiction in all inter-Government disputes, i.e. disputes between two or more Governments. Governments mean the Federal and the Provincial governments. The word “dispute” has not been defined by the article and is wide enough to include all disputes, jurisdictional, administrative and fiscal etc. The jurisdiction of the court is exclusive because it excludes the jurisdiction of all other courts in respect of the disputes mentioned in the article.

In the exercise of this jurisdiction, the court can pass only declaratory judgment and not a decree, order or direction executable under article 187.

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<sup>4</sup> Ibid Article 189.

<sup>5</sup> Ibid Article 190.

According to clause (3) of article 184, without prejudice to the provisions of article 199,<sup>6</sup> the Supreme Court has the power to issue writ for the enforcement of any Fundamental Right of public importance.<sup>7</sup> The opening words “without prejudice” in article 184(3) mean no more than to save the provisions of article 199. The clause means that it leaves the power of the High Court under article 199 intact.

Again the plain language of Article 184(3) indicates that it is open ended. The article does not say as to who shall have the right to move the Supreme Court nor does it say by what proceedings the Supreme Court may be so moved.

#### **4.1.2: Appellate Jurisdiction of the Supreme Court:**

Articles 185, 212 and 203F of the constitution provide the appellate jurisdiction of the Supreme Court in criminal matters, civil matters, interpretation of the constitution, service matters and appeal by special leave of the court. The appellate jurisdiction of the Supreme Court under article 185 can broadly be divided into two categories: right to appeal and leave to appeal.

##### **(a) Right to Appeal:**

Clause (2) of Article 185 specifies the cases in which appeal to the Supreme Court lies as of right. An appeal from any judgment, decree, final order or sentence of a High Court, shall lie to the Supreme Court in the following cases:

- If the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or transportation for life or imprisonment for life; or on revision, has enhanced a sentence to any of the stated sentences; or

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<sup>6</sup> Article 199 states the constitutional jurisdiction of a High Court.

<sup>7</sup> Fundamental Rights granted by the Constitution of Pakistan 1973.

- If the High Court has withdrawn any case for trial before itself, from any subordinate court and has in such trial convicted the accused person and sentenced him as aforesaid; or
- If the High Court has imposed any punishment on any person for contempt of the High Court; or
- If the value of the subject matter of the dispute in the first court and also in appeal is not less than 50000 rupees and the judgment, decree or final order has been varied or set aside, by the High court; or
- If the judgment, or decree or final order involves some claim or property of the like value (i.e. 50000 rupees) and has been varied or set aside, by the High Court; or
- If the High Court certifies that the case involves a substantial question of law as to interpretation of the constitution.

(b) Leave to Appeal:

According to clause (3) of article 185, an appeal to the Supreme Court from a judgment, decree, order or sentence of a High Court in cases to which the above cited clause (2) does not apply, shall lie only if the Supreme Court grants leave to appeal. The power given in clause (3) of the article 185 is in the nature of special power which is exercisable in cases lying outside the purview of clause (2) of the article. This power of the Supreme Court to grant special leave to appeal from the judgments, decrees, orders or sentences of a High court, is not subject to any constitutional limitation and is left entirely to the discretion of the Supreme Court.

The clause (3) does not confer a right of appeal upon the party but merely vests discretion in the Supreme Court to interfere in exceptional cases.

(c) Appeal to the Supreme Court from Administrative

Courts/Tribunals:

An appeal is provided to the Supreme Court under clause 3 of Article 212 of the Constitution against a judgment, decree, order or sentence of administrative courts or tribunals. However, appeal shall lie only if the Supreme Court grants leave to appeal being satisfied that the case involves a substantial question of law of public importance.

(d) Appeal to the Supreme Court from the Federal Shariat Court:

Under Article 203F of the constitution appeal is provided against final decision of the Federal Shariat Court within sixty days of such decision before the Supreme Court Shariat Appellate Bench. The Federal Government or a Provincial Government is allowed to prefer appeal within six months of such decision. The Supreme Court Shariat Appellate Bench consists of three Muslim judges of the Supreme Court and not more than two *Ulema*<sup>8</sup> to be appointed by the President (on advice of the Prime Minister) to attend sitting of the Bench as ad hoc members of the Shariat Appellate Bench.

**4.1.3: Advisory Jurisdiction of the Supreme Court:**

Article 186 of the constitution says that if the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law of public importance he may refer the question to the Supreme Court for consideration. The Supreme Court shall consider the question and report its opinion to the President. The opinion of the court is essentially in the nature of an advice, not binding on the referring authority and is not a decision within the meaning of article 189.

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<sup>8</sup> *Ulema* are plural of *A'alim* which means a scholar of Islamic law (Shariat) and Islamic theology.

#### **4.1.4: Power to Transfer Cases:**

Article 186-A empowers the Supreme Court to transfer any case, appeal or any other proceedings pending before any High Court to another High Court if the Supreme Court considers it expedient to do so in the interest of justice.

This article 186-A was added to constitution by President Order No.14 of 1985. It is worthy of notice that the article neither prescribes any specific conditions nor places any limitations on the power of the Supreme Court to transfer any case from one High Court to another High Court. The only requirement for the exercise of the power is that the Supreme Court should consider such transfer expedient in the interest of justice. Thus the Supreme Court has very wide powers in this behalf.

#### **4.1.5: Review Power of the Supreme Court:**

Under Article 188 the Supreme Court has jurisdiction, subject to any Act of Parliament and any Rules made by the Supreme Court itself, to review its own judgment or order. Thus the review power of the Supreme Court can only be limited either by an Act of Parliament or by Rules to be made by the Supreme Court itself. At present there is neither any Act of Parliament nor any Rules of the Supreme Court in this regard. Therefore its jurisdiction to review remains unlimited.

#### **4.1.6: Execution of Processes of the Supreme Court:**

According to article 187 the Supreme Court has powers to issue such directions or orders as may be necessary for doing complete justice. In this connection the Supreme Court may order the attendance of any person or the discovery or production of document. Any such order or direction shall be enforceable throughout Pakistan.

#### **4.1.7: Rule-making Power:**

The constitution has expressly conferred powers on the Supreme Court under article 191, to make rules for regulating the practice and procedure of the court.

#### **4.1.8: Power to Punish for Contempt of Court:**

Article 204 of the constitution confers a power on the Supreme Court and High Court to punish any person who commits an act of contempt of the court. The Article has laid down four broad categories of situations where under the court is empowered to punish any person, namely:

- ❖ When he abuses, interferes with or obstructs the process of the court in any way or disobeys any order of the court; or
- ❖ He scandalizes the court or otherwise does any thing which tends to bring the court or a judge of the court into hatred, ridicule, or contempt; or
- ❖ He does any thing which tends to prejudice the determination of a matter pending before the court; or
- ❖ He does any thing which, by law, constitutes contempt of the court.

#### **4.2: Functions and Powers of the Federal Shariat Court:**

Chapter 3-A was added to the Constitution by General Zia through President Order No: 1 of 1980. This chapter establishes the Federal Shariat Court and confers powers on it. The provisions of chapter 3-A have been given an over ridding effect over the remaining Constitution by Article 203-A, which declares that the provisions of this chapter shall have effect notwithstanding anything contained in the constitution. So supremacy has been given to the provisions of this chapter.

#### **4.2.1: To Examine a Law:**

The first and the important function of the Federal Shariat Court is to examine a law whether it is against the Injunctions of Islam as laid down in the Quran and the Sunnah of the Holy Prophet. Under Article 203-D of the Constitution, the court may take up the examination of any law either on the petition of a citizen of Pakistan, or the Federal Government or the Provincial Government or of its own motion. If such law appears to the court, to be repugnant to the injunctions of Islam, the court shall issue a notice in this regard to the Federal Government in case of Federal law or to the Provincial Government in case of Provincial law. An adequate opportunity shall be given to the concerned Govt. to place its point of view before the court.

If any law or provision of law is held by the court to be repugnant to the Injunctions of Islam, the President in case of Federal law or the Governor in case of a Provincial law shall take steps to amend the law so as to bring it into conformity with the injunctions of Islam. The court shall specify the day on which the decision shall take effect. Such law or provision of law, held to be repugnant, shall cease to have effect on the day on which the decision of the court takes effect.

#### **4.2.2: Revisional Power of the Federal Shariat Court:**

Article 203-DD of the constitution confers exclusive revisional jurisdiction on the Federal Shariat Court. The revisional powers of the Federal Shariat court extends to calling for and examining the record of any case decided by any criminal court under any Hudood Law for the purpose of satisfying itself as to the correctness or legality of any finding, sentence or order passed by it and when calling for such record it may direct that execution of any sentence be suspended. In any case the record of which has been called for by the Federal Shariat Court, it may pass such order as it may deem fit and proper. The court is also vested with the

power to enhance the sentence or to convert finding of acquittal into one of conviction where the needs of justice so demand. The only mandatory requirement for the exercise of these powers by the court is that no order to the prejudice of the accused can be passed by the court unless he has been given an opportunity of being heard in his defense.

Power of revision conferred on Federal Shariat Court under Article 203-DD are exclusive in nature. No other court has jurisdiction over an order passed by any criminal court under Hudood laws. High Court is not the criminal court and this revisional jurisdiction cannot be exercised in cases decided by the High Court.

#### **4.2.3: Procedural Powers of the Federal Shariat Court.**

Article 203-E of the Constitution confers a lot of procedural powers on the Federal Shariat Court. For the purposes of the performance of its functions, the court shall have the powers of a civil court trying a suit under the Code of Civil Procedure. Clause 2 of the article confers on the court tremendous power to conduct its proceedings and regulate its procedure in all respects as it deems fit. Clause 3 of the same article empowers the court to punish its own contempt just as the High Court can do in its own case under article 204.

#### **4.2.4: Review Power of the Federal Shariat Court:**

Clause 9 of article 203-E confers power on the Federal Shariat Court to review its own judgment, decision or order. There is no condition and no limitation on the exercise of this power of review.

#### **4.2.5: Rule-making Power of the Federal Shariat Court:**

Article 203-J empowers the Federal Shariat Court to make rules for carrying out the purposes of the chapter 3-A. Such rules made by the court, be notified in the official Gazette.

### **4.3: Powers and Jurisdictions of the High Courts:**

The High Court is a constitutional court and wide powers have been conferred on it by the constitution. It also exercises powers and jurisdictions under ordinary laws.

#### **4.3.1: Constitutional Jurisdiction of High Court:**

The jurisdiction conferred on the High Court under Article 199 is interchangeably known as constitutional jurisdiction or writ jurisdiction or original jurisdiction of the High Court. This jurisdiction being constitutional can not be taken away by the law. It can be only changed by constitutional amendment.

Article 199 gives to the High Court a special original jurisdiction which is subject to the constitution. It is discretionary to the High Court to exercise or refuse to exercise this jurisdiction. The object of the constitutional jurisdiction is to faster justice and strike down orders which are found to be in excess of authority or in absence of authority or in violation of express provisions of law. It is not every illegal order which is liable to be set aside in exercise of the constitutional jurisdiction. Article 199 has specifically stated cases where the High Court may exercise its jurisdiction under the article.

The constitutional jurisdiction may be exercised if the High Court is satisfied that no other adequate remedy is available to the applicant. The person who invokes this jurisdiction must be an aggrieved party except in cases of habeas corpus and quo warranto.

The cases where the High Court may exercise the original jurisdiction under Article 199 are stated below:

- (a) On the application of any aggrieved party against a functionary discharging his official function within the territorial jurisdiction of the High Court, the court may issue an appropriate order: directing such functionary to refrain from doing anything he is not permitted by law to do; or directing such functionary to do any thing he is required

by law to do; or declaring any act taken by such functionary as of without lawful authority and is of no legal effect.

- (b) On the application of any person, the High court may make an order that a person held in custody within the territorial jurisdiction of the Court, be brought before it so that the court may satisfy itself that he is not being held without lawful authority or in an unlawful manner.
- (c) On the application of any person, the High Court may issue an order to a person, within the territorial jurisdiction of the court, who holds a public office, to show under what authority of law he holds that office.
- (d) On the application of any aggrieved person, the High court may issue order to a person or authority exercising any authority or performing any function, for the enforcement of any Fundamental Rights guaranteed by the constitution.

Exception to the Constitutional Jurisdiction of the High Court:

According to clause (3) of Article 199, the above stated powers of the High Court shall not apply to a person who is a member of the Armed Forces of Pakistan and to a person who is for the time being subject to any law related to Armed Forces.

Interim Order under Article 199:

If an application is made to the High Court for an interim order under Article 199 and such interim order would have adverse effect on public works, or harmful to public interest or assessment/collection of public revenue, the court shall not make such order without a notice to the Prescribed Law officer and an opportunity of hearing to him. If an interim order is made by the High Court after notice and an opportunity of hearing to the law officer, such order shall cease to have effect after six months, provided that the matter shall be finally decided by the High Court within 6 months from the date on which the interim order is made.

#### **4.3.2: Binding Authority of a High Court's Decision:**

According to Article 201, any decision of a High Court on a question of law shall be binding on all courts subordinate to it.

#### **4.3.3: Rule-making Power of the High Court:**

Under Article 202, a High court has discretionary power to make rules for regulation of practice and procedure of the court and of any court subordinate to it.

#### **4.3.4: Supervision of Subordinate Courts:**

According to Article 203, each High Court shall supervise and control all courts subordinate to it. Such supervision and control is both administrative as well as judicial. In the administrative sphere disciplinary proceedings may be initiated against a judicial officer by the High Court. Judicial control is also exercised through revision and appeals being filed in the High Court against the orders/decisions of the subordinate courts. The High Court carries out its supervisory functions through inspections and calling of record from the courts. The Member Inspection Team (MIT) mostly deals with the issue; however, the Chief Justice of the High Court or any other judge deputed by the Chief Justice also carries out regular as well as surprise inspections. The Chief Justice is competent to initiate disciplinary action against a judge and take appropriate action in the matter.

#### **4.3.5: Power to Punish for its own Contempt:**

A High Court may punish, under article 204 of the Constitution, any person who commits contempt of court.

#### **4.3.6: Powers of the High Court under Ordinary Laws:**

Although the High Court is a constitutional court and the constitution confers wide powers on it but it also exercises powers under

ordinary laws. A High Court does not have any original jurisdiction under ordinary laws. Ordinary laws empower the High Court with appellate jurisdiction. Certain orders/decisions of the subordinate courts are subject to the High Courts' revision. Under ordinary laws, the High Court is empowered to review its own order/judgment.

In civil cases, a High Court exercises its appellate jurisdiction under sections 96 and 100 of Civil Procedure Code (CPC). Under section 96, the High Court is the court of first appeal in some cases for example if the value of the decree or judgment passed by a subordinate court, is more than 10, 00, 000 rupees, then appeal shall lie to the High Court. Section 100 provides for a second appeal to the High Court from an appellate decree passed by a court subordinate to the High Court. Under Section 113 of CPC any civil court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order there on as it thinks fit. A High Court may review its own order under section 114 in conjunction with section 117 of CPC. Section 115 of CPC confers on the High Court a power to call for the record of any case which has been decided by any court subordinate to such High Court. This section applies only to those cases against which appeal is not allowed and which involve the illegal exercise or non exercise or irregular exercise of the jurisdiction by the subordinate court. The High Court may make such orders in the cases as it thinks fit.

In criminal cases the High Court exercises its appellate and revisional jurisdiction under Criminal Procedure Code (CrPC). Section 410 of CrPC gives jurisdiction to the High Court to hear appeal against conviction on a trial held by Session Judge or an Additional Sessions Judge. Section 417 of CrPC provides for an appeal to the High Court against an order of acquittal passed by any court other than a High Court.

Section 435 of CrPC empowers the High Court to call for the records of criminal courts and examine them for the purpose of satisfying itself as to whether a sentence, finding or order of such inferior courts is

legal, correct or proper. Revisional jurisdiction of the High Court under this section is very wide. Revisional jurisdiction is conferred upon superior courts to correct miscarriage of justice, arising from misconception of law or irregularity of procedure.

Section 491 of CrPC confers power on the High Court to issue directions of the nature of a “habeas corpus”. This section confers statutory power and not the power to issue writ of habeas corpus. High Court has two fold jurisdiction under Section 491 of CrPC; firstly to deal with a person within its jurisdiction according to law and secondly to set a detenu at liberty if found to be illegally or improperly detained. Proceedings by way of habeas corpus are proceedings calling upon a person having custody of another person to produce him and demonstrate under what authority he holds him in custody. Section 491 and Article 199 of the constitution both empowered the High Court to provide remedy in all cases of wrongful deprivation of personal liberty. Article 199 is similar to, but wider than the jurisdiction conferred by Section 491.

In addition to the powers and jurisdiction of the High Court under the constitution and ordinary laws, it has appellate jurisdiction under various special laws, against judgment of such courts/tribunals functioning under special laws such as banking court, service tribunals, special court for anti-terrorism etc.

After the study of the powers available to the superior courts in Pakistan, one gets the impression that the superior judiciary in Pakistan is a powerful judiciary because the Constitution of Pakistan confers fairly wide powers on the superior judiciary. But the Supreme Court of Pakistan held that “the judiciary is the weakest organ”.<sup>9</sup> The judiciary of Pakistan is the weakest organ because it remained under constant pressure of various actors/factors. It has the powers but cannot exercise them independently. In the coming chapters the factors which undermined the independence of the Judiciary will be examined and discussed.

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<sup>9</sup> Mehram Ali and Others V. Federation of Pakistan. PLD 1998, SC 1445.

## **Chapter V: STRUCTURAL FACTORS AFFECTING INDEPENDENCE OF THE JUDICIARY.**

The factors which have, direct or indirect, impact on the independence of the judiciary in Pakistan may be broadly divided into four groups: structural factors; judicial commitment to the independence of the judiciary; culture of the legal profession in Pakistan and its impact on the independence of the judiciary; and executive's impact on the independence of the judiciary. Structural factors include the constitutional foundation of the judiciary, appointment procedure for the judges, system of protection to the judges and judicial accountability.

### **5.1: Constitutional Foundation of the Judiciary.**

The First Constituent Assembly of Pakistan passed a resolution in March 1949 called the Objectives Resolution wherein the founding fathers of Pakistan resolved to frame a Constitution for the newly independent state of Pakistan. This Objectives Resolution established amongst other ideals "the independence of the Judiciary shall be fully secured". The Objectives Resolution remained a preamble to all Constitutions of Pakistan but was not enforceable as it was not substantive part of the Constitutions. It was made an enforceable part of the Constitution in 1985 under newly inserted Article 2-A, which provides that the principles and provisions set out in the Objectives Resolution are made substantive part of the Constitution and shall have effect accordingly.<sup>10</sup>

The first danger to the constitutionally guaranteed independence of the judiciary is from within the Constitution itself which, alongside the provisions ensuring independence of the judiciary, also carries provisions which can be misused or misapplied by the executive for interfering with

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<sup>10</sup> Article 2-A was inserted by President's Order No: 14 of 1985.

the independence of the judiciary. The Constitution of Pakistan has been correctly termed “an internally contradictory Constitutional instrument”.<sup>11</sup>

Here the focus is to study the provisions of the Constitution related to the Judiciary whether they are consistent with the principle laid down in the Objectives Resolution that is “fully securing the independence of Judiciary”. Articles 177, 179, 180, 181, 182, 193, 195, 196, 197, 200, 203C, 203F 203G of the Constitution of Pakistan are discussed.

### **5.1.1: Appointment of Judges to the Superior Courts:**

Judges including the Chief Justices of the Supreme Court, High Courts and Federal Shariat Court are appointed under Articles 177(I), 193(I) and 203C (4) of the Constitution respectively. Under Article 177 (I) of the Constitution the Chief Justice of the Supreme Court to be called Chief Justice of Pakistan is appointed by the President of Pakistan and other Judges are appointed by the President after consultation with the Chief Justice of Pakistan.

According to Article 193(1) of the Constitution, a Judge of High Court is appointed by the President after consultation with the Chief Justice of Pakistan, the Governor of concerned province and the Chief Justice of the concerned High Court except where the appointment is that of the Chief Justice of the concerned High Court.

Under Article 203-C the Judges including the Chief Justice of the Federal Shariat Court are appointed by the President for a term of three years which may be extended further. Under this Article no consultation with anyone is provided. It means that sole and tremendous powers of appointing Judges to the Federal Shariat Court are available to the executive under this article.

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<sup>11</sup> Paula R. Newberg, ‘Judging the State’ p-27.

From the study of Articles 177, 193 and 203-C, the following questions emerge:

1. As Pakistan has adopted a parliamentary system of government under the Constitution of 1973, the question is whether it is the discretionary powers of the President to appoint judges of the Superior Courts or he is to act in accordance with the advice of the Prime Minister?
2. What is true import of the expression “after consultation” under articles 177 and 193? Whether the recommendations of the consultees are binding on the President?
3. Whether an acting Chief Justice is included in the list of consultees?
4. Who should be appointed the Chief Justice of a High court?
5. Who should be appointed the Chief Justice of Pakistan?
6. In case of difference of opinion among the consultees, whose opinion shall have primacy and shall prevail?
7. Who will initiate the process of appointment of a judge of a High Court?

The first question came before the Supreme Court in a reference sent by the President in 1996 under Article 186 of the Constitution for the opinion whether the President is permitted to appoint Judges of the Superior Courts in his sole discretion or only on the advice of the Prime Minister? Two Constitutional petitions on the same issue about the same time, were also filed in the Supreme Court under Article 184(3) by Wahab-ul Khairi on behalf of Al-Jehad Trust and by Zafar Iqbal Chaudhry, seeking a declaration that the President was the appointing authority for the Judges of the Superior Judiciary and that the advice of the Prime Minister under Article 48(1) of the Constitution was not required. Article 48(I) of the Constitution envisages that in exercise of his functions, the President shall act in accordance with the advice of the cabinet or the Prime Minister. Clause (2) of Article 48 must be mentioned

which says that notwithstanding anything contained in clause (I) the President shall act in his discretion in respect of any matter for which he is empowered by the Constitution to do so.

The Supreme Court held in the instant case that there is no conflict between Article 48 and Articles 177 and 193 of the Constitution. The court concluded that the President was bound by the advice of the Prime Minister in respect of appointment of judges of the superior judiciary under Articles, 177 and 193 of the Constitution.<sup>12</sup>

Question Nos2, 3 and 4 were discussed by the Supreme Court in the famous Judges' case<sup>13</sup>. Chief Justice Sajjad Ali Shah concluded his opinion in the said case, in these words "Consultation is supposed to be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and Chief Justice of High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reason to be recorded in writing by the President/Executive".<sup>14</sup> As per judgment of Justice Ajmal Mian, if the executive disagrees with the views of the Chief Justice of Pakistan and Chief Justice of the concerned High Court, it has to record strong reasons which will be justiciable. He also held that a person found to be unfit by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan for appointment as a judge of a High Court or by the Chief Justice of Pakistan for the judgeship of the Supreme Court can not be appointed as it will not be a proper exercise of power under Articles 177 and 193 of the Constitution.<sup>15</sup>

In respect of the issue whether an acting Chief Justice is included in the list of consultees, the Supreme Court held in the same case that an acting Chief Justice is not a consultee for the purpose of Articles 177 and

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<sup>12</sup> Al Jihad Trust V. Federation of Pakistan PLD 1997 SC 84.

<sup>13</sup> Al Jihad Trust V. Federation of Pakistan 1996, commonly known as Judges' case.

<sup>14</sup> Ibid, PLD 1996 SC P. 405

<sup>15</sup> Ibid, P. 491

193 of the Constitution as the appointment of acting Chief Justice is a stop gap arrangement for a short period not more than 90 days.<sup>16</sup>

Resolving the issue of the appointment of the Chief Justice of a High Court (i.e. the fourth question above) the Supreme Court observed that the most senior Judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice and in the absence of any concrete and valid reasons to be recorded by the President/Executive, he is entitled to be appointed as such in the Court concerned.<sup>17</sup>

The fifth question in respect of the appointment of the Chief Justice of Pakistan was answered again by the Supreme Court in another important case. As per ruling of the Supreme Court, the senior most judge of the Supreme Court is to be appointed as the Chief Justice of Pakistan unless for some solid or strong reason.<sup>18</sup>

The last two questions (i.e. 6<sup>th</sup> and 7<sup>th</sup> above) still call for clarification and interpretation of the relevant provisions of the Constitution. There are examples of difference of opinion among the consultees in the constitutional history of Pakistan, yet so far no proper attention has been given to such constitutional and legal complexities. When Justice Cornelius was the Chief Justice of Pakistan he often did not agree with recommendations of the Chief Justice of the West Pakistan High Court.<sup>19</sup>

Again the rulings/verdicts/interpretations of the Supreme Court in the above referred three cases are, so far, only rulings of the court and not formally incorporated into Constitution through amendment. Keeping in view the track record of Pakistan, it is feared that these rulings can easily be disregarded, at any time, by the Executive or even quashed by the court itself. That is why one can not say with certainty that the constitutional questions relating to the Superior Judiciary have

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<sup>16</sup> Al Jihad Trust V. Federation of Pakistan, PLD 1996 SC P. 491

<sup>17</sup> Ibid

<sup>18</sup> Malik Asad Ali V. Federation of Pakistan, PLD 1998, SC 161.

<sup>19</sup> Ralph Braibanti, 'Chief Justice Cornelius of Pakistan' p. 360. quoted by Justice Shabbar Raza Rizvi, 'Constitutional Law of Pakistan'.

finally been solved or cleared by the Supreme Court. The judgments of the Supreme Court in the two cases (Judges Case and Malik Asad Ali's Case) have already been violated by the Executive while making appointments to the Superior Judiciary. The Court itself deviated from its former rulings in the said cases in a very short period of time. The short order of the Supreme Court in the Judges' case (Al Jihad Trust V. Federation of Pakistan 1996) was announced on March 20, 1996 and it was disregarded by the Executive within 25 days. The government elevated Justice Nasir Aslam Zahid to Supreme Court and Justice Mamoon Kazi was appointed as Chief Justice of Sindh High Court on April 14, 1996, without the knowledge and approval of the Chief Justice of Pakistan.<sup>20</sup> Again in June 1999, Justice Rashid Aziz the Chief Justice of Lahore High Court was going on leave, the Chief Justice of Pakistan recommended the name of the senior most judge of Lahore High Court Justice Falak Sher to be appointed as acting chief Justice of Lahore High Court. The federal government on the contrary appointed the next senior judge, Justice Allah Nawaz as acting Chief Justice of Lahore High Court. The appointment of justice Allah Nawaz as acting Chief Justice was challenged through a writ petition in the Lahore High Court on the ground that the principle of seniority was not followed as he was number 3 at the seniority list. It was further alleged that the impugned appointment was also against the judgments of the Supreme Court given in the Judges' case and Malik Asad Ali's case. The petition was dismissed by a single bench of the Lahore High Court, with costs of fifty thousands rupees. The bench held that it is only a convention and not a legal requirement that the senior most judge of a High Court be appointed as acting Chief Justice of the concerned High Court. The court further held that since there was no clear provision in article 196 that only a senior most judge of High Court shall be appointed an acting Chief Justice of a High Court therefore the President

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<sup>20</sup> Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' p – 200-1.

can exercise his discretion.<sup>21</sup> One can not find it easy to agree with this interpretation/decision of the bench of Lahore High Court as it is inconsistent with the principles laid down by the Supreme Court in the above referred two judgments (i.e. the Judges' case and Malik Asad Ali's case) wherein the Supreme Court held that the senior most judge both in a High Court and Supreme Court shall be appointed as Chief Justice, even though, there is no such clear provision in articles 193 and 177 of the Constitution. Secondly, the assertion of Justice Ehsan-ul-Haq that appointment of an acting Chief Justice is a discretionary power of the President is not in conformity with the judgment of the full bench of the Supreme Court in the second Al Jihad Trust case in 1997. The Supreme Court held in that case that "the appointment of judges of the Superior Courts under Articles 177 and 193 and/or under any other Articles can not be exercised by the President in his discretion but be exercised in accordance to the advice of the Prime Minister under Article 48(I) of the Constitution."<sup>22</sup>

Again on December 26, 2001, one judge from Peshawar High Court and three judges from Lahore High Court were appointed as judges of the Supreme Court. The validity of the appointment of the three judges from the Lahore High Court was challenged in the Supreme Court under Article 184(3) of the Constitution by four different petitioners. The common ground in all these petitions was that the doctrine of seniority was not followed in the appointment of the judges of the Supreme Court despite the longstanding convention in this regard and the two important judgments of the Supreme Court in Al Jihad Trust case, 1996(i.e. Judges' Cases) and Malik Asad Ali's case 1997. The names of the three judges of the Lahore High Court elevated to the Supreme Court appeared at serial No.3, 4 and 13 of the seniority list of the judges of the Lahore High Court. These petitions were jointly heard by a full bench of the Supreme

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<sup>21</sup> Unreported judgment. Writ petition No: 11757/99, 'M D Tahir Advocate V. Federation of Pakistan, Lahore High Court'.

<sup>22</sup> Al Jihad Trust V. Federation of Pakistan PLD 1997 SC 84.

Court consisting of five judges including the Chief Justice of Pakistan and decided on April 10, 2002.

Despite the fact that principle of seniority was applied in Malik Asad Ali's case on the basis of the Judges' case and for the same reason appointment of Justice Sajjad Ali Shah, the former Chief Justice of Pakistan, was declared invalid. But the principle of seniority was not applied in this case and the Supreme Court refused to accept the arguments of the petitioners on the ground that there was a difference between the appointment of the Chief Justice of the Supreme Court and appointments of Judges of the Supreme Court.<sup>23</sup> Incidentally the same argument was forwarded in Malik Asad Ali's case by the counsel of Justice Sajjad Ali Shah, that the decision in the judges' case was not applicable in Malik Asad Ali's case as there was difference between the appointment of the Chief Justice of a High Court and the Chief Justice of Pakistan. However that Bench of the Supreme Court refused to accept this argument or distinction between the appointment of the Chief Justice of High Court and of the Chief Justice of Pakistan. The amazing irony is that the Chief Justice of Pakistan, Justice Irshad Hassan Khan, who headed the Bench hearing the petitions wherein the appointments of three judges were challenged, was also a member of the Bench that decided Malik Asad Ali's case. It becomes further surprising to know that he was the leader of the Bench of three judges at Quetta that issued a temporary injunction in September 1997, restraining Justice Sajjad Ali Shah to function as Chief Justice of Pakistan on the analogy of judges' case.

Having a power-hungry executive who feels no pain in exploiting the weak points of the provisions of law, even of Constitution and such honorable judges of Superior Courts who can easily make and unmake any rule, the only possible way is to have constitutional provisions clear, unambiguous and complete in themselves.

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<sup>23</sup> Supreme Court Bar Association V. Federation of Pakistan PLD 2002 SC 939.

Furthermore, clause (2) (b) of Article 193 of the Constitution provides that a member of civil service having served as a district judge for a period not less than three years, may be appointed as a judge of a High Court. In the past civil servants on the executive side often came to have judicial experience. Criminal justice was often administered at lower courts jointly by the executive and the judiciary. A civil servant could be appointed a district judge for three years and then elevated to the status of High Court judge. This provision was inherited from the Government of India Act 1935 and was incorporated in all Constitutions of Pakistan. Many civil servants had been inducted in the Superior Judiciary since independence. Some outstanding judges of the superior judiciary belonged to the group of civil service, such as Justice Cornelius, Justice Rustam Kayani, Justice Saad Saad Jan, Justice Shafi Ur Rehman, Justice K.M.A Samdani and Justice Zafarullah Chaudhry. Somehow, no appointment has been made from the civil service under this provision of the Constitution in the recent past. The reason for the non-compliance or non-observation of this provision is not known. Anyhow this provision goes against the basic concept of separation of powers and is also detrimental to the independence of judiciary. Furthermore clause (2) (b) of Article 193 should not be practiced after separation of judiciary from the executive at the lower level since 1996.

### **5.1.2: Appointment of Acting Chief Justices:**

Article 180 provides for the appointment of Acting Chief Justice of Pakistan. Whenever the office of the Chief Justice of Pakistan becomes vacant, the President is to appoint “the most senior of the Judges of the Supreme Court to act as Chief Justice of Pakistan”. Ironically weightage has been given to seniority for appointment of Acting Chief Justice of Pakistan but not for permanent Chief Justice of Pakistan under Article 177. It is again interesting that no seniority condition is laid down for

appointment of acting Chief Justice of a High Court under Article 196 of the Constitution.

### **5.1.3: Appointment of Acting, Ad hoc and Additional judges:**

Articles 181 and 182 of the Constitution provide for the appointment of acting judges and ad hoc judges in the Supreme Court respectively, whereas additional judges in the High Courts are appointed under Article 197. At any time when the office of a judge is absent or is unable to perform the function of his office due to any other cause, the President may under Article 181 of the Constitution appoint a judge of a High Court as acting judge of the Supreme Court if he is qualified for appointment as a judge of the Supreme Court as per Article 177 of the Constitution. If at any time it is not possible to hold or continue a sitting of the Supreme Court for want of quorum or for any other reason and it is necessary to increase temporarily the number of judges of the Supreme Court, ad hoc judges/judge may be appointed under Article 182 of the Constitution. The language of Article 182 provides different grounds than the grounds under Article 181 of the Constitution. The grounds under Article 181 are vacancy in office and inability to perform the functions whereas the ground under Article 182 is want of quorum and necessity to increase temporarily the number of the judges of the Supreme Court. The language of the both Articles indicates that they provide for the appointment of judges to meet the temporary situation. Unfortunately the letter and spirit of these constitutional provisions were not correctly followed or the same were for the past many years, consciously misused or misapplied and permanent vacancies were usually filled by acting/ad hoc appointments who continued for years as temporary judges. The Supreme Court of Pakistan consists of 17 permanent judges including the Chief Justice. In 1995 there were as many as seven acting/ad hoc judges

in the Supreme Court against 10 permanent judges including the Chief Justice.<sup>24</sup>

Article 197 of the Constitution is more detrimental to the independence of the judiciary and more misapplied and misused than Articles 181 and 182. Under Article 197 an additional judge of a High Court may be appointed by the President under the following circumstances:

- i. When the office of a judge of a High Court is vacant; or
- ii. When a judge of a High Court is absent from or is unable to perform the functions of his office due to any other cause; or
- iii. When for any other reason, it is necessary to increase the number of a Judges of a High Court.

The qualifications for appointment as an additional judge under Article 197 are similar to those for appointment of a permanent judge under Article 193. An additional judge is appointed for such period as the President may determine. After the lapse of such period, the President may extend the period. In case the period is not extended or the appointment is not made under Article 193, the additional judge shall relinquish the charge of his office.

It may be noted that an additional judge appointed under Article 197 and permanent Judge of a High Court appointed under Article 193, as for as, powers jurisdictions, functions, pay, privileges, duties and obligations are concerned, are at par; the only different is of the service tenure.

The provisions for appointment of additional judges in High Courts were provided in the Government of India Act 1935,<sup>25</sup> but were not included in the first Constitution of Pakistan known as Constitution of 1956. It is also noteworthy that Qaid-i-Azam Muhammad Ali Jinnah did

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<sup>24</sup> Hamid khan, 'Government and Judiciary 1994-97: The Crisis of State' PLJ 1998 Magazine p- 66; and Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' p- 177.

<sup>25</sup> Clause 3 of section 222 of Government of India Act 1935.

not approve the idea of appointment of additional judges.<sup>26</sup> The practice of appointment of additional judges in High Courts got started in 1958 through President's Order<sup>27</sup> after abrogation of the Constitution of 1956 and declaration of Marshal Law under General Ayub Khan.<sup>28</sup> Article 2 of the President's order provided that "if by reason of any temporary increase in the business of the Supreme Court or of a High Court or by reason of arrears of work in any such court it appears to the President that the number of the judges of the court should be for the time being, increased the President may appoint person duly qualified for appointment as judges to be additional judges of the court for such period not exceeding two years as he may specify"

Article 96 was incorporated in 1962 Constitution for appointment of additional judges even to fill permanent vacancies. This provision was included in 1972 interim Constitution and has been also retained by the Constitution of 1973.

There was no provision for the appointment of acting or additional judges in the Indian Constitution when it came into force in 1950. It was in 1956 that original Article 224 of the Indian Constitution was substituted by the new article 224, through Constitution (Seventh Amendment) Act 1956 which provides for the appointment of additional judges in the High Courts.

Under section 222(3) of the Government of India Act 1935 and under Article 2 of the above President's Order of 1958 as well as under Article 224(1) of the Indian Constitution, an additional judge could be appointed in the following two contingencies: -

- Temporary increase in the business of a High Court; and
- Temporary increase in the arrears of work.

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<sup>26</sup> Justice Shabbar Raza Rizvi, 'Constitutional Law of Pakistan' p- 1100.

<sup>27</sup> President's Order Post-Proclamation No: 3of 1958, 'the Courts (Additional judges) Order, 1958 issued on November 19, 1958.

<sup>28</sup> The Courts (Additional judges) Order 1958.

Whereas under Article 197 of the Constitution of Pakistan an additional judge can be appointed against a permanent vacancy or when a High Court judge is absent or is unable to perform the functions of his office due to any other cause or for any reason it is necessary to increase the number of Judges of a high court. In other words, under Article 224 of the Indian Constitution, the appointment of an additional judge is purely temporary to achieve the two specified objectives, whereas under Article 197 of Pakistan Constitution appointment of an additional judge can be made against permanent vacancy.

The unfortunate and unconstitutional practice that has been keenly followed by all the governments since 1962 is to treat Article 197 as the gateway through which every judge of a High Court has to pass before being made permanent. Almost all judges of the High Court before they were made permanent had to get a number of extensions for short terms. The additional judges continued entering the superior judiciary with a legitimate expectation that they would not have to go back on the expiration of their term but they would be confirmed ultimately. What happened in practice is that the true purpose of Article 197 has never been carried into effect.

The concept and practice of appointment of a judge who is member of superior judiciary for a short and conditional duration is non-existent in the United Kingdom from where we have inherited the present legal system. The comments of Taj Bahadur Sapru - a famous advocate cum politician of early days of India - on the practice of appointment of additional or acting Judges are noteworthy: "I would add that practice of appointing additional and temporary judges should be definitely given up. When I said at the Round Table Conference<sup>29</sup> that there were acting, additional and temporary judges in India, some of the English lawyers not

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<sup>29</sup> There were three Round Table Conferences held in London in 1930s between the British Government and Political Parties from India to agree on a constitutional formula for India.

accustomed to Indian law felt rather surprised. I am also of the opinion that temporary or acting judges do greater harm than permanent judges”.<sup>30</sup>

The practice of appointment of temporary judges (acting/ad hoc judges in Supreme Court and additional judges in High Court) carries some inherent and natural draw backs with itself which are destructive to the image and independence of the judiciary.

Firstly, a temporary judge particular an additional judge of a High Court will not be in a position to perform his duties as independently as a permanent judge, on account of the fact that a temporary judge is subject to fresh test of fitness and suitability. The conduct of an additional judge would remain subject to the scrutiny by the high dignitaries in connection with his re-appointment. It is very clear that he would not be in position to deal with the matters placed before him without fear of incurring the displeasure of any one of them. This fact has been very vividly acknowledged by a former judge of High Court in these words: “I did not feel weak even as an additional judge, but realized that some other additional judges were reluctant to decide cases against the executive before their confirmations. This is a very unhappy position. Some additional judges would even go out of their way to please the executive”.<sup>31</sup>

Secondly, very often the orders passed by a temporary judge and particularly an additional judge, against the Federal and Provincial governments which are the biggest litigants, in every High Court as well as in the Supreme Court, are sure to displease one government or the other, in one way or the other. The judge too, after all, is a human being and a member of a society where perfect moral standards are an alien concept. He is well aware of the price of the executive’s displeasure, that is, his non-confirmation. The judicial history of Pakistan does not lack such examples. In 1990, the Provincial Assembly of NWFP was dissolved

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<sup>30</sup> Quoted by B. Shiva Roa, ‘The Framing of India’s Constitution, Vol. IV pp- 172-3.

<sup>31</sup> Justice (Retd) K. M. A. Samdani, ‘Reminiscence’ p- 84.

by the Governor as per the direction of the President of Pakistan. The dissolution order was challenged in the Peshawar High Court. The High Court, by a majority judgment four to one, set aside the dissolution order and restored the Assembly as well as the cabinet.<sup>32</sup> There were two additional judges on the Bench. One supported the majority view and other was the only dissenting judge. Although this judgment was never given effect and was soon suspended by a single judge of the Supreme Court, the President, Ghulam Ishaq Khan, was clearly offended by this judgment and the judges on the Bench had to face dire consequences for giving such judgment. Justice Qazi Muhammad Jamil, an additional judge on the Bench who supported the majority view, was not made permanent judge. The only dissenting judge, Justice Ibne Ali, who was also an additional judge, was rewarded and made a permanent judge. The other three permanent judges on the bench were not elevated to the Supreme Court and instead a judge junior to them and who had not even completed the required experience of five years as a judge of a High Court was elevated to the Supreme Court.<sup>33</sup>

Thirdly there is no denying the fact that security of tenure ensures judicial independence and the tenures for short terms of appointment on ad hoc basis brings in insecurity directly impinging on judicial independence. The judges appointed for short terms on temporary basis are more vulnerable and more unsecured in a country like Pakistan having a political culture where government are frequently changed and where political tolerance is non-existent. A very unhealthy trend has been developed that judges of the superior judiciary appointed on temporary basis by one government are not confirmed by the government of another political party. This unhappy trend was first introduced by General Zia who did not confirm the judges appointed by the government of Zulfiqar

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<sup>32</sup> Aftab Ahmad Khan V. the Governor of NWFP, PLD 1990 Peshawar 192.

<sup>33</sup> Hamid Khan, 'Constitutional And Political History of Pakistan' (2005) pp- 418 and 421.

Ali Bhutto's government.<sup>34</sup> After dismissal of Benazir Bhutto's government in 1990, the President of Pakistan, Ghulam Ishaq Khan revoked the appointment order of Justice Abdul Hafeez Memon as an acting judge of the Supreme Court.<sup>35</sup> He was appointed by Benazir Bhutto's government. Again Benazir Bhutto, during her second tenure, did not confirm those judges of High Courts who were appointed by the government of Nawaz Sharif.<sup>36</sup>

The fourth draw-back of the existing system of appointing additional judges in High Courts under Article 197 is that there is no provision whatsoever for giving an additional judge an opportunity of defense or of being heard if a complaint against his integrity as an additional judge is received. Dropping an additional judge at the end of his initial term of office without any concrete reason and sound ground is not only destructive of the independence of judiciary but is also inconsistent with the principles of natural justice. If an advocate at the age of above 45 years<sup>37</sup> is appointed as an additional judge of High Court for one year or two years, what would he do if at the end of his tenure he is not confirmed as a permanent judge? Having burnt his boats of the Bar after his appointment as an additional judge, should he make fresh efforts to re-establish himself at the Bar? Will he not be in a worse position at the Bar if he is sent back with a label that he was not found fit to continue as a judge? Again, if the affected additional judge is not at fault but he is dropped merely for political considerations of the government, then how can he be compensated for the wrong done to him or justice be done with him or his injury of the great injustice be cured?

The last draw-back of the system of appointing acting, ad hoc and additional judges to the superior courts is that such temporary judges on the Bench do not inspire confidence in the litigants particularly in cases

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<sup>34</sup> See High Court Judges (Scrutiny of Appointment) order 1977, PLD 1977, Central Statutes p- 436.

<sup>35</sup> Justice (Retd) Sajjad Ali Shah, ' Law Courts in a Glass House' p- 155

<sup>36</sup> Ibid p- 205.

<sup>37</sup> The minimum age required for appointment as a judge of a High Court is 45 years.

where government is a party. There are many examples of the objection raised against the formation of a Bench on the ground of having non-permanent judges. In Sindh High Court an application for transfer of a case from an additional judge was submitted to the Chief justice of that High Court on the ground that the additional judge was like a probationer and therefore was not expected to do justice. It was further argued that such judge would not feel confident to hear case against the government; therefore in the interest of the justice the case should be transferred. The Sindh High Court did not agree with the arguments and held that an additional judge is equivalent to a permanent judge and is not a probationer.<sup>38</sup> As per the ruling of the Sindh High Court in this case, an additional judge is not like a probationer but another Chief Justice of the same High Court regarded him as a probationer. In 1990, after the dismissal of Benazir Bhutto's government, the then Chief Justice of Sindh High Court, Sajjad Ali Shah, was informed by the then law Secretary that the President had approved the names of two judges of Sindh High Court to be members of Disqualification Tribunal. Justice Sajjad Ali Shah told the law Secretary that "nominated judges were not permanent judges and were still on probation" he further requested him that "permanent judges should be appointed because they would inspire confidence in the aggrieved parties against whom references were to be heard".<sup>39</sup> In 1994 a constitutional case was decided by the Supreme Court.<sup>40</sup> The judgment was announced by a majority of seven to five. Justice Ajmal Mian who held the minority view notes about the judgment that the majority view was supported by four acting or ad hoc judges, whereas the senior permanent judges supported the minority opinion.<sup>41</sup> It must be mentioned that the case was decided in favor of the federal government. A known

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<sup>38</sup> Shaikh Abdul Aziz Hamed Al-Gosaibi V. Pakistan International Airlines Corporation, PLD 1995, Karachi 566.

<sup>39</sup> Justice (Retd) Sajjad Ali Shah, 'Law Courts in a Glass House' p- 148.

<sup>40</sup> Pir Sabir Shah V. Federation of Pakistan, PLD 1995, SC 738

<sup>41</sup> Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' p- 161.

columnist Ardshir Cowasjee highlighted in his article that senior judges were out-numbered by the induction of acting or ad hoc judges.<sup>42</sup>

The practice of appointment of acting or ad hoc judges in the Supreme Court and additional judges in the High Courts is detrimental to independence of judiciary. It can be said without a fear of dispute that successive governments of Pakistan have been “virtually playing with the courts” to use the words of Indian justice E.S Venkataramiah who vehemently criticized the appointment of additional judges to the Indian High Court.<sup>43</sup>

#### **5.1.4: Retirement Age of the Judges of the Superior Courts:**

Another constitutional provision needing serious attention in respect of the independence of the judiciary is the disparity between the retirement ages of the judges of the Supreme Court and judges of the High Courts. According to Article 179(1) of the Constitution, the retirement age for a judge of the Supreme Court is sixty five years whereas for a judge of a High Court it is sixty two years under Article 195 (1) of the Constitution. It goes without saying that a judge of a High Court nearing his retirement age naturally may wish to be appointed as a judge of the Supreme Court because apart from obvious honor and dignity of such appointment , he can then get the period of his service and official facilities extended for another three years. Availability of such an opportunity can possibly make such a judge prey to this temptation and to the allurements of the political executive. One cannot understand the logic and rationale behind this disparity between the retirement ages of the judges of the Supreme Court and High Courts. However this disparity between the retirement ages is not good for and is, indeed, detrimental to the independence of the judiciary.

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<sup>42</sup>Ardshir Cowasjee ‘The Defection Case’ daily Dawn November 25, 1994.

<sup>43</sup> Quoted by Ikramul Haq Advocate, ‘Appointment of Additional judges: A Threat to Independence of judiciary’ PLJ 1997 Magazine p-112.

### **5.1.5: Transfer of High Court Judges:**

Under Article 200(1) of the Constitution a judge of a High Court may be transferred to another High Court by the President of Pakistan without the consent of the concerned judge and without consultation with the Chief Justice of Pakistan and the Chief Justice of the concerned High Court, provided that the transfer is for a period not exceeding two years. The consent of the concerned judge and the consultation with the Chief Justices are required if the transfer is for a period of more than two years. Clause 4, of the same Article provides that a judge of a High Court who does not accept transfer to another High Court under clause (I) shall be deemed to have retired from his office. Under the original Article 200 of the Constitution, the President might transfer a judge of a High Court to another High Court only with consent of the concerned judge and after consultation by the President with the Chief Justice of Pakistan and the Chief Justices of both High Courts. By Fifth Constitutional Amendment in 1976 during Zulfikar Ali Bhutto's government, the condition of consent and consultation was dispensed with if the transfer was for a period not exceeding one year at a time. The period of one year was extended to two years subsequently by President's Order No.14 of 1985. Clause (4) of the Article 200 was incorporated again by the President's Order No.24 of 1985. The last two President's orders were issued by the military regime of General Zia.

The above amendments in Article 200 were challenged before the Sindh High Court by the Sindh High Court Bar Association through its President Sharaf Faridi in 1989. It was contended that these amendments were violation of the independence of judiciary. The court observed that the above mentioned amendments militate against the concept of independence of judiciary as originally envisaged by the Constitution itself. The court held as under: -

“The above amendments/additions in the Constitution were made from time to time to keep the judiciary docile and subservient. The introduction of the provision for transfer of a High Court judge to another High Court without his consent under the Fifth Amendment for one year, then under President’s order No.14 of 1985 for 2 years and so also appointment of a High Court judge to the Federal Shariat Court without his consent for the above period at the peril of his being stand retired, in case of his refusal to accept transfer or appointment.... .... are the amendments/additions which militate against the concept of the independence of judiciary/separation of judiciary as envisaged by the Constitution”.<sup>44</sup>

However the court refused to declare the said provisions of the Constitution as ultra vires. The court held in the following words:

“The present cases do not involve the question of change in the basic structure and framework of the Constitution as the amendments in the aforesaid articles relating to judiciary can not be said to have altered the basic structure of the Constitution pertaining to the working of the judiciary. It is therefore, not necessary to dilate upon the above question any further. The upshot of the above discussion is that we cannot declare any of the Constitution provision as ultra vires in the instant petitions”.<sup>45</sup>

One can very respectfully disagree with the learned justice’s opinion that these amendments can not be declared ultra vires because they do not alter the structure of the Constitution pertaining to the working of the Constitution. It has been observed by the court that these amendments militate against the concept of the independence of judiciary. Isn’t this a contradiction between the findings and rulings of the court?

Secondly clause (4) of Article 200 is in direct conflict with Article 209 (7) which provides constitutional protection to the services of the judges of the Supreme Court and High Courts.

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<sup>44</sup> Sharaf Faridi and Others V. The Federation of Pakistan through Prime Minister and others, PLD 1989 Karachi 404.

<sup>45</sup> Ibid

Thirdly in the presence of Article 200, as it is can the independence of the judiciary be “fully secured” as envisaged by the Objectives Resolution. If not, then again aren’t these provisions against the founding principles of the Constitution and consequently should not they be declared ultra vires? These provisions under Article 200 of the Constitution remained intact even in the highly reported judgment in the judges’ case. The Supreme Court observed, in the said judgment that transfer mentioned under Article 200 could be allowed if it was in the public interest and was not by way of punishment.

#### **5.1.6: Federal Shariat Court:**

Article 203C was inserted by the military regime of General Zia in 1980 through the Constitution (Amendment) Order 1980. This Article provides for the Federal Shariat Court consisting of the Chief Justice and seven other judges to be appointed by the President. The term of the Chief Justice and other judges shall be for a period not exceeding three years, but may be extended to such further term or terms as the President may determine. The President may appoint any judge of a High Court, including an acting Chief Justice of a High Court, as a judge of the Federal Shariat Court without his consent and without consultation by the President with the Chief Justice of the concerned High Court if such appointment is for a period not exceeding two years. According to clause (5) of the same Article a judge of a High Court who does not accept appointment as a judge of the Federal Shariat Court shall be deemed to have retired from judgeship of the High Court.

Under clause (4B) of Article 203-C<sup>46</sup> the President may at any time, modify the term of appointment of a judge of the Federal Shariat Court or assign any other office or may require a judge of the Federal

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<sup>46</sup> Clause 4B of Article 203C was inserted by General Zia in 1985 through President’s Order No; 14 of 1985.

Shariat Court to perform such other functions as the President may deem fit. In the present context i.e. clause (4B) of this Article, the term judge includes the Chief Justice of the Federal Shariat Court. A Chief Justice of the Federal Shariat Court, Justice Aftab Ahmad was transferred from his office and appointed as an Advisor to the ministry for religious affairs by General Zia through a Presidential Order in 1986. The Honorable Justice did not accept the new appointment and resigned. Justice Aftab Ahmad himself stated: “the President is empowered to assign any duty to the Chief Justice or a judge of the Federal Shariat Court without his consent” he added “the President may upgrade the post of a peon and appoint a former Chief Justice to that post”. He further said “in the presence of this law i.e. (4B) of Article 203C every judge of the Federal Shariat Court remains under pressure of the Government. The job of the Federal Shariat Court is to examine whether the existing laws of the country are against Islamic injunctions and if they are, to declare them void. Therefore in the presence of provision of (4B) it appears the government wants interpretation of Islamic injunctions as it desires”.<sup>47</sup>

Article 203C provides sole and tremendous powers to the President. Provisions under Clause 4B of the said Article are the most outrageous and most detrimental to the independence of judiciary. Such sweeping powers under Article 203C, introduced by a military dictator, make a mockery of the independence of the Judiciary. Unfortunately our judicial history has witnessed that several Chief Justices and Judges of High Courts were sent to the Federal Shariat Court because they annoyed the Government.

The Supreme Court of Pakistan has imposed some checks upon the tremendous powers of the President through rulings in two important cases both filed on behalf of Al-Jehad Trust<sup>48</sup>. But constitutional provisions still exist and the Constitution has not yet been amended in the

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<sup>47</sup> Quoted by Justice Shabbar Raza Rizvi, ‘Constitutional Law of Pakistan’ Vol: II p- 1317.

<sup>48</sup> Al Jihad Trust V Federation of Pakistan PLD 1996 SC 324; and Al Jihad Trust V Federation of Pakistan PLD 1997 SC 84.

light of the judgments of the Supreme Court. In the second case of Al-Jehad Trust, the Supreme Court held that, the appointments of the Chief Justice and the Judges of the Federal Shariat Court will be made by the President on the advice of the Prime Minister. In the first case of Al-Jehad Trust (Judges' case) the Supreme Court observed that once a sitting Chief Justice or a judge of a High Court is appointed in the Federal Shariat Court, he becomes susceptible under clause 4B of Article 203C to actions detrimental to his security of tenure which is guaranteed by Article 209 of the Constitution. Finding Article 203C of the Constitution to be irreconcilable with Article 209, thereof the Supreme Court held that a Chief Justice or a Judge of a High Court could not be transferred to the Federal Shariat Court without his consent.

The judges of High Courts giving a decision which will annoy the sitting Government, will certainly bear in their minds the fear of victimization, at least transfer to another High Court under Article 200 of the Constitution or to the Federal Shariat Court under Article 203C of the Constitution. "It needs to be instilled in every mind that where fear is, Justice cannot be" in the words of a former Justice of India.<sup>49</sup> When judiciary is ceased by fear in the decision of cases, it becomes demoralized.

There is a conflict between Article 203C (5) and Article 209(7) of the Constitution. Clause (5) of Article 203C provides that if a judge of a high court is appointed as a judge of the Federal Shariat Court and he refuses to accept such appointment, he shall be deemed to have retired from the High Court. Whereas clause (7) of Article 209, giving protection to the services of a judge of the Superior Courts, declares that a judge of the Supreme Court or of a High Court shall not be removed from office except as provided by Article 209, i.e. through the Supreme Judicial Council.

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<sup>49</sup> Justice (Retd) H. R. Khanna, 'Judiciary in India and Judicial Process', p- 28.

### **5.1.7: Supreme Court Shariat Appellate Bench:**

Under Clause (1) of Article 203-F appeal is allowed against a final decision of the Federal Shariat Court before the Supreme Court Shariat Appellate Bench. Clause (3) of this Article provides for the composition of the Supreme Court Shariat Appellate Bench which reads as:

“(3) For the purpose of the exercise of the jurisdiction (appellate jurisdiction) conferred by this article, there shall be constituted in the Supreme Court a Bench called the Shariat Appellate Bench and consisting of:

- a) Three Muslim Judges of the Supreme Court, and
- b) Not more than two *Ulema*<sup>50</sup> to be appointed by the President to attend sitting of the Bench as ad-hoc members thereof from amongst the judges of the Federal Shariat Court or from out of a panel of *Ulema* to be drawn up by the President in Consultation with the Chief Justice.”

Clause (6) of Article 203F declares that a person appointed under paragraph (B) of Clause (3) shall have the same power and jurisdiction, and be entitled to the same privileges, as a judge of the Supreme Court while attending sitting of the Shariat Appellate Bench.

Some rules / principles of law and jurisprudence are universally recognized and applied. One such principle says that one cannot be a judge in his own cause. Similarly another such principle disallows a judge to sit on the appellate bench to review his own judgment against which appeal has been preferred. But the irony of the Constitution of Pakistan is that it allows under paragraph (b), clause (3) of Article 203F, (*Ulema*) judges of the Federal Shariat Court to be member of the Supreme Court Shariat Appellate Bench for the purpose of hearing appeals against the decisions of the Federal Shariat Court; i.e. their own decisions. It will seem too simple to call this mockery of justice.

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<sup>50</sup> *Ulema* is plural for *A'alim* which means a scholar in theology of Islam.

Secondly, under the above paragraph (b) of Article 203F (3), a panel of *Ulema* should be prepared by the President with the consultation of the Chief Justice of the Federal Shariat Court. The surprising element in this constitutional provision is that a panel of *Ulema* is prepared by the President only in consultation with the Chief Justice of the Federal Shariat Court, and the Chief Justice of the concerned court (the Supreme Court) is not consulted in spite of the fact that these *Ulema* will sit on the Supreme Court Shariat Appellate Bench.

#### **5.1.8: Article 203G of the Constitution:**

Article 203G of the Constitution ensures protection to the jurisdiction conferred upon the Federal Shariat Court. It provides that except appeal to the Supreme Court Shariat Appellate Bench against the final decision of the Federal Shariat Court, in all other matters no court or tribunal including the Supreme Court and a High Court shall entertain any proceedings or exercise any powers or jurisdiction in respect of any matter which is within the power / jurisdiction of the Federal Shariat Court. Keeping the Federal Shariat Court aloof from the hierarchy of the Judiciary and barring the jurisdiction / powers of the Supreme Court, being the highest court of the country, is not in conformity with the concept of independence of judiciary.

#### **5.2: Appointment of the Judges of the Superior Courts in Pakistan:**

On independence, Pakistan inherited a healthy judicial system with a reputation for integrity and competence. This was mainly attributable to a fair system of appointment of judges in the superior judiciary wherein appointments were generally made on merit alone. There were two channels of such appointments – from the Indian Civil Service and from amongst the leading lawyers. In spite of the fact that executive had

tremendous power of appointment in the superior judiciary under the Government of India Act 1935<sup>51</sup> but the appointment to the superior courts during the time of British India were made rather carefully. Due to this care in the appointment, the judges of the superior courts in British India, with few exceptions, had a reputation for integrity and competence.<sup>52</sup>

It was in this perspective that Pakistan, in its first Constitution in 1956, adopted the system of judicial appointment prevalent during the time of British India.

The practical procedure adopted for the appointment of judges to the Supreme Court is that a list of names recommended for appointment as judges of Supreme Court is prepared by the Chief Justice of Pakistan and is sent to the law ministry. From law ministry it is sent to the Prime Minister who forwards it to the President for approval. The procedure for appointment of High Court judges followed in practice is that the Chief Justice of the concerned High Court initiates the process by preparing a list of recommended persons consisting of the leading advocates in the province and senior judicial officers amongst subordinate judiciary to be appointed as judges of a High Court. The list is sent to the provincial law ministry, from there to the Chief Minister who forwards it to the Governor of the Province. The Governor sends it to the Federal Law Ministry that will forward it to the Chief Justice of Pakistan who will send, indeed, with his comments/recommendations, back to the federal law ministry. The law ministry will put the file before the Prime Minister who forwards it to the President for his assent. Every functionary mentioned in the process of appointment of judges puts his own view points/comments/recommendations on the file. The reports of the enquiries and investigations made by the secret agencies of the government about the recommended persons are also sent to the President. The rationale behind this system is that the Chiefs Justices of the

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<sup>51</sup> See Articles 200 and 220 of the Government of India Act 1935.

<sup>52</sup> Hamid Khan 'Judicial Organ' p-112; and Allen McGrath 'The Destruction of Pakistan's Democracy' pp-155-56.

concerned High Courts and Supreme Court are in better position to assess the ability, reputation and integrity of advocates appearing before them and of the members of the subordinate judiciary working under them. The participation of the executive functionaries (the President, the Prime Minister, the Governors and the Chief Ministers) is to ensure that there are no negative reports about the recommendees relating to their integrity and loyalty to the nation.<sup>53</sup> The presumption behind this system is that all the constitutional functionaries in the process are fair, impartial and free from any personal interest, bias or prejudice, capable of applying objective standards with high sense of responsibility and committed to the independence of judiciary. Unfortunately, our historical experience in this behalf establishes that such rationale or presumption have eroded or ceased to exist over the years and the constitutional functionaries involved have repeatedly misused the system.<sup>54</sup>

The appointment in judiciary not on merit but on the basis of personal consideration started from the earlier years of Pakistan. When the first Chief Justice of the Federal Court<sup>55</sup> Sir Abdur Rashid retired in June 1954, the Governor General of Pakistan<sup>56</sup> Ghulam Muhammad appointed Justice Munir who was the Chief Justice of Lahore High Court at that time, as the Chief Justice of the Federal Court bypassing the senior most judge of the Federal Court Justice A.S.M. Akram.<sup>57</sup> Pakistan is still suffering from the adverse effects of this appointment to the judiciary based on favoritism and ignoring merit. The Federal Court of Pakistan under Chief Justice Munir was called upon to give verdicts on very important and fundamental constitutional questions such as the dissolution of the Constituent Assembly of Pakistan in 1954, the Governor General Reference to the Federal Court in 1955 and Dosso case. Justice Munir

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<sup>53</sup> Hamid Khan, 'Judicial Organ', pp- 113-14.

<sup>54</sup> Ibid

<sup>55</sup> Federal Court was the Highest Court under the Provisional Constitution of Pakistan (i.e. Government of India Act 1935).

<sup>56</sup> Under the Provisional Constitution the head of the state was called Governor General of Pakistan.

<sup>57</sup> Allen McGrath, "The Destruction of Pakistan's Democracy" P- 195.

gave verdicts in all these important cases in favor of the Federal Government. The judgments that followed not only became controversial but raised more questions than were answered. The echoes of these judgments are always heard in the constitutional crisis and constitutional development of Pakistan.

The rot started in 1954 under the Governor General Ghulam Muhammad, instead of being stopped, went on and expanded to a worrying situation.<sup>58</sup> A retired Chief Justice of Pakistan in his autobiography discussing the appointment in the superior judiciary comes to this conclusion: "It has been noticed that close relatives of the judges of the High Courts and Supreme Court are appointed as law officers and are put on the panel of advocates-general and attorney-general.....Relatives of the judges who are appointed as law officers subsequently get appointed as High Court Judges. If a proper survey is made, one can find that sons, sons-in-law or other relatives of the judges are appointed in the High Court and the judgeship is retained by the family, generation after generation."<sup>59</sup> The same assertion was made by the President of the Lahore High Court Bar Association, in these words: "the offices of Attorney General and Advocates General have become nurseries for appointment to the superior judiciary, but the plantation in such nurseries is restricted to the near relatives of the men of influence".<sup>60</sup>

The system of appointment of judges to the superior judiciary is anything but transparent. It has been manipulated repeatedly to bring about appointments on political considerations or due to favoritism or nepotism. It is rare that merit is taken into consideration. The appointment of the judges to the superior courts without merit is one of the major factors caused decline in the standard and independence of the judiciary. The system of appointment of judges is of paramount

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<sup>58</sup> For details see the chapter on Historical Background of the Thesis.

<sup>59</sup> Justice (Retd) Sajjad Ali Shah, "Law Courts in Glass House" P-661.

<sup>60</sup> Introductory Address by Hamid Khan, President, Lahore High Court Bar Association to All Pakistan Lawyers Representatives Conference held on April 30, 1992; published in the daily "The News" in two installments on May 23 and 30 1992.

importance to ensure independence of judiciary because it is primarily the human being that makes or mars the institution. It is the integrity and competence of the judges that ensures the credibility and public confidence in the institution, which has unfortunately eroded over the years. One cannot, after all, expect much from judges whose very appointment was made on the basis of favoritism and nepotism. Neither the present constitutional provisions under Articles 177(1) and 193(1) nor the verdicts of the Supreme Court are strong enough to check the executive from arbitrary exercise of the powers of appointment of judges in the superior courts. There is a lot of criticism and dissatisfactions being expressed on present system of selection of judges of superior judiciary from different quarters i.e. Pakistan Bar Council, Punjab Bar Council and various bar associations in the country. These constitutional provisions call for amendments and the procedure of appointment needs reformation.

### **5.3: Independence of the Judges and Judicial Accountability:**

The need for judicial independence is not for judges or the judiciary per se, but for the people, so that the Rule of Law is ensured, the rights and liberties guaranteed by law are protected, the abuse or misuse of powers by the government machinery is checked, political victimization is disallowed etc. It is a fundamental principle that no judiciary can function effectively unless their tenures and conditions of services their salaries and privileges are guaranteed either by constitution or statute. To check unauthorized exercise of powers effectively judges must be beyond the reach of those who would transfer or remove them because of their decision. Similarly judges must have legal immunity for their judicial action being called in question by an authority other than a judicial authority.

Judges in Pakistan enjoy the legal immunity for their judicial action under ordinary law whereas the services and privileges of judges of the superior judiciary are protected by constitutional provisions.

### **5.3.1: Legal Immunity and Protections to the Judges:**

Judges in Pakistan enjoy legal immunity and protection for their judicial actions under various statutes. One such law provides that no judge, magistrate, justice of peace, collector and other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction.<sup>61</sup> It has been provided in the Pakistan Penal Code that nothing is an offence which is done by a judge when acting judicially in the exercise of any power, which is or which in good faith he believes to be given to him by law.<sup>62</sup> Section 135 (1) of the Civil Procedure Code protects a judge, a magistrate or other judicial officer from arrest under civil process while going to, presiding in or returning from his court.

The superior courts of Pakistan have been empowered, under the constitution, to punish a person for contempt of court in accordance with law. Article 204 of the Constitution of Pakistan 1973 deals with the offence of contempt of court. It provides that the Supreme Court or a High Court shall have power to punish any person who:

- a) abuses, interferes with or obstructs the process of the court in any way or disobeys an order of the court;
- b) scandalizes the court or otherwise does anything which tends to bring the court or a judge of the court into hatred, ridicule or contempt;

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<sup>61</sup> The Judicial Officers Protection Act, 1850.

<sup>62</sup> Section 77 of Pakistan Penal Code

- c) does anything which tends to prejudice the determination of a matter pending before the court; or
- d) does any other thing which, by law, constitutes contempt of the court.

Clause (3) of this Article further clarified that the exercise of the power conferred on a court by the Article may be regulated by law and subject to law, by rules made by the court. Under this clause of Article 204, Contempt of Court Act 1976 was enacted to achieve the purpose of the Article. Till the passing of the Act 1976, the Contempt of Court Act 1926 was being applied.

Contempt of court has been defined: “Whoever disobeys or disregards any order, direction or process of a court, which he is legally bound to obey, or commits a willful breach of a valid undertaking given to a court, or does anything which is intended to or tends to bring the authority of a court or the administration of law into disrespect or disrepute or prejudice the process of law or the due course of any judicial proceedings, or to lower the authority of a court or scandalize a judge in relation to his office, or to disturb the order or decorum of a court is said to commit ‘contempt of court’.”<sup>63</sup>

A person accused of having committed contempt of court may be punished with simple imprisonment which may extend to six months or with fine or with both; provided that the accused, at any stage, may submit an unconditional apology and the court, if satisfied that it is bona fide, may discharge him or remit his sentence.<sup>64</sup>

Services of the judges of the superior court are protected under the Article 209(7) of the constitution which ensures that a judge of the Supreme Court or of a High Court shall not be removed from office except as provided by the Article.

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<sup>63</sup> Section 3, the Contempt of Court Act 1976.

<sup>64</sup> Section 4, *ibid.*

### **5.3.2: Judicial Accountability of the Superior Courts' Judges:**

Article 209 provides the forum and the procedure for the removal of a judge of the Superior Courts. Clause (2) of Article 209 constitutes the Supreme Judicial Council consisting of the Chief Justice of Pakistan, two next Senior Judges of the Supreme Court and two most Senior Chief Justices of the High Courts. According to the clause (3) of the Article if the Council is conducting enquiry against a judge who is a member of the Council or a member of the Council is absent or unable to perform as a member due to illness or any-other cause, then if such member is a judge of the Supreme Court, the next senior judge of the Supreme Court shall become member of the Council and if such member is the Chief Justice of a High Court, the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining High Courts, shall act as a member of the Council in his place.

Under clause (5) of the Article, the President of Pakistan is empowered to direct the Council to inquire into the matter / complaint against a judge of the Supreme Court or a High Court. The President can initiate such inquiry on information received from the Council itself or from any other source. Such inquiry against a judge of the superior courts can be conducted on either of the following allegations:

- I. The judge is incapable of performing his duties by physical or mental incapacity; or
- II. Is guilty of misconduct.

Clause (5) of the Article has been amended in August 2002 by the Legal Framework Order 2002 prior to the amendment the Council could not start inquiry on its own initiative. After the amendment, the Council can start inquiry itself on information received by the Council or from any other source.

If there is a difference of opinion amongst the members of the Council, according to clause (4) of the Article the opinion of the majority

shall prevail and the report of the Council to the President shall be expressed in terms of the view of the majority. After an inquiry into the matter, if the Council, finding the judge incapable of performing duties of his office or guilty of misconduct, recommends removal of the judge, the President “may” remove the judge from his office. The expression “may” conveys that the recommendation of the Council is not binding on the President. Reading this provision along with Article 48 (1) of the constitution, it is clear that the President shall exercise this power on the advice of the Prime Minister or cabinet.

The provisions of Article 209 of the constitution are exhaustive and otherwise self-explanatory except in one respect i.e. a situation where the President may direct the Council to inquire into the capacity or conduct of the Chief Justice of Pakistan. A very serious question arises whether the Chief Justice of Pakistan is to remain a member and presiding officer of the Council even when the Council is conducting an inquiry into his own capacity or conduct or he should be replaced. The constitution is silent in this respect.

Clause (2) of the Article 209, which provides for the composition of the council, mentions the Chief Justice of Pakistan, judges of the Supreme Court and the Chief Justices of the High Courts in three distinct categories. But when it comes to providing for replacement of any member of the Council, clause (3) of the Article is completely silent about the Chief Justice of Pakistan whereas it expressly provides for replacement of the members of the Council belonging to the other two categories. The issue leads us to another question whether an acting Chief Justice of Pakistan can be a member and can preside over the sitting of the Council? The problem becomes more complex when one considers that an acting Chief Justice of Pakistan cannot be appointed, as under 180 of the constitution, an acting Chief Justice of Pakistan is appointed by the President under two circumstances: (i) when the office of the Chief

Justice of Pakistan is vacant or (ii) he is absent or unable to perform the duties of his office due to any other cause.

This vacuum in the Article 209 became a legal issue in March 2007 when a reference against the Chief Justice of Pakistan, Justice Iftikhar Muhammad Chaudhry was sent to the Supreme Judicial Council by the President. Justice Iftikhar was suspended and Justice Javid Iqbal was appointed as acting Chief Justice of Pakistan under Article 180 of the constitution. Justice Iftikhar challenged the reference and his suspension in the Supreme Court through writ petition under Article 184 (3) of the constitution. Consequently he was restored by the verdict of the Supreme Court. The reference against the Chief Justice of Pakistan, his suspension order and the appointment order of the acting Chief Justice of Pakistan were found by the Court to be unconstitutional and void. But the basic issue, whether the Chief Justice of Pakistan, in case of inquiry against him, should continue to remain a member of the Council or he should be replaced, remained unresolved.

### **5.3.3: Pakistan's History of Judicial Accountability:**

Pakistan has experimented with several methods of judicial accountability in its very short history. Under the Government of India Act 1935, which Pakistan inherited from the British Government, a judge of the Federal Court and of a High Court could be removed from his office by the order of the Governor General of Pakistan on the ground of misbehavior or of infirmity of mind or body if the Judicial Committee of the Privy Council, on a reference being made to them, reported the judge ought, on any of the said grounds, to be removed.<sup>65</sup> The function of the Judicial Committee of the Privy Council was given to the Federal Court of Pakistan under the Privy Council (Abolition of Jurisdiction) Act 1950 passed by the Federal Legislature of Pakistan. The first Constitution of

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<sup>65</sup> Sections 200 (2) (b) and 220 (2) (b) of the Government of India Act 1935.

Pakistan 1956 changed the method of removal of a judge of the superior courts. A judge of the Supreme Court could be removed by the President on an address by the National Assembly and a judge of a High Court could be removed by the President if, on a reference made by him, the Supreme Court recommended judge's removal.<sup>66</sup> In the second constitution of Pakistan, promulgated in 1962, the Supreme Judicial Council was introduced for the removal of the judges of the Superior Courts. The Supreme Judicial Council was retained in the interim constitution of 1972 and in the constitution of 1973. The wisdom behind the idea of the Supreme Judicial Council was to give more protection to the judges of the superior courts in the light of the independence of judiciary and to make them free from the blackmailing of the politicians as complaints against them will be inquired not by politicians but by their own peers.

So far as judicial accountability is concerned, no proper attention has been given. The Supreme Judicial Council has not even handedly been utilized. In the whole judicial history of Pakistan, since 1947 to 2007, there are only six instances of inquiry being conducted against the judges of the superior courts. In 1951, inquiry was conducted against a judge of Sindh High Court Justice Hassan Ali Agha. Allegations against him could not be proved and he was exonerated.<sup>67</sup> The second reference was made against a judge of West Pakistan High Court, Justice Akalaque Hussain in 1958 during the period of General Ayub Khan's Martial law, and he was removed on the ground of misconduct. But the impression was that the cause of his removal was his leftist's thoughts as at that time, Pakistan was actively collaborating with the anti-socialist bloc.<sup>68</sup> In 1969-70 the Martial law of General Yahya Khan started inquiries against two judges of the West Pakistan High Court. Justice Fazal-e-Ghani was accused of selling a gun he brought from Britain for his personal use, hence allegedly committed misconduct. The judge did not contend the allegation and

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<sup>66</sup> Articles 151 and 169, the Constitution of Pakistan, 1956.

<sup>67</sup> Tariq Butt, 'Iftikhar Chaudhry: Fourth one in line', the News, dated March 29, 2007.

<sup>68</sup> Rafiqat Ali 'Musharraf Ne Aisa Keun Kia?' at [www.bbc.co.uk/urdu](http://www.bbc.co.uk/urdu) visited on March 20, 2007.

resigned from the High Court. Justice Shaukat Ali was accused of misconduct on the ground of having shares in his family firm. He was removed from the service on the recommendation of the Supreme Judicial Council. During the third martial law regime of General Zia, a Presidential reference was sent to the Supreme Judicial Council in 1979, to conduct an inquiry against a judge of the Supreme Court, Justice Safdar Shah, who fled away from the country just to save his life. The sixth reference was against the Chief Justice of Pakistan, Justice Iftikhar Muhammad Chaudhry in March 2007, again by a President cum Chief of Army Staff General Musharraf. In this instance the Supreme Court set aside the reference as void and unconstitutional.<sup>69</sup>

The following points may be induced from the discussion of the references against the judges of the superior courts:

- Except for the first, all references against the judges of the superior judiciary were sent by military dictators.
- All the references, except the first and the last, were made when the constitution was either abrogated or held in abeyance.
- The idea behind the creation of the Supreme Judicial Council was to strengthen the independence of the judiciary, but the Supreme Judicial Council, somehow, stifles the independence of the judiciary. It has become a vehicle in the hands of the Executive against an independent judge whom it can undermine by threatening that his case would be sent to the council.

#### **5.3.4: Analysis of the Judicial Accountability in Pakistan:**

After this discussion of judicial accountability one can draw two possible conclusions:

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<sup>69</sup> For the short order of the court see daily Dawn, The NEWS, Nation, the Frontier Post dated July 21, 2007.

- ✚ That all judges of the Superior Courts, particularly appointed or working since 1962,<sup>70</sup> except for the cases mentioned above, have not suffered from any mental or physical infirmity or none of them have ever committed any act of misconduct. OR
- ✚ That the Supreme Judicial Council and its procedure regarding the accountability of judges are not effective.

The first conclusion is very difficult to justify because it is more than clear that not all the judges who had served over these years were angels. At least they were human beings and members of a society where constantly increasing corruption no longer remained a shameful act. According to a survey conducted by Transparency International, 55% people of Pakistan believe that judges are corrupt.<sup>71</sup> There are several instances where misconduct of the judges of the superior courts have been either alleged by senior advocates, or acknowledged by the Supreme Court in hearing appeals or recommended by the Chief Justice of Pakistan, but for reason not known, no action has been taken in this regard.

In April 2001 the Supreme Court while deciding the appeal filed on behalf of Benazir Bhutto, found the conviction of Benazir Bhutto and her husband politically motivated, hence it was set aside and the case was sent back for retrial. The Supreme Court also found Justice Qayyum of Lahore High Court and Justice Rashid Aziz Khan (former Chief Justice of Lahore High Court) a Judge of Supreme Court, guilty of bias and misconduct. Justice Rashid Aziz was specifically cited by the Supreme Court as being instrumental (as the then Chief Justice of Lahore High Court) in asking Justice Qayyum to try the cases of interest to the then government.<sup>72</sup> But the judges, found guilty of misconduct by the highest

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<sup>70</sup> The Supreme Judicial Council has been introduced first in the Constitution of 1962.

<sup>71</sup> See chapter Regional Highlights Asia – ‘Global Corruption Report 2007’ at [www.transparency.org/news\\_room/in\\_focus/2007](http://www.transparency.org/news_room/in_focus/2007) visited on October 27, 2007.

<sup>72</sup> In 1999 Benazir Bhutto (farmer Prime Minister of Pakistan) and her husband Asef Ali Zardari were found guilty in SGS kick back case and, consequently, were convicted to imprisonment for five years and fine up to nine millions rupees, by a bench of Lahore High Court presided over by Justice Malik Qayyum.

court of the country were not referred to the Supreme Judicial Council for inquiry. It was only after great outcry and constant criticism from the bar and media that the judges were pressured by the government to resign<sup>73</sup> and they resigned in the end of June 2001.

In November 1997, the then Chief Justice of Pakistan Justice Sajjad Ali Shah recommended to the President of Pakistan to direct the Supreme Judicial Council to conduct inquiry against a judge of the Supreme Court Justice Saeeduzzaman Siddiqui. The President wrote to the Prime Minister of Pakistan for his advice regarding inquiry against the said judge. The government did not take any action as the said judge was in its good books.<sup>74</sup> Another former Chief Justice of Pakistan also laments the lack of judicial accountability saying, “during my tenure as the Chief Justice, I had asked the President and the Prime Minister to refer cases of judicial misconduct against the judges who did not enjoy a good reputation, but there was no response”.<sup>75</sup> The Chief Justice of Pakistan, Justice Iftikhar Muhammad Chaudhry, showed his non-confidence in the composition of the Supreme Judicial Council, which was to conduct inquiry against him as three members out of the five members of the Council, according to him, were facing their own serious charges of misconduct.<sup>76</sup> The Council for the Chief Justice also objected to the composition of the Council on the ground that two members of the Council Justice Dogar, a judge of the Supreme Court and Justice Iftikhar Hussain, Chief Justice of Lahore High Court had references pending

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Appeal against the conviction was filed before the supreme court of Pakistan. The appeal was still pending, in the mean while some very interesting and surprising facts, showing the political motivation behind the conviction of Benazir Bhutto, were released to the media by a Pakistan’s intelligence agency in February 2001. A Deputy Director of IB (Intelligence Bureau) A. Rahim sent a letter to the President of Pakistan from Britain, along with a cassette containing conversation between Justice Malik Qayyum and a Federal Minister (Sairf-ur-Rehman) and Attorney General (Khalid Anwer) of Nawaz Sharif’s government, discussing SGS case against Benazir Bhutto. (For the conversation see Sunday Times, London, dated February 4, 2001; *Aaj* – Urdu daily from Islamabad- dated February 9, 2001. BBC report is available at [http://news.bbc.co.uk/1/hi/world/south\\_asia/1410387.stm](http://news.bbc.co.uk/1/hi/world/south_asia/1410387.stm) and for judgment of the Supreme Court see Asef Ali Zardari and another V. the State, PLD 2001 SC - 568.)

<sup>73</sup> Editorial of The NEWS (Islamabad) dated June 28, 2001)

<sup>74</sup> Justice (Retd) Sajjad Ali Shah ‘Law Courts in a Glass House’ p- 510.

<sup>75</sup> Chief Justice (Retd) Ajmal Mian ‘A judge Speaks Out’ p- 348.

<sup>76</sup> The NEWS (Islamabad) dated March 12 and 14, 2007.

against them.<sup>77</sup> Another eminent lawyer Wahab-ul Khairi filed an application before the Supreme Judicial Council on July 23, 2004, leveling serious allegation of misconduct against the Chief Justice of Lahore High Court Justice Iftikhar Hussain.<sup>78</sup> No procedure of judicial accountability has been processed in all these complaints/allegations of misconduct against the various judges of the superior courts.

The foregoing episodes, which are obviously not the only unhappy instances of the misconduct on the part of the judges of the superior judiciary, convincingly lead us to the above second conclusion, that is, the machinery of judicial accountability in Pakistan is dormant and not effective. The wisdom behind the creation of the Supreme Judicial Council was to regulate and discipline the judges of the superior courts by the judiciary itself, but the Supreme Judicial Council has proved to be a failed institution so far as its function of judicial accountability is concerned. It has rather, in the words of an eminent lawyer, degenerated into a judges' club meant primarily to protect rather than punish judges for their wrong doings.<sup>79</sup>

A reader, not well acquainted with the judicial history of Pakistan, will have a misconception from the foregoing discussion that the judges of the Superior Courts in Pakistan are completely independent. They enjoy constitutional protection and guarantee against arbitrary removal or termination. Again such conception is in contrast to the factual position. Article 209(7) of the constitution provides protection to the judges of the Superior Courts against arbitrary removal from service but on the contrary several judges have been removed arbitrarily and not under the procedure laid down by Article 209. The Constitution of Pakistan 1973, in some aspects, is also a self contradictory document. Some provisions of the constitution provide for the removal of a judge of a High Court in obvious

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<sup>77</sup> The NEWS (Islamabad) - Special Report - dated March 18, 2007.

<sup>78</sup> The NEWS (Islamabad) dated March 16, 2007.

<sup>79</sup> Hamid Khan 'The Judicial Organ' p- 189.

contradiction to the Article 209. If a judge of a High Court does not accept his transfer to another High Court under Article 200 or appointment as a judge of the Federal Shariat Court under Article 203C, he will cease to be a judge and will be deemed retired. Several judges of High Courts have lost their offices under these provisions of the constitution. In addition to the removal of judges under these Articles (200 & 203C) of the Constitution, many judges have arbitrarily been removed from their offices during military regimes. In September 1977 General Zia removed the Chief Justice of Pakistan Justice Yaqoob Ali Khan. About 80 judges of the Superior Courts including Chief Justices were arbitrarily removed under three Provisional Constitution Orders (PCOs) promulgated by military dictators at three different stages. Under PCO 1981 issued by General Zia four judges of the Supreme Court including the Chief Justice of Pakistan and more than a dozen judges of High Courts including the Chief Justice of Baluchistan High Court were removed from their services. The same process was repeated by General Musharraf in January 2000 where six judges of the Supreme Court including the Chief Justice of Pakistan and seven judges of the High Court lost their offices which were protected and guaranteed by Article 209 (7) of the Constitution. The judicial history of Pakistan has another unique example of removal of the Chief Justice of Pakistan Justice Sajjad Ali Shah by order of the Supreme Court in 1998 but not in accordance with procedure laid down in Article 209. The Chief Justice of Pakistan, Justice Iftikhar Muhammad Chaudhry was suspended in March 2007 by General Pervez Musharraf and kept under undeclared house arrest up to five days. Justice Iftikhar challenged his suspension in the Supreme Court and in the result of the court's ruling he was restored. The most shocking and painful episode is the recent PCO 2007 issued by General Musharraf on November 3, 2007. Under PCO 2007 twelve judges out of 17 judges of the Supreme Court including the Chief Justice of Pakistan and 37 judges out of 77 judges of the High Courts including two Chief Justices of two High

Courts have arbitrarily been removed from their offices and they were kept under house arrest for more than three weeks.<sup>80</sup> During the period of military regimes and unfortunately Pakistan has been ruled for longer period by Army than by politicians, the constitutional protections become meaningless. So on one hand even the services of the judges of the superior courts are not really protected and guaranteed where as on the other side judicial accountability is also not in practice.

Judicial independence and judicial accountability are two faces of a same coin. If one face is tarnished, no matter how fine the other side may be, the coin goes out of use. Unfortunately, both sides of the judicial coin in Pakistan have been badly tarnished. One can not find it easy to say which one should be improved first; the judicial independence or judicial accountability. Both are of equal importance. When we speak of judicial accountability, the question of judicial independence comes unbidden, for they are interdependent. The Chief justice of Malaysia very beautifully expresses this phenomenon, “Indeed independence is a vital component of a judge’s accountability since a judiciary which is not truly independent, competent or possessed of integrity, would not be able to give any account of itself.” Then he stresses on the accountability. “Thus judicial accountability is an indispensable to judicial independence, for an unaccountable judge would be free to disregard the ends that independence is supposed to serve.”<sup>81</sup> However judicial accountability must be developed, consistent with the principles of judicial independence and integrity. The purpose of the judicial accountability must be to advance the cause of justice. Judicial independence is a means to the end of justice for all, since independence is not for the personal benefit of the judges but for the protection of the people. A former judge of the Indian

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<sup>80</sup> The NEWS (Islamabad) dated November 4 – 6, 23, 24, 2007. Dawn (Karachi) dated November 4, 23, 2007. [http://www.bbc.co.uk/urdu/indepth/cluster/2007/11/071103\\_emergency\\_pk\\_zs.shtml](http://www.bbc.co.uk/urdu/indepth/cluster/2007/11/071103_emergency_pk_zs.shtml) visited on November 3 – 24 2007, [www.hr.org.com](http://www.hr.org.com) visited on November 8, &20, 2007.

<sup>81</sup> Justice Tun Mohammad Draidin Abdullah, Chief Justice of Malaysia, ‘Welcome Address’ to the Commonwealth Lawyers’ Association Workshop on ‘Judicial Accountability’ held in April 2002, available in “Judges and Judicial Accountability” edited by Cyrus Das and K Chandra.

Supreme Court has well said. “it is, therefore, important to have regard to the independence not only of the judge but also of the judiciary as an institution. The latter may provide traditions and a sense of corporate responsibility which are a stronger guarantee of independence than the private conscience of individual judges.”<sup>82</sup>

Unlike other civil services of Pakistan, judicial accountability is provided with one option, of course very extreme option, that is, removal from services under a procedure provided by Article 209 of the Constitution on grounds of proved misconduct or incapacity. Such removal from office may be for gross misconduct and should not be always resorted to, except in extreme cases. But judges do indulge in many kinds of misconduct which may require serious notice and even punishment, falling short of removal from office. But in the system of judicial accountability applied in Pakistan, no other method of check or censure is available except removal from service.

All other civil services’ laws in Pakistan provide various kinds of punishment such as termination of service, compulsory retirement, reversion to lower grade/position, stoppage or withdrawal of annual increment, sending on compulsory leave, suspension, notice of warning. Due to non-existent of minor punishments in the judicial accountability for minor misconduct or small wrongs the commission of some acts by the judges of the Superior Courts not befitting them, go unnoticed and unchecked. Every big evil is the result of small evil.

“Much more than executive arbitrariness is judicial arbitrariness” says Justice Khanna.<sup>83</sup> The effective and correct way is public censure of judicial excesses.<sup>84</sup> Again to have judicial independence and to allow public criticism of the judges at the same time seems a paradox because “there is no office which is so infinitely powerful and at

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<sup>82</sup> Justice (Retd) H R Khanna, ‘Judiciary in India and Judicial Process’ p- 20

<sup>83</sup> Ibid p- 27.

<sup>84</sup> Justice V. R. Krishna Iyer ‘Our Courts on Trial’ p- 19

the same time so frightfully defenseless as that of a judge.”<sup>85</sup> The judges from the nature of their office, cannot reply to criticism nor can they enter public controversy, much less of a political nature. But at the same time we are to remember the wisdom of Chief Justice William Howard Taft who said “Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice, than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellowmen and to their candid criticism.”<sup>86</sup> Dr Cyrus Das recognizes the right of the public to criticize judgments as an important feature of free speech and for the judiciary to be accountable as a public institution.<sup>87</sup> Judicial independence was debated by experts from Commonwealth, at Latimer House in London in June 1998, resulting in a set of guide lines for good governance called “Latimer House Guidelines”. Article VI (1) (b) of the Latimer House Guidelines declares that legitimate public criticism of judicial performance is a means of ensuring accountability and contempt proceedings are not appropriate mechanism for restricting legitimate criticisms of the court.<sup>88</sup>

It is to be admitted that free criticism is the life breath of democracy even if it over steps limits according to Justice Krishna. One important corrective is freer criticism of judges and judgments, factually founded, responsibly worded and correctionally oriented.<sup>89</sup> The USA Supreme Court speaking through Burger, gives its opinion about public criticism: “criticism of court administration, even when expressed in ‘ill-mannered’ terms with ‘unlawyer-like rudeness’ cannot form the basis for action.”<sup>90</sup>

Public accountability of the judiciary though recognized by all civilized nations in modern world is like a forbidden tree in Pakistan.

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<sup>85</sup> Justice (Retd) H R Khanna, ‘Judiciary in India and Judicial Process’ p- 28

<sup>86</sup> Quoted by Chief Justice of Malaysia supra note at 78.

<sup>87</sup> Dr Cyrus Das ‘Judges and Judicial Accountability’ p- 211

<sup>88</sup> Available at [www.commonwealth.org/7D\\_Latimer%20House%20principlespdf](http://www.commonwealth.org/7D_Latimer%20House%20principlespdf)

<sup>89</sup> Justice V. R. Krishna Iyer ‘Our Courts on Trial’ p- 19

<sup>90</sup> Quoted by Justice Krishna, *ibid*.

Public criticism even of the judgments is not allowed. A former judge of the Supreme Court of Pakistan describes thus: “Many our political battles are fought in the courts, but newspapers are discouraged from performing their duty of informing the public about matters debated in the courts”.<sup>91</sup> The ages old law of contempt of court is always there to suppress the voice which tries to expose the weaknesses in the administration of justice. The law of contempt in Pakistan is always subjectively and selectively applied. More often than not, by the ruthless enforcement of the law of contempt the judges manage to successfully suppress the truth, shield the evil, allow the act complained of to go unpunished and instead punish the complainant himself. Thus by applying the law of contempt all approaches to the issue are closed and the expositor is effectively silenced in the interest of preserving ‘the dignity and independence of the judiciary’. Perhaps the administrators of justice in Pakistan do not remember the prophetic saying of Lord Denning: “Justice has no place in darkness and secrecy. When the judge sits on a case he himself is on trial if there is any misconduct on his part, any bias or prejudice there is a reporter to keep an eye on him.”<sup>92</sup>

There are plenty of instances in Pakistan where powerful and influential people have openly committed the offence of contempt of court, but no contempt proceedings have taken place where as on the other hand, many ordinary individuals and journalists have been punished and humiliated for bona fide and mild criticism of judgments of the courts.

In summary, consensus is found among the jurists that competent and independent judiciary is first prerequisite for good governance, for real democracy, for rule of law and for enforcement of fundamental rights. And the competency and independence of judiciary cannot be preserved without effective and constant judicial accountability both legal

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<sup>91</sup> Justice (Retd) Dorab Patel ‘Testament of a Liberal’ p- 76.

<sup>92</sup> Quoted by Phiroza Anklesaria ‘Independence of Judiciary’ AIR 1991 Journal P- 101.

and public accountability. In fact, Pakistan badly needs both judicial independence as well as judicial accountability.

## **CHAPTER VI: JUDICIAL COMMITMENT TO INDEPENDENCE OF JUDICIARY IN PAKISTAN.**

Independence of judiciary cannot depend solely on the structure of the government and the judiciary's formal role within it. It also depends on the judges themselves. In this chapter the judicial commitment to independence of judiciary in Pakistan is examined. This study examines role of the judiciary during constitutional and legal crisis of Pakistan, collective role of the judges, integrity and character of the individual judges.

Independence of judiciary does not mean merely independence from outside influences but also from those within. A former justice of India is of the opinion that dangers from within have much larger and greater potential for harm than dangers from outside.<sup>1</sup> Professor Dam differentiates between structural independence and behavioral independence. The latter, according to him, is more important than the former.<sup>2</sup> The former term as used here, refers to the way in which government is constitutionally structured. Does that structure lend itself to independence of judiciary? Behavioral independence resides in the judge as a person. Is the judge independent – that is, not just dispassionate and free from bias, but willing to take difficult positions to resist political or any external pressure, to reject any temptation of corruption and to make truly independent decisions? Prof. Dam refers to the British constitutional system, in support of his conclusion that behavioral independence is more important and more effective than structural independence in the context of independence of judiciary,. He concludes that the structural arrangement in Britain makes structural

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<sup>1</sup> Chief Justice (Retd) J. S. Verma, 'New Dimensions of Justice' P-18.

<sup>2</sup> Kenneth W. Dam, 'The Judiciary and Economic Development' Journal of the University of Chicago Law School, March 2006, available at [www.law.uchicago.edu/lawecon/index.html](http://www.law.uchicago.edu/lawecon/index.html).

judicial independence unlikely,<sup>3</sup> the fact is that British judiciary, particularly at the highest level, is known for its independence (because of behavioral independence). Behavioral independence he further elaborates, was acquired after a long struggle in which many British judges were willing to stand up to the British sovereign at great personal risk during the Tudor and Stuart periods, even before the Act of Settlement of 1701, gave life judges tenure on good behavior.

Although the independence of the British judicial system was established by behavioral independence rather than structural independence, it does not follow that a developing country like Pakistan can afford to neglect structural independence. Structural independence and behavioral independence can support each other and in a country seeking to overcome legalized abuse of the executive authority, it is mars to see judicial independence “fully secured” if one does not foster both. Unfortunately, the judiciary in Pakistan is not based on sound foundation of structural independence, as discussed in the last chapter. Furthermore as we shall demonstrate here, it miserably lacks behavioral independence also.

### **6.1: Role of the Judiciary during Constitutional Crisis:**

At the times of constitutional crisis, bold and independent decisions of the courts can help to shape the destiny of a nation and set the law on the right course. Weak and timid decisions of a court help to pave the way for future justification of arbitrary acts of executive on self serving theories and concepts or hyper technical grounds which ultimately undermines the image and credibility of the judiciary in the public eye.

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<sup>3</sup> The British judiciary has not traditionally been structurally independent is shown by the intermingling of judicial, executive and legislative functions at the highest level. Until the Constitutional Reform Act 2005 was passed, the Law Lords who formed the Highest Appellate Court in the British Judiciary, also sat in the House of Lords – the upper house of the British Parliament. More amazing was the position of Lord Chancellor, who presided over the Law Lords as well as the House of Lords and was a member of the cabinet also at the same time. The Law Lords will be transferred to the newly created Supreme Court under the Reform Act 2005, to take place in 2008.

According to a former judge of the Indian Supreme Court, “it is not test of the independence of judiciary that it can hold the scales even in ordinary run of cases between obscure citizens. The real test of independence of judiciary arises when times are abnormal, when the atmosphere is surcharged with passion and emotion, when there is brooding sense of fear, when important personalities get involved and when judicial processes are used by those in power to get their political objectives. At such time it is judiciary which is on trial.”<sup>4</sup>

The judiciary of Pakistan has been confronted more than once with such a ‘real test’ at times of constitutional crisis and has had opportunities to give some historic verdicts at the crucial stages of the history of Pakistan. But the courts awarded some controversial verdicts on constitutional issues. Examples usually and rightly begin with Federal Court’s decision in case of Tamizuddin Khan.

The constitutional crises of Pakistan started with the dissolution of the Constituent Assembly of Pakistan by the Governor General of Pakistan Ghulam Muhammad through a proclamation on October 24, 1954. There were two significant omissions in the proclamation. First, it did not use the word of dissolution for the Constituent Assembly and it only said that the Constituent Assembly had lost the confidence of the people and could no longer function. The second omission was that it nowhere specified any provisions of law under which the proclamation was issued. Normally, whenever any such order or proclamation is issued the provision of laws under which the power is exercised is indicated. Both these omissions were due to the fact that there was no provision of the law that could permit such an action.

The President of the Constituent Assembly, Moulvi Tamizuddin Khan, challenged, the proclamation dissolving the Constituent Assembly, in the Chief Court of Sindh under section 223A of the Government of

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<sup>4</sup> Justice (Retd) H. R. Khanna, ‘Judiciary in India and Judicial Process’ P- 25.

India Act 1935.<sup>5</sup> Section 223A had been added to the Act 1935 by the Constituent Assembly through a Constitutional Amendment in 1954, conferring writ jurisdiction upon the High Courts (including the Chief Court of Sindh). The main objection from the Federal government was that the amendment introduced by the Assembly in the Act 1935 whereby section 223A was added, was not a valid law as it had not received the assent of the Governor General. The Chief Court of Sindh, over ruled this objection by drawing a distinction between the constitutional functions and the federal legislature's functions of the Constituent Assembly, and accepted the concepts that assent of Governor General was not required for the Constitutional Acts passed by the Constituent Assembly. As per judgment of the Chief Justice of the Chief Court, this view was in keeping with the consistent course of practice and understanding of the government and that no such objection had been ever raised previously by any counsel for the state. As to the authority of the Governor General to dissolve the Constituent Assembly, the court found that there was no specific provision either in the Government of India Act 1935 or in the Indian Independence Act 1947, giving such authority to the Governor General. Consequently, the petition of the President of the Assembly succeeded and the Court unanimously issued writ for the restoration of the Constituent Assembly as well as the former government. This judgment of the Chief Court of Sindh demonstrates the behavioral independence of the judges in Pakistan during the infancy of this nation .What the Supreme Court of today, cannot do, the Chief Court of Sindh did easily in the earlier days of Pakistan. The Chief Court of Sindh played its part in a manner befitting a superior court, without fear or favor, without being influenced by any extraneous considerations.<sup>6</sup>

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<sup>5</sup> Moulvi Tamizuddin Khan V. Federation of Pakistan, PLD 1955, Sindh 96.

<sup>6</sup> Justice (Retd) K. M. A. Samdani, 'Role of the Judiciary in the Constitutional Crises of Pakistan' P- 65.

One can agree with the assessment of Allen McGrath that when Pakistan came into existence, the courts were only in theory independent.<sup>7</sup> In fact the judiciary in the earlier days of Pakistan was, though not fully, virtually independent. Pakistan on independence, inherited a healthy judicial system with a “reputation for integrity and competence”.<sup>8</sup> A lot of pressure was put on the Chief Justice Constantine and other judges of the Chief Court of Sindh by the executive during the proceedings of the case, but they were able to resist all types of the executive pressure.<sup>9</sup>

The federal government challenged the decision of the Chief Court of Sindh in the Federal Court.<sup>10</sup> The Federal Court accepted the appeal by majority judgment, four to one.<sup>11</sup> The lone dissenting voice was Justice Cornelius. The four learned judges led by Chief Justice Munir came to the conclusion that no constitutional amendment could be valid without the assent of the Governor General and since section 223A conferring writ jurisdiction on the High Courts of the country derived its authority from a constitutional amendment which had not received the assent of the Governor General, the Chief Court of Sindh had no authority to issue the writs. Consequently, the judgment of the Chief Court was set aside and the writs issued by the Chief Court were recalled. As per judgment of Chief Justice Munir, they could not go into other issues in the case whatever their importance might be, (that is, the issue of dissolution of the Constituent Assembly wasn't even touched). Justice Cornelius in his dissenting judgment disagreed with the majority view and upheld the decision of the Chief Court of Sindh.

This case pitted two important constitutionalists – Chief Justice Munir and Justice Cornelius – against one another, according to Newberg,

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<sup>7</sup> Allen McGrath, ‘The Destruction of Pakistan’s Democracy’ P- 155.

<sup>8</sup> Hamid Khan, ‘Judicial Organ’ P- 112.

<sup>9</sup> See for details, Allen McGrath, ‘The Destruction of Pakistan’s Democracy’ Chapter VII, PP – 155- 99; Sharifuddin Pirzada, ‘Dissolution of the First Constituent Assembly’; Hamid Khan, ‘Constitutional and Political History of Pakistan’ (2005) Chapter VII, PP- 85-9

<sup>10</sup> The Federal Court was the Highest Court in Pakistan under the Government of India Act 1935 till the promulgation of 1956 Constitution of Pakistan.

<sup>11</sup> Federation of Pakistan V. Moulvi Tamizuddin Khan PLD 1955, FC 240.

the former made his mark defending executive authority and the later offered notion of popular sovereignty and constitutional government.<sup>12</sup>

Justice Munir while criticizing the Chief Court of Sindh questioned the role of Judiciary by asking, whether it was a wise exercise of discretion for the judiciary to re-instate in power a deposed government by issuing enforceable writs against a de facto government. This undoubtedly was and still continues to be the basic question in Pakistan. The Chief Justice's view appears to be that it is the duty of the judiciary to set the seal of approval on anything that comes to stay de facto regardless of the unconstitutionality, illegality, impropriety or immorality of its origin.<sup>13</sup> This view, coming unfortunately from the highest court in the country at a very early stage of its life, set the tone for the future performance of the judiciary in Pakistan. Justice Munir's comment dismissed any distinction between de jure and de facto governance. In this sense, "the Federal Court may not have wanted to legitimize the Governor Generals' actions but thought it necessary to bow to his powers. Later, this precept seemed to demonstrate Courts early predilection to support the government of the day."<sup>14</sup> It was the duty of the court to declare the truth, and also to issue enforceable writs where it was permissible under the law even if it amounts to re-installing in power a deposed government and removing a de facto government. It is not difficult to imagine a situation where the de facto government might refuse to honor the writ. Should it do so, it would be for the people to execute the writ, but the people, a former Justice says, can decide to move and decide rightly only if the superior judiciary of the country advises them correctly.<sup>15</sup>

The judgment of the Federal Court in the instant case, apart from its technical and legal aspects, has been widely commented upon and criticized. Some have described it as a political rather than a judicial

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<sup>12</sup> Paula R. Newberg, 'Judging the State' P – 45.

<sup>13</sup> Justice (Retd) K. M. A. Samdani, 'Role of the Judiciary in the Constitutional Crises of Pakistan' P-67.

<sup>14</sup> Paula R. Newberg, 'Judging the State' P- 49.

<sup>15</sup> Justice (Retd) K. M. A. Samdani, 'Role of the Judiciary in the Constitutional Crises of Pakistan' P-67

judgment, while others have declared it as a first nail in the coffin of democracy in Pakistan. After so many years it has now become clear that this judgment was not free from bias, partiality and external pressure. It was not an erroneous judgment due to lack of vision but rather it was an act of collusion on the part of the court.<sup>16</sup> In the words of Justice (Retired) Haziqul Khairi, “Moulvi Tamizuddin Khan’s case is a classical example of intellectual corruption in the judicial history of Pakistan. How greatly we have suffered because of this case, is anybody’s guess.”<sup>17</sup> Another former justice did not agree even with the technical objection of the Federal Court regarding section 223A. He states that when the section 223A of the Government of India Act 1935 was enacted, the first impression of the lawyers in this country was that the provisions had conferred upon the High Court the power to issue writs.<sup>18</sup> The political impact of this judgment was so profound that the echo of Tamizuddin Khan’s case can still be heard in the current constitutional crises of Pakistan. It has since been called, ‘a momentous ruling from which Pakistan has never fully recovered’.<sup>19</sup> The political as well as legal consequences, ignored by the Federal Court in Tamizuddin Khan’s case were of far reaching effects. The Federal Court’s decision left a bulk of invalidated laws and no self-evident method for giving them effect. Almost everything the dissolved Constituent Assembly had accomplished was rendered moot by the Federal Court’s verdict. If the interpretation of the Federal Court, regarding Section 6(3) of the Independence Act 1947 which dealt with the assent of the Governor General to legislation in dominion was correct, then one may wonder how the entire legal and

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<sup>16</sup> See for details, Allen McGrath, ‘The Destruction of Pakistan’s Democracy’ Chapter VII, PP – 155- 99; Sharifuddin Pirzada, ‘Dissolution of the First Constituent Assembly’; Hamid Khan, ‘Constitutional and Political History of Pakistan’ (2005) Chapter VII, PP- 85-9; and Sami Ahmed, ‘The Judgment that Brought Disaster’.

<sup>17</sup> Justice (Retd) Haziqul Khairi, ‘Intellectual Corruption in Pakistan’, The NEWS June 25, 2001.

<sup>18</sup> Justice (Retd) Syed Akhlaque Hussain, ‘Writ Jurisdiction of the Superior Courts in Pakistan’, PLD Journal 1958.

<sup>19</sup> Ayesha Jalal quoted by Yusuf Hamid, ‘Pakistan: A Study of Political Development 1947 – 97’, P-59.

administrative systems of the country were allowed to be based on such illegal foundation for so many years.

Justice Munir remained defensive and apologetic about his judgment in Tamizuddin Khan's case for the rest of his life. He wrote and spoke on this point on various occasions.<sup>20</sup> This judgment has become the most widely disliked verdict in Pakistan. During the proceedings of Chief Justice Iftikhar's petition in 2007, at a reference to Tamizuddin Khan's case by the council for the government, the presiding judge of the Supreme Court Bench – Justice Khalil-ur-Rehman Ramday – observed, “the judgment in Tamizuddin Khan's case has become a taunt for us, so no reference be made to that Judgment”.<sup>21</sup>

By declaring, in that judgment, the addition of 223A to the Government of India Act 1935, illegal, void and inoperative for want of the assent of the Governor General, dozens of constitutional laws (46 acts) passed by the Constituent Assembly since 1948 were made void and inoperative, the country was faced with a legal vacuum. The courts of the country were flooded with cases challenging various actions of the government taken under the provisions of the constitutional acts that stood void and ultra vires due to the verdict of the Federal Court.<sup>22</sup> After the judgment of the Federal Court in Tamizuddin Khan's case, the Governor General, to fill the legal vacuum, promulgated a wide ranging Emergency Powers Ordinance IX of 1955 and assumed powers to give validity, with retrospective effect, to all laws made void and inoperative due to the Federal Court's verdict and to make provisions for framing a Constitution for Pakistan. A state of grave emergency was declared throughout Pakistan.<sup>23</sup> This ordinance came under discussion and was challenged in an already pending case, namely Usif Patel vs. The Crown, before the Federal Court. The Federal Court declared in this case that

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<sup>20</sup> Hamid Khan, 'Constitutional and Political History of Pakistan' (2005) P- 141.

<sup>21</sup> Reported in *The Mashriq*, Peshawar, dated May 23 2007, translated by the author from Urdu into English.

<sup>22</sup> G. W. Chaudhry, 'Constitutional Development in Pakistan' P- 87.

<sup>23</sup> Emergency Powers Ordinance 1955, PLD, Central Acts and Notifications.

power to make provisions to the constitution of the country would not be exercised by the Governor General by means of an ordinance. The court, therefore, held that section 2 of the ordinance which authorized the Governor General to give validity to void laws and to frame new constitution, was unconstitutional and ultra vires.<sup>24</sup> This ruling of the Federal Court imposing a legal check on the executive placed the government in very uncertain situation. It presented the country with a constitutional crisis of greater magnitude than that when the Governor General dissolved the Constituent Assembly.

Seeking a route out of the political and legal stalemate, the Governor General announced plans for a new constitutional convention and, concurrently invoking the advisory jurisdiction of the court, he also requested an advisory opinion from the Federal Court on his plans. The request for an advisory opinion, technically called a “Reference” placed four issues before the Federal Court: the powers and responsibilities of Governor General’s office; how to validate the prior laws made void due to the Federal Court’s rulings in Tamizuddin Khan’s case and Usif Patel’s case; whether the Constituent Assembly was rightly dissolved by the Governor General; and the competency of the proposed Constituent Convention.<sup>25</sup> The court undertook to offer a legal solution to politically intractable problems but understood that an opinion contrary to the Governor General might not be upheld. This mixed political message affected the courts method to a degree.<sup>26</sup>

The court returned its advisory opinion on the four issues placed before it in the Reference, by a majority of four to one. The first issue, powers of the Governor General was not discussed and not answered by the court as it was too general. The court examined the second issue, how to validate the prior laws, a crisis caused by the invalidation of 46 enactments of the Constituent Assembly because they lacked the assent of

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<sup>24</sup> Usif Patel V. The Crown, PLD 1955 FC 387.

<sup>25</sup> Reference by His Excellency The Governor General, PLD 1955 FC 435.

<sup>26</sup> Paula R. Newberg, ‘Judging the State’ P- 55.

the Governor General. The court found that this result justified the use of emergency powers of the Governor General provided the Governor General's powers were to be exercised only temporarily until a new Constituent Assembly could be convened. The emergency powers Justice Munir referred to were not the emergency powers available to the Governor General under the Constitution, but special and extraordinary powers he created for the present situation. He therefore sought a legal foundation independent of the Government of India Act 1935 and the Indian Independence Act 1947. The legal principle he invoked was the doctrine of state necessity which he had embraced in a judgment delivered by him as the Chief Justice of Lahore High Court in 1953.<sup>27</sup> Later in the decade, the doctrine of state necessity was used by military regimes and civilian politicians to authenticate their arrogation of powers.<sup>28</sup>

To support the Governor General's use of these non-constitutional emergency powers, Justice Munir found it necessary to move beyond the Constitution to what he claimed was the common law, to general legal maxims, and to English historical precedents. He relied on Brocton's maxim, "that which is otherwise not lawful is made lawful by necessity". Justice Munir supported this maxim by making reference to a number of famous cases in English constitutional history. None of the cited cases, however, supported his position that the Crown could exercise emergency powers in peace times and outside of the nation's Constitution.<sup>29</sup>

The third question, whether the Governor General had rightly dissolved the Constituent Assembly, was examined at length. This question was not included in the original Reference. On the insistence of the Federal Court, the Reference was modified and this issue was included in the Reference. Justice Munir wanted to provide justifications for the dissolution of the Constituent Assembly because this core issue was not discussed but rather avoided in Tamizuddin Khan's case. The critics of

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<sup>27</sup> Muhammad Umer Khan V. The Crown PLD 1953 Lahore 528.

<sup>28</sup> Paula R. Newberg, 'Judging the State' P- 59.

<sup>29</sup> Allen McGrath, 'The Destruction of Pakistan's Democracy' P- 210.

that judgment had lamented on ignoring this core issue by the Federal Court in Tamizuddin Khan's case. In reply to the third query in the Reference, Justice Munir gave three grounds which justified the use of the Crown's prerogative by the Governor General to dissolve the Assembly. First, according to Justice Munir, the Constituent Assembly for seven long years was not able to frame a Constitution for Pakistan. Although known to him to be a fact, Justice Munir disregarded the existence of the new Constitution<sup>30</sup> and accepted the Governor General's claim that the Assembly had not produced a Constitution in seven years after independence. His second ground was that the Constituent Assembly had become unrepresentative, a point Sir Ivor Jennings (counsel for the government) had, in Tamizuddin Khan's case, concluded that it was a political question, not proper for a court to decide. The third ground, Justice Munir found as justification for the Governor General's power to dissolve the Constituent Assembly, that by illegally claiming from the time of independence that the Governor General's assent was not necessary for all legislation, the Assembly 'never functioned as it was intended by the Indian Independence Act to function'. One may rightly wonder what the logic of examining a closed issue was. The proper time and proper occasion of discussing this issue was Tamizuddin Khan's case.

The court answered to the fourth issue that the correct name of the Constituent Convention was Constituent Assembly. That the Governor General could not nominate the members of the Constituent Assembly and the Constituent Assembly would be competent to exercise all powers conferred by the Indian Independence Act 1947 on the Constituent Assembly.

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<sup>30</sup> Constitution was framed and it was sent to the press for publication and after publication it was to be presented to Assembly for final approval. For this purpose Assembly was to be convened on October 28 1954. The Governor General dissolved Assembly on October 24 1954. Justice Munir had congratulated, for the new Constitution, Lahore High Court Bar Association in his address before dissolution of the Assembly. G. W. Chaudhry, 'Constitutional Development in Pakistan'; Hamid Khan, 'Constitutional and Political History of Pakistan' P- 82; Allen McGrath, 'The Destruction of Pakistan's Democracy' P- 124.

A former Chief Justice of Baluchistan High Court termed the Federal Court's rulings in Tamizuddin Khan's case and opinion of the Federal Court in the Reference of 1955, an ill-fated judiciary and executive engineering which was perpetrated on the people of Pakistan. Had it been avoided, Pakistan's present constitutional wrangles and successive martial laws might not have been encouraged.<sup>31</sup> An analyst very comprehensively describes the after effects of the Federal Court's rulings in Tamizuddin Khan's case and the Reference of 1955, in these words: "by giving the Governor General wide berth and offering precedents to uphold executive intervention in constitutional and legislative activities, the immediate consequences of the Federal Court rulings were detrimental for Pakistan's developing polity and particularly for legislative sovereignty. For the longer term, the court established a practice of striking unspoken bargains with those in powers so that its rulings would be obeyed and those in power would not feel defied. At a crucial time of Pakistan's history the judiciary molded this interpretation of prudence into a precedent from which it would later find it hard to depart."<sup>32</sup>

President Sikandar Mirza abrogated 1956 Constitution, by his Proclamation of October 7 1958, dismissed the central and provincial cabinets, dissolved the assemblies and imposed Martial Law throughout Pakistan with General Ayub Khan Commander in Chief of Pakistan Army, as a Chief Martial Law Administrator (CMLA). Three days later on October 10, 1958, the President promulgated the Laws (Continuance in Force) Order 1958 providing inter alia, that Pakistan would be governed as nearly as possible in accordance with the late constitution and the courts were allowed to continue and function but could not challenge the government. An appeal was filed in the Supreme Court by the government against a judgment of the High Court declaring some provisions of 1901

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<sup>31</sup> Justice (Retd) Mir Khuda Bakhsh Mari, 'A Judge May Speak' P-12.

<sup>32</sup> Paula R. Newberg, 'Judging the State' P-31.

Frontier Crimes Regulations (FCR) null and void being repugnant to certain provisions of the Constitution of 1956.<sup>33</sup> In this appeal the Supreme Court ruled on the legality of the usurpation of power by the army. The question involved in this case was whether the writ issued by the High Court had abated under Article 1 (7) of the Laws (Continuance in Force) Order 1958. The Supreme Court led by Chief Justice Munir, held by majority vote the military regime to be legitimate, the Laws (Continuance in Force) Order 1958 to be valid and the old legal order including the constitution to be no longer in effect. Again the only dissenting voice was of Justice Cornelius. Justice Munir found a ground for his judgment in Hans Kelsen's General Theory of Law and State. The Chief Justice read into Kelsen's theory wide justifications for usurping constitutional powers. Justice Munir ruled that a successful challenge to power conferred a badge of legality; 'where revolution is successful it satisfies the test of efficiency and becomes a law – creating fact'. The Chief Justice's consignment of the declaration of usurpation and the revolutionary legality doctrine further diminished the Court's power.<sup>34</sup>

In Asma Jilani's case,<sup>35</sup> the Supreme Court over-ruled the doctrine of revolutionary legality applied in Dosso's case as 'an empty theoretical concept'. The court disallowed the possibility that the military could abrogate the fundamental law of a country in the name of martial law. The court observed that if the argument was valid that the proclamation of the martial law by itself led to complete destruction of the legal order, then the armed forces did not assist the state in suppressing disorder but actually created further disorder, by disrupting

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<sup>33</sup> The State V. Dosso and another PLD 1958, SC 533.

<sup>34</sup> Paula R. Newberg, 'Judging the State' P- 76.

<sup>35</sup> Miss Asma Jilani V. The Government of Punjab and Mrs. Zarina Gauhar V. the Province of Sindh, PLD 1972 SC 1391. Malik Ghulam Jilani (father of Asma Jilani) and Altaf Gauhar (husband of Zarina Gauhar) were arrested under martial law regulations. Asma Jilani (currently known as Asma Jehangir) challenged the arrest of her father in Lahore High Court and Zarina Gauhar challenged the arrest of her husband in Sindh High Court. Their writ petitions were rejected by the High Courts for want of jurisdiction as the courts could not challenge or issue any order against martial law authorities or martial law regulations. Both Asma and Zarina filed appeals in the Supreme Court against the decisions of the High Courts.

the entire legal order of the state. The Supreme Court, making a departure from its past, held the martial law of General Yahya Khan to be illegal in its conception and operation. All orders or regulations issued by martial law authority were declared void and ineffective. However an important fact needs mentioning that when this judgment was announced by the court, the usurper General Yahya was not in power, he was under house arrest, the Pakistan army was demoralized due to a defeat at the hands of Indian Army in December 1971 and the powers were already transferred to Zulfikar Ali Bhutto. Yet still this judgment was welcomed by the people of Pakistan and they were, erroneously, hoping that “doctrine of state necessity” had been buried and future martial laws were blocked.

General Zia-ul-Haq took power on July 5, 1977; the court was not immediately called upon to judge the validity of the coup d’etat. The validity and legality of martial law regime was challenged before the Supreme Court in a petition by Begum Nusrat Bhutto<sup>36</sup> (wife of Zulfikar Ali Bhutto), when Z. A. Bhutto and ten other People Party’s leaders were re-arrested by martial law government in September 1977. The full Supreme Court consisting of nine judges including the Chief Justice deliberated on the issue raised in the petition before them. If the court were to follow the precedent in Dosso’s case, there would be no problem regarding the legitimacy of the present regime. But in the meanwhile Asma Jilani’s case having intervened which had, in clear terms overruled Dosso’s case; it was open to the court either to follow Asma Jilani’s case or to revert to Dosso, by over-ruling Asma Jilani this time, or to find a via media. The court resorted to the last alternative. The court extended validity to the “extra-constitutional step” of the army seizing power for “temporary period” in the interest of the state and for the welfare of the people. The Court under Justice Anwer-ul-Haq committed a “judicial suicide” by allowing the usurper to take any legislative measure including

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<sup>36</sup> Begum Nusrat Bhutto V. The Chief of Army Staff and others, PLD 1977 SC 657.

amending of the Constitution.<sup>37</sup> The court held that it had full power of judicial review available under Article 199 of the constitution but this jurisdiction was taken away by the military regime through amendments in the constitution and finally all constitutional jurisdictions were virtually removed by the Provisional Constitution Order 1981.

Surprisingly, the court ignored the serious restrictions that the Laws (Continuance in Force) Order 1977 placed on its operation. The court also did not consider it necessary to give specific meaning to “the temporary period” or to provide for new election within a specified period on the pattern of 1955 Reference. One of the judges of the Supreme Court, Justice Patel, summarized very beautifully the whole debate over Nusrat Bhutto’s case in an interview after his retirement: “therefore when we heard Begum Nusrat Bhutto’s writ petition, the court had before it two conflicting judgments, and I think it took a middle way, though the unkind critic might say that we fell between two stools”.<sup>38</sup>

During the interval period between General Zia’s martial law (1977-88) and General Pervez Musharraf’s takeover in 1999, the National Assembly had been dissolved and governments had been dismissed for four times<sup>39</sup> under Article 58(2) (b) of the Constitution.<sup>40</sup> Whenever the central legislature is dissolved, all provincial assemblies are also dissolved by their respective Governors which seem to be a strange and not understandable phenomenon in a federation. Every time the dissolution order of the National Assembly was challenged in the Supreme Court of Pakistan. In all such petitions it was held that the discretionary power of the President under Article 58(2) (b) was challengeable and qualified instead of ‘absolute, unchallengeable and unlimited’. On two

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<sup>37</sup> Justice (Retd) Shamim Hussain Kadri, ‘Judges and Politics’ P-45.

<sup>38</sup> Justice (Retd) Dorab Patel’s interview to MAG (a weekly magazine) January 31 to February 6 1985, PP-8-9.

<sup>39</sup> First dissolution was made by General Zia in 1988; second and third by President Ghulam Ishaq Khan in 1990 and 1993; fourth by President Farooq Laghari in 1996

<sup>40</sup> Article 58(2)(b) of the Constitution envisages that the President may also dissolve the National Assembly in his discretion where, in his opinion, a situation has arisen in which the government of federation cannot be carried on in accordance with provisions of the constitution and appeal to the electorate is necessary.

occasions, the exercise of such presidential power was held and on other two occasions, it was held that the power was exercised invalidly. However, the National Assembly and the Federal Government were restored in one case only.

The dissolution of the National Assembly by General Zia in May 1988 was not challenged at the time. General Zia's death in August 1988 inspired petitions from the members of the former Assembly for re-instatement. The Sindh High Court dismissed the first challenge to the dissolution's constitutionality in September 1988.<sup>41</sup> A petition in Lahore High Court on the same issue met with greater consideration.<sup>42</sup> The Chief Justice opined that the discretion or formation of opinion of course, were subjective yet these had to be based on facts and reasons which were objective realities. Formation of opinion, according to him, could not be based on illusions, fancy or whim. The court held that the grounds for the 1988 dissolution were "so vague, general or non-existent" that the orders were not sustainable in law. The court further held that "if one ground is wide, vague, general, non-specific or non-existent, the whole order has to fall". Ruling that the dissolutions were unconstitutional, the Lahore High Court nonetheless refused to re-instate the former Assembly, holding the prospect of elections to fulfill the ends of the constitutional governance.

The decision of the Lahore High Court was challenged in the Supreme Court by both parties, the federal government challenged the findings of the Lahore High Court, inter alia, dissolution of the National Assembly was held unconstitutional and invalid, and the members of the dissolved Assembly challenged that part of the judgment refusing relief and not restoring the Assembly. The Supreme Court entertained appeals in October 1988. The Supreme Court upholding the findings of the Lahore High Court, observed that presidential discretion concerning legislature's dissolution "has to be exercised in terms of the words and spirit of the

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<sup>41</sup> M. P. Bhandara V. The Federation of Pakistan, Petition # 293 of 1988.

<sup>42</sup> Muhammad Sharif V. Federation of Pakistan, PLD 1988 Lahore 725.

constitutional provision” – and that such exercise must be objectively measurable. More difficult, however, was granting relief. The Supreme Court ruled, “the writ jurisdiction is discretionary in nature and even if the court finds that a party has a good case, it may refrain from giving him the relief if greater harm is likely to be caused thereby than the one sought to be remedied. It is well settled that individual interest must be subordinated to the collective good. Therefore, we refrain from granting consequential relief, inter alia the restoration of the National Assembly and the dissolved federal cabinet.”<sup>43</sup>

one analyst opines that the courts validated the status quo ante: the dictator was dead, campaigns were in progress and popular sentiment strongly favored elected government.<sup>44</sup> One of General Zia’s sons had boasted publicly that no such judgment would have come had his father been alive.<sup>45</sup> The effective reason behind the Supreme Court decision of not granting consequential relief to the petitioners was that the then Chief of Army Staff, Mirza Aslam, as he claimed in a press conference after his retirement, had send a message to the judges of the Supreme Court that the Assembly should not be restored, and that the elections be allowed to take place because the government machinery was by then in full gear.<sup>46</sup>

Benazir Bhutto’s government was dismissed and the National Assembly was dissolved in August 1990, the dissolution order was challenged before the Lahore High Court and Sindh High court.<sup>47</sup> Both High Courts endorsed the dissolution of the Assembly by holding that the President was justified in forming the opinion that the government of the federation could not be carried on in accordance with the provisions of the Constitution and an appeal to the electorate had become necessary. Consequently, the courts held, the President had validly passed the

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<sup>43</sup> Federation of Pakistan V. Hajji Muhammad Saifullah Khan PLD 1989 SC 166.

<sup>44</sup> Paula R. Newberg, ‘Judging the State’ P- 209.

<sup>45</sup> Hamid Khan, ‘Constitutional and Political History of Pakistan’ (2005) P-401.

<sup>46</sup> The NEWS Islamabad, The Nation Lahore and *Nawa-i-Waqt* Lahore dated February 5, 1993.

<sup>47</sup> Khwaja Ahmed Tariq Rahim challenged before Lahore High Court (Khwaja Ahmed Tariq Rahim V. the Federation of Pakistan PLD 1990 Lahore 505) ; and Khalid Malik challenged before Sindh High Court (Khalid Malik V. the Federation of Pakistan PLD 1991, Karachi 1).

dissolution order of the National Assembly. The Lahore High Court deviated from its former stand in *Muhammad Sharif V. Federation of Pakistan* 1988 that if one ground was wide, vague, non-specific or non-existent, the whole order had to fall.

The judgment of Lahore High Court was challenged before the Supreme Court.<sup>48</sup> The appeal was dismissed by the Supreme Court and the decision of the Lahore High Court was accordingly upheld by the majority of ten to two judges. One of the dissenting judges Justice Sajjad Ali Shah, holding the dissolution order as not sustainable under the provisions of the constitution and the law, however, was of the view that relief for restoration of the National Assembly could not be granted (as held in the *Hajji Saifullah's* case) because after dissolution of the Assembly, elections had taken place with the full participation of all political parties, including the deposed Prime Minister and her party. It is to be noted that the decision of the Supreme Court in the instant case was announced after general election being held; only initial hearing of the case took place before the election in October 1990.

On April 18, 1993, President Ghulam Ishaq Khan dissolved the National Assembly and dismissed Nawaz Sharif's government, exercising his powers under Article 58(2) (b) of the Constitution. The order of dissolution was challenged by the speaker of the dissolved National Assembly, Gohar Ayub Khan, before the Lahore High Court. While the speaker's petition was pending, Nawaz Sharif – the deposed Prime Minister – filed a petition under Article 184(3) of the Constitution<sup>49</sup> directly before the Supreme Court, challenging the order of dissolution of the National Assembly on the ground of violation of his fundamental right under Article 17(2) of the Constitution.<sup>50</sup> The petition was heard by a bench of the Supreme Court consisting of eleven judges headed by the

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<sup>48</sup> *Khwaja Ahmed Tariq Rahim V. the Federation of Pakistan* PLD 1991 SC 646.

<sup>49</sup> Article 184 (3) of the Constitution confers original jurisdiction on the Supreme Court to entertain petition if it raises "a question of public importance with reference to the enforcement of the Fundamental Rights" conferred by the Constitution.

<sup>50</sup> Clause 2 of Article 17 confers on citizens the right to form or be a member of a political party.

Chief Justice, Justice Nasim Hassan Shah, on a day-to-day basis. The Supreme Court accepted the petition by majority of ten to one, holding in its short order that the impugned order of dissolution did not fall within the ambit of the powers conferred on the President under Article 58 (2) (b) and was, therefore, not sustainable under the Constitution. The National Assembly and the former government were thus restored and were held entitled to function with immediate effect. This is the first and last example till 2007, in the constitutional history of Pakistan, whereby dissolved Assembly and dismissed government were restored by an order of the court.

Justice Sajjad Ali Shah the only dissenting judge differed with the majority judges both on question of maintainability as well as on question of merit of the petition. He held, in his dissenting opinion, the dissolution order of the President sustainable under the provision of the Constitution and law; hence declared it a valid order. His observations about the majority view calls for reproduction: “----- there is no difference in the case of Khwaja Ahmed Tariq Rahim<sup>51</sup> and in the dissolution and material produced in support thereof are concerned. In the present case departure is made and same yard stick of evaluation of material is not applied. Seemingly it so appears that two Prime Ministers from Sindh<sup>52</sup> were sacrificed at the alter of Article 58(2) (b) of the Constitution but when turn of Prime Minister from Punjab came the tables were turned”.<sup>53</sup>

The observation of the honorable judge of the Supreme Court betrays the prejudice of provincialism which is not befitting to the status of a judge of the Supreme Court. The dissenting judge appears to have forgotten that he was also making a departure from his earlier dissenting

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<sup>51</sup> Khwaja Ahmed Tariq Rahim V. the Federation of Pakistan 1990 wherein the dissolution of Benazir Bhutto’s government was challenged.

<sup>52</sup> He refers to Muhammad Khan Junejo whose government was dissolved by General Zia in 1988 and to Benazir Bhutto whose government was dissolved by Ghulam Ishaq Khan in 1990. Both of them belonged to Sindh Province and in both cases relief was not granted by the court. It is to be noted that Justice Sajjad Ali Shah also belong to Sindh.

<sup>53</sup> Muhammad Nawaz Sharif V. the Federation of Pakistan PLD 1993, SC 473.

opinion in the case of Khwaja Ahmed Tariq Rahim, wherein he had held that the dissolution order of the Assembly was not sustainable under the Constitution and hence had declared void in his dissenting opinion. Was he not expected or required to apply the same yard stick as he had done in his earlier judgment? After holding the two cases similar and liable to similar result was he not bound by his opinion in Ahmed Tariq Rahim's case holding the dissolution order not sustainable and invalid?

A former Director General of ISI,<sup>54</sup> Asad Durrani, gives another reason for the acceptance of Nawaz Sharif's petition and restoration of his government by the Supreme Court. He claims that the court was able to restore the dismissed government because the dismissal of Nawaz Sharif's government was not supported by army.<sup>55</sup> His claim carries weight with all those who are aware of the track record of Pakistan's constitutional history. However the decision of the court in Nawaz Sharif's case was welcomed by legal fraternity and the media as well as by almost all sections of the society save the opposition parties.<sup>56</sup>

Benazir Bhutto's government and the National Assembly were dissolved again on November 5 1996, this time by her own party's President Farooq Laghari. The dissolution of the National Assembly was challenged before the Supreme Court under its original jurisdiction (Article 184(3) of the Constitution) by the speaker of the dissolved Assembly, Syed Yousaf Raza Gilani, on November 11 1996. Two days after, Benazir also filed a petition challenging the order of dissolution of the National Assembly and the dismissal of her government.<sup>57</sup> The Supreme Court formed a bench of seven judges headed by the Chief Justice, Justice Sajjad Ali Shah, himself, to hear these constitutional petitions. The Supreme Court, by a majority of six to one upheld the order

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<sup>54</sup> ISI stand for Inter Services Intelligence. It is the top spy agency of Pakistan, fully controlled by Pakistan Army.

<sup>55</sup> His interview to BBC Urdu Service in October 2007 at [www.bbc.co.uk/urdu](http://www.bbc.co.uk/urdu) visited on October 9 2007.

<sup>56</sup> See The NEWS, The Nation, The Muslim, The Frontier Post, *Nawa-i-Waqt*, *Mashriq* and *Jang* dated May 27 1993.

<sup>57</sup> Benazir Bhutto V. Farooq Ahmed Laghari, PLJ 1998 SC 27.

of the President dissolving the National Assembly and dismissing Benazir Bhutto's government.

The famous quote of Lord Hewart says, "Justice should not be only done but should manifestly and undoubtedly be seen to be done".<sup>58</sup> With great respect and honor to the honorable judges of the Bench, justice was not seen to be done in the case of Benazir Bhutto v. Farooq Ahmed Laghari, due to the following reasons:

1. Before the dismissal of Bhutto's government, there was a confrontation between her and the Chief Justice of Pakistan, Justice Sajjad Ali Shah, over appointments of judges in the superior courts. The confrontation was escalated to such extreme that the Chief Justice of Pakistan became a symbol of resistance and opposition forces in the country.<sup>59</sup> One of the grounds allegedly stated by the President for the dismissal of Benazir's government was her confrontation with the judiciary. In such a situation just for the sake of utmost fairness, the Chief Justice should have opted not to sit on the bench.
2. The Chief Justices in the past had constituted the full court of all available judges for hearing such cases, except in the case of Nawaz Sharif, in which Justice Wali Muhammad Khan, who was an ad hoc judge, was left out. There was wisdom in this practice as it eliminated the possibility of any manipulation by the Chief Justice to constitute a bench of his choice, which could be pressured into adopting his view point. A former judge of the Supreme Court remarks that in such an important matter the Supreme Court should speak with one voice and the judgment should comprise the full Supreme Court Bench.<sup>60</sup> Chief Justice Sajjad Ali Shah, however, decided to constitute a bench of only seven judges out of fourteen

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<sup>58</sup> Available at [http://www.acumenlegal.com/English\\_Legal\\_System/Justice\\_should\\_not\\_only\\_be\\_done\\_but\\_should\\_manifestly\\_L44436/](http://www.acumenlegal.com/English_Legal_System/Justice_should_not_only_be_done_but_should_manifestly_L44436/)

<sup>59</sup> Hamid Khan, 'Constitutional and Political History of Pakistan' (2005) P- 459.

<sup>60</sup> Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' P- 210.

- judges of the Supreme Court. Aitzaz Ahsan, senior counsel, appearing for Benazir Bhutto, requested on the first day of hearing that the bench should comprise of all available judges of the Supreme Court according to past practice in identical cases but his request was not acceded to.<sup>61</sup>
3. Senior judges of the Supreme Court were not included in the bench.<sup>62</sup>
  4. When Benazir challenged the order of dissolution of the National Assembly, Chief Justice's attitude was clearly hostile; he returned her petition twice on flimsy procedural grounds. It appeared that he would delay and frustrate the petition.<sup>63</sup>
  5. The Chief Justice pulled out old cases pending since long against the validity of Eighth Amendment in the Constitution and fixed them ahead of the dissolution cases. Despite Aitzaz Ahsan's request, as well as that of Qazi Jamil, counsel for Mahmood Khan Achakzai in the petition challenging Eighth Constitutional Amendment that the case of Eighth Amendment be heard subsequent to Benazir Bhutto's case because general election was to be held within 90 days but Bhutto's petition was not heard first.<sup>64</sup>
  6. Benazir Bhutto filed the petition on Nov. 13, 1996 and its regular hearing started from January 13, 1997, i.e. after two months. The Supreme Court announced its decision on January 29, 1997, just four days before the election scheduled on February 3, 1997.<sup>65</sup>

On October 12 1999, the Armed Forces of Pakistan under General Musharraf, once again moved in and took control of the affairs of the country. A number of petitions were filed by deposed Prime Minister Nawaz Sharif and other leaders of his party in the Supreme Court under

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<sup>61</sup> The NEWS Islamabad dated January 14, 1997.

<sup>62</sup> For example, Justice Ajmal Mian, Justice Saeeduzzman Siddiqui, Justice Bashir Jehangiri.

<sup>63</sup> Hamid Khan, 'Constitutional and Political History of Pakistan' (2005) P- 459

<sup>64</sup> Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' P- 210-11

<sup>65</sup> Date wise proceedings of the court in this case are available in Dawn dated January 30, 1997 under the title "Events Leading to SC judgment".

Article 184(3) of the Constitution challenging the military takeover on October 12 1999, and seeking restoration of Assemblies. All those petitions were entertained and fixed for hearing on January 31, 2000. On January 25 2000, Oath of Office (Judges) Order, 2000, was promulgated in which all the judges of the superior courts were required to take oath to the effect that they would discharge their duties and perform their functions in accordance with the proclamation of Emergency of October 14 1999, and the Provisional Constitution Order (PCO) 1999. The then Chief Justice of Pakistan, Justice Saeeduzzman Siddiqui along with five other judges of the Supreme Court refused to take a new oath under PCO 1999. Only seven judges of the Supreme Court took oath and the senior most amongst them, Justice Irshad Hassan Khan was appointed the Chief Justice of Pakistan.

The petitions against the military takeover were heard by the newly constituted Supreme Court. After months of hearings, the judgment was announced on May 12 2000.<sup>66</sup> All petitions were dismissed and the Supreme Court validated the army intervention on the basis of the doctrine of state necessity and the principle of *salus populi suprema lex* as embodied in Begum Nusrat Bhutto's case. Regarding the new oath under PCO, the Supreme Court held that the court would continue to function under the Constitution and the mere fact that the judges of the Supreme Court had taken a new oath did not in any manner derogate from this position. The court further held that cases of former Chief Justice and judges of the Supreme Court, who had not taken oath under the Order of 2000<sup>67</sup> and those judges of the High Courts who were not given oath, could not be reopened having being hit by the doctrine of past and closed transaction.

The Chief Executive (COAS) was held, by the court, entitled to perform all such acts and promulgate all legislative measures including

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<sup>66</sup> Zafar Ali Shah V, General Pervez Musharraf, PLD 2000, SC 869.

<sup>67</sup> Oath of Office (Judges) Order 2000.

amending the Constitution, which would establish or lead to establish the declared objectives of the Chief Executive stated in his speeches of October 13 and 17, 1999. The court allowed a period of three years to the Chief Executive from the date of army takeover i.e. October 12 1999, for holding general elections and achieving his declared objectives. The Supreme Court found the arbitrary removal of General Musharraf from his constitutional post, in violation of the principle of *audi altram partem* and declared it as ab initio void and of no legal effect.

A senior lawyer commented over the decision of the Supreme Court, “the military government could not have asked for more”.<sup>68</sup> The Supreme Court went all the way to justify the military takeover of October 12, 1999. The court, while empowering the military regime of General Musharraf to amend the Constitution, willfully did ignore the bitter experience of the past when General Zia as head of a military government was allowed by the court in Nusrat Bhutto’s case to amend the Constitution. The irony is that the Supreme Court did not possess any power to amend the constitution, yet it delegated such authority to the Chief of Army Staff.

On the one hand the court held that the army’s takeover was merely a case of constitutional deviation for a transition period, on the other hand the military government was allowed a period of three years to accomplish its seven-point agenda spell out in the speeches of General Musharraf. The court did not appreciate that the program was so comprehensive that it might not be accomplished even in many more years.

The Supreme Court ruled over matters in this case which were not even issues before the court. The validity of the removal of General Musharraf from his office on October 12, 1999 was not directly an issue in the case but the court went out of its way to invalidate his removal on the principle of natural justice. But the same principle of natural justice

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<sup>68</sup> Hamid Khan, ‘Constitutional and Political History of Pakistan’ (2005) P- 493.

was not applied in the matter of the judges who did not take new oath. Most unusual was the finding regarding the judges of the Supreme Court who did not take new oath or judges of High Courts who were not invited for the oath by the government. The matter of not taking or not being given oath was declared by the court as a matter of past and closed transaction, which could not be reopened in future. Besides, the finding was clearly against the principles of natural justice; none of these judges were heard or even represented before the court and they were all condemned unheard. There are several self-contradicting rulings in this judgment. The Court should have held the arbitrary removal of the judges as an unconstitutional and against the principles of natural justice as they held the removal order of General Musharraf void. Again the court held that the 1973 Constitution remained the supreme law of the land subject to the condition that certain parts thereof were held in abeyance on account of state necessity, the court did not realize that if Constitution was still supreme law, then why protection under Article 209 of the Constitution was not available to judges of the superior courts? The court also failed to rule over the issue whether the new oath for judges was necessary under state necessity. What heaven would have fallen if the judges were not asked to take new oath?

Going through the judicial journey of Pakistan since 1947 to 2000, the role of the superior judiciary at the testing times of the constitutional crisis in Pakistan has been very disappointing and detrimental to the development of political institutions based on the universal principles of democracy and popular sovereignty. The judiciary has consistently compromised on its own powers and independence. The judgment of the Supreme Court in the case of Zafar Ali Shah v. General Pervez Musharraf appears to be the most disappointing one for the reasons stated above.

A consensus appears to be among analysts that judges of the superior courts in Pakistan, save few exceptions, could not resist external

pressure, particularly of executive, and always judged over constitutional questions to appease the government of the day, at the cost of the fundamental rights of the citizens of Pakistan and surrendering the political sovereignty of the people of Pakistan. An analyst comments that judges have supported the government of the day and accepted limits on their jurisdiction, and extensions of executive rule, inconsistent with the conceptual foundations of their rulings in order to judge at all. These strategies have endowed judicial actions with political consequences that have restricted judicial autonomy. They have limited the ability to give force to constitutional government, to give meaning to the concept of judicial independence and finally, to judge the state.<sup>69</sup> The same commentator comes to bitter conclusion that the court laid a jurisprudential ground work both for the 1958 coup d'etate and the demise of the two-winged state in 1971.<sup>70</sup>

Several former judges of the superior courts of Pakistan have been expressing, in their private lives after retirements, their disappointment over and, indeed, criticism of the superior judiciary at the testing times of constitutional crisis. For example a former judge of the superior judiciary discusses the role of the judiciary in a very disappointing tone: “our judiciary misled the elite and non elite both by failing to declare the true constitutional and legal status of the martial law. Instead, it resorted to technicalities to favor the martial law regime”.<sup>71</sup> The same judge writes in his another book, “by and large the judiciary in Pakistan has tried, in times of crisis, to avoid confrontation with the executive and went out of its way to take to the path of least resistance. It upheld the de facto situation rather than declare the de jure position”.<sup>72</sup> A former Chief Justice of the Baluchistan High Court remarks that all courts have been giving legal protection to all martial law

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<sup>69</sup> Paula R. Newberg, ‘Judging the State’ P- 13.

<sup>70</sup> Ibid P- 234.

<sup>71</sup> Justice (Retd) K. M. A. Samdani, ‘Reminiscence’ P- 41.

<sup>72</sup> Justice (Retd) K. M. A. Samdani, ‘Role of the Judiciary in the Constitutional Crises of Pakistan’ P- 59

regulations, orders etc; as this has become a common pattern in later years of this country's constitutional history of Pakistan.<sup>73</sup> After each phase of judicial activism, the court has always been issuing a certificate of validity and legitimacy to military interventions. Such a situation, wherein utmost hope for rule of law is being inspired by judicial activism and then disappointment is given by applying again and again the doctrine of state necessity, is described by a former Chief Justice of Pakistan as “a game of musical chairs” being played by the courts.<sup>74</sup>

## **6.2: Judiciary as an Institution:**

As the preceding history makes clear, judges could not develop the judiciary as an institution. They never responded collectively as an institution to a threat or direct interference in the independence of judiciary. For example the Chief Justice of Pakistan, Justice Yaqoob Ali Khan was arbitrarily removed by the military government in 1977. The whole process was accepted by the judiciary with very ease without any murmur on its part. The judges of superior courts had been asked four times by the military dictators to take a new oath under Provisional Constitutional Order (PCO).<sup>75</sup> They have never been able to act collectively and to resist as an institution, the executives measures undermining the prestige as wells as independence of the judiciary. Each time except in 1977, a good number of judges of the superior judiciary were arbitrarily removed by the military regime, simply not inviting them to take new oath. Their only fault was that they were not under the influence of the government and were apparently known as independent judges. There were also certain noble judges who individually refused to

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<sup>73</sup> Justice (Retd) Mir Khuda Bakhsh Mari, 'A Judge may Speak' P- 15.

<sup>74</sup> Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' P- 321.

<sup>75</sup> In September 1977, March 1981, January 2000 and November 2007. Details are available in the second chapter of the Thesis.

take new oath under PCO and preferred to sacrifice their prestigious service at the altar of their conscience.

The most shocking and painful episode was the oath taking of several judges of the superior judiciary under PCO 2007, promulgated on November 3, 2007 by General Musharraf as Chief of Army Staff. Anticipating something unusual, several senior judges of the Supreme Court including the Chief Justice remained in the Supreme Court till late afternoon on Saturday (November 3, 2007). As they came to know about the declaration of extra-constitutional Emergency and promulgation of PCO 2007, they immediately assembled in a court room. In an unprecedented move, seven judges of the Supreme Court headed by Chief Justice Iftikhar overturned the PCO and restrained the Chief of Army Staff, Corps Commanders, Staff Officers and other civil and military officers from acting under PCO. The court directed the President Musharraf and Prime Minister Shaukat Aziz not to take any action contrary to the independence of the judiciary and asked the judges of the Supreme Court and the High Courts, including their Chief Justices, not to take an oath under the PCO or follow any other extra-constitutional step. This order of the court was distributed among the media men present at the time.<sup>76</sup> The same was communicated to all Chief Justices and judges of the Supreme Court and High Courts.<sup>77</sup> In spite of the clear order from the Supreme Court, there were certain judges who took new oath under PCO without any hesitation and in complete violation of the Supreme Court's direction. Though this time majority of the judges resisted the powerful establishment but their stand was destroyed by some self-centered judges.<sup>78</sup> A very good opportunity of collective stand as an institution has

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<sup>76</sup> Dawn, The NEWS, the Nations dated November 4, 2007.

<sup>77</sup> The NEWS dated November 4, 2007, Justice Tariq Pervez's (the then Chief Justice of Peshawar High Court) interview to BBC's representative Abdul Hai Kakar, broadcasted in BBC Urdu service and available at [www.bbb.co.uk/urdu](http://www.bbb.co.uk/urdu) on November 10, 2007.

<sup>78</sup> On November 3, 2007, 13 judges out of 17 Supreme Court judges including the Chief Justice of Pakistan and 49 judges out of 77 judges of the High Courts refused to take oath under PCO. Within few days some other judges also switched over to the government's side. At the end 5 Supreme Court judges and 40 High Courts judges took oath under PCO.

been missed by the judges who preferred their personal perks and privileges over institutional interests.

Historically, judges of the superior judiciary have not only failed to collectively resist the onslaught on the independence of judiciary but they have been so docile and passive that they could not protest even at humiliation of their brother judges. For example, during General Yahya Khan's martial law in 1969, as Sub-Martial Law Administrator, General Abu Bakr Usman Mitha issued a notice of contempt of martial law to two justices of the West Pakistan High Court and both judges were asked to appear before the General. They were blamed in the notice for staying an order of military court. According to Justice Nasim Hassan – one of the two judges to whom the notice was issued – almost all judges of the West Pakistan High Court kept silent and was avoiding taking open stand and supporting their colleagues against General Mitha.<sup>79</sup> Another shocking episode of judges' disgrace happened in 1981, during General Zia's regime, where three judges of the Lahore High Court were returned from the Governor Hour because they were not to be given oath. Other brother judges present including the Chief Justice of the Lahore High Court did not take any stand for the colleagues who were so blatantly insulted and humiliated.<sup>80</sup>

On March 9 2007, the Chief Justice of Pakistan, Justice Iftikhar Muhammad Chaudhry was summoned by General Musharraf to his army office, there he was pressured to quit. On the refusal of the Chief Justice to do accordingly, he was detained in the army office up to five hours. In the meanwhile another judge of the Supreme Court, Justice Javid Iqbal, was appointed and sworn in as acting Chief Justice of Pakistan. The irony is that the fellow judges of Justice Iftikhar instead of inquiring about the well being of their Chief and ordering of his production and availability in the Supreme Court, rather they went ahead and took oath as was desired

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<sup>79</sup> Chief Justice (Retd) Nasim Hassan Shah, '*Ahad Saz Munsif*' P- 33

<sup>80</sup> Hamid Khan, '*Constitutional and Political History of Pakistan*' (2001) P-651.

by another Chief (COAS) and people saw them congratulating each other on this victory. Sweets were presented to one another on this happy occasion.<sup>81</sup>

In short when it is time of judicial unity you can always find judges, who will come forward and act against their own peer. Solidarity amongst the judges would be a better guarantee than that offered by a Constitution which could be abrogated by a stroke of the sword. Respect and stature of institutions grow with sacrifices. High traditions are never established by taking apologetic attitude. A question comes to one's mind. What would have happened if all of the judges of the Supreme Court and High Courts, at any of the past four occasions, had declined to take oath under PCO? In a society like Pakistan, according to a former judge, even a dictator would think a hundred times before sacking the entire judiciary. In the days of General Ayub Khan's regime, where the Chief Justice of Lahore High Court (one of the noble exceptions) learnt that a writ issued by the High Court was not going to be honored by the government, the Chief Justice threatened Ayub Khan that the whole Court would resign in bloc. It is said that Chief Justice was carrying the letters of resignations of the judges in his pocket. There upon a strong dictator like Ayub Khan baked down.<sup>82</sup> But this example is unique in the judicial history of Pakistan.

### **6.3: Chief Justice Accepting Appointment as an Acting Governor of a Province:**

Under article 104 of the Constitution, the President of Pakistan may direct a person to act as Governor of a province when the Governor of that province is absent from Pakistan or is unable to perform his functions of his office due to any cause. It must be noted that Governor of

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<sup>81</sup> Amjad Malik, 'Another Blow to the Judiciary' Frontier Post, dated March 14, 2007. These facts were also mentioned in the petition of Justice Iftikhar filed in the Supreme Court.

<sup>82</sup> Justice (Retd) K. M. A. Samdani, 'Role of the Judiciary in the Constitutional Crises of Pakistan' P-61. The Chief Justice was Justice Kayani.

a province in Pakistan is not elected person but he is appointed by the president after consultation with the Prime Minister and holds office during the pleasure of the President.<sup>83</sup> Whenever the office of the Governor of a province becomes vacant, due to his absence or inability to function, usually the Chief Justice of the High Court of the concerned province is directed by the President to act as a Governor of that province. In the early history of Pakistan, the Chief Justice of High Court was casually appointed as acting Governor. It became practice from days of General Zia's regime.

The direction of President to Chief Justice of High Court to act as Governor was challenged on several occasions. In most of these cases the main controversy was, whether a Chief Justice of a High Court could be directed by the President to perform as acting Governor or not? The decisions of the courts were that the Chief Justice of a High Court could be directed by the President to act as Governor in absence of Governor from Pakistan or where the Governor is unable to perform his functions due to any cause.<sup>84</sup>

The disappointing episode in this context was appointment of all Chief Justices of the High Courts as acting Governor of their respective provinces by General Zia at the dawn of his martial law in 1977, with the consent of the Chief Justice of Pakistan. Under post-proclamation order, acting Chief Justices were appointed for the High Courts.<sup>85</sup> The High Courts remained under acting Chief Justices for long time. In this way new trend, detrimental to the independence of judiciary, was started and usually the Chief Justices of the High Courts were kept acting even by the political executives, after General Zia's regime, till 1996 when it was discarded by the Supreme Court in the judgment of Al-Jihad Trust's case 1996.

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<sup>83</sup> The Constitution of Pakistan 1973, Article 101.

<sup>84</sup> See Shabbar Raza Rizvi, 'Constitutional Law of Pakistan' Vol. I PP. 613-20.

<sup>85</sup> Post Proclamation Order No 2 of 1977, High Courts (Appointment of Acting Chief Justice) Order 1977, PLD 1977, Central Statutes P- 331

This practice of appointing the Chief Justice of a High Court as acting Governor of a province, on several accounts, is detrimental to the independence of judiciary. The Constitution of the Pakistan provides for the separation of judiciary particularly from the executive.<sup>86</sup> The willingness of the Chief Justice of the High Court to function as acting Governor goes against the concept of separation of powers. Secondly when the Chief Justice assumes the executive office as acting Governor, he becomes head of the provincial executives. And his executive's orders or administrative actions or provincial legislation ascended to by him, may be challenged in the court of law of which he is the Chief Justice. In such an eventuality, will not his colleagues/judges feel embarrassment in over-ruling the executive's order of their own peer? Thirdly the judiciary, by accepting the office of the acting Governor, gives an opportunity to the executives to get ride of an unwanted Chief Justice during some important and crucial constitutional cases' proceedings. For example in 1990 petitions were filed in the Sindh High Court challenging the President's order of dissolving Benazir Bhutto's government. The petitions were entertained by the then Chief Justice of Sindh High Court, Justice Sajjad Ali Shah and a bench of five judges headed by the Chief Justice was formed for the hearing of the constitutional petitions fixed for September 24, 1990. On September 19, 1990 the Governor of Sindh went to Saudi Arabia for *Umrah*<sup>87</sup>. The Chief Justice of Sindh High Court was appointed as acting Governor. The initial tour of Governor was for three days. But it was extended on the pretext of his illness. He stayed abroad up to disposal of the petitions. After rejection of the petitions, the Governor came back and the Chief Justice was relieved to resume his own duties.<sup>88</sup> Justice Sajjad Ali Shah was appointed as acting Governor just to keep him away from the bench hearing the petitions against the dissolution of Benazir's government. A brother judge in the Supreme Court told Justice Sajjad Ali

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<sup>86</sup> The Constitution of Pakistan 1973, Article 175.

<sup>87</sup> *Umrah* is a religious pilgrimage to Mecca in Saudi Arabia.

<sup>88</sup> Chief Justice Ali Shah, 'Law Courts in a Glass House' P- 147-9.

Shah that he was appointed as acting Governor because he was not trusted by the government.<sup>89</sup>

The appointment of Justice Shahab-ud-din, a judge of the Federal Court, as acting Governor of East Bengal Province<sup>90</sup> in 1955 caused disastrous consequences for democracy in Pakistan. As Tamizuddin Khan's case moved to the Chief Court of Sindh, Justice Shahab-ud-din was temporarily assigned by the government to fill the office of Governor of East Bengal. The appointment was unexpected and unusual because it was practice to have Chief Justice of High Court of the province fill in for an absent Governor. The Governor General replaced Justice Shahab-ud-din with S.A. Rehman, the Chief Justice of Lahore High Court, as acting judge of Federal Court. He has served in the Lahore High Court under Chief Justice Munir. Justice Shahab-ud-din was not only as strong minded as Justice Munir but had already taken position on the core issue in Tamizuddin Khan's case that is the Governor General's assent to the constitutional legislation.<sup>91</sup> Chief Justice feared that with Justice Shahab-ud-din and Justice Cornelius on the Court, he might not be able to carry the majority of the court with him.<sup>92</sup> So Justice Munir requested Governor General to get justice Shahab-ud-din out of the way so that he could manage the majority of the court in his favor.<sup>93</sup>

The fourth drawback of the appointment of the High Court's Chief Justice as an acting Governor is that the first priority of every judge must be an even and speedy administration of justice. By assuming the function as an acting Governor, the basic function of the judge, that is, administration of justice, will certainly suffer as acknowledged by the Sindh High Court in its resolution on March 27, 2007. A meeting of all judges of Sindh High Court with the Chief Justice Sabih-ud-din in the

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<sup>89</sup> Ibid P-201.

<sup>90</sup> The Province of East Bengal was later renamed as East Pakistan in 1955, separated in 1971, and adopted the name of Bangla Desh.

<sup>91</sup> Allen McGrath, 'The Destruction of Pakistan's Democracy' P- 197.

<sup>92</sup> During those days, the Federal Court consisted of five judges including the Chief Justice.

<sup>93</sup> Hamid Khan, 'A Political Instrument' the Nation (daily) Lahore, dated August 22, 2005.

Chair, was held in Karachi and an unprecedented resolution was unanimously passed declaring that in future no judge of Sindh High Court would accept the office of acting Governor or acting Speaker of Sindh Provincial Assembly, as such extra function adversely affect the function of the court. This resolution was welcomed, with a lot of praise and termed as a step forward towards independence of judiciary, by the legal fraternity and media.<sup>94</sup> Unfortunately this good step could not be utilized as almost all judges of Sindh High Court save few ones were arbitrarily removed under PCO, issued on November 3, 2007. Lastly, the Chief Justice appointment as acting Governor is not in conformity with the Judicial Code of Conduct which provides, “Extra-Judicial duties or responsibilities, official or private should be avoided to the greatest possible extent”.<sup>95</sup>

#### **6.4: Role of the Individual Judges of the Superior Courts:**

The role of the individual judges in achieving and preserving the independence of judiciary can hardly be overemphasized. On the other hand, a judge’s adverse role is more injurious to the judicial independence than any other factor. A former Indian judge says “the functioning of institutions and the conduct of the individual judges is the sine quo non for independence of the judiciary. The damage caused by the institution, either by its decision----- or by the conduct of the judges is far more injurious to the independence of judiciary than the external assaults”.<sup>96</sup>

It takes years and decades of dedicated and conscientious work to build an institution, according to Justice Khanna, but institutions can be destroyed over night by the ambition, waywardness, pettiness or weakness or by one or the other of these taints at the hands of, sometimes,

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<sup>94</sup> Dawn, The NEWS, The Nation, Frontier Post dated March 27, 2007.

<sup>95</sup> Article VII of the Judicial Code of Conduct, PLJ 1996, Journal P- 48.

<sup>96</sup> Justice K. N. Singh quoted by Phiroza Anklesaria ‘Independence of the Judiciary’ AIR 1991, Journal P- 97.

adventurist or self-seekers and at other times of petty minds or those who cave in under fear and even those well intentioned but carried away by exuberance of their ideas.<sup>97</sup>

History tells us that great institutions have sometimes been damaged by internal forces proven to violate established code and norms of behavior. The inevitable effect is that they erode the institution from within and defile its image. The same thing happened with the judiciary of Pakistan. The majority of the judges of the superior courts in Pakistan, except on one occasion (i.e. the judges' resistance to PCO 2007); instead of protecting the image and integrity of the judiciary from the onslaught of the external factors, they facilitated the external factors in trespassing the independence of judiciary. Before the British left this country, one of them remarked that of all the institutions, they were leaving behind, judiciary was one which could never come to harm except from inside. This is exactly what befell Pakistan's judiciary.<sup>98</sup>

The judges of the superior courts take an oath that they will "preserve, protect and defend the Constitution" and they will do justice "according to law without fear or favor, affection or ill-will".<sup>99</sup> Article II of the Judicial Code of Conduct provides that a judge shall be careful to preserve the dignity of the court. Article III directs a judge to be above reproach, and for this purpose to keep his conduct in all things, official and private, free from impropriety or even the appearance of impropriety, to avoid infractions of the law even in the smallest things. Certain judges particularly Chief Justices of the superior courts had been involved in certain activities which could not be reconciled with the oath taken by the judges as well as with the Judicial Code of Conduct. Consequently, the image of the judiciary had been lowered in the eyes of the public, the dignity of the judiciary tarnished and judicial independence surrender at

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<sup>97</sup> Justice (Retd) H. R. Khanna, 'Judiciary in India and Judicial Process' P-99.

<sup>98</sup> Justice (Retd) K. M. A. Samdani, 'Reminiscence' P-85.

<sup>99</sup> Sixth Schedule of the Constitution of Pakistan prescribes the oath for judges.

the preference of the judges' personal gains, self-interests and official perks and privileges.

In spite of the fact that they were bound by their pious promises made under the oath to preserve, protect and defend the Constitution, they presented their services, for legal advice/legal drafting, to the actors responsible for assault on the Constitution, disruption in the legal order and destruction of the political institutions of the country. Examples again start from the tenure of Justice Munir as Chief Justice of Pakistan. Justice Munir used to give his legal advice, on important legal and constitutional issues to President Iskandar Mirza and General Ayub Khan – the First Martial Law dictator.<sup>100</sup> Justice Munir was also helpful in drafting the Laws (Continuance in Force) Order 1958, promulgated by martial law regime of General Ayub Khan. He stated, after his retirement, that a few hours after declaration of martial law, he was called by the President to Karachi and he took the first available plane. He continued, “I was to scrutinize the draft instrument which the law secretary had been required to prepare-----and in a meeting which was attended by the President and Chief Martial Law Administrator who was accompanied by a young army officer, the law secretary and myself, I suggested certain modifications. The instrument was entitled the Laws (Continuances Force) Order and purported to be promulgated in the name of the President.”<sup>101</sup>

The Chief Justice of Pakistan having associated himself with the drafting of the Laws (Continuance in Force) Order 1958, then presided over the Bench of the Supreme Court which gave validity to this order in Dosso's case. An analyst termed this shocking episode as a “mockery of judicial propriety and judicial independence”.<sup>102</sup>

General Zia's martial law received the blessings of the judiciary right from the beginning. The General, who started function as CMLA by

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<sup>100</sup> See General Ayub Khan, 'Friends Not Masters' P-74; Air Marshal (Retd) Asghar Khan, 'General in Politics' P-7; and Justice (Retd) M. Dilawar Mahmood, 'The Judiciary and Politics in Pakistan' P-16.

<sup>101</sup> Justice Munir, 'The Days I Remember' The Pakistan Times (daily) dated November 11, 1968, quoted by M. Dilawar Mahmood, 'The Judiciary and Politics in Pakistan' PP-15-6.

<sup>102</sup> Justice (Retd) M. Dilawar Mahmood, 'The Judiciary and Politics in Pakistan' P-16

imposing martial law in July 1977, consulted the Chief Justice of Pakistan on almost every important legal matter.<sup>103</sup> After taking over the government, General Zia drew to the Supreme Court to meet Chief Justice Yaqoob Ali Khan in seeking his constitutional advice and the steps to be taken in the matter. It is no secret that Justice Yaqoob advised him to put the constitution in “abeyance”.<sup>104</sup> Again it was Chief Justice Yaqoob Ali Kahn who recommended advocate Sharif-ud-din Pirzada to be the Attorney General and chief advisor of General Zia’s regime.<sup>105</sup>

In Begum Nusrat Bhutto’s case (1977) the Supreme Court not only validated General Zia’s martial law but General Zia was empowered to perform all acts of legislative measures which could have been made under 1973 Constitution including the power to amend it. Justice Dorab Patel, a judge of the Supreme Court Bench that validated General Zia’s coup, narrated in later days, that the aforesaid underlined words were not included in the typed judgment circulated amongst other members of the Bench and these were later added by Chief Justice Anwer-ul-Haq.<sup>106</sup> The same shocking episode has been, further elaborated by General (Retd) K. M. Arif (he was one of the confident Generals of Zia’s regime) in these words: “One day before announcement of the judgment, the Chief Justice met Sharifuddin Pirzada<sup>107</sup> at a party and told him that the judgment would be announced the next morning, at 9 am, adding that the court had decided to hold the promulgation of martial law as legal. He enquired from Pirzada if he would be attending court. Pirzada asked if the power to amend the constitution was also conceded to the chief martial law administrator. Justice Anwer replied in negative. ‘In that case’ replied Pirzada, ‘the government would have to swear in a new chief justice.’ .....

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<sup>103</sup> Justice (Retd) K. M. A. Samdani, ‘Reminiscence’ P- 97.

<sup>104</sup> Justice (Retd) Shamim Hussain Kadri, ‘Judges and Politics’ P-36.

<sup>105</sup> Ibid

<sup>106</sup> Hamid Khan, ‘Constitutional and Political History of Pakistan’ (2005) P-337.

<sup>107</sup> Sharifuddin Pirzada was Attorney General of Zia’s government.

Anwer inserted the words, ‘including the power to amend it’ (constitution) in the sentence in his own hand.”<sup>108</sup>

In May 1980, the Chief Justice of Lahore High Court, Justice Mushtaq Hussain and the Chief Justice of Pakistan, Justice Anwer-ul-Haq had been called by General Zia for consultation. Both Chief Justices prepared a draft for the General to make amendment in the Constitution. This draft was written by Justice Mushtaq Hussain in his handwriting and Justice Anwer-ul-Haq scrutinized it and made some corrections in it. This draft became Article 212A of the Constitution.<sup>109</sup> Article 212A was added in the Constitution through amendment order promulgated on May 27, 1980 barring the High Courts from making any order relating to the validity of martial law regulations or martial law orders. It restricted the writ jurisdiction of the High Courts. Furthermore, the provision in Article 212A was violation of the express direction in the Supreme Court’s judgment in Begum Nusrat Bhutto’s case that the High Courts and the Supreme Court would continue to exercise their powers of judicial review against all orders of martial law authorities.

After the coup on October 12, 1999 General Pervez Musharraf held two meetings on the same day, with the Chief Justice of Pakistan seeking his consultation and advice over the new administrative set up of the government and other related constitutional and legal issues.<sup>110</sup> The extra official consultation and personal advisory function of the Chief Justices had not been limited only to military dictators. The practice of appeasing the executive by giving extra official advice had been carried on by the Judiciary during civilian governments also. For example, President Farooq Laghari, after dissolution of Benazir Bhutto’s government on November 5, 1996, invited the Chief Justice, Justice Sajjad Ali Shah to President House, where the Chief Justice was briefed of the entire situation which led the President of Pakistan to dismiss Benazir

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<sup>108</sup> General (Retd) K. M. Arif, ‘Khaki Shadows’ P-291.

<sup>109</sup> Justice (Retd) Dorab Patel, ‘Testament of a Liberal’ P-161.

<sup>110</sup> S. M. Zafar, ‘Adalat Mein Siyasat’ P-139.

Bhutto's government.<sup>111</sup> The Chief Justice could not realize that in the near future, he could be on a bench to decide over the legality of the President's action of dissolving the Assembly. The Prime Minister Nawaz Sharif intended to enact anti-terrorism law. In August 1977, Prime Minister Nawaz Sharif, Chief Justice of Pakistan Justice Sajjad Ali Shah, Chief Minister of Punjab Shahbaz Sharif (Nawaz Sharif's younger brother) and Majeed Nizami of the *Nawa-i-Waqt* group met at the Lahore residence of Nawaz Sharif to discuss the proposed anti-terrorism law and to arrive at some settlement.<sup>112</sup> One fails to understand how the Chief Justice of Pakistan could hold talks with Prime Minister and other persons about a proposed law. Under what authority could he arrive at any settlement over a proposed law that was apparently unconstitutional? The same law, when enacted, was challenged in the Supreme Court and some provisions of the law (Anti-Terrorism Act 1997) were held by the Supreme Court unconstitutional, hence declared void.<sup>113</sup>

The Constitution of Pakistan is based on the doctrine of separation of powers. It clearly defines the domain of each. The judiciary is entrusted the power to interpret the law and if any provision of law violates any fundamental right guaranteed by the Constitution, the judiciary can strike it down as ultra vires of the constitution. The judiciary or the Chief Justice has no power under law and constitution to propose legislation or participate in any such process.

Under Article III of the Judicial Code of Conduct, judges are required to avoid extra-judicial duties or responsibilities, official or private to the greatest possible extent. But judges of the superior courts particularly of High Courts do accept extra-judicial duties, like

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<sup>111</sup> Ibid P-30

<sup>112</sup> Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' P-217.

<sup>113</sup> Mehran Ali V. Federation of Pakistan, PLD 1998 SC 1445.

appointment as acting Governors, membership of the Universities' bodies like Senate and Syndicate.<sup>114</sup>

Article VIII of the Judicial Code of Conduct, provides that a judge must refuse everything which comes as a favor due to his office. The code of conduct asks for refusal, on the contrary some judges had been found requesting for favor. During the earlier days of General Zia's martial law, the Chief Justices of the High Courts were appointed as acting Governors of their respective provinces. They wanted to import for their personal use a duty free Mercedes car each. The federal law secretary opposed the proposal on the ground that by accepting the office of the Governor, the Chief Justice did not cease to be judges and to import a car in such a manner was not among the judge's privileges. Therefore it was inappropriate for them to do so. But the military government wanted to oblige the Chief Justices. So the CMLA referred the matter to the Chief Justice of Pakistan.<sup>115</sup> Instead of refusing to give advice as he was not the government advisor, he wrote back an opinion which accorded with the wishes of the government.<sup>116</sup> Chief Justice Anwer-ul-Haq could not realize that his opinion was inconsistent with the article VIII of the Judicial Code of Conduct.

Several governments allotted residential plots to the judges of the superior courts to win over their loyalty.<sup>117</sup> In 1986, under a scheme, plots were allotted to almost all judges, save few ones, of the Sindh High Court by the Chief Minister of Sindh, Ghous Ali Shah. When a judge pointed out to the Chief Minister, in an informal meeting, that by allotting plots of land to some of the judges, he had compromised the position of

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<sup>114</sup> Senate and Syndicate are statutory bodies of the universities in Pakistan. These bodies in addition to other functions make bye laws for the universities. Some are nominated by the Chancellor (the Governor of a Province is Chancellor for all universities in the Province).and other members are elected. Judges of the High Court are ex officio members of these bodies.

<sup>115</sup> The Law Secretary (Justice Samdani) was also a serving Judge of Lahore High Court. He opposed the proposal. No further legal opinion was needed.

<sup>116</sup> Justice (Retd) K. M. A. Samdani, 'Reminiscence' P-100.

<sup>117</sup> Hamid Khan, 'Constitutional and Political History of Pakistan' (2001) P-872.

the judiciary, his reply was that he had been pressed hard by some of the interested judges.<sup>118</sup>

In March 2007, President General Musharraf sent a reference to the Supreme Judicial Council to conduct an inquiry against the Chief Justice of Pakistan who was accused of misconduct. It was alleged in the reference that the Chief Justice had got his son, Arslan Iftikhar, admitted to Bolan Medical College, Baluchistan in 1996 on the recommendation of the Chief Minister Baluchistan. The posting of Arslan as Section Officer in civil secretariat Baluchistan, was allegedly made, outside of merit. His subsequent postings and transfers were allegedly possible due to special favor with him. One of the allegations among others was that the Chief Justice of Pakistan had been using seven official vehicles whereas one car was allowed for him.<sup>119</sup> But all these remained mere allegations because no inquiry about the allegations was conducted as the reference against him was held by the Supreme Court void and illegal. As allegations in the reference might not be true but it seemed very difficult to believe that everything was false and baseless. The agitating lawyers, members of the civil society and other critics of the reference against Justice Iftikhar Muhammad Chaudhry, were not debating the allegations, nor were they defending the allegations, they were critical about the timing of the reference and the ideas behind the reference which were, according to them, based on prejudice, bias and personal interests of General Musharraf.

Chief Justice Iftikhar challenged in the Supreme Court the reference against him as well as the composition of the Supreme Judicial Council. One of his objections against the composition of the Supreme Judicial Council was that the acting Chief Justice Javid Iqbal was not entitled to sit in the Supreme Judicial Council and conduct inquiry against him because Justice Javid Iqbal had also got his two daughters admitted in

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<sup>118</sup> Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' P-92.

<sup>119</sup> The text of the reference was published in The NEWS (a daily) dated March 21 2007.

the same medical college on the nomination of the Chief Minister of Baluchistan and got his son-in-law appointed.<sup>120</sup>

Article IX of the Judicial Code of Conduct says that a judge should, in his judicial work and his relations with other judges, act always for the maintenance of harmony among all courts and the integrity of the institution of justice. There are several examples of gross violation of this Article IX of the Judicial Code of Conduct. Once it was violated by almost all judges of the Supreme Court of Pakistan, that is, the removal of Justice Sajjad Ali Shah from the office of the Chief Justice of Pakistan in 1997 by a Bench of Supreme Court consisting of ten judges. The revolting judges succeeded with clear support of Nawaz Sharif's government, in removing their own senior peer with disgrace and in unprecedented way. Justice Sajjad Ali Shah, once Chief Justice of Pakistan and an honorable brother judge of the other Judges of the Supreme Court was sent to his home even without a reference in his honor. All these judges of the Supreme Court were bound to "preserve the dignity of the court" under Article II of the Judicial Code of Conduct and "to maintain harmony in relations with other judges and integrity of the institution of the justice" under Article IX of the Code of Conduct.

The observation of an eminent lawyer seems very convincing and rational: "not only politicians failed the judiciary but the judges themselves out of their narrow personal considerations have also undermined the institution".<sup>121</sup> According to Justice Khanna, "weak characters cannot be good judges".<sup>122</sup> Without good judges an independent and competent judiciary will remain only an amazing dream. Independence of judiciary does not mean merely independence from outside influences but also from those within i.e. from the judges of weak character and doubtful integrity. 'Damages from within have much larger and greater potential for harm than damages from outside. To protect

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<sup>120</sup> The contents of the Chief Justice's petition were published in The NEWS dated April 19 2007.

<sup>121</sup> Hamid Khan, 'Judicial Organ' P-69.

<sup>122</sup> Justice (Retd) H. R. Khanna, 'Judiciary in India and Judicial Process' P-25

judges from damages which emanate from sources outside there are many others who can help, so far as the dangers from within are concerned, judges are the one primarily responsible for them and judges are the ones primarily who can avoid them.’<sup>123</sup>

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<sup>123</sup> Justice J. S. Verma, ‘New Dimensions of Justice’ P-18.

## **Chapter VII: Culture of the Legal Profession in Pakistan and its Impact on the Independence of the Judiciary:**

In this chapter culture of the legal profession in Pakistan and its impact on the independence of the judiciary are examined. The study includes the general relation between bench and bar, importance of bar for judicial independence and Pakistani bar's role in protecting and preserving independence of judiciary in Pakistan. Before analyzing these topics, various categories of advocates, the bar councils and bar associations are very briefly discussed.

### **7.1: Various Categories of Advocates:**

The Legal Practitioners and Bar Councils Act 1973, in the pattern of the hierarchy of the courts, recognizes the following three categories of advocates:

- a) Advocate of the Supreme Court;
- b) Advocate of the High Courts; and
- c) Advocate.

A person can be enrolled as an advocate if he is a citizen of Pakistan; is at least of 21 years of age; holds a graduation degree in law from any university recognized by the Pakistan Bar Council; has undergone a course of training after graduation in law and has passed such examination after the training as prescribed by the Pakistan Bar Council.<sup>1</sup> The procedure in practice is that a student of law after completion of his graduation program has to enroll himself with a Provincial Bar Council as an apprentice with an advocate of High Court having at least ten years standing practice in a High Court. The required period for apprenticeship is at least six months. The Provincial Bar Council conducts a written examination and only those candidates may appear who have got their law

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<sup>1</sup> The Legal Practitioners and Bar Councils Act 1973, Section 26.

graduation degree and have completed the required apprenticeship. A candidate who passes the written examination is to appear for oral examination before a committee consisting of a judge of the High Court and a member of the Provincial Bar Council. If the candidate succeeds in the oral examination also, then he is enrolled as an advocate by the Provincial Bar Council and a proper Identity Card is issued to him. After enrollment he is qualified to appear and plead before any lower court in the respective province.

An advocate is qualified for enrollment as an advocate of a High Court after two years' practice as an advocate before the lower courts. The Provincial Bar Councils and High Courts have given exemption, from this condition of two years practice, to those persons who have served as magistrates or judicial officers for a period of at least two years. The Provincial Bar Council with the previous approval of the High Court may give exemption, from the requirement of two years' practice, to a person possessing higher legal training or qualification such as LLM from a university recognized by the Pakistan Bar Council.<sup>2</sup> The Provincial Bar Council enrolls advocates and advocates of the High Court.

Enrollment of the advocates of the Supreme Court is done by the Pakistan Bar Council and rules and qualifications for such enrollment are framed by the Supreme Court.<sup>3</sup> An advocate of High Court having standing practice of ten years as an advocate of the High Court and have appeared before the Supreme Court in at least 100 cases, is qualified for enrollment as an advocate of the Supreme Court provided that a certificate is issued by the Chief Justice of the High Court that he is fit to appear and plead as an advocate before the Supreme Court.<sup>4</sup>

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<sup>2</sup> Ibid section 27.

<sup>3</sup> Ibid section 28.

<sup>4</sup> The Supreme Court Rules 1980, Order IV.

## **7.2: Bar Councils:**

In Pakistan five bar councils have been established and functioning under the Legal Practitioners and Bar Councils Act 1973, i.e. the Pakistan Bar Council and four Provincial Bar Councils namely Baluchistan Bar Council, Punjab Bar Council, Sindh Bar Council and NWFP Bar Council. The members of the Provincial Bar Councils are elected by the advocates enrolled in the respective province and the members of the Pakistan Bar Council are elected by the members of the Provincial Bar Councils. The Attorney General is the ex officio Chairman of the Pakistan Bar Council. The Pakistan Bar Council consists of twenty members and they elect one of them as Vice Chairman.<sup>5</sup> Functions of the Pakistan Bar Council includes enrollment of advocates of the Supreme Court, to deal with the disciplinary matters related to the advocates of the Supreme Court, to exercise general control and supervision over the Provincial Bar Councils, to promote legal education and to recognize universities awarding law degrees etc.<sup>6</sup> The Advocate General of a provincial government is the ex officio Chairman of the respective Provincial Bar Council. The Vice Chairman of a Provincial Bar Council is elected by the members amongst them.<sup>7</sup> The functions of a Provincial Bar Council includes enrollment of advocates and advocates of High Court, to deal with the disciplinary matters related to the advocates and advocates of High Court, to recognize and derecognize bar associations etc.<sup>8</sup>

## **7.3: Bar Associations:**

The bar associations functioning in Pakistan are of four categories, namely, the Supreme Court Bar Association, High Court Bar

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<sup>5</sup> The Legal Practitioners and Bar Councils Act 1973, section 12.

<sup>6</sup> Ibid section 13.

<sup>7</sup> Ibid section 7.

<sup>8</sup> Ibid section 9.

Associations, District Bar Associations and Sub Divisional Bar Associations. The Legal Practitioners and Bar Councils Act 1973 provides for the formation, recognition and functions of the Supreme Court Bar Association under the control of the Pakistan Bar Council.<sup>9</sup> The office holders of the Supreme Court Bar Association are elected for one year by the advocates of the Supreme Court. The remaining three categories of the bar associations are formed and recognized under their respective Provincial Bar Council. The High Court Bar Association is an organization of advocates of a High Court. There are four High Court Bar Associations. A District Bar Association is an organization of advocates practicing in a particular district. A Sub Divisional Bar Association is an organization of advocates in the courts of a particular sub division (commonly called Tehsil). All the office holders of these bar associations are elected for one year by their respective members. These various bar associations provide a comprehensive organization to the legal fraternity and they play an important and effective role in forwarding the cause of the legal community. These organizations of the lawyers can play, in a proper and effective way, the role of watch dog over the judiciary and can launch a resistance movement against any external assault on the independence of judiciary. In the current judicial crisis of Pakistan, these organizations proved their utilities.

#### **7.4: Relation between Bench and Bar:**

Bench and bar are so closely attached with and interdependent on each other, that one cannot survive without the other. The strength of the bench is the ultimate success of the bar and vice versa. Similarly the degeneration of one will surely cause the down fall of the other. The bench and bar have been described by a former Chief Justice of India as ‘two sides of the same coin and even if one of it gets defaced, the coin

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<sup>9</sup> Ibid section 55.

goes out of circulation.’<sup>10</sup> According to a former Chief Justice of Pakistan, bench and bar are equal partners as two wheels of a chariot. In order to provide smooth running, both wheel must run in coordination.<sup>11</sup>

Justice Verma holds that the word “Bar” in the context means not merely the lawyers but also the judges. Administration of justice is a joint venture in which the lawyers and judges are equal participants. It is for this reason that not merely judges but lawyers are as well called “officers of the court”.<sup>12</sup> It is only from the bar that members of the bench are drawn. As a matter of fact the upbringing of both is the same. They pass through the same route of legal education, entry into the bar and then onwards to the bench. Therefore the requirements are common; rather the requirements of both are the same. Unless one is a good, honest, industrious and conscientious lawyer, he cannot be a competent judge of integrity, that is why, each one of them is equally important for proper administration of justice.

The quality of a product depends upon the raw material, used for its preparation. The human resources are the raw material for the institutions. So the success of an institution depends upon the competent human resources and the competency of human resources depends upon their knowledge and training. Bar is the main recruiting ground of the judiciary. So it has to provide the competent human resources, having knowledge and training, to the judicial institutions. It is from amongst the lawyers that judges are chosen; and ultimately it is the quality of lawyers which determines the quality of judges who adorn the bench. Justice (Retd) Krishna, was not wrong when he said, “the Bar first lost its finer values and the Bench slowly surrendered....It is the advocate of yesterday who has, without scruples, evaded or avoided tax, fixed benches, practiced communal politics, bribed the gods of politics and established good public relations and, through cute arts, cultivated clients and

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<sup>10</sup> Chief Justice (Retd) J. S. Verma, ‘New Dimensions of Justice’ P- 11.

<sup>11</sup> Chief Justice (Retd) Sajjad Ali Shah, ‘Law Courts in Glass House’ P-660.

<sup>12</sup> Chief Justice (Retd) J. S. Verma, ‘New Dimensions of Justice’, P- 20.

managed judges, who becomes the District Judge, or High Court (or Supreme Court) Justice later. The judiciary is not a lotus which remains pure but grows out of dirt”.<sup>13</sup> For a competent, honest, hard working and bold judge, you must have first responsible, professional, hard working and noble lawyers. The judiciary reflects the contemporary standard of the bar.

### **7.5: The Role of Bar in Protecting Judicial Independence in Pakistan:**

It is an undisputed fact that the lawyers enjoy greater freedom than the judges. The lawyers, not the judges can mould the public opinion. The judges, from the nature of their office, cannot reply to criticism nor can they enter public controversy. It is a duty of the bar to protect judges from unwanted criticism. A Canon of Professional Conduct also provides that judges not being free to defend themselves are peculiarly entitled to receive the support of the bar against unjust criticism.<sup>14</sup> Lawyers, in the words of Ali Ahmed Kurd, are “like soldiers of the court” and they have to fight for the dignity and independence of the judiciary.<sup>15</sup> According to Muhammad Ikram Chaudhry Advocate, the bench cannot sustain itself respectable without an appropriate role of the legal fraternity.<sup>16</sup> In short a mutual understanding and close cooperation between the bench and members of the bar are essential for the independence of judiciary and rule of law.

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<sup>13</sup> Justice V. R. Krishna Iyer, ‘Our Courts on Trial’ P-16.

<sup>14</sup> Canons of Professional Conduct and Etiquette of Advocates, (These Canons have been prepared by the Pakistan Bar Council under the authority of section 13 of the Legal Practitioners and Bar Councils Act 1973) Canon # 159, PLJ 1996, Magazine P- 53.

<sup>15</sup> Ali Ahmed Kurd’s address to the Peshawar High Court Bar Association on April 20, 2007. His address was live telecasted by Aaj TV and the author has watched the whole program on Aaj TV. This function was arranged in connection of the lawyers’ movement against removal of the Chief Justice Iftikhar on March 9, 2007. Kurd, the Vice Chairman of Pakistan Bar Council, is one of the top leaders of the Lawyers and he is still in prison till the writing of this chapter (i.e. Dec 18, 2007).

<sup>16</sup> Muhammad Ikram Chaudhry, ‘Lawyers as Custodian of Independence of Judiciary’ PLJ 1996, Magazine P- 24.

Pakistani lawyers have been playing multi-faceted roles particularly their active participation in almost all political movements cannot go unnoticed but this study will discuss only the lawyers' role in preserving and protecting independence of judiciary in Pakistan. Lawyers can protect and strengthen independence of judiciary by performing three types of functions: to provide legal assistance to the court whenever it is asked for; to be vigilant and prepared to resist any external pressure and interference in the judiciary; and to constantly watch with high sense of responsibility the performance and conduct of all judicial officers.

#### **7.5.1: Legal Assistance to Court:**

The government enacts laws, the court administers them, whereas, the lawyers assist both of them for the fair functioning in their respective parts. An advocate is supposed to put before the court all aspects of the case which are favorable to his client. But he must do so fairly without misleading the court and without concealing from it anything that it is his duty to divulge. These pious duties and responsibilities towards the court and the government have earned them the status of "officers of the court".<sup>17</sup> A lawyer's duty, therefore, does not end with securing an acquittal or having a suit dismissed. If he has reached these ends by misleading the court as to facts or law, his conduct is not professional. And unfortunately cases of this description, where the counsel deliberately tries to mislead the court, are not rare in Pakistan.<sup>18</sup> Very recently a petition has been filed by Zahid Mehmood in Lahore High Court. The petitioner alleged that the current Attorney General of Pakistan, Malik Qayyum concealing facts in litigation about *Qasr-e-Zauq* banquet hall in 2006, committed fraud with courts and also instituted a suit through his maternal uncle Malik Zulfiqar regarding the same

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<sup>17</sup> Ratilal P. Dholaria, 'Advocacy: A Noble Profession' AIR 1994 Journal P- 200.

<sup>18</sup> Justice (Retd) M. R. Kayani, 'Not the Whole Truth' P- 49.

property on the basis of a fake compromise. On December 14 2007, the High Court issued contempt of court notices to Attorney General Malik Qayyum and thirteen other respondents.<sup>19</sup>

In addition to this legal assistance in shape of defending his client's interests, the members of the legal fraternity are not infrequently asked by the courts to assist them in important cases. In Pakistan judicial system it has become a practice of the Supreme Court and High Courts to invite eminent lawyers and organizations of the lawyers like the Pakistan Bar Council, the Provincial Bar Councils and the Supreme Court Bar Association, to render assistance in matters touching independence of judiciary and other questions of public importance. For example in Asma Jilani's case A. K. Brohi and Sharifuddin Pirzada; in Zafar Ali Shah's case S. M. Zafar, the Pakistan Bar Council and the four Provincial Bar Councils; in Judges' case S. M. Zafar and Fakhruddin G. Ibrahim; in Qazi Hussain Ahmed V. General Pervez Musharraf S.M. Zafar, Abdul Hafiz Pirzada and Aitzaz Ahsan were asked by the Supreme Court to act as *amicus curiae* which means friends of the court.<sup>20</sup> This is also the duty of a lawyer under the Canons of Professional Conduct to assist the court if called upon to do so in open court by a judge or judicial officer. In advancing any such opinion, he must do so with a sense of responsibility and impartiality without any regard to the interest of any party.<sup>21</sup> The legal fraternity in Pakistan has been rendering valuable services to the court in the status of *amicus curiae*.

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<sup>19</sup> The NEWS online dated December 15, 2007. available at [www.thenews.com.pk](http://www.thenews.com.pk)

<sup>20</sup> *Amicus curiae* means a friend of the court, that is a person, whether a member of the bar not engaged in the case or any other by stander, who calls the attention of the court to some decision, whether reported or unreported or some point of law which would appear to have been overlooked. (The Dictionary of English Law by Earl Jawitt). *Amicus curiae* are lawyers not engaged by any of the parties but are there by request of the court to assist it.

<sup>21</sup> Canons of Professional Conduct and Etiquette of Advocates, canon # 167, PLJ 1996, Magazine P- 55

### **7.5.2: Bar's Role as a Watch-dog over the Judiciary:**

Lawyers are expected to protect and defend judiciary from external interference and for sustainable independence of judiciary it is also necessary for bar to watch the performance and conduct of the judges. If any judicial officer's behavior is detrimental to the dignity of judiciary, the bar is to indicate censure and disapproval, through bar resolutions. One of the Canons of the Professional Conduct provides that whenever there is a proper ground for complaint against a judicial officer, it is the right and duty of an advocate to ventilate such grievances and seek redress thereof legally and to protect the complainant and person affected.<sup>22</sup> It is the duty of advocates, according to another principle of the Professional Conduct, to endeavor to prevent political considerations from outweighing judicial fitness in the appointment and selection of judges. They should protest earnestly and actively against the appointment or selection of persons who are unsuitable for the bench.<sup>23</sup>

Lawyers in Pakistan have always been conscious about appointments to the superior courts. Unfortunately the track record of the judicial appointments to the superior judiciary in Pakistan establishes the fact that more often than not the appointments in the superior judiciary were made not on merit but on the basis of personal considerations.<sup>24</sup> In past lawyers used only to criticize improper appointments to the superior judiciary but they became more reactive to such appointments since 1980s. The lawyers' community gave a lot of importance to the judicial appointments and always demanded appointment to the superior courts on merit. That is why, all those appointments which were made in violation of any rule of law or judicial convention, were challenged before High Courts and Supreme Court by the lawyers through constitutional

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<sup>22</sup> Canons of Professional Conduct and Etiquette of Advocates, canon # 159, PLJ 1996, Magazine P- 53.

<sup>23</sup> Ibid, canon # 165, PLJ 1996, Magazine P- 54.

<sup>24</sup> See for details about judicial appointment in Pakistan, chapter II and chapter V (5.2) of the Thesis.

petitions.<sup>25</sup> Such petitions were filed by individual lawyers in some cases and by bar associations in other cases. The famous judgment of the Supreme Court related to the judicial independence, announced in Judges' case, was result of the lawyers' petitions against improper appointments in High Courts and Supreme Court.<sup>26</sup>

The bar's role as a check and a watch-dog can improve the judicial system and make things go better, but unfortunately this role of the bar has grown very weak. The bar's failure in performing its duty as a watch-dog over the judicial officers is being admitted by the lawyers.<sup>27</sup> A former Chief Justice, while discussing the bar's role as a check and a watch-dog over the conduct and performance of the judges, states: "there is a tendency among the lawyers to think that they have to be on good terms with judges. Lawyers would not like to take a stand on certain issues even if these are against the interests of the judiciary as an institution."<sup>28</sup> The major reason behind this weakness of the bar seems to be the impact of the prevailing corrupt culture in Pakistan.<sup>29</sup> Judges and lawyers both are involved in corrupt practices, that is why, lawyers cannot check the misconduct on the part of the judges. An eminent lawyer, Dr Khalid Ranja, rather says that corruption in the judiciary is possible only with the collaboration of lawyers. He says, "I as a lawyer am a party to it. If I am not involved, corruption is impossible".<sup>30</sup>

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<sup>25</sup> For example: Al Jihad Trust V. Federation of Pakistan PLD 1996 SC 324; Al Jihad Trust V. Federation of Pakistan PLD 1997, SC 84; M.D. Tahir Advocate V. Federation of Pakistan Lahore, Petition # 11757/99; Sharaf Faridi & others V. Federation of Pakistan PLD 1989, Karachi 404; Supreme Court Bar Association V. Federation of Pakistan PLD 2002 SC 939; President Baluchistan Bar Association and others V. the Government of Baluchistan, PLD 1991, Quetta 7; etc.

<sup>26</sup> Al Jihad Trust V. Federation of Pakistan PLD 1996 SC 324 (commonly known as Judges' Case)

<sup>27</sup> Muhammad Ikram Chaudhry, 'Corruption in the Judicial System and its Eradication with Special Reference to Police and other Law Enforcing Agencies in Pakistan' PLJ 1996, Magazine P- 18.

<sup>28</sup> Chief Justice (Retd) Sajjad Ali Shah, 'Law Courts in a Glass House' P-660.

<sup>29</sup> The latest Global Corruption Barometer for year 2007, released by the Berlin-based corruption watchdog, Transparency International (TI), places Pakistan at seventh place from bottom on a list of 60 countries ranked on the basis of corruption. According to a survey conducted by Transparency International, 55% people of Pakistan believe that judges are corrupt. See chapter Regional Highlights Asia – 'Global Corruption Report 2007' at [www.transparency.org/news\\_room/in\\_focus/2007](http://www.transparency.org/news_room/in_focus/2007) visited on October 27, 2007.

<sup>30</sup> Dr. Khalid Ranjah, 'For Justice – Just Think!' The NEWS dated July 27 2007.

### **7.5.3: Lawyers' Role in Resisting External Interference in the Independence of Judiciary:**

The lawyers' role to protest and resist the forces detrimental to the independence of judiciary carries a very pivotal importance for judicial independence. Lawyers' this role overshadows and outweighs all other assistances or services rendered by the lawyers to the court. Pakistan judicial history, for the purpose of discussing the lawyers' role in defending judicial independence from external assault, may be divided into three phases, that is, phase first from 1947 to 1977; second phase from 1977 to March 9, 2007; and third phase after March 9, 2007 till December 2007.

The efforts of the legal fraternity in the first phase, covering thirty years, to protect and preserve the independence of judiciary had been ignorable, rather disappointing. The lawyers during this period of Pakistan constitutional history bitterly failed in playing its due role and performing its professional duty to protest and resist the forces or actions of such forces that adversely affected the independence of the judiciary. Whether it was the court deviating from the legal dictions and norms; or it was army intervention in shape of imposing martial law, curtailing jurisdictions of the courts and restricting independence of the judges; or it was a political government making inroads in the independence of judiciary, the legal fraternity could not play its due role and remained as spectators like other segments of Pakistani society. The lawyers could not realize that they were to mould the public opinion in favor of the judicial independence and against any interference in the affairs of the judiciary. During this crucial period of the constitutional history of Pakistan, no noteworthy collective effort for independence of judiciary, save some individual voices, on the part of the legal community can be traced out. The lawyers could not even criticize the Federal Court's controversial judgments in Tamizuddin Khan's case in 1955, Governor General's

Reference of 1955 and Dosso's case in 1958.<sup>31</sup> As a result of the legal community's silence, the public remained ignorant of the reasoning used by the courts to support these decisions.<sup>32</sup> The then Chief Justice of the Lahore High Court, Justice Kayani, was so disappointed and angered over the inability of the lawyers to effectively respond to the assaults on the independence of judiciary that he wanted to express this fact in a judgment. In his address to the convocation at University Law College, Lahore, on March 30, 1957, Justice Kayani said: "On you, therefore, rests the responsibility of moulding public opinion and of expressing yourselves frankly and critically when the government misconducts itself. I am sorry to say that very few bodies of lawyers have regarded themselves with any responsibility in this matter, and I was constrained on one occasion to say in the course of a judgment – to which four other judges were signatories – that except for a few songs of mourning no bar associations had found the strength or dignity to express strongly on the taking away of the writ jurisdiction in 1955"<sup>33</sup> Another former justice expresses the failure of the legal fraternity to criticize the Federal Court's decision in Dosso's case in a very sarcastic manner: "the elite of the society, particularly the law professors, the law practitioners and the jurists etc, who are supposed to be the cream of the society, failed to criticize the judgment (Dosso's case). Perhaps we cannot blame them. They had not taken any oath. But the judges had. I think there is something wrong with our psyche".<sup>34</sup>

The lawyers did endorse the first martial law under General Ayub Khan in 1958 and second martial law of General Yahya Khan in 1969 by their silence as it goes without saying that silence speaks when there is a duty to protest. The legal fraternity not only failed in protesting the martial law and the taking away of the jurisdiction of the superior

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<sup>31</sup> Detailed discussion about these cases is available in the preceding chapter # VI of the Thesis.

<sup>32</sup> Allen McGrath, 'The Destruction of Pakistan's Democracy' P- 202.

<sup>33</sup> M. R. Kayani, 'Not the Whole Truth' P- 51.

<sup>34</sup> Justice (Retd) K. M. A. Samdani, 'Reminiscence' P- 52.

courts, but the bar associations arranged functions in the honor of the martial law authorities, for example, the Sindh High Court Bar Association had given a dinner in honor of General Yahya Khan in 1969.<sup>35</sup> The direct and open assault on the independence of Judiciary was first made by General Ayub Khan's government when he started the practice of interviewing the judges before appointment to the High Courts.<sup>36</sup> In the second martial law of General Yahya Khan, as if to cut the judiciary to size a Presidential Order<sup>37</sup> was passed for the judges of the superior courts requiring them to declare their assets. It was under this Presidential Order that enquiries were held into the financial affairs of the judges of the superior courts. During this period General Mitha (a Sub Martial Law Administrator) issued contempt of court notices to two judges of the Lahore High Court for staying proceedings of a military court in a case.<sup>38</sup> These are few examples out of a lot of actions of martial law authorities which undermined the dignity as well as the independence of the judiciary but the legal fraternity could not take any notable step for the protection of the dignity and independence of the judiciary, nor could the judiciary dare to resist or at least to protest over the open and direct assault on the institution of judiciary.

The civilian government of Zulfikar Ali Bhutto promulgated a new Constitution for Pakistan on August 14, 1973. Up to 1977, seven Constitutional Amendment Acts were passed. Five out of seven amendments were clearly detrimental to the independence of judiciary. At the end of 1976, the Chief Justice of Lahore high Court retired and his successor superseded more than half a dozen judges of the High Court. Some of the superseded judges, according to Justice Patel, were more competent than the newly appointed Chief Justice. This appointment was

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<sup>35</sup> Justice (Retd) Dorab Patel, 'Testament of a Liberal' P- 103.

<sup>36</sup> Chief Justice @ Nasim Hassan Shah, "*Ahad Saz Munsef*" P- 49. (Detailed discussion on this is in the second chapter of the Thesis.)

<sup>37</sup> Judges (Declaration of Assets) Order, 1969. President's Order No: 4 of 1969. PLD 1969 Central Statutes. P- 120.

<sup>38</sup> Chief Justice (Retd) Nasim Hassan Shah, "*Ahad Saz Munsef*" P- 33.

intended to undermine the independence of the judiciary.<sup>39</sup> Unfortunately all such steps of the Bhutto's government, which were detrimental to the independence of judiciary, could not receive a proper and effective reaction from the bar associations.

The lawyers' community became active and started playing prominent role in the second phase of its history, that is, after General Zia's Martial Law in 1977. They started offering serious resistance to the martial law regime and demanding restoration of the Constitution, restoration of the powers of the judiciary, holding of general election and lifting of martial law. The legal community including Professors of law through articles, started analyzing and criticizing all important court decisions like Bhutto's trial and his conviction as well as the Supreme Court decision in Begum Nusrat Bhutto's case wherein validity was given to the military coup of 1977. Due to these activities of the lawyers, the bar councils and bar associations came under direct assault from General Zia's regime. The hub of the lawyers' activities was Lahore, where lawyers' conventions were being organized by the Lahore High Court Bar Association. To punish the lawyers of Lahore and to undermine their bar association for their anti-regime activities, the government planned to disperse them throughout Punjab province. So the government, to achieve this objective, created in 1981 permanent benches of Lahore High Court at Bahawalpur, Multan and Rawalpindi.<sup>40</sup> Under the Legal Practitioners and Bar Councils Act 1973, the disciplinary powers over the advocates had been vested in the Bar Councils. In 1985 General Zia amended the Legal Practitioners and Bar Councils Act 1973 whereby these powers were withdrawn from the Bar Councils and were conferred in the High Courts and the Supreme Court. The lawyers' community in general and the Bar Councils in particular, refused to give up their disciplinary powers and offered maximum resistance to exercise such powers by the courts. The

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<sup>39</sup> Justice (Retd) Dorab Patel, 'Testament of a Liberal' P- 158.

<sup>40</sup> High Courts (Establishment) Order (Punjab Amendment) Ordinance 1981.

Bar Councils refused to send the record of disciplinary cases to the courts.<sup>41</sup> Consequently this law was reversed in 1987 and the disciplinary powers of Bar Councils were restored.

During this second phase, the lawyers initiated a new trend which was very fruitful and healthy for the independence of judiciary. Lawyers individually as well as from the platform of bar associations used to challenge before the superior courts every act or step of the government which apparently seemed to interfere in the independence of judiciary. The lawyers' community gave a lot of importance to the judicial appointments and always demanded appointment to the superior courts on merit. That is why, all those appointments which were made in violation of any rule of law or judicial convention, were challenged before High Courts and Supreme Court by the lawyers through constitutional petitions.<sup>42</sup>

On October 12 1999, Pakistan army once again overthrew the civilian government and captured the rein of government. General Pervez Musharraf declared himself as Chief Executive of Pakistan. The army coup was challenged in the Supreme Court. The judges of the Supreme Court and High Courts were administered a new oath to abide by the Provisional Constitution Order (PCO) 1999. Six judges of the Supreme Court including the Chief Justice of Pakistan refused to take new oath under PCO 1999. As a result of their refusal, they were arbitrarily removed. The newly constituted Supreme Court validated the coup of General Musharraf and granted him tenure of three years.<sup>43</sup> As the tenure of three years was to expire on October 12 2002, General Musharraf got himself elected as President of Pakistan for five years through a

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<sup>41</sup> Hamid Khan, 'A History of the Legal Profession in Pakistan', PLJ 1998, Magazine P- 108.

<sup>42</sup> There is a long list of such constitutional cases, only few are referred to here as examples: Al Jihad Trust V. Federation of Pakistan PLD 1996 SC 324; Al Jihad Trust V. Federation of Pakistan PLD 1997, SC 84; M.D. Tahir Advocate V. Federation of Pakistan Lahore, Petition # 11757/99; Sharaf Faridi & others V. Federation of Pakistan PLD 1989, Karachi 404; Supreme Court Bar Association V. Federation of Pakistan PLD 2002 SC 939; President Baluchistan Bar Association and others V. the Government of Baluchistan, PLD 1991, Quetta 7; etc.

<sup>43</sup> Zafar Ali Shah and others V. General Pervez Musharraf, PLD 2000 SC 869.

controversial referendum in April 2002.<sup>44</sup> Before revival of the constitution, General Musharraf promulgated the Legal Framework Order (LFO) 2002. Through this LFO 2002 extensive amendments were made in the Constitution in order to perpetuate his personal rule. Some 80 articles of the constitution were amended. The legal fraternity condemned and rejected both steps of Musharraf, i.e. Referendum and LFO as unconstitutional and negation of rule of law. LFO was challenged in the Supreme Court by Barrister Zafarullah Khan. The Supreme Court rejected his petition on the ground that he had no locus standi. The court announced its decision on October 7 2002. After two days of the decision i.e. on October 9 2002, the government extended the retirement age for judges of the superior courts by three years through amendment in the Legal Framework Order 2002. An analyst commented over this favor with the judges in these words: “Interestingly, the extension period corresponds with the period granted by the judges to General Musharraf as the Chief Executive”.<sup>45</sup> The lawyers’ bodies rejected this extension in the retirement age for the judges and demanded from the judges of the superior courts to refuse the extension on their own. The judges did not follow the line of action drawn by the lawyers and accepted the extension by their conduct. Lawyers started protests against LFO and extension in the retirement age for the judges. The lawyers gave to the judges a dead line of February 28 2002 for rejecting the extension.<sup>46</sup> The then Chief Justice of Pakistan, Justice Sheikh Riaz Ahmed had to retire on March 8 2003 without the extension. The legal fraternity was demanding of the Chief Justice to get retirement on March 8 2003 and the lawyers declared that if the Chief Justice accepted the extension then they would observe the date of his retirement i.e. March 8, 2003 as Black Day. The Chief Justice Sheikh Riaz Ahmed accepted the extension by continuing his

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<sup>44</sup> For this farce referendum see Mian Raza Rabbani, ‘LFO: A Fraud on the Constitution’

<sup>45</sup> Ijaz Hussain, ‘Cancer in Pakistan’s Judiciary Has Metastasized’ available at [http://www.satribune.antisystemic.org/www.satribune.com/archives/sep7\\_13\\_03/opinion\\_judiciary.htm](http://www.satribune.antisystemic.org/www.satribune.com/archives/sep7_13_03/opinion_judiciary.htm)

<sup>46</sup> The NEWS Islamabad, “The Age of Controversy” dated February 23, 2003.

functions as the Chief Justice beyond March 8, 2003 and lawyers boycotted from courts proceedings and observed March 8 2003 as a Black Day in the judicial history of Pakistan. According to Justice (Retd) Rashid A. Rizvi by accepting the extension, the Chief Justice foreclosed the doors against a judicial challenge to this aspect of the Legal Framework Order.<sup>47</sup> Lawyers continued their protests against LFO as well as against the extension in the retirement age for judges. Besides resolutions from the bar associations, the lawyers boycotted from the courts' proceedings on various dates. Lawyers' conventions at national level, to mobilize public opinion against LFO, were held at various cities of Pakistan including Islamabad, Lahore, Karachi, Peshawar and Quetta. Though their movement could not achieve complete success and the Parliament adopted LFO 2002 through Seventeenth Amendment in the Constitution but they succeeded to the extent that the extension in the retirement age for judges was dropped by the Parliament. The Seventeenth Amendment revived the previous retirement age for judges. Consequently about ten judges of the superior courts including Chief Justice Sheikh Riaz Ahmed went on retirement.<sup>48</sup> An editor of a newspaper very beautifully said, "Not all movements are fated to succeed, but they do leave an imprint on history".<sup>49</sup> The roots of the current unprecedented movement of the lawyers may be traced back to their struggle against LFO in 2003-04.

During this second phase, the lawyers as well as their associations gained strength and confidence in resisting external interference in the judiciary. It is true that their role in the second phase won appreciation and their leadership became vigilant and responsive to the actions of the executive which were detrimental to the independence of judiciary but they could not raise themselves above the level of the political affiliation. All major political parties in Pakistan have penetrated

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<sup>47</sup>Justice (Retd) Rashid A. Rizvi, 'Report From Pakistan' available at <http://www.razvilaw.com.pk/articles.html>

<sup>48</sup> Ibid.

<sup>49</sup> Imtiaz Alam, 'The Bar at War' The NEWS, Islamabad, dated March 20, 2007.

since long into the ranks of the lawyers by establishing lawyers' wings/forums of their respective parties. That is why the lawyers' reaction to actions or steps by the civilian government undermining judicial independence had not been so severe as they did resist identical actions taken by military regimes. During the judicial crisis in 1997,<sup>50</sup> a large group of lawyers were openly supporting the government of Nawaz Sharif against Chief Justice of Pakistan, Justice Sajjad Ali Shah. The Supreme Court was physically assaulted by the mob of political activists belonging to Pakistan Muslim League (Nawaz Sharif's Party) on November 28, 1997. The bar associations condemned the attack on the Supreme Court and boycotted the courts' proceedings on December 1 1997 in protest against the attack<sup>51</sup> but no effective efforts were made nor a protest movement was launched against Nawaz Sharif's government for such a blatant assault on the dignity and independence of the judiciary.

Bar was divided like the bench. The tragic aspect of the lawyers' role during this judicial crisis was not that they could not protect the dignity of the Supreme Court and independence of judiciary, but the tragedy was that lawyers belonging to government's party did otherwise. The Supreme Court Bench at Quetta entertained a constitutional petition in clear violation of the Supreme Court Rules 1980<sup>52</sup> and passed an interim order restraining Chief Justice Sajjad Ali Shah to function as the Chief Justice of Pakistan. This order was passed on November 26 1997 and next day i.e. on November 27, the Quetta Bar Association arranged a tea-party in the honor of the Supreme Court Bench at Quetta,<sup>53</sup> indicating its support to the judges who revolted against their own Chief. During contempt proceedings in the Supreme Court on November 27 1997 against Nawaz Sharif, the then Prime Minister of Pakistan, advocates who were

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<sup>50</sup> Details of the judicial crisis are available in Chapter II of the Thesis. Majority judges of the Supreme Court revolted, with support from the executive, against Chief Justice Sajjad Ali Shah in November 1997.

<sup>51</sup> Chief Justice (Retd) Sajjad Ali Shah, 'Law Courts in a Glass House' P- 517.

<sup>52</sup> Order XXV of the Supreme Court Rules 1980 provides: "All constitutional petitions and applications can be entertained and registered only in the main Registry at Islamabad."

<sup>53</sup> S. M. Zafar, '*Adalat mein Siyasat*' P- 81.

supporters of the government kept on shouting and wanted to disrupt the proceedings of the court. There was complete disarray and disorder in the Supreme Court due to the lawyers' unprofessional attitude.<sup>54</sup>

The third phase of the lawyers' role started with the failed attempt of the arbitrary removal of Chief Justice Iftikhar Muhammad Chaudhry by General Pervez Musharraf. On March 9 2007, the President General Musharraf summoned the Chief Justice of Pakistan, Justice Iftikhar, to his Army Office and asked him to resign, based on grounds of alleged misconduct, in the presence of Prime Minister and six other uniformed Generals. The Chief Justice's refusal resulted in his virtual suspension and soon after an acting Chief Justice was sworn-in while Justice Iftikhar was detained in army office. President General Musharraf also invoked his authority under Article 209 of the Constitution to refer the alleged misconduct by the Chief Justice to the Supreme Judicial Council for conducting inquiry. Justice Iftikhar was kept under house arrest.<sup>55</sup>

The Chief Justice's act of refusal against a generally powerful executive, and in the face of pressure, is unheard of in Pakistan, which has seen no less than four military regimes ruling the country for significant periods during its sixty-year history. The Chief Justice's refusal unleashed an unprecedented movement by Pakistani Lawyers in support of Justice Iftikhar with slogans of 'independence of the Judiciary and rule of law'. The Lawyers' bodies organized protests and processions through out Pakistan. The Lawyers' movement, fully supported by Pakistani media, also generated public protests. Civil society organizations actively participated in the movement. Some opposition political parties extended their full support while other opposition parties half-heartedly participated. This was the first time in Pakistan's history that lawyers had dropped their conflicting political affiliations and forged

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<sup>54</sup> Chief Justice (Retd) Sajjad Ali Shah, 'Law Courts in a Glass House' P- 501.

<sup>55</sup> For details see The NEWS, Dawn, The Nation, Daily Times and The Frontier Post dated March 10, 2007.

an unprecedented professional unity to fight for independence of judiciary, rule of law and restoration of Chief Justice Iftikhar. The inspiring and encouraging element in the lawyers' resistance was the participation of the civil society in the movement. According to a columnist, the civil society in Pakistan had never been so outraged. In every place, in every gathering, there was nothing but condemnation for what happened to Chief Justice Iftikhar.<sup>56</sup>

The lawyers' movement set three objectives, namely, independence of judiciary, rule of law and restoration of Justice Iftikhar. The movement succeeded in achieving the last objective and Chief Justice Iftikhar was restored on July 20, 2007 through a "historic decision" of the Supreme Court. The suspension of the Chief Justice and the reference against him were challenged in the Supreme Court through twenty three constitutional petitions including the petitions by the Pakistan Bar Council, Supreme Court Bar Association, four High Court Bar Associations and Chief Justice Iftikhar himself.

The restoration of Chief Justice Iftikhar was achieved after rendering great sacrifices by the lawyers and people of Pakistan. The lawyers faced violence and brutalities of Pakistani police. For example on March 17 2007, the police attacked a peaceful convention of lawyers in Lahore to sabotage the convention. Consequently fifty five lawyers including several aged advocates of Supreme Court were injured at the hand of police.<sup>57</sup> The lawyers faced severe police violence on several occasions. On may 12 2007, in Karachi – Pakistan biggest city – clashes rather street fights between factions supporting the Chief Justice and pro-government activists left more than forty persons dead and more than hundred injured.<sup>58</sup> On July 17 2007, at a gathering of lawyers in Islamabad, a bomb blast killed at least twelve civilians who had gathered outside to listen to Chief Justice Iftikhar's address to the lawyers'

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<sup>56</sup> Shafqat Mahmood, 'A Storm is Brewing' The NEWS dated March 16, 2007.

<sup>57</sup> The NEWS dated March 18, 2007.

<sup>58</sup> All newspapers in Pakistan including Dawn, The NEWS and *Jang* dated May 13, 2007

convention.<sup>59</sup> A professor of law was correct in saying, before the court's verdict, that the lawyers would not be willing to agree to or accept less than restoration of the Chief Justice.<sup>60</sup>

After restoration of the Chief Justice, the lawyers' bodies declared that they were determined to continue their struggle for the complete independence of judiciary and rule of law in Pakistan. The stand of lawyers' community had been since long that General Pervez Musharraf was unconstitutional President, as not elected through constitutional procedure, and being Chief of Army Staff, was not eligible to contest the Presidential election of October 2007. They fielded Justice (Retd) Wajihuddin as their candidate in the Presidential election just to create locus standi for challenging the eligibility of General Musharraf. Lawyers challenged the eligibility of General Musharraf before the Chief Election Commissioner of Pakistan. Their objections were over-ruled and General Musharraf's nomination papers were accepted. Several petitions including a petition by Wajihuddin were filed in the Supreme Court challenging the eligibility of General Musharraf. The petitioners requested the bench to stay the process of the Presidential election. A larger bench of the Supreme Court allowed the holding of the Presidential election as per schedule, i.e. on October 6 2007, but barred the Election Commission from issuance of notification of the result till a final decision on the petitions and the hearing of the petitions was adjourned till October 17 2007.<sup>61</sup>

The hearing of the petitions was at the concluding stage and there was a fear in the government circle based on the remarks of the judges on the bench that the court might disqualify General Musharraf.<sup>62</sup> On November 3 2007, General Musharraf, to preempt the Court's verdict,

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<sup>59</sup> Ibid dated July 18 2007.

<sup>60</sup> Ali Khan, 'Lawyers' Mutiny in Pakistan' available at <http://jurist.law.pitt.edu/forumy/2007/05/lawyers-mutiny-in-pakistan.php>

<sup>61</sup> The NEWS, Dawn dated October 6, 2007.

<sup>62</sup> President Musharraf claimed in a press conference on December 11 2007 that the Chief Justice was trying to remove him illegally. See Dawn, The NEWS dated December 12 2007.

declared extra-constitutional emergency and promulgated Provisional Constitution Order (PCO) 2007. Constitution was suspended, judges of High Courts and Supreme Court were asked, on the basis of choose and pick, to take new oath under PCO 2007. A large number of judges of the superior courts (about 49 including 12 judges of the Supreme Court) refused to accept PCO. All refusing judges were kept under house arrest, Thousands of lawyers, members of civil society and political activists were arrested. Lawyers' leaders including President of Supreme Court Bar Association, Aitzaz Ahsan were arrested. The deposed Chief Justice Iftikhar and some senior lawyers including the president of SCBA Aitzaz Ahsan were under house arrest till the formation of the new government in the third week of March 2008. The Pakistan Bar Council, the Supreme Court Bar Association and the four High Courts Bar Associations declared boycott, of the judges of the Supreme Court and High Courts who had taken oath under PCO.

An American journalist describes the current lawyers' movement in these words: "Can anyone remember anywhere in all of modern history, large numbers of lawyers leading the resistance as they did on the streets of Pakistani cities way ahead of the workers, peasants and even the university students? Pakistani police and troops rounded up the mass protests of lawyers and pushed hundreds of them into trucks on the way to the prison. Lawyers were willing to go to prison and endure beatings, while demanding the re-establishment of the rule of law and the independence of judges, right up to the Supreme Court, a rare display of professional courage and duty."<sup>63</sup>

The images of Pakistani lawyers marching in their traditional black coats on the roads, facing the police violence and courting arrests for rule of law and independence of judiciary, inspired diverse legal and human rights groups in the whole world to march around Pakistani consulates,

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<sup>63</sup> Ralph Nader, 'Pakistani Lawyers V. American Lawyers' The NEWS dated November 15 2007.

where available, and local courts to show support for lawyers' movement in Pakistan.

Fifty years ago Justice Kayani said, "It is only a good bar which can save a politically insolvent country, for here there is no public opinion, there is no electorate with a firm voice."<sup>64</sup> The prophetic words of Justice Kayani uttered in his address at convocation of University law College Lahore in 1957 still echo in the current judicial crisis and lawyers' movement in Pakistan.

The role of the legal fraternity in defending judicial independence in the first phase (1947 to 1977) had been very disappointing; in the second phase (1977 to March 2007) it was satisfactory and overall commendable; and in third phase, i.e. after March 9 2007, it has become revolutionary.

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<sup>64</sup> Justice (Retd) M. R. Kayani, 'Not the Whole Truth' P-20.

## **Chapter-VIII: Executive Impact on the Independence of Judiciary in Pakistan.**

Powerful executive has been always the biggest impediment in achieving judicial independence in Pakistan. Impact of the executive on the independence of the judiciary will be examined from several aspects, such as the executive role in the appointment and removal of judges; its interference in the proceedings of the courts; its influence on the decision of the court; curtailing the powers and jurisdictions of the court; the abuse of the legal and constitutional powers by the executive; and its disregard for the courts' orders and decisions.

The constitutional history of Pakistan is full of constitutional eventualities as well as of extra-constitutional military adventurism. Pakistan has practiced one provisional constitution, three permanent constitutions and one interim constitution.<sup>1</sup> Pakistan had been subjected five times to extra-constitutional emergency or martial law regimes, when the constitution was either abrogated or partly or wholly suspended. The functions of government were being carried on under Laws (Continuance in Force) Orders or Provisional Constitution Orders. Martial law was declared in Pakistan in 1958, 1969, 1977, 1999 and 2007. In the last two instances, the military initiated their extra-ordinary regime not by a proclamation of martial law, but through "proclamation of emergency." Thus military ruled over Pakistan for more than 30 years.

The current study of the impact of the executive on the judicial independence in Pakistan is broadly divided into two parts, namely, the political executive and military regimes. It is demonstrated that one element remained common in all governments whether civil or military, that none of the governments in Pakistan wanted an independent judiciary.

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<sup>1</sup> The government of India Act 1935 was Provisional Constitution of Pakistan from 1947 to 1956; permanent constitutions were adopted in 1956, 1962 and 1973; the Interim Constitution was framed in 1972

They preferred pliable judges over independent judges. Civil as well as military executive kept judiciary under pressure and made it subservient for perpetuation of executive's powers. The difference between civil government and military regime appeared to be that of the extent of interference in the affairs of the judiciary and the method of the interference.

### **8.1: Judicial independence under Civil Governments:**

Civilian governments in Pakistan remained in powers for less than 30 years. The history of the civilian governments may be divided into three periods: first period starts from 1947 to 1958; second period from 1972 to 1977 and third period from 1989 to 1999. Pakistan started its life in 1947 with the continuation of the vice-regal system of the colonial period. Pakistan adopted the Government of India Act 1935 as its provisional constitution. It was not able to have its own constitution till 1956, when the first constitution of Pakistan was promulgated which remained in force only for two and a half year. In 1958 martial law was declared and constitution of 1956 was abrogated. During this period four governor generals and seven prime ministers ruled the country. Zulfikar Ali Bhutto ruled Pakistan from 1972 to 1977 as a President under 1972 Interim Constitution and as a Prime Minister under 1973 Constitution. During the third period Benazir Bhutto and Nawaz Sharif remained in power.

Inroad in the independence of the judiciary was first started by Governor General Ghulam Muhammad. The judiciary was cut to a size and its wings were cut by Zulfikar Ali Bhutto through constitutional amendments. The judiciary was transformed from a state organ into a government department. The dignity and prestige of the superior judiciary in Pakistan was further degraded by the governments of Benazir Bhutto and Nawaz Sharif. During the periods of the civilian governments, the

appointment of the judges was politicized, courts were manipulated to get favorable decision, judges were harassed and at last the Supreme Court was attacked in 1998 by political activists belonging to Nawaz Sharif's political party. All such actions of the civilian governments which were detrimental to the independence of the judiciary are examined and discussed under separate sub-headings.

### **8.1.1: Appointment and Removal of the Judges during Civilian Governments.**

The appointment of judges is of paramount importance to ensure independence of the judiciary because it is primarily the human being that makes or mars the institution. It is the integrity and competence of the judges that ensures the credibility and public confidence in the judiciary. The appointment in judiciary on the basis of personal consideration and without merit started from the earlier years of Pakistan. When the first Chief Justice of the Federal Court,<sup>2</sup> Sir Abdur Rashid retired in June 1954, the Governor General of Pakistan<sup>3</sup> Ghulam Muhammad appointed Justice Munir who was the Chief Justice of Lahore High Court at that time, as the Chief Justice of the Federal Court by passing the senior most judge of the Federal Court, Justice A.S.M Akram.<sup>4</sup> Pakistan is still suffering from the adverse effects of this appointment to the judiciary based on favoritism and ignoring merit. The rot started in 1954 under Governor General Ghulam Muhammad, instead of being stopped, went on and expanded to a worrying situation.<sup>5</sup> During the regime of Zulfikar Ali Bhutto the judicial appointment was politicized. A number of office bearers and members of the Pakistan Peoples Party (PPP) were appointed as judges of the High Courts with obvious intention that they would uphold the policy and

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<sup>2</sup> The Federal Court was the Highest Court of Pakistan under the provisional constitution of Pakistan (i.e. The Government of India Act 1935)

<sup>3</sup> Under the provisional constitution the head of the state was called the Governor General of Pakistan.

<sup>4</sup> Allen McGrath, "The Destruction of Pakistan's Democracy" P- 195.

<sup>5</sup> For details see the chapter on Historical Background of the Thesis.

objectives of the party.<sup>6</sup> At the end of 1976 the Chief Justice of Lahore High Court retired and Zulfiqar Ali Bhutto appointed a junior judge as the Chief Justice of Lahore High court. The new Chief Justice superseded more than half a dozen of the judges of the High court some of whom were more competent than him.<sup>7</sup>

In 1977, Zulfiqar Ali Bhutto made an even more arbitrary appointment in the judiciary. An advocate was appointed as a judge of a Lahore High Court, who had been elected to the Punjab Provincial Assembly from the platform of Bhutto's PPP and whose election was set aside by the election tribunal on account of malpractices in his election campaign. This appointment was a shock to the public, to the judiciary, and to the bar. Due to severe criticism from the various segments of the society, the said judge resigned within few days of his appointment. But the process of undermining the independence of the judiciary had begun.<sup>8</sup>

Benazir Bhutto, as a leader of opposition in 1991-3, used to say publicly that the method of appointment of judges should be radically reformed, so that persons of independent opinion and disposition might be appointed. This idea formed a part of the manifesto of her party (Pakistan Peoples Party) in the general election of 1993. When PPP came into power the government of Benazir Bhutto surpassed all previous governments in the arbitrary appointments of judges in the superior judiciary.<sup>9</sup> In June 1994, Benazir's government appointed Justice Sajjad Ali Shah, superseding his three senior colleagues, as the Chief Justice of Pakistan, deviating from the forty years old convention of appointing the senior most judge of the Supreme Court as the Chief Justice of Pakistan.

Prior to his appointment as the Chief Justice of Pakistan, Justice Shah was asked by Asif Ali Zardari (husband of Benazir Bhutto), to give his written resignation in advance, which would be used if he failed to

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<sup>6</sup> Hamid Khan, 'the Judicial Organ' P- 63.

<sup>7</sup> Justice (Retd) Dorab Patel, 'Testament of a Liberal, P- 158.

<sup>8</sup> Ibid

<sup>9</sup> Hamid Khan, 'Government and Judiciary 1994-97: The Crisis of State' PLJ Magazine 1998 P-66.

oblige the Prime Minister.<sup>10</sup> Such amazing things were happening behind the curtain while Benazir Bhutto and her party members were publicly declaring their faith in the independence of judiciary. Her government embarked on the policy to pack the High Courts with judges to be appointed for political and personal considerations. In a meeting with the newly appointed Chief Justice of Pakistan Benazir Bhutto revealed to him that she wanted to appoint judges who belonged to her party and were loyal to her even when they were unfit for such appointments.<sup>11</sup>

In August 1994, 20 Additional judges were appointed by Benazir's government in the Lahore High court in one go against the advice of the Chief Justice of Pakistan.<sup>12</sup> Out of these twenty judges only two were from amongst the lower judiciary and the remaining were supposedly taken from the bar. Only six or seven judges could justify their appointment on merit, eight or nine of these appointees were simply outrageous. One of them was said to have seen the building of the High Court for the first time when he came to take the oath of his office as a judge.<sup>13</sup> One of them was facing a trial on a murder charge in the same High Court. Yet another gentleman was "compensated" for his perseverance in loosing three elections contested by him under the PPP flag.<sup>14</sup> Nine additional judges were appointed to the Sindh High court. Two out of the nine appointees in Sindh High Court were from amongst the list of sessions judges, namely, Agha Rafiq Ahmad who was number thirty-four, seniority-wise, in the list of total of thirty-seven sessions judges, in the province of Sindh,<sup>15</sup> and Shah Nawaz Awan who was number thirteen on the same list.<sup>16</sup> There were some controversial names in the list of the appointees, particularly from the bar, who, according to

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<sup>10</sup> Chief Justice (Retd) Sajjad Ali Shah, 'Law Courts in a Glass House' PP-187-8

<sup>11</sup> Ibid PP 269-70.

<sup>12</sup> Ibid P- 215.

<sup>13</sup> Hamid khan, 'Constitutional and Political History of Pakistan' (2001) P- 785.

<sup>14</sup> K. M. Arif, 'Khaki Shadow' PP- 311-12

<sup>15</sup> Ibid P- 229.

<sup>16</sup> Ibid P- 232

Justice Shah, had never appeared before the High court.<sup>17</sup> Even the Supreme Court was packed with as many as seven acting/ad hoc judges against the ten permanent judges.<sup>18</sup> Benazir Bhutto's government politicized the judiciary and the famous judgment of the Supreme Court in the judge's case was a reaction to such arbitrary appointments.<sup>19</sup>

In the addition to the political appointments in the judiciary, the political governments further undermined the independence of the judiciary by inventing new methods for removal of the judges. Security of tenure is one of the first conditions required for judicial independence. That is why the article 209 of the Constitution of Pakistan provides the forum and the procedure for removal of the judges of the superior courts.<sup>20</sup> Services of the judges of the superior courts are protected under article 209(7) of the Constitution which ensures that a judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this article. Under article 209 a judge of the superior courts may be removed by the President of Pakistan if so recommended by the Supreme Judicial Council. But this constitutional procedure was not adopted for removing judges of the superior courts. Zulfikar Ali Bhutto got the constitution amended to get ride of the unwanted Chief Justices of the High Courts. In spite of severe criticism and opposition from the opposition parties, Bhutto's government passed the Fifth Constitutional Amendment in 1976 which limited the tenure of the Chief Justices of Supreme Court and High Courts to five and four years respectively. They were given choice thereafter either to retire from office or to assume the office as senior most judge of the court. A judge of the High Court who did not accept appointment as judge of the Supreme Court would be deemed to have been retired from his office. This provision was a contradiction of the protection available to the judges under Article

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<sup>17</sup> Ibid P- 231.

<sup>18</sup> Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' P- 163.

<sup>19</sup> Al-Jihad Trust V. the Federation of Pakistan, PLD 1996, SC P- 324.

<sup>20</sup> See Chapter V of the Thesis for detailed discussion about Article 209.

209(7) of the Constitution. The Fifth Amendment to the Constitution resulted in the victimization of Justice Sardar Muhammad Iqbal and Justice Ghulam Safdar Shah, the Chief Justices of Lahore High Court and Peshawar High Court respectively.<sup>21</sup> These Chief Justices were pushed either to get retirement or to accept lower status as they had completed a period of four years as Chief Justices. This amendment was made in order to remove Chief Justice of Lahore High Court, Justice Sardar Muhammad Iqbal.<sup>22</sup>

Justice Sajjad Ali Shah was removed from the post of the Chief Justice of Pakistan by an order of the Supreme Court Bench.<sup>23</sup>

The Political government's interference in the affairs of the judiciary was not limited only to political appointments in the judicial and un-ceremonial removal of independent judges; they further undermined the independence of judiciary by harassment of the judges, pressurizing judges for getting favorable decision.

### **8.1.2: Pressure on the Judges to Get Favorable Decisions:**

All governments in Pakistan ever tried to get favorable decisions from the courts. To achieve this objective they applied various tactics to put pressure on the judges. When some judges showed their courage to resist the executive pressure and to administer justice according to law, such judges and their families suffered too much. They were harassed and humiliated. The executive did not hesitate to disregard and dishonors unfavorable verdicts and orders of the courts. Not less than Prime Minister ridiculed the judiciary, several times for giving a decision against the government, at the floor of the parliament as well as in the public. For this reason contempt proceedings took place against three

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<sup>21</sup>M. Dilawar Mahmood, 'The Judiciary and Politics in Pakistan' PP-48-9.

<sup>22</sup> Justice (Retd) Javid Iqbal, 'The Judiciary and Constitutional Crisis in Pakistan' in Hafeez Malik (Ed) 'Pakistan Founders' Aspirations and Today's Realities' P-69.

<sup>23</sup> For details see chapter II of the Thesis.

prime Ministers,<sup>24</sup> but the head of the powerful executive could not be convicted.

The judicial history of Pakistan is full of such instances where judges are pressurized or harassed by the executive for getting a decision of its own choice. The instances need no recounting and only few examples are stated here. Examples start from Tamizuddin Khan's case. The Federal Court reversed the decision of the Chief Court of Sindh and upheld the Governor General's order dissolving the first Constituent Assembly of Pakistan. The only dissenting judge, Justice Cornelius revealed later that the Governor General Ghulam Muhammad had pressured and influenced the other judges when the case was being argued before the court.<sup>25</sup>

A former Chief Justice of Lahore High Court, Justice Kadri recollects that during Zulfiqar Ali Bhutto's regime, "all tactics fair and foul were adopted to humiliate and intimidate the judges" throughout the hearing of a case in which the government had interest.<sup>26</sup> Justice Kadri was called on by Zulfiqar Ali Bhutto for a meeting. Bhutto complained to the Chief Justice that the government had been losing all cases and wanted him to decide the cases in government's favor. When the Chief Justice did not surrender to the pressure of Bhutto, Rao Rashid - a key figure in Bhutto's government - threatened his family's members that the Chief Justice should follow the government's line, otherwise their houses would be burnt and the entire family would be eliminated.<sup>27</sup>

Once a special assistant to the Prime Minister Zulfiqar Ali Bhutto, Rafi Raza threatened a judge of the Supreme Court, Justice Salahuddin Ahmad, not to release a person under detention otherwise he would be imprisoned. Justice Ahmad was Chairman of the Review Board which used to consider, after every three months, the cases of all persons

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<sup>24</sup> Zulfiqar Ali Bhutto, Benazir Bhutto and Muhammad Nawaz Sharif.

<sup>25</sup> Allen McGrath, 'The Destruction of the Pakistan's Democracy' P-177.

<sup>26</sup> Justice (Retd) Shamim Hussain Kadri, 'Judges and Politics' P-27.

<sup>27</sup> Ibid P- 31.

detained by the government under the safety ordinance. Justice Ahmad reported the matter to the Chief Justice of Pakistan and resigned from the Chairmanship of the Board in protest.<sup>28</sup>

Justice Sajjad Ali Shah admits in his autobiography that a day before the announcement of the judgment in Muhammad Nawaz Sharif's case in 1993, he received so many telephone calls that he felt pressurized and harassed. In order to avoid the pressure and tension, he left his room.<sup>29</sup>

### **8.1.3: Humiliation and Harassment of the Judges.**

The civilian governments in Pakistan, instead of giving due regards and status to the judiciary, always humiliated and degraded publicly the judges of the superior courts. The executive always tried to keep the judges under pressure to serve the ulterior motives of the executive. When some judges showed resistance to the executive's pressure and dared to apply the law, they were humiliated by the government. If the judges, instead of humiliation and harassment, continued to administer justice, then various legal and illegal actions were taken against them. Judicial history of Pakistan is abundant with the events of judges' humiliation. Only few events are stated here as instances.

In 1972 when Zulfikar Ali Bhutto assumed power, he summoned all the judges of the Supreme Court and Lahore High Court for a meeting in the university campus, Lahore. Judges had never been summoned to a meeting by any head of government in Pakistan. Bhutto addressed the meeting in a highly authoritarian style and criticized the judiciary. In another similar meeting in the government house, Lahore, Bhutto started

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<sup>28</sup> Altaf Gauhar, 'Thoughts After Thoughts' P- 469.

<sup>29</sup> Chief Justice (Retd) Sajjad Ali Shah, 'Law Courts in a Glass House' P- 180.

berating the judges to such extent that the Chief Justice, Hamoodur Rehman, was forced to rebut his irresponsible charges.<sup>30</sup>

As discussed earlier, the Prime Minister Benazir Bhutto desired to get the judges' case in 1996 adjourned sine die. When the Chief Justice declined to adjourn the case, the federal government and the Prime Minister in particular were annoyed. "Deliberate revenge was taken and measures were adopted which were intended to intimidate the Chief Justice and teach him a lesson for not falling in line with the wishes of the Prime Minister".<sup>31</sup> The official residence of the Chief Justice's son-in-law, Pervez Ali Shah, was raided by the police and searched the house without presenting a search warrant to the inmates of the house. Later Pervez Ali Shah was summoned by the Chief Minister of Sindh and asked him to convey to the Chief Justice that he should proceed with the judges' case in the line of the Prime Minister's desires. When Pervez Ali Shah could not achieve the mean objectives of the government, his service was suspended.<sup>32</sup> A son of another judge hearing the judges' case, was transferred to some distant station in NWFP to convey the message to the judges that if they would go against the wishes of the government, they would be asking for troubles. All these were being done while the Prime Minister was proclaiming her commitment to the independence of the judiciary.<sup>33</sup>

Facing all these pressures with various tactics of intimidation, the Supreme Court Bench headed by the Chief Justice, Sajjad Ali Shah, was able to announce a historic judgment in the case of judges' appointment (Judges' case). The Prime Minister, in a meeting insulted the Chief Justice to such extent that the Chief Justice could not observe the insult and he, in the evening, suffered a heart attack. He remained hospitalized

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<sup>30</sup> Altaf Gauhar, 'Thoughts After Thoughts' P- 468-9

<sup>31</sup> Chief Justice (Retd) Sajjad Ali Shah, 'Law Courts in a Glass House' P- 241.

<sup>32</sup> Ibid P- 244.

<sup>33</sup> Altaf Gauhar, 'Thoughts After Thoughts' P- 452.

for several days in the Armed Forces Institute of Cardiology in Rawalpindi.<sup>34</sup>

In 1997 contempt proceedings were started by the Supreme Court against the then prime Minister, Nawaz Sharif. As a reaction to the contempt proceedings against the Prime Minister, a pamphlet against the Chief Justice of Pakistan was printed and distributed by the political activists belonging to the government's party. They started harassing the Chief Justice and ultimately attacked the court room, on October 28, 1997, where the contempt proceedings were being held.<sup>35</sup>

The humiliation and intimidation of the judges by the government are not limited only to the superior judiciary, the lower judiciary has very badly been treated by the executive and the concept of independence of the judiciary at the district level, sometimes, has been torn into pieces. The violation of independence of the judiciary at lower level is not discussed because this study is limited to study of the independence of superior judiciary. Only one example of the blatant attack on the independence of judiciary at district level is given. During the government of Zulfikar Ali Bhutto the District Judge of Sanghar District (Province of Sindh) was arrested on a false charge because he had given bail to a politician belonging to an opposition party. The arrested District Judge applied for interim bail in the High Court but his application for bail was dismissed. He was able to get interim bail from the Supreme Court. According to Justice Patel, "he had been arrested on a false charge. And this attempt to prosecute a District Judge for performing his duties as a Judge had traumatic effect on the subordinate judiciary of Sindh".<sup>36</sup>

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<sup>34</sup> Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' P- 192.

<sup>35</sup> See for the details of this tragic episode Chief Justice (Retd) Sajjad Ali Shah, 'Law Courts in a Glass House' PP- 494-508.

<sup>36</sup> Justice (Retd) Dorab Patel, 'Testament of a Liberal' P-121.

#### **8.1.4: Executive misused Judiciary as an Instrument for Political**

##### **Victimization:**

One of the tragic aspects of the judicial history in Pakistan is that judicial processes have been used by those in power to persecute political opponents under the garb of prosecution. Judiciary has been used just like other departments of the government to achieve the ulterior motives of the executive. Almost all governments created cases against the political opponents, either to stop their opposing voices or to keep them under pressure. A former Director General of ISI (Inter Services Intelligence-the top most spy agency of Pakistan), Asad Durrani states this fact in these words, “it is evident that if you are in the government and the legal institutions, the prosecution authority, the FIA etc, are under your control-you use them to create cases against the opposition so that even if they are not proven in the court because of lack of evidence, the opposition remains under pressure”.<sup>37</sup>

One of the most disappointing examples, in the constitutional history of Pakistan, of persecution of political opponents through judicial process is the decision of the Supreme Court in *Pakistan V. Abdul Wali Khan MNA (Member of National Assembly) and others*.<sup>38</sup> In 1975, the government of Zulfikar Ali Bhutto banned the National Awami Party (NAP) under the Political Parties Act 1962. Section 3 of the Act provides that a political party can be dissolved if it is propagating any opinion or acting in a manner prejudicial to sovereignty and integrity of Pakistan. NAP was the major opposition party in the country at that time and its leader, Abdul Wali Khan was the leader of the opposition in the National Assembly.<sup>39</sup> After dissolving NAP, the government referred its decision

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<sup>37</sup> Asad Durrani, *The NEWS*, dated July 27, 2007 under the title “For Justice – Just Think”.

<sup>38</sup> *Pakistan V. Abdul Wali Khan MNA and others*, PLD 1976 Sc P- 53.

<sup>39</sup> Abdul Wali Khan’s father Ghaffar Khan had been one of the leaders of the Indian National Congress before independence. He was opposed to the partition of India because he believed that India’s partition would not solve the Hindu-Muslim problem, as millions of Muslims would have to continue living in India and their conditions would deteriorate if India was divided on the basis of religion. The Establishment of Pakistan, due to this background, suspected the loyalty of Ghaffar Khan, his family and his followers. Ghaffar Khan and Wali Khan had spent many years of their lives in prison under various detention laws.

for approval to the Supreme Court, as required by the Political Parties Act. The government then filed in the Supreme Court a complaint containing a number of allegations against NAP. Wali Khan showed his dissatisfaction over the formation of the Supreme Court Bench and objected to the presence of two judges, Justice Muhammad Gul and Justice Muhammad Afzal Cheema at the bench. His objection was rejected. During initial proceedings of the Reference, Bhutto made a public speech. He said, "If the Supreme Court gives a decision against us, then it will not be my decision or that of the people. We will accept this decision but the responsibility of the consequence will be of the Supreme Court".<sup>40</sup> His speech was gross contempt of court under Article 204 of the constitution. Chaudhry Zahoor Elahi moved a contempt application against Bhutto in the Supreme Court but the court dismissed the application. The dismissal of the contempt application against Bhutto had a disastrous effect on the image of the judiciary and the confidence of the defendants in the court.<sup>41</sup> After the dismissal of Chaudhry Zahoor Elahi's contempt application against Bhutto and rejection of Wali Khan's objections over the formation of the bench, all the defendants including Wali Khan boycotted the court proceedings in the Reference. The court carried on its proceedings of the Reference without defendants' participation. The court held that the government had proved its allegations that NAP and its leaders had been trying to break up the country and had resorted to terrorism, armed insurgency, the subversion of the constitution etc. The court accepted fully government's evidence

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After his release Ghaffar Khan went into exile while Wali Khan and the followers of Ghaffar Khan along with some other progressive activists formed National Awami Party (NAP). NAP's followers were confined to the Frontier Province (NWFP) and Baluchistan Province. Both these provinces were governed, after martial law was lifted in 1972, by a coalition of parties in which the NAP was a senior partner. NAP's Leader Abdul Wali Khan was also the Leader of Opposition in the National Assembly. He and his party cooperated with Bhutto government in passing the 1973 Constitution, However this cooperation ended very soon because Bhutto dismissed the NAP government in Baluchistan, the NAP government in the Frontier Province resigned in protest. Thereafter, as the government alleged that the NAP had begun a campaign of terrorism against the government.

<sup>40</sup> Justice Dorab Patel, 'Testament of a Liberal' P- 132.

<sup>41</sup> Ibid

and conclusions, responding to the language of national instability and violence rather than to pristine logic.<sup>42</sup> “The sum of its long judgment”, in the words of Newberg, “however, was to endorse the Prime Minister’s contempt for political opposition”.<sup>43</sup>

Justice Patel is of the view that the government did not have the power to dissolve NAP on the ground that it was against the ideology of Pakistan and the Supreme Court did not have the jurisdiction to uphold the Reference on this ground. He further holds that the Supreme Court should not have relied on intelligence reports and newspapers’ reports for the purpose of accepting the government’s Reference.<sup>44</sup>

Apart from upholding the arbitrary order of the government, the Supreme Court in this case exercised its powers beyond its jurisdiction, for example, newspaper reports were admitted in evidence in the absence of testimony of eye witnesses. Monitoring reports of Kabul Radio made by officers engaged in the task were accepted as authentic. Non-contextual excerpts from NAP speeches were admitted by the court. All such evidences were either inadmissible or weak evidence under evidence law of Pakistan.<sup>45</sup>

The necessary implication of the Supreme Court’s findings that the NAP leaders had resorted to terrorism, an armed rebellion, etc was that they had committed offences like sedition, subversion of the constitution etc. Consequently the government set up a Tribunal of three judges of High Courts for the trial of the defendants in the Reference for these offences. The Tribunal started the trial of 55 NAP’s members and associates, already imprisoned, in Hyderabad Central Jail in which the testimony and proceedings of the Reference were used under special rules of evidence.<sup>46</sup> While the court was considering the reference, government

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<sup>42</sup> Paula Newberg, ‘Judging the State’ P- 153

<sup>43</sup> Ibid P- 155.

<sup>44</sup> Justice Dorab Patel, ‘Testament of a Liberal’, PP- 134-5

<sup>45</sup> See chapters iv and v of the Qanun-E- Shahadat Order, 1884.

<sup>46</sup> The Hyderabad trial was constituted under Criminal Law Amendment (Special Court) Ordinance 1975, later replaced with Criminal Law Amendment (Special Court) Act (XVII) 1976.

intelligence agencies were collecting information for Special Court trial to be conducted in Hyderabad Central Jail. The Supreme Court was aware of case preparations for Hyderabad trial. Taken together, they provide an intriguing view of the Supreme Court's relationship to the Prime Minister and to the government's special courts.<sup>47</sup>

Sometimes history moves very fast. The Special Court's trials against NAP members in Hyderabad Central Jail were still being proceeded, meanwhile, General Zia removed Bhutto and his government and imposed martial law on July 5, 1977. General Zia's government wound up the Tribunal and the cases against NAP members were withdrawn.

This was not the sole case in which Bhutto's government utilized the judicial process for political victimization. By 1977, the government had lodged hundreds of cases against politicians and party members (as well as their families) on matters sometimes only distantly related to politics.<sup>48</sup>

Every successive government in Pakistan had persecuted political opponents either in the name of ideology of Pakistan or accountability. Cases had been prepared against opposition politicians sometimes to save Pakistan by eliminating, as claimed by the party in power, anti-state elements, other times to clean politics from corruption. Almost all government had established special courts or special tribunals for trial of such cases. For achieving the evil motives, the whole judicial system had been manipulated and undermined by the government. Every government had spent a huge amount from the public exchequer over fabricating and pursuing politically motivated cases. Apart from the disgrace and mental torture of the defendants in such cases, precious time of the court had also been wasted. The political victimization through judicial process, besides other adverse effects on the political culture in Pakistan, resulted in the

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<sup>47</sup> Paula Newberg, 'Judging the State' P- 1148.

<sup>48</sup> Ibid P- 144.

loss of public faith in the judiciary. The willingness of the judiciary to strengthen the hands of the government of the day for political victimization lowered the dignity and status of the judiciary in the eyes of public.

In a politically motivated case, Ijaz Batalvi Advocate, council for the accused, Shaikh Rashid Ahmad, termed the judicial proceedings against his client as a “Judicial scandal”. This damaging statement was made before the Supreme Court and none of the judges of the Supreme Court questioned.<sup>49</sup> Actually the judges of the Supreme Court were well aware of the irregularities and illegalities being made in the proceedings of this case. That is why the judges of the Supreme Court did not object to this annoying statement by a counsel which might have crossed the limits of the contempt of court otherwise. A very brief review of this case is given.

Shaikh Rashid Ahmed, member of National Assembly and leader of Pakistan Muslim League at that time, was arrested in 1994 by the government of Benazir Bhutto, in a criminal case for possessing an unlicensed Kalashnikov rifle which was allegedly recovered from his house, though he was not present at the time of search of his house. The case against Shaikh Rashid was heard by a special court which was presided over by a judge who had been previously dismissed on grounds of corruption.<sup>50</sup> On February 9, 1995 he was convicted to seven years’ rigorous imprisonment and a fine of 2,00,000 rupees. An appeal against his conviction was filed in Lahore High court but the government did not allow proceeding the matter on one ground or another for eleven months. An application was moved in the Supreme Court requesting the court to direct the Lahore High Court to decide the appeal. Under the direction of the Supreme Court, Lahore High Court fixed a date for hearing. On March 10, 1996, a law officer appearing on behalf of the government informed

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<sup>49</sup> Altaf Gauhar, ‘Thoughts after Thoughts’ P- 436.

<sup>50</sup> Chief Justice (Retd) Sajjad Ali Shah, ‘Law Courts in a Glass House’ P- 221.

the High Court that the government did not wish to contest the appeal. The court did not ask the law officer for justification of keeping the appellant in prison for more than 18 months. The court accepted the statement of the law officer and set Shaikh Rashid Ahmed at liberty without passing any order regarding the damages the government should pay to compensate him for the loss of his liberty for 18 months. One can imagine the judgment of the court, had the government contested the appeal. This was the background of a case which forced a senior lawyer like Ijaz Batalvi to term judicial proceeding as a “judicial scandal”.

In April 2001, the Supreme Court find out another similar “judicial scandal”, again in Lahore High Court.<sup>51</sup> In 1999 Benazir Bhutto and her husband Asif Ali Zardari were found guilty by an Accountability Bench of Lahore High Court, in SGS Kick Back Case and were convicted to imprisonment for five years and fine up to nine million rupees. An appeal was filed in the Supreme Court. The Supreme Court while deciding the appeal, found the conviction of Benazir Bhutto and her husband “politically motivated”. The conviction was set aside and the Case was sent back for retrial.

The foregoing discussion regarding the judicial independence under civilian governments may be summed up that every government in Pakistan had not missed any opportunity of degrading the court, making inroads in the independence of the judiciary and abusing the judicial process for achieving their ulterior and political motives. Independence of the judiciary is appreciated by the politicians in opposition, but when they come in power, they abuse the judicial process for political objectives particularly for victimization of political opponents. According to a former Chief Justice of Pakistan, they do not tolerate if justice is done without any discrimination and according to law and relief is provided to political opponents.<sup>52</sup> Another former Chief Justice says that politicians,

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<sup>51</sup> Asif Ali Zardari and another V. the state, PLD 2001, SC 568.

<sup>52</sup> Chief Justice (Retd) Sajjad Ali Shah, ‘Law Courts in a Glass House’ P- 686.

when in opposition, want an independent judiciary, but when in power, they want a pliable judiciary.<sup>53</sup>

The judicial history of Pakistan indicates that Governor General Ghulam Muhammad and three Prime Ministers namely Zulfiqar Ali Bhutto, Benazir Bhutto and Nawaz Sharif have severely damaged the institution of judiciary. All of the three Prime Ministers ridiculed the judiciary when ever they received unfavorable decisions from the court. That is why, they faced contempt proceedings but the judiciary in Pakistan has never been in the position to challenge the powerful executive. No civilian government ever supported independent judiciary but the governments under the above three named Prime Ministers harassed judges, assaulted the independence of the judiciary and ultimately damaged the confidence of the public in the judiciary. If all civilian governments in Pakistan are examined on the parameter of judicial independence, the government of Zulfiqar Ali Bhutto seemed to be the most detrimental to judicial independence. Z.A. Bhutto's government made seven amendments in the constitution. Five constitutional amendments were detrimental to the independence of judiciary. Once Bhutto told to one of his political opponents, who remained imprisoned for several years under various detention laws during Bhutto's government, that he was a fool to seek his freedom from the courts. Bhutto warned him that courts did not figure in his book.<sup>54</sup>

## **8.2: Impact of Army on the Judiciary:**

Army has ruled Pakistan for more than half of its total 60 years history and has imposed martial law five times over this unfortunate country. Like other institutions of the state, judiciary also suffered a lot under military dictators. Each martial law regime clipped the wings of the

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<sup>53</sup> Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' P- 347.

<sup>54</sup> Altaf Gauhar, 'Thoughts after Thoughts' P- 75.

judiciary by curtailing its jurisdictions, assaulted the independence of the judiciary by arbitrary removal of the independent judges and degraded the dignity of the judiciary by making open interference in the proceedings of the court. Every successive martial law governments while dealing with judiciary followed the foot prints of its predecessors and adopted the already tested methods of subjugating judiciary with more damaging and aggressive way. In addition to adopting old practices each of the military regimes, added new trend of more harmful and more detrimental act for controlling judiciary.

Apart from curtailing the jurisdiction of the courts, arbitrary removal of the judges, blatant interference in the proceedings of the courts damaging the credibility of the court, the military dictators also introduced detrimental changes in the constitutional structure of the judiciary. All these issues are examined under separate sub-headings.

### **8.2.1: Powers of the Courts under Martial Law Regimes:**

Every martial law regime abrogated or suspended the Constitution of Pakistan and promulgated new legal order either under the title of Laws (Continuance in Force) Order or under the name of Provisional Constitution Order (PCO). All military dictators declared that the country would be run as much as possible under the abrogated or suspended constitution- paradoxically the political basis for the constitution was not considered viable but its administrative rules were adequate.<sup>55</sup> Unlike the other organ of the state i.e. legislature, the judiciary was allowed to function but was deprived of the power to challenge the military government. Under all martial law regimes all courts including Supreme Court and High Court were allowed to exercise their respective powers and jurisdictions provided that no court or tribunal would have the power to pass any order/judgment against military dictator. No court could call

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<sup>55</sup> Paula Newberg, 'Judging the State' P- 72.

in question the proclamation of martial law or extra constitutional emergency or any order made in pursuance of the proclamation.

During first three martial law regimes of 1958, 1969 and 1977, military courts of criminal jurisdiction were set up. These courts were parallel to the existing courts in the country. The military courts were empowered to punish any person for the violation of martial law regulations or orders and also for offences under ordinary law. Appeals against any decision or order of the military courts were not allowed to any court including Supreme Court and High Court.

Whenever the Courts reviewed the actions taken by martial law regime or questioned military judgments and occasionally overturned military convictions- that is, they acted like real courts rather than puppet tribunals-the military regimes reacted by restricting the powers of the courts and effectively curbing the independence of the judiciary. In 1969 Lahore High Court ruled in a case that courts could operate without obstruction.<sup>56</sup> General Yahya's martial law government reacted by promulgating the Courts (Removal of Doubts) Order 1969, just to remind the judges the limitations of their powers. In the Nusrat Bhutto's case, the Supreme Court while giving validity to General Zia's martial of 1977 under doctrine of State Necessity retained the power of judicial review. Chief Justice Anwer-ul-Haq held that the superior courts continued to have the power of judicial review to judge the validity of any act or action of martial law authorities, if challenged in the light of the principles underlying the law of necessity. The High Courts tried to establish their right to review regime's actions, though their rulings were creative and careful.<sup>57</sup> The judiciary was cautious while exercising the power of judicial review. Martial law regulations and orders were not generally touched in exercise of judicial review. The judges of High Courts interfered with the sentences of the military courts and detention cases

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<sup>56</sup> Mir Hassan and another V. The State, PLD 1969, Lahore P- 786.

<sup>57</sup> Paula Newberg, 'Judging the State' P- 175.

under martial law regulations, when there was either no evidence or evidence of independent nature was not there.<sup>58</sup>

The judges' optimism proved wrong. General Zia tightened restriction on the superior courts in October 1979, by inserting a new Article 212-A in the constitution.<sup>59</sup> By this amendment the power of judicial review, reserved for the superior courts by the Supreme Court in the judgment of Begum Nusrat Bhutto's case, was completely nullified. The High Courts continued to entertain petition even challenging the validity of the constitutional amendments in the parameter of the Supreme Court judgment in Begum Nusrat Bhutto's case. In May 1980, General Zia further curbed the powers of High Court available under Article 199 of the constitution through Presidential order No.1 of 1980, promulgated on May 27, 1980. This amendment order restricted the "writ jurisdiction" of the High Courts and barred them from making an order relating to the validity or effect of any martial law regulation or any martial law order. The order also prohibited the High Courts from reviewing the judgments or sentences passed by military courts or tribunals. The intriguing aspect of this order was that it removed the High Courts' jurisdiction with retrospective effect.

The Baluchistan High Court declared that the two latest constitutional amendments to Articles 212 and 199 (passed on October 16 1979 and May 27 1980 respectively) were illegal because these amendments failed to pass the test of necessity laid down in the Supreme Court's judgment of Begum Nusrat Bhutto's case.<sup>60</sup> In one stroke, General Zia effectively extinguished judicial powers by promulgating Provisional Constitution Order (PCO) 1981.<sup>61</sup> Judgments against military rule led to confrontation with the military that the courts could not win; the PCO

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<sup>58</sup> Hamid Khan, 'Constitutional and Political History of Pakistan' (2001) P- 622.

<sup>59</sup> Constitutional (Second Amendment) Order 1979, PLD 1979 Central Statutes P- 567.

<sup>60</sup> Suleman V. President Special Military Court. Full text of the judgment is available on PP 96- 120 in Mir Khuda Bakhsh Mari, 'A Judge May Speak'.

<sup>61</sup> CMLA's Order No: 1 of 1981 promulgated on March 24, 1981.

1981 was General Zia's victory proclamation.<sup>62</sup> The PCO put a formal end to the necessity regime as sanctioned by the Supreme Court in Begum Nusrat Bhutto's case.

The military governments, besides depriving the courts from its judicial powers provided by the constitution, caused detrimental changes in the structure of the superior judiciary.

### **8.2.2: Structural Innovation in the Institution of Judiciary under Martial Law Regimes.**

General Zia had imposed third martial law in the country on July 5, 1977. The most extraordinary thing about General Zia's regime was that it appeared to have had the blessings of the Judiciary right from the beginning.<sup>63</sup> General Zia consulted the Chief Justice of Pakistan on almost all important legal issues. He secured the cooperation of the Judiciary by appointing the Chief Justices of the High Courts as acting governors of their respective provinces. General Zia got the certificate of validity of his martial law from the judiciary. He eliminated Zulfikar Ali Bhutto through judicial process. All these favors and concessions could not stop General Zia from undermining the institution of judiciary. General Zia not only restricted the judicial powers of the courts, arbitrarily removed unwanted judges, he also introduced fundamental changes in the judiciary bearing too much detrimental effects on the independence of judiciary even after martial law era.

The structural innovations in the judiciary were made through martial law orders. General Zia was empowered by the Supreme Court in the judgment of Begum Nusrat Bhutto's case to amend the constitution. He exploited this unique authority by making amendments in the constitution whatever he liked. To underline its Islamization program, General Zia's regime organized a new constitutional court, namely the

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<sup>62</sup> Paula Newberg, 'Judging the State' P- 180.

<sup>63</sup> Justice (Retd) Samdani, 'Role of the Judiciary in the Constitutional Crisis of Pakistan' P- 87.

Federal Shariat Court. By creating the Federal Shariat court, General Zia not only showed his lack of confidence in the superior judiciary, he undermined the constitutional position of the Chief Justice of Pakistan also.

General Zia's regime made substantial changes, through Provisional Constitution Order 1981, in the constitutional provisions relating to the Supreme Court and High Courts. A judge of a High Court was made transferable to another High Court for a period of two years without his consent and without consultation with the Chief Justices of the concerned High Courts. In case of his refusal to accept such transfer, the judge will lose his office. This provision was a contradiction of the security of service provided to the judges of the Supreme Court and High Court under Article 209 of the Constitution. Permanent benches of the four High Courts, in addition to their principal seats, were created to be situated at various specified places in the provinces. All these structural changes are detrimental to the independence of the judiciary.

### **8.2.3: Appointment and Removal of the Judges of the Superior Courts under Martial law Regimes:**

Every government in Pakistan whether civilian executive or military dictators, has repeatedly manipulated the system of appointment of judges and made appointments on personal or political consideration. In very few cases of judicial appointments, merit seemed to be adopted. The appointments of the judges in the superior courts under martial law regimes had been more arbitrary and outrageous. The judicial appointment without merit is one of the major factors undermining the independence of the judiciary.

The direct and blatant assault on the independence of judiciary was first made by the first military dictator, General Ayub Khan who started, in gross violation of the procedure provided by the constitution, the

practice of interviewing the judges before appointment to the High Courts.<sup>64</sup> The consultation of the Chief Justice of Pakistan and the Chief Justice of the concerned High Court or their participation in the process of interview were not considered necessary.

Services of the judges of the superior courts are protected under Article 209(7) of the constitution of Pakistan. It is very intriguing that removal of the judges always took place during military governments. No judge of the superior judiciary has ever been removed from office during civilian rule. The military dictators removed unwanted judges of the superior courts sometimes by adopting the constitutional procedure, other times by arbitrary orders. The first two military dictators i.e. General Ayub Khan and General Yahya Khan adopted the constitutional procedure, though it was also questionable. General Zia started the practice of arbitrary removal of the judges of the superior courts and General Musharraf followed the foot prints of General Zia. Some judges of the superior court were removed by military dictators through constitutional procedure while several judges resigned under pressure. More than 80 judges of the superior courts including several Chief Justices were arbitrarily removed under three Provisional Constitution Orders promulgated by military dictators at three different stages.<sup>65</sup>

The military regimes' inroads in the independence of the judiciary were not limited to the arbitrary removal of judges or depriving the courts of its jurisdictions, they manipulated the judges to get favorable decisions from them.

#### **8.2.4: Courts' Manipulation during Martial Law Regimes:**

Maneuvering and manipulation of the judges for getting favorable decisions have been practiced by all successive military governments. The

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<sup>64</sup> Chief Justice (Retd) Nasim Hassan Shah, '*Ahad Saz Munsif*' P- 49. He himself was interviewed and selected by the same board.

<sup>65</sup>Details are available in chapter ii of the thesis.

coup of General Zia was challenged in the Supreme Court by Begum Nusrat Bhutto (wife of Z.A Bhutto). The Supreme Court under Chief Justice Yaqoob Ali Khan entertained the petition and date was fixed for hearing. General Zia removed Justice Yaqoob Ali Khan and appointed Justice Anwer-ul-Haq as Chief Justice of Pakistan. Justice Anwer-ul-Haq granted the legitimacy certificate and empowered General Zia to perform all legislative measures including amending the constitution. The same practice was repeated by General Musharraf in 1999 for getting legitimacy from the court for his coup in October 1999. The Chief Justice of Pakistan along with other five judges of the Supreme Court were arbitrarily removed when the military take over was challenged in the Supreme Court. General Musharraf made second coup in November 2007, this time, against the judiciary to stop the Supreme Court from giving a judgment in the cases challenging his eligibility for the Presidential election. Twelve out of seventeen judges of the Supreme Court were arbitrarily removed. A new supreme court of his choice was reconstituted and got the eligibility verdict from it.

Military dictators abused the judicial process for political persecution. General Zia used court to eliminate his arch rival, Zulfiqar Ali Bhutto. It was through manipulation of judges that he had been able to wrest from the court a death sentence for Z. A. Bhutto.<sup>66</sup> General Zia knew that Justice Mushtaq was aggrieved and held a grudge against Bhutto.<sup>67</sup> He started favoring him. Justice Mushtaq was first appointed as Chief Election Commissioner and later as acting Chief Justice of Lahore High Court. Thus he came in a position where he could get even with Bhutto.<sup>68</sup>

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<sup>66</sup> Anupama, 'Presidential Autocracy in Pakistan' P-153.

<sup>67</sup> Justice Mushtaq was aggrieved because he was not appointed as the Chief Justice of Lahore High Court when Chief Justice Sardar Muhammad Iqbal got retirement in 1976. Justice Mushtaq's hatred against Bhutto was an open secret. Justice Mushtaq was offered, several times, elevation to the Supreme Court but he declined to go the Supreme Court. Once in an interview to a monthly "Moon Digest" published in April 1984, Justice Mushtaq stated that he did not accept the offer of elevation to the Supreme Court because he knew that if he stayed in the High Court, Bhutto would appear before him in some case and he was waiting for that "supreme moment." This Justice was appointed by General Zia as acting Chief Justice of Lahore High Court to do justice with Bhutto.

<sup>68</sup> Hamid Khan, 'Constitutional and Political History of Pakistan' (2001) P- 597.

Bhutto was tried before a full bench of five judges headed by acting Chief Justice Mushtaq. Justice Mushtaq had made the selection of the bench much carefully.<sup>69</sup> Under questionable proceedings, Justice Mushtaq convicted Bhutto and sentenced him to death.<sup>70</sup> The Supreme Court under another annoyed Chief Justice Anwer-ul-Haq rejected Bhutto's appeal and endorsed the decision of Lahore High Court. The Supreme Court upheld the judgment of Lahore High Court by majority opinion of four to three. One of the dissenting judges, Justice Patel admitted in his later life that he remained under heavy pressure while hearing Bhutto's appeal.<sup>71</sup>

In addition to the abuse of the judicial process for political victimization, the military regimes always did interfere in the courts proceedings to get favorable decision even in ordinary cases also. For example in 1980, an ordinary petition was heard by a bench of Sindh High Court and at the end of hearing the court was going to dismiss the petition on the legal ground that the same issue was before the same High Court in a civil suit. Zia's government wanted the court to allow the petition. When the judges of the bench were not willing to oblige the government, adjournment of the hearing of the petition was sought by the petitioner. On the next day the bench of the court was reconstituted for a fresh hearing of the petition. Finally it was allowed.<sup>72</sup>

Apart from manipulation of judges to get favorable decisions in particular cases, army interfered in the judicial proceedings of the courts and tried to influence the decisions of the courts. When they failed to influence the independent judges, then they harassed and intimidated such judges.

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<sup>69</sup> Ibid P-598.

<sup>70</sup> See for details Hamid Khan, 'Constitutional and Political History of Pakistan' Chapter #26; M. Dilawar Mahmood, 'The Judiciary and Politics in Pakistan' Chapter # 5; Syed Afzal Haidar, 'Bhutto Trial' Chapters 10-15 and Victoria Schofield, 'Bhutto Trial and Execution'.

<sup>71</sup> Altaf Gauhar, 'Thoughts After Thoughts' P- 198.

<sup>72</sup> Chief Justice (Retd) Sajjad Ali Shah, 'Law Courts in a Glass House' P- 134.

### **8.2.5: Army's Interference in the Judicial Proceedings and Harassment of Independent Judges:**

The judicial history of Pakistan provides a lot of instances of army's interference in the judicial proceedings of the court through the various phases of the history of Pakistan. Army of Pakistan did interfere in the judicial affairs and successfully influenced the decisions of the courts even during civilian governments, but its interference during military regimes had been so blatant and outrageous that the whole judicial process seemed to be a mockery. For example, in 1977, during General Zia's martial law, in the garb of accountability, Tribunals were constituted consisting of a Judge of High Court and a Brigadier from army to decide the allegations of misconduct against politicians and bureaucracy.<sup>73</sup>

After death of General Zia in August 1988, there was an appeal before the Supreme Court for restoration of the dissolved government of Muhammad Khan Junejo.<sup>74</sup> The Supreme Court, upholding the findings of Lahore High Court that the dissolution of the National Assembly was illegal and unconstitutional, hence void, yet refused to grant the relief of restoration of the Assembly. The then Chief of Army staff General Mirza Aslam Beg claimed in a press conference after his retirement that the Supreme Court did not restore the government of Junejo because he had send a message to the judges of the Supreme Court not to restore the Assembly.<sup>75</sup> The Supreme Court judges did not rebut his claim. Contempt proceedings were initiated against him. General Beg took stand on his claim even before the court that he had told the truth. General Beg was found guilty of contempt of court, but not sentenced for the reason that he had already been reprimanded in court.<sup>76</sup> It was not a surprising revelation

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<sup>73</sup> Justice (Retd) Shamim Hussain Kadri, 'Judges and Politics' PP- 36-8.

<sup>74</sup> Federation of Pakistan V. Hajji Muhammad Saifullah khan, PLD 1989 SC 166.

<sup>75</sup> The NEWS Islamabad, The Nation Lahore and *Nawa-i-Waqt* Lahore dated February 5, 1993.

<sup>76</sup> Chief Justice (Retd) Sajjad Ali Shah, 'Law Courts in a Glass House' P-169.

for the people of Pakistan that General Beg had illegally influenced decision of the court or that he was not punished for contempt of court. The most shocking aspect of this episode for the public was that during the hearing of the contempt proceedings against General Beg, a journalist Shahid Orakzai, was convicted for interrupting the proceedings and sentenced to jail. He refused to apologize, so he was sent to jail to purge him.<sup>77</sup>

In 1985, when the High Court of Baluchistan started giving relief, by granting bail to persons detained under the West Pakistan Maintenance of Public Order Ordinance 1962, General Zia's government was annoyed. Deputy Martial Law Administrator Brigadier Khokar tried to influence and pressurize the court. He phoned to the Chief Justice of the High Court and complained to him that the court was giving release to numerous people detained by the government.<sup>78</sup>

Apart from outrageous and blatant interference in the judicial proceedings of the court, the army government harassed, intimidated and humiliated judges of the superior courts.

Besides the devastating effects of the military regimes on the independence of the judiciary, army did interfere in the judicial affairs even during civilian governments. For example in 1996 Benazir, government could not appoint justice Zahid as the Chief Justice of Sindh High Court due to pressure from the army against his appointment.<sup>79</sup> In 1996 the contempt case and other cases against the Prime Minister, Nawaz Sharif, were adjourned by the court for a week due to intervention of the Chief of Army staff, General Jehangir Kiramat.<sup>80</sup>

On the basis of the foregoing discussion one can say without fear of contradiction that no government in Pakistan, whether military or civilian, wanted an independent judiciary. All successive governments

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<sup>77</sup> Ibid P- 168

<sup>78</sup> Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' P-83.

<sup>79</sup> Chief Justice (Retd) Sajjad Ali Shah, 'Law Courts in a Glass House' P- 268.

<sup>80</sup> S. M. Zafar, '*Adalat mein Siyasat*' P- 77 and Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' P- 236.

intensified the assaults on the independence of the judiciary and degraded the judiciary. Gradually the public lost confidence in the independence and impartiality of the judiciary. The judiciary, once a prestigious institution, has been down graded to such a low level, due to the detrimental measures of the powerful executive that in 2002, the then President of Supreme Court Bar Association, submitted an application to the Supreme Court for withdrawal of a review petition because Pakistan Bar Council and Supreme Court Bar Association both were of the opinion that the Supreme Court was not independent.<sup>81</sup>

A former Chief Justice of Pakistan feels no hesitation in saying that in Pakistan the judiciary has always remained under the pressure of the executive.<sup>82</sup> Another Chief Justice Ajmal Mian says that none of the governments in Pakistan during his tenure wanted an independent judiciary. They preferred pliable judges over independent judges.<sup>83</sup> The judiciary has never been the first or the second priority for the government but rather the last.<sup>84</sup> The reason behind this is that justice has never been a priority of any government in Pakistan.<sup>85</sup>

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<sup>81</sup> "Dawn" November 7, 2002

<sup>82</sup> Chief Justice (Retd) Sajjad Ali Shah, 'Law Courts in a Glass House', P 686.

<sup>83</sup> Chief Justice (Retd) Ajmal Mian, 'A Judge Speaks Out' P- 347.

<sup>84</sup> Chief Justice (Retd) Saeeduzzman Siddiqui, 'The NEWS' dated July 27, 2007, under title, "For Justice – Just Think".

<sup>85</sup> Justice (Retd) Nasir Aslam Zahid, 'The NEWS' dated July 25, 2007, "For Justice – Just Think".

## **Chapter IX: CONCLUSION**

No country can realize the ideal of stable and prosperous polity without an efficient and independent judiciary. The role of judiciary in Pakistan in up holding the Constitution and rule of law has not been impressive. Consequently there is not only frequent violation of the constitution but also a general decline in the integrity and performance of the judiciary, which ultimately affect every segment of the society.

The Objectives Resolution of 1949 that has been made a substantive part of the Constitution of Pakistan by article 2-A, fully secures the independence of the judiciary. But the independence of the judiciary has been a myth rather than a reality. Successive governments and members of the judiciary have caused incalculable harm to the institution. The role of the judiciary has at times been relegated from that of an organ of the state to that of a department of government. It has been the object of manipulation by the executive and is perceived by the people as docile.<sup>1</sup> Hina Jilani, while discussing the judicial system of Pakistan, has come to the conclusion that “failure of the judicial system to dispense justice has eroded respect for the rule of law. This has led to a tendency in the general public to circumvent the law. The perception that the judicial system does not work has become common, and is used to justify excess by the executive branch of the government.”<sup>2</sup>

The public confidence in the independence of the judiciary is perceived by many to be in dangerous state of decline, so much so that once the President of the Supreme Court Bar Association showed his lack of confidence even in the Supreme Court of Pakistan.<sup>3</sup>

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<sup>1</sup> Hamid Khan, “Constitutional and Political History of Pakistan”. (2001) P- 876.

<sup>2</sup> Hina Jilani: “Human Rights and Democratic Development in Pakistan.” P-156.

<sup>3</sup> In an unprecedented move, the then President of Supreme Court Bar Association, Hamid Khan, appeared before the apex court of Pakistan (Supreme Court) in the review petition relating to the appointment of Judges in the Supreme Court and filed a “Statement at Bar”. This was filed on behalf of the Supreme Court Bar Association and also represented the views of other bar associations, including the Pakistan Bar Council. The President of the Bar submitted that they had no confidence in the independence of the Supreme Court in its present composition and therefore the association refused to argue the review petition before the court. “Dawn” November 7, 2002

The foregoing study identifies the various incidents and factors which undermined the independence of the judiciary in Pakistan. The factors which are detrimental to the independence of the judiciary in Pakistan have been critically discussed and examined. For the purpose of this study the factors affecting the independence of the judiciary have been classified into four groups, namely structural factors affecting the independence of the judiciary; judicial commitment to independence of the judiciary; role of the lawyers in protecting and preserving the independence of judiciary; and the impact of the executive on the independence of judiciary.

Structural factor includes the structure of the judiciary, the relevant provisions of the Constitution, the procedure of the judges' appointment as well as their removal, legal protection and immunity available to judges and the process of judicial accountability in Pakistan. Several provisions of the Constitution were found in clash with the principle "fully securing the independence of Judiciary" laid down in the Objectives Resolution. Some provisions of the Constitution dealing with the judiciary contradict each other.

Under Article 200(1) of the Constitution a judge of a High Court may be transferred to another High Court by the President of Pakistan without the consent of the concerned judge and without consultation with the Chief Justice of Pakistan and the Chief Justices of the concerned High Courts, provided that the transfer is for a period not exceeding two years. Clause 4, of the same Article provides that a judge of a High Court who does not accept transfer to another High Court under clause (I) shall be deemed to have retired from his office. The power of the President under Article 200 (1) of the Constitution to transfer a judge of a High Court to another High Court without his consent is detrimental to the independence of the judiciary whereas clause (4) of Article 200 is in direct conflict with Article 209 (7) which provides constitutional protection to the services of the judges of the Supreme Court and High Courts. There is also a conflict

between Article 203C (5) and Article 209(7) of the Constitution. Clause (5) of Article 203C provides that if a judge of a High Court is appointed as a judge of the Federal Shariat Court and he refuses to accept such appointment, he shall be deemed to have retired from the High Court.

Under clause (4B) of Article 203-C<sup>4</sup> the President may at any time, modify the term of appointment of a judge of the Federal Shariat Court or assign any other office or may require a judge of the Federal Shariat Court to perform such other functions as the President may deem fit. In the present context i.e. clause (4B) of this Article judge includes Chief Justice of the Federal Shariat Court. Article 203C provides sole and tremendous powers to the President. Provisions under clause 4B of the said Article are the most outrageous and most detrimental to the independence of judiciary. Such sweeping powers under article 203C make a mockery of the independence of the Judiciary.

Ever since its establishment in 1980, the Federal Shariat Court has been the subject of criticism and controversy in the society. It was created as an Islamization measure by the Military Regime of General Zia<sup>5</sup> and subsequently protected under the controversial 8<sup>th</sup> Amendment.<sup>6</sup> A judge of the Federal Shariat Court is appointed for a period of three years extendable by the President and may be removed any time by the President without showing any reason.<sup>7</sup> It is very strange that the service of a judge of the Federal Shariat Court seems to be the most unsecured service in Pakistan. Every judge of the Federal Shariat Court remains under the pressure of the executive.

The system of appointment of judges to the superior judiciary is anything but not transparent. It has been manipulated repeatedly to bring about appointments on political considerations or due to favoritism or nepotism. The history of the judicial appointment in Pakistan shows that

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<sup>4</sup> Clause 4B of Article 203C was inserted by General Zia in 1985 through President's Order No; 14 of 1985.

<sup>5</sup> The Constitution (Amendment) Order 1980.

<sup>6</sup> The Constitution (Amendment) Act 1985

<sup>7</sup> The Constitution of Pakistan 1973, Article 203-C.

it is rare that merit is taken into consideration. The appointment of the judges to the superior courts without merit is one of the major factors caused decline in the standard and independence of the judiciary. Neither the present Constitutional provisions under Articles 177(1) and 193(1) nor the verdicts of the Supreme Court are strong enough to check the executive from arbitrary exercise of the powers of appointment of judges in the superior courts.

Article 180 provides for the appointment of Acting Chief Justice of Pakistan. Whenever the office of the Chief Justice of Pakistan becomes vacant, the President is to appoint “the most senior of the Judges of the Supreme Court to act as Chief Justice of Pakistan”. It is amazing that weightage has been given to seniority for appointment of Acting Chief Justice of Pakistan but not for permanent Chief Justice of Pakistan under Article 177. It is again interesting that no seniority condition is laid down for appointment of acting Chief Justice of a High Court under Article 196 of the Constitution. It had been practiced in the past to appoint acting Chief Justices for a long time, particularly during General Zia’s martial law. The object was to keep the acting Chief Justice under constant pressure and fear of removal from the office of the Chief Justice. In this way the executive utilized the services of acting Chief Justices to achieve its ulterior motives. This practice is detrimental to the independence of the judiciary.

Articles 181 and 182 of the Constitution provide for the appointment of acting judges and ad hoc judges in the Supreme Court respectively, whereas additional judges in the High Courts are appointed under Article 197. The language of these Articles indicates that they provide for the appointment of judges to meet the temporary situation. Unfortunately the letter and spirit of these Constitutional provisions were not correctly followed or the same were, for the past many years, consciously misused or misapplied and permanent vacancies were usually filled by acting/ad hoc/additional appointments who continued for years

as temporary judges. Article 197 of the Constitution is more detrimental to the independence of the judiciary and more misapplied and misused than Articles 181 and 182. All the governments treated Article 197 as the gateway through which every judge of a High Court has to pass before being made permanent. Almost all judges of the High Court, before they were made permanent, had to get a number of extensions for short terms. What happened in practice is that the true purpose of Article 197 has never been carried into effect. The practice of appointment of temporary judges (acting/ad hoc judges in Supreme Court and additional judges in High Court) are destructive to the image and independence of the judiciary.

Another matter needing serious attention in respect of the independence of judiciary is the disparity between the retirement ages of the judges of the Supreme Court and judges of the High Courts. According to Article 179(1) of the Constitution, the retirement age for a judge of the Supreme Court is sixty five years whereas for a judge of High Courts it is sixty two years under Article 195 (1) of the Constitution. It goes without saying that a judge of a High Court nearing his retirement age naturally may wish to be appointed as a judge of the Supreme Court because apart from obvious honor and dignity of such appointment, he can then get the period of his service and official facilities extended for another three years. Availability of such an opportunity can possibly make such a judge pray to this temptation and to the vile allurements of the political executive. One cannot understand the logic and rationale behind this disparity between the retirement ages of the judges of the Supreme Court and High Courts. However, this disparity between the retirement ages is not good for independence of the judiciary.

Article 209 provides the forum and the procedure for the removal of a judge of the Superior Courts. The provisions of Article 209 of the constitution are exhaustive and otherwise self-explanatory except in one respect i.e. a situation where the President may direct the Council to

inquire into the capacity or conduct of the Chief Justice of Pakistan. A very serious question arises whether the Chief Justice of Pakistan is to remain a member and presiding officer of the Council even when the Council is conducting an inquiry into his own capacity or conduct or he should be replaced. The Constitution is silent in this respect.

One comes to the conclusion that the first danger to the constitutionally guaranteed independence of the Judiciary is from within the Constitution itself. Some provisions of the Constitution are in conflict with each other and others are detrimental to the independence of the judiciary. The constitutional provisions dealing with appointment of the judges have been misused or misapplied by the power hungry executive and consequently the independence of judiciary has been undermined. The Constitution of Pakistan has been correctly termed “an internally contradictory Constitutional instrument”.<sup>8</sup> What kind of justice can emerge from a constitutional system that embodies such structural weaknesses?

It is a fundamental principle that no judiciary can function effectively unless their tenures and conditions of services, their salaries and privileges are guaranteed either by constitution or statute. To check unauthorized exercise of powers effectively judges must be beyond the reach of those who will transfer or remove them because of their decision. Similarly judges must have legal immunity for their judicial action being called in question by an authority other than a judicial authority. The judges in Pakistan enjoy the legal immunity for their judicial action under ordinary law whereas the services and privileges of judges of the superior judiciary are protected by constitutional provisions.<sup>9</sup>

Judicial independence and judicial accountability are indispensable for each other. But, unfortunately, both have been badly tarnished. One can not find it easy to say which one should be improved first; the judicial

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<sup>8</sup> Paula R. Newberg, ‘Judging the State’ p-27.

<sup>9</sup> The Judicial Officers Protection Act, 1850; Section 77 of Pakistan Penal Code; Section 135 of the Civil Procedure Code; the Contempt of Court Act 1976 and Articles 204 & 209 (7) of the Constitution.

independence or judicial accountability. Both are of equal importance. So far as judicial accountability is concerned, no proper attention has been given in Pakistan. The Supreme Judicial Council has not even handedly been utilized. It remained dormant and not effective. The wisdom behind the creation of the Supreme Judicial Council was to regulate and discipline the judges of the superior courts by the judiciary itself, but Supreme Judicial Council proved to be a failed institution so far as its function of judicial accountability is concerned. It has rather, in the words of an eminent lawyer, degenerated into a judges' club meant primarily to protect rather than punish judges for their wrong doings.<sup>10</sup>

Public accountability of the judiciary though recognized by all civilized nations in modern world is like a forbidden tree in Pakistan. Public criticism even of the judgments is not allowed. The ages old law of contempt of court is always there to suppress the voice which tries to expose the weaknesses in the administration of justice. The law of contempt in Pakistan is always subjectively and selectively applied. More often than not, by the ruthless enforcement of the law of contempt the judges manage to successfully suppress the truth, shield the evil, allow the act complained of to go unpunished and instead punish the complainant himself.

Independence of judiciary, however, cannot depend solely on the structure of the government and the judiciary's formal role within it. It also depends on the judges themselves. Structural independence and behavioral independence can support each other and in a country seeking to overcome legalized abuse of the executive authority, it is mars to see judicial independence "fully secured" if one does not foster both. Behavioral independence resides in a judge as a person. Is the judge independent – that is, not just dispassionate and free from bias, but willing to take difficult positions to resist political or any external pressure, to reject any temptation of corruption and to make truly

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<sup>10</sup> Hamid Khan 'The Judicial Organ' p- 189.

independent decisions? The judiciary in Pakistan, in fact, is not based on sound foundation of structural independence and it miserably lacks behavioral independence also.

At the times of constitutional crisis, bold and independent decisions of the courts can help to shape the destiny of a nation and set the law on the right course. Going through constitutional history of Pakistan, the role of the superior judiciary at the testing times of the constitutional crisis in Pakistan has been very disappointing and detrimental to the development of political institutions based on the universal principles of democracy and popular sovereignty. The judiciary has consistently compromised on its own powers and independence. A consensus appears to be among analysts that judges of the superior courts in Pakistan, save few exceptions, could not resist external pressure, particularly of executive, and always judged over constitutional questions to appease the government of the day, at the cost of the fundamental rights of the citizens of Pakistan and surrendering the political sovereignty of the people of Pakistan.

The role of the individual judges in achieving and preserving the independence of judiciary can hardly be overemphasized. On the other hand, a judge's adverse role is more injurious to the judicial independence than any other factor. A former Indian judge correctly says "the functioning of institutions and the conduct of the individual judges is the sine quo non for independence of the judiciary. The damage caused by the institution, either by its decision----- or by the conduct of the judges is far more injurious to the independence of judiciary than the external assaults".<sup>11</sup>

History tells us that great institutions have sometimes been damaged by internal forces proven to violate established code and norms of behavior. The inevitable effect is that they erode the institution from

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<sup>11</sup> Justice K. N. Singh quoted by Phiroza Anklesaria 'Independence of the Judiciary' AIR 1991, Journal P-97.

within and defile its image. The same thing happened with the judiciary of Pakistan. The majority of the judges of the superior courts in Pakistan, except on one occasion (i.e. the judges' resistance to PCO 2007), instead of protecting the image and integrity of the judiciary from the onslaught of the external factors, they facilitated the external factors in trespassing the independence of judiciary.

Bench and bar are so closely attached with and interdependent on each other, that one cannot survive without the entity of the other. The strength of the bench is the ultimate success of the bar and vice versa. Similarly the degeneration of one will surely cause the down fall of the other. Lawyers are expected to protect and defend judiciary from external interference and for sustainable independence of judiciary it is also necessary for bar to watch the performance and conduct of the judges. If any judicial officer's behavior is detrimental to the dignity of judiciary, the bar is to indicate censure and disapproval, through bar resolutions. The bar's role as a check and a watch-dog can improve the judicial system and make things go better, but unfortunately this role of the bar has grown very weak. The bar's failure in performing its duty as a watch-dog over the judicial officers is being admitted by the lawyers.<sup>12</sup> The major reason behind this weakness of the bar seems to be the impact of the prevailing corrupt culture in Pakistan.<sup>13</sup> Judges and lawyers both are involved in corrupt practices. Consequently lawyers cannot check the misconduct on the part of the judges.

The lawyers' role to protest and resist the forces detrimental to the independence of judiciary carries a very pivotal importance for judicial

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<sup>12</sup> Muhammad Ikram Chaudhry, 'Corruption in the Judicial System and its Eradication with Special Reference to Police and other Law Enforcing Agencies in Pakistan' PLJ 1996, Magazine P- 18.

<sup>13</sup> The latest Global Corruption Barometer for year 2007, released by the Berlin-based corruption watchdog, Transparency International (TI), places Pakistan at seventh place from bottom on a list of 60 countries ranked on the basis of corruption. According to a survey conducted by Transparency International, 55% people of Pakistan believe that judges are corrupt. See chapter Regional Highlights Asia – 'Global Corruption Report 2007' at [www.transparency.org/news\\_room/in\\_focus/2007](http://www.transparency.org/news_room/in_focus/2007) visited on October 27, 2007.

independence. Lawyers' this role overshadows and outweighs all other assistances or services rendered by the lawyers to the court. Pakistan judicial history, for the purpose of discussing the lawyers' role in defending judicial independence from external assault, may be divided into three phases, that is, phase first from 1947 to 1977; second phase from 1977 to March 9, 2007; and third phase after March 9, 2007 till December 2007.

The efforts of the legal fraternity in the first phase, covering thirty years, to protect and preserve the independence of judiciary had been ignorable and disappointing. The lawyers during this period of Pakistan constitutional history bitterly failed in playing its due role and performing its professional duty to protest and resist the forces or actions of such forces that adversely affected the independence of the judiciary. During this crucial period of the constitutional history of Pakistan, no noteworthy collective effort for independence of judiciary, save some individual voices, on the part of the legal community can be traced out.

The lawyers' community became active and started playing prominent role in the second phase of its history, that is, after General Zia's Martial Law in 1977. They started offering serious resistance to the martial law regime and demanding restoration of the Constitution, restoration of the powers of the judiciary, holding of general election and lifting of martial law. During this second phase, the lawyers as well as their associations gained strength and confidence in resisting external interference in the judiciary. It is true that their role in the second phase won appreciation and their leadership became vigilant and responsive to the actions of the executive which were detrimental to the independence of judiciary but they could not raise themselves above the level of the political affiliation.

The third phase of the lawyers' role started from March 9 2007, with the failed attempt of the arbitrary removal of Chief Justice Iftikhar Muhammad Chaudhry by General Pervez Musharraf. The Chief Justice's

refusal unleashed an unprecedented movement by Pakistani Lawyers in support of Justice Iftikhar with slogans of ‘independence of the Judiciary and rule of law’. The Lawyers’ bodies organized protests and processions through out Pakistan. The Lawyers’ movement, fully supported by Pakistani media, also generated public protests. Civil society organizations actively participated in the movement. Some opposition political parties extended their support. This was the first time in Pakistan’s history that lawyers had dropped their conflicting political affiliations and forged an unprecedented professional unity to fight for independence of judiciary, rule of law and restoration of Chief Justice Iftikhar. The role of the legal fraternity in defending judicial independence in the first phase (1947 to 1977) had been very disappointing; in the second phase (1977 to March 2007) it was satisfactory and overall commendable; and in third phase, i.e. after March 9 2007, it has become revolutionary.

The impact of the executive on the judicial independence in Pakistan may broadly be divided into two parts, namely, the political executive and military regimes. One element remained common in all governments whether civil governments or military governments, that none of the governments in Pakistan wanted an independent judiciary. They preferred pliable judges over independent judges. The object of both kinds of executive, that is, civil as well as military executive, remained the same, that is, to keep judiciary under their thumbs and to make it subservient for perpetuation of executive’s powers. Every government in Pakistan had not missed any opportunity of degrading the court, making inroads in the independence of the judiciary and abusing the judicial process for achieving their ulterior and political motives. The difference between civil executive and military executive appeared to be that of the extent of interference in the affairs of the judiciary and the method of the interference.

The executive always tried to keep the judges under pressure to serve the ulterior motives of the executive. When some judges showed resistance to the executive's pressure and dared to apply the law, they were humiliated by the government. If the judges, instead of humiliation and harassment, continued to administer justice, then various legal and illegal actions were taken against them.

One of the tragic aspects of the judicial history in Pakistan is that judicial processes have been used by those in power to persecute political opponents under the garb of prosecution. Almost all governments created cases against the political opponents, either to stop their opposing voices or to keep them under pressure. The political victimization through judicial process, besides of other adverse effects on the political culture in Pakistan, resulted in the loss of public faith in the judiciary. The willingness of the judiciary to strengthen the hands of the government of the day for political victimization lowered the dignity and status of the judiciary in the eyes of public.

### **9.1: Suggestions for Improving Independence of Judiciary in Pakistan:**

The independence of the judiciary has two aspects, that is, *de jure* independence which can be deduced from legal documents; and *de facto* independence which means the degree of independence that the courts factually enjoy. To get *de jure* independence for judiciary in Pakistan amendments in the Constitution of Pakistan are suggested.

Firstly, to achieve the independence of the judiciary and to have efficient judges of integrity, the whole system of the judicial appointment needs overhauling. The system of appointment of judges is of paramount importance to ensure independence of judiciary because it is primarily the human being that makes or mars the institution. The judicial appointment must be made more competitive and more transparent. The executive's power to appoint judges to the superior courts must be limited. The

present system of judicial appointment does not provide any role to the bar. The effectiveness and importance of the bar in preserving and defending the independence of the judiciary must be recognized and it must be given an appropriate role. The prevailing system and procedure of judicial appointments need drastic changes. A Judicial Appointment Commission is recommended to replace the existing system of judicial appointments.

The Commission should consist of the Chief Justice of Pakistan, two next senior judges of the Supreme Court, the Chief Justices of the four High Courts, three/four retired judges of the Supreme Court to be appointed by the Parliament and two nominees of the bar to be elected by the advocates. The Commission must have exclusive and final authority to recommend appointment of judges including the Chief Justices of the superior courts. It should make criteria for the selection of judges of the superior courts. It should invite applications from the interested candidates to be appointed as judges of the superior courts. The Chief Justice of Pakistan and the Chief Justices of the High Courts must be appointed in accordance with recommendation of the Commission. The Commission should recommend the Chief Justices out of the three most senior judges of their respective courts. The recommendation of the Commission for appointments of the judges including the Chief Justices must be binding on the executive. The executive's function should be limited only to issuing the appointment order. The parliament's role should be only to appoint the retired judges of the Supreme Court as members of the Commission. Judges of the High Courts be selected from the bar as well as from the lower judiciary. The strength of both groups in the superior judiciary should be specified with more seats allocated to bar.

The process of the selection of the judges of the High Courts must be open. The names of the persons to be appointed as judges of the High

Courts must be advertised for public scrutiny. Public censure is good and helpful in selecting judges of integrity.

Secondly, Articles 180 and 196 dealing with the appointment of acting Chief Justice of Pakistan and acting Chief Justice of a High Court respectively must be amended as per the judgment of the Supreme Court in the Judges' case.<sup>14</sup> Appointment of acting Chief Justices must be a stop-gape arrangement for a short period not more than one month. Furthermore Article 196 must be brought at par with Article 180. Article 180 provides that the senior most judge of the Supreme Court shall be appointed as an acting Chief Justice of Pakistan. So it is recommended that only the senior most judge of a High Court must be appointed as an acting Chief Justice of that High Court

Thirdly, Articles 181 and 182 of the Constitution provide for the appointment of acting judges and ad hoc judges in the Supreme Court respectively, whereas additional judges in the High Courts are appointed under Article 197. The Supreme Court has ruled that appointment of ad hoc judges against permanent vacancies violates the Constitution.<sup>15</sup> These Articles must be amended and permanent vacancies of the judges in the superior courts must be filled with permanent appointment within a specified period. Temporary appointment of judges against permanent vacancies must not be allowed.

Fourthly, disparity between the retirement ages of the Supreme Court Judges and the High Court Judges must be removed. Article 195(1) of the Constitution must be amended and the retirement age of a judge of a High Court must be increased up to 65 years to bring it at par with the retirement age of a judge of the Supreme Court.

Fifthly, Article 200 must be amended not to allow transfer of a judge of a High Court to another High Court without consent of the concerned judge and the Chief Justices of the concerned High Courts.

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<sup>14</sup> Al-Jehad Trust Vs Federation of Pakistan, PLD 1996, SC. P-324.

<sup>15</sup> Ibid

Sixthly, the very rationale behind the establishment of the Federal Shariat Court and its utility are questionable. This Court merely duplicates the functions of the existing superior courts and also operates as a check on the sovereignty of Parliament. The composition of the Court, particularly the mode of appointment of its judges and the insecurity of their tenure are detrimental to judicial independence. This Court does not fully meet the criterion prescribed for the independence of the judiciary, hence, is not immune to pressure and influence from the executive. Its sole function i.e. to examine a law whether it is in conformity with the injunctions of Islam may be performed by the High Court. So the Federal Shariat Court must be abolished.

De jure independence of the judiciary without de facto independence is like a beautiful flower without fragrance. For de facto independence of the judiciary the following factors are essential:

- The political parties should commit not to interfere in the judicial affairs and should be prepared to resist any encroachment upon independence of the judiciary.
- A vigilant and determined Bar is indispensable for preserving judicial independence.
- The people of Pakistan have to play a major role in protecting independence of the judiciary. Public opinion must be sensitive and reactive to any interference in the judicial affairs. The political parties, civil society organizations, bar associations, press and media can effectively and easily mould public opinion in this regard.
- Lastly, independence of judiciary cannot depend solely on the structure of the government and the judiciary's formal role within it. It depends on the judges' character also. Judges should develop judiciary as an institution. They must collectively as well as individually resist any external interference in the judicial affairs.

When we speak of judicial independence, the question of judicial accountability comes unbidden, for they are interdependent. The Chief justice of Malaysia has correctly said that an unaccountable judge would be free to disregard the ends that independence is supposed to serve.<sup>16</sup> However judicial accountability must be developed, consistent with the principles of judicial independence and integrity. The purpose of the judicial accountability must be to advance the cause of justice. Consensus is found among the jurists that competent and independent judiciary cannot be preserved without effective and constant judicial accountability both legal and public accountability. In fact, Pakistan badly needs both judicial independence as well as judicial accountability.

Unlike other civil services of Pakistan, judicial accountability is provided with one option, of course very extreme option, that is, removal from services under a procedure provided by Article 209 of the Constitution on grounds of proved misconduct or incapacity. Such removal from office may be for gross misconduct and should not be always resorted to, except in extreme cases. Judges do indulge in many kinds of misconduct which may require serious notice and even punishment, falling short of removal from office. But in the system of judicial accountability applied in Pakistan, no other method of check or censure is available except removal from service. Due to non-existent of minor punishments in the judicial accountability for minor misconduct or small wrongs the commission of some acts by the judges of the Superior Courts not befitting them, go un-noticed and unchecked. Every big evil is the result of small evil. Law for efficiency and discipline of judges should be enacted on the pattern of the Civil Services Act 1973. Only the Supreme Judicial Council should be empowered to conduct inquiries and take disciplinary actions against judges. Rules and procedure of the Council must be amended. The proceedings of the Council must be open

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<sup>16</sup> Justice Tun Mohammad Draidin Abdullah, Chief Justice of Malaysia, 'Welcome Address' to the Commonwealth Lawyers' Association Workshop on 'Judicial Accountability' held in April 2002, available in "Judges and Judicial Accountability" edited by Cyrus Das and K Chandra.

for media and public. Every citizen of Pakistan must have a right to file in the Council a bona fide complaint against any judge and the Council must be bound to entertain such complaint.

As the object of the law of contempt is to preserve and enhance respect for courts, it is essential for judges to change rules laid down by them which have become repugnant to the conscience of modern society. The law of contempt must be liberalized giving more place for public accountability and be tolerant to positive public criticism of the administration of justice. The basic concept and very definition of the contempt of court should be changed. It should not be law only for protection of judges but it should be for the enhancement of the dignity, prestige, integrity and independence of the judiciary.

Though the judicial history of Pakistan is not impressive, but the judges' resistance to PCO 2007 and the following movement of the Bar and civil society for independence of judiciary and rule of law show the Pakistani nation's commitment to these noble objectives. The political parties must join hands with the lawyers and civil society to "fully secure" judicial independence as envisaged by the Objectives Resolution 1949. If the current movement of the lawyers for independence of the judiciary and rule of law is succeeded, then, consequently, we will be able to have a new Pakistan with true democracy, rule of law and good governance. Otherwise the future of the nation may be uncertain.

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