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THE ROLE OF JUDICIARY IN THE CONSTITUTIONAL DEVELOPMENT OF PAKISTAN (1947-1971)

by

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The Government of India Act, 1935[1] established for the first time in British India a federal constitutional court-the Federal court of India-with powers and jurisdiction, *inter alia*, to adjudicate on the constitutionality of British Indian central and provincial legislation in the light of the provisions of the Constitution Act and other Imperial statutes.[2] On independence in 1947, a new Federal Court[3] had to be established as a successor to the British Indian Federal Court to exercise all its powers and jurisdiction with respect to the territories of the new state of Pakistan. The superior courts within the teritory of Pakistan including the new High Court for East Bengal at Dacca inherited all the power and jurisdiction as had been held by their repective predecessors in pre-independence days. These superior courts were also given special writ jurisdiction by the Constituent Assembly of Pakistan by inserting Section 223 A[4] to the Government of India Act, 1935. This Act, as adapted to suit the changed circumstances[5] together with the Indian Independence Act, 1947[6] formed the Constitution of independent Pakistan. Further, in 1950 by an Act[7] passed by the Constituent Assembly of Pakistan, the Federal Court was made the highest court in the judicial hierarchy of the country. The higher judiciary in Pakistan was, thus, arranged in conformity with the traditional concept of

1. 26 Geo. 5. c. 2.
2. Section 204 & 205 of Gov't. of India Act, 1935.
3. The Federal Court of Pakistan Order, 1948 (G.G.O. 3 dt. 23. 2. 48).
4. "Every High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue any person or authority including in appropriate cases any government within those territories writs including writs in the nature of *habas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* or any of them". inserted by Government of India (Amendment) Act. 1954, P.L.D. 1954 central statutes, 152.
5. Pakistan (Provincial Constitution) Order, 1947 (G.G.O. 22 of 14.8.47)
6. 10 & 11 Geo. 6, c. 30.
7. Privy Council (Abolition of Jurisdiction) Act, 1950.

its position and role under a political system with a written constitution as the supreme law of the land.

In the field of law-making, apart from the four provincial assemblies functioning under the Government of India Act, 1935, a Constituent Assembly was created for Pakistan under the Partition Plan[8] of 3 June 1947. The Constituent Assembly thus created was given statutory recognition by the Indian Independence Act, 1947, which defined its powers and functions. The main function of the Constituent Assembly was to prepare a constitution for Pakistan[9] and in addition to this constituent power, the Assembly was to exercise, during the interim period, the powers, and discharge the functions, of the Federal Legislature.[10] Subject to the law-making powers of these legislatures, the Ordinance-making power of the Govenor-General and the provincial Governors to meet immediate necessity of law-making was retained.[11] Thus under the arrangement of the interim Constitution, the legislative, executive and judicial powers of the state of Pakistan were to be exercised on the basis of the written provisions of the Constitution Acts which stood as the source of all Powers and jurisdiction.

As had been envisaged, soon after the establishment of Pakistan, its superior courts were called upon to examine the constitutionality of Acts passed by the Constituent Assembly. In *Khuhro* V, *Federation*[12] the action of the Governor-General under the Public and Representative Officers (Disqualification) Act, 1949, passed by the Constituent Assembly was challenged on the ground that the Act itself was void as it was not assented to by the Governor-General. It was contended on behalf of the Government that the impugned Act was passed by the Constituent Assembly in exercise of its constituent powers and as such the Governor-General's assent was not necessary. Accepting this argument the Sind Chief Court

8. The Partition Plan, popularly known as the Mountbatten plan, contained the terms and conditions of the political settlement for the future of British India creating two independent dominions-India and Pakistan-through partition of British India.
9. Section 8, sub-section (1) of the Indian Independence Act, 1947.
10. Section 8 (2) para (e) of the Act of 1947.
11. Government of India Act, 1935 section 42 (1) and 81 (1)
12. P.L.D. 1950 Sind 49

held that laws passed by the Constituent Assembly in exercise of its constituent power were valid constitutional laws without the assent of the Governor-General. In two other cases[13] before the Federal Court, the statutes purported to have been passed by the Constituent Assembly as constitutional laws were challenged on the ground that the statutes in question should have been passed by the Federal Legislature and should therefore, have been assented to by the Governor-General, without which they had no legal effect. The Federal Court, however, accepted the submission made on behalf of the Government that they were constitutional laws and so were fully valid without the assent of the Governor-General.

As things went on, by 1954 it would seem that the Federal Court of Pakistan and other superior courts had been able to establish their competence and authority to protect and uphold the principales and provisions of the Constitution of the country. But in late October, 1954 the nation was plunged into its first major constitutional crisis by an authoritarian action of the Governor-General who by a proclamation[14] dissolved the Constituent Assembly. The Governor-General claimed that the country was faced with a serious political crisis and that the constitutional machinery had broken down; that the Constituent Assembly had lost the confidence of the people and hence could no longer function; that fresh elections would be held and the newly elected representatives woutd decide all issues including constitutional issues. It may be recalled at this stage that the Constituent Assembly after seven years of relentless efforts had been able to resolve controversial issues and at last adopted a draft constitution at its last session ended a month before its dissolution. The Prime Minister had even set 25 December 1954 for implementation of the Constitution after which it was expected that general elections would be held to put the whole administration of the country under the long cherished constitutional rule.[15] The Constituent Assembly was not allowed to complete its work and by dissolving it the country was pushed to an unprecedented constitutional crisis and political uncertainly.

13. *Khan of Mamdot* V. *Crown*, P.L.D. 1950 F.C. 15; and *Akbar Knan* V. *Crown*, P.L.D. 1954 F.C. 87.
14. *Gazette of Pakistan*, 24 October, 1954.
15. For the political background of the Governor-General's action see generally, G.W. Choudhury, *Constitutional Development of Pakistan* 2nd Edition Longman, London.

The Governor-General's action was challenged in the Sind Chief Court by the Constituent Assembly's President Maulvi Tamizuddin Khan.[16] The petitioner applied to the Court under section 223A of the Government of India Act, 1935, for issue of writs of *mandamus* and *quo warranto* with a view to : (i) restraining the Federation from giving effect to the proclamation and obstructing the petitioner in the exercise of his functions and duties as the President of the Assembly; and (ii) to determine the validity of appointment of the recently appointed Ministers who were not members of the legislature. The respondents raised the preliminary objection that section 223A of the Act of 1935 which gave powers to superior courts to issue writs, was, in the absence of the assent of the Governor-General, not valid law and as such the Court had no jurisdiction to issue writs to the respondents. The same objection applied to new sectien 10 of the Government of India Act, 1935 which purported to limit the Governor-General's discretion in his choice of Ministers to the members of the Constituent Assembly.

The five judges of the Chief Court of Sind unanimously held that, to constitutional laws passed by the Constituent Assembly the assent of the Governor - General was not necessary and, therefore, the amended section 10 and section 223A of the Government of India Act, 1935, were valid constitutional laws, enforceable without the assent of the Governor-General. The Court also held that the Governor-General had no power to dissolve the Constituent Assembly which had no prescribed period of duration and could only be dissolved by itself on the fulfilment of its main task of making a constitution for the country.

The Government filed an appeal to the Federal Court against the judgment of the Sind Chief Court.[17] The Federal Court in its first vital decision in the field of constitutional process of the country reversed the judgment of the Court below. It held by a majority of four to one (Cornelius, J. dissenting) that all Acts passed by the Constituent Assembly including the Acts providing for constitutional provisions required the assent of the Governor-General for their validity. Since section 223 A of the Government of India Act, 1935, by virtue of which the Chief Court of Sind had assumed jurisdiction

16. *Maulvi Tamizuddin Khan* V. *Federation of Pakistan* P.L.D. 1955 Sind 96.
17. *Federation of Pakistan* V. *Maulvi Tamizuddin Khan* P.L.D. F.C. 240.

to issue writs did not receive such assent it was not yet a law, and hence that Court had no jurisdiction to issue the writs. In view of this finding the Federel Court did not go into the other issues.

The main judgment of the Federal Court was delivered by the Chief Justic, Muhammad Munir, who argued that being a Dominion within the British Commonwealth, Pakistan's constitutional structure and practices were like those of the United Kingdom and other Dominions. Legislation was the exercise of a 'high prerogative power' and even when it was delegated by statute or charter to a legislature, in theory, it was always subject to assent, whether that assent be given by the King or a person nominated by the King. The necessity of assent was enjoined in the case of Pakistan so long as it continued to be a Dominion, though it was open to that Dominion, if the Governor-General gave assent to a Bill of secession, to repudiate its Dominion status. Interpreting sections 6(1)[18] and 8(1)[19] of the Indian Independence Act, 1947, the Chief Justice held that the combined meaning of these two sections could not be other than that the Constituent Assembly, even when exercising the constituent powers in making constitutional laws, was the legislature of the Dominion. "That being the position," Munir, C. J. concluded, "There can be no escape from the conclusion that the Governor-General's assent to the laws made by the Constituent Assembly is as necessary as his assent to any future legislature of the Dominion brought into existence by the Constituent Assembly to replace itself."[20] The Chief Justice declined to consider the fact that since the inception of Pakistan all organs of the government including the judiciary had acted on the assumption that assent to the constitutional laws was not necessary. In this connection Munir, C. J., held that the doctrine of *contemporanea expositio* would apply only when there was any doubt about the meaning of the provisions of the statute. His lordship, in the instant case, did not entertain any doubt as to the meaning of the material provisions.

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18. "The Legislature of each of the new Dominions shall have full power to make laws for that Dominion . . . "
19. "In the case of each of the new Dominions, the powers of the Legislature of the Dominion, shall, for the purpose of making provisions as to the Constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion. . . "
20. P.L.D. 1955 F.C. 240, at p. 289.

Dissenting from the majority, Cornelius, J, as he then was, held that the 'independent' Dominion of Pakistan, though a member of the Commonwealth, was different in status from the older Dominions, and the Constituent Assembly having been created by a 'supra-legal' power to discharge the 'supra-legal' function of making a constitution for Pakistan, its constitutional laws were not subject to the 'qualified-negative' assent of the Governor-General.

Chief Justice Munir's judgment has been viewed variously by different authorities.[21] But on an analysis of the circumstances leading to the case it would perhaps not be an exaggeration to say that here in this case Munir, C.J., was certainly confronted with a dilemma as the Chief Justice of the United States of America, John Marshall, was confronted more than one hundred and fifty years ago.[22] If he were to uphold the judgment of the Chief Court of Sind probably in the face of almost certain disobedience by the Governor-General, the Court would be powerless, and if he were to reverse that judgment the authoritarian Governor-General would triumph. In such a situatton the Chief Justice found, as was found by his great American counterpart, that the law empowering the superior courts to issue writs was unconstitutional and invalid because of the lack of Governor-General's assent.

The allegation of subservience[23] of the Court to the wishes of the autocratic Governor-General would perhaps be a harsh remark on the Court. It may, however, be true that having closely observed the autocratic style of administration in the country since its inception, and being fully conscious of the contemptuous attitude of the ruling clique towards popular rule, principles of democracy and constitutionalism, Munir, C.J., wanted to avoid direct confrontation with the clique without, of course, tarnishing the authority

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21. See K.C. Wheare, *The Constitutional Structure of the Commonwealth* (Oxford University Press 1960). p. 100; S.A. de Smith. "Constitutional Lawyers in Revolutionary Situations", (1968) 7 *Western Ontario Law* Review, 93; A. Gledhill, "The Constitutional Crisis in Pakistan", (1955). *Indian Year Book of International Affairs.*

22. *Marbury* v. *Madison*, 1 Cranch 137 (1803), See for the Amerian Dilemma Henry J. Abraham, *The Judicial Process* (OUP 1980) p. 329.

23. See, S.A. de Smith, "Constitutional Lawyers in Revolutionary Situations", (1968) 7 *Western Ontaio Law Review*, 93.

of the Court. Under the garb of apparent strict legality he tried to maitain a balance between the authority of the Court and the stubborn attitude of the executive. That the Chief Justice was not prepared to connive at every anti-constitutional and anti-people action was aptly proved by his strong observation he made in the case[24] that arose out of his judgment in *Maulvi Tamizuddin Khan's* case.

It may be noted that the Federal Court in *Tamizuddin Khan's* case refused to go into the legality of the Governor-General's action in dissolving the Constituent Assembly. However, as a result of the Court's finding forty-four Constitutional Acts, by implication, became invalid for want of assent of the Governor-General. The Governor-General, thereupon, declared a grave emergency throughout the country and purporting to act under section 42(1) of the Government of India Act, 1935, issued and promulgated the Emergency Powers Ordinance, 1955.[25] The Ordinance, after narrating that the Federal Court's judgment by invalidating certain constiutional Acts, had caused a breakdown of the constitutional machinery, purported to validate retrospectively thirty-five of the Acts, listed in the Schedule to the Ordinance.

The above Ordinance came for examination before the Federal Court in the case of *Usif Patel* v. *Crown.*[26] The Court held that the Governor-General could not, by Ordinance, validate any of the laws, which had become invalid for want of his assent. Muhammad Munir, C.J., held, on the authority of *Tamizuddin Khan's* case discussed above, that the Governor-General's power to make Ordinance did not go beyond the Federal Legislature's power to make laws. The power of the Legislature of the Dominion to make provision for the Constitution of the Dominion could, under section 8(1) of the Independence Act, 1947, be exercised only by the Constituent Assembly, and that power could not be exercised by the Assembly when it functioned as the Federal Legislature under the Govt. of India Act, 1935. Therefore, if the Federal Legislature was incompetent to pass laws amending the Constitution Acts, the Governor-General possessing no larger power than the Federal Legislature was

24. *Usif Patel* V. *Crown*, P.L.D. 1955 F.C. 387
25. Ordinance ix of 1955, P.L.D. 1955 *Central Statutes* 63.
26. P.L.D. 1955 F.C. 387.

equally incompetent to amend either of the Constitution Acts by Ordinance. The Governor-General could give or withhold his assent to the legislation of the Constituent Assembly. But the Governor-General, argued the Chief Justice, was not the Constitutent Assembly and, on its disappearnce he could neither claim power which he never possessed nor could he claim to succeed to the powers of the Assembly.[27]

In the course of his judgment the Chief Justice referred to the statement made by counsel for the Federation in *Tamizuddin Khan's* case regarding the constitutional position consequent upon the dissolution of the Constituent Assembly. His lordship cited a portion which implied that immediate steps were being taken to hold elections to a new Assembly. The Chief Justice observed that it might well be expected that the first concern of the government would be to bring into existence another representative body to exercise the powers of the Constituent Assembly. His Lordship, however, regretted that events showed that other counsels had since prevailed. The Ordinance (ix of 1955) contained no reference to elections, and all that the learned Advocate-General could say was that they were intended to be held.[28] It may also be noted that not only the Ordinance contained nothing about the representative body that the Chief Justice referred to, on the contrary, section 10 of the Ordinance (ix of 1955) contained an ominous provision empowering the Governor-General to make, by order, such provisions as appeared to him to be necessary or expedient for the future constitution of the country. The situtation was worsened by the irresponsible public utterances of Major-General Iskander Mirza, the then Minister of the Interior, who as the spokesman of the regime had nothing but contempt for democratic and constitutional processes.[29] In the circumstances, it was apprehended in the political and judicial circles that a constitution of the regime's liking would be promulgated by the Governor-General's decree. It was in this background that the Federal Court in *Usif Patel's* case rose to the occasion and held the Governor-General's Ordinance void which smacked of authoritarian rule devoid

27. *Ibid* at p. 392
28. *Ibid* p. 401
29. See, for Mirza's Statements on Political process and 'controlled democracy', *Dawn*, 31 October and 15 November, 1954.

of democratic principles. It was the strong criticism of the Chief Justice that the Governor-General and his lackeys were dissuaded from exercising powers under the Ordinance (ix of 1966). Paying heed to the Chief Justice's remarks the Governor-General issued the Constituent Covention Order, 1955[30], providing for the setting up of a "Convention" to make a Constitution for the country and also issued and promulgated a new Emergency Powers Ordnances, 1955[31] assuming to himself, until other provisions were made by the Constituent Convention, such powers as were necessary to validate the invalid laws in order "to avoid a a possible breakdown in the constitutional and administrative machinery of the countrry and to preserve the state and maintain the Government of the country in its existing condition." In exercise of these powers the Governor-General retrospectively validated and declared enforceable the laws listed in the Schedule to the Emergency Powers Ordinace (ix of 1955). These powers were exercised by the Governor-General subject to any report of the Federal Court on the constitutional position referred to it by the Governor-General under section 213 of the Government of India Act, 1935[32].

Thus, at last the Governor-General had to seek the advice of the Federal Court to help him out of the constitutional crisis which he himself created. The question referred to the Federal Court[33] covered the scope of the Governor-General's powers and responsibilities in governing the country before the proposed 'Convention' passed the necessary legislation; and whether, in view of the Federal Court's decision in *Usif Patel*'s case, the Governor-General had any power under the Constitution or any rule of law to declare the invalid laws to be part of the law of the land until their validity was determined by the proposed 'Convention'. During the hearing of the *Reference*, however, at the instance of the Court, two more questions were added. One was whether the Constituent Assembly was rightly dessolved by the Governor-General, and and the other, whether the proposed Constituent Convention would be competent to exercise

30. G.G. 's O. VIII of 1955. P.L.D. 1955 *Central Statutes* 118.
31. P.L.D. 1955 *Central Statutes* 113.
32. *Ibid.* See the provisions of the Ordinance.
33. *Reference by H. E. the Governor-General* P. L.D. 1955 F.C. 435

powers conferred on the Constituent Assembly by section 8 of the Indian Indepence Act.

The majority opinion of the Federal Court given by Munir, C.J. held that the first question was too general and need not be answered. On the second question the court said that "in the situation presented by the *Reference*, the Governor-General has, during the interim period, the power under the common law of civil or state necessity, of retrospectively validating the laws listed in the Schedule to the Emergency Powers Ordinance 1955, and all these laws, until the question of their validation is decided upon by the Constituent Assembly, are during the aforesaid period valid and enforceable".[34] In expounding the doctrine of state necessity the Chief Justice referred to Lord Mansfield's address to the Jury in *George Stratton's* case[35] and the opinions of Chitty and Bracton on the doctrine of state necessity, and observed that "necessity makes lawful that which otherwise is not lawful". In this context considering the condition following the decision in *Usif Patel*'s case Munir, C.J., held that "the Governor-General must, therefore, be held to have acted in order to avert an impending disaster and to prevent the state and the Society from dissolution".[36]

On the all-important question of the dissolution of the Constituent Assembly, the Chief Justice examining the scheme of the Indian Independence Act, 1947, and following the principle enunciated by the House of Lords in *De Keyser's Royal Hotel* case[37] held that the absolute and unqualified prerogative right of the Crown and of the Governor-General as the representative of the Crown to dissolve the Assembly had clearly been taken away.[38] He, however, observed that where a statute made provisions for a particular situation it excluded the common law. But if the situation was entirely beyond the contemplation of the statute, it would be governed by common law. In the instant case the Constitution Acts assumed that the Constituent Assembly would frame a constitution within a reasonable time; it was not given power to function as long as it liked and

34. *Ibid.* at pp. 520-21
35. 21 *Howard's St. trial* 1046.
36. P.L.D. 1955 F.C. 435 at p. 486
37. *Attorney General* v. *De Keyser's Royal Hotel*, (1920) A.C. 508.
38. P,L.D. 1955 F.C. 435 at 452.

assume the form of a perpetual or indissoluble legislature. In this context, accepting the statement of facts made in the *Reference* that the Contsituent Assembly had failed to fulfil its task and acted illegally or in a manner different from the one it was intended to function, Munir, C.J., held that the common law prerogative, which was kept in abeyance must be held to have revived, when it became apparent to the Governor-General that the Constituent Assembly was unable or had failed to provide a constitution for the country. In view of this the Court came to the conclusion that "the Governor-General had under section 5 of the Indian Independence Act, legal authority to dissolve the Constituent Assembly."[39]

Dealing with the question of the competence of the proposed Constituent Convention, Munir, C.J., following the same principle, held that in the absence of statutory prohibition, the Governor-General had under common law the power to create a fresh Constituent Assembly to prepare a constitution for the country. The only legal requirement in setting up a new body was that it should be a representative one. The term 'Convention' being misleading, the new body should be called the Constituent Assembly which would have all powers exercised by the dissolved Constituent Assembly.[40]

Dissenting from the majority, Cornelius and Sharif, JJ, held that the Governor-General had no authority to validate the invalid laws, whether temporarily or permanently. On the application of the doctrine of 'state necessity', Sharif, J., pointed out that general application of this doctrine could lead to dangerous situation where the Head of the state might be tempted to tamper with the constitutional structure itself.[41]

In the *Special Reference case*, the Federal Court gave its opinion in the exercise of its advisory jurisdiction. The Governor-General's authority temporarily and retrospectively to validate the invalid laws was subsequently recognised by the Federal Court in a contentious case.[42] Munir, C.J., distinguished *Usif Patel's* case where validation by the Governor-General was held to be beyond his power "because by the validating Ordinance, the Governor-General claimed for himself

39. *Ibid* at p. 486.
40. *Ibid* p.p. 472-475
41. *Ibid* at p. 519
42. *Federation of Pakistan* v. *A Ahmad Shah*, P.L.D. 1955 F.C. 522

the power to validate, without any reference to, and in the absence of the legislature, whereas, in the present case, the validation is only provisional and subject to legislation by the Constituent Assembly."[43] The end result of these judgments was that *status quo* in the legal structure was to be maintained till the new Constituent Assembly decided on the issue.

On an analysis of the above discussion it would be seen that although the Federal Court's decision in *Maulvi Tamizuddin Khan's* case and its opinion in the *Special Reference* case were not free from the allegation of having a taint of political bias,[44] these decisions, without doubt, contributed much in overcoming an unprecedented constiutional crisis created by an autocratic Governor-General. It might be alleged that the Federal Court's decision in the *Maulvi Tamizuddin Khan's* case might have encouraged the Governor-General with the support of his coterie, to take unto himself the power to give a constitution to the country according to his ideas. The fact that the Proclamation dissolving the Constituent Assembly contained a promise of fresh elections which was totally forgetten while issuing the Emergency Powers Ordinance (ix of 1955) which empowered the Governor-General to provide for a suitable constitution as he deemed fit and necessary, may be cited to support the allegation. But it must be admitted that the Court's strong observations in *Usif Patel's* case had been able to restrain the Governor-Genenral from exercising the constituent power and made him submit to the Court seeking its advice in tiding over the crisis. The Federal Court, not only advised the executive to leave the task of constitution-making to the representatives of the people, it at the same time, enabled the Governor-General to take appropriate measure to run the administration according to law temporarily for an interim period by invoking the common law doctrine of 'state necessity'. This was indeed a great contribution on the part of the Federal Court to guide the country on the path of democracy and constitutionalism.

Soon after the Federal Court's opinion in the *Special Reference* case, elections to the new Constituent Assembly were held and it was

43. *Ibid.* at p. 529

44. See S.A. de smith, "Constitutional Lawyers in Revolutionary Situations", (1968) 7 *Western Ontario Law Review*, 93.

convened forthwith to deliberate on the burning legal and constitutional issues. Apparently, having learnt a lesson through the fate of its predecessor, the second Constituent Assembly took only about two months from the date of the publication of the draft constitution to finally adopt it on 17 Februrary, 1956 which came into effect on 23 March, 1956.[45]

But "the Constitution which emerged nine years after independence, the product of so much turmoil and strife, had a very short life."[46] It could not give the expected political stability in the country due to dissension among political leaders on both fundamental and petty issues. However, in the course of thirty months of its working, when the country was preparing for the first ever general elections scheduled to be held in Februrary, 1959,[47] by a Proclamation[48] of the President issued on the night of 7 October, 1958, the Constitution of 1956 was abrogated, the national and provincial legislatures were dissolved, the Central and Provincial Governments were dismissed, all political parties were abolished and martial law was declared throughout the country. The President appointed General M. Ayub Khan, the then army Chief, as the Chief Martial Law Administrator with supreme command over all the armed forces. On 10 October, 1958, three days after the abrogation of the Constitution of 1956, the President issued the Laws (Continuance in Force) Order,1958[49], which turned out to be the principal constitutional document for the martial law period.

The Laws (Continuance in Force) Order, 1958 which was deemed to have taken effect immediately upon the making of the Proclamation, provided that subject to the Proclamation, any Order of the President or Regulation made by the Chief Martial Law Administrator, the country was to be governed as nearly as possible in accordance with the abrogated constitution. The powers and

45. See A. Gledhill, *Pakistan* (2nd Edition, Stevens 1967) pp. 81-83.
46. *Ibid.* p. 101.
47. See for election alliances and other political background, K.B. Sayeed, *The Political System of Pakistan* (Boston, 1967), pp. 90-91; G. W. Choudhury, *Constitutional Development in Pakistan* (Longman 1959) p. 255.
48. *Gazette of Pakistan*, 7 October, 1958, also, P.L.D. 1958 Central Statute 577.
49. President's Order (post-proclamation) No. 1 of 1958.

jurisdiction of civilian authorities were not interfered with, but all these had now to function subject to the orders and directions of the Chief Martial Law Administrator or authorities designated by him. The Supreme Court and the High Courts retained their powers and jurisdiction including their power to issue writs, but they were not to call in question the President's Proclamation of 7 October, any Order made under the Proclamation, or Martial Law Order or Regulation or findings or judgment of any military court. All orders, and judgments made or given by the Supreme Court before 10 October, 1958 were valid and binding, but saving those, no other order or writ made or issued after 7 October would be valid unless permitted by the Order, and all applications and proceedings in respect of any writ, which was not retained by the Order, would abate. All laws in force, except the late Constitution, subject to the Orders and Regualtians made by the President or the Chief Martial Law Administrator, were to continue in force until altered, repealed or amended.

In such extra-ordinary circumstances, the Supreme Court of Pakistan was called upon to determine the legality of the regime which had abrogated the Constitution of 1956, abolished or destroyed the legal order under it, and established entirely a new one backed by the armed forces of the country. There was no doubt in the minds of the people concerned, and the regime also did not attempt to hide the fact that the entire armed forces were behind the *coup*. In the *State* v. *Dosso*[50] the question arose whether a writ issued by the West Pakistan High Court under the provisions of the abrogated Constitution had abated by virtue of the provisions of the Laws (Continuance in force) Order. The Supreme Court, by a majoritty (Cornelius, J. dissenting) held that it had, inasmuch as the late Constitution itself had been abrogated; the Court recognised the Laws (Continuance in Force) Order as the 'new constitution' which determined the jurisdiction of all courts including the Supreme Court. The Court took judicial notice of the President's Proclamation of 7 October, 1958 abrogating the Constitution which both the President and the Judges were oath-bound to "preserve, protect and defend", and accepted the position provided for in the Laws (Continuance in Force) Order of 10 October 1958.

50. P.L.D. 1958 S.C. 533

Muhammad Munir, C.J., who gave the main judgment of the Court, in a detailed discussion of constitutional changes maintained that an abrupt political change, not contemplated by the existing constitution emerging as a 'victorious revolution' or a 'successful *coup d' etat*' was an internationally recognised method of changing a constitution. He said,

> 'It sometimes happens.... that a constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing constitution but also the validity of the national legal order'.[51]

The learned Chief Justice pointed out that a revolution was generally associated with public tumult, mutiny and bloodshed, but 'from a juristic point of view the method by which and persons by whom a revolution is brought about is wholly immaterial ..... Equally irrelevant in law is the motive for the revolution.....' For the purpose of the dectrine '..... a change is, in law, a revolution if it annuls the constitution and the annulment is effective'. In support of his view Munir, C.J. applied the positivist theory of 'efficacy' propounded by Hans Kelsen and quoted extensively from his famous work *General Theory of Law and State*[52] and came to the conclusion that the revolution having been successful, it had satisfied the test of 'efficacy' and become a basic law-creating fact. 'On that assumption', the Chief Justice held, 'the Laws (Continuance in Force) Order, however, transitory or imperfect it may be, is a new legal order and it is in accordance with that Order that the validity of the laws and the correctness of judicial decisions has to be examined.[53]

This historic judgment of Munir, C.J., and endorsed by the majority of the judges of the Supreme Court gave approval to an utterly unconstitutional act of an autocratic President who had a tremendous hatred towards normal democratic political process and constitutional rule. He was instigated and backed by an ambitious army general, M. Ayub Khan, who had his own political designs.[54] The Court simply recognised the 'abrupt political change'

51. *Ibid.* p. 538.
52. Harvard University Press : 1946 (Tr, By Anders Wedberg).
53. *State* v. *Dosso*, Ibid, at p. 540.
54. See M. Ayub Khan, *Friends Not Masters*, (OUP : 1967) pp. 73-75

in view of its effectiveness', having no opposition from any quarter. It did not take into consideration the objective political condition obtaining in the country at the material time nor did it think it fit to examine the validity of the claim of the usurpers that the Constitution of 1956 was unworkable. It also ignored the fact that the constitution itself had provisions for its own amendment which was universally reconised method for bringing about any necessary change.

Thus, the Court, not only upheld the destruction of a legal order which was based on a Constitution enshrined with democratic values and principles, but also, implicitly allowed the usurpers of power to design and implement a constitution without any heed to the political sensitivities of the people of the country in general, and those of the eastern wing in particular. The presidential system with the extreme centralisation of powers in the hands of the President under the provision of the Conslitution of 1962 promulgated by Field Marshal Ayub Khan, was a single major factor alienating the people of the eastern wing from the main political stream of the country. The people generally suffered from a sense of deprivation and lack of participation in the state activities which ultimately led to the disintegration of the country.[55] The post-1958 political episode in Pakistan seems to have left an ominous legacy for the two successor states which are still in search of a political system based on democratic principles. The sad experience of Pakistan and Bangladesh since their seperation proves the correctness of the prophetic remark made by Professor Gledhill who, while commenting on the Supreme Court's judgment in the case of *Dosso* said, "the course taken by the Supreme Court] was calculated to encourage an individual weilding supreme power to seek the approval of the courts for unconstitutional action.[56]

The judgment of the Supreme Court of Pakistan in the *State* v. *Dosso* has since been referred to in many cases before the highest courts of different countries. In all these cases the courts were called upon to deal with the effects of 'abrupt political change'

55. See Rounaq Jahan, *Pakistan, Failure in National Integration*, (OUP : 1973) Ch. VII pp. 143-177.

56. A. Gledhill, *Pakistan, the Development of its Laws and Constitution* (Sterens : 1967) p. 109.

in their respective jurisdictions and they seem to have agreed in substance with the views of Chief Justice Munir that such a change amounted to a 'legal revolution' which the courts perforce of the circumstances had to recognise.[57] The judgment of Munir, C, J., also drew criticison from commentators. Macfarlane, a political scientist observed that the manner in which the Supreme Court of Pakistan had interpreted the phenomenon of change was fraught with the danger that the arbitrary ruler would be free to take whatever measures he liked and even the courts might be required to find 'legal' reasons for his arbitrary measures. 'In such circumstances for judges to uphold the decrees of those in power in the name of law and *de jure* authority', Macfarlane pointed out, 'is to mock and undermine ordinary men's confidence in the rule of law. It is one thing to argue...that men cannot be required to behave in conformity with norms of a total legal order which has passed away; quite another to conclude, as the Pakistani ... judges have done, that this requires that the courts of the old order are required to validate the norms of its effective replacements.'[58]

It is to be noted that what happened in Pakistan in October, 1958 then an isolated incident in the Commonwealth became, with the exception so far, of India, Malaysia Singapore and a few other countries, a pattern for the newly liberated Commonwealth and other third world countries. In most cases the army and other forces established, patronised and used by the former colonial administrators to suppress popular movements for liberation and independence, in collaboration with each other, overthrew the constitutional regimes on allegations of corruption, inefficiency and oppression and usurped the power with the grand promise of establishing honest, efficient and forward-looking administration based on 'true' democratic principles.

57. See the Ugandan case of *Uganda* v. *Commissioner of Prisons, ex parte Matuvo*, (1966) E.A. 514; the Rhodesian cases of *Madzimbamuto* v. *Lardner-Burke*, (1968) 2 S.A. 284 (R.A.D.); *R.* V. *Ndholvu*, (1968) 4 S.A. 514 (R.A.D.) The Judicial Committee of the Privy Council though refused to accept the validity of Smith regime, because Britain as the legal sovereign was committed to put an end to the rebellion, accepted Munir, C.J., s contention as right, see *Madzimbamuta* v. *Lardner-Burke*, (1968) 3 All E.R. 561.

58. L.J. Macfarlane, "Pronouncing on Rebellion : The Courts and the U.D.I." (1968) *Public Law*, 323.

But the experience of nearly four decades of the era of decolonisation suggests that with a very few rare exceptions, the usurpers of state power have failed to deliver the promised good; rather, after a short while of their assuming power they indulged in the same vices, sometimes in greater scale, resulting in *coups* and counter *coups* or, in the words of Munir C.J., in the succession of 'abrupt political changes', without any substantial benefit for the suffering masses. The net result being interruption in the normal political process which, even the Marxists now admit, is vital for socio-eonomic development of the people and the mation. The administration set up by the new rulers invariably deprive the people of their basic democratic right to participate in the government of their country, a right for which the people had fought against their colonial masters.

A case study of Pakistan's constitutional and political development since the overothrow of the 1956- constitutional government would, it is submitted, provide a sample pattern of administration which the usurpers attempt to establish under the garb of a constitutional system of their own choice. Commenting on the Pakistan Constitution of 1962 given by the self-made Field-Marshal M. Ayub Khan, K.J. Newman observed that "the document bears all the hallmarks of a constitution devised by the Executive, to be imposed through the Executive, and for the Executive".[59] As for the motive behind such a constitutional system, Newman, who was a keen observer of Pakistan political development, said, "what emerges .. is the fact that the constitution has been drafted in such a way as to perpetuate the present regime, and to eliminate the competition of political parties for a long time to come."[60] The designs of the detractors of democracy, however, did not succeed and Ayub's regime was overthrown by a country-wide popular movement of 1968 - 69 demading establishment of democratic constitutlonal rule based on popular mandate. In the melee that followed, Ayub on 25 March 1969 handed over the power to the Commander-in-Chief of the army who poclaimed martial law throughout the country, assuimg to himself

59. K.J. Newman, "The Constitutional Evolution in Pakistan" (1962) 38 *International Affa'rs*, 533.

60. K.J. Newman, "Democracy under Control", *The Times* (London), 16 March, 1962, p. 13.

"the powers of the Chief Martial Law Administrator and the command of all the armed forces of Pakistan."[61]

It is significant to note that though some concrete political demands had emerged out of the Round Table Coeference[62] convened by Ayub Khan in early March, 1969 to tackle the political crisis that had been raging the country during the past one year, Ayub Khan and his henchmen refused to accommodate them in the existing political system. They preferred to impose military rule which was bound to be West Pakistani dominated because of the composition of the armed forces and thus estranged the people of the eastern wing further. In the events that followed, the military rule could not hold the two wings together leading to the secession of the eastern wing to become the soverign state of Bangladesh.

The March, 1969 *coup d'etat* like its predecessor of October, 1958 also came for judicial scrutiny before the same Court in 1972. It is heartening to note that the Supreme Court, this time, overruled the *State* v. *Dosso* and held the military take over as illegal.[63] The Court headed by Hamoodur Rahman, C.J., refused to accept Hans Kelsen's pure theory of Law to find a 'legal revolution' in the change that took place in the country on 25 March, 1969. The Chief Justice noted with apparent approval the views of Mr. A.K. Brohi appearing as *amicus curiae*, that the Supreme Court in *Dosso's* case accepted Kelsen's theory as a "question of law itself, although it was nothing more than a 'question about law' and no legal judgment could possibly be based on such a purely hypothetical proposition".[64] In analysing Kelsen's theory he found that it was never accepted universally and that Kelsen never admitted to support totalitarianism. His lordship, therefore, agreed with the 'criticism' that "The Chief Justice of the Supreme Court [in *State* v. *Dosso*] not only misapplied the doctrine of Hans Kelsen but also fell into error in thinking that it was a generally accepted doctrine of modern jurisprudence".[65] The Chief Justice held : "The Principle enunciated [in *Dosso's* case,] is wholly unsustainable and it cannot be treated

61. For full text of the Proclamation, see *Gazette of Pakistan*, 25 March, 1969.
62. See for details, S.M. Zafar, *Through the Crisis*, (Lahore : 1970)
63. *Miss Asma Jilani* v. *Govt of the Punjab*. P.L.D. 1972 S.C. 139
64. *Ibid.* at p. 171 and also see pp. 178-181.
65. *Ibid.* p. 181.

as good law either on the principle of *stare decisis* or even otherwise".[66] Having held that "the military rule sought to be imposed upon the country by General Agha Mohammad Yahya Khan was entirely illegal", His Lordship, however, proceeded to 'Condone' or 'maintain', on the basis of necessity, certain acts, legislative or otherwise, of the regime "notwithstanding their illegality in the wider public interest. I would call this a principle of condonation and not legitimization".[67]

The case of *Miss Asma Jilani* discussed above is quite relevant for our purpose because the Supreme Court in this case had ruled on a situation occurred during the period under our consideration. It is to be noted, however, that the same Court within five years of its pronouncement on Martial Law of 1969 had to deal with a similar situation in *Begum Nusrat Bhutto* v. *Chief of Army Staff & others*.[68] The constitutional government of Prime Minister Z.A. Bhutto was ousted by the Commander-in-Chief of Pakistan Army, General Muhammad Zia-ul-Haq on 5 July 1977 who proclaimed martial law throughout the country. A brief mention of this case would, it is submitted, also be relevant in the context of our discussion about the impact of abrupt political change on a country's political development. The Supreme Court of Pakistan, following *Miss Asma Jilani's* case, refused to validate the military rule of General Zia-ul-Haq on the basis of its 'effectiveness', and to see a 'legal revolution' in the change, and held that the abrupt political change was "merely a case of constitutional deviation for a temporary period and for a specified and limited objective, namely, the restoration of law order and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution".[69]

In giving the main judgment of the Court the Chief Justice of Pakistan, S. Anwarul Haq discussed at length Kelsen's pure theory of law, other authorities on the subject and also similar cases decided in foreign courts and reached the conclusion, as did his predecessor Hamoodur Rahman, C.J., that the judgment of the

66. *Ibid* p. 183.
67. *Ibid.* p. 207.
68. P.L.D. 1977 S.C. 657.
69. *Ibid.* p. 722, per S. Anwarul Haq C.J.

Supreme Court in *Dosso's* case was not based on correct interpretation of any legal doctrine. The Chief Justice reiterated that Kelsen's pure theory of law was not universally accepted as a legal doctrine; it was "also open to serious criticism on the ground that, by making effectiveness of the political change as the sole condition or criterion of its legality it excludes from consideration sociological factors of morality and justice which contribute to the acceptance or effectiveness of the new Legal Order. The legal consequences of such a change must, therefore, be determined by a consideration of the total milieu in which the change is brought about including the motivation of those responsible for the change; and the extent to which the legal order is sought to be preserved or suppressed".[70]

Pointing out the fact that the Court in *Asma Jilani's* case had to determine *ex post facto* the legality of the acts of the past military regime functioning since 25 March, 1969, till 20 December, 1971, and thus had enunciated the doctrine of 'condonation,' the Chief Justice observed that in the instant case the Court had to extend validity to certain acts of the regime aimed at achieving 'the specified and limited objectives' namely, the holding of general elections and restoration of democratic institutions under the Constitution. While the learned Chief Justice did not consider it appropriate to issue any directions as to a definite time-table for holding the elections, he made a significant observation expressing the Court's sincere expectation in that regard. His Lordship observed :

> "... the court would like to state in clear terms that it has found it possible to validate the extra-constitutional action of the Chief Martial Law Administrator not only for the reason that he stepped in to save the country at a time of grave national crisis and Constitutional breakdown, but also because of the solemn pledge given by him that the period of constitutional deviation shall be of as short a duration as possible, and that during this period all his energies shall be directed towards creating conditions conducive to the holding of free and fair elections, leading to the restoration of democratic rule in accrodance with the dictates of the Constitution, the Court therefore, expects the Chief Martial Law Administrator to redeem this pledge, which must be construed in the nature of a mandate from the poeple of Pakistan..."[71]

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70. *Ibid.* p. 721.
71. *Ibid.* p. 723.

Unfortunately, however, the expectation of the learned Chief Justice did not come true. The Chief Martial Law Administrator, contrary to his own solemn promise and the expectation of the Chief Justice, took a series of steps, including amending the Constitution by decrees, which would prolong his stay in power and ultimately creating a situation devoid of political process in the country leading to his own election to the office of the President, wielding absolute powers according to the amended Constitution. After eleven years, of General Zia-ul-Haq's assuming power through a *coup d' etat,* on the eve of his death in a plane crash in August, 1988, there was no sign of normal democratic processes visible in the political horizon of Pakistan.

It was only after General Zia-ul-Haq's death that through a free and fair elections held in November, 1988 and participated by all main political parties that a democratic Government on the basis of popular mandate has been installed in the office. But in late 1989 it appears that Pakistan cannot possibly, be said to have overcome the political crises which have become endemic in its political life through frequent interruptions.[72] The same is the case, it can safely be submitted, with most other countries where normal political processes have been deliberately interrupted by anti-political forces.

In the light of the above discussion and having found that the judgment in the *State* v. *Dosso* has been rather counter-productive in the sense that instead of helping the country move towards progressive constitutional development, it had recognised a situation where might could be considered as right and as a 'constitutional fact' in the political arena, it remains for us to comment on the proper role of the judiciary in such a situation. It may at once be recalled that even the sincerest expectation of the highest court,[73] of going back to constitutional rule could be ignored with impunity by the usurpers who, in the name of the people's right and liberty suppress them without fail and establish personal rule in the country.

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72. See *Sangbad,* 28 August, 1989. An editorial entitled "Democracy under Challenge, Not Benazir Bhutto," analysed the political situation of Pakistan tracing the constitutional history since the first military *croup* in October, 1958.

73. *Begum Nusrat Bhutto* v. *Chief of Army Staff,* P.L.D. 1977 S.C. 657.

It is in the above context the judiciary, it is humbly submitted, should be willing to play a role commensurate with the hopes and aspirations of the people who have the fundamental right to participate in the government of the country. Any situation which is designed to stifle the democratic process must be opposed by all concerned including the judges. Admitting the long established principle that the courts function within the limited sphere of state activity to apply law as they are, which 'pre-supposes an established government capable of enacting laws and enforcing their execution',[74] would it not fall within the sphere of judicial power to examine the nature and status of the 'established government' within a constitutional framework which provides specific functions for each organ of the government and also the procedure for effecting necessary change in the framework through constitutional amendment ! In a modern written constitution the judiciary, generally, is given the constitutional right and duty to protect and uphold the principles of the constitution in accordance with its letter and spirit and the courts will be failing in their constitutional responsiblity, it is submitted, if they abdicate this authority in favour of a situation created deliberately countrary to constitutional contemplation.

If it is accepted to be a basic constitutional rule that the government must be run on the basic of the consent of the governed, the court must ensure, whenever situation warrants, the functioning of democratic process enabling the people to make their choice of governmet through free and fair eleetions. If the court fails to uphold this right of the sovereign people, its role could possibly be seen to be devoid of political reality, in the sense that its judgment would be contrary to the hopes and aspiration of the people.[75] The judgment in the *State* v. *Dosso* might be appropriate, indeed should be appropriate, in a situation where a foreign or dictatorial oppressive rule is overthrown by popular uprising establishing a new legal order on the basis of popular consent as the first constitution of extra-legal origin, as envisaged by authors of text-books on jurisprudence.[76] But such a change in the legal order must not be equated with

74. Per Taney, C.J. *in Luther* V. *Borden*, (1849)7 Howard 1
75. C.J. *Madzimbamuto* v. *Lardner-Burke* (1968)2 S.A. 284, observation of Beadle C.J. at pp. 329-330.
76. See, for example Sir John Salmond, *Jurisprudence* (12th ed. 1966) pp. 84-85 G.W. Paten, A Text-Book on *Jurisprudenee* (2nd. ed. 1951) p. 12.

unwarranted intervention in normal political process contemplated by the established constitutional arrangement.

Analysing the experience of decades of dictatorial or near-dictatorial rule in the countries of Asia, Africa and Latin America, it can be easily established that the system is neither capable of ensuring political stability nor can it advance the socio-economic and political interest of the people at large. Democratic system with all its shortcomings provides for a built-in system for its own correction through trial and error method by ensuring the right of the people to choose their rulers in free and fair elections. The judiciary must, it is submitted, discharge its constitutional responsibility to guide all concerned, whenever called upon to do so, to ensure this right of the people. The elections are costly and sometimes hazardous, but a nation must be made used to bear with the cost and hazards, if it wants to have a government running the administration on the basis of the consent of the governed. And only such a government can ensure basic funamental rights in the state and socio-economic devlopment in the interest of the people which are universally recognised to be the main objectives of any modern government.