

## **Assessing the Freedom of Judiciary in Pakistan during 20<sup>th</sup> Century**

**Muhammad Nawaz Bhatti**

*Associate Professor,  
Department Politics & International Relations  
University of Sargodha.*

**Misbah Shaheen**

*Lecturer,  
Department of Politics & International Relations  
University of Sargodha.*

### **Abstract:**

*Judiciary is considered an important pillar of every political system. It always tried to ensure the rule of law and guarantees civil liberties and fundamental rights to the citizens. To perform these functions effectively, independence of judiciary must be ensured. Unfortunately, in Pakistan judiciary faced severe hurdles in its smooth functioning due to legal framework orders and provisional constitutional orders issued from time to time by military rulers. Resultantly independence of judiciary suffered severely. This paper is an attempt to assess the level of judicial independence in political system of Pakistan from 1947 to 1999. Historical and analytical approaches of research with secondary sources of data have been used to find the results.*

**Key Words:** *Judiciary, Independence, Assessment, Pakistan, Political System*

### **Introduction:**

The judicial system was adopted by Pakistan from the prevailing system of colonial period which was mainly acquired from the judicial system of the British; however that judicial system was designed and developed according to colonial needs of the British Empire because it was not made independent from the executive which had financial

and administrative powers over the judiciary. Therefore, the colonial judicial system adopted by Pakistan after its independence could not ensure the standard of justice for an independent nation state. The judicial system in Pakistan had been favoring the executive branch of the government and the powerful classes against the rights of the common people since the emergence of Pakistan.

A Court at federal level was recognized with the provision of the Government of India Act 1935 in 1949, which became the Supreme Court in Pakistan<sup>1</sup>. The Lahore High Court and the Karachi Chief Court were also established, whereas Judicial Commission in Baluchistan and NWFP gifted the powers of High Courts. A new High Court was setup at Dacca. The jurisdiction of the Privy Council was abolished at the same time Justice Mian Abdur Rashid became the first Chief Justice of Pakistan in 1949<sup>2</sup>.

The power of the Higher judiciary regarding Original, Appellate as well as the Advisory jurisdiction remained almost similar except some necessary changes to accommodate new Constitutional and legal position of the new emerged state, for example the words "India" and "His Majesty" were substituted by Pakistan and Governor General. The qualifications and procedure of appointment of judges, the term of office, procedure for removal and terms and conditions for service of judges have been elaborated.

In 1953 the Nazim Uddin Government faced serious difficulties stemming out of the Ahmadiyya riots<sup>3</sup>. According to Lawrence Ziring "Pakistan was deeply wounded by the Punjab riots, and Ghulam Muhammad, the then Governor General of Pakistan was of the opinion that only the country's steel frame of civil-military administration could save the nation"<sup>4</sup>. Pakistan was in trouble, rioting and killings were happening in Lahore. In that critical situation, General Azam was brought to suppress the riots in Lahore via Martial Law and reinstated order in the city. General Ayub, the Army Chief declared that army would not allow any kind of anarchy in the country.<sup>5</sup> On the other side, the stage was ready for action against Khawaja Nazim Uddin's

dismissal in the name of his inability to control the riots. This action changed the political direction of Pakistan therefore in later years, General Ayub and Iskandar Mirza used the Martial Law as a precedent and the legal justification was amplified by the doctrine of necessity.

### **Maulvi Tamizuddin Khan Case:**

In 1954 judiciary faced its first confrontation with the Governor General when he dissolved Pakistan's first Constituent Assembly on 24 October, 1954.<sup>6</sup> He proclaimed that his powers had been curtailed by the Constituent Assembly. Consequently, he imposed emergency and dissolved parliament with the claim that it had lost the trust of the masses.

Maulvi Tamizuddin Khan, the then speaker of Assembly, challenged that orders of the Governor General in the Sindh Chief Court and resultantly, the Court unanimously issued its decision in favor of Maulvi Tamizuddin Khan. The Sindh Court stated that Constituent Assembly was authorized to reject and amend existing laws. Furthermore, it could form and bring into force a new constitution. The quo-warranto had been issued for the ministers to exercise the office of the minister; consequently Maulvi Tamizuddin Khan was also restored.<sup>7</sup>

The Federal Government challenged the decision of the Sindh Court in the federal Court and resultantly, the decision of Sindh Court was reversed on 21st March, 1955.<sup>8</sup> This decision opened the way for judiciary to justify arbitrary and unpredictable acts of the military and civil governments. Because the Governor General was not empowered to dissolve the Assembly under the independence Act, while the Assembly was empowered to amend and repeal the existing laws. The ability and competence of justice Munir was beyond any doubt, but this judgment had weakened and distorted the image of the judiciary in the public eyes.

### **Usif Patel's Case:**

Just after six days of the reversal of Sindh Court decision, the

Governor General issued Emergency Order and assumed certain powers such as framing of the Constitution. A serious state of emergency has been put in place across the country, most likely to prevent the collapse of the constitutional mechanism.<sup>9</sup> That Order from the Governor General was soon challenged in the Federal Court. On April 13, 1955, the Court headed by Justice Munir issued its decision that the Governor General had no power to frame or amend the constitution. This decision created a serious constitutional crisis in the country. The country was about to collapse. On that occasion, an appeal was filed with the Federal Court to exit the legal disaster. The Federal Court again validated the laws listed in the Emergency Powers Ordinance 1955, using the doctrine of necessity. Such constitutional cases have had an impact on Pakistan's policy.<sup>10</sup>

### **The Constitution of 1956:**

On March 23, 1956 the First Constitution was promulgated in the country. The existing judicial system and its power almost remained the same. The apex court was renamed as the Supreme Court of Pakistan.<sup>11</sup>

G. W. Chaudhary asserts that the efficiency and independence of the judicial system depends on the method of appointment, the service mandate and the privileges of the judges. The explanation of these constitutional guarantees in the organization of the judiciary was essential to guarantee their independence.<sup>12</sup> The Constitution of Pakistan 1956 was characterized with a significant principle of judicial independence known as Judicial Review which could be applied to various jurisdictions of the apex court. The explicit power had provided the Supreme Court of Pakistan the power to arbitrate on the various issues between the Center and the province. It was also an interpreter and custodian of the constitution.<sup>13</sup> Under the Constitution of 1956, the number of the judges of Supreme Court would be six including the Chief Justice; afterward the number of other judges could be increased beyond six by the act of the parliament.<sup>14</sup> The Article 228 describes that such act would be passed by a majority of not less than two-third of the members of that assembly. The

Chief Justice of the Supreme Court would be appointed by the President who was constitutionally empowered for such appointments and other appointments were required consultation and advice by the chief justice.<sup>15</sup> The Constitution authorizes the President to remove a Supreme Court judge from his office if a two-thirds majority of members of parliament confirm his misconduct and mental illness.<sup>16</sup> If the position for the chief justice of the Supreme Court has become vacant or if he was unable to fulfill the duties of his office, the President had the authority to appoint an acting Chief Justice of the Supreme Court.<sup>17</sup> The removal of a High Court judge required an order from the President if he was reported for physical or mental infirmity about the concerned judge, but it was necessary for the President to receive a report from the Supreme Court<sup>18</sup>. If the transfer was required for the judges of the High Court from one High Court to another the Constitution also had a provision for it but advice from the concerned Chief Justice of the High Court and the consent of the concerned judge was needed.<sup>19</sup>

As the effectiveness and self-determination of the judicial institute significantly depends upon the practice of selection, permanent status of service, and the financial matters i.e. Salaries and budget for judicial structure so, the judicial independence was strengthened by various Articles of the Constitution like 151 and 172. The political and executive interference in the matter related to the judicial appointment, process for the removal of the apex court judge and the transfer of the judge were blocked by the constitution because a judge of the Supreme Court was removed by the two-third majority of the member of the parliament. Unlikely the pre-constitutional instrument, the 1935 Act had no provisions for the transfer of a High Court judge.<sup>20</sup>

### **The Martial Law of 1958:**

In October 1958, President Iskandar Mirza dissolved the national and provincial assemblies. He repealed the Constitution and enforced Martial law. He also declared all political parties dysfunctional and that all types of political activities had been banned across the country. By exercising his executive authority, he appointed General Ayub Khan as the Chief Martial Law Administrator.<sup>21</sup> General Ayub enforced The Laws (Continuance in Force) with new legal provisions thus Pakistan entered into a first military regime. The Laws (Continuance in Force) were made to nourish the new mechanism adopted by the military government for governing the state. It was incorporated with judicial provision that all courts would perform their judicial functions which were being provided by the 1956 Constitution. However, the Laws (Continuance in Force) made all the Courts bound to follow the Martial Law Regulations (MLR).<sup>22</sup>

According to Hassan Askari Rizvi, the economic and political chaos which over-took Pakistan after the independence persuaded the military leader that the model of West Minister did not suit the condition and circumstance of Pakistan. The military leaders declared the revolution of October 7th, 1958 was not against the institution of democracy as such. During first Martial Law President Ayub Khan tried to strengthen his grip on administrative structure by establishing the Military Courts through Martial Law Regulations. The parallel courts were established against the existing judicial system.<sup>23</sup> If any person violated the MLR or orders, the military courts had power to make any necessary actions against the violator.

#### **The Dosso Case:**

However, the vires of martial law proclamation were questioned before the Supreme Court shortly after its promulgation. This question arose in the appeal against the state filed by a person named Doss.<sup>24</sup> Justice Munir confirmed the Order (continuity of the laws in force). Based on this ruling, he relied on Kelson's theory of law that a successful uprising is a globally recognized legal means of modifying a constitution. He also declared that, this change in the state, the new

constitutions of the revolutionary government were in accordance with international law.<sup>25</sup>

For justifying his judgment, Justice Munir put before the logic behind popular revolutions, such as French or Russian revolution. By introducing a new speculation he tried to rationalize martial law, but he ignored a naked fact that there was a wide difference between the martial law and revolution. It was obviously unnecessary acceleration going on the branch of the superior judiciary to validate the adaptation of the martial law. Under the Martial Law Regulation, General Ayub Khan governed the country by using an authoritarian system. He declared that he would struggle to convert the martial law into a document, which would provide the basic lines for running the state.

It was promised by the military government that the entire structure would be changed by the new reforms and it would eliminate corruption throughout the country. Therefore, it attempted to form the Constitution under the supervision of military government.

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

To frame the constitution, Ayub Khan appointed a commission led by Justice Shahabuddin and composed of ten other selected members from various sectors of administration, namely law and civil service.<sup>26</sup> Following the recommendations of the Commission, a constitution was drafted and executed on June 8, 1962. It contained a preamble with 250 articles and 4 schedules.

The fundamental rights of the people were conferred by the Constitution but it was non-justifiable. The powers of the existing judicial setup were curtailed in certain cases such as to issuing court order to protect the fundamental right. The jurisdiction of the apex court in that Constitution was not as much extensive as laid down in the Constitution of 1956. However Appellate, Original and Advisory jurisdiction or powers retained in the Constitution but were limited, such as the Supreme Court would pronounce declaratory

judgment only, when it would be exercising its original jurisdiction. Under the 1962 Constitution, the judiciary has lost its power of Judicial Review. The fundamental rights were later on made justifiable and the power of judicial review was restored through 1<sup>st</sup> Constitutional Amendment in 1963. Subsequently, the Supreme Court was empowered to put into effect the judicial review and to state any law passed by the Parliament invalid if it would be repulsive to the fundamental rights.

The reflection of judicial independence was seen after this constitutional amendment. However, above the wires of the legislator, the superior judiciary had the power to approve the judgment. The Constitution of 1962 had fully upheld the legal control of the executive. Comparatively, the procedure for removing the judges of the superior judiciary was different from that of the 1956 Constitution. The concept of Supreme Judicial Council (SJC) was first time introduced in Pakistan through that Constitution. It was composed of Chief Justice and two seniors most judges of the Supreme Court and the chief justices of high courts of the provinces.<sup>27</sup> The head of the state was empowered to remove a judge of the apex court from his office if he received a report about his unpleasant misbehavior, mental and physical illness. This Constitution also adopted an almost same criterion which was laid down in the previous Constitution of 1956.

After the Indo-Pak War 1965 President Ayub Khan had faced much criticism. Strikes and agitations had been started throughout the country against President Ayub Khan and he gradually lost his grip over executive control. Ultimately, he resigned from his office on March, 1969.

### **Martial Law 1969:**

After the resignation of Ayub Khan, Pakistan had to undergo the second martial law in its history. General Yahya Khan has been appointed chief administrator of martial law (CMLA). The two military dictators took the same measures, that is, the national and provincial assemblies and the executive ones were

dissolved. After taking charge as CMLA General Yahya Khan became president on April 1, 1969.

On 4 April, 1969 President Yahya Khan issued the Provisional Constitutional Order (PCO). According to PCO regulation, the government machinery would govern as nearly as per previous Constitution of 1962. The CMLA would exercise all Presidential power which was conferred to the President by the Constitution.<sup>28</sup>

The superior courts of Pakistan had been allowed to continue their routine functions in accordance with the previous Constitution of 1962. However, the parallel courts known as the military courts were setup but they could deal only with the criminal matters.<sup>29</sup>

There was a new method introduced for the harassment of the judges through a Presidential Order passed by the President Yahya Khan. According to that order it was essential for the judges to provide the detail about their assets. If their assets were found illegal, the Supreme Judicial Council was empowered to conduct an investigation about the judges. As a result, an offensive measure was taken against the judges in Pakistan.<sup>30</sup>

On March 30, 1970, the Legal Framework Order (LFO) was announced by General Yahya Khan. It was incorporated with the provision of basic principle of future Constitution of Pakistan. Yahya Khan assured that the general elections would be held in October, 1970 and that peaceful transfer of power to the people of Pakistan would be ensured. By issuing LFO a steel frame was produced by Yahya Khan to limit the freedom of National Assembly, as well as to legalize his authoritarian rule. In 1970, coincidentally the nation of Pakistan first time participated in the general elections. The results of these elections were in favor of Awami League on the bases of controversial Six-point agenda but unfortunately it could not form a government in Pakistan. People of East Pakistan started agitations, strikes and attacks on official assets. Pakistan executive launched an army operation for the maintenance

of peace in the East wing of Pakistan. During this deteriorating situation of the East Pakistan Indian army attacked on the East Pakistan in December 1971. After losing one wing of Pakistan, the military government handed over the executive control to the Chairman of the Pakistan People's Party Mr. Zulfiqar Ali Bhutto.<sup>31</sup>

### **The Interim Constitution of Pakistan 1972:**

There was no rationalization for Yahya Khan to carry on his control after the fall of Dhaka. As a result, he relinquished power to Zulfiqar Ali Bhutto. He has taken on the dual capacity of being the President and CMLA. To deal with the whole range of issues and problems; he issued orders and pronouncements as a CMLA. On 2<sup>nd</sup> January, 1972, under Martial Law Regulation, Mr. Bhutto pinned the wings of judiciary. No court could call any provision of his order into the question. Although he was a champion of the fundamental rights and democracy but he used the weapon of martial law regulations. To teach the opposition a lesson, his government arrested two of his critics. Pursuant to the Pakistan Defense Rules and Martial Law Rules, Altaf Gauhar, editor in chief, Dawn, Karachi and Malik Ghulam Jilani, a political leader from Lahore, were arrested and subjected to pre-trial detention.

### **Asma Jilani Case:**

Pursuant to Article 184, the detention of Altaf Gohar and Malik Ghulam Jilani was challenged before the Sindh and Lahore High Court. These constitutional petitions have been rejected by both higher courts. To dismiss constitutional petitions, the Superior Court invoked the Supreme Court's decision in the state against Dosso. Against the arrest of his father Malik Ghulam Jilani, Asma Jilani appealed to the Supreme Court. In which he claimed that Pakistan was not a foreign country that had been occupied by an army. Pakistan had its legal principles in the form of the Holy Quran and the Objective Resolution, so martial law was in no way greater than the Constitution. The Supreme Court of Pakistan declared Yahya Khan a usurper, he was no longer a winner and Pakistan was no longer an occupied

state. The Supreme Court also justified that all the actions taken by Yahya Khan were illegal. The court tried to confirm the principle of civil authority in the national political system.<sup>32</sup>

The judgement of the Asma Jilani case was released during the Civilian Martial Law regime under Z. A. Bhutto. The judgment was appreciated by various political parties, because it was released after the Martial Law. The Asma Jelani case is considered a milestone in the history of judiciary. It remained helpful for the restoration of the civilian government and in Pakistan.

### **The Constitution of 1973:**

After the long period of martial law, democratic forces managed to frame the Constitution of Pakistan. All political parties have unanimously approved the third constitution for Pakistan. The provisions relating to the judiciary are similar to those of the previous constitutions. The power of Pakistan's apex court had been widely explained. For example, article 175 stated that no court is competent, except as far as it can be or can be conferred by the constitution or by any law. The constitutional guarantee for judicial independence was highlighted by the concept of intrinsic powers and jurisdiction of the higher courts. It also assures that judiciary will gradually be separated from the executive within three years from the commencement of the Constitution. However, the period to separate the judiciary from the executive branch was specified as three years in the original constitution, but through constitutional amendments and presidential orders it was gradually extended to fourteen years. This period finally ended in 1987.

The government of Pakistan did not take any appreciative measures for separation of power between the two organs of the state and even the period suggested by the constitution to separate the judicial system from the executive was expired. Meanwhile Karachi High Court Bar Association played its role for securing the judicial independence. Consequently, on February 6th, 1989 a petition was filed by the President of

the Karachi Bar Association before the Sind High Court. According to that petitioner the constitutional period for separating the judicial system from the executive had been expired moreover the government was bound to practically introduce that prescribed system of separate power. But the government has failed to do that. The Sindh High Court suggested to the Federal Government for making necessary action under the constitutional provision, that the government must take compulsory steps for the constitutional independence for the superior judiciary within six months. After receiving the verdict from that Court, the Federal and Sindh Provincial Government filed an appeal against this decision to the Supreme Court but it was rejected and the decision by the High Court was supported.

During Bhutto regime to maintain strong political and executive influence upon the judicial system certain amendments were made in the Constitution. During the period of Mr. Zulfikar Ali Bhutto, the Constitution was amended seven times and for the five times it was amended only for the judiciary. The first Amendment in the Constitution was related to transfer of the High Court judges. The third Amendment to the Constitution was made for curtailing the powers of the judiciary: The Courts were prohibited to grant bail, before arresting a person unless a case was registered. It was indeed a struggle to demoralize and to curtail the power of the judiciary. Under Article 199 the power of the high Courts for granting relief to the political opponents, especially with respect to the constitutional jurisdiction had been curtailed through 4<sup>th</sup> Amendment in the Constitution.

The 5<sup>th</sup> Constitutional Amendment was introduced in the National Assembly in order to extend the period of separation of the judiciary from executive. This amendment also included new laws for contempt of court, restrictions on the jurisdictions of the High Courts to grant interim bail and compulsory transfer of judges from one High Court to another. These amendments were criticized by the lawyers and politicians for their dangerous effects for the independence of the judiciary.

During the last session of the National Assembly the 6<sup>th</sup> Amendment was voted for speedily, since it was going to be dissolving for fresh general elections. The age for the retirement of the Chief justice of the Supreme Court and High Courts was extended by that Amendment.

After three months the sixth Amendment was laid down and notified on 4th January 1977, according to that Amendment the Chief Justice of the Supreme Court could perform his duties until the age of 65 years. The organizational structure of the judiciary was changed several times, and it had been established according to the will of the executive. During Bhutto regime all the amendments were fabricated and manipulated by the ruling party.<sup>33</sup>

#### **General Zia-ul-Haq Regime 1977-88:**

On 5<sup>th</sup> July, 1977 the third Martial Law was enforced by General Zia who was the Chief of Army Staff (COAS). To successfully carry out Martial Law in Pakistan, he followed the methods adopted by the previous martial law dictators. General Zia Suspended the Constitution and promulgated the Laws (Continuance in Force) Order 1977 which consisted of the similar measures taken by the previous military rulers in the history of Pakistan. The apex courts were bound to follow this order which stated that no judgment or order could be passed against the Martial Law Regulation. Unfortunately, the people of Pakistan had been deprived of their fundamental rights which were conferred by the constitution.

#### **Nusrat Bhutto Case:**

The real conflict for power sharing between CMLA and the judiciary had begun during Begum Nusrat Bhutto case, who was the spouse of Zulfiqar Ali Bhutto. She moved to the Supreme Court in favor of the detention of her husband. Chief justice Yaqoob Ali ordered to admit the petition on 20<sup>th</sup> September, 1977 and shifted Mr. Zulfiqar Ali Bhutto and others to Rawalpindi.<sup>34</sup>

After receiving the petition, the Supreme Court had adjourned the proceeding on 2<sup>nd</sup> September, 1977. However, the decision made by the Chief Justice Yaqoob Ali was fair and impartial but during those five days, dramatic changes were made by CMLA, who showed his supremacy over the judiciary by passing an order to amend the Constitution on 22<sup>nd</sup> September, 1977. However, the Constitution was held in abeyance during that time but now it was not possible to amend it. It clearly showed the great monopoly of executive over the judiciary.

Ultimately the Chief Justice Yaqoob Ali was removed from his office and he was charged as he had completed his age for retirement. Justice Anwar-ul-Haq took over the charge as the Chief Justice of the Supreme Court of Pakistan. A similar order was again delivered by CMLA on the same day for taking fresh oath from High Court judges. He warned judges to take oath within 24 hours and if they could not do so they would be removed from their office. The process of scrutinizing was accomplished through the Supreme Judicial Council by removing three and the two judges of the Lahore and the Sindh High Court respectively with one judge of the Lahore High Court reverted towards the office of the Session Judge.<sup>35</sup>

The doctrine of the new oath taking for the judges of the Superior Courts was introduced by General Zia through his Presidential order No. 1 in 1977. This instrument labeled the judiciary as PCO judiciary rather than constitutional. It created huge gap between the people and justice and caused huge damage for the independence of the apex courts as well.

The Begum Nusrat Bhutto case again started during the period of the new Chief Justice and verdict was released on 10<sup>th</sup> November 1977. This decision was in favor of CMLA, the court again used the doctrine of necessity to validate the coup of General Zia. It also granted the power to CMLA for any kind of legislation including constitutional amendment. The military establishment decided to postpone the general elections after receiving the decision about Nusrat Bhutto case.<sup>36</sup>

By using his authority, General Zia issued a Provisional Constitutional Order (PCO) on March 24, 1981. The Main point of focus for that PCO was to limit the power of the apex court and to harass the judges. General Zia assigned the task to Supreme Judicial Council for inquiring that how many judges were appointed on the basis of political affiliations in all High Courts. After investigations several allegedly politically appointed judges were removed from their services.<sup>37</sup> All judges of the apex court as well as the chief justices had to take fresh oath under the PCO. For the judges the oath taking was not a matter of choice. It had been decided by the President that those judges who were not ready to take oath, would be deprived of their job. It was necessary for those judges who took oath to perform their duties under the provision of the PCO and they were not allowed to call validity of its provisions to the question.

The personal pleasure was shown during the preparation of the list for the judges to take oath. This list was much confidential, even CMLA required no need for consultation to chief justices for the selection of judges. On the other side, Justice Durab Patel who was the next to rule as a senior judge later than the Chief Justice of the Supreme Court, and the Justice Fakhruddin Ibrahim both were not in favor to take oath. These judges were forced to make a strong block against the oath of PCO (Chauhan, 2002).<sup>38</sup>

The overwhelming majority of the judges including the Chief Justice Anwar-ul-Haq and Maulvi Mushtaq (who were most beneficiary judges during the Zia regime) were in favor of taking an oath. Justice Maulvi Mushtaq faced a strange situation when he was informed that he was not shortlisted for oath taking. The Chief Justice was invited for oath taking but he laid a condition that if justice Maulvi Mushtaq was asked to take an oath then he would take an oath. Therefore, the Chief Justice with Justice Durab Patel and Fakhruddin Ibrahim did not take the oath. Justice Maulvi Mushtaq was not invited to take an oath. Other 6 judges took the fresh oath under the PCO. The justice Halim Khan assumed the charge as substitute Chief Justice under prescribed constitutional instrument. The

judges of Lahore High Court had also been divided on the matter of oath taking, seven judges were unwilling to take the oath, and the remaining judges were present to take oath including the acting Chief Justice. At that time, apex court could not take a strong position for their contemporaries who were snubbed by a military dictator. Each judge was busy to save his own career. While on the other hand the self-respect of the constitutional institution was in danger in the hands of the military dictator.<sup>39</sup>

As far as the Sindh High Court was concerned, all judges agreed to take the oath under General Zia PCO. Two judges' justice Abdul Hafiz Mamon and Justice Ghulam Muhammad shah were removed from their offices due to their personal relevance to a political party and having close relationship to Pakistan People's Party. Six judges of the Peshawar High Court including Chief Justice were present inside the Governor House of NWFP to take oath. Justice Muhammad Daud Khan, the then Chairman of Federal Service Tribunal, refused to take oath.<sup>40</sup> From the three judges of Baluchistan High Court, Chief Justice Murri and justice Rashid were unwilling to take the oath, only one judge Justice Abdul Qadeer Choudhary presented himself for oath taking under that PCO. Justice Zakaullah Lodhi, the then working as a judge of Federal Shariat Court, was appointed as Chief Justice of Baluchistan High Court.<sup>41</sup>

That Martial law period proved an unfortunate era for judiciary. During that regime Pakistan judiciary was humiliated and insulted in the worst way. It must be stated that only military government should not be blamed for this inappropriate step, but in fact those judges who were present at the moment of oath taking were equally responsible for undermining the judicial independence and they also participated in humiliating judiciary. The PCO judges also sacrificed the independence and self-respect of the judiciary for accomplishment of their ambitions.

On February 25, 1985, non-party elections were held for national and provincial assemblies in Pakistan. Political parties were not allowed to participate in the elections. Before the

inaugural session of the National Assembly, General Zia withdrew and held a part of Constitution in abeyance through the Presidential Order known as the 1973 Revival of the Constitution Order (RCO) issued on March 2, 1985. The provisions of this order were to strengthen presidential power and recast the powers of the Prime Minister. General Zia made complete changes to the Constitution before its revival.<sup>42</sup>

### **Judiciary under the Civilian Governments 1988-99:**

The period of civilian government during 1988-99, and the politics of Pakistan had faced various confrontations among the state organs. As Prime Minister, Benazir Bhutto had to face various problems especially, on the recruitment of the judges of the apex courts and the chairman of the joint Chief of Army Staff Committee (COAS). Benazir Bhutto government crossed boundaries set by military establishment. She also opened front against the President without making consensus with opposition parties in the Parliament.<sup>43</sup>

The relationship between the main constitutional bodies had been damaged by the prescribed problems and the consequence of this dispute was the dissolution of the National Assembly in August 1990. The presumed act of the President was addressed in the Lahore High Court. The Court recognized that this President's action was valid, since the government could not be admitted in accordance with the pre-requisite of the Constitution. The Lahore High Court verdict was unsuccessfully challenged in the Supreme Court and confirmed the decision taken by the Lahore High Court. . After the dismissal of the Benazir government, general elections were held on October 24, 1990 and Islami Jamhuri Ithad (IJI) led by Nawaz Sharif convincingly won the elections and formed a coalition government. Nawaz Sharif has been elected Prime Minister of Pakistan.<sup>44</sup>

Once again a dispute arose over the appointment of the army chief. Prime Minister Nawaz Sharif wanted to change the constitution and annul the president's unlimited power, such as dissolving the national assembly and also appointing

the chiefs of the armed forces. The relationship between the prime minister and the president deteriorated further when Nawaz Sharif publicly announced and attacked the president's position and blamed the president for being involved in conspiracies to destabilize his government.<sup>45</sup> As retaliation, on the very next day 18<sup>th</sup> April 1993 Nawaz Sharif government was dismissed by the President Ghulam Ishaq Khan.

The deposed prime minister filed a petition under Article 184 (3) to the Supreme Court. A bench of eleven judges led by Chief Justice Nasim Hasan Shah met to hear the case. The Supreme Court confirmed the decision in favor of the Nawaz Sharif government with a majority of ten to one and, therefore, reinstated the government with immediate effect.<sup>46</sup> The judiciary showed its independence through this decision by rejecting any kind of pressure from other organs of the government and external influences.

The Pakistan People's Party (PPP) again won the 1993 elections. Benazir Bhutto, for the second time, was elected Prime Minister of Pakistan and formed a coalition government. During the second term of the Benazir government, there were many decisions that had adversely affected the prestige of the judiciary, for example, judges appointed under the mandate of the Nawaz Sharif government were deprived of job security. The logic given for this case was that these appointments were made to satisfy political aims and wishes.<sup>47</sup>

The Benazir government has appointed two new judges as acting chiefs of high courts of Lahore and Sindh. These judges were subsequently appointed to the Supreme Court. The government in question showed its political relevance for appointment to the upper court when Judge Abdul Hafiz Memon was appointed judge of the Sindh High Court. However, after taking an oath, he was immediately promoted to acting chief justice of the Sindh High Court. Shortly thereafter he was appointed judge of the Supreme Court because he had crossed the age of sequestration as a judge of the High Court.<sup>48</sup> Benazir made another surprising decision when she appointed a junior judge, Justice Sajjad Ali, as chief justice of the Supreme

Court. Nine judges in Sindh High Court and twenty in Lahore High Court was also appointed on the basis of their political affiliations.<sup>49</sup>

Seven ad hoc judges were appointed in Supreme Court against the permanent posts. After examining the violation of the constitutional procedure for the appointment of judges, the Chief Justice, Sajjad Ali, separated his way from the government of Benazir. Therefore, the relationship between the executive branch and the judiciary has entered in a critical period. In the meantime, chief Justice decided to defend and protect the status of judiciary as an institution, so appointments made to the Lahore High Court were challenged in the Supreme Court. On March 20, 1996, the Supreme Court decided that the government must consult with the Chief Justice before making any judicial appointments. The Supreme Court also advised the government to appoint permanent judges for the higher courts.<sup>50</sup> Benazir Bhutto's government refused to accept the Supreme Court's decision. Its reaction to this decision has not been pleasant. This decision was indeed an important, constructive and significant milestone in the judicial history of Pakistan. Therefore, the court decision paved the way for a new trend for the appointment of judges to the higher court.

This decision made the judiciary itself an operative institution free from outside interference and also eliminated the chances of dispute among the judges. It produced a healthy impact over the society and rehabilitated the trust of the public on the judiciary. Benazir Government adopted a hostile behavior towards the Chief Justice. A dispute emerged between the Benazir government and the President on the issue of the appointment of judges; as a result, the National Assembly was dissolved in November 1996 and Benazir lost his second term due to the judicial appointments.<sup>51</sup>

Syed Yousif Raza Gilani, the then speaker of National Assembly, filed an appeal against dissolution order before the Supreme Court. The Supreme Court set up a bench of seven judges to hear the case. An explicit majority of six judges confirmed the dissolution. The Supreme Court decision

was released a few days before the general election.<sup>52</sup>

PML (N) won elections with two-third majority and Nawaz Sharif became Prime Minister once again. During his second tenure, a conflict between judiciary and his government emerged on the issue of the formation of Anti-Terrorism Courts. The Chief Justice Sajjad Ali Shah, for whom PML (N) was a great benefactor, strongly opposed that kind of idea. His argument was that the determined budget to be spent on the formation of new terrorism courts could have been better spent in the current judicial structure and that the session judges could be charged with hearing counter-terrorism cases.<sup>53</sup>

The formation of anti-terrorism courts and the anti-terrorist laws was the basic conflicting point between the judiciary and Nawaz Sharif's Government. The situation further deteriorated when the Chief Justice suggested five judges from three High Courts for superlative to the Supreme Court but this recommendation was strongly opposed by the Prime Minister Nawaz Sharif. In order to show his superiority of executive over the judiciary, the Prime Minister issued a notification through which numbers of the judges of Supreme Court were reduced from seventeen to twelve.<sup>54</sup>

The Supreme Court Bar Association played its role in defending the independence of the judiciary and petitioned the Supreme Court. A three-judge bench chaired by Chief Justice suspended the notification and the Nawaz Sharif government therefore had to withdraw the notification on September 16, 1997.

The immediate result of the alleged conflict was that the Chief Justice formed a three member's bench to suspend the Fourteenth Amendment which had been made for the omission of the problems and the defects in the Thirteenth Amendment.<sup>55</sup>

The Chief Justice, through his jurisdictions, proved that the Chief Justice and the Bar Association were the true protectors of the judicial independence. It was an instant of a prestige for

judicial independence and degradation for executive thus it was the victory of superior courts rather than executive.

After the suspension of the 14<sup>th</sup> Amendment, there was a strong reaction from the ruling party and its allied parties. Even the harsh words were used in the speeches against Chief Justice about his prescribed order. The Cabinet also severely criticized and during a press conference Nawaz Sharif announced the suspension of constitution illegal and unconstitutional. There were strong remarks delivered by the members of the parliament against the Chief Justice and other judges. As a net result of these speeches, the charge of contempt for court was made against Nawaz Sharif and other members of his government. During the contempt of court proceedings on two occasions, 17<sup>th</sup> and 18<sup>th</sup> November, 1997 respectively, Nawaz Sharif made a personal appearance in the Supreme Court. A written statement was provided by the Prime Minister in which he expressed his regret over the remarks.<sup>56</sup>

On 18<sup>th</sup> November 1997, to protect Nawaz Sharif from the punishment in the contempt case, the parliament session was called to vote for the amendment in the Contempt of Court Bill. This bill suggested that due to contempt for court any order issued by the Supreme Court must be appealable before any other bench constituted by the apex court. It also suggested that order related to this issue would not be effectual for thirty days.<sup>57</sup> The Contempt of Court Bill was passed by the Majlis-e-Shura and sent for presidential consent. A writ petition was filed against the Contemp of Court Bill in the Supreme Court and an interim order was issued to stop the President from signing the bill.

The battle line had been drawn by this conflict between the government and judiciary. Meanwhile, army leadership entered into the situation to resolve the tension between the two organs of the state. The Army Chief played a role of arbitrator. On the other hand, the contempt for court proceeding was not in favor of Nawaz Sharif and other members of his government. It was adjourned only for seven days till 21 to 27<sup>th</sup> November 1997. A Petition was filed against Chief Justice in Quetta

Registry of the Supreme Court.<sup>58</sup>

It was absolutely against the rules and regulations of the Supreme Court that any petition regarding the original jurisdiction be filed in sub-registry; it could only be filed before the principal seat. However, to restrain the Chief Justice from performing the judicial function, on the same day an interim order was passed by the Quetta Bench, but it was opposed and suspended by the Chief Justice who exercised his administrative authority.<sup>59</sup> The Peshawar Registry of the Supreme Court had received a similar petition against the Chief Justice of Pakistan Sajjad Ali Shah. The same practice was revised by that registry.

After the two interim orders from Quetta and Peshawar Registry, by the order of Justice Saiduz Zaman Siddique, a bench of fifteen judges (without Chief Justice and the justice Ajmal Mian) had been formed for hearing the case against the Chief Justice.<sup>60</sup> Chief Justice once again took up the contempt for court case on November, 1997 but the proceeding had been disrupted by the ruling party who stormed the building of the Supreme Court. It was definitely one of the most disgraceful assaults on the Superior Courts.

By keeping in view, the gravity of the situation, Chief Justice formed a three-member bench and passed the orders for suspending the 13<sup>th</sup> Amendment to the Constitution. Never before, had such an illegal and unconstitutional step been taken by the apex court. Finally the constitutional and judicial crisis had been removed through the notification of Federal Government. According to the notification, Justice Ajmal Mian assumed the charge as new Chief Justice of Pakistan.<sup>61</sup>

Nawaz Sharif chose General Musharraf as a Chief of Army Staff after the resignation of General Jahangir Karamat. The real face and picture of General Musharraf personality appeared on the scene when he occupied the outposts of Siachen vacated by the Indian troops. General Musharraf took his troops and directed them to occupy those outposts without consulting the Prime Minister and other military rulers. The relationship

between the government and General Musharraf grew extremely grave after the Kargil war with India. The situation further became worsen when the rumors spread throughout the country that on the position of General Parvez Musharraf who was the then COAS, Nawaz Sharif Government had appointed someone as an army chief according to its personal choice.<sup>62</sup>

These rumors became true when General Musharraf as COAS was in Sri Lanka on an official visit on 12<sup>th</sup> October 1999, the prime minister appointed Lt. Gen. Zia ud Din as COAS. This modification in army regulation was not acceptable for military and took over the rule. In retaliation General Musharraf once again followed the history of Pakistan by suspending the constitution and assumed the charge as a Chief Executive of Pakistan. Historically the superior judiciary remained under absolute control by government. These governments controlled the constitutional norms for making appointments, promotions and removal. The said norms had often been manipulated by the rulings of the courts in their own favor, which caused to weaken the status of judiciary.

The appointment procedure of judges to the superior courts was not transparent under the control of some specific governments. He had been repeatedly manipulated for political reasons or for favoritism or nepotism. The procedure for appointing the higher judiciary was one of the main factors, which caused the independence of the judiciary to diminish. Unfortunately, during military regimes, the working of judges of superior courts not only created a faction among the judges, but also took an oath under martial law regulations and also legitimized the military coup.<sup>63</sup>

Since the first military intervention in 1958 the superior judiciary not only lost its independence but also remained under the influence of government because of repeated interference by executive. The doctrine of state of necessity became an effective legal instrument in the hands of military government to de-spirit the democratic Constitution of Pakistan.

The retirement age of a Supreme Court judge was sixty-five years and that of the high court judge was sixty-two years, when a high court judge reached his retirement age, he would obviously have thought to be a Supreme Court judge because he could exploit and extend the privilege for the next three years. It is difficult to understand the rationale behind such kind of inequality involved in the decision about the age for the retirement of the judges. The constitutional provisions and decisions of the Superior Court were not adequate to control the government from making random interference in the appointment procedure. To ensure the freedom of the judiciary, the issue relating to the retirement age of the judges of superior courts needs serious attention.

During the constitutional crisis, the destiny of the nations and respect of the law can be secured by the courts. Unfortunately, in the statutory history of Pakistan the role of superior judiciary during the constitutional crisis had been very disappointing. The politicians who championed the cause of democracy in Pakistan found it extremely difficult to run the country on democratic line. Mr. Z. A. Bhutto, a politician of par-excellence was the last hope; he did not allow the judiciary to function freely with full constitutional protection.<sup>64</sup>

During the years of 1988-99 the superior judiciary in Pakistan remained under tremendous stress and strain. Its role has been subjected to close scrutiny by its critiques. The suspension of 13<sup>th</sup> Constitutional Amendment was serious blow to very sanctity of the Constitution of Pakistan. It was out of sheer desperation that an attempt was made to subvert the Constitution of Pakistan. Higher judiciary was functioning under the parameters of the Constitution. The superior judiciary is subservient to the provision of the constitution and the judges of the superior judiciary have been empowered to interpret the constitution, not to repeal, delete or suspend any part of it.<sup>65</sup> The order by the Supreme Court was disastrous in nature and could cause the destruction of the Judiciary of Pakistan.

Due to pressure excreted on the institutional structure from time to time by executive through constitutional means, the

superior judiciary could not maintain and preserve its image established in early years. During military regimes the superior judiciary in Pakistan was again and again forced to sacrifice its independence and power. Except a few judges, the whole body of the judiciary remained busy to compromise with the government of the day because they could not resist against the external pressure, especially from the executive.

### **Conclusion:**

Liberty is a precious possession of every individual. It needs to be protected for the sake of peace in human societies. There are several methods of safeguarding the human rights. The most important of them is the independence of judiciary. The courts have delegated powers with the important task of defining and protecting the rights and liberties of the individual. Such instrument is also being applied in the constitutional history of Pakistan. But the question is: how the courts remained successful to perform this duty in Pakistan from 1947 to 1999?

The superior judiciary of Pakistan tried well to ensure fundamental rights of the people but unfortunately it faces many hurdles to perform its function effectively. Military interventions of 1958, 1969 and 1977 crushed the judicial independence through various legal framework orders and provisional constitutional orders. It also very important to mention that judiciary itself also played a vital role to sacrifice its freedom. Higher judiciary in Pakistan always supported military regimes and even the judges took oath on provisional constitutional orders issued by the dictators.

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