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Constitutional Development in Pakistan Some Significant Judgments of Supreme Court of Pakistan

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Abstract

Pakistan has faced multiple problems in its early days regarding framing of constitution. Due to death of Qaid-e-Azam, Liaqat Ali Khan's assassination, abrogation of first constituent assembly, legal interpretation of powers of Governor General. Then imposition of martial laws and instability of elected governments due to army intervention time and again, till 2009, when supreme court has declared every act abrogating the constitution as illegal and unlawful and also nipped the evil in bud by stopping the gateway to martial law in its landmark judgments. These steps are discussed in this writing to highlight the core issue of instability of the Constitution in Pakistan.

Keywords: Constitution, Martial law, Supreme court, Army intervention, Emergency

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1. The Independence in 1947

Pakistan came into being on August 14, 1947 and adopted the Indian Independence Act, 1935 as its constitution. This act, drafted by the colonial master Britain, functioned as Pakistan's constitution at the time and provided for a strong central government, a governor-general with unreviewable powers, and very limited representation which continued feudal-like politics.

2. First Phase-1954

On October 24, 1954, such vast powers resulted in dissolution of the first constitutional assembly headed by Moulvi Tameezuddin Khan. The council of ministers was reconstituted with the task to make constitution for the Country. It is awful fact of the history that the first constitutional assembly has worked for day and night for upto seven years and the draft was almost ready to be placed before the Governor General and at this eve Governor General has dissolved the assembly because new proposed constitutional draft has diminished the powers of the Governor General office. Moulvi Tameezuddin Khan has challenged the abrogation of the constitutional Assembly and reconstitution of council of ministers by the Governor General, before the Sindh

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Chief Court at Karachi. The Sindh Chief court has allowed the petition under Section 223-A of the Government of India Act, 1935, filed by the president of first constitutional assembly in the case reported as PLD 1955 Sindh 96 (*Moulvi Tameezuddin Khan v/s Federation of Pakistan*)

The said order of the Sindh Chief Court was challenged before Federal Court where the order of Sindh Chief Court was set aside with majority of 4:1 ratio by Justice Muhammad Munir, the then Chief Justice of Federal Court, the case is reported as (PLD 1955 FC 240 *Federation of Pakistan v/s Moulvi Tameezuddin Khan*). The decision of Federal Court was mainly based on the following points:

- Assent of Governor General was necessary for all laws passed by the Assembly, which was not obtained.
- Section 223-A Government of India Act, 1935 was not a valid law as it did not get assent of Governor General, hence petition under Section 223-A was illegal.
- The Sindh Chief Court has no jurisdiction to entertain the petition as the Section 223-A per se is illegal, wherefrom the Sindh Chief Court assumes jurisdiction.
- The constitution Assembly has no sovereignty and it cannot go beyond the boundaries.

This decision has far reaching effects upon the constitutional history of Pakistan. It created a political crisis in the country and legal problems also raised their head as decision of Federal Court declared that all the 46 Acts passed by the Assembly were null void ab initio because these Acts has not got assent of Governor General. Thus the country has fallen into a legal vacuum.

In such situation, after six days of the judgment in Moulvi Tamizuddin Khan case, the Governor General has promulgated Emergency Ordinance, 1955 regarding

- Framing of Constitution of Pakistan;
- Make provisions to constitute the province of West Pakistan;
- Validation of Laws passed by the Constituent Assembly and had not received assent of the Governor General;
- Authenticate the Central Budget;
- Name of East Bengal changed as East Pakistan.

The emergency powers of the Governor General were challenged in a number of petitions. One of the most popular cases was *Usif Patel v/s The Crown* (PLD 1955 FC 387) wherein it was challenged that the power to make provisions to the constitution of the country could not be exercised by the Governor General by means of an ordinance. The Federal Court, headed by Chief Justice Muhammad Muneer has held that emergency powers of the Governor General are ultra vires and powers to make provisions to the constitution of the country was not conferred by the law on anybody except the Constituent Assembly whose continuing legal status was recognized. The Governors of the Provinces were empowered, by the Governor General, to promulgate ordinance under Section 92-A of the Government of India Act, 1935. The Governor of Sindh Province has promulgated The Sindh Control of Gundas Act, 1952. One Usif Patel was arrested by the Deputy Commissioner Larkana and detained under the said Act, 1952. The detention was challenged in the Federal Court by Usif Patel. The court has held that powers of Governor General were ceased on 31.3.1948 by virtue of Indian Independence Act, 1947; therefore, promulgation of Sindh Gundas Control Act, 1952 was illegal and having no legal consequences under the law and having no legal and lawful effect ab initio.

Now in such situation the system was collapsed as there is no law to run the state and there is no authority to promulgate the laws, hence the Governor General has made a reference to the Chief Court to guide in such situation and following queries were raised in the reference:¹

- What are powers and responsibilities of Governor General?
- Federal Court has held in Usif Patel Case that laws listed in the Emergency Powers Ordinance cannot be validated nor be given retrospective effect and there is no legislature body to validate the laws now in such

¹ PLD 1955 FC 522 (Reference of H.E. Governor General).

situation is there any provision in the constitution to authorize the Governor General to validate the laws and invalidate the others until the question of their validation is determined by the new Constituent Assembly/Convention?

- Whether Constituent Assembly was validly dissolved?
- Whether constituent Convention proposed to be set up will be competent to exercise the powers conferred upon the Constituent Assembly?

The reference (PLD 1955 FC 435), was replied by the Federal Court that due to civil and state of necessity, all the acts and laws are to be validated till Constituent Assembly finalize these laws and present the same for assent before the Governor General. Therefore, it is said that necessity knows no laws or necessity makes lawful which otherwise is unlawful.

Another important case was Ali Ahmed Shah's case reported as (PLD 1955 FC 522) wherein doctrine of state necessity was applied by the Federal Court that though the judgment of Moulvi Tameezuddin Khan has invalidated all those acts including the Privy Council (Abolition of Jurisdiction) Act, 1950 and Constitution Assembly for Pakistan (Increase and Redistribution of Seats) Act, 1949, even though the same are validated temporarily and retrospectively by virtue of reply of the Reference of Governor General, by the Federal Court, as discussed above.

The second Constituent Assembly sought main guidance from the work already done by the First Constituent Assembly therefore, there has no need to set up special committees or sub committees for deep discussion or elaboration of the framing of the constitutional draft. The objective Resolution was included as preamble of the constitution. It consisted of 245 Articles and overall thirteen parts. Out of which many articles were contested by the opposition party specially Awami League (East Pakistan dominated party). In the final form only 234 Articles were included in 13 parts

The new constituent Assembly has passed the 1956 Constitution for the Country being first Constitution of Pakistan after a struggle of more than nine years since independence in 1947.² The new constitution was outrightly condemned by Awami League and some Hindus in East Pakistan and demanded it to be done away with mainly on demand of powers to the province of East Pakistan. So severe agitations were launched in East Pakistan in this connection which has deep effects on the history of Pakistan opposing strong national governments. Eventually by adoption of first constitution, 1956 the Government of India Act, 1935 was laid to rest on February 29, 1956.

Main features of 1956 Constitution

- It was a written constitution.
- It fulfills all requirements of federation.
- It provides for distribution of powers between center and federating units so also judiciary.
- It allowed decentralization process.
- The 1956 constitution named the country as Islamic Republic of Pakistan.
- It included provisions regarding Fundamental Rights, though there was no such provision in the Government of India Act, 1935.
- Directives Principles of State Policy were included in it.
- It introduced Parliamentary Form of Government though there were a few people who were against it.
- Federal Legislature was unicameral (Single House) unlike Federal constitution having bicameral system.
- Powers of president were subject to advice of Cabinet, i.e., appointments of Chief Justice and judges of Supreme Court and High Courts, Governors of the Provinces, Attorney General and Principal Military Officers etc.

² H. Khan. (2017). *Constitutional and Political History of Pakistan*. Oxford University Press, Karachi.

- Powers to be supreme Command of Armed forces were vested in the President.
- He would assent the bills passed by Assembly.
- Islamic provisions were inserted in the constitution, 1956.
- Emergency provisions (Articles 191-196).
- Urdu and Bangali were declared official languages of the Country.

3. Second Phase-1958

Constitution 1956 was passed by the constituent assembly but unfortunately the Constitution, 1956 was annulled in 1958 only after two years of its life. The central legislature was dissolved as the parliamentary system of democracy has failed. It also resulted in dissolution of Provincial Assemblies. Martial law was imposed and chief of Army Muhammad Ayub Khan took the office of Chief Martial Law Administrator (CMLA) and became head of the state and then president. Sikandar Mirza has to leave the office of president as he was sent to London by force.

At this juncture the promulgation of law (continuance in force) Order 1958 was introduced. It gave effect to all laws already existed except the Constitution, 1956. Several writ petitions were filed by different petitioners wherein certain actions were challenged. Among these one Dosso has also filed a Writ challenging the validity of Frontier Crimes Regulations (FCR). The High Courts has decided the writ petitions in favor of the petitioners. The Government has challenged these orders before Supreme Court. Supreme Court has allowed the petition filed by the Government (PLD 1958 SC 533 the State v. Dosso). In this decision it was held by the Supreme Court that there are two ways to change the constitution one is peaceful and other is by way of revolution. A change brought about by the revolution is internationally recognized. Where a successful revolution is accepted the constitution can be changed. It was held that after change of the constitution the courts have no jurisdiction to take up any case until the same is provided in new set up. Thus the FCR was valid as the Law (Continuance in force) Order, 1958 has validated all existing law and assumption of powers of Chief Martial Law Administrator Muhammad Ayub Khan, as the revolution was successful. The courts have also limited powers to entertain the petitions or enforce fundamental rights.

3.1. Corruption in Public Service Office and Politicians

Ayub Khan has started a thorough screening process against all government servants and conducted close scrutiny of the service records of the public servants. Tribunals were created who were presided over by the retired judges of Supreme Court and High Courts to try the cases of misconduct, bribery, corruption. Thus action was taken in shape of dismissal from service, reduction in rank compulsory retirement etc of the public servants at large.

Ayub Khan also took action against politicians as due to martial law all political parties were banned. Disqualification Order 1959 was promulgated and the politicians were tried by the tribunals as that of public servants.

He also introduced the land reforms and over 500 irrigated acres and over 1000 unirrigated acres were taken over by the government. All types of Jagirs were abolished.

Ayub Khan introduced Basic Democratic form in shape of local government at lowest level. In this system the people were to elect the man they know personally, directly to local union council level. It introduced Union Council for in village areas, and town committees in town areas. Whereas in East Pakistan Thana Council and Tehsil council in West Pakistan. Same as division council in a division.

4. Third Phase-1962

Ayub Khan has introduced in 1962 Constitution the presidential form of government and declared that it is simple form of government more akin to our system and polity, practicable and effective. He introduced centralized federal system and a unicameral legislature for the country. Provinces were given more powers to legislate the laws. Jamaat-e-Islami was banned in both provinces by issuance of notifications. These notifications

were challenged by Molana Maudoodi in West Pakistan High Court and Dhaka High court in writ jurisdiction. The petition at Lahore High Court was dismissed and that of Dhaka High court was allowed. Two different appeals were filed against these orders which were heard together. Supreme court has heard and decided the matter in favor of Molana Maudoodi and declared the notifications as illegal and unlawful.³ This judgment is one of the most important constitutional case law upholding fundamental rights.

5. Fourth Phase-1969-71

In 1969, when Ayub Khan became president, he handed over power to Army Chief General Yahya Khan. He abrogated the Constitution resulting dissolution of National Assembly, two provincial assemblies and two governor of the provinces. Yahya Khan assumed the office of Chief Martial Law Administrator (CMLA). He has also appointed the deputy army chief, air force and naval chief as Deputy CMLA and promulgated 25 Martial law regulations, including offences, punishments and their procedures in trials.⁴ Though the sole aim, as per Yahya Khan, of Martial law was to protect the life and property of people and take the administration back on track. All the laws before promulgation of Martial law, were to continue in force and all courts and tribunals were also allowed to continue and exercise all the powers and jurisdiction which they had before abrogation of the constitution. The judges of the Supreme Court and High Courts, the attorney general, advocate general shall continue the offices subject to pleasure of the CMLA. However the courts cannot pass any orders against Martial law regulations, nor call into question the CMLA.

Provisional Constitutional Order was promulgated by Chief Martial Law Administrator in April, 1969 which stated that the country shall be governed as nearly as possible to the abrogated constitution. Many a fundamental rights were abrogated and all continuing proceedings regarding fundamental rights were abated forthwith.

The powers of the superior courts and tribunals were curtailed by Yahya Khan and certain powers of appeal were conferred upon himself. The judges of the superior courts were required to declare their assets and every judge was required to submit his statement to the supreme judicial council regarding his properties.

5.1. *Mir Hassan Case*

Malik Mir Hassan and others were summoned to be trialed before the special judge (Central) Rawalpindi. They have approached the High Court of West Pakistan, to set aside the said case and quash the proceedings. The Single judge of the High court has referred the matter to the Chief Justice to constitute a full bench, in the mean time the CMLA has passed orders that the matter may be transferred to special Military court. The court has held that transfer order was defective and without jurisdiction. It was also held the powers of high court could not be withheld under Martial Law Regulation as the same is protected under the provisional constitutional order. It was further held by the court that the as per article 2 of 1962 Constitution still held. As such any order of any authority would be invalid if it has not been given by the constitution. It was a landmark judgment.⁵

The one unit was dissolved with effect from July 1, 1970. In general elections Shaikh Mujeeb's Awami League has got majority of the seats while Bhutto's Peoples Party was second in number. As the Peoples Party did not nominate a single candidate in East Pakistan therefore, there became a big gulf in between two wings of Pakistan. Yahya Khan has declared that even after elections, the Martial Law shall continue for maintenance of Law and Order situation in the country. The situation after general election were critical amongst both wings of the country which resulted in fall of Dhaka on December 16, 1971. It is tragic to say that arrogance of west Pakistan establishment has lead the east Pakistan people leading to separation and fall of union of east and west Pakistan.

Bhutto being deputy Prime Minister and elected member of the National Assembly, took over the office of President from Yahya Khan and thus assumed dual office of President so also Chief Martial Law Administrator. It was first ever civilian CMLA in Pakistan's History.

³ *PLD 1964 SC 673 Abul Ala Maudoodi v/s Govt of West Pakistan.*

⁴ H. Khan. (2017). *Op. cit.*

⁵ *PLD 1969 Lahore 786 Mir Hassan v/s the state.*

Lahore based politician Malik Ghulam Jilani was arrested from Karachi with Altaf Hussain Gohar under the Defense of Pakistan Rules MLR 78. Malik Ghulam Jilani's Petition was dismissed by the Lahore High Court based upon the dictum laid down on the case of State v/s Dosso, as discussed above. This order was challenged in the Supreme Court of Pakistan and the Court had to decide whether the High Court had jurisdiction under the 1962 Constitution to entertain petition against the Martial Law Regulations or otherwise. Supreme Court has held that Hans Kelsen theory is not universally acceptable nor it is a theory of basic doctrine of science of modern jurisprudence nor it was a theory of totalitarianism.⁶ It is also held by the Supreme Court that Grund-Norms of the constitution are provided in its objective resolution, which says that sovereignty belongs to Allah and the authority exercised by people of Pakistan is a sacred trust for which they are accountable. It was also held that it is not correct that promulgation of martial law does not automatically authorize the Commander of Army to abrogate the Constitution rather he is bound to defend it as per his oath. The Supreme Court has examined all events occurred from handing over of power to Yahya till the case in hand, in detail and held that Yahya Khan was usurper of the power and all laws enacted in his regime were illegal. At this juncture Supreme Court has condoned that all past and closed transactions were given validity. Therefore, Asma Jilani case was actually a practical departure of Supreme Court from its past decision particularly from Dosso case. It was declared that Dosso's case observations were incorrect. It was observed by the Supreme Court that a person who seeks power by illegal means and then brings about certain change in Legal Framework of the country shall not be declared legalized by the courts rather when he gives up or is removed, he shall be punished for high treason as provided in the constitution itself.

6. Fifth Phase 1972-1976 Zulfiqar Ali Bhutto's Regime

An interim Constitution was in force by the National Assembly on April 21, 1972 after withdrawal of Martial Law. In fact there would have been fresh elections in Pakistan after war 1971 and separation of East Pakistan (now Bangladesh) but history traces that it was Bhutto who did not want to lose the sustained majority in the earlier elections. As there were chirpings that Bhutto was responsible for loss of East Wing of the country. However the same, earlier elected members of National Assembly were to continue as Constituent Assembly for drafting the Constitution of Pakistan. Thus an Islamic cum socialist constitution was drafted by the National Assembly. Recognition of Bangladesh was an important issue for Bhutto therefore, he has referred the matter to the Supreme Court as to whether the National Assembly is competent to pass a resolution for recognition of Bangladesh. The supreme Court has declared that there was no bar under the law for national assembly to pass such resolution.⁷

6.1. 1973 Constitution

History of Pakistan shows that it was the most significant work of Bhutto who has successfully passed the constitution of Pakistan unanimously without any dissenting votes from National Assembly. Features of 1973 Constitution required a separate discussion, therefore, the same are skipped here, as we focus the main constitutional cases which resulted in development of the constitution of Pakistan.

After elections 1977 rigging allegation were leveled upon Bhutto by Pakistan National Alliance (PNA) and others. Bhutto has arrived at a settlement between himself and PNA which annoyed General Muhammad Zia-ul-Haq. Therefore, it was resolved by General Muhammad Zia-ul-Haq to oust Bhutto in April, 1977 as Corp Commanders had advised General Muhammad Zia-ul-Haq to impose Martial Law. At this juncture, Bhutto has delayed a little bit to settle the differences with PNA and thus unconsciously gave opportunity to General Muhammad Zia-ul-Haq to take over the power.⁸

7. Sixth Phase 1977 to 1988

In the first week of July 1977 army stormed the administration country and General Muhammad Zia-ul-Haq has assumed the office of Chief Martial Law Administrator (CMLA) and announced that he did never want the

⁶ PLD 1972 S.C. 139 *Asma Jilani v/s Government of Punjab*,

⁷ PLD 1973 SC 563 special Reference under article 187 of the interim constitution made by President of Pakistan, Special Reference No:1 of 1973.

⁸ H. Khan. (2017). *Op. cit.*

government nor the army is on way to usurp the power rather he being true soldier of Islam. The Constitution was held in abeyance by General Zia however Laws (Continuance in Force) Order, 1977 was promulgated to run the affairs of the State. Provisional Constitutional Order (PCO) was promulgated. The PCO gave the military not only the power to rule, but to amend the Constitution, 1973 to remain in power. Fundamental rights, as guaranteed under the Constitution 1973, were suspended and all pending cases, wherever may be, regarding enforcement of fundamental rights were ordered to be abated. It was allowed to continue the political activities for Election purpose and the same were at peak when PNA felt that Bhutto was the main hurdle in its way.

On November 10, 1974 Nawab Muhammad Ahmed Khan was murdered, when asked Kasuri alleged that he was targeted but mistakenly his father sustained bullet and he doubted Bhutto behind the murder, thus police recorded name of Bhutto in murder FIR.

On July 28, 1977, Bhutto was released from protective custody and used to address large crowds for election campaign. The family members of Ahmed Raza Kasuri had revived the murder case of Nawab Muhammad Ahmed Khan and filed a criminal complaint, the murder complaint was then transferred to Lahore High Court and a challan in murder case was filed by state against Bhutto, too. On September 3, 1977, Bhutto was arrested from his Karachi residency and taken to Lahore to facietrial of Murder case, where his bail was allowed by Lahore High Court and was released.⁹

On the other hand Bhutto's habeas corpus petition was admitted in the Supreme Court resulting the removal of Chief Justice Yakub Ali Khan replace by Justice Anwar-ul-Haq due to amendment in Constitution 1973, though it was still in abeyance. This amendment was the very first of its nature by CMLA when fifth and sixth amendments were withdrawn. By now PPP was practically lead by Begum Nusrat Bhutto. Zia's rift with Bhutto has become larger and larger. PNA was in favor of postponement of elections seeing that large crowds are being attracted to PPP through Begum Nusrat Bhutto thus PNA leaders joined hands with General Zia-ul-Haq and a formal announcement was made by General Zia to ban all political activities.

7.1. Nusrat Bhutto Case¹⁰

Begum Nusrat Bhutto has challenged the detention of Bhutto before the Supreme Court of Pakistan mainly on the grounds relying on Asmajilani Case (supra) that General Zia had no powers or authority under the constitution 1973 to declare martial law rather such act amounts to high treason under article 6 of the constitution. The PCO and other enactments by General Zia were ab initio illegal and unlawful including imposition of Martial Law in July, 1977. The supreme court has observed that there was state necessity therefore, the acts of General Zia as CMLA were validated. By this judgment, Judiciary has given ultimate services to the Martial Law regime and thus given powers to the CMLA to amend constitution, 1973

7.2. General Zia-ul-haq and Judiciary

As we have earlier discussed that the political activity was fully banned during Zia's era. Press was also under severe clutches as many, senior press related, personalities were arrested. It was also worded that no decision, act, order etc. is challengeable in any court of law. In those days the military courts judgments were frequently overturned by the superior courts in appeals the military regime has severely reacted. Resultantly Article 212-A in the constitution was added through an amendment, whereby military courts or tribunals were established. This gave the military rule vast powers that any case can be transferred from any ordinary court to military courts. The military tribunals has powers to try any case under any law/especial law or military law. It amounted to recognized the military courts, which were established under Army Act, 1952, as constitutional courts. In each province such military courts were established and hundreds of politicians, press related and civil servants were arrested and under martial law regulation. The said amendment in constitution was challenged before the supreme court in a number of petitions but later on the advocate for petitioner has withdrew the same with plea that he will pursue like nature petitions before Lahore High court.

⁹ *PLJ 1978 Cr.C Lahore 9Zulfiqar Ali Bhutto v/s The State.*

¹⁰ *PLD 1977 SC 657 Begum Nusrat Bhutto v/s Chief of Army Staff and Federation of Pakistan.*

When Lahore High court was about to decide the said petitions, the military government had heard that the decision in Asghar Khan's case may be against the government, it passed another amendment¹¹ that no High court can make order against any martial law regulation or any martial law order etc. it also banned High courts from reviewing any such order of martial law. It was mainly intended from the said amendment to curb the powers of superior judiciary to review the judgments of military courts or tribunals established by the CMLA. Immediately after the said amendment, the chamber of the chief justice of Lahore High court was locked by army men and was also forcibly dispatched to the Supreme Court as an ad hoc Judge. Almost all the decisions in favor of General Zia were obtained by Military from the superior judiciary including getting rid of Bhutto, now these judges are of no use to the General Zia government, therefore, he thought to cut down the size of number of judges of the superior judiciary.

One Hamid Baloch was tried and convicted to death by Military court in Balochistan. The governor of Balochistan Lt. Gen. Rahimuddin Khan has stated in October, 1979 that all sentences by military courts should be executed forthwith. The High Court of Balochistan has passed stay order against the convictions of Military courts. The advocates of the accused has approached the High court that their clients would certainly be hanged by the Jail authorities at the Orders of Military persons. Thus High court of Balochistan has passed orders to the Jail authorities not to execute the sentences of Military courts lest the jail authorities shall exposed themselves to contempt of court on one hand and on the other hand to premeditated murder of the accused. Thus due to firm decision of the High Court, these sentences were not executed. Despite constitutional amendment 1980, the Balochistan High Court has continued to hear the vires of Article 212-A, etc. and lastly declared that it was ultra vires to the constitution. In another decision of the Balochistan High Court, in case of Muhammad Niaz¹² it was held that an ordinary citizen could not be tried by the Military courts. But on the other hand new chief justice of the Lahore High Court did never take up the case of Asghar Khan because of the question of his own survival.

The powers of the superior judiciary regarding Islamic provisions were snatched by creation of Federal Shariat Court. It was a blow to superior judiciary. The legal fraternity was agitating at Lahore High court bar against Military rule and restoration of the Constitution, 1973 and restoration of powers to the superior judiciary thus the Military regime has established permanent benches¹³ of the Lahore High Court at Bhawalpur, Multan and Rawalpindi in 1981 to break the unity of the lawyer community at Lahore and to scatter them. In Sindh the permanent bench at Sukkur, whereas in NWFP (now KPK) Abbotabad and Dera Ismail Khan and Sibi in Balochistan were established under 1981 amendment.

A provisional constitutional Order, 1981 was passed by General Zia and resultantly fresh oath of the office of Justices and Chief Justices of the superior Judiciary was to be administered. The matter has never been consulted with the Chief Justices but it was kept secret that whom of these judges would be administered oath. Justice Dorab Patel and Justice Fakhruddin G Ibraheem has refused to take oath. By this way the judiciary was humiliated as such three of the judges of Lahore High Court were returned back from Oath taking ceremony and were refused to have administered the oath of the judge of Lahore High court.

7.3. This PCO was Challenged Before the Lahore High Court Which was Upheld to be Valid

In 1985 Revival of Constitution Order was passed. Non party based elections resulting in civil government under Martial Law was established. It was clearly declared by General Zia that this civilian government is not transfer of Powers rather it is sharing the Powers. The conflicts of civilian government with Military authorities arose over Afghan war. Thus in May, 1988 he dissolved the National Assembly so also provincial assemblies. Later on August 17, 1988 General Zia died due to air crash in Bhawalpur, Punjab. The dissolution of National Assembly was challenged in the Lahore High Court, Lahore but the same could not succeed. An appeal was also made before the Supreme Court by filing petition by the Federal Government v/s Haji Muhammad Saifullah wherein supreme court has upheld the decision of Lahore High Court.¹⁴

¹¹ PLD Central Statutes 89: Constitution (amendment) Order, 1980, President's Order 1 or 1980.

¹² *Muhammad Niaz v/s Martial Law Administrator*, PLD 1979 Quetta 179.

¹³ PLD 1981 Punjab Statutes 1.

¹⁴ PLD 1989 SC 166.

8. Seventh Phase 1988-1999

As a result of 1988 general election, Benazir Bhutto formed PPP government and later on Ghulam Ishaque Khan was also elected as President of Pakistan securing majority votes from the electoral college. Though the PPP lead government was a fragile government from its first inception, therefore, could not continue and the President has used his powers to dissolve the PPP government and nominated care taker prime minister and care taker chief ministers in provinces from the opposition party who were in favor of Nawaz Sharif and also facilitated Nawaz Sharif in general election openly. Such dissolution of Benazir Government was challenged before Lahore High Court and Sindh High Court. The Lahore High Court has upheld the action of the President and declared it to be *intra vires* to the constitution. The Sindh High court also upheld the president's order of dissolution of National Assembly on the same lines as that of Lahore High Court. The Lahore High Court Judgment was challenged in the Supreme Court but could not succeed.¹⁵ Likewise the dissolution of provincial assembly of NWFP (now KPK) was challenged before the Peshawar High Court¹⁶ and the court has declared that Governor order of dissolution of Provincial Assembly was illegal thus ordered to restore the Provincial Assembly. This judgment was challenged in Supreme Court which was set aside by a majority view, mainly on the point that mandatory notice was not given to Attorney General while deciding the petition.¹⁷ The minority view dissented that notice was not necessary particularly when the Peshawar High Court has taken a sound view and the attorney general was otherwise well aware and could have stepped into the proceedings. The dissolution of Sindh Assembly was also challenged before the Sindh High Court, the said petition was dismissed with observation that governor has used his discretion rightly.¹⁸

8.1. General Election 1990

In general election 1990, Islami Jamhoori Ittehad (IJI) secured majority and Nawaz Sharif became Prime Minister of Pakistan. Soon after formation of new government of IJI there occurred serious differences between President and Prime Minister, thus President has used his powers under Article 58 (2) (b) of the Constitution, 1973.¹⁹ The dissolution of National Assembly was challenged by speaker of the Assembly before Lahore High Court, while this petition was sub judice, Nawaz Sharif has filed petition before the supreme court under Article 184 (3) of the constitution 1973. The Supreme Court has set aside the order of president and restored the government of Nawaz Sharif.²⁰

8.2. General Election 1993 and Benazir 2nd Term

After being elected as prime minister of Pakistan for second time, Benazir Bhutto has firstly conducted election of President and resultantly Farooq Leghari was elected. It was suggested to present a bill for repeal of eighth amendment in the constitution, 1973 but Nawaz Sharif did not cooperate with PPP Government therefore, no such bill has ever been presented in National Assembly. Due to differences with NWFP government, the president Farooque Leghari has imposed Governor rule under Article 234 and dissolved the provincial assembly.

8.3. Sabir Shah Case

Sabir Shah has challenged the validity of proclamation before Supreme Court and same was accepted by majority.²¹

8.4. Legal Reforms Ordinance 1996

By the order of Supreme Court, the judiciary was separated from executive and thus Judicial Magistrates were empowered to exercise jurisdiction under Pakistan Penal Code and to try other offences under supervision of Sessions Judge, while executive magistrates were empowered to try cases of public tranquility, contempt of lawful authority etc. under the control of district Magistrates.

¹⁵ *PLD 1992 SC 646 Khwaja Ahmed Tariq Raheem v/s Federation of Pakistan.*

¹⁶ *PLD 1990 Peshawar 192 Aftab Ahmed Khan Sherpao v/s Governor of NWFP.*

¹⁷ *PLD 1992 SC 723 Federation of Pakistan v/s Aftab Ahmed Khan Sherpao.*

¹⁸ *PLD 1992 Sindh 1.*

¹⁹ This article was added by General Zia to have ultimate powers in his hand.

²⁰ *PLD 1993 SC 473, Mian Muhammad Nawaz Sharif v/s Federation of Pakistan.*

²¹ *PLD 1994 SC 738 Sabir Shah v/s Federation of Pakistan.*

8.5. *Al Jihad Trust Case*

Benazir Bhutto's PPP government was in direct confrontation with superior judiciary and wanted to pack the superior judiciary with political appointments without considering merit for considering nomination of a person to be appointed as judge of the superior court. In these days, when appointments were made in different High courts were purely on political affiliations and merit was never considered. Thus the most important case of Al-Jihad Trust came on surface which was decided by the Supreme Court, wherein appointment of 20 judges of Lahore High court was challenged. The Supreme Court has mainly held in Al-Jihad Trust Case as under:²²

- Appointment of ad hoc judges against permanent posts is violation of the Constitution.
- Acting chief justice shall be for only 90 days and not more than that period and he cannot be a consultee judge.
- Additional judge of High Court is expected to be appointed as permanent judge except with strong exception.
- All permanent vacancies shall be filled first. Particularly the posts of Chief Justices.
- Senior most judge of High Court is expected to be appointed as Chief Justice of the Court.
- Supreme Court judges are not desired to be sent to act as acting chief Justice of a High Court.
- Recommendation of Chief Justice is binding upon executive.
- Ten year practice as required for appointment as judge of a High Court means actual practice but not mere enrolment.
- Political affiliation of nominee judge shall not come in his way if he is otherwise fit to be appointed as judge of High Court.

President Farooq Leghari has dissolved the Government of Benazir Bhutto and such order was challenged Supreme Court has upheld the order of the president whereby validated dissolution of National Assembly.²³

8.6. *Thirteenth Amendment and End of Eighth Amendment*

In 1997 general elections Nawaz Sharif has got two-third majority, therefore, a constitutional amendment for omission of 58 (2)(b) was passed by both houses and now such powers of president was subject to advice of Prime Minister.

Supreme Court Chief Justice Sajjad Ali Shah has recommended five judges of high courts to be elevated to Supreme Court and the recommendation of Chief Justice was binding upon government as per Al-Jihad Trust case. Nawaz Sharif was reluctant to agree therefore, he got issued a notification whereby number of judges of supreme court was reduced. The confrontation of Nawaz Sharif and Sajjad Ali Shah has been raised to its heights. A two member bench of supreme court registry at Quetta has decided case of Asad Ali v/s Federation of Pakistan.²⁴ It was held that appointment of Chief Justice Sajjad Ali Shah was against the norms laid down by Supreme Court in Judges Case, i.e., Al Jihad Trust Case, supra, therefore, he was stopped to function as Chief Justice till further orders. On the other hand Chief Justice Sajjad Ali Shah has suspended the said order while in his chamber in administrative capacity. Cases of contempt of court were in process when PML (N) supporters had stormed the Supreme Court of Pakistan Building. Justice Ajmal Mian has decided the contempt cases and announced a land mark judgment which is a golden piece of work for reference on the subject of contempt of court.²⁵

During Nawaz Sharif era law and order situation was getting worse thus Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998 was promulgated and military courts were established to try civilian citizens for offences scheduled therein. Such ordinance was challenged before the Supreme Court by filing a petition which was accepted.²⁶

²² *PLD 1996 SC 324 Al Jihad Trust v/s Federation of Pakistan.*

²³ *PLJ 1998 SC 27 Benazir Bhutto v/s Farooq Leghari.*

²⁴ *1998 SCMR 122 Asad Ali v/s Federation of Pakistan.*

²⁵ *PLD 1998 SC 823 Syed Masroor Ahsan v/s Ardeshir Cowasjee.*

²⁶ *PLD 1999 SC 504 Sh. Liaquat Hassan v/s Federation of Pakistan.*

9. Eighth Phase 1999-2008 General Musharraf Era

On October 13, 1999 General Pervez Musharraf has announced that PML (N) government has been removed and the Army had taken control of the affairs of the state. On October 14, 1999 he proclaimed state of Emergency throughout country and assumed office of Chief Executive and constitution was held in abeyance. The National Assembly, Senate and all four provincial assemblies were suspended. Provisional constitution Order (PCO) was promulgated and it was stated that the PCO and other orders of Chief Executive would run as nearly as possible in accordance with constitution. Initially Musharraf has not touched the Judiciary nor required any fresh oath under PCO. Several petitions were filed before Supreme Court against the military take over and for restoration of the Assemblies. When these petitions were fixed for hearing, it was believed that these petitions would be allowed and Nawaz Government may be restored by the order of the court, therefore, Oath of Office (judges) Order, 2000 was promulgated on January 25, 2000 wherein all the judges of superior judiciary were required to take oath that they will discharge their functions and duties as per PCO and if anyone who does not take oath within time fixed by the Chief Executive, he shall cease to hold such office.

Supreme Court has upheld the military takeover while deciding petitions against the said takeover by observing that the situation arisen on the day for which there was no solution in the constitution, 1973 and it was inevitable except to adopt extra constitutional measures. It based the principle of *salus populi suprema lex* as in Begum Nusrat Bhutto case. All past and closed transactions were validated in the prime good of the people of Pakistan. Constitution remained the supreme law of the country. All superior courts would continue their jurisdiction as per constitution, 1973. It was also declared the General Pervez Musharraf has rightly assumed powers of Chief Executive office. The Chief Executive can resort to constitutional amendments if constitution does not provide its solution. No amendments shall be made in the salient features of the constitution, i.e., Judiciary, federalism, form of parliamentary government and Islamic provisions. All act and actions of the Chief Executive are subject to judicial review. Judges of superior courts would be subject to accountability.²⁷ Later on 17th amendment was passed by the military regime. Several petitions were filed to challenge and the same had been rejected and 17th amendment was upheld.²⁸

9.1. November 3, 2007

The Chief Justice Iftikhar Muhammad Chaudhary was called by Chief Executive, General Musharraf on March 9, 2007 at Army House Rawalpindi, to resign from the office of Chief Justice but he refused. General Musharraf sent his on compulsory leave till submission of a reference to supreme judicial council. The said reference was challenged by Chief Justice Iftikhar Muhammad Chaudhary before the Supreme Court under Article 184 (3) of the Constitution. The Supreme court has allowed the said petition and such decision brought a sigh of relief and was thought to be one of its nature in sixty years that people of Pakistan developed a sense of independence of Judiciary in Pakistan.²⁹ These events has raised certain events like protest by legal fraternity, media and public at large. Thus state of emergency was seen by Military ruler. Musharraf proclaimed emergency in his capacity as Chief of Army Staff and he also issued PCO No.1 of 2007. On November 3, 2007 Oath of Office (judges) Order, 2007 was promulgated. As many as all judges refused to take oath only four judges of the Supreme Court took oath under PCO, whilerest of the judges defy Musharraf and remained loyal to the constitution. More than 70% of the judges of the Sindh High Court did not take oath under PCO, 2007.

9.2. General Elections 2008

PPP and PML (N) were elected as majority parties in General Elections 2008 in Pakistan. Both parties agreed to set up a coalition government resultantly in all four provinces the speakers, deputy speakers, Chief Ministers were elected unopposed. Both the parties also agreed to restore the judges deposed since November 3, 2007, as were agreed on Murree Declaration.³⁰ On March 7, 2009 Ministry of Law and Justice has issued notification of restoration of Chief Justice (as then he was) Iftikhar Muhammad Chaudhary and ten other Judges of Honorable Supreme Court and High Courts of the provinces. After restoration of the deposed Chief Justice and judges of

²⁷ PLD 2000 SC 869 Zafar Ali Shah v/s General Pervez Musharraf.

²⁸ PLD 1997 SC 719 Pakistan Lawyers Forum v/s Federation of Pakistan.

²⁹ PLD 2007 SC 578 Mr. Justice Iftikhar Muhammad Chaudhary v/s Federation of Pakistan.

³⁰ Dawn, March 10, 2008.

the superior courts, there was a sense of fear that certain judgments of the Supreme Court are hanging rapiers upon them. There were several petitions filed against above mentioned illegal acts of Army General Pervaiz Musharraf before the Supreme Court challenging acts after November 3, 2007. In the petition filed by the *Sindh High Court Bar Association v/s Federation of Pakistan*³¹ a 14-member bench of deposed judges has allowed the petition and declared all act done or taken on November 3, 2007 and later on to be *ab initio* illegal and *ultra vires* to the constitution, 1973. It is, by now, deemed that by this judgment the door of military takeover in Pakistan is closed permanently so also effects of previous judgments was declared to be of no legal effect. More than 100 judges who took oath under PCO were sent back home without hearing them by a single prick of pen. Though it was strongly felt by the members of the bench that it is against the equity and natural justice that no one should be condemned un heard as held in the maxim *Audi Alteram Partem*. However, the past and closed transactions done by those judges were accepted, thereby, validated the judgments and orders passed by those PCO judges of the superior courts were given validity. This judgment is deemed to be most important development in the constitutional history of Pakistan. Though there are much reservations and much more written for and against the said judgment.

10. Conclusion

From above discussion and case laws, it is evident that the supreme court of Pakistan has time and again validated the illegal takeovers of powers by any one on one or the other context. It is deemed and felt that *Judgment of Sindh Bar Council v/s Federation of Pakistan* (supra) has closed the chapter of forceful takeover of Military over the civilian governments and favors given by the superior courts on and context of Kelsen's theory "state necessity" is closed permanently, however, the other sources and forces, including but not limited to the military influence, which influence the civilian governments may continue to penetrate in the decision making of any civilian government till long time.

³¹ *PLD 2009 SC 879 Sindh High Court Bar Association v/s Federation of Pakistan.*