Position of constitution and fundamental rights during the martial law regime, 1958-1962: a case study

This thesis is submitted in partial fulfillment of the requirements for the degree of Master of Philosophy at the University of Rajshahi.

By

A. B. M. Mafizul Islam Patwari

Institute of Bangladesh Studies (IBS)

June, 1980

© This work is licensed under Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License https://creativecommons.org/licenses/by-nc-sa/4.0/

POSITION OF THE CONSTITUTION AND FUNDAMENTAL RIGHTS DURING THE MARTIAL LAW REGIME, 1958-1962:

A CASE STUDY

THESIS SUBMITTED FOR THE DEGREE OF

MASTER OF PHILOSOPHY

IN THE

UNIVERSITY OF RAJSHAHI

D-1129

BY

A. B. M. MAFIZUL ISLAM PATWARI

Rajshahi University Library
Document Section
Document No. D-1129
Date

INSTITUTE OF BANGLADESH STUDIES

JUNE, 1980.

© This work is licensed under Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License
https://creativecommons.org/licenses/by-nc-sa/4.0/

২,৭,১৯৯১

Abstract

In this thesis an attempt has been made, mainly, to examine and assess the position of the Constitution of 1956 and the fundamental rights incorporated in that Constitution in view of the Presidential Proclamation of the 7th October, 1958, and the Presidential Laws (Continuance in Force) Order, issued on the 10th October, 1958. Questions relating to their status and position were raised in contentious cases before the Supreme Court and High Courts of Pakistan involving them in a legal dilemma. The relevant cases have, therefore, been discussed and analysed.

Though the work is concerned, mainly, with the period between the 7th October, 1958, and the 8th June, 1962, during which period Martial Law prevailed in the country, it was necessary that constitutional and socio-economic and political conditions of Pakistan before the Proclamation of the 7th October, 1958, should be discussed. This was necessary not only as description of the background over the topic and period, but also because prior to this, Pakistan had another constitutional crisis in October, 1954, when Ghulam Mohammad, the then Governor-General of Pakistan, dissolved the first Constituent Assembly. On that occasion also the superior courts of Pakistan had to tackle the situation, amounting virtually to a constitutional vacuum. In order to provide a link between the Martial Law period and the period preceding it the important constitutional cases and political and constitutional developments have been discussed in some length.

The main object of this thesis is introduced in Chapter I, followed by Chapter II which contains a brief survey of attempts for promulgating a constitution and fundamental rights preceding the Proclamation of Martial Law.

In Chapter III, the working of the Constitution of 1956 since its inauguration, its position in the light of the Presidential Proclamation and the Presidential Laws (Continuance in Force) Order, the legitimacy of the regime as pronounced by the Supreme Court of Pakistan and justifiability of Martial Law in Pakistan in accordance with the traditions maintained in the Commonwealth are discussed and analysed.

Chapter IV has dealt with the organisation and jurisdiction of the Military Courts as established by the Martial Law Authority, and the attempt of the regime to turn itself into a constitutional Government through the system of the Basic Democracies and the Constitution of 1962.

In Chapter V, the position of the fundamental rights contained in the Constitution of 1956 and the writ jurisdiction of the superior courts contained in the Constitution and recognised by the Laws (Continuance in Force) Order, 1958, is focussed in some length. In this Chapter we can see the liberal attitude of the courts which tried to avoid confrontation with the Martial Law Authority but at the same time attempted to enforce fundamental rights on the plea of basic rights recognised by every civilised legal system, and the principle of natural justice.

Chapter VI has drawn a reflection on the position of the Constitution of 1956 which was restored in structure and outline only, the role of judiciary which by legitimising the regime became a part of the Government, and the fundamental rights which were enforced in indirect way; and has made an attempt to analyse the real nature of the Martial Law regime.

© This work is licensed under Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License
https://creativecommons.org/licenses/by-nc-sa/4.0/

Acknowledgements

I would like to express my deep feeling of gratitude to my reverend teacher Dr. Z.I.Choudhury, Professor, Department of Law, University of Rajshahi, for his sincere co-operation and proper supervision in preparing this thesis. Without his help and guidance it would not have been possible on my part to complete it.

I am grateful to my reverend teachers Dr. Zillur Rahman, Professor, Department of Law and Dean, Faculty of Law, University of Rajshahi, Mr. Amanullah Ahmed, Professor, Department of English, University of Rajshahi, Dr. Sadaruddin, Professor, Department of English, University of Rajshahi, Dr. M. Badaruddin, Associate Professor and Chairman, Department of Law, University of Rajshahi and Mr. Habibur Rahman, Assistant Professor, Department of Law, University of Rajshahi, for their suggestion and encouragement in preparing and completing this thesis.

I owe indebtedness to my reverend teachers Dr. S.A.Akanda, Professor, Social History and Director, Institute of Bangladesh Studies, Dr. Serajul Islam, Professor, Rural Economics, Institute of Bangladesh Studies, Dr. M.S.Quoreshi, Professor, Intellectual and Cultural History, Institute of Bangladesh Studies, Dr. A.K.M. Aminul Islam, Professor, Department of Anthropology, University of Wright State, Ohio, U.S.A. and visiting Professor, Institute of Bangladesh Studies, Dr. Clarence T. Malony, visiting Professor, Institute of Bangladesh Studies, Dr. Abu Imam, Professor, Department of History, University of Jahangir Nagar, Dr. Safiuddin Joarder, Professor, Department of Islamic History and Culture, University of Rajshahi, Dr. Serajul Arephin, Professor, Department of

Geography, University of Rajshahi, Dr. F.R.Khan, Professor and Chairman, Department of Sociology, University of Rajshahi, Dr. M.K.U.Mullah, Associate Professor and Chairman, Department of History, University of Rajshahi and Mr. Ghulam Morshed, Associate Professor and Chairman, Department of Political Science, University of Rajshahi, from all of whom I took inter-disciplinary courses in the first year of my M. Phil. Course.

My thanks are due to the members of the Library staff of the Institute of Bangladesh Studies and the University of Rajshahi for their help and co-operation in finding books and materials. I am grateful to the District Judge, Rajshahi, for kindly allowing me to use his official library. My thanks are also to the members of the library staff of the Rajshahi Bar Association for their permission to use law Journals in finding materials.

I am thankful to my friends Shahidur Rahman, Abdul Hai Talukder, Moslemuddin, Abdul Bari, Saiful Islam, Abdul Latif, Mohammad Idrish, Sanat Kumar Sutradhar, Ghulam Kibria, Naseem Hussain and Parvin Bhanu for their co-operation and help at different stages in preparing this thesis.

Finally, I am thankful to the Institute of Bangladesh Studies authority for awarding fellowship for the M. Phil. Course and the Pirgachha Degree College authority, specially to the Principal, Mr.Shah Ayub Hossain, for granting study leave for the period required for the completion of the Course.

Abbreviations

A. C.	Appeal Cases
All E. R.	All England Reports
A. I. R.	All India Reporter
C. C.	Current Cases
C. J.	Chief Justice
C. L. R.	Commonwealth Law Reports
C. M. L. A.	Chief Martial Law Administrator
Cranch	Cranch Reports (U.S.)
D. L. R.	Dacca Law Reports
E. A.	Eastern African Law Reports
F. C.	Federal Court
G. G. O.	Governor-General's Order
G.D.	General Division
Howard	Howard Reports (U.S.)
I. R.	Ireland Reports
K. B.	King's Bench
M.L.R.	Martial Law Regulation
P.C.	Privy Council
P.L.D.	All Pakistan Legal Decisions
Q.B.	Queen's Bench
R. A.D.	Rhodesia High Court, Appellate Division
R. L. D.	Rhodesia Law Reports
S. A.	South African Law Reports
St. Tr.	State Trial
U.D.I.	Unilateral Declaration of Independence (Rhodesia)

Table of Contents

		Page
Abstract	...	ii
Acknowledgements	...	iv
Abbreviations	...	vi
Chapter I	Introduction ...	1-6
Chapter II	The Constitution and Fundamental Rights During 1947-1958	7-53
	1. Interim Constitution	7
	2. Early Constitution-Making : Problems and Steps.	12
	3. Dissolution of Constituent Assembly and Supremacy of Judiciary	22
	4. Second Constituent Assembly and the Constitution of 1956	35
	5. Position of Fundamental Rights up to the Abrogation of Constitution, 1956	43
Chapter III	Proclamation of Martial Law and Position of Constitution, 1956	54-97
	1. Working of Constitution, 1956(1956-1958)	54
	2. Abrogation of the Constitution and Proclamation of Martial Law	60
	3. Verdict of the Supreme Court and its Impects	70
	4. Martial Law as it is Understood in Common Law	86

		Page
Chapter IV	Martial Law Regime and Constitutional Development	98-127
	1. Military Courts : Organisation and Jurisdiction	98
	2. Political Innovations : Basic Democracies	104
	3. Constitutional Development	115
Chapter V	Position of Fundamental Rights and Writ Jurisdiction During the Regime	128-163
	1. Fundamental Rights and Their Enforcement	128
	2. Writ Jurisdiction for Purposes Other Than Enforcement of Fundamental Rights	140
	3. Attempts of the Courts for Restoring Fundamental Rights : Application of the Principle of Natural Justice	149
	4. Writs against Government	156
Chapter VI	Conclusion	164-168
Appendices	I - IV	
Bibliography		
Table of Statutes		
Table of Cases		

Chapter I

Introduction

Pakistan, after nine years of its independent existence, had been able to adopt and implement its first Republican Constitution on the 23rd March, 1956. Before that, since independence in August, 1947, the country had been governed under the Government of India Act, 1935, adapted and modified by the Constituent Assembly of Pakistan acting under the Indian Independence Act, 1947, both these constitutional Acts being Acts passed by the British Imperial Parliament. During the nine years that Pakistan took to frame a constitution it had to face and tackle more than one constitutional crises including the one in October, 1954, when the then Governor-General, Ghulam Mohammad, dissolved the first Constituent Assembly at a time when the Assembly was about to adopt the final draft of the constitution. The Governor-General's action created a legal and constitutional vacuum and it fell upon the Federal Court of Pakistan to give direction to the Governor-General to convene a second Constituent Assembly in order, mainly, to frame a constitution for the country.

So, when the Second Constituent Assembly adopted the Constitution in February, 1956, which came into effect in March, there was naturally a sense of relief in the political circle who expected full implementation of the Constitution after the first general election to be held soon. But such expectations proved unreal as governments after governments came and went resulting in an extreme political chaos and instability both at the centre and in the provinces. President Iskander Mirza, being directly involved in party politics was the master-architect of these

chaos and instability. But when the country was preparing for the general election announced to be held in February, 1959, Mirza, finding himself unable to rally support among the politicians for his re-election, by a Proclamation on the night of the 7th October, 1958, abrogated the Constitution of 1956, dismissed the Central and Provincial Governments, dissolved the Central and Provincial Legislatures and declared Martial Law throughout the country. In doing this Iskander Mirza was encouraged and supported by the Commander-in-Chief of the Pakistan Army, General Mohammad Ayub Khan. It was apparently a joint venture of these two men; Mirza, being the Head of the State, acted as the spokesman for the usurpers of power.

The Presidential Proclamation of the 7th October, 1958, purely an executive measure, while successfully over-throwing the pre-existing legal order based on the Constitution of 1956 which now stood abrogated, did not provide for any structural base on which the civilian side of the administration including the judiciary would function. In order to obviate this omission, the Laws (Continuance in Force) Order, 1958, was issued and promulgated on the 10th October, 1958. This law, which was deemed to be effective from the 7th October, vested supreme power of law-making simultaneously in the President and the Chief Administrator of Martial Law and continued all Pre-existing Laws subject to any modification, alteration etc. made either by the President or the Chief Administrator of Martial Law. But the important point to be noted about the Laws (Continuance in Force) Order was that it provided that the country was to be "governed as nearly as may be" in accordance with the provisions of the late Constitution of 1956.

In view of the Presidential Proclamation and the Laws (Continuance in Force) Order, the Pakistan Judiciary had to examine the nature of constitutional change that was brought about by the Presidential Proclamation in determining the position of the Constitution of 1956 and the fundamental rights incorporated therein . The main purpose of this dissertation is to analyse the above situation in the light of the judicial decisions. The Martial Law period was one of the most crucial periods in the constitutional history of Pakistan not only because it was, in the ordinary nature of things, an abnormal and extra-ordinary sort of thing which continued for a long period of fortyfour months, but also because the constitutional system which had been evolved at that time dominated the political scene of the country for about seven years when it proved itself a failure and had to be scrapped through another Proclamation of Martial Law in March, 1969.

The Pakistan judiciary had to face a unique situation when it was required to pronounce on the legality of the new regime which usurped power through an unprecedented means hitherto unknown in the constitutional history of the Commonwealth. The Martial Law imposed throughout the country by the Presidential Proclamation of the 7th October, 1958, was not 'martial law' as understood by the ordinary connotation of the term. The Pakistani Court did not find it difficult to examine the justifiability of the declaration of Martial Law in the City of Lahore in 1953 when there were riots and turmoil of extreme nature. The courts simply followed the Commonwealth tradition and upheld the Indemnity Act passed on lifting of Martial Law.[1]

---

1. Umar Khan V. Crown P.L.D. 1953 Lahore 528;
   Abdus Sattar Khan Niazi V. Crown P.L.D. 1954 F.C. 187

In October, 1958, the situation was different. The pre-existing legal order had been overthrown establishing a new one by an extraordinary means not contemplated by the Constitution and the question of legitimacy of the new order had come for examination before a court established under the system which had now been replaced. The Commonwealth traditions were of no help to the court. Resort had to be taken to the positivist theory of Hans Kelsen and the legitimacy of the new order was tested on the basis of the 'abrupt political change' and the 'efficacy' of the new regime which had not been challenged in the political field.[2]

The judgment delivered in Dosso's case had a great impact because it gave recognition to an unconstitutional government which became a pattern of 'change' in the new Commonwealth. Thus we see that it had been referred to with approval in the courts of Nigeria, Rhodesia, Ghana, Uganda and Pakistan in giving recognition to revolutionary governments not contemplated by the existing constitutions. In deciding the case, Munir C.J. did not conceal his clear inclination towards 'political reality'. In the unique circumstances, that were created, if the court had shown respect to strict legality and ignored 'political reality', the Judges might have faced dismissal by the revolutionary Government. Such a decision would have no practical value rather it might result in the lack of confidence of the people in the judiciary.

Though the Constitution of 1956 was abrogated by the Proclamation of the 7th October, 1958, provision was made by the Laws (continuance in Force) Order, 1958, that the country was to be governed "as nearly as may be" in accordance with the abrogated Constitution of 1956.

---

2. State V. Dosso (xi) D.L.R. 1959 S.C. I.

In interpreting this provision, the courts of Pakistan , it is submitted, found themselves in confusion as to the extent to which the provisions of the late Constitution were to be enforced.

There was no mention in the Proclamation nor in the Laws (Continuance in Force) Order whether the fundamental rights incorporated in the late Constitution of 1956 still survived. It was mentioned that the writ jurisdiction of the Superior Courts would continue. But the question arose whether writ would lie against government in the absence of the words "including in appropriate cases any Government" which were expressly incorporated in the relevant provision of the late Constitution. Thus a great confusion had crapped up in respect of the enforcement of fundamental rights and issue of writs against the government by the Superior Courts.

In spite of these facts the role of the judiciary during this period had been significant inasmuch as it had evolved a way to exert some control over the regime, while avoiding direct confrontation with it. The courts in other countries with similar situation have conveniently followed the precedent established by Pakistani courts. The relevant cases in Pakistan and in other countries have been discussed and analysed.

While analysing the background of the coup d'etat of the 7th October 1958, it would seem that Martial Law was declared not out of any legal necessity, rather it was used as a "cover" to protect and advance a premeditated political and constitutional programme. Though President Mirza was to do the apparent mischief of scrapping the constitution and condemning the politicians for "creating" a situation which he and his collaborators had used as a pretext for the coup, the President, within three weeks of his Proclamation, had to quit on the 27th October, 1958, leaving his appointee, General Ayub Khan, in full control with absolute

power. From the 27th October, 1958, General Ayub, as the President and Chief Administrator of Martial Law, wielded unlimited powers during the whole period of Martial Law and he wanted to introduce a political structure which would ensure an authoritarian rule in a facade of presidential system of government. And, Field Marshal Ayub, through this system, wanted to parpetuate his personal rule as Head of the administration with substantial control over the legislature and judiciary. His idea about a constitution of the country found expression in the novel system of Basic Democracies and the Constitution of 1962 which he "enacted" and promulgated on the 8th June, 1962. The Constitution was nothing but the politicization of the system of government which commenced with Ayub's assumption of power in 1958. The system of Basic Democracies and the salient features of the Constitution of 1962 have been discussed and analysed.

This dissertation, therefore, though mainly concerned with an analysis and assessment of the status and position of the abogated Constitution of 1956 and the fundamental rights contained therein in the light of the judicial decisions, has, nevertheless, made an attempt, as a matter of necessity, to discuss the background of the coup d' etat of the 7th October, 1958, and to throw some light on the constitutional system that was devised by Ayub Khan and prevailed in the country till its architect and his authoritarian system had to be dispensed with in March, 1969.

Chapter II

The Constitution and Fundamental Rights During 1947-1958

1. Interim Constitution

The transfer of power in British India and the creation of two Independent Dominions, India and Pakistan, were effected by the Indian Independence Act[1], 1947, which received the royal assent on the 18th July, 1947, and came into force on the 15th August, 1947[2]. It was provided in section 8(2) of the Act that until the new constitutions were framed the government of each Dominion would be carried on according to the Government of India Act, 1935[3], subject to necessary omissions, additions, adaptations and modifications. This Act of 1935 supplemented by the Indian Independence Act of 1947 became the Interim Constitution for both the Dominions[4].

Section I of the Indian Independence Act, 1947, provided for the establishment of two Independent Dominions, India and Pakistan, from the 15th August, 1947. In the case of Federation of Pakistan V. Tamiz Uddin Khan[5] it was shown that there was a difference between a Dominion and an "Independent" Dominion. The Dominion had no right to change its own constitution whereas "Independent" Dominion had the right to change its own constitution[6]. On this point Dr. Amiya Chatterjee commented:

---

1. 10 & 11 Geo. vi C 30.
2. Section I of the Indian Independence Act, 1947.
3. 26 Geo. v C. 2 .
4. The Interim Constitution continued in Pakistan from 1947 to the inauguration of the Constitution of 1956.
5. P.L.D. 1955 F.C. 240. Reproduced in Ivor Jennings, Constitutional Problems in Pakistan (West Port, Connecticus, Green Wood Press, 1971) P. 79
6. Ibid. Per Munir C. J., at P. 110.

" The word independent emphasised freedom from control from [British] Parliament and White Hall[7]".

The Governor-General of the Dominion, who was to be appointed by His Majesty, was to represent His Majesty for the purposes of the government of the Dominion[8]; and the offices of the Governor-General and Governor of Province in Pakistan under the Interim Constitution remained almost as powerful as before. But the powers of the Governor-General and the Governor to act in their discretion or to exercise their individual judgment lapsed from the 15th August, 1947[9]. The Governor-General and the Governor were expected to act on the advice of their respective ministries. The Prime Minister as well as other Ministers were chosen by, and held office at the pleasure of, the Governor-General[10]. Similarly the Provincial Chief Minister as well as other Ministers were chosen by, and held office at the pleasure of, the Governor.

The Governor-General could legislate by Ordinance in emergencies, whether the legislature was sitting or not; and there was no time limit for the validity of such legislation. The Governor-General's power to proclaim an emergency was retained. Though section 93 of the Goverment of India Act, 1935, had been struck off[11], section 92-A was inserted in 1948[12] which empowered the Governor-General to direct the Governor of a province to assume, on his behalf, the government of the province, if the security of Pakistan was endangered, or the provincial government in the opinion of the Governor-General could not function according to the provisions of the constitution.

---

7. Amiya Chatterjee, The Constitutional Development of India : 1927-1947 (Calcutta, Firma K.L.Mukhopadhyay, 1958) P. 208
8. Section 5 of the Indian Independence Act, 1947.
9. Section 8 (2) (c). Ibid.
10. Section 10. Ibid.
11. The Pakistan (Provisional Constitution) Order, 1947(G.G.O. 22 of 1947) Government of Pakistan, Ministry of Law & Parliamentary Affairs. Constitutional Documents (Pakistan)(Karachi, Government of Pakistan Press, 1964) Vol. iv-B P. 1051.
12. Section 92-A was inserted by the Pakistan Provisional Constitution (Third Amendment)Order, 1948, (G.G.O. 13 of 1948)P.L.D.1948 Central Statutes 428.

The lagistature of each Dominion was empowered to make laws for that Dominion including laws having extra-toritorial operation and it had full power to repeal or amend any Act, Order, Rule or Regulation in so far as it was part of the law of the Dominion, and no law made by it was to be void or inoperative on the ground that it was repugnant to the law of England[13].

> "Section 6(1), read with section 6(2), confers plenary powers upon the legislature of the Dominion or, if Dicey's unfortunate phrase be preferred, 'sovereign' powers[14]".

The Governor-General was given full power to assent in His Majesty's name to any law of the legislature of the Dominion[15].

> "It makes the Governor-General a constituent part of the legislature inasmuch as the right to give assent necessarily includes in it the right to withhold assent[16]".

The Constituent Assembly was to exercise the power of the lagislature of the Dominion in making provisions for the constitution of the Dominion under section 8(1) of the Indian Independence Act, 1947[17]. Proviso (e) of

---

13. Section 6(1) & 6(2) of the Indian Independence Act, 1947.
14. Ivor Jennings, Constitutional Problems in Pakistan, P. 16.
15. Section 6(3) of the Indian Independence Act, 1947.
16. Federation of Pakistan V. Tamiz Uddin Khan, Op. cit., Per Munir C.J. at P. 124.
17. Section 8(1) reads :

    "In the case of each of the new Dominions, the powers of the legislature of the Dominion shall, for the purpose of making provision as to the constitution of the Dominion, be exercisable in the first intance by the Constituent Assembly of that Dominion ..."

section 8(2) declared that powers of the Federal Legislature, as envisaged in section 6(1), should be exercisable by the Constituent Assembly of the Dominion in addition to the powers exercisable by that Assembly under section 8(1). Thus the position of the Constituent Assembly was that it was the Legislature of the Dominion, when it made laws for the constitution of the Dominion and the Federal Legislature, when it functioned under the limitations imposed upon it by the Government of India Act, 1935[18]. This position was explained by Munir C.J. in the case of Federation V Tamiz Uddin Khan in the form of a mathematical proposition :

> " (i) Constituent Assembly minus the fetters to which it is subject as a Federal Legislature is equal to the Legislature of the Dominion; and
>
> (ii) Constituent Assembly plus the fetters to which it is subject under the Government of India Act, 1935, is equal to the Federal Legislature[19]".

As it has been noted earlier, section 8(2) of the Indian Independence Act, 1947, provided a provisional constitution for each Dominion and that constitution was the Government of India Act, 1935; and section 9 of the Indian Independence Act, 1947, provided that till the 31st March, 1948[20], the Governor-General had the power of promulgating Orders for the purpose of making omissions from, additions to, and adaptations and modifications of, the Government of India Act, 1935, and the Orders- in-Council, rules and other instruments made thereunder in their application to the Dominion[21]. In exercise of the authority conferred on him, the Governor-General promulgated the Pakistan (Provisional Constitution) Order, 1947[22].

---

18. Federation V. Tamiz Uddin Khan, Op.cit., at P. 114.
19. Ibid.
20. The date was extended upto the 31st March 1949, by the Indian Independence (Amendment) Act, 1948, P.L.D. 1949 Central Statutes, 57.
21. Section 9(1) (c) of the Indian Independence Act, 1947.
22. Governor-General Order 22 of 1947, Constitutional Documents(Pakistan) Vol. iv-B, P. 1051.

Under the new legal structure, the Federation of Pakistan consisted of (a) the four Governors' Provinces of East Bengal, West Punjab, Sind and North-West Frontier; (b) the Chief Commissioner's Province of Baluchistan; (c) any other areas that might, with the consent of the Federation, be included therein; (d) the Capital of the Federation-Karachi; (e) such Indian States as might accede to the Federation. The subjects, which were divided into three lists : (i) Federal (ii) Provincial and (iii) Concurrent under the Government of India Act, 1935, remained the same as it was before partition, save that, to make "adequate" revenues available to the centre, purchase tax, and Estate and succession duties of all kinds were forthwith removed to the Federal list. To ensure adequate power to the centre in dealing with subversive activities, the Provinces were deprived of their exclusive powers in relation to preventive detention. The centre retained the ultimate means of controlling and guiding the provinces and there was no room for a weak centre[23].

Under the Interim Constitution, a new Federal Court of Pakistan was set up at Karachi[24]. The Federal Court (Enlargement of Jurisdiction) Act, 1950, provided that civil appeals which previously lay to the Privy Council would lie to the Federal Court, and the Privy Council (Abolition of Jurisdiction) Act, 1950[25] transferred on the 22nd April, 1950, to the Federal Court all the appellate jurisdiction of the Privy Council in respect of Pakistan. Before the partition, there were High Court at Lahore in the Punjab, and the Chief Court at Karachi in Sind; the Judicial Commissioners in North-West Frontier and Baluchistan also exercised the

---

23. G.W.Choudhury, Constitutional Development in Pakistan (London, longman group limited, 1969) P. 28.

24. The Federal Court Order, 1947, (G.G.O. 3 of 1947) Constitutional Documents (Pakistan) Vol. iv-B p. 913.

25. Constitutional Documents (Pakistan) Vol. iii P. 73.

Rajshahi University Library
Documentation Section
Document No. D-1129
Date 30/3/89

powers of the High Courts. Their powers and jurisdiction with certain modification were retained[26]. To exercise powers and jurisdiction over the territory comprising the province of East Bengal a new High Court for East Bengal was set up at Dacca[27] in 1947.

Thus on independence in August, 1947, Pakistan, on the basis of the constitutional Act of 1935 and the Indian Independence Act of 1947, had parliamentary system of government both at the centre and in the provinces. The judicial system remained unaltered; though, of necessity, a new High Court at Dacca and Federal Court at Karachi had to be established. The Constituent Assembly, as constituted under the Independence Act, had the power and responsibility to make a constitution for the country.

2. Early Constitution-Making : Problems and Steps.

After the Partition of British India on the 15th August, 1947, the Government of India Act, 1935, proved a satisfactory starting point for the evolution of the new constitution in India, but Pakistan had to think afresh because there were serious issues which prevented an early completion of constitution-making work [28]. The main issues can be summarised in the following terms :

(a) Separation of two wings of Pakistan by a distance of one thousand miles at their nearest point;

(b) Place of Islam into the constitution of Pakistan;

---

26. The High Court(Punjab) Order, 1947 (Order 5 of 1947); the High Court (Lahore) Order, 1947 (Order 7 of 1947); Constitutional Documents (Pakistan) Vol. iv-B PP. 921 and 927 respectively.

27. The High Court (Bengal) Order, 1947 (Order 4 of 1947) Constitutional Documents (Pakistan), Vol iv-B P. 915

28. K.J.Newman, Essays on the Constitution of Pakistan (Dacca,Pakistan Co-operative Book Society Limited, 1956) P. xix.

(c) Problem of state language which affected political conditions in East Bengal to a major, and in West Pakistan to a minor extent ; and

(d) controversy between East Bengal and West Pakistan regarding the federal structure of the constitution.

(a) Pakistan consisted of two parts : East Bengal and West Pakistan, which were separated by a thousand miles of Indian territory. The Western Wing of Pakistan had an area of 310,236 square miles whereas Eastern Wing had an area of 54,501 square miles. East Bengal comprised nearly one-sixth of the total area, but its population exceeded the total population of all the provinces of West Pakistan. West Pakistan was a predominantly Muslim populated area, whereas East Bengal had important non-Muslim minorities[29]. West Pakistan had a dry climate with a wide range of temperatures, whereas East Bengal had an entirely different climate which was rainy and tropical[30]. In West Pakistan food grains, cotton, sugar cane were grown --- cotton being the main cash crop; whereas in East Bengal Jute, tea, paddy etc. were grown --- tea and jute being the main cash crops. To all of these differences there must be added one more, namely, difference of languages[31], which will be discussed in the later part of this section.

(b) From the early days of Pakistan it was regarded as a "Muslim country" for two reasons : first, 85 percent of the population professed Islam as their religion, and secondly, Pakistan was created in order to provide a homeland for the Muslims of Indian Sub-Continent where religious, cultural, economic, political, administrative and other rights of the Muslims would be secured and capable of development[32].

---

29. G. W. Choudhury, Op. cit.,P 68.

30. Herbert Feldman, A Constitution for Pakistan (London,Oxford University Press, 1955) P. 11.

31. Ibid. , P. 12

32. Ibid., P. 18

In Pakistan there were two schools of thought in respect of place of Islam in the constitution. According to the orthodox school of thought the constitution of Pakistan would be a purely Islamic constitution, in which there should be a discrimination among the Muslims and non-Muslims and their respective rights and duties in the state. In a state where Islamic constitution was enforced, the non-Muslims could not enjoy rights of citizenship, although they might enjoy right of protection by the state, the right to exercise their respective trades and callings, and the right to their own form of worship and personal law. This point of view found support in the opinion held by Pakistan's second Prime Minister Khawaja Nazim Uddin.

Another school of thought, led by Liaquat Ali Khan, was liberal in its attitude towards the making of constitution for Pakistan. The first Prime Minister once explained that Pakistan was to be built up as an Islamic state which did not mean 'theocracy' but it would be a modern state where freedom of conscience for all, equality based on Islamic principles and social and economic justice should be guaranteed[33]. The suggestion of Mohammad Ali Jinnah, in this respect, was as follows :

> " The constitution and the policies of Pakistan should be conceived in accordance with a doctrine which has been termed as 'Islamic Socialism'."[34]

In view of these facts, it was not easy for the framers of the constitution to make an Islamic constitution for Pakistan which could satisfy different groups holding divergent views regarding the structure and nature of an Islamic state.

---

33. Speech of Liaquat Ali Khan on'Objective Resolution', G.W.Choudhury, Documents and Speeches on the Constitution of Pakistan (Dacca, Green Book House, 1967) P. 23.

34. Herbert Feldman, Op. cit., P. 23

(c) The third problem in the making of a constitution had been on the question whether Pakistan should have a single state language, Urdu or two, Urdu and Bengali.

> " The Muslim League leaders ... were not only opposed to Bengali but were psychologically prepared to adopt Urdu as the sole National language".[35]

On this point, Mr. Mohammad Ali Jinnah gave very clear expression as to the intention of the Government :

> " ... Let me make it clear to you that the state language of Pakistan is going to be Urdu and no other language"[36].

This provoked a strong protest in East Bengal, and a movement for recognition of Bengali as one of the state languages was started which led to the killing of people in Dacca by police firing in February, 1952. Ultimately, the framers of constitution could see the importance of the issue and engaged themselved for months in seeking an acceptable solution. At last, it was accepted by the Constituent Assembly that both Urdu and Bengali should be the official languages of Pakistan and for a period of twenty years from the commencement of the constitution English should continue to be used for all official purposes of the state[37].

(d) Generally, a federation comes into existence to overcome differences, it, therefore, has to workout a compromise between the desire for Union and the anxiety to safeguard the interests of the federating Units. If a federation has homogeneity of population, its difficulties are lessened. In the case of Pakistan, there was not only

---

35. S.A.Akanda,"The National Language Issue Potent Forcefor Transforming East Pakistanis Regionalism into Bangali Nationalism". The Journal of the Institute of Bangladesh Studies. Vol I No. I P. 14

36. Speech of Mr. Jinnah on the 21st March, 1948 at Dacca. Jamil Uddin Ahmed Speeches and Writings of Mr. Jinnah,(Lahore, Mohammed Ashraf, 1952) Vol. II P. 490.

37. Report of the Basic Principles Committee, Pakistan, 1954. G.W.Choudhury, Documents and Speeches on the Constitution of Pakistan, P. 197

lack of homogeneity between East and West Pakistan, but even in West Pakistan, there were differences among the different sections of population. The problem of federal organisation was, therefore, a more complicated issue in Pakistan.

These problems have been summarised by Professor S.A.de Smith in the following words :

> " Expressed in the constitutional terms they included the questions whether West Pakistan should be formed into one Unit, whether elections should be conducted on the basis of a common roll or separate communal electorates, how far the laws of Pakistan should be required to reflect the philosophy of an Islamic state, how to give effect to federal principles without accentuating centrifugal tendencies and how to demarcate the respective powers of the head of state, the head of government and the legislature; ..." [38]

These constitutional complexities continued for seven years,[39] until the state came to the brink of a constitutional disaster with three alternatives before it :

> " 1. To turn back the way came by ;
> 2. to cross the gap by a legal bridge ;
> 3. to hurtle into chasm beyond any hope of rescue".[40]

However, in spite of these complexities some steps were taken in preparing the constitution, of which the first creditable one was the adoption of the Objective Resolution,[41] which was introduced by the then Prime Minister, late Liaquat Ali Khan, to the Constituent Assembly on the

---

38. S.A. de Smith, The New Common Wealth and its Constitutions (London, Stevens and Sons, 1964) PP 218-219.

39. On the 24th October, 1954, Governor-General Ghulam Mohammad proclamed emergency dissolving the Constituent Assembly and, therefore, constitutional complication arose.

40. Reference by Governor-General to the Federal Court. P.L.D. 1955 F.C. 435, Reproduced in Ivor Jennings Op. cit., P. 259.

41. G.W.Choudhury, Documents and Speeches on the Constitution of Pakistan, P. 23.

12th March, 1949. The Objective Resolution, written in 'Islamic terms',[42] began with a declaration :

> " Sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the state of Pakistan through its people, for being exercised within the limits prescribed by Him is a sacred trust".[43]

It envisaged a federal state, with the autonomy of the units, governed by elected representatives of the people with an independent judiciary. Along with it an 'impressive'[44] provision was made to protect " the integrity and independence of the federation".

One clause called for equality of status and opportunity, equality before the law, social, political and economic justice, and subject to law and morality, freedom of expression, faith, worship and association. Though rights of the minorities to profess and practice their religions and to develop their cultures, were to be safeguarded, it was provided that the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam should be fully observed so that the Muslims should be enabled to order their lives in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah.

> " Authority could be cited for the view that this would involve giving non-Muslims protection to follow their own avocations, to follow their own religions, and enjoy the benefits of their personal law, but not rights of citizenship".[45]

Though the Islamic feature of the Objective Resolution aroused resentment of a section of the people, it represented the high water-mark of agreement

---

42. Keith Callard, Pakistan : A Political Study (London, George Allen and Unwin Limited, 1968) P. 89.

43. See G.W.Choudhury, Documents and Speeches on the Constitution of Pakistan, P. 23

44. K. J. Newman, Op. cit. , P. xviii

45. Alan Gledhill, Pakistan : The Development of its Laws and Constitution (London, Stevens and Sons Limited, 1957) P. 68

on constitutional principles during the life of the first Assembly.[46]

The Constituent Assembly on the same day set up a Basic Principles Committee to report on the main principles in which the constitution of Pakistan was to be framed. The interim Report[47] of the Basic Principles Committee, which was presented to the Constituent Assembly by Liaquat Ali Khan , on the 7th September, 1950, provided that there should be a Central Legislature consisting of two Houses :

1. The House of Units, the upper House, having equal representation from all provinces including Baluchistan; and

2. the House of the people, the lower House, elected by the people, the membership of which would be divided equally between two wings of Pakistan.[48]

The Report did not give a full picture of the composition and size of the House of the people; but it was provided that the two Houses of the Federal Legislature should have equal powers in all matters including the Budget and Money-Bills. In case of a dispute on any question, a joint-session of both the Houses should resolve the question. The power to convene a joint-session was to be vested in the Head of the state and was to be exercised in the following cases :

" 1. Conflict between the Houses of the Legislature.

2. Election and removal of the Head of the state.

3. Consideration of the Budget and other money bills.

4. Consideration of a motion of no confidence in the Cabinet".[49]

---

46. Keith Callard, Op. cit.,P. 89

47. Report of the Basic Principles Committee, Pakistan, 1950. G. W. Choudhury, Documents and Speeches on the Constitution of Pakistan, P. 32

48. Ibid.,P. 39

49. Ibid.

The interim Report of the Constituent Assenbly failed to strike public imagination[50]. On the contrary, it created much suspicion and opposition in East Bengal and it was feared that the intention was really to creat unitary form of government.[51] It was opposed on the ground that it did not provide East Bengal with an overall majority in the Federal Legislature on the basis of population and might even make the province a minority in a joint-session of the two Houses.[52]

Instead of running to suppress criticisms and opposition, Mr.Liaquat Ali Khan bowed before the storm of criticism, and the Constituent Assembly invited proposals and suggestions from the public by the 31st January, 1951, and appointed a Sub-Committee to examine the suggestions. The Sub-Committee made the requisite investigations and submitted its Report to the Basic Principles Committee which in turn prepared a comprehensive Report which was presented to the Constituent Assembly by the then Prime Minister Khawaza Nazim Uddin on the 22nd December, 1952.[53]

The Report provided that there should be a Central Legislature consisting of two Houses :

1. The House of Units, the upper House, was to consist of 120 members divided equally between East Bengal and West Pakistan; and

2. the House of the people, the lower House, was to consist of 400 members divided equally between East Bengal and West Pakistan.[54]

---

50. Mushtaq Ahmad, Government and Politics in Pakistan (Karachi, Pakistan Publishing House, 1963) P. 49

51. K. J. Newman, Op. cit.,P. xxvi

52. A Muslim leage member expressed his fears on the floor of the House in the following words :

> "In East Pakistan there is a growing belief ... that there are principles in the report which, if adopted, will reduce the majority of East Bengal into a minority and will turn East Bengal into a colony of Pakistan".

See Keith Callard, Op. cit.,P. 92

53. Report of the Basic Principles Committee, Pakistan, 1952. G.W. Choudhury, Documents and Speeches on the Constitution of Pakistan, P. 67.

54. Ibid., P. 78

Under the Report, the House of the people was vested with real authority, the House of Units would be a revising body.[55] The Cabinet would be collectively responsible to the House of the people only. All money Bills would originate in the House of the people. In the case of any conflict between the Houses, joint-sittings of both the Houses were provided for, in which a simple majority would decide the issue.[56]

However, the Report brought the principle of parity between East and West Pakistan as its most important contribution towards solving the problem of representation. It claimed to bring about a constitutional balance of power as well as responsibilities between the two wings of Pakistan.[57]

The parity formula was adversely criticised. The reaction in the Punjab was extremely unfavourable. The press and the ruling elites in the Punjab opposed the parity formula on the ground that they were designed to establish Bengali domination over the whole country. The argument was that the Bengalis would come as a united group; by winning support from the smaller provinces of Sind and the North-West Frontier and by isolating the Punjab, they would have sufficient majority to rule the country.[58] On the other hand, the Bengali members continued to feel that they had not received their due. The Bengalis professed themselves agrieved because they did not command that number of seats to which their province was entitled by reason of its substantially greater population.[59] The reaction

---

55. Muzaffer Ahmed Chaudhuri, Government and Politics in Pakistan (Dacca Puthighar Limited, 1968) P. 207
56. Report of the Basic Principles Committee, Pakistan, 1952. G.W. Choudhury, Op. cit., P. 88
57. G.W. Choughury, Constitutional Development in Pakistan. P. 74 .
58. K.B. Sayeed, The Political System of Pakistan (Karachi, Oxford University Press, 1967) P. 68.
59. Herbert Feldman, Op. cit., P. 35.

to the Report was not unfavourable in smaller Units of West Pakistan. The Chief Minister of the North-West Frontier Province welcomed it.[60]

In view of opposition to the Report and its shortcomings, the Constituent Assembly was forced to postpone once again its deliberations for an indefinite period. The country seemed to face a constitutional deadlock of great magnitude which Khawaja Nazim Uddin's Cabinet could not solve. On the plea of the failure of the Government to tackle the situation, Prime Minister Khawaja Nazim Uddin was dismissed on the 17th April, 1953, by the Governor-General, Ghulam Mohammad, by exercising powers under section 10 of the Government of India Act,1935. The Governor-General invited Mohammad Ali of Bogra, the then Ambassador of Pakistan to the United states of America, being his personal choice,[61] to form a new government.

On his appointment, Prime Minister Mohammad Ali considered it as one of his principal tasks to overcome the constitutional deadlock. The Prime Minister's patient manoeuvres were rewarded and a compromise, known as 'the Mohammad Ali Formula'[62] was reached. The Formula was as follows :

The Federal Legislature should consist of two Houses (a) the House of Units consisting of 50 members divided equally among 5 Units each unit sending 10 members, and (b) the House of the people consisting of 300 hundred members on the basis of population of each of the 5 Units.[63] In all,

---

60. K. J. Newman, Op. cit., P. xxviii
61. A.C.Kapur, Select Constitutions of the World (Delhi, S.Chand and Co. Pvt. Limited, 1970) P. 839
62. Speech of the Prime Minister on the Third Draft Constitution on the 9th October, 1953. G.W.Choudhury, Documents and Speeches on the Constitution of Pakistan. P. 140
63. The break up of membership was to be as follows : (a) East Bengal 165; (b) The Punjab 75; (c) N.W.F.P., Frontier States and Tribal Areas-24, (d) Sind and Khairpur-20; and (e) Baluchistan, Baluchistan States Union, Bahawalpur and Karachi-16.
G.W.Choudhury, Ibid., P. 141

there would be 175 members from East Bengal and 175 members from West Pakistan in a joint session of the two Houses. The powers of the two Houses were to be equal and in the case of conflict there was a provision for joint-session and in such a joint-session the majority vote must include at least 30 percent of the total members belonging to two zones.[64] In this respect G. W. Choudhury writes :

> " The distribution of seats in the upper House was made in accordance with the geographical facts of the country. As West Pakistan had the majority of country's territory, it was given a clear majority in the House of Units. In the lower House, East Bengal, having the majority of country's population, got a clear majority of seats in accordance with the democratic principle. But the distribution of seats in the two Houses combined was made in such a way as to ensure parity between East and West Pakistan".[65]

About the purpose and effect of the proposals contained in 'the Mohammad Ali Formula' K. J. Newman observes :

> " By making the two zones interdependent, these proposals will help to weld the two parts of Pakistan into one strong, integrated whole".[66]

3. <u>Dissolution of Constituent Assembly and Supremacy of Judiceary.</u>

The Mohammad Ali Formula was a landmark in the political and constitutional history of Pakistan because on its acceptance by the Constituent Assembly, the entire country felt considerable relief that a grave danger to the unity and solidarity of the state had been overcome. The final draft constitution, prepared by the Drafting Committee appointed by the Constituent Assembly on the 14th November, 1953, was to be "ready

---

64. G.W.Choudhury, <u>Ibid</u>.
65. G.W.Choudhury <u>Constitutional Development in Pakistan</u>, P. 77
66. K. J. Newman, <u>Op. cit</u>., P. xxxii.

for signature on 25th October, and would have been reported to the Assembly on 27th October".[67] The Prime Minister declared that the new constitution would be promulgated on the 25th December, 1954.

But during September and October, 1954, there happened a chain of dramatic events which resulted in a final showdown between the Governor-General supported by the Punjabi group and the Bengali-Sind-Frontier group in the Assenbly led by the Prime Minister.[68] On the 20th September, 1954, the Constituent Assembly repealed the Public and Representative Offices (Disqualification) Act, 1949[69] which had served as a handle to the executive to disqualify from Public Office Ministers and Politicians who had become for some reason or other persone non gratae.

On the 21st September, 1954, the Government of India (5th Amendment) Act, 1954,[70] was passed which fundamentally ammended sections 9, 10, 10-A and 10-B of the Government of India Act, 1935. It contained four main provisions : first, the Prime Minister, at the time of his appointment by the Governor-General, and other Ministers were required to be members of the existing Assembly;[71] secondly, it was declared that the Cabinet was to be collectively responsible to the Assembly and should cease to hold office on the expression of want of confidence in any of them by the Federal Legislature;[72] thirdly, the Prime Minister was given the right to force the resignation of any Minister;[73] and fourthly, the Governer-General was required to perform all functions and exercise powers in

---

67. Ivor Jennings, Op.cit., P. 3
68. K.B. Sayeed Op. cit., P. 74
69. Constitutional Documents(Pakistan) Vol. III P. 66.
70. Ibid. Wal. II P. 535
71. Section 10(1), of the Government of India (5th Amendment) Act, 1954
72. Section 10(3), Ibid.
73. Section 10(4), Ibid.

accordance with the advice of the Cabinet.[74]

Undoubtedly, this was an important step towards the development of parliamentary democracy in Pakistan, but the amendment was made in such a way that it could be termed as a "constitutional coup".[75] However, these enactments put the Governor-General in an 'intolerable situation' who on the 24th October, 1954, issued a proclamation of emergency[76] throughout Pakistan. In the Proclamation it was recorded that the Governor-General had come to the conclusion that the 'constitutional machinery' had broken down and the Constituent Assembly had lost the 'confidence of the people and could no longer function. It declared the intention of the Government to hold fresh elections as soon as possible and until that time, the Prime Minister had accepted an invitation to re-form his Cabinet in order to give the country 'a vigorous and stable administration'. The Proclamation asserted that the security and stability of the country were of paramount importance and that all personal, sectional and provincial interests must be subordinated to the supreme national interest.[77]

The action of Ghulam Mohammad was prompted not only by his intense personal desire to display authority, but also to defeat the democratic forces attempted to promulgate a constitution in the country, so that the vested interest of the Punjabi coterie could be safeguarded.[78]

---

74. Section 9(1), Ibid.
75. G.W.Choudhury, Constitutional Development in Pakistan, P. 84
76. Gazette of Pakistan, 24 October, 1954. P.L.D. 1954 Central Statute 202.
77. Ibid.
78. Z.I.Choudhury, "Dissolution of the Constituent Assembly of Pakistan in 1954 : Its Legal and Political Implications", (1973)3 The Rajshahi University Studies, 229.

So apart from the legality of the whole question, the political motive behind the disolution of the Constituent Assembly was, without doubt, malicious. The action was prompted by the desire to achieve ulterior political ends.[79] To attain that end the Governor-General had relied on his supporters in the Punjabi group of politicians, the Civil Service and the Army. S.A.de Smith rightly observed that Ghulam Muhammad dissolved the Constituent Assembly not because it had failed to make a constitution, but because it had nearly succeeded.[80]

However, the action of the Governor-General in dissolving the Constituent Assembly was the subject of a lengthy legal dispute.

> " The legal battles hereafter fought were the greatest ever fought in legal history and provided to the superior courts of Pakistan the greatest headache that Judges anywhere else in the world had ever experienced before".[81]

The President of the Constituent Assembly, Maulvi Tamiz Uddin Khan, on the 7th November, 1954, petitioned the Chief Court of Sind[82] to issue a writ of mandamus and a writ of quo warrante under section 223-A of the Government of India Act, 1935, with a view to(a) 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 (b) declaring the appointment of the recently appointed Ministers repugnant to section 10 of the Government of India (5th Amendment) Act, 1954. The respondents raised the preliminary objection

---

79. Ibid., P. 242 .
80. S. A. de Smith. Op. cit., P. 219
81. Mohammad Munir, Constitution of the Islamic Republic of Pakistan (Lahore, All Pakistan Legal Decisions, 1965) P. 30
82. Tamiz Uddin Khan V. Federation of Pakistan, P.L.D. 1955, Sind 96.

that section 223-A and the amended section 10 of the Government of India Act, 1935, were, in the absence of assent of the Governor-General, not valid laws and the Court, therefore, had no jurisdiction to issue writs to the respondents.

The Chief Court of Sind held that the Acts of the Constituent Assembly, when it did not function as the Federal Legislature, dit not require assent of the Governor-General. It further held that the dissolution of the Constituent Assembly was illegal. It, therefore, issued the writs prayed for. In this connection Constantine C. J. observed :

> " Where legislatures have been created by statute, dissolution has been provided for by statute. There is no case throughout the Commonwealth outside England, where dissolution of a legislature takes place except by express provision in the constitution".[83]

Vellani J. referred to Bonanza Gold Mining Co. Limited V. The King,[84] Attorney-General V. De Keyser's Hotel[85] and Moore V. Attorney-General for the Irish Freestate[86] and viewed that the prerogative to dissolve the Constituent Assembly was governed by the express provision of section 5 of the Indian Independence Act, 1947, and that section did not enable the Governor-General to dissolve the Constituent Assembly.[87]

Against the unanimous judgment of the Chief Court of Sind the Federation and other respondents appealed to the Federal Court of Pakistan[88] which by a majority of four to one reversed the findings of the court below and held that all the Acts passed by the Constituent Assembly

---

83. Ibid. per Constantine C.J. at P. 106.
84. (1916) A. C. 566.
85. (1920) A.C. 508
86. 1935 A.C. 484
87. P.L.D. 1955 Sind 96. Per Vellani J. at P. 111
88. Federation of Pakistan V. Tamiz Uddin Khan. P.L.D. 1955 F.C. 240. Reproduced in Jennings Op. cit. at P. 79.

including constitutional Acts required the assent of the Governor-General for their validity and operation. Since section 223-A of the Government of India Act, 1935, under which the Chief Court of Sind assumed jurisdiction to issue writs, did not receive such assent, it was not yet a law and, therefore, the court had no jurisdiction to issue writs. In view of this conclusion the court did not go into the other issues.[89]

Munir C.J. held that as Pakistan was a member of the Commonwealth and its Interim Constitution was of the Commonwealth type there must be an authority with power to assent to laws. The learned Chief Justice referred to the cases of Stock dale V. Hansard[90] and Ndwana V. Hofmeyer[91] and explained that according to section 6(3) of the Indian Independence Act, 1947, the Governor-General, being the representative of the Crown, might give or withhold assent, every Act, passed by the Constituent Assembly, therefore, required the assent of the Governor-General.

Cornelius J., as he then was, in a dissenting judgement, on the question of assent held that the Governor-General's power to assent under section 6(3) could not be enlarged by applying section 5 of the Indian Independence Act, 1947.[92] As a representative of the Crown his prerogative power was regulated by the statute. His lordship referred to American constitutional law in which constitutional amendments did not require the assent of the President. In two American cases of

---

89. Ibid. Per Munir C. J. at P. 160

90. (1839) a Ad. & E. 1.

91. 1937 A.D. 229.

92. Federation of Pakistan V. Tamiz Uddin Khan, Op. cit. per Cornelius J. at P. 223

Hollingsworth V. Virginia[93] and Hawke V. Smith[94] it was decided that the negation of the president applied only to the ordinary cases of legislation; he had nothing to do with the proposition or adoption of amendments to the constitution. The learned Judge also referred to three Pakistani cases where in one case [95] the Chief Court of Sind had held assent to be unnecessary; and the findings in two other cases[96] before the Federal Court also clearly implied this. Considering the above points the learned Judge concluded that laws, made by the Constituent Assembly of constitutional nature, did not require the assent of the Governor-General for their validity and operation.

However, as a consequence of the decision of the Federal Court 44 Acts of the Constituent Assembly and hundreds of orders and acts of the Federal and Provincial Governments made and done under these Acts became invalid as they did not receive the assent of the Governor-General. " The consequence seemed to be a state of legal chaos"[97]. Six days after the judgement of the Federal Court, the Governor-General issued a Proclamation of emergency,[98] 1955, under section 102 of the Governornment of India Act, 1935, and promulgated an 'Emergency Powers Ordinance', 1955,[99] 'in exercise of the powers conferred by sub-section(1)

---

93. (1789) U.S.S.C.R. ed. P. 644.
94. (1919) U.S.S.C.R. 64 ed. P. 871.
95. M.A.Khuhro V. Federation P.L.D. 1950 Sind 49.
96. Khan of Mamdot V. Crown P.L.D. 1950 F.C. 15;
    Akbor Khan V. Crown P.L.D. 1954 F.C. 87.
97. Keith Callard Op. cit. P. 143
98. Constitutional Documents (Pakistan) Vol. IV-B , P. 1838.
99. Ordinance IX of 1955.P.L.D. 1955 Central Statute , 63.

of section 42 of the Government of India Act, 1935, and of all other powers enabling him in that behalf.' According to the provisions of the Ordinance the Governor-General validated retrospectively 35 Acts[1] out of 44 Acts, which had been passed by the Constituent Assembly but had not received the assent of the Governor-General. It also provided that the validity of any law should not be questioned in any Court.[2]

In accordance with the provisions of the Ordinance the Governor-General assumed powers to (i) make provisions for framing the constitution of Pakistan;[3] (ii) make provision to constitute the Province of West Pakistan;[4] (iii) authenticate the Central Budget;[5] and (iv) name East Bengal as East Pakistan.[6]

But the validity of the Ordinance was challenged in the Federal Court in the case of Usif Patel V. Crown[7] where it was held that the Governor-General had no power under section 42 of the Government of India Act, 1935, or otherwise to validate constitutional legislation retrospectively, and accordingly that Ordinance was invalid. The Court explained the legal and constitutional position of Pakistan in this way :

> " Under the Independence Act the authority competent to legislate on constitutional matters being the Constituent Assembly, it is that Assembly alone which can amend those Acts ... The Governor-General can give or withhold his assent to the legislation of the Constituent Assembly but he himself is not the Constituent Assembly and on its disappearance he can neither claim powers which he never possessed not claim to succeed to powers of that Assembly".[8]

---

1. Section 2(1) and Schedule of The Emergency Powers Ordinance, 1955.
2. Section 2(2) (a), Ibid.
3. Section 10, Ibid.
4. Section 6, Ibid.
5. Section 4(1), Ibid.
6. Section 6, Ibid.
7. P.L.D. 1955 F.C. 387, Ivor Jennings, Op.cit., P.241.
8. Ibid. per Munir C.J. at PP. 244-245.

The decision of the Federal Court in Usif Patel's case put an end to the Governor-General's endeavour by himself to restore the constitutional machinery to life and to his intention to make the future constitution of the country. Mustaq Ahmad aptly remarked;

> " Ghulam Mohammad won the first battle but lost the war".[9]

However, the Governor-General accepted the ruling of the Federal Court and by an Order[10] moved towards the creation of a new Constituent Assembly to be known as Constituent Convention to meet on the 10th May, 1955, at Murree. The Government had some doubt whether this step had effectively brought it within the campus of the law. Accordingly, the Governor-General referred the matter of dissolution and its consequences in the form of four questions to the Federal Court under section 213 of the Government of India Act, 1935, for its advisory opinion[11].

A full Bench of the Federal Court gave their opinion on the Reference. Munir C.J. after examining the scheme of the Indian Independence Act, 1947, held that the absolute and unqualified prerogative right of the Crown and of the Governor-General as the representative of the Crown to disolve the Constituent Assembly was taken away. The Commonlaw prerogative had been taken away only in so far and as long as the Constituent Assembly fulfilled its task of providing the country with a constitution within a reasonable time.[12] But the prerogative of dissolution revived when it became apparent to the Governor-General that

---

9. Mushtaq Ahmad, Op. cit., P. 36.
10. The Constituent Convention Order, 1955 (Order VIII of 1955), Constitutional Documents (Pakistan) Vol. IV-B, P. 1388.
11. Reference by H.E. the Governor-General, P.L.D. 1955 F.C. 435, Jennings Op.cit., P. 257.
12. Ibid., Per Munir C.J. at P. 270

the Constituent Assembly had failed to provide a constitution for the country.

The Chief Justice declared that (i) the Governor-General had the legal authority to dissolve the Constituent Assembly under section 5 of the Indian Independence Act, 1947; (ii) the Constituent Assembly became in course of time wholly unrepresentative; (iii) for practical purposes the Constituent Assembly assumed the form of a 'Perpetual legislature'; and (iv) throughout the period of its existence the Constituent Assembly asserted that laws made by it were valid without the consent of the Governor-General.[13]

The learned Chief Justice also declared that the proposed Constituent Convention was competent enough to exercise all the powers conferred on the Constituent Assembly by section 8(1) of the Indian Independence Act, 1947, subject to the following conditions that (i) the correct name of the Constituent Convention should be Constituent Assembly; (ii) the Governor-General's right to dissolve the Assembly could be derived only from the Indian Independence Act; (iii) the arrangement for representation of States and Tribal Areas could be made only by the Constituent Assembly and not by the Governor-General ;and (iv) the Governor-General had no power to nominate any members of the Constituent Assembly.[14]

His lordship discussed the question of the emergency powers legislation which brought up the law of state necessity. He viewed :

> " The law of Natural necessity is a part of the statute law of our country but the law of civil or state necessity is as much a part of the unwritten law as the law of military necessity".[15]

---

13. Ibid., PP. 307-308
14. Ibid., P. 308
15. Ibid., P. 298.

On this point, his lordship referred to Mr. Diplock's citation of Bracton's Treatise " De Legibus et consuetudinibut Angliae"[16] in which the maxim was"Id quod alias non est licitum, necessitas licitum facit".[17] The learned Chief Justice also referred to two other maxims "Salus populi suprema lex"[18] and"Salus reipublicae est suprema lex",[19] and the cases of In re an Arbitration between Shipton, Anderson and Co. and Harrison Brothers and Co.[20], Attorney-General V. De Keyser's Royal Hotel,[21] Salt Petre case,[22] R. V. Hamnden,[23] Bates case,[24] Muhammad Umar Khan V. the Crown,[25] Phyllips V. Eyre,[26] Tilonko V. Attorney-General of Natal[27] etc. which justified the principle of state necessity and held that to the question of validation of the legislation of the old Assembly the principle of state necessity applied. His lordship, therefore, held

---

16. " Of the laws and customsof England."
17. "That which is otherwise not lawful necessity makes lawful".
18. "Safety of the people is the supreme law".
19. "Safety of the state is the supreme law".
20. (1915) 3. K.B. 676.
21. (1920) A.C. 508.
22. (1607) 12 Co. Rep. 12.
23. (1637) 3 St. Tr. 825.
24. (1606) 2 St. Tr. 371.
25. (1953) P.L.R. Lahore 825; P.L.D. 1953 Lahore 528.
26. (1870) 6 Q.B. I.
27. 1907 A.C. 93

that the Governor-General would be justified in issuing a proclamation giving retrospective validation to constitutional laws to which assent had not been accorded until such time as the new Constituent Assembly could decide upon their validity.[28]

In this way, the Federal Court proved to be the guardian of the constitution, and indirectly also the savior of the state and of democratic form of government. However, these decisions of the Federal Court have met with " a mixed reception"[29] from academic and political commentators. Ivor Jennings observed :

> " The litigation which followed the dissolution of the Constituent Assembly of Pakistan on 24 October 1954, dealt with the fundamental principles of constitutional law of interest throughout the Commonwealth".[30]

According to Professor S.A. de Smith :

> " It was very important for the Court not to come to a conclusion adverse to the Governor-General on the main issue".[31]

This argument found support in a speech of the Chief Justice, Munir, where he had disclosed that the judgment was dictated by the events that happened and that the writs issued by the Sind Chief Court on

---

28. Reference by H.E. the Governor-General, Op.cit. per Munir, C.J. at p. 307.
    The Reference was an advisory juegement, but in Federation of Pakistan V. Ali Ahmed Hussain Shah, P.L.D. 1955 F.C. 522, it was held that a constitutional law not assented to by the Governor-General could be given temporary retrospective validation by proclamation.
29. Z. I. Choudhury, Op.cit., P. 236.
30. Ivor Jennings, Op. cit., Preface.
31. S.A. de Smith, " Constitutional Lawyers in Revolutionary Situations" (1968) 7 Western Ontario Law Review, 93.

the basis of 'constitutional instruments' could not be enforced against a de facto government.[32] Professor K. C. Wheare regards the findings of the Federal Court relating to the assent of the Governor-General to constitutional laws as "correct".[33] Professor Alan Gledhill regards the judgments not as " political decisions".[34] Herbert Feldman defended the Federal Court on three points in order to show that the Court was not subject to external influences in arriving at its decisions. In the first place, the dissenting judgment of Justice Cornelius was couched in language sufficiently vigorous as to show that every Judge was free to form his own opinion of the matter. Secondly, the majority judgment was not, in some respects, a popular judgment. Thirdly, the decision in Tamiz Uddin Khan's case did not neatly and sufficiently cleared the way for the Governor-General to proceed with.[35]

On the observation of the Federal Court that the Constituent Assembly had failed to frame a constitution for the country, Professor Z. I. Choudhury comments :

> " This contention is true if one regards the situation as it stood on October 24,1954. It is true that the Assembly had not yet adopted a constitution formally. But the Assembly had already adopted a draft constitution in September and the final draft'would have been ready for signature on 25 October and would have reported to the Assembly on 27 October'. Not only that, the

---

32. Speech of Munir C.J. at Lahore High Court Bar Association, the 22nd April, 1960. See Mushtaq Ahmad, Op.cit., P. 37.

33. K.C. Wheare,the Constitutional Structure of the Commonwealth (London, Oxford University Press, 1960). P. 100.

34. Alam Gledhill, "The Constitutional Crisis in Pakistan", Indian Year Book of International Affairs,1935 .

35. Herbert Feldman,Op. cit.,PP. 72-73 .

> Prime Minister had already declared that the new constitution would come into effect on December 25, 1954. It would, therefore, be utterly incorrect to conclude that the Constituent Assembly had failed to frame a constitution for the country".[36]

Mushtaq Ahmad though considered the judgments of the Federal Court not to be "truly judicial", he praised them in the following words :

> "Taken together they helped in arresting the trends towards unmitigated dictatorship and restoration of Parliamentary Government".[37]

While the Federal Court upheld the Governor-General's action in dissolving the Constituent Assembly, it did not hesitate to make it clear that it would not allow a second long parliament, nor could it give its legal sanction to a continued government by proclamation.

> "Thus by its wise and learned decision it built the 'legal bridge' which brought the nation back to a Constitutional government".[38]

4. Second Constituent Assembly and the Constitution of 1956.

In accordance with the advice of the Federal Court, the Constituent Convention Orders[39] were revoked by the Constituent Assembly Order,[40] 1955, which paved the way for the establishment of the new Constituent Assembly.

---

36. Z.I.Choudhury, Op.cit., P. 239
37. Mushtaq Ahmad, Op.cit., P. 37
38. K. J. Newman, Op. cit., P. XLIX
39. The Constituent Convention Order,1955,(Order VIII of 1955); The Constituent Convention(Amendment)Order,1955 (Order IX of 1955); The Constituent Convention (Second Amendment)Order,1955(Order X of 1955) Constitutional Documents(Pakistan),Vol. IV-B, PP.1388,1397 and 1404 respectively.
40. Order XII of 1955. (Constitutional Documents (Pakistan), Vol. IV-B, P. 1408.

The second Constituent Assembly was to have 80 members divided equally between the two wings of Pakistan.[41] The first job of the new Assembly was to revalidate the statutes which had lost their force due to decisions of the Federal Court. The Validation of Laws Act,[42] 1955, was passed and the country was finally rescued from a critical legal situation.[43] The Establishment of West Pakistan Act,[44] 1955, was passed by the Assembly on the 30th September, 1955, which came into force on the 14th October, 1955. The Assembly, thus, legalised the integration of West Pakistan as one Province a power which had been denied to the Governor-General by the Federal Court.[45]

The most important task of the Constituent Assembly, however, was the framing of the constitution. On the 8th January, 1956, a draft constitution was presented to the Constituent Assembly, which, with certain changes, was finally adopted on the 29th February, 1956, and received the assent of the Governor-General on the 2nd March, 1956. The Constitution came into force on the 23rd March,[46] 1956. It had the following characteristics :

The Constitution of 1956 provided for an elected President of Pakistan in whom the executive power of the federation would vest.[47]

---

41. Section 4 of the Constituent Assembly Order, 1955.
42. Constitutional Documents (Pakistan), Vol. 111, P. 111.
43. G.W.Choudhury, Constitutional Development in Pakistan, P. 93
44. Constitutional Documents (Pakistan), Vol. 111, P. 117
45. K.B.Sayeed, Op.cit., P. 81
46. The Constitution of Islamic Republic of Pakistan, 1956, Government of Pakistan, Ministry of Law (Karachi, Government of Pakistan Press, 1956).
47. Article 39(1) of the Constitution of 1956.

The President would be elected by an electeral college consisting of the members of the National and Provincial Assemblies.[48] To qualify for election a candidate must be a Muslim and at least 40 years of age.[49] The President could be removed from office by impeachment provided that such a motion was approved by not less than three-quarters of the members of the National Assembly.[50] He could hold office for a term of five years;[51] but no one could serve more than two terms.[52] If the office of the President would fall vacant or the president was unable to perform his duties the Speaker of the National Assembly was to exercise the function of the President.[53]

There was to be a Cabinet of Ministers headed by the Prime Minister, which would be collectively responsible to the National Assembly,[54] to aid and advise the President in the exercise of his functions.[55]

> "The relationship that would subsist between the President and the Cabinet of Ministers would be analogous to the relationship the kind in Britain bears to the British Cabinet".[56]

The President in his discretion was to appoint a Prime Minister who was

---

48. Article 32(1), Ibid.
49. Article 32(2), Ibid.
50. Article 35, Ibid.
51. Article 33(1), Ibid.
52. Article 33(2), Ibid.
53. Article 36, Ibid.
54. Article 37(5), Ibid.
55. Article 37(1), Ibid.
56. M.A.Chaudhuri, Op. cit., PP. 219-220.

to be a member of the National Assembly and who, according to the President, was most likely to command the confidence of the majority of members of the National Assembly.[57] Other Ministers, Ministers of the state and Deputy Ministers were to be appointed and dismissed by the President in accordance with the advice of the Prime Minister.[58] The Prime Minister was to hold office during the pleasure of the President; but the President was not to exercise his power of discretion unless the latter was satisfied that the Prime Minister had lost the confidence of the majority of the members of the National Assembly.[59]

The President who was to exercise his functions according to the advice of the Cabinet, was not a mere figurative head.[60] It was the duty of the Prime Minister to keep him informed about the entire administration and proposals for legislation.[61] The President could use his discretion in the appointment of the Prime Minister. Moreover, he was to be elected for a fixed term. A Governor-General could be removed by a simple telegram to London; a President was in office for five years unless he was impeached by the National Assembly. For all these considerations, the President was not willing to play the "dignified" role of a British Monarch, letting his Prime Minister function as the "efficient" executive.[62] In this sense, the Constitution of 1956 merged as a mixture of the British and American constitutional Pattern.[63]

---

57. Article 37(3) of the Constition of 1956.
58. Article 37(4), Ibid.
59. Article 37(6), Ibid.
60. K.B. Sayeed, Op. cit., P. 81
61. Article 42 of the Constitution of 1956.
62. K. B. Sayeed, Op. cit., P. 81
63. R. N. Spann, Constitutionalism in Asia, P. 143. Reproduced in M. Rashiduzzaman, Pakistan : A Study of Government and Politics (Dacca, Ideal Library, 1967), P. 104.

The Central Legislature, known as the National Assembly of Pakistan, was to consist of 310 members of which 10 seats were reserved for women.[64] Following the tradition of Parliamentary systems in England and in the Commonwealth, the President was a constituent and integrated part of parliament [65] whose assent was necessary for Bills passed by the National Assembly for their validation.[66] A candidate for election to the Assembly had to be twenty five years of age and qualified to vote.[67] The normal life of the Assembly was five years.[68] The National Assembly would choose its own Speaker and Deputy Speaker[69] from its own members and would frame its own rule of procedure,[70] which could not be questioned in any court.[71] The President had the power to summon, prorogue and dissolve the National Assembly.[72] He could address and send messages to it.[73]

The executive powers of a Province were vested in the Governor[74] who was to be appointed by and hold office at the pleasure of the President.[75] There was to be a cabinet of Ministers headed by the Chief Minister,[76] who was to be appointed by the Governor from amongst the

---

64. Article 44 of the Constitution of 1956.
65. G.W.Choudhury, Constitutional Development in Pakistan, P. 104.
66. Article 57 of Constitution of 1956.
67. Article 45, Ibid.
68. Article 50(3), Ibid.
69. Article 54, Ibid.
70. Article 55(1), Ibid.
71. Article 56(1), Ibid.
72. Article 50, Ibid.
73. Article 52, Ibid.
74. Article 73(1), Ibid.
75. Article 70(1), Ibid.
76. Article 71(1), Ibid.

members of the Provincial Assembly and who, in his opinion, was most likely to command the confidence of the majority of members of the Assembly.[77] Other Ministers, Deputy Ministers and Parliamentary Secretaries would be appointed and dismissed by the Governor in accordance with the advice of the Chief Minister.[78] The Cabinet was to aid and advise the Governer in the exercise of his functions,[79] it would be collectively responsbile to the Provincial Assembly.[80] The Provincial Assembly was to consist of 310 members of which 10 seats were reserved for women.[81] The Governor was also made the constituent and integral part of the Assembly.[82]

The Supreme Court, consisting of the Chief Justice and not more than six other Judges,[83] became the successor to the Federal Court under the Interim Constitution. The Chief Justice of the Supreme Court was to be appointed by the President, and other Judges were to be appointed by the President after consultation with the Chief Justice, provided they were citizens of Pakistan and had been Judges of the High Court for five years or Advocates or Pleaders of the High Courts for fifteen years.[84] The law declared by the Supreme Court was binding on all courts.[85]

---

77. Article 71(3), Ibid.
78. Article 71(4), Ibid.
79. Article 71(1), Ibid.
80. Article 71(5), Ibid.
81. Article 77, Ibid.
82. Article 76, Ibid.
83. Article 148, Ibid.
84. Article 149, Ibid.
85. Article 163(1), Ibid.

Apart from the expressed constitutional or statutory provisions, the appellate jurisdiction of the Supreme Court had no limitation in matters decided by the High Courts.[86] It was specifically given the power to adjudicate in any dispute between the Federal Government and the Government of one or Governments of both the Provinces; or the Federal Governemtn and the Government of Province on the one side and the Government of the other Province on the other side; or the Governments of the Provinces if the dispute should involve any question of legal right or question as to the interpretation of the Constitution.[87] The Supreme Court had also jurisdiction to give advisory opinion on any question of law of public importance referred to it by the President.[88] In view of the above, Alan Gledhill commented that the jurisdiction of the Supreme Court was "without parallel in the Commonwealth".[89]

The High Court of a Province, consisting of a Chief Justice and such number of other Judges as the Presidnet might determine,[90] besides its ordinary appellate jurisdiction, had the power to issue directions or orders to all statutory authorities and also writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari.[91]

One of the most original features of the Constitution was its Islamic provisions. These Islamic provisions were apparent from —

---

86. Articles 157, 158 and 159, Ibid.
87. Article 156, Ibid.
88. Article 162, Ibid.
89. Alan Gledhill, Pakistan. The Development of its Law and Constitution, P. 120.
90. Article 166 of the Constitution of 1956.
91. Article 170, Ibid.

(i) the Preamble to the Constitution; (ii) the designation of the state as the Islamic Republic of Pakistan;[92] (iii) the condition that the President was to be a Muslim;[93] (iv) the Directive Principles of State Policy;[94] and (v) the organisation for Islamic research and instruction.[95] As regards future laws, it was also laid down that no law would be enacted which was repugnant to the injunction of Islam as laid down in the Holy Quran and Sunnah.[96] As regards the existing law, the President was to appoint a Commission within a year of the inauguration of the Constitution to make recommendations as to how it could be brought into conformity with the injunctions of Islam.[97] K. B. Sayeed considered the Islamic provisions as the expression of 'orthodox elements',[98] whereas, according to R. N. Spann, the position of Islam, occupied in the Constitution of 1956, showed an attitude of hypocrisy and vagueness of Muslim framers of the Constitution.[99]

From the above Characteristics, it is apparent that in its general aspects, the Constitution of 1956 was based on the pattern of the Government of India Act, 1935[1]. It formed a logical continuation of the scheme of government under the Government of India Act, 1935, and thus, after about nine years Pakistan had been able to get a constitution of its own. People could now look to a document as the country's basic law and expect the politicians to work the constitution.

---

92. Article 1, Ibid.
93. Article 32(2), Ibid.
94. Articles 24 and 25, Ibid.
    Article 25(1) reads as follows:
    "Steps shall be taken to enable the Muslims of Pakistan individually and collectively to order their lives in accordance with the Holy Quran and Sunnah".
95. Article 197, Ibid.
96. Article 198(1), Ibid.
97. Article 198(3), Ibid.
98. K.B.Sayeed, Op.cit., P. 82
99. See Rashiduzzaman, Op. cit., P. 105
1. Mohammad Munir, Op. cit., P. 45.

5. Position of Fundamental Rights up to the Abrogation of Constitution, 1956

Before examining the fundamental rights guaranteed by the Constitution of 1956, it will, perhaps, be convenient to have a brief survey of their position during the British period as well as after the creation of Pakistan. It may be simply said that before the introduction of the Government of India Act, 1935, there was no provision in the constitutional laws guaranteeing fundamental rights. It was for the first time in the Sub-Continent, upon the demands raised by the people of India,[2] a few provisions guaranteeing some rights to the subjects were incorporated in the Government of India Act, 1935.

The rights were provided in sections 275, 297, 298 and 299 of the Government of India Act, 1935. It was laid down that no person should ordinarily be disqualified on the ground of sex for being appointed to any civil service or civil post under the Crown in India.[3] Discrimination on internal trade by Provincial Legislature or government was also prohibited.[4]

No subject of His Majesty domiciled in India should on grounds only of religion, place of birth, descent, colour or any of them be ———

---

2. The Muslim League in a resolution of 13th Annual Session held in Delhi, 1926 emphasised on fundamental rights. Nehru Committee's Report, 1928, referred to the resolution of Madras Congress and cited the illustration of Ireland. The Report of Simmon Commission, 1930, first rejected the demands. Indian leaders raised the demands at the Round Table Conferences, consequent upon which some rights were guaranteed.
3. Section 275 of the Government of India Act, 1935.
4. Section 297, Ibid.

(a) ineligible for any office under the Crown in India;[5] (b) debarred from acquiring, holding or disposing of property;[6] and (c) prohibited from carrying on any occupation, trade, business or profession in British India.[7] It was also provided that no person should be deprived of his property in British India save by authority of law.[8] Under the provisions of the Act, it was made one of the special responsibilities of the Governor-General and the Governors of the Provinces to safeguard the legitimate interest of the minorities.[9] It should be noted that there was no specifice provision in the Act itself for the enforcement of these rights, but they could be enforced even against the statute.[10]

From the early days of the creation of Pakistan, the Constituent Assembly had tried its best to promulgate a constitution and to codify some fundamental rights. It adopted, on the 6th October, 1950, the interim Report of the Committee on fundamental rights and on matters relating to minorities.[11] The Constituent Assembly on the 7th September, 1954, adopted another Report of the Committee on fundamental rights and on matters relating to minorities.[12]

---

5. Section 298(1), Ibid.
6. Ibid.
7. Ibid.
8. Section 299(1), Ibid.
9. Section 298(2) (c), Ibid.
10. Pubjab V. Daulat Singh (1946) 73 A.I.R. 59.
11. Report of the Committee on fundamental rights and on matters relating to minorities, Pakistan, 1950, G.W.Choudhury, Documents and Speeches on the Constitution of Pakistan, P. 274.
12. Report of the Committee on fundamental rights and on matters relating to monorities, Pakistan, 1954, G.W.Choudhury, Ibid., P. 278.

On the basis of these Reports, fundamental rights were incorporated in the Constitution of 1956.[13] Before enumerating the fundamental rights it was laid down in the Constitution that if any existing law or custom or usage having the force of law on the Constitution day i.e., the 23rd March, 1956, was inconsistent with any provision of fundamental rights, it would be void to the extent of inconsistency.[14] It did not mean that such laws were void ab initio.[15] Moreover, it was laid down that any law made by the state after the Constitution day, which took away or abridged any fundamental right, was void to the extent to which it had that effect.[16] Articles 5 to 21 of the Constitution of 1956 described a number of fundamental rights which could be categoried under the following heads : (1) equality of persons; (2) protection of life, liberty and proterty; (3) political rights; and (4) cultural and religious rights.

(1) Equality of Persons :

It was provided in the Constitution that all citizens were equal before law and were entitled to equal protection of law.[17] This right embraced two rules : first, the provision did not mean that all laws would apply to all the subjects or that all the subjects might have the same rights and liabilities; and secondly, that a citizen's right as a human being were not affected by reason of his descent, religion, social or official status, economic condition or place of birth or residence; and further that all citizens were equally subject to the general law.[18]

---

13. Part II of the Constitution of 1956.
14. Article 4(1) of the Constitution of 1956.
15. Province of East Pakistan V. Md. Mehdi Ali Khan(XI)D.L.R.,1959 S.C.319.
16. Article 4(2) of the Constitution of 1956.
17. Article 5, Ibid.
18. Mohammad Munir, Op. cit., P. 177.

There should be no discrimination against any citizen on the ground only of race, religion, caste, sex or place of birth, in respect of access to places of public entertainment or resort.[19] Untouchability was abolished and its practice in any form was forbidden.[20] Equal protection of law recognised that any citizen otherwise qualified for appointment in the service of Pakistan, should not be discriminated on grounds of race, religion, caste, sex, residence or place of birth.[21] There were some qualifications to this rule : (a) for a period of 15 years beginning from the Constitution day, posts might be reserved for persons belonging to any class or area, where such class or area was under-represented in the service of Pakistan;[22] (b) in the interest of any service, specific posts or services might be reserved for members of either sex;[23] and (c) the Constitution permitted a provincial government or any local or other authority to make rules that residence in the province concerned should be an indispensable qualification for service under that government or authority.[24] Moreover, public officers, for the purpose of carrying out their duties, were given certain powers which other people dit not possess.

Equality, thus, in the Constitution, did not imply mechanical equality. Discrimination, as observed above, was permissible provided it was not 'arbitrary'. If a law provided any discrimination in favour of, or against a class, the classification was to be based on a real difference, having a reasonable bearing on its subject-matter.[25]

---

19. Article 14(1) of the Constitution of 1956.
20. Article 20, Ibid.
21. Article 17(1), Ibid.
22. Proviso to Article 17(1), Ibid.
23. Ibid.
24. Article 17(2), Ibid.
25. Jibendra Kishore V. Province of East Pakistan P.L.D. 1957 S.C. 9.

(2) Protection of Life, Liberty and Property :

No person was to be deprived of life or liberty save in accordance with law.[26] This provision amounted to a declaration that no person was to take the life or liberty of another person except under a law authorising him to do so.

> " There must be a provision in a statute or statutory instrument justifying any sentence of death or imprisonment, or the arrest of any person".[27]

Moreover, it was provided protection against retrospective offences or punishment. This meant that no person should be punished for an act which was not punishable when the offence was committed, or subjected to a punishment greater than that was prescribed, when the act was done.[28]

The Constitution ensured to every citizen certain safeguards against arbitrary arrest and detention. A person arrested should not be detained in custody without being informed " as soon as may be " of grounds for such arrest, and such person should not be denied the right of legal consultation and defence by a legal practitioner of his choice.[29] Further, a person arrested or detained in custody had to be produced before the nearest magistrate within a period of twenty four hours excluding the time required for the journey from the place of arrest to the court of the magistrate, and no further detention was allowed except on an order of the magistrate.[30] Such safeguards did not extend to an enemy alien or any person arrested or detained under any law providing for preventive detention.[31]

---

26. Article 5(2), of the Constitution of 1956.
27. Alan Gledhill, Pakistan, The Development of its Laws and Constitutions, P. 129.
28. Article 6, of the Constitution of 1956.
29. Article 7(1), Ibid.
30. Article 7(2), Ibid.
31. Article 7(3), Ibid.

The right mentioned above extended not only to criminal proceedings but to other cases; for instance, it would extend to persons arrested under the Pakistan (Recovery of Abducted Persons) Ordinance, 1949,[32] or the Pubjab Control of Goondas Act, 1957.[33]

No law providing for preventive detention should autherise the detention of a person for a period exceeding three months unless an Advisory Board, appointed by the Chief Justice of Pakistan in the case of person detained under a Central Act, or by the Chief Justice of the Province concerned in the case of a person detained under a Provincial Act, would certify that there was sufficient causes for such detention.[34] The grounds should be known at the time of making the detention order and should be served on the detenu with the detention order affording him the earliest opportunity of making a representation against the order.[35] The detention would be illegal if the grounds were not communicated to him at all or not within a reasonable time.[36] The grounds could be communicated verbally to the prisoner if he was illiterate.[37]

The Constitution prohibited slavery.[38] All forms of forced labour were prohibited except for public purposes;[39] for instance, compulsory

---

32. Sakhi Delar Khan V. Superintendent Incharge, Recovery of Abducted women, P.L.D. 1957 Lahore 813; Jhumma Khan Baluch V. Government of Pakistan, P.L.D. 1957 Karachi 939.
33. Bazal Ahmad Ayyubi V. The Province of West Pakistan P.L.D. 1957 Lahore 388.
34. Article 7(4) of the Constitution of 1956.
35. Article 7(5), Ibid.
36. Ghulam Mohammad Loondkhawar V. The State P.L.D. 1957 Lahore 497.
37. Jumma Khan Baluch V. Government of Pakistan, Op. cit.
38. Article 16 (1) of the Constitution of 1956.
39. Article 16 (2), Ibid.

military service or conscription for any social service under any law that might be made for the purpose would be immune from such prohibition. It was held in Dalmia Cement Limited V. Dalmia Cement Workers' Union[40] that overtime work by a factory worker employed in accordance with the agreement of his service was not forced labour.

Subject to reasonable restrictions imposed by law in the public interest, every citizen should have right to acquire, hold and dispose of property.[41] No person should be deprived of his property save in accordance with the law.[42] The principle of 'eminent domain'[43] applied only where the 'property'[44] was acquired or taken possession of ; and in such cases the constitutional requirements were that the acquisition or taking possession of —— (i) was to be for a public purpose; (ii) should be authorised by law; and (iii) law under which the property was acquired or possessed should either itself provide for compensation or specify the principles on which and the manner in which compensation was to be determined and given.[45]

---

40. P.L.D. 1958 S.C. 153.
41. Article 11(b) of the Constitution of 1956.
42. Article 15(1), Ibid.
43. The American constitutional principle by which the state has the power to acquire property of its subjects.
44. According to Article 15(4) of the Constitution property meant only " immovable property, or any commercial or industrial undertaking or any interest in any such undertaking."
45. Article 15 (2) of the Constitution of 1956.
    It was held in Jibendra Kishore V. Province of East Pakisten that compensation meant the market value of the property acquired.

The rule governing acquisition or taking possession of property only for public purpose and on payment of compensation did not apply to : (i) any law under which a person might be deprived of property with a view to preventing danger to life, property or public health;[46] (ii) any acquisition or administration of any property which was or was deemed to be evacuee property under any law;[47] (iii) any law where the property of another person might be taken in management for his benefit;[48] and (iv) any law that was in force before the Constitution day.[49]

(3) Political Rights :

Under the category of political rights the following fundamental rights were placed :

(a) Every citizen was guaranteed the right to freedom of speech and expression, subject to any reasonable restrictions imposed by law in the interest of (i) security of Pakistan, (ii) friendly relations with foreign states, (iii) public order, (iv) decency, (v) morality, (vi) contempt of court, (vii) defamation, and (viii) incitement to an offence.[50] There was no absolute test for determining reasonableness of restriction. It was open for the court to decide the reasonableness of a case.[51]

---

46. These are the instances of laws of "police power" recognised by American constitutio law. Police power is the inherent power of a state to regulate public health, morals and safety, and to promote public convenience and prosperity.

47. The Pakistan (Administration of Evacuee Property) Ordinance, 1949.

48. The Guardian and Ward Act, 1890 (Act VIII of 1890).

49. The East Bengal State Acquisition and Tenancy Act, 1950 (Act XXVIII of 1951).

50. Article 8 of the Constitution of 1956.

51. Tofazzal Hossain V. Government of East Pakistan P.L.D. 1965 Dacca 68; Nawabzada Nasrullah Khan V. Province of West Pakistan P.L.D. 1965 Lahore 642.

(b) Every citizen should have the right to assemble freely provided that the assembly was for a peaceful purpose and without arms and that it was made not in contravention of any restriction imposed by law in the interest of public order.[52]

(c) Every citizen should have the right to form association or union, subject to any reasonable restriction imposed by law in the interest of morality or public order.[53] It was held in a number of cases that the association might have the form of a political party,[54] company,[55] an institute,[56] a firm, union, society or it might be an association of persons.

(d) Every citizen was entitled to engage in any lawful profession and occupation and to conduct any lawful trade or business; but the state might by law —— (i) prescribe qualifications for the practice of a profession or occupation; (ii) regulate any trade or profession by a licensing system; (iii) regulate any trade, commerce or industry in the interest of free competition; and (iv) assume for itself or grant to government controlled corporation, the monopoly, complete or partial of any trade, business, industry or service.[57]

(e) Every citizen should have the right to move freely throughout Pakistan and to reside and settle in any part thereof.[58] The right was subject to any law which might impose any reasonable restriction in the public interest.

---

52. Article 9 of the Constitution of 1956.
53. Article 10, Ibid.
54. Abu Ala Maudoodi V. Government of West Pakistan, P.L.D. 1964 S.C. 673.
55. Progress of Pakistan Co. Ltd. V. Registrar, Joint Stock Companies, P.L.D. 1958 Lahore 887.
56. Dacca National Medical Institute V. Province of East Pakistan, P.L.D. 1958 Dacca 560.
57. Article 12 of the Constitution of 1956.
58. Article 11(a), Ibid.

(4) Cultural and Religious Rights:

Any section of citizens, having a distinct language, script or culture, should have the right to preserve it.[59] Subject to law, public order and morality —— (i) every citizen should have the right to profess, practice and propagate any religion; and (ii) every religious denomination should have the right to establish, maintain and manage its religious institutions.[60] No citizen was to be denied admission to any state-aided educational institution on grounds of race, religion, caste, or place of birth, unless this was the consequence of a public authority making special provision for backward classes of citizens.[61] Every religious community or denomination should have the right to establish and maintain educational institutions of its own choice, and the state should not deny recognition to any such institution on the ground that it belonged to that denomination.[62] No person was compelled to pay taxes for the maintenance or propagation of any religion other than his own.[63] In granting concessions or exemptions from taxation for religious institutions, there was to be no discrimination against any community.[64]

As regards the enforcement of these rights the fundamantal right to move the Supreme Court was guaranteed;[65] and the Supreme Court had the power to issue to any person or authority, including " in appropriate

---

59. Article 19, Ibid.
60. Article 18, Ibid.
61. Article 13(3), Ibid.
62. Article 13(5), Ibid.
63. Article 21, Ibid.
64. Article 13(4), Ibid.
65. Article 22(1), Ibid.
Besides the Supreme Court, the High Courts were also empowered to issue appropriate orders and writs to enforce these rights. See Atricle 170 of the Constitution of 1956.

cases any government", directions, orders, writs including any appropriate writs in the nature of habeas corpus, mandamus, prohibition, que warranto and certiorari, for the enforcement of any of the fundamental rights.[66] The fundamental rights could be suspended according to specific constitutional provisions.[67] They could be suspended by an order of the Presidnent under Article 192(1) if an emergency was proclaimed under Article 191 of the Constitution and so long as the order remained in force, the fundamental rights, specified in the order, could not be enforced and all pending proceedings in respect of them remained suspended.[68]

66. Article 22 (2), Ibid.

67. Article 23 (3), Ibid.

68. Article 192 (1), Ibid.

Chapter - III

Proclamation of Martial Law and Position of Constitution, 1956

1. Working of Constitution, 1956 (1956-1958)

The Constitution which came into force on the 23rd March, 1956, had obviously an ominous start when the then Governor-General Major-General Iskander Mirza was elected as the country's first President under the Constitution. Mirza, being the sole candidate, allegedly manipulated his nomination from the ruling coalition party in the National Assembly as the price for his assent to the Constitution and for his support to the Government which, as Governor-General, he was in a position to dismiss.[1] Mirza had no respect for, or training in, parliamentary procedures, tradition or convention. After he got himself elected, the sanctity of the Constitution was violated by more subtle and dubious means, keeping the Governments in office at his sufferance through a skilful manipulation of parliamentary support. The Republican Party provided him with a convenient tool to establish his supremacy both over the Parliament and the Prime Minister.[2]

By identifying himself with the Republican Party the President violated the principle of neutrality associated with the office of the Head of the State in a parliamentary government,[3] he ought to have been above party politics, but unfortunately he was very much with it.

---

1. See Mushtaq Ahmad, Op.cit., P. 178; and also G.W.Choudhury, Constitutional Development in Pakistan, P.110
2. Mushtaq Ahmad, Ibid., P. 179.
3. M. A. Chaudhuri, Op. Cit., P. 232

The Republican Party was considered as 'the Party of the Palace' and on several occasions party-meetings were held in the President's House.[4] So, Iskander Mirza's conduct was not inconformity with the conception of the presidential office in a parliamantary form of government. For this, in spite of the differences that existed among politicians in Pakistan, most of those who enjoyed popular support were agreed about one thing : to get rid of Iskander Mirza as the President of the country at the very first chance.[5] In the later part of 1958 when the country was set for the first general election scheduled to be held in February, 1959, Mirza saw no prospect of his getting re-relected.[6]

Within the space of thirty months, following the coming into force of the Constitution of 1956, there were repeated changes of the ministries at the Centre. Chowdhury Mohammad Ali, being the first Prime Minister under the Constitution was succeeded by Hussain Shaheed Suhrawardy who in turn was replaced by I.I. Chundrigar. Malik Firoz Khan Noon who succeeded Chundrigar was the last Prime Minister under the Constitution of 1956.

Political parties during this period exhibited a ruthless scramble for power. The second Constituent Assembly converted itself into the National Assembly which consisted of 80 members. These 80 members were

---

4. Mushtaq Ahmad, Op. cit., P. 179.
5. See K.B. Sayeed, Op. cit., P. 92.
6. " The Constitution was abregated ... because President Mirza did not foresee any chance of his becoming President for the second time".
   See G.W.Choudhury, Constitutional Development in Pakistan, P.146.

divided into nine parties and nine independents and no single party had absolute majority in the Assembly. The Government was bound to take the form of a coalition from which 'no stable administration'[7] could be ensured.

Thus the weaknesses of the parties and the President's direct interest in politics contributed both to the curtailment of the Prime Minister's authority[8] and to the failure of parliamentary democracy. The Constitution Commission, set-up in 1960, reported that the parliamentary form of government had proved a "failure" for the following causes:

> "(1) Lack of proper elections and defect in the Constitution.
>
> (2) Undue interference by the Heads of the State with the ministries and political parties, and by Central Government with the functioning of the governmentsin the provinces.
>
> (3) Lack of leadership resulting in lack of well-organised and disciplined parties, the general lack of character in the politicians and their undue interference in the administration".[9]

In the opinion of the Commission, the real causes of the above mentioned failure were to be found in the last mentioned group of opinions than in the first two groups.[10] In the context of the situation prevailing in the Provinces, the above observation of the Constitution Commission was also true. The provincial politics would, through direct central interference, always reflect the party line-up in the Centre. In this

---

7. Herbart Feldman, Revolution in Pakistan (London, Oxford University Press, 1967) P. 31.

8. Mushtaq Ahmad, Op.cit., P. 179.

9. Report of the Constitution Commission, Pakistan, 1961 (Karachi, Government of Pakistan Press, 1962) Para 10, P. 6.

10. Ibid.

connection Mohammad Munir observed:

> "Governors were frequently changed and some of the Governors with the connivance of ... the President busied themselves in maneouvring changes to their own advantages".[11]

In the East Pakistan Assembly there was bitter contest among the parties to secure office and to retain majority. This struggle was so bitterly conducted that within a short time representative government had to be superseded by the President, exercising his constitutional powers.[12] Within two years of the inauguration of the Constitution, the East Pakistan Budget could be passed only by means of those constitutional provisions which enabled the Central Government to authenticate it.[13] There was alleged abuse of office by the Speaker of the Provincial Assembly and his Deputy was considered to be as unfair and unreliable. These deplorable happenings as well as the death of the Deputy Speaker, made their mark upon the conscience of the nation which fully understood what inpact they would have outside the country.[14]

More or less, the same situation prevailed in the Provincial Government of West Pakistan. The Government of Dr. Khan Shahib initially had no parliamentary backing and the Republican party, created by the Government and patronised by the President, had no entity apart from the Government.

> " The Republicans could never organise themselves outside the legislature among the people effectively".[15]

---

11. Mohammad Munir, Op.cit., P. 50.
12. Herbert Feldman, Revolution in Pakistan, P. 28 .
13. Ibid.
14. Ibid., P. 29.
15. Rashiduzzaman, Op.cit., P. 129.

Changes in leadership of the parliamentary party and of the Government, suspension of the Assembly, distribution of allotments and licenses to the members, were the methods used for manipulating the Government's majority. Moreover, the One Unit Scheme created a complicated atmosphere in the political arena of West Pakistan. K. B. Sayeed observes :

> " Parliamentary government in West Pakistan was reduced to a farce, the administrative machinary paralyzed, and the Provincial Assembly was often in a state of pandemonium where it was difficult to determine on a particular day which party was in majority and where it stood on a particular issue".[16]

Mohammad Munir, a former Chief Justic of Pakistan, described the situation thus :

> " In a country where changes in Government are so frequent and persons high up in power remain perpetually engaged in creating and destroying majorities in their own interests, and members of the Assemblies, tempted by the lure of office, power or gain, change their political creed overnight, Government by majority becomes a farce and leads to every kind of evil ——— corruption, favouritism, nepotism, inefficiency and lack of responsibility. Under pressure, threats and inducement, services become demoralised and begin to flow with the tide; Government becomes incapable of conceiving long range social and economic policies; and measures of public welfare become a secondary consideration".[17]

In this way politicians' pre-occupation with their own advancement and their neglect of the country's problem brought Pakistan to the'brink of National insolvency.'[18] The state of country's economy remained,more or less, stagnant and the major problems confronting Pakistan remained

---

16. K. B. Sayeed, Op.cit., P. 85.
17. Mohammad Munir, Op.cit., P. 50.
18. Alan Gledhill, Pakistan. The Development of its Laws and Constitution, 1967, P. 105.

unsolved. The settlement of refugees, evacuee property, and basic necessities of life such as food, clothing, housing, education and medical relief remained far away from common man. All this inevitably resulted in the spreading of a sense of frustration and despondency in the country and gave a clear opportunity to President Iskander Mirza and General Ayub Khan to take over power.

From the brief discussion above, it would be evident that the Constitution of 1956, which came as a great relief to the people at a time when constitution-making in the country seemed a near-impossible task, could not have a "fair trial". President Mirza, who was oath-bound to "preserve, protect and defend" the Constitution, did everything possible to make its working impossible by his direct involvement in party politics. Mirza's inordinate ambition to perpetuate power in his own hand ignoring the provisions of the Constitution and established practices and conventions of parliamentary system of government was mainly responsible for the political instability and economic crises that prevailed in the country when he abregated the Constitution in October, 1958. He found an unscrupulous group of politicians with whose help he was successful in thoroughly discrediting the democratic political process envisaged by the Constitution. But the vital help and encouragement in Mirza's designs came from the Chief of the army staff, General Ayub Khan.[19] The General, of course, had his own plans and designs, and he utilised Mirza and his position as the President to achieve these goals.

---

19. G. W. Choudhury, Democracy in Pakistan, (Dacca, Green Book House, 1963) P. 129.

2. Abrogation of the Constitution and Proclamation of Martial Law

On the 7th October, 1958, Major-General Iskander Mirza, President of Pakistan, by a Proclamation,[20] abrogated the Constitution of 1956 and declared Martial Law throughout the country. By this Proclamation he appointed General Ayub Khan, Commander-in-Chief of the Pakistan Army, as the Chief Martial Law Administrator and placed all armed forces of Pakistan under his command.[21]

In his Proclamation, President Mirza blamed the politicians for the deplorable condition of the country in all spheres. According to him, agriculture was mismanaged resulting famines in parts of the country, economy of the country was in a bad shape, and political activities had centred round the struggle for power among the politicians. The incident inside the East Pakistan Assembly resulting in the death of the Deputy Speaker was an indication of the degree of degradation that the political activities had sunk. In view of these, President Mirza concluded that strong and stable government could not be expected out of fresh election.[22]

For the past three years, Mirza claimed, he had been doing his utmost to work the Constitution in a democratic way. For that purpose he had laboured to bring about coalition after coalition, hoping that it would stabilise the administration and the affairs of the country would be run in the interests of the masses. But his attempt to create coalitions to continue the Parliamentary government were described as

---

20. Proclamation of President, Gazette of Pakistan, Extra-ordinary, 7 October, 1958. G.W.Choudhury, Documents and Speeches on the Constitution of Pakistan, P. 482. See Appendix-I at P. 169.

21. G.W.Choudhury, Ibid., P. 484.

22. Ibid. PP. 482-483.

"palace intrigues" and it had become fashionable to blame the President for everything.[23]

His appraisal of the internal situation, he said, had led him to believe that a vast majority of the people no longer had any confidence in the existing system of government and were getting more and more disillusioned and disappointed and were becoming dangerously resentful of the manner in which they were exploited. According to him, the existing Constitution, being full of dangerous compromises, was "unworkable" and a threat to the integrity and solidarity of the country.[24] To rectify them, the country was first to be taken to sanity by a "peaceful revolution" and then it was his intention to collect a number of patriotic persons to examine the problems in the political fields and devise a constitution more suitable to the genius of the Muslim people.[25]

Thus," to save the country from complete disruption", the President through the Proclamation declared that : (i) the Constitution of the 23rd March, 1956, would stand abrogated; (ii) the Central and Provincial Governments would be dismissed; (iii) the National Parliament and Provincial Assemblies would be dissolved; (iv) all political parties would be abolished; and (v) until alternative arrangements were made, Pakistan would come under Martial Law.[26]

Simultaneously with the Proclamation of the President, General Ayub Khan, the Supreme Commander of Pakistan Army and the Chief Martial Law Administrator, issued a 'Proclamation of Martial Law'[27]. In the

---

23. Ibid., P. 483.
24. Ibid., PP. 483-484.
25. Ibid., P. 484.
26. Ibid.,
27. Proclamation of Martial Law by Chief Martial Law Administrator, Gazette of Pakistan, Extra-ordinary, 15th October, 1958. P.L.D. 1958, Central Statutes 499. See Appendix-II at P. 175.

Proclamation General Ayub stated that Martial Law Regulations and Orders would be issued the contravention of which would be punished with penalties stated therein. The said Regulations might prescribe special penalties for offences under the ordinary law & Special Courts would be appointed to try contraventions of the Regulations and Orders and offences under the ordinary law.[28]

It is significant to note that General Ayub's Proclamation made no mention what so ever of the delegation of power to him by the President, nor was it anywhere said that he was issuing this declaration by virtue of any Presidential appointment.[29] However, in his broadcast to the nation on the evening of the 8th October, 1958, he made a reference to the President's Proclamation abrogating the Constitution and appointing him the Chief Martial Law Administrator :

> " He [President] has appointed me as the Chief Martial Law Administrator and all the Armed Forces of Pakistan, including Civil Armed Forces, have been put under my command".[30]

Three days after the Proclamation of Martial Law, on the 10th October, 1958, President Mirza issued the Laws (Continuance in Force) Order, 1958,[31] which was to be regarded as the main 'constitutional document' for the Martial Law period. It was deemed to have been effective immediately upon the making of the Proclamation of Martial Law on the 7th October, 1958.[32] The Order was amended from time to time with

---

28. Ibid.

29. Herbert Feldman, Revolution in Pakistan, P. 2.

30. General Ayub's Broadcast to the Nation on the 8th October, 1958. G.W.Choudhury, Documents and Speeches on the Constitution of Pakistan. P. 486.

31. President's Order (Post Proclamation) No. I of 1958. P.L.D. 1958 Central Statute 497. See Appendix-III at P. 176.

32. Article 1(1) of the Laws (Continuance in Force) Order, 1958.

variation of the circumstances up to the 8th June, 1962, the day when Martial Law was lifted and the second Constitution of the Republic of Pakistan came into force. The main provisions of the Order, however, were as follows :

(1) The name of the Republic was changed to "Pakistan" dropping the word "Islamic" adopted in the abregated Constitution of Pakistan, 1956.[33] Subject to 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 abregated Constitution of 1956.[34]

(2) Subject aforesaid, all courts, existing immediately before the Proclamation of Martial Law, would continue in being.[35] But it was provided that no court or person could call or permit to be called in question (i) the Presidential Proclamation; (ii) any Order made in pursuance of the Proclamation or any Martial Law Order or Martial Law Regulation; or (iii) any finding, judgment, or order of a Special Military Court or a Summary Military Court.[36]

(3) The law declared by the Supreme Court would be binding on all courts of Pakistan.[37] The Supreme Court and the High Courts would have power to issue writs of habeas corpus, mandamus, prohibition, que warrante and certiorari,[38] but no writ would issue against the Chief Martial Law Administrator or the Deputy Chief Martial Law Administrator or any person exercising power or jurisdiction under the authority of either of them.[39]

---

33. Article 2(1), Ibid.
34. Ibid.
35. Article 2(2), Ibid.
36. Article 3, Ibid.
37. Article 2(3), Ibid.
38. Article 2(4), Ibid.
39. Article 2(5), Ibid.

It was also provided that where a writ had been sought against an authority which had been succeeded by any Martial Law authority, and the writ sought was a writ provided for in Article 2(2) of the Order, the court might send to the authority its opinion on the question of law raised.[40]

(4) All orders and judgment made or given by the Supreme Court before the 10th October, 1958, were valid and binding on all courts and authorities in Pakistan, but saving these orders and judgments, no other writ or order made or issued after the 7th October, 1958, would be valid unless permitted by this Order, and all applications and proceedings in respect of any writ, which was not retained by the Order, would 'abate forthwith'.[41]

(5) Subject to any Order of the President and Regulation made by the Chief Martial Law Administrator, all Laws, other than the abrogated Constitution of 1956, all Ordinances, Orders-in- Council, Orders, other than Orders made by the President under the abrogated Constitution of 1956, Rules, By-laws, Regulations, Notifications and other legal instruments should, " so far as applicable and with such necessary adaptations as the President may see it fit to make," continue in force until altered, repealed or amended by competent authority;[42] and no court was to call in question any such adaptations made by the President.[43]

(6) It was provided in the Order that the powers of a Provincial Governor would be those which he would have had if the President had directed him to assume on his behalf all the functions of Government of

---

40. Article 2(6), Ibid.
41. Article 2(7), Ibid.
42. Article 4(1), Ibid.
43. Article 4(3), Ibid.

the Province under the provisions of Article 193 of the abrogated Constitution of 1956.[44] The Governor's power of promulgating Ordinances, subject to the limitations imposed by Article 106 and Article 102 (3)(1) of the abrogated Constitution of 1956, also continued.[45] The Governor was required to act under the directions given to him by the President or by the Chief Martial Law Administrator or by a person having authority from the Chief Martial Law Administrator.[46] It was also provided that if any controversy arose between an Ordinance promulgated by a Governor and a Regulation issued by the Chief Martial Law Administrator or by any person authorised by him, the latter was to prevail.[47]

(7) All persons who were in the service of the state before the Proclamation of Martial Law would continue to be in service on the same terms and conditions and would enjoy the same privileges, if any.[48]

(8) Lastly, the Laws (Continuance in Force) Order, 1958, provided that any provision in any law providing for the reference of a detention order to an Advisory Board would be of no effect.[49]

From the above, it is evident, that the laws (Continuance in Force) Order, was issued in order to "restore the structure and outline of the Government" and not the laws of the Constitution of 1956 which had been expressly abrogated by the Presidential Proclamation of the 7th October, 1958.[50] It seemed to have provided a legal frame-work and for continuity of the legal system after the abrogation of Constitution of 1956.[51]

---

44. Article 5(1), Ibid.
45. Ibid.
46. Article 5(2), Ibid.
47. Article 5(3), Ibid.
48. Article 6, Ibid.
49. Article 7, Ibid.
50. State V. Dosso, (XI) D.L.R. 1959, S.C. I
51. G.W.Choudhury, Constitutional Development in Pakistan, P. 136.

The Order restored the composition, powers and jurisdictions of the Courts of Pakistan as had been provided for in the abrogated Constitution of 1956. The writ jurisdiction of the superior courts was restored, but the jurisdiction was narrowed down to a great extent, because (1) no writ could issue against the Chief Martial Law Administrator or any person exercising powers or jurisdiction under his authority, and (2) further no court could call in question the Proclamation, any Order made in pursuance of the Proclamation or any Marticla Law Order or Martial Law Regulation, and any finding judgment or order of the Special Military Court or the Summary Military Court. It was held in Muhammad Ayub Khuhro V. Pakistan[52] that a court could not declare a Martial Law Order or Martial Law Regulation as invalid or ultra vires; but calling in question an order made under a Martial Law Order or Regulation was entirely different, it might or might not amount to questioning the Martial Law Order itself the former prohibited, the latter not.

Thus, the Courts in Pakistan had to function within the limited sphere of the state activity.[53] They were to apply laws as they were, pre-supposing 'an established Government capable of enacting laws and enforcing their execution'.[54] The courts of Pakistan did not take stand against the "successful" revolution which by bringing about an abrupt political change, destroyed the pre-existing legal order and established in its place a new one.[55]

---

52. P.L.D. 1960 S.C. 237.
53. State V. Dosse, Op.cit.
54. Luther V. Borden (1849)7 Howard.1.
55. See Infra.

In view of these limitations, the courts in Pakistan could not issue any writ for the enforcement of fundamental rights[56] as provided for in the abrogated Constitution of 1956. With the abrogation of the Constitution, the provisions of law, repugnant to fundamental rights, which were declared by the Constitution to be void only to the extent of the repugnancy,[57] became fully effective.[58] But with change of time and of the attitude of the martial law authority —— the attitude of the courts in respect of enforcement of fundamental rights also changed; and the courts afterwards began to issue writs to enforce fundamental rights,[59] the elaborate discussion of which has been made in a later chapter of this work.

As regards the powers and functions of the Governor of a Province a brief discussion would seem relevant. Under the Constitution of 1956, the Governor had to act under the directions of the President, but under Laws (Continuance in Force) Order, 1958, he had to act not only under the directions of the President but also under the directions of the Chief Martial Law Administrator or of any person having authority from the Chief Martial Law Administrator. It is interesting to note that the powers of the Governor to promulgate Ordinances continued under the Laws (Continuance in Force) Order; but with it a provision was made that in the case of conflict between an Ordinance promulgated by the Governor and an Order or a Regulation issued by the Chief Martial Law Administrator or by any person having authority from him the latter would prevail. So it can be safely said that under the Constitution

---

56. See Infra.
57. Article 4 of the Constitution of 1956.
58. Province of East Pakistan V. Mehdi Ali Khan,(XI)D.L.R.1959: S.C. 319.
59. Iftikhar Uddin V. Muhammad Sarfraz, P.L.D. 1961 S.C. 585.

the Governor had to serve one master, the President, but under the laws (Continuance in Force) Order, he had to serve two masters, the President and the Chief Martial Law Administrator.

Provisions were made in the laws (Continuance in Force) Order, 1958, that all persons who were in the service of the state before the Proclamation of Martial Law on the 7th October, 1958, would continue to be in service on the same terms and conditions and would enjoy the same privileges, if any. Later amendments to the Order were made and restrictions were imposed on the terms, conditions and privileges of the public servants.[60]

---

60. The laws (Continuance in Force)(Amendment) Order, 1958,(Order 4 of 1958); the laws (Continuance in Force)(Amendment) Order, 1959,(Order I of 1959); the laws (Continuance in Force) (Second Amendment) Order, 1959, (Order 5 of 1959); the laws (Continuance in Force) (Third Amendment) Order, 1959, (Order 10 of 1959); the laws (Continuance in Force) (Fourth Amendment) Order, 1959 (Order 19 of 1959); the laws (Continuance in Force) (Amendment) Order, 1960, (Order 1 of 1960); the laws (Continuance in Force) (Second Amendment)Order, 1960,(Order 4 of 1960); the laws (Continuance in Force)(Third Amendment)Order, 1960, (Order 6 of 1960); the laws (Continuance in Force)(Fourth Amendment) Order, 1960,(Order 12 of 1960); the laws(Continuance in Force)(Fifth Amendment)Order, 1960,(Order 18 of 1960); the laws(Continuance in Force) (Sixth Amendment) Order,1960,(Order 23 of 1960);the laws (Continuance in Force) (Amendment) Order, 1961,(Order 6 of 1961); the laws (Continuance in Force) (Amendment) Order, 1962, (Order 2 of 1962); the laws (Continuance in Force) (Second Amendment) Order, 1962, (Order 17 of 1962).

See Constitutional Documents (Pakistan), Vol. III, PP.348-363.

For instance, an amendment promulgated on the 9th March, 1959, provided that any person in the service of Pakistan found inefficient or guilty of subversive activities, corruption or misconduct could be suspended, compulsorily retired, reduced in rank, removed or dismissed in accordance with the rules made for the purpose by any authority not subordinate to the appointing authority and that no such order could be called in question in any Court.[61]

Another important provision of the laws (Continuance in Force) Order, 1958, was that any provision in any law providing for the reference of a detention order to an Advisory Board would be of no effect. This was one of the provisions which violated the provisions of clauses (4) and (5) of Article 7 of the Constitution of 1956. Under clause (5) of Article 7 of the Constitution , the President and the Chief Justice of the Supreme Court (in the case of a Central Act) and the Chief Justice of the High Court of the province concerned (in the case of a Provincial Act) were under a constitutional obligation to constitute Advisory Boards to examine the cases of preventive detention involving periods exceeding three months, so that citizen's fundamental right could be curtailed on justifiable ground and that justice could be done to him.[62] By nullifying the provision, the Martial Law authority showed their arbitrary nature and their contemptuous attitude towards the provisions of the Constitution of 1956 which was restored to a limited extent.

---

61. Article 2 of the Laws (Continuance in Force) (Amendment) Order, 1959, (Order 1 of 1959), Ibid., P. 349.

62. Abdul Aziz V. Province of West Pakistan, P.L.D. 1958, S.C. 499; Sobho Tanwar Mal V. the State, P.L.D. 1959, Lahore 435.

Whatever defects the Laws (Continuance in Force) Order, 1958, might contain, it was a turning point in the constitutional history of Pakistan. It was regarded as " a new Constitution"[63] for the Martial Law period. By it, as G.W.Choudhury observed :

> " The legal vacuum and crisis which the country faced after the dissolution of the first Constituent Assembly in 1954 were ... avoided".[64]

Hameedur Rahman J., as he than was, in Muhammad Afzal V. Commissioner, Lahore Division held :

> " ... The Laws (Continuance in Force) Order, was designed both to prevent chaos and to establish an orderly government with a legal sanction behind it".[65]

3. Verdict of the Supreme Court and its Impacts

Three weeks after the Proclamation of Martial Law, the claims of the new regime were to receive their legal sanction. In the case of State V. Dosso,[66] the question arose whether a writ issued by the West Pakistan High Court under the provisions of the abrogated Constitution of 1956 had abated under the provisions of the Laws (Continuance in Force) Order, 1958. The Supreme Court of Pakistan, by a majority of four to one, held that it had abated as the Constitution of 1956 itself had been abrogated. The Supreme Court recognised the Laws (Continuance in Force) Order, 1958, as " new Constitution" which since the Proclamation

---

63. State V. Dosso, Op.cit., per Munir C.J. at P. 6
64. G.W.Choudhury, Constitutional Development in Pakistan, P. 136.
65. (XV) D.L.R. 1963 S.C. 298, per Hameedur Rahman J. at P. 306.
66. (XI) D.L.R. 1959 S.C. 1.

of the 7th October, 1958, determined the jurisdiction of all courts including the Supreme Court.

Mohammad Munir C.J. maintained that a "victorious revolution" or a "successful" coup d'etat was an internationally recognised legal method of changing a constitution, and the revolution having become successful in Pakistan it satisfied the efficacy of the change and became a basic law-creating fact. The Chief Justice observed :

> " It is necessary to appraise the existing constitutional position in the light of the juristic principles which determine the validity or otherwise of law-creating organs in modern states which being members of the Comity of Nations are governed by Internation Law. In judging the validity of laws at a given time, one of the basic doctrines of legal positivism, on which the whole science of modern jurisprudence rests, requires a jurist to pre-suppose the validity of, historically, the first constitution whether it was given by an internal usurper, an external invader or a national hero or by a popular or other assembly of persons. Subsequent alteration in the constitution and the validity of all laws made thereunder is determined by the first constitution. Where a constitution presents such continuity, a law once made continues in force until it is repealed, altered or amended in accordance with the constitution".67

Regarding the change of constitution by revolution His Lordship observed :

> " It sometimes happens, however, 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. A revolution is generally associated with public tumult, mutiny, violence or bloodshed but from a juristic point of

---

67. Ibid. per Munir C.J. at P. 5.

> view the method by which and the persons by whom a revolution is brought about is wholly immaterial ... Equally irrelevant in law is the motive for a revolution ... For the purposes of the doctrine, here explained, a change is, in law, a revolution if it annuls the constitution and the annulment is effective. If the attempt to break the constitution fails, those who sponsor or organise it are judged by the existing constitution as guilty of the crime of treason".[68]

Regarding the victory or effectiveness of a revolution the learned Chief Justice said :

> " If the revolution is victorious in the sense that persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled constitution but by reference to its own success. On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled constitution. Thus the essential condition to determine whether a constitution has been annulled is the efficacy of the change".[69]

The Chief Justice continued :

> " If the territory and the people remain substantially the same, there is, under the modern jurisprudence, no change in the corpus or international entity of the state and the revolutionary government and the new constitution are, according to International Law, the legitimate government and the valid constitution of the state. Thus a victorious revolution or a coup 'd' etate is an internationally recognised legal method of changing a constitution".[70]

---

68. Ibid.
69. Ibid.
70. Ibid., P. 6.

In support of his views the learned Chief Justice quoted from Hans Kelsen's positivist theory of efficacy of the change :

> "From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated ... A great part of the old legal order remains valid ... within the frame of the new order. But the phrase 'remains valid' does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force, it is replaced by a new constitution which is not the result of a constitutional alteration of the former. If laws which are intreduced under the old constitution continues to be valid under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution.
>
> " This shows that all norms of the old order have been deprived of their validity by revolution and not according to the principle of legitimacy. And they have been so deprived not only de facto but also de jure".71

On the basis of these arguments the learned Chief Justice concluded :

> " The revolution having been successful it satisfied the test of efficicy and becomes a law-creating fact. On that assumption the laws (Continuance in Force) Order, however transitory and imperfect it may be, is a new legal order and it is in accordance with that Order that the validity of the laws and correctness of the judicial decisions have to be determined".72

---

71. Hans Kelsen, General theory of Law and State.(Tr. by Anders Welberg) (Harward : Harward University Press, 1946)PP. 117-118. Quoted in State V. Dosso, Ibid., P. 6.

72. State V. Dosso, Ibid.

Cornelius J. as he then was, in a dissenting judgment held :

> " The abrogation of the Constitution of 1956 represents an irrevocable act of the supreme authority by which it is performed. It has a definite effect in relation, both to that Constitution, as well as to the order of things which has replaced it".[73]

But in respect of enforcement of fundamental rights and of abatement of pending proceedings he found himself in doubt and that was why he gave a dissenting judgment which will be discussed in some length in chapter 5 of this work.

In the case of State V. Dosso the Supreme Court of Pakistan was called upon to deal with a situation which had no precedent in the legal history of the Commewealth. In a number of cases other Commonwealth Courts from time to time and the Pakistani Courts in Muhammad Umar Khan V. Crown[74] and Abdus Sattar Khan Niazi V. Crown[75] had dealt with Martial Law situation of the kind recognised by common law. But in the case of State V. Dosso, the Supreme Court of Pakistan had to determine the validity of a new legal order, which had replaced the old. In such a situation, as Professor Alan Gledhill observed :

> " No Crown prerogative or rule of common law could be invoked to justify what had been done. Instead resort was to Hans Kelsen's 'General Theory of Law and State' for the proposition that a victorious revolution or a successful Coup d'etat was an internationally recongised method of changing a constitution".[76]

Professor Gledhill pointing out that the Constitution of 1956 had provisions for its amendment further observed :

---

73. Ibid., per Cornelius J. at P. 17.
74. P.L.D. 1953 Lahore 528.
75. P.L.D. 1954 F.C. 187.
76. Alan Gledhill, Pakistan. The Development of its Laws and Constitution, 1967, P. 109.

> " The course was calculated to encourage an individual wielding supreme power to seek the approval of the courts for unconstitutional action".[77]

Leslie J. Macfarlane has also commented adversely on the decision of the Supreme Court of Pakistan in recognising the abrupt political change as a legal revolution. In such an interpretation, according to him, the danger was that, the artitrary 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.[78] Commenting on this judgment, Herbert Feldman writes :

> "It is a time-hallowed maxim that law by power subsists and, where the power goes, the law must follow."[79]

In this respect Jawaharlal Nehru, the then Prime Minister of India, said :

> " So far as Pakistan Courts are concerned factual success of a Military Government is enough law".[80]

A later Chief Justice of Pakistan, Mr. Justice Hameedur Rahman, while disposing of a case in 1972, commented on the judgment thus :

> " I am ... unable to agree with the learned Chief Justice that upon the Principles of International Law if the territory and the people remain substantially the same there is no change in the corpus or international entity of the state and the revolutionary government

---

77. Ibid.

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

79. Herbert Feldman, Revolution in Pakistan, P. 205.

80. See Joseph Minattur, Martial Law in India, Pakistan and Ceylon (The Hague, Martinus Nijhoff, 1962) P. 65.

and the new state are, according to International Law, the legitimate government and the valid constitution of the state'. With great respect I must point out that this proposition does not find support from any principle of International Law. According to Oppenheim's view as propounded in his book on International Law[81] if the revolutionary government is ineffective and or has no'reasonable expentancy of permanence' and/or does not'enjoy the acquiescence of the population; then the international community may well refuse to recognise it, even though its territorial integrity remains unchanged and its people remain substantially the same.

" With the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice not only misapplied the doctrine of Hans Kelsen, but also fell into error in thinking that it was a generally accepted doctrine of modern jurisprudence".[82]

His lordship further observed :

" The principle enunciated by him [Munir C. J.] is in my humble opinion, wholly unsustainable, and I am duty bound to say that it cannot be treated as good law either on the principle of Stare decisis or even otherwise".[83]

In the same case Yakub Ali J. also commented thus :

" Kelsen invests revolutionary government with legal authority on the basis of a pre-supposed norm that the victorious revolution and successful coup d'etat are law-creating facts. This is the realm of a theory and not a part of the national legal order of any state. No municipal court will, therefore, rely on it as a rule ...

" If my appraisal of Kelsen is correct, then the decision in the case State V. Dosso upholding

---

81. Oppenheim, International Law, (ed. by H. Lauterpacht) (London, Longman, 1967) PP. 131-133.

82. Asma Jilani V. Government of the Punjab, P.L.D. 1972 S.C. 139, per Hamoodur Rahman C.J. at P. 181.

83. Ibid., P. 183.

> the validity of the laws (Continuance in Force) Order must be held to be erroneous. The court ought to have acted in the same manner as it partially did in the Governor-General's Reference No. I of 1955 and directed the President to call the National Parliament and adopt a new constitution. Unless this direction was complied with, no new legal order would have come into being for neither Iskander Mirza nor Mohammad Ayub Khan could become a valid source of law-making".[84]

The court's application of Kelsen's theory has also led to hostile discussions of the judgment on several counts, which J.W. Harris has summarised in four categories.[85] First, the courts were wrong inasmuch as Kelsen stipulated that efficacy was only a necessary condition of validity, and not identical with validity. Secondly, it was difficult to accord validity to a recent revolution simply on the basis of Kelsen's theory of efficacy free from political consideration. Thirdly, Kelsen's conception of efficacy referred to a total efficacy, and only the courts' recognition of the new order constituted such efficacy. Finally, Kelsen's theory, being purely descriptive of legal science, it had nothing to do with the role of the Judge in a revolutionary situation.

Whatever might be the demerits of the decision of State V. Dosso, it was of practical utility. If the court had not recognised the right to change the constitution by rebellion, it was possible that the Judges,

---

84. Ibid., per yakub Ali J. PP. 241-242

85. J.W.Harris, "When and Why does the Grundnorm Change ?" (1971) 29 Cambridge Law Journal 103; and see also Z.I.Choudhury, "Constitutional Courts in a Revolutionary Situation", Law and Internation Affairs, Vol. I. No. I. 1973, P. 118.

as pointed out by Professor Alan Gledhill, "would have been suspended and replaced by military courts affording fewer remedies to the citizen who complained of the activities of Government".[86]

Herbert Feldman put the situation in the following words :

> " It is ... improbable that even if the Supreme Court's entire Bench had risen as one man in protest and opposition, it would have made the slightest difference to the changes that had taken place ..."[87]

This practical situation was taken into consideration by the Judges of the Supreme Court of Pakistan and it found approval, as discussed below, in other Commonwealth courts including the Judicial Committee of the Privy Council when dealing with legal questions in similar situations.

> "What happened in Pakistan in October, 1958, then an isolated incident in the Commonwealth, has become a pattern for the 'new Commonwealth' ".[88]

The case of Uganda V. Commissioner of Prisons, Ex Parte Matuvo[89] came before the High Court of Uganda in 1966 to determine the legality of the new constitution which had replaced the existing constitution of 1962 by adopting a procedure contrary to the provisions for amendment of the constitution. The Chief Justice, Sir Udo Udoma, referred to an American Supreme Court case of Luther V. Borden[90] in which it was held that it was not for the court to decide which of the two contending constitutions was in force at a given time; the function of the judiciary was to follow the decision of the political department.

---

86. Alan Gledhill, Pakistan. The Development of its Laws and Constitution, 1967, P. 109.
87. Herbert Feldman, Revolution in Pakistan, P. 11.
88. Z.I.Choudhury, "Constitutional Courts in a Revolutionary Situation", P. 105.
89. (1966) E.A. 514.
90. (1849)7 Howard. 1.

The learned Chief Justice analysed the requirements which had to be fulfilled for a change to be legally valid and after discussing the events that took place in Uganda since the 22nd February, 1966, in the light of these requirements, he came to the conclusion that these could be appropriately described in law as a revolution. In support of his contention he quoted from Kelsen's General Theory of Law and State and from Salmond's Jurisprudence.[91] His lordship also discussed the Pakistani case of State V. Dosso and agreed with Munir C.J. that the events in Pakistan was an abrupt political change amounting in law, to a revolution and a victorious revolution was an internationally recognised legal method of changing a constitution. So the events of Pakistan had the effect of abrogation of the Constitution of 1956. On the same basis, the Chief Justice of the High Court of Uganda held that the Constitution of 1966 of Uganda was a product of a revolution; it would be regarded as the valid Constitution and the supreme law of Uganda.

In the case of Madzimbamuto V. Lardner-Burke[92] the High Court of Rhodesia was called upon to determine, the legality of the new order effected through the Unilateral Declaration of Independence by the Smith Government on the 11th November, 1965. The General Division of the High Court refused to accept the Government's contention that the legal tie with Britain had been severed by the Unilateral Declaration of Independence and that the Constitution of 1965 was the legal and effective Constitution of Rhodesia. The Court, referring to the positivist theory of Kelsen and to the decision of the Supreme Court of Pakistan,[93] held that the situation

---

91. Salmond, Jurisprudence, (ed.by Granville Williams) (London, Sweet and Maxwell, 1957) P. 101.

92. (1966) R.L.R. 756 (G.D.).

93. State V. Dosso, Op.cit.

in Rhodesia at the material time was different from that of Pakistan, it still had a legal tie with Britain and until such a tie had been successfully severed the rebel Government and its Constitution could not be regarded as lawful.

The Appellate Division of the Rhodesian High Court, however, by a majority recognised the rebel Smith Government as the de facto Government in complete administrative and legislative control of the country.[94] But Sir Hugh Beadle C. J. refused to accept the Constitution of 1965 as the lawful constitution. His Lorship, however, accepted the positivist theory of Kelsen, which indicated that the legality of the change in the 'Grund norm' must follow the 'political reality'[95], and found himself in agreement with the findings of the Courts in Pakistan and Uganda. The Judicial Committee of the Privy Council, after discussing constitutional developments and existing political conditions, held the Smith Government and its Constitution of 1965 as unlawful.[96] It is significant to note that the Board discussed the Pakistan and Uganda 'Grund Norn' cases and indicated that the Judges of the Supreme Court of Pakistan and the High Court of Uganda were right in holding the annulment of the old constitutions and their replacement by the new ones. But the situation in Rhodesia, according to Their Lordships, was not comparable to the situation that existed in Pakistan and Uganda.

---

94. Madzimbamuto V. Lardner-Burke (1968) 2 S.A. 284 (R.A.D.)

95. The political reality here referred to by Beadle C.J. was recognised by the Court in the cases of Madzimbamuto V. Lardner-Burke (2), (1968) 2 S.A. 457 and Dhlamini V. Carter (1968) 2 S.A. 464.

96. Madzimbamuto V. Lardner-Burke (1968) 3 AIL E.R. 561.

After the decision of the Judicial Committee of the Privy Council the Rhodesian High Court in R V. Ndhlovu[97] had to determine finally the legal position of the Constitution of 1965. Sir Hugh Beadle C.J. held that it was the duty of the court to give its decision on the basis of facts and if it was found that the old constitution had been successfully annulled, the court was to give de jure recognition to the new constitution establishing a new legal order. On the basis of the facts existed in Rhodesia in 1968, His Lorship concluded that the Constitution of 1961 had been annulled by the 'efficacy of the change' brought about by the Unilateral Declaration of Independence in 1965.

So in all the three cases of Pakistan, Uganda and Rhodesia, the Courts established under the pre-existing constitutions were called upon to decide the legality of the new legal orders established by what has been described as "revolutions" in law.

> " Where the pre-existing legal order had been successfully overthrown and replaced by an effective new order, obtaining universal obedience from the people, and without any rival, the judges recognised the change as a hard political fact".[98]

But there are instances within the Commonwealth where the courts either were not prepared to see a "revolution" or tried to restrict the executive powers in such circumstances. The results was that the usurpers of political power did not recognise the courts' findings and the latter had to submit before the political realities of the change.[99]

---

97. (1968) 4 S.A. 515 (R. A.D.).

98. Z.I.Choudhury, "Constitutional Courts in a Revolutionary Situation", P. 112.

99. Ibid.

In this regard, we may mention the Nigerian case of E.O. Lakanmi V. Attorney-General,[1] the Ghana case of E.K. Sallah V. Attorney-General[2] and even a later Pakistani case of Malik Mir Hassan V. State[3] in which the judgments were devoid of political reality and were of little use to contending parties, who wanted judicial redress of their grievances.

In the case of Lakanmi V. Attorney-General, the Supreme Court of Nigeria was to determine whether or not the events, that took place in Nigeria as a result of a rebellion in the Nigerian Army establishing a Federal Military Government in place of the pre-existing constitutional Government, made it a revolution, which could be regarded as having annulled the Republican Constitution of 1963. Ademola C.J. referred to the Pakistani case of State V. Dosso and the Uganda case of Uganda V. Commissioner of prisons, Ex parte Matuvo, and found himself in agreement with the findings of the courts of those countries that the abrupt political changes that took place therein amounted, in law, to revolutions and the new regimes as well as the constitution were to be recognised by the courts. However, examining the events that took place in Nigeria, in the light of those judgments the learned Chief Justice came to the conclusion that the Federal Military Government was not a revolutionary Government with unrestricted powers, because it was established to deal with an abnormal situation created by the rebellion in the Army, and then to return the administration back to the constitutional Government. His Lorship further held that there was no disruption of the Constitution; it was still in force excepting certain sections which were suspended.

---

1. Nigeria S.C. 58/69.
2. Const. S.C. 8/70 Digested in 1970 Current Cases.
3. P.L.D. 1969 Lahore 786.

This attempt of the Supreme Court to make Federal Military Government subject to the Republican Constitution of 1963 was frustrated by the Military Goverment by issuing the Federal Military Government (Supremacy and Enforcement of Powers) Decree,[4] 1970, nullifying the effect of any judgment purporting to invalidate any Decree or Edict.

In the case of E.K. Sallah V. Attorney-General, the Supreme Court of Ghana, after the Constitution of 1969 came into effect, was called upon to determine the legal implications of the Military coup d'etat on the pre-existing legal system. The Supreme Court by a majority held that the suspension of the Constitution of 1960 by the Proclamation of the National Liberation Council had no effect of destroying the legal order. In an earlier case of Awoornor-Williams V. Ghedemah[5] the Supreme Court recognised the supreme authority of the National Liberation Council, which suspended the Constitution of 1960, but in Sallah's case the Court refused to accept the plea that the suspension of the Constitution amounted to destruction of the pre-existing legal order. It should be noted that Sallah's case came before the Supreme Court after the Military Government had ceased to exist and the Constitution of 1969 had came into effect. If the judgment of Sallah's case, experience suggest, was delivered during the continuance of the Military Government, it would not be difficult for the National Liberation Council to nullify its effect simply by issuing a Decree.

The case of Malik Mir Hassan V. State came before the High Court of Lahore involving the question as to the legality of the Proclamation

---

4. Decree No. 28, May, 1970.
5. S.C. 1/69 Digested in 1970 Current Cases..

of Martial Law[6] made on the 25th March, 1969. The High Court, while recognising the Martial Law regime, gave a restricted meaning of Martial Law. In this respect Mushtaq Hussain J. observed :

> " Martial Law arised from state necessity and is justified at Common law by necessity, and by necessity alone ... The jurisdiction of the ordinary courts continues to vest in them and the same cannot and has not been taken away by the Proclamation of Martial Law".[7]

Bashir Uddin J. in this respect held :

> " In this country, Martial Law was introduced to secure general peace, to curb riots and to stop resistance to the law. The person assuming the power is to ascertain the will of the people, their settled habits and sentiments and to make laws and regulation to gain its ends. Thus in our view, where the army of a country proclaims Martial Law to curb riots, tumults and violence to law, sovereignty still continues to vest with the people".[8]

But prompt reaction to the judgment was launched by the Martial Law Administrator by issuing the President's Jurisdiction of Courts (Removal of Doubts) Order,[9] 1969, by which the courts were barred from questining the exercise of powers by the Martial Law authorities and the decision in contravention of this would be deemed to be of no effect. In a later case of Fazal Ahmed V. State,[10] the same Court declaring the validity of the President's Order recognised the unfettered power of the Martial Law Authorities.

---

6. Gazette of Pakistan, Extra-ordinary, 4th April, 1969. P.L.D. 1969 Central Statute 41.
7. Malik Mir Hassan V. State, Op.cit., per Mushtaq Hussain J. at P. 809.
8. Ibid., per Bashir Uddin J. at P. 816.
9. President's Order 3 of 1969. Gazetted of Pakistan, Extra-ordinary, 30th June, 1969, P.L.D. 1969 Central Statute 119.
10. P.L.D. 1970 Lahore 741.

It is interesting to note that the Supreme Court of Pakistan in the case of Asma Jilani V. Government of the Punjab held that the Martial Law proclaimed by Yahya Khan was illegal and that his assumption of power on the 25th March, 1969, was wholly unconstitutional and could not be recognised as valid. The Chief Justice of the Supreme Court, Mr. Justice Hamoodur Rahman, focussed his attention to the Proclamation of Martial Law on the 7th October, 1958, and on the 25th March, 1969, and pointed out :

> " Field-Marshal Mohammad Ayub Khan had no powerto hand over power to any body ... It is difficult however, to appreciate under what authority a Military Commander could proclaim Martial Law".[11]

It is also significant to note that the decision of the Asma Jilani's case, as that of the Sallah's case, came after the Yahya regime had been discredited and removed from office. If it was pronounced during the continuance of the regime, it, probably, would have met with the same fate as the decisions of the Lakanmi's case and Mir Hassan's case met.

It would, therefore, seem that the decision of the Supreme Court of Pakistan in State V. Dosso, based on the positivist theory of Kelsen, was a turning point in the legal history of the Commonwealth. Following this a large number of the Commonwealth courts delivered judgments on the basis of Kelsen's theory. Kelsen's definition of "revolution", a change in the legal order in a manner not prescribed by the pre-existing order and outside the scope of the principles of legitimacy has been widely accepted by the courts. It was the Supreme Court of Pakistan which first understood the political reality that the court in a revolutionary situation was not expected to take a stand against the

---

11. Asma Jilani V. Government of the Punjab, Op.cit., per Hamoodur Rahman, C.J. at P. 185

successful revolutionaries, who by bringing about an abrupt political change, destroyed the pre-existing legal order and established in its place a new one. The court also maintained that if the order was effective and without any opposition in the political sphere, the court was to recognise the new political facts by extending legal validity to the new legal order on the basis of its efficacy, because the judiciary could not play any useful role if its decisions remained for long, devoid of political reality.[12]

4. Martial Law as it is Understood in Common Law.

In this section an attempt has been made to examine the rationale of the Proclamation of Martial Law on the 7th October, 1958, vis-a-vis the relevant principles of Common law prevailing in the Commonwealth. To define martial law is a complicated matter because different jurists have tried to define it in different ways. It has no single meaning but a number of meanings. To begin with, two theories can be referred as to the origin of the term martial law.

> " One theory is that the term 'martial law' was originally spelt 'marshal law', meaning the law administered by the Marshal or Constable which, according to Coke, was 'the fountain of marshal law'. The other is that 'martial' is derived from the Latin word martialis, an adjective meaning 'pertaining to war' and that martial law means the law relating to war. Though both explanations are plausible, the first is probably the correct one".[13]

---

12. Z. I. Choudhury," Constitutional Courts in a Revolutionary Situation" P. 124.

13. Joseph Minattur, Op.cit., P. 8.

According to A.V. Dicey Martial law means "the suspension of ordinary law and the temperary government of a country or parts of it by military tribunals ..."[14]. In England, according to him, martial law is used in two different senses. In the first sense " Martial law is sometimes employed as a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law".[15] This right, maintains Dicey, is essential to the very exsistence of orderly government, and is most assuredly recognised by the law of England. The King has the right to put down breaches of the peace. Officers, magistrates, soldiers, police men, ordinarry citizens, all occupy the same position in the eye of law and they are all bound to withstand and put down breaches of the peace. They are authorised to employ so much force, even to the taking of life, as may be necessary for the purpose. None of them is entitled to use more force than what is necessary, and they are liable to be called to account before a jury for the use of excessive and unnecessary force.[16] In the second sense martial law is used as "the name for the government of a country or a district by military tribunals, which more or less supersede the jurisdiction of the courts".[17] In this sense, the proclamation of martial law is equivalent to the circumstances which in France is known as the declaration of a "state of siege" and is, in effect, a temporary and recognised government of

---

14. A.V.Dicey, An Introduction to the Study of the Law of the Constitution (London, Macmillan and Co. Ltd., 1968) P. 287.

15. Ibid., at P. 288.

16. Ibid., PP. 288-289.

    It was held in the King V. Pinney (1932) 5 Car and P. 254, that the obligations of a magistrate in time of tumult were stringent and the amount of force which he was bound to employ in support of the law was unlimited.

17. Ibid., P. 291.

a country by military force. This kind of martial law is utterly unknown to the English constitution. According English constitution soldiers may suppress a riot as they may resist an invasion, they may fight rebels just as they may fight foreign enemies, but they have no right under the law to inflict punishment for riot or rebellion.[18]

According to Professor Hood Phillips the term martial law is used in different senses : first, it is used to mean military law i.e., the codes governing the armed forces at home and abroad, in war and in peace. Secondly, it means the law administered by a military commander in occupied enemy-territory in time of war. Thirdly, the common law right and duty to maintain public order by the exercise of any degree of necessary force in time of invasion, rebellion, insurrection or riot. Fourthly, in the strict sense of the term, martial law means the suspension of any ordinary law and the substitution therefor any discretionary government by the executive exercised through the military.[19]

Professor Hood Phillips makes a distinction between a state of siege as it is recognised in France and martial law as it is understood in England, and observes that in France a state of siege may be declared by the Council of Ministers, but only parliament may authorise its extension beyond twelve days. It involves the temporary and partial transfer of powers from the civil to the military authorities. The purpose of a state of siege in France is merely to maintain public order. For the conduct of war it is necessary as in England, for emergency powers to be conferred on the executive by legislation. In England, the

---

18. Wolf Tone's Case (1798) 27 St. Fr. 614.

19. Hood Phillips, Constitutional and Administrative Law (London, Sweet and Maxwell, 1967) PP. 510-511.

Crown cannot proclaim martial law by prerogative in time of peace. Martial law may validly be invoked in time of war and when it has been done, the civil courts have no authority to call in question the actions of the military authorities.[20]

According to E.C.S. Wade and G.G. Phillips the term martial law has two meanings : first, martial law means in International law the powers exercised by a military commander in occupation of foreign territory; secondly, it means the action of the military when, in order to deal with an emergency amounting to a state of war, they impose restrictions and regulations upon the civilians in their own country.[21] The military may in time of major emergency exercise such abnormal powers as recognised by Common law. In time of invasion or insurrection, the law affords little protection to persons in a martial law area. If the courts are not sitting, they have no remedy. If the courts are in session, an order of prohibition will not be granted, while the writ of habeas corpus is only available if the courts hold that war was not raging at the time of the commission of the offence.[22]

According to D.L. Keir and F.H. Lawson martial law has been used to describe a peculiar system of legal relations which arise between the military and the civilian subjects of the King in time of insurrection or civil war. It has also been used to cover the assumption by military commanders of powers for the restoration of order in the event of civil war or insurrection, which are not equally exercisable by the ordinary citizen.[23]

---

20. Ibid., P. 512.

21. E.C.S. Wade and G.G. Phillips, Constitutional Law (London, Longmans, 1966) P. 402.

22. Ibid., P. 406.

23. D.L.Keir and F.H.Lawson, Cases in Constitution Law (Oxford, Clarendon Press, 1967) P. 224

Mohammad Munir, a former Chief Justice of Pakistan, in the case of Muhammad Umar Khan V. The Crown observed:

> " Martial law is used at least in four different senses. In the first sense, it is used with reference to the law relating to discipline in the armed forces of the state which is administered by tribunals, called courts martial ...
>
> "In the second sense, the word [sic] martial law means military government in occupied territory and is used to describe the powers of a military commander in times of war in the enemy territory. In this sense, martial law is recognised by Public International Law as a part of the jus belli ...
>
> " In the third sense in which it is a part of English constitutional law, martial law means the rights and obligations of the military under the common and statute law of the country to repel force by force while assisting the civil authorities to suppress riots, insurrections or other disorders in the land ...
>
> " Martial law fourthly and finally as a conception of Internation law enters as an aspect of jus belli. In that sense, martial law is incidental to the state of solemn war and appertains to the law of the nations".[24]

According to Blackstone martial law is not statutory in character because it is built upon no settled principles, but is entirely arbitrary in its decisions, is in truth and reality no law, but something indulged rather than allowed as law.[25] It is the law of emergencies and arises out of strict military necessity, that is why Weiner describes it as " the public law of necessity".[26]

---

24. Muhammad Umar Khan V. the Crown, Op.cit., per Munir C.J. at P. 533.

25. See A.K.Brohi, Fundamental Law of Pakistan (Karachi, Din Muhammad Press, 1958) P. 645.

26. See Joseph Minattur, Op.cit., P. 8.
It was held in Duncan V. Kahana Moku (1946) 327 U.S. 304, that martial law was a law of necessity to be prescribed and administered by the executive power.

From the above discussion the following general characteristics of the term martial law as understood in Common law, can be traced :

(i) Martial law is the power of the government or of loyal citizens to maintain public order at whatever cost of blood or property as may be necessary.

> " If there is war, there is the right of repel force by force ..."[27]

It is a law which can be justified on the ground that " by reason of open rebellion, the enforcing of any other law has become impossible".[28]

(ii) Martial law must not be permitted in time of peace, when the courts are open for all persons to receive justice according to the law of the land. While war is still raging, the court has no jurisdiction to question any acts done by the military authorities. After the war is over persons may be made liable, civilly and criminally, for any acts which they are proved to have done in excess of what was reasonably required by the necessities of the case[29] — unless these acts have in the meantime been covered by an Act of Indemnity.[30]

(iii) If a state of war does exist, then the military tribunal would not be bound by the ordinary law or procedure.[31] If it is held

---

27. Tilonko V. Attorney General for Natal,(1907) A.C. 93. Reproduced in Keir and Lawson, Op.cit., P.258

28. Joint Opinion of the Attorney and Solicitor General,Sir John Campbell and Sir R.M.Rolfe, as to the power of the Governor of Canada to proclaim martial law, 1938. Keir and Lawson, Ibid., PP. 238-239.

29. Ex parte Marais(1902) A.C. 109; Governor Wall's Case (1802) 28 St.Tr.51; Wright V. Fitzgerald (1798) 27 St. Tr. 759; Rainsford V. Browne 2 N.Ir. Jur. Reps. 179; Expart Milligan(1866)4 Wall U.S. 2.

30. Rex V. Allen (1921) 2 I.R. 241, Keir and Lawson, Op.cit., P. 251.

31. Clifford and O' Sullivan (1921) 2 A.C. 570. Keir and Lawson, Ibid.P256.

that a state of war does not or did not exist at the relevant time, the persons injured has his remedy by habeas corpus[32] or otherwise for the injury done to him, subject to the terms of an Act of Indemnity which would probably have been passed in the meanwhile.[33]

(iv) Martial law, as it appears, has to operate within certain limits. The limits within which martial law, being a law of necessity, is available as a defence in the ordinary civil courts, were stated by Mohammad Munir C.J. in Muhammad Umar Khan V. the Crown in the following words :

> " If martial law is law and its limits are prescribed by necessity, then :
>
> "(1) Not only the Crown has the prerogative to proclaim martial law but without any such proclamation the military can take over when by war, insurrection, rebellion, or tumult civil authority is deposed, suspended or paralysed;
>
> "(2) all acts done by the military which are either justified by the civil law or were dictated by necessity and done in good faith will be protected even if there be no Bill of Indemnity;
>
> "(3) while preventive action for the duration of the martial law will be valid, punitive action will generally be invalid;
>
> "(4) martial law will cease ipso facto with the cessation of the necessity for it; and
>
> "(5) sentences of confinement by military courts will expire with the expiry of the martial law".[34]

(v) An Act of Indemnity is passed after the end of martial law period. When martial law has been proclaimed the Crown has almost invariably protected its servants after the events by obtaining the

---

32. Egan V. Macready 7 (1921) 1. I.R. 265; Wolf Tone's Case, Op.cit.
33. Tilonko V. Attorney General for Natal, Op.cit.
34. Muhammad Umar Khan V. the Crown, Op.cit., per Munir C.J. at P. 539.

passing of Acts of Indemnity.[35] The purpose of such legislation is to deprive the civil courts of their jurisdiction to undertake a judicial review of acts, committed during the martial law period, of the military officers and others acting in their aid. But no such enactment could receive the royal assent unless it were confined to acts honestly done in the suppression of existing rebellion, and under the pressure of the most urgent necessity.[36] The idea is more clarified in Rex V. Allen in which it was held ;

> " It seems competent, if war exists, for the military authorities to use special military court, machinery, and to impose any sentence, even death, without being disabled, in another case, from applying procedure of a more moderate and limited character, or vice versa. When peace is restored, acts in excess of what necessity required, as to which they are many cases, which will be found in the notes to Mostyn V. Fabrigas (1774) 1 S.M.L.C. 662, may require the protection of indemnifying legislation".[37]

In the light of the above, an attempt will now be made to analyse the situation that existed in Pakistan in early October, 1958, to examine the justifiability of proclaiming martial law in the country in which the fundamental law had been abrogated. In October, 1958, it may be recalled, the socio-economic and political conditions of Pakistan were in bad shape. Deterioration loomed large in every sphere of the nation's life. In spite of the deplorable situation it could not be said that there was an existence of war, invasion, insurrection, riot

---

35. R. V. Nelson and Brand 1867 F.Cock bern's Rep. PP. 59,79.
36. Phyllips V. Eyre (1870) L.R. 6 Q.B.1. Keir and Lawson, Op.cit.,P.239.
37. Rex V. Allen, Op. cit., per Molony C.J. at P. 254.

or of any violent resistance to the law so that it would require to 'repel force by force'. Nowhere in the Proclamation of President Mirza it was claimed that there was an existence of revolution; he simply referred to 'bloody revolution' taking the phrase from the speech of a member of the Constituent Assembly while discussing the Constitution Bill at the Constituent Assembly. President Mirza also referred to the disgraceful events of the East Pakistan Provincial Assembly in which the Deputy Speaker of the Assembly had died of the injury received at the Assembly.

Mirza's description of socio-economic and political conditions of the country contained some element of truth. But it is also undoubtedly true that there existed no such situation as would warrant a declaration of martial law because "Pakistan was tranguil, the courts and public offices were functioning normally. What the Proclamation said was that the politicians holding office were corrupt, incompetent and malignant; those facts were not previously regarded in the Commonwealth as justifying a proclamation of martial law".[38]

More over before the Proclamation of Martial law, there was existence of constitutional Government in Pakistan and there was no gross violation of the provisions of the Constitution except probably by the President himself, who being a constitutional Head of the State, violated the provisions of the Constitution and the principles of parliamentary system of government and entrapped the Cabinet and the Parliament so that they could not function smoothly. Further more, alternative recourses were open for tackling the problem within the framework if the provisions of the Constitution. For example, emergency could be declared to enable

---

38. Alan Gledhill, Pakistan. The Development of its laws and Constitution, 1967, P. 108.

the government to face the economic crises or internal disturbances, if there were any;[39] take over provincial governments;[40] assume power of directing any provincial government to observe any particular financial principle[41] so that all machineries and engines of the state could be mobilised under one central authority in order to face the crises. Besides, if any provision of the Constitution was found fit for amendment, that could be done by Parliament in accordance with the provisions of the Constitution itself.[42]

Now, the question arises why did not Mirza take either of the above steps ? He rather preferred an extra-legal step which never had been thought of being taken by any Head of the State in the Commonwealth. It was wholly an unconstitutional step which was prompted by his personal greed for power. The real reason behind his action lay in the fact that he was suffering from a sort of uncertainty whether he would be re-elected as President or not after the general election which was announced to be held in February, 1959. Because in spite of the differences that existed among politicians in Pakistan, they were agreed about one issue : Iskander Mirza should not be re-elected as President. K. B. Sayeed, as noted earlier,[43] explain this in an explicit term :

> " Why President Iskander Mirza proclain Martial Law on October 7, 1958 ? It was clear to him that there was not much prospect of his getting re-elected as President".[44]

---

39. Article 191 of the Constitution of 1956.
40. Article 193, Ibid.
41. Article 194, Ibid.
42. Article 216, Ibid.
43. See Supra. P. 55.
44. K.B. Sayeed, Op.cit., P. 92.

In addition to these factors influencing the President, there was the Commonder-in-Chief of the Pakistan Army, whose counsel weighed more heavily with the President than that of any one else.[45] In Mirza's abrogating the Constitution and declaration of Martial Law in October, 1958, the influence of General Ayub was great.[46] Surely Mirza saw in Ayub's arguments and persuasion a grand opportunity of realising his own idea of perpetuating his personal rule. It is interesting to note that both Iskander Mirza and General Ayub Khan were motivated by their personal ends and each of them exploited the other to achieve his end, because if they had not been united, it would have been, perhaps, impossible for either of them to adopt such a 'drastic action'. G.W.Choudhury rightly observes that

---

45. In this respect the view of Mohammad Munir is to be mentioned :

" Some months before the 1956 — Constitution was to come into force the [Iskander Mirza] casually mentioned to me that things were going bad to worse and that he intended to assume supreme power by dismissing the Ministers and dissolving the Assembly. He did not tell me that he intended to introduce martial law though he often used to say that the politicians were not to forget the army".

Mohammad Munir, "The Days I Remember" The Pakistan Times, 11th November, 1968.

46. A broad tactical out line of imposing martial law in the country was prepared which received final approval of General Ayub on the last day of September, 1958.

See Major-General Fazal Muqueem Khan, the Story of Pakistan Army. (Dacca, Oxford University Press, 1963) P. 194.

" the Ayub-Mirza coup" in 1958 was one of the "products of palace intrigues"[47].

In view of the above one would be inclined to conclude that the socio-economic and political conditions of the country existing before the Martial Law period did not justify the Proclamation of Martial Law because if there were socio-economic and policital malaises, there were appropriate provisions in the Constitution of 1956 for their remedies. If there were defects in the Constitution, which made it "unworkable", that could be removed by amending the Constitution. So the Proclamation of Martial Law was motivated by the personal ends of both the President and the Commander-in-Chief of the Pakistan Army; and such a Proclamation had no precedent in the constitutional history of the Commonwealth.

---

47. "The dismissal of Khwaja Nazim Uddin's Cabinet in 1953, of Mohammed Ali (Bogra) Cabinet and the dissolution of the Constituent Assembly in 1954; of Suhrawardy's Cabinet in 1957 as well as the Ayub-Mirza coup in 1958 were all products of ' palace intrigues'."
G.W.Choudhury, The Last Days of United Pakistan (London, C. Hurst and Company, 1974) P. 16.

Chapter - IV

Martial Law Regime and Constitutional Development

1. Military Courts : Organisation and Jurisdiction

The Laws (Continuance in Force) Order, 1958, as mentioned earlier, provided that all courts, existing immediately before the Proclamation of Martial Law, would continue to function, exercising the same jurisdiction, except that they could not call in question the President's Proclamation of the 7th October, 1958, any Order made in pursuance of the Proclamation or any Martial Law Order or Martial Law Regulation, or any finding, judgment or order of a Special Military Court or a Summary Military Court. The Order also provided that the Supreme Court and the High Courts would have power to issue writs, but no writ would issue against the Chief Martial Law Administrator, Deputy Chief Martial Law Administrator, or any person exercising powers or jurisdiction under authority of either of them.[1]

Besides the ordinary courts, Special Courts of criminal jurisdiction were established in pursuance of the Proclamation issued by the Chief Martial Law Administration.[2] Two classes of Special Courts were established: Special Military Courts and Summary Military Courts which had the power to try and punish any person for contravention of Martial Law Regulations or Orders or for offences under the ordinary law. The criminal courts, as by law established, retained the power to try and punish any person

---

1. See Supra., Chapter-III. 2.
2. Martial Law Regulation No. 1-A (a). P.L.D. 1958 Central Statute 500.

for offences under the ordinary law, and were given additional power to try any person for contravention of Martial Law Regulations or Orders.[3]

Constitution of Special Military Court :

A Martial Law Administrator was empowered to convene special Military Courts in his area of administration[4] for the trial of any offence committed in any area to which the Regulations were made applicable.[5] A Special Military Court was to be Constituted in the same manner and was to exercise the same powers and follow the same procedure as a Field General Court Martial convened under the Pakistan

---

3. Martial Law Regulation No. 1-A (a); Martial Law Regulation 2, P.L.D. 1958 Central Statute 501; Martial Law Regulation 61, P.L.D. 1959 Central Statute 91.

4. For the purpose of administration the whole of Pakistan was considered to be a Martial Law area, which was divided into 3 Zones :

   (i) Zone A-Karachi Federal Area including MALIR.

   (ii) Zone B-Whole of West Pakistan less Zone A.

   (iii) Zone C-Whole of East Pakistan.

   The following Commanders of the Pakistan Military Forces were appointed as Administrators of Martial Law in their respective Zones :-

   (i) Zone A-Major General Malik Sher Bahadur.

   (ii) Zone B-Lieutenant General Mohammad Azam Khan.

   (iii) Zone C-Major General Mohammad Umrao Khan.

   See Martial Law Regulation No. 1. P.L.D. 1958 Central Statute 499.

5. Martial Law Regulation No. 1-A(b), P.L.D. 1958 Central Statute 500.

Army Act, 1952,[6] and the provisions of that Act and the rules made thereunder would apply to and govern all such proceedings; provided that :-

(i) any person exercising the powers of a magistrate of the first class or of a sessions judge might be appointed a member of the Court;

(ii) the Court was empowered to pass any sentence authorised by law or by the Martial Law Regulations;

(iii) all sentences of death was to be reserved for confirmation by an appointed Martial Law Administrator, irrespective of this rank.[7]

Constitution of Summary Military Court :

A Martial Law Administrator could, by general or special order, empower any magistrate of the first class or any Military or Naval or Air Force Officer, provided that he had been specially selected for this particular duty, to hold a Summary Military Court in his area of

---

6. A Field General Court Martial is normally convened by the Commander-in-Chief or any other officer empowered by Government. It consists of not less than three officers, each of whom as well as the Judge-Advocate take the oath to try fairly. The accused may object to being tried by any member. The provisions of Evidence Act, 1872, apply in such cases. All findings are by a majority. If the members are evenly divided, the decision will be in favour of the person accused of the offence. The President has a casting vote. For a death sentence two-thirds majority is to be required.

   See sections 84, 87 and 89 —— 113 of the Pakistan Army Act, 1952, (Act XXXIX of 1952). P.L.D. 1952 Central Statute 306.

7. Martial Law Regulation 1-A (b).

administration for the trial of any offence committed in that area.[8] A Summary Military Court was to exercise the powers and was to follow the same procedure as a Summary Court Martial held under the Pakistan Army Act 1952,[9] and the provisions of that Act and the rules made thereunder were to apply to, and govern, all such proceedings, provided that :-

(i) no other officer was required to attend such proceedings;

(ii) the Court was not required to record more than a memorandum of the evidence or to frame a formal charge;

(iii) the Court could try any offence without reference to superior authority;

(iv) the Court could pass any sentence authorised by law or by Regulations except death, transportation, or imprisonment exceeding one year or whipping exceeding 15 stripes;

(v) the proceedings of every Summary Court should without delay be forwarded for review to the Martial Law Administrator of the area in which the trial was held.[10]

A Martial Law Administrator might, by general or special order, give directions as to the distribution among the Summary Military Courts of cases to be tried by them.[11] Cases involving contravention of Martial Law Regulations or Orders should be tried by Special or Summary Military Courts.[12]

---

8. Martial Law Regulation No. 1-A(c). P.L.D. 1958 Central Statute 500.

9. A Summary Court Martial is convened by a commanding officer, and consists of the officer directed to hold it, but the Army Act requires two other officers to attend.

   See section 88 of the Pakistan Army Act, 1952.

10. Martial Law Regulation No. 1-A(c).

11. Ibid.

12. See proclamation of Martial Law by the Chief Martial Law Administrator, Op.cit.; Martial Law Regulation No. 66, P.L.D. 1959 Central Statute 111.

Scales of Punishment :

The punishments, which could be awarded by the Courts, were according to the following scales :

(i) death;

(ii) transportation for life or imprisonment for not less than 7 years;

(iii) rigorous imprisonment for not more than 14 years;

(iv) whipping not more than 30 stripes (whipping should not be inflicted on females or persons over 45 years of age);

(v) fine, unless a maximum was mentioned, the amount was unlimited;

(vi) forfeiture of property, either completely or in part, or destruction of property either completely or in part (where any person was sentenced to have his property forfeited or destroyed, that sentence would apply to any property in which he had any interest whatever).[13] Provision was made that the sentance of death should be inflicted by hanging.[14]

From the above, it would be evident that the Special Military Courts and Summary Military Courts had more powers than any other ordinary court during the Martial Law period. The Special Military Courts and Summary Military Courts had the power to try and punish any person for contravention of Martial Law Regulations or Martial Law Orders. Moreover, it had the power to try and punish any person for offences under the ordinary law. On the other hand, the ordinary courts

---

13. Martial Law Regulation No. 3(a), P.L.D. 1958 Central Statute 501.
14. Ibid.

had the power to try and punish any person for offences under the ordinary law; they were given additional powers to try and punish any person for contravention of Martial Law Regulations and Martial Law Orders subject to conditions that they could not call in question the the Proclamation of Martial Law, any order made in pursuance of the Proclamation or any Martial Law Order or Martial Law Regulation, or " any finding, judgment or order of a special Military Court or a Summary Military Court".[15] From this point of view it can be said that the Special Military Courts and Summary Military Courts were more powerful than the ordinary criminal court during the continuance of Martial Law.

It may be recalled in this connection that similar provisions were made when Martial Law was proclaimed in the Pubjab in 1953. Major General Azam Khan, the then Chief Martial Law Administrator, issued a series of Martial Law Regulations and Orders. By Regulation 1 the Martial Law area was defined which was divided into several sectors and an administrator was put in charge of each of the sectors. He also constituted two kinds of Military Courts : Special Military Courts and Summary Military Courts and their respective jurisdiction was clearly defined. The procedure to be followed by them and their powers to pass sentences were similarly defined. Ordinary criminal courts were permitted to exercise jurisdiction in respect of offences other than those created by the Regulations or connected with the disturbances. Certain offences were declared to be punishable with death, transportation for life or or inprisonment which could be extended to 14 years.

---

15. See Supra., chapter III. 2.

From this it can be observed that though there had been little similarity between Martial Law, proclaimed on the 6th March, 1953, by the local Military Commander with the approval of the Central Government, which was more or less in line with the traditions maintained in the Commonwealth and Martial Law, proclaimed on the 7th October, 1958, by the President of Pakistan, which did not fall in line with the principles maintained in the Commonwealth, there was similarity as to their execution. As for example, through Regulations in each case, Martial Law area was defined which was divided into different sectors a Martial Law Administrator being incharge of each sector. In each case there were provisions for the constitution of Special Military Courts and Summary Military Courts, and the ordinary courts were permitted to exercise their jurisdiction subject to the limitations imposed by the Martial Law Regulations. In each case, there were provisions for punishment, death being the maximum punishment which could be inflicted in accordance with the Martial Law Regulations. Being fundamentally different in nature and scope the *modus operandi* adopted for the administration of Martial Law on both occasions was the same.

2. Political Innovations : Basic Democracies

In his address to the nation over the radio on the 8th October, 1958, General Mohammad Ayub Khan announced that the ultimate aim of Martial Law was to restore democracy but of a type that people could understand and work. He belived that the western type of parliamentary democrary could

not work among the people of Pakistan and the Constitution of 1956 was no better than a bundle of unworkable compromises. In this respect Ayub Khan writes :

> " All changes and reforms that were introduced had only one purpose : to prepare the base on which the upword pyramid of a sound political system could be developed".[16]

In conformity with the idea Ayub Khan promulgated on the 27th October, 1959, the Basic Democracies Order, 1959.[17] The system of Basic Democracies was a fivetier arrangement of Councils : (a) a Union Council for a Union in rural areas, and a Town Committee for a Town or a Union Committee for a Union in urban areas; (b) a Thana Council for a Thana in East Pakistan, and a Tahsil Council for a Tahsil in West Pakistan; (c) a District Council for a District; (d) a Divisional Council for a Division; and (e) a Provincial Development Advisory Council for a Province.

A Union Council consisted of such number of members as was fixed by the Commissioner.[18] The members, popularly known as Basic Democrats, were elected directly on the basis of adult franchise.[19] From its own body the Council was to elect a Chairman[20] who was entitled to receive an honorarium.[21] The term of office of the Union Council was five years commencing on the day on which it assumed office.[22] A member of the Union Council could resign his office by tendering his resignation to the

---

16. Mohammad Ayub Khan, Friends not Masters(Karachi, Oxford University Press, 1967) P. 207.
17. President's Order 18 of 1959,P.L.D. 1959 Central Statute 364.
18. Section 11(1)of the Basic Democracies Order, 1959.
19. Sections 18 — 20, Ibid.
20. Section 11(5), Ibid.
21. Section 11(6), Ibid.
22. Section 21, Ibid.

Chairman and if he was Chairman to the controlling authority.[23] A member of Union Council would render himself liable to removal from membership (a) if he incurred any disqualification, (b) if he, without reasonable excuse, absented himself from three consecutive meetings of the Union Council, or (c) if he was guilty of an abuse of power or of any misconduct in the discharge of his duties as a member, or had been responsible for any loss or misappropriation of any money or property of the Council.[24] The Chairman of the Union Council was to vacate his office if a vote of no-confidence was passed against him by a majority of two-thirds of the total number of existing members.[25]

The function of the Union Council covered a variety of subjects. It was authorised to promote agricultural, industrial and community development and to adopt measures for increased food production.[26] It maintained law and order through its rural police.[27] With the previous sanction of the Commissioner it could levy taxes and impose rates, tolls and fees.[28] The Union Council was delegated to perform some administrative and welfare functions e.g., lightening of public ways, public streets, public places;[29] regulation of the disposal of carcasses of dead animals;[30] organisation of the celebration of public festivals.[31] The Chairman was

---

23. Section 25, Ibid.
24. Section 25(2), Ibid.
25. Section 25-A(1), Ibid.
26. Section 20 and items 31 and 32 of the Third Schedule , Ibid.
27. Section 28, Ibid.
28. Section 60, Ibid.
29. Item 3 of the Third Schedule, Ibid.
30. Item 12, of the Third Schedule, Ibid.
31. Items 26 and 27 of the Third Schedule, Ibid.

required to assist revenue and police officers in the performance of their official duties.[32] Besides these, new functions of great significance had been added to the list which were the administration of Muslim Family Laws Ordinance,[33] 1961, and the Conciliation Courts Ordinance, 1961.[34] Lastly, but the most important aspect of their function from political point of view was that they constituted the National Electoral College consisting of 80,000 members for the election of the President of the country and the members of the National Assembly and the Provincial Assemblies.

The next tier was the Thana Council in East Pakistan and Tahsil Council in West Pakistan. A Thana Council consisted of representative members and such number of official members as was fixed by the Commissioner.[35] The total number of official members of a Thana Council would not be more than the total number of its representative members.[36] The Collector was to appoint the official members from holders of such offices as was specified by the Commissioner in order of preference.[37] The Chairmen of the Union Councils and Town Committees in a Thana were ex-officio the representative members of the Thana Council.[38] The Sub-divisional Officer, within whose jurisdiction the Thana lay, was ex-officio an official member of the Thana Council and its Chairman.[39] The Circle Officer (Development), within whose jurisdiction the Thana Council lay, was ex-officio an official member of the Thana Council and

---

32. Section 29, Ibid.
33. P.L.D. 1961 Central Statute 209.
34. P.L.D. 1962 Central Statute 3.
35. Section 13(1) of the Basic Democracies Order, 1959.
36. Section 13(3), Ibid.
37. Section 13(1a), Ibid.
38. Section 13(2), Ibid.
39. Section 13(4), Ibid.

its Vice-Chairman and in the absence of the Chairman, performed the function of the Chairman.[40]

The powers of the Thana Council were left vague,[41] because its powers were not specified in a separate Schedule. It was laid down in the Basic Democracies Order that it was entrusted to co-ordinate the activities of all the Union Councils or Town Committees within the Thana as the case might be, and would in this behalf perform the function as were likely to promote the purposes of the Order. It might be required to perform function delegated by the District Council.[42] The Government could, either generally or in respect of any particular Thana, direct from time to time that any function entrusted to the District Council, or to any Union Council or Town Committee in the Thana would be undertaken by the Thana Council concerned.[43] In the performance of its functions, the Thana Council was to be responsible to the District Council concerned and was to act in accordance with such directions as the District Council from time to time gave.[44]

> " It appears that they [the Thana Councils] are primarily co-ordinating bodies and a communications link through which public policy is channeled to the Union Councils and hopefully to the peope".[45]

The District Council, the third tier of Basic Democracies, consisted of such number of official and elected members as might be fixed by the Commissioner, provided that the total number of elected members would not be less than the total number of official members.[46] The holders of

---

40. Section 13(5), Ibid.
41. See Karl Von Vorys, Political Development in Pakistan (Princeton, Princeton University Press, 1965) P. 98.
42. Section 32(1) of the Basic Democracies Order, 1959.
43. Section 32(3), Ibid.
44. Section 32(4), Ibid.
45. Karl Von Vorys, Op.cit., P. 198.
46. Section 15(1) of the Basic Democracies Order, 1959.

such offices, as was specified by the Government, would ex-officio be the official members of the District Council.[47] The elected members of the District Council would be elected in the prescribed manner from amongst the electors by an electoral college consisting of the Chairmen of the Union Council, Town Committees and Union Committees within the District.[48] The Collector would be ex-officb an official member of the District Council and its Chairman.[49]

The Order divided the functions of the District Council into two categories : "compulsory" and "optional". The compulsory functions included among others "the provision and maintenance" of libraries, reading rooms, hospitals, dispensaries, public roads, culverts, bridges, public gardens and public play grounds, public places; agricultural, industrial and community development; adoption of measures for increased agricultural production; protection of food stuff; celebration of public festivals.[50] Optional functions had been discussed under the broad headings like education, culture, social welfare, economic welfare, public health, public works etc.[51]

Besides compulsory and optional functions the District Council was entrusted with co-ordinating functions. It would co-ordinate the activities of all local councils, municipal bodies and Cantonment Boards within the District, and could, among other things, formulate and recommend to the Divisional Council and other authorities, development schemes of importance to the District; review generally the progress in

---

47. Section 15(2), Ibid.
48. Section 15(3), Ibid.
49. Section 15(4), Ibid.
50. For details see Part I of the Fourth Schedule, Ibid.
51. For details see Part II of the Fourth Schedule, Ibid.

various branches of administration in the District; and consider local problems of importance to the District in all branches of administration, and make suggestions for development, improvement and general advancement.[52]

The fourth tier of the Basic Democracies, the Divisional Council, consisted of such number of official members and such number of elected members from each District as was fixed by the Government.[53] It was also provided that the total number of elected numbers should be less than the total number of official members. The Chairmen of District Councils and holders of such offices as was specified by the Government would ex-officio be the official members of the Divisional Council.[54] The elected members of the Divisional Council from a District would be elected from amongst the electors by an electoral college consisting of the elected members of the District Council of that District.[55] The Commissioner would ex-officio be an official member of the Divisional Council and its Chairman.[56]

The Divisional Council was not assigned any specific function under the Order. It was to co-ordinate the activities of all local councils and municipal bodies and Cantonment Boards within the Division, and could, among other things formulate and recommend to the Provincial Development Advisory Council development schemes of importance to the Division; review generally the progress in various branches of administration in the Division; and consider problems of importance to the Division in all branches of administration, and make suggestions for development, improvement and general advancement.[57] Moreover, the Government could from time

---

52. Section 34, Ibid.
53. Section 16(1), Ibid.
54. Section 16(2), Ibid.
55. Section 16(3), Ibid.
56. Section 16(4), Ibid.
57. Section 35(1), Ibid.

to time direct that, subject to such terms and conditions as were specified, any function entrusted to District Councils under this Order was to be undertaken by the Divisional Council on behalf of all the District Councils or any particular District Council in the Division.[58]

The last tier of the Basic Damocracies was the Provincial Development Advisory Council of which the Provincial Governor was the Chairman. The Council consisted of 48 members ——officials and non-officials, appointed by the President on the recommendation of the Governor of the Priwince concerned. These two categories were to be equal in number and, of the appointed non-official members, at least, one third were to be selected from amongst the Chairman of Union Councils, Union Committees. The powers of the Provincial Development Advisory Council were"purely advisory and limited to development".[59] The Provincial Development Advisory Councils were set up for the first time in May, 1960 and ceased to function with the introduction of the Constitution of 1962 when the Provincial Legislatures, elected by the Basic Democrats, came into existence.

From the above, it would be apparent that Ayub Khan attempted to cultivate self Government from the grass roots by the establishment of Basic Democracies.[60] In this respect Samuel P. Huntington observed :

> " The Basic Democracies ... brought politics to the rural areas and created a class of rural activist with a role to play in both local and national politics. For the first time political activity was

---

58. Section 35(2), Ibid.
59. Karl Von Vorys, Op.cit., P. 199.
60. S. A. de Smith, The New Commonwealth and Its Constitutions, P. 222

dispersed outward from the cities and spread over the country side".[61]

Ayub Khan formulated the principles of Basic Democracies in the following words :

> " First, they should reflect the representation of the people obtained in the most direct manner; secondly, they should become the nerve centres of their areas where all local problems of development and civic responsibility could be studied at close range and their solutions discovered and applied with concentrated attention; Thirdly, they should in course of time absorb the official agencies and begin to function as people's bodies; and, finally, they should be operated to generate vigour and enthusiasm and liberate those moral and intellectual forces which are essential to the development of a dynamic and dedicated leadership in the country".[62]

---

61. Samuel P. Huntington , Political Order in Changing Societies(New Haven, Yale University Press, 1968) P. 252.

G.W.Choudhury observed that the main objective of Ayub's political order was to "create a rural elite ' the Basic Democrats ',— and by-pass the urban elite composed of lawyers, journalists, doctors, teachers and other professional groups".

See The Last Days of United Pakistan, P. 18.

Ayub Khan himself gave the following rationale behind the introduction of this system :

First, this type of democracy will not be foisted upon the people from above. Instead it will work from below gradually going to the top. Second, the people will not have to go far from neighbourhood to elect their representatives. It is highly difficult for an electorate in the rural areas where literacy does not prevail to elect their representatives from forty to one hundred thousand persons in a constituency ... The third factor which is of considerable significance is that the council which will be formed will be free from the curse of party intrigues, political pressures and tub-thumping politicians that characterised the Assemblies in out country in the past".

See Speeches and Statements,II. 24-25.

62. Mohammad Ayub Khan, Friends Not Masters, P. 209.

But despite their socio-economic development functions, the Councils established under the Basic Democracies Order did not fail to attract the attention of politicians and political scientists as the fundamental base on which new political structure was to stand. Such a "base" was also needed to legitimise the Martial Law regime.

> " As a first step toward civilianization, the regime needed a support base separate from the military".[63]

With this end in view, the Presidential (Election and Constitution) Order, 1960[64] was promulgated which called for a referendum by the Basic Democrats to make known their confidence in the President. To assure continuity an affirmative majority also entitled him to serve as President for the first term under the new constitution.

Another main function of the system of Basic Democracies, however, was to win long-range popular commitment through popular participation.[65] It was expected to mobilise the people of the rural areas for development activities, and to give them a sense of active participation in local affairs.

> " Mobilization and participation would be limited, controlled, and guided, however, so as not to put an unbearable pressure on the new political system".[66]

As the implementation of system proceeded, the limitations upon popular participation became increasingly apparent, First, there were restrictions placed upon the numerical share of the elected elements in the various councils. Secondly, there was no separation of powers between the government's administrative agents and the councillors.

---

63. Rounaq Jahan, Pakistan, Failure in National Integration (Dacca, University Press Limited, 1972) P. 112.
64. P. L. D. 1960 Central Statue 30.
65. Karl Von Vorys, Op. cit., P. 202
66. Rounaq Jahan Op.cit., P. 112.

The Councils, in fact, had no independent authority; the controlling authority was in full command.[67] That was why Abul Mansur Ahmed called it worse than the Controlled Democracy.[68] Finally, these restrictions were aggravated by the attitude of the bureaucracy. To most of the intermediate and lower level officers the Basic Democrats were inefficient and irresponsible and deserved to be treated accordingly.

> " The officials were reluctant to change their methods and were not aggreable to take the councillors into their confidence."[69]

The system of Basic Democracies failed to become a'grand national assembly' as Ayub hoped for. In spite of their similarity in two wings of Pakistan, the Basic Democracies did not form a national body. There was no built-in mechanism to develop a consensus on national issues or to train and promote national leaders.[70] Moreover, the system alienated nearly every powerful interest group in East Pakistan which prior to 1958 had played a leading role in East Pakistani political movement.

> " The Basic Democracies introduced a new kind of politics, to which the Bengali counterelite was unaccustomed".[71]

According to Inayatullah :

> " The system of Basic Democracies was regarded as a'new political system' and a new alternative to parliamentary democracy".[72]

K.J. Newman called it an experiment in guided democracy.[73] In fact, when the system of Basic Democracies was introduced, it appeared to be

---

67. Karl Von Vorys, Op.cit., P. 204.
68. Abul Mansur Ahmed, Fifty Years of Politics as I Saw It (Dacca, Nawroze Kitabistan, 1975) P. 603.
69. Mushtaq Ahmad, Op.cit., P. 204.
70. See Rounaq Jahan, Op.cit., P. 116.
71. Ibid., at P. 125.
72. Inayatullah, Basic Democracies District Administration and Development (Peshawar, Pakistan Academy for Rural Development, 1964) P. 29.
73. K. J. Newman, "Basic Democracy as an Experiment" (1962) 10 Political Studies, 46.

designed both to modify and to strengthen the system of local government rather than to pioneer any radically new institutions.

> " Its only novel contribution was to introduce the Thana Council in between the Union and District level. In some respect it marked a retreat from the Principles of local self government".[74]

So it can not be accepted as a new system of local government.rather than a new political system.

Whether it was a new system of local government or not it was seen as a means through which political participation, in the context of the existing Martial Law dictatorial regime, was broadened and a new source of support was created for the government.[75] Through Basic Democracies the President legitimised his unconstitutional regime and proceeded to step in the next stage of institutional reconstruction, the framing of the Constitution of 1962.

3. Constitutional Development

In the previous section we have pointed out that the President having legitimised his unconstitutional regime by the introduction of Basic Democracies through which he got the "mandate" to proceed on to the next stage of institutional reconstruction, the framing of a constitution. He made it clear that his intention was to promulgate a constitution which will form the"basis of running the country";[76] he had no

---

74. Rehman Sobhan, Basic Democracies Works Programme and Rural Development in East Pakistan (Dacca, Oxford University Press, 1968) P. 77.
75. Samuel P. Huntington, Op.cit., P. 252.
76. Mohammad Ayub Khan, Speeches and Statement Vol. I, P. 58.

intention to go back to the Parliamentary Constitution of 1956 because it was, as Ayub Khan observed :

> " An unholy wedlock of the executive, legislative, and judicial functions of the state in which the power for good government remained illusive, undefined, and therefore, inoperative".[77]

The President was in favour of presidential form of government and a strong, stable and centralised government which, according to him, was necessary for the integrity of the nation. That was why, he appointed a Constitution Commission on the 17 February, 1960, to identify the causes of the "failure" of Parliamentary system of government in the country, to consider future remedies, to present constitutional proposals for democratic institutions that would be 'adaptable to changing circumstances and based on the Islamic principles of justice, equality and tolerance' and would contribute to 'national unity' and a 'stable government'.[78] The commission was also advised to take into account the genius of the people, the general standard of education, the political judgment in the country and the social, economic, administrative and political reforms which were carried out during the regime.[79]

The commission which submitted its Report on the 6th May, 1961, examined the causes of the "failure" of parliamentary government and reported that the main causes were : (a) lack of proper elections and defects in the Constitution of 1956; (b) undue interference by the Heads of the State and politicians; and (c) lack of leadership resulting in lack of well-organised and disciplined parties.[80] The Commission preferred

---

77. Ibid., Vol. I, P. 96.
78. Report of the Constitution Commission, Pakistan, 1961 (Karachi, Government of Pakistan Press, 1962). Para. I , P. 1.
79. Ibid.
80. Ibid., Para 10, P. 6.

presidential form of government because in that system there would be one person at the head of affairs, with an effective restraint exercised on him by an independent legislature, the members of which should not be in a position to seriously interfere with the administration by exercising political pressure for their personal ends. The Commission had come to this conclusion on the basis of the fact :

> " Such a system is available in the presidential form of government which has been successful in the United States of America".[81]

As to the role of the legislature in a presidential system the Commission observed that the legislature should be in a sufficiently strong position to act as a check on the exercise by the executive of its extensive powers, without at the same time affecting the firmness of the administration.[82] The Commission favoured a bi-cameral legislature consisting of a lower House to be known as the House of the people and an upper House to be known as the Senate. In this respect the Commission observed :

> " It seems to us necessary to have an Upper Chamber so constituted that will be able to act as a check on the impetuosity of legislation by the Lower House, and also exercise a healthy influence, by its utterances, both on the members of that House and the public".[83]

The Commission rejected the unitary form of government and preferred federal system :

> " The government should be of the same pattern as that of India and Canada and not unitary as in Great Britain".[84]

---

81. Ibid., Para. 49, P. 28.
82. Ibid.,
83. Ibid., Para. 75, P. 45.
84. Ibid., Para. 68, P. 40.

The Commission recommended a strong centre and rejected the view that the centre should have only such powers as defence, foreign affairs and currency, remaining powers being left with the provinces, on the ground that it had been largely influenced by the doubt and suspicion entertained against West Pakistan and also by the insidious and unremitting propaganda carried on by the subversive elements which were hostile to Pakistan.[85] One peculiar recommandation of the Commission was that the provincial Governor was to be appointed by the President rather than elected by the province. Upon this point Karl Von Vorys writes:

> " The total effect of these recommendations was that the proposed government was federal more in name than in substance".[86]

The Commission recommended that the President, the Vice-President, the House of the people and the Legislative Assemblies of East and West Pakistan were to be elected directly on a restricted adult franchise which would be determined by a franchise Committee. The elections to the House of the people and the Legislative Assemblies were to be held on the basis of separate electorates, i.e., one electorate for Muslims and separate electorates for the Scheduled Castes, Caste Hindus and other communities provided their numbers came up to what the Franchise Committee might fix as minimum for constituting a constituency. As regards the distribution of seats in each of these legislatures as between the said communities, the basis would be their respective populations so as to ensure their due representation.[87]

On the issue of political parties, the Report recorded the statement of suggestions presented by the official delegation to ban political

---

85. Ibid., Para. 70, P. 41.
86. Karl Von Vorys, Op. cit., P. 215.
87. Report of the Constitution Commission, Pakistan, 1961, Para. 117, PP. 76-77.

parties, and rejected the idea of the delegation. The Commission admitted frankly the importance of political parties in any form of government and reached to the conclusion :

> " If we want to have a democratic form of government, our endeavour should be to create conditions in which parties based on the principles can emerge".[88]

The Commission recommended for the independence of judiciary and suggested that it was necessary for a Judge to have capacity and learning honesty and independence.[89] The appointment of Judges were to be for life and they were to be guaranteed substantial remuneration. They would enjoy the power of judicial review over the acts of the legislature.

The Commission recommended for the incorporation of fundamental rights in the constitution and observed :

> " We donot think we can follow the example of England in this regard because, there, the tradition that had grown, and the genius of the people, make it almost certain that the Parliament, though it is supreme in the sense that it can pass any law, which the English courts have no power to declare as void, would not infringe the fundamental rights except in grave emergency and that, too, only to the extent strictly necessary".[90]

The Commission pointed out that the Constitution of 1956 specified and protected fundamental rights because one could not be certain that the legislature of the country would so soon acquire the sort of intuition which enables the British people to react almost instinctively against interference with fundamental liberties. For the same reason, the Commission proposed to adopt the relevant provisions of the Constitution of 1956 in the proposed constitution.[91] The Commission rejected the idea

---

88. Ibid., Para. 121, P. 80.
89. Ibid., Para. 133, P. 87.
90. Ibid., Para. 161, P. 101.
91. Ibid., Para. 162, P. 102.

of incorporating the obligations to the state in the constitution.[92] It also recommended for incorporating the Directive Principles of State Policy in the proposed constitution.[93]

The proposals of the Constitution Commission were examined vigorously and finally discussed at the Governors' conference held in Rowalpindi from the 24th October, 1961, to the 31st October, 1961. A constitution was then drafted and finalised which ultimately got the approval of the President. On the 1st March, 1962, the President announced the Constitution which was "enacted" by him in pursuance of the "mandate"[94] given to him by the people of Pakistan. In his introductory speech Ayub referred to his pledge of the 8th October, 1958, in which he assured of restoring, democracy and claimed that the introduction of the Constitution represented the fulfilment of his pledge. In that speech he also stated that the new Constitution embodied

> " A blending of democracy with discipline - two pre-requisites to running a free society with stable government and sound administration".[95]

The constitution came into force on the 8th June, 1962, with the following features :

As expected the Constitution of 1962 provided for a presidential form of government. The President became the central figure of the Constitution --being the Head of the government and Head of the state.

---

92. Ibid., Para. 165, P. 104.

93. Ibid., Para. 166, PP. 104-105.

94. See the Preamble of the Constitution of 1962(as modified up to the 12th October, 1964)Government of Pakistan,Ministry of Law And Parliamentary Affairs(Government of Karachi,Government of Pakistan Press, 1964) P. 2.

95. Speech of President Ayub announcing the Constitution of 1962. G.W. Choudhury, Documents and Speeches on the Constitution of Pakistan,P.796.

He was to be elected by 80,000 members of the Basic Democracies for a term of 5 years.[96] The President was to be a Muslim, attained the age of 35 years and qualified to be elected as a member of the National Assembly.[97] The President could resign by writing and addressed to the Speaker of the National Assembly.[98] On notice given to the Speaker by one-third members of the National Assembly, the President was liable to be impeached or removed for any glaring breach of the Constitution, misconduct or infirmity, if the procedure for impeachment or removal initiated by a resolution moved by one-third of the members of the Assembly and the resolution was supported by three-fourths of the total numbers of members of the Assembly; but if at least one-half of the members did not vote for the resolution, those who gave notice were to lose their seats in the Assembly.[99]

The executive authority of the Republic vested in the President.[1] He could have a Council of Ministers, to assist him in the discharge of his function.[2] He could seek the advice of all or any of his Ministers, but was not bound to accept it, He was authorised to appoint a number of Parliamentary Secretaries who were to "perform such functions ... as the President may direct".[3] The President was the Supreme Commander of the of the Defence Services of Pakistan.[4] He had the power to grant pardons,

---

96. Article 12 of the Constitution of 1962.
97. Article 10, Ibid.
98. Article 12(3), Ibid.
99. Articles 13-15, Ibid.
1. Article 31, Ibid.
2. Article 33, Ibid.
3. Article 35, Ibid.
4. Article 17, Ibid.

reprieves and respites, and to remit, suspend or commute any sentence passed by any court, tribunal or any authority.[5]

When the National Assembly was not in session, the President could promulgate Ordinances,[6] and in a state of emergency, proclaimed by him, he acquired the power to promulgate Ordinances whether the National Assembly was in session or not.[7] The President could dissolve the National Assembly before the expiry of its term, but in that event he himself ceased to hold office[8] and had to seek re-election. His assent was necessary to Bills passed by the National Assembly and he could withhold his assent to a Bill. If a Bill was not acceptable to the President even though it was passed by special majorities prescribed by the Constitution he could refer the Bill to a referendum among the members of the Electoral College.[9] If the majority of the total number of members of the Electoral College voted in favour of the Bill being assented to, the President was deemed to have assented to the Bill.

In the Provinces the executive authority was vested in the Governor[10] who was appointed by, held office during the pleasure of, and exercised function under the direction of, the President.[11] Each Governor had a Council of Ministers composed of persons not members of the Provincial Assembly, whose appointment was to be approved by the President and who held office during the pleasure of the Governor, subject to the concurrence of the President.[12] The assent of the Governor was necessary to Bills

---

5. Article 18, Ibid.
6. Article 29, Ibid.
7. Article 30, Ibid.
8. Article 23, Ibid.
9. Article 27, Ibid.
10. Article 80, Ibid.
11. Article 66, Ibid.
12. Article 82, Ibid.

passed by the Provincial Assembly.[13] In financial or other matters a Governor's position was generally similar to that of the President at the Centre.

The National Assembly of Pakistan consisted of 156 members of which 6 seats were reserved for women.[14] The term of the National Assembly was 5 years[15], but it could be dissolved earlier by the President.[16] Only a part of the Annual Budget was subject to its vote.[17] Each Provincial Assembly consisted of 155 members, of whom 150 were elected by the members of the Electoral College of the Province and the remaining 5 seats were reserved for women who were elected by members of their respective Provincial Assembly.[18] The term of the Provincial Assembly was 5 years[19] and the Governor could not dissolve the Provincial Assembly before the expiry of its term except with approval of the majority of the members of the National Assembly and the concurrence of the President.[20]

Although the Preamble to the Constitution of 1962 spoke of Pakistan to be a "form of federation" and for this purpose legistative powers were distributed between the Centre and the Provinces, it showed a "marked shift towards a unitary system".[21] As for instance, the Governor was not elected by the people or the National Assembly, rather he was appointed by the President and held office at his pleasure; the Provincial Government was to discharge furnction subject to the direction of the President; the

---

13. Article 77, Ibid.
14. Article 20, Ibid.
15. Article 21, Ibid.
16. Article 23, Ibid.
17. Articles 37-48, Ibid.
18. Article 71, Ibid.
19. Article 72, Ibid.
20. Article 74, Ibid.
21. S.A.de Smith, the New Commonwealth and Its Constitutions, P. 226.

Provincial Ministry could be dismissed by the Governor only with the concurrence of the President; the Governor was not in a position to dissolve the Provincial Assembly without the approval of the National Assembly and the concurrence of the President; the conflict between Governor and the Provincial Assembly was to be resolved by the National Assembly;[22] the Judges of the Provincial High Court were appointed by the President;[23] the Centre was granted the overriding power to legislate on any subject for the whole or any part of the country whenever the national interest in relation to security, planning or co-ordination, or the achievement of uniformity in any matter in different parts of Pakistan so required;[24] moreover, no court, could question the authority of a legislature to legislate on any particular matter, and in the case of a conflict between a central law and a provincial law the former prevailed over the latter.[25]

The Supreme Court, with a Chief Justice and as many Judges as might be determined by law, and in the absence of any such law, by the President,[26] was the court of ultimate jurisdiction in the country. The Chief Justice of the Supreme Court was to be appointed by the President, and other Judges were to be appointed by the President after consultation with the Chief Justice.[27] A Judge of the Supreme Court could hold office until he had attained 65 years of age unless resigned earlier or was removed from office in accordance with the provision of the Constitution.[28]

---

22. Article 74 of the Constitution of 1962.
23. Article 92, Ibid.
24. Articles 131 and 132 and the Third Schedule, Ibid.
25. Articles 133 and 134, Ibid.
26. Article 49, Ibid.
27. Article 50(1), Ibid.
28. Article 52, Ibid.

The Supreme Court had original jurisdiction in any dispute between one of the Governments and one or both of the other Governments.[29] It had jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of a High Court.[30] It had advisory and constitutional jurisdiction and its decisions were binding on other courts.[31] The High Court, consisted of a Chief Justice and so many other Judges as was determined by law, or until so determined, as was fixed by the President.[32] The High Court of a province was a regular court of appeal and revision, and exercised writ jurisdiction in defined circumstances.[33]

Originally, the Constitution of 1962 did not contain fundamental rights. It contained some principles of law-making which were not justiciable in any court. Following the Indian pattern the Constitution of 1956 contained justiciable guarantees of fundamental rights; but the Constitution of 1962, as Professor S. A. de Smith pointed out, "converted these rules into non-justiciable principles of law-making".[34]

The principles of law-making as contained in Part II Ch.1 of the original Constitution of 1962 were as follows : (a) Islam, (b) equality of citizens, (c) freedom of expression, (d) freedom of association, (e) freedom of movement and right to acquire property, (f) freedom to follow vocation, (g) freedom of religion, (h) safe guards in relation to arrest and detention, (i) protection against retrospective punishment, (j) regulation of compulsory acquisition of property, (k) protection against forced labour, (l) non-discrimination in respect of attendance of public educational institutions, (m) access to public places, (n) protection of languages,

---

29. Article 57, Ibid.
30. Article 58, Ibid.
31. Article 63, Ibid.
32. Article 91, Ibid.
33. Article 98, Ibid.
34. S. A. de Smith, The New Commonwealth and Its Constitutions, P. 227.

scripts and culture, (o) protection against slavery, (p) abolition of untouchability.[35]

According to the principles of law-making, it was the responsibility of the legislatures both central and provincial, to ensure that no law was to be enacted which disregarded, violated, or was otherwise not consistent with these principles.[36] If a doubt arose whether a particular legislation was consistent with and in conformity to the principles of law-making, the National Assembly, a Provincial Assembly, the President or the Provincial Governor could refer it to the Advisory Council of Islamic Ideology for advice and guidance.[37] The validity of a law, however, could not be questioned by any court on the ground that the law disregarded, violated or was otherwise not in accordance with the principles of law-making.[38]

One year after the coming into effect of the Constitution of 1962, the National Assembly amended the Constitution and re-instated justiciable fundamental rights.[39] It was provided that some Regulations and Ordinances made during the Martial Law regime could be excluded from the scope of enforcement of fundamental rights.[40] The rationale of amended article 6(3)(II) was given by G.W.Choudhury in the following words :

> " There is no doubt that some Acts and Regulations have been put outside the scope of the first amendment as a result of this qualifying clause but it was justified on the ground that the reforms and laws made during the Martial Law period had to be validated and protected".[41]

---

35. For details see Appendix IV of the Constitution of 1962(As modified up to the 12th October, 1964) PP. 184-193.
36. Article 5 of the original Constitution of 1962.
37. Article 6(1), Ibid.
38. Article 6(2), Ibid.
39. The Constitution (First Amendment) Act, 1963(Act 1 of 1964). See Appendix I of the Constitution of 1962(As modified up to the 12th October, 1964) P. 149.
40. See Article 6(3)(II), Ibid.; and the 4th Schedule of the Constitution of 1962(As modified up to the 12th October, 1964) P.146.
41. G.W.Choudhury, Constitutional Development in Pakistan, P. 242.

The Constitution of 1962 made the presidency 'the corner stone' of the new system. As it was given by a single individual and not by a representative Assembly, it embodied the political philosophy of its maker. In this regard Karl Von Vorys observed :

> " In spite of the electorate machinery involved in the formulation of the Constitution, in spite of the many hours of deliberations, and in spite of the wide variety of recommendations, the final version agrees in every major detail with the political pattern desired by the President".[42]

The Constitution of 1962 came into effect on the 8th June, 1962, when Martial Law, proclaimed by President Mirza forty four months earlier, had been lifted. The Constitution contained as has been already observed, Field-Marshal Ayub Khan's ideas of a governmental system. And during the long period of Martial Law no occasion was missed, no method was spared to make the nation understand as to what was expected to come and to prepare it to accept the system. But all such attempts proved abortive. Opposition to the Constitution started almost since its promulgation which gained momentum with the passage of time. Ultimately, in the face of a nation-wide popular upsurge, the President had to resign and the Constitution had been abrogated on the 25th March, 1969, when another spell of Martial Law ushered in.

---

42. Karl Von Vorys, Op.cit., P. 229.

Chapter - V

Position of Fundamental Rights and Writ Jurisdiction During the Regime

1. Fundamental Rights and Their Enforcement

The Laws (Continuance in Force) Order, 1958, had been issued on the 10th October, 1958, to tackle the situation consequent upon the Presidential Proclamation of the 7th October, 1958. The laws that were in force after that date were enumerated in Article 4 of the Order, but from the list of these laws the Constitution of 1956 had been expressly excluded. Under clause (4) of Article 2 of the Order if the Supreme Court or the High Court was moved for a writ, the ground for the writ could only be the infraction of any of the laws mentioned in Article 4, or any right recognised by the Order and not the violation of a right created by the late Constitution. The Order also provided that no writ would issue against the Chief Martial Law Administrator or Deputy Chief Martial Law Administrator or any person exercising powers or jurisdiction under the authority of either of them. Moreover, it was provided that no court or person could call or permited to be called in question the Presidential Proclamation, any Order made in pursuance of the Proclamation, or any Martial Law Order, or Martial Law Regulation or any finding, judgment or order of a Special Military Court or a Summary Military Court.[1]

In interpreting these provisions, Munir C.J. in the case of the State V. Dosso[2] held:

---

1. For details see Supra., Chapter III. 2.

> " The so-called fundamental rights which are described in part II of the late Constitution are, therefore, no longer a part of the National legal order and neither the Supreme Court nor the High Court has under the new order the authority to issue any writ on the ground of the violation of any of the fundamental rights ... The very essence of a fundamental right is that it is more or less permenent and cannot be changed like the ordinary law ... Under the new legal order, any law may at any time be changed by the President and, therefore, there is no such thing as a fundamental right, there being no restriction on the President's law-making power".[2]

Referring to Article 4 of the Constitution of 1956, the learned Chief Justice pointed out that there was a restriction on the power of the legislature to make laws involving breaches of fundamental rights, and invalidity attached to all existing laws, customs and usages having the force of law if they were inconsistent with any of the fundamental rights. This test to determine the validity of the laws and the fetter on the power of the legislature to make laws had both disappeared under the new legal order.

> " Unless ... the President expressly enacts the provisions relating to fundamental rights, they are not a part of the law of the land and no writs can issue on their basis".[3]

Article 2 of the laws (Continuance in Force) Order, 1958, provided that Pakistan would be governed "as nearly as may be" in accordance with the late Constitution but this provision did not have the effect of restoring fundamental rights because

> " The reference to government in this Article is to the structure and outline of government and not to the laws of the late Constitution which had been expressly abrogated by Article 4".[4]

---

2. State V. Dosso, Op.cit., per Munir C.J. at P. 7.
3. Ibid., at P. 8.
4. Ibid.

Article 2 and Article 4 could, therefore, stand together and there was no conclict between the two, the provisions of Article 4 being specific and coming later would override those of Article 2.

Cornelius J, as he then was, pointed out in Dosso's case that Article 4 of the Constitution of 1956 had provided that every law and every custom or usage having the force of law was to be void to the extent of its inconsistency with the fundamental rights. It was clear, according to him, that these fundamental rights and the supporting Article 4 had not been retained as law under the new legal order. The abrogation of the Constitution of 1956 represented an irrevocable act of the supreme authority by which it was performed. It had a definitive effect in relation, both to that Constitution, as well as to the order of things which had replaced it. The words "in accordance with the late Constitution" in Article 2 of the Order only meant that in matters affecting the Government of the country, for which no provision was made in any instrument issued under the authority of the new regime, where guidance was needed, it was to be sought by reference to the wording of the relevant provisions contained in the Constitution of 1956[5]. The fetters in law-making in contravention of the fundamental rights contained in the late Constitution had obviously been removed by the laws (Continuance in Force) Order because "the Order gives overriding power now to the President and the Chief Administrator of Martial Law to make Orders and Regulations contrary to anything appearing from the words used in the Constitution, 1956".[6]

---

5. Ibid., per Cornelius J. at P. 17.
6. Ibid., P. 18.

With reference to the nature of fundamental rights enumerated in part II of the Constitution of 1956, His Lordship, however, observed that they did not derive their entire validity from the fact of having been formulated in words and enacted in the Constitution.

> " A number of these rights are essential human rights which inherently belong to every citizen of a country governed in a civilised mode".[7]

The learned Judge saw a conflict between the question of "the liberty of the subject" and the proposition advanced by the Attorney General on the question of "abatement" of a proceeding. The Attorney-General viewed that the provision in question provided for abatement of a proceeding not on the ground of procedural defect or lack of capacity or competency, but by reason of the cancellation of the fundamental rights which took effect from the 7th October, 1958, so that as from that date, the validity of any law still in force was not to be judged in relation to those rights. His lordship was prepared to accept the proposition with regard to any proceeding under section 11 of the Frontier Crimes Regulation Act, 1901, which was still pending before the Court after the Proclamation of the 7th October, 1958. But it was clear that up to that date, the duty of the Court was plainly to declare any law which did not comply with the fundamental rights contained in the late Constitution to be invalid.[8]

His Lordship was unwilling to accept the word "abatement" as appearing in the Order, to mean fundamentally different from its generally accepted notion. According to him,

> " Abatment ordinarily follows upon defect of form

---

7. Ibid., at P. 24.
8. Ibid., at P. 22.

> or procedure or loss of capacity in parties, and it may not be safe to assumed that the meaning of the word 'abate' as used in the Order of the 10th October, 1958, is so widely different from the generally accepted senses of that word, as is claimed by the learned Attorney-General".[9]

If by the Order of the 10th October, 1958, any law had been wholly destroyed or deprived of effect whatsoever, then the issue of a writ to enforce any right provided for by such law became impossible. Any application or proceeding that might be pending whose purpose was to obtain enforcement of such a right, might, therefore, fail "by reason of the right no longer being available, and not by reason of procedural or formal defects or loss of capacity".[10]

In the case of Mehdi Ali Khan Panni V. Province of East Pakistan[11] it was held by the East Pakistan High Court that wakfs including wakf-al-al-aulad were religious institutions within the meaning of Article 18 of the Constitution of 1956 and, therefore, were to be protected under that Article. On appeal, however, Munir C.J. confirmed his earlier view expressed in Dosso's case that Article 2 of the Laws (Continuance in Force) Order did not have the effect of preserving the fundamental rights. The learned Chief Justice referred to the views of Mr. Hamidul Haque Chowdhury who described the Laws (Continuance in Force) Order as "the shortest constitution" in the world and of Mr. A.K.Brohi who described it as " a singularly ingenious piece of constitutional legulation", and held :

> "Add to this the simple constitutional theorem that fundamental rights are more or less permanent and may be abridged or extended only by special legislative and executive action, that their enforcement against such action depends on the powers of the judiciary, that at the present

---

9. Ibid.
10. Ibid.
11. P.L.D. 1958 Dacca 203.

> moment the Constitution stands abrogated and the entire legislative and executive authority vests in the President and the Chief Martial Law Administrator, that the powers of the Courts themselves are subject to Orders of the President and Chief Martial Law Administrator and the argument in favour of the present existence of such rights gets into self evident contradictions making their inferential continuance a complete impossibility".[12]

The learned Chief Justice observed that on a perusal of part II of the late Constitution it would be found that the fundamental rights were not common to all persons, that they did not apply to the whole of Pakistan because Special Areas were excluded from their operation, and that they were not of constant operation, because they were liable to suspension in accordance with the provisions of the Constitution of 1956.[13] The rights, therefore, were not universal because they were not available to all persons and not enforceable at all times. His lordship referred to the decisions of Attorney-General for Ontario V. Attorney-General for the Dominion,[14] Sheppard V. Wheeling,[15] State of Iowa V. O'neil,[16] Harkishan Das V. The Emperor,[17] Murbury V. Madison,[18] Carter and others V. The Egg Pulp Marketing Board for the State of Victoria,[19] and R V. Brisbane Licensing Court,[20] and held :

> " The law described to be void by Article 4 [of the Constitution of 1956] by reason of its conflict with a fundamental right cannot be said to have been in force merely by reason of

---

12. The Province of East Pakistan V. Mehdi Ali Khan,(XI) D.L.R.1959 S.C.319, per Munir C.J. at P. 331.
13. Ibid., at P. 332.
14. 1896 A.C. 348.
15. 30 W.Va. 379.
16. 147 Ia 593.
17. A.I.R. 1944 Lahore 33.
18. I Cranch 137 U.S. 1803.
19. 1942-43 66 C.L.R. 557.
20. 1920-21 28 C.L.R. 23.

> the whole or any portion of it having been in conflict with a fundamental right. The law was in force not only because there were persons and territories to which the fundamental rights did not extend and in respect of such territories and persons the law had full operation but because it was void only in the sense that in the dicision of a particular case which brought it into conflict with a fundamental right it had to be ignored or discredited. The moment the fundamental right was taken away by an amendment of the Constitution the law again became operative without its being re-enacted".[21]

Regarding the prohibition imposed by clause (2) of Article 4 of the Constitution of 1956, the Chief Justice observed :

> " The clause contemplates cases where inadvertently, not deliberately because no legislature could intentionally disobey a constitutional prohibition, the legislature enacted a law which collides with a fundamental right but the result here is precisely the same as in the case of an existing law under clause (1) of the Article — the law is void only 'to the extent of such contravention' and not void ab initio like legislation which suffers from the incident of an inherent lack of power".[22]

In this regard S.A.Rahman J. in the same case held :

> " With the abrogation of the Constitution on the promulgation of the President's Proclamation, the fundamental rights disappeared from the field entailing the consequence that laws existing on the statute Book were given a fresh lease of life by the Laws (Continuance in Force) Order, 1958, in their original condition and those of their provisions which were inconsistent with the fundamental rights, had been revived in their full vigour."[23]

Cornelius J. as he then was, gave a dissenting judgment and observed that the consequence of the promulgation of the Laws(Continuance in Force) Order, 1958 was that the compulsive force of the fundamental

---

21. The Province of East Pakistan V. Mehdi Ali Khan, Op.cit.,at P. 336
22. Ibid., at P. 338.
23. Ibid., per S.A. Rahman J. at P. 364.

rights in respect of all laws and all executive actions was at one stroke taken away. That plain conclusion was sufficient to cause the failure of every proceeding before a court in which the question of the issue of a writ to enforce a fundamental right was pending, either as an original matter, or constructively in appeal or revision. The learned Judge further observed :

> " Looking through the list of fundamental rights, I cannot find any one of them other than that relating to preventive detention, which received special treatment in the Order which might in itself by being put into operation, have prejudiced the success of the new regime as it has been observed in operation during the past nine months".[24]

His Lordship further added that the fundamental rights in part II of the Constitution of 1956 had not become entirely devoid of validity, any more than the Preamble of that Constitution, or the Directive Principles of State Policy. The fundamental rights had, indeed lost the operation which was conferred upon them by the provisions of Article 4 of the Constitution, but they nevertheless remained as provisions in the late Constitution, and were valid to the extent assured by Article 2(1) of the Laws (Continuance in Force) Order.[25]

The Supreme Court, however, re-affirmed its earlier view in the case of Province of East Pakistan V. Abdul Karim and others. This was an appeal from the judgment and order of the High Court of East Pakistan which held that the requisitions in question were in contravention of Article 15 of the late Constitution and, therefore, were invalid. The Supreme Court reversed the judgment of the court below. In this respect

---

24. Ibid., per Cornelius J. at P. 357.

25. Ibid., P. 360.

Munir C.J. held :

> " In, so far as the judgment of the High Court gives effect to the constitutional objection, it has ceased to be enforceable by reason of Paragraph (2), clause (7) of the Laws (Continuance in Force) Order, 1958, which as explained in the judgment of this Court in the State V. Dosso brings about the abatement of all pending petitions for writs which had been moved on the allegation that the orders questioned therein contrevened any fundamental right guaranteed by the Constitution".[26]

This view was also re-affirmed in the case of Sargodha Bhera Bus Service Limited and others V. The Province of West Pakistan where the Supreme Court held that as the Constitution stood abrogated, the fundamental rights ceased to exist.[27]

The High Court of West Pakistan, however, attempted to give a different interpretation on the status of the pre-proclamation laws which contravened the fundamental rights quaranteed by the Constitution of 1956. In the case of Hasham V. Tribunal the question arose before that Courtwwhether the enactments rendered void by the Articles relating to fundamental rights in the late Constitution were still in force in Pakistan. Taking into consideration of the decisions of the case of Muhammad Bashir V. Province of West Pakistan[28] and the Indian Supreme Court cases of Keshavan V. State of Bomboy[29] and Bhikhaji Narain V. State of Madhya Prodesh[30], Kayani C.J. held :

> " A law that was enacted in contravention of the fundamental rights after the Constitution Day was a law beyond the competency of the legislature, and such laws are obviously void, even if they

---

26. Province of East Pakistan V. Abdul Karim and others,(XI) P.L.D. 1959 S.C. 246, per Munir C.J. at P. 249.
27. Sargodha Bhera Bus Service Limited and others V. Province of West Pakistan(XI) D.L.R. 1959 S.C. 285, per Amiruddin Ahmad J. at P. 289.
28. P.L.D. 1958 Lahore 853.
29. A.I.R. 1951 S.C. 128.
30. A.I.R. 1955 S.C. 781.

> exist on the Statute Book, for whenever their incompetency is discovered, they are treated as though they had never been [enacted]. But legislative incompetency is not on a higher level than repugnancy to a fundamental right. In the last resort they are both martyrs to unconstitutionality, both opposed to one provision of the Constitution or another".31

In answer to the question before the Full Bench, His Lordship, therefore, concluded :

> " The enactments rendered void by the Articles relating fundamental rights in the late Constitution are not in force in Pakistan".32

Kaikaus J. held that Article 4 of the Laws (Continuance in Force) Order, 1958, continued the laws that existed before the proclamation was made. At that time surely the laws that had been rendered void by the fundamental rights were not in force. The intention of that Article was to maintain the status quo — to continue a state of things that existed before the Proclamation came into force.

> "What ever the effect of the withdrawal of fundamental rights, we are concerned only with law as it stood before the Proclamation. It is apparent that if the question whether a law is in force in Pakistan, is to be determined with reference to Article 4 of the President's Order, the effect of withdrawal of fundamental rights is irrelevant".33

On appeal, following the decision of Mehdi Ali Khan's case the Supreme Court of Pakistan set aside the judgment of the High Court and directed that the answer to the question referred to the Full Bench of the High Court should be rendered as follows :

> " With effect from the 7th October, 1958, when the constitution including the fundamental rights was abrogated, all enactments of date prior to the 7th October, 1958, are continued in full force according to their terms, and irrespective of any conflict between their provisions, and

31. Hasham V. Tribunal, P.L.D. 1959 Karachi 286, per Kayani C.J. at pp. 293-294.

32. Ibid., at P. 298.

33. Ibid., per Kaikaus J. at P. 302.

> the fundamental rights formulated in the late Constitution".[34]

In this connection the case of the District Magistrate, Lahore V. Reza Karim may also be discussed. This was a certified appeal from the judgment and order of a Division Bench of the High Court of West Pakistan commanding by a writ of mandamus, to issue an arms licence as prayed for by the respondent. Having regard to the limited scope of the powers vested in the High Courts and the Supreme Court by the Laws (Continuance in Force) Order, 1958, to issue writs only of habeas corpus, mandamus, prohibition, quo warranto and certiorari, Hamoodur Rahman J. as he then was, pointed out that the foundation for an application for a writ of mandamus was that " there must exist a legal right in the person seeking relief to insist upon upon a clear duty to be performed by some public officer or authority in respect of that right".[35] In the instant case, the learned Judge observed that this foundation did not exist, for, on a plain reading of the provisions of the Arms Act, 1978, it was clear that no one had a right to possess or carry a gun.

> "The legal right to do so is created only after the licence is granted. The grant of a licence amounts, in these circumstances, for all political purposes to the conferment of a privilege. Hence the respondent, cannot ... maintain an application for a writ of mandamus in the absence of any such right in him to possess a revolver".[36]

In the case of Pakistan Textile Mill Owners' Association V. Chief Commissioner of Karachi, the question arose whether a writ petition

---

34. Tribunal V. Hashim, P.L.D., 1960 S.C. 260, per Cornelius J. at P.265.
35. District Magistrate, Lahore V. Reza Karim, P.L.D. 1961 S.C. 178, per Hamoodur Rahman, J. at P. 186.
36. Ibid.

filed in the year 1957 at the time when the Constitution of 1956 was still in force and the validity of the impugned notification which was subject-matter of the writ petition, could be tested on the fundamental rights recognised under the Constitution of 1956. It was held by Wahiduddin J. that after the abrogation of the Constitution of 1956 which was no longer in force at the time of hearing of the petition,

> " The grounds based on the fundamental rights were not material and could not be taken into consideration for the decision of the writ petition".[37]

In the case of Muhammad Tota Mia V. Province of East Pakistan and others Murshed J. as he then as, referred to the ruling of the Supreme Court in Dosso's case that with the abrogation of the Constitution of 1956, the categories of fundamental rights had been wiped out, and held:

> " The provisions of the late Constitution with regard to 'equality before the law' enumerated in the category of fundamental rights has been abrogated ... It is no longer open to the petitioner to canvass this contention before us:.[38]

His Lordship further held :

> " The provision as to fundamental rights, such as contained in Article 15 of the late Constirution, was no longer available to an aggrieved citizen".[39]

Though the learned Judge admitted that with the abrogation of the Constitution of 1956, the fundamental rights had also been abolished, yet his comments on the "propriety" of the East Bengal (Emergency) Requisition of Property (Amendment) Ordinance, 1959, were remarkable. His Lordship remarked :

> " We do feel that the impugned legislation has far reaching consequences and that it entrenches [sic] upon the rights of citizens without adequate and just compensation".[40]

---

37. Pakistan Textile Mill Owners' Association V. Chief Commissioner of Karachi, P.L.D. 1961 Karachi 474, per Wahiduddin J.at P. 478.
38. Muhammad Tota Mia V. Province of East Pakistan and others, P.L.D.1962 Dacca 151, per Murshed J. at P. 158.
39. Ibid., at P. 160 .
40. Ibid., at P. 157.

It would, therefore, seem that in spite of the attempts made by the High Courts to give more or less a limited scope to the provisions of the Laws (Continuance in Force) Order, 1958, vis-a-vis the fundamental rights and other provisions of the Constitution of 1956, the Supreme Court uptill now would not budge from its original stand taken in the State V. Dosso decided just within three weeks of an unprecedented measure resorted to by the President in collaboration with the armed forces of the country. According to the Supreme Court the Constitution of 1956, had for all practical purposes, been struck off the Statute Book giving place to the Laws (Continuance in Force) Order, establishing a new legal order. No fundamental right nor any provision of the abrogated Constitution could now be a source or basis for any legal right. If any of them was revived by the order of the supreme law — giver under the new legal order, its validity would be derived from the instrument issued under the Laws (Continuance in Force) Order by the President and Chief Martial Law Administrator, and not from the late Constitution which from the legal point of view, did no longer exist.

2. Writ Jurisdiction for Purposes Other Than Enforcement of Fundamental Rights

It has been seen in the previous section that the superior courts' power to issue writs had been curtailed by the Laws (Continuance in Force) Order so that they could not issue any writ to enforce fundamental rights guaranteed by the Constitution of 1956. This conclussion was reached on the basis of the argument that as the Constitution of 1956 itself had been abrogated, the fundamental rights contained therein had

also been abolished. But it is interesting to note that the courts in interpreting the provisions of the Laws (Continuance in Force) Order assumed the power to issue writs for purposes other than enforcement of fundamental rights enumerated in the Constitution of 1956. The courts' endeavour to assume and extend their writ jurisdiction had started almost from the same time as they gave recognition to the new legal order after the Presidential Proclamation of the 7th October, 1958. They had accepted the proposition that provisions of the Constitution of 1956 were no longer alive enabling them to grant relief to the citizen. But they would not hesitate to come in aid of parties aggrieved by any order or action within the frame-work of the new legal order by interpreting the provisions in the light of the generally accepted principle of natural justice.

In order fully to appreciate the situation a discussion, it is submitted, will have to commence from the Dosso's case in which the Supreme Court of Pakistan gave a clear analysis of the position of writ jurisdiction of the superior courts in the changed circumstances. In that case Munir C.J. held that

> " The position in regard to future application for writs ... is that they lie only on the ground that any one or more of the laws mentioned in Article 4, or any other right preserved by the Laws (Continuance in Force) Order — has been contravened".[41]

As regards pending application for writs already issued but which were either sub - judice before the Supreme Court, or required enforcement, the relevant provision was Article 2(7) which provided that excepting the writs issued by the Supreme Court after the Proclamation and before

---

41. State V. Dosso, Op.cit., per Munir C.J. at P. 8.

the promulgation of the Laws (Continuance in Force) Order no writ or order for writ issued or made after the Proclamation should have any legal effect unless the writ was issued on the ground that any one or more of the laws mentioned in Article 4 or any other right kept alive by the new order had been contravened. If there was a pending application or proceeding in respect of a writ which was not covered by Article 2(4), or any other provision of the new order, that is to say, if the application or proceeding relating to a writ sought on the ground that a fundamental right had been contravened then the application or proceeding should abate forthwith.[42]

Cornelius J. in the same case 'held that the validity of writs issued prior to the 7th October, 1958, under the provisions of the Constitution of 1956 did not appear to be generally hit by anything contained in Article 2(7) of the Laws (Continuance in Force) Order. Only those of such writs which happened to be still subject to legal revision upon the coming into force of the new regime were sought to be avoided. His Lordship concluded :

> " It is in my view, more reasonable to infer, especially since the Order of the 10th October, 1958 does not appear, by expression, to have retrospective effect, that as to matters which were concluded during the period which finally terminated on the 7th October, 1958, the intention of the Order is that the law in force during that period, at the relevant time, should be allowed to prevail".[43]

In the case of Election Commissioner, Pakistan V. Sajjid Ali Khan,[44] Munir C.J. referred to the decisions in Dosso's and Mehdi Ali Khan's cases

---

42. Ibid.
43. Ibid., per Cornelius J. at P. 23.
44. P.L.D. 1960 S.C. 235.

and held that all applications for writs which were pending on the date of the proclamation or in which leave to appeal from the orders passed before the Proclamation had been given by the Supreme Court or by High Court abated if the writ issued on the ground that some action taken or law made was repugnent to the abrogated Constitution of 1956.

It was contended on behalf of the respondent, in Chowdhury Manzoor Elahi V. the State,[45] that no court of ordinary jurisdiction including the High Court of West Pakistan had jurisdiction to question the finding, judgment or order of a Military Court. Shabir Ahmed J. considering the above points held that it was not in all cases that the jurisdiction of the High Court with regard to a judgment or order of a Military Court had been taken away while that court would have no jurisdiction to determine whether or not a finding, judgment or order of a Military Court was justified, there was no ouster of jurisdiction where the order of Military Court was without jurisdiction. If a Military Court passed a sentence on a person it could not try or tried an offence it was not given the power to try or passed a sentence it was not competent to pass, the order would be without jurisdiction and would not enjoy the immunity from scrutiny by the court of ordinary jurisdiction. The learned Judge concluded :

> " My reliance in coming to the above conclusion is on the well-known principle of law that an order which is without jurisdiction cannot be treated as an order for any purpose".[45]

In this connection the decision of Zahid Umar and Company V. Chief Secretary, West Pakistan[46] may be mentioned. In that case it was held

---

45. Chowdhury Manzoor Elahi V. the State, (XI) D.L.R. 1959 W.P. 111, per Shabir Ahmed J. at P. 113.

46. P.L.D. 1959 Lahore 764.

by the High Court of West Pakistan that each and every member of the Armed Forces of Pakistan was not competent to pass orders which were immune from scrutiny by courts, and in order to claim that the order of a member of the Armed Forces was outside the jurisdiction of civil court it had to be provided that he was a Martial Law Authority.[47] Taking into consideration the decision of Zahid Umar's case, Shabir Ahmed J. in Gulab Din V. A.T.Shaukat held that the Border Allotment Committee, comprising a member of the Pakistan Army and a person who was not a member of the Pakistan Army, could not be considered to be a Military Authority because a civilian could not get the status of a Military man without its being conferred on him. The Committee was not a 'Martial Law Authority' contemplated by Martial Law Regulation No. 88(1); so that Regulation did not take away "the jurisdiction of the High Court to issue a writ, if that jurisdiction exists otherwise with regard to an order passed by a Border Allotment Committee".[48]

It would seem, therefore that the superior courts retained the writ jurisdiction under the new legal order and exercised the same in fit cases. The courts were cautious not to exercise this discretionary

---

47. Martial Law Authority had been defined by Shabir Ahmed J. in the following words :

> "A civil or military authority which can issue a Martial Law Regulation or a Martial Law Order or an Authority which has been declared to be a Martial Law Authority either by the Chief Administrator of Martial Law or by some one authorised by the Chief Administrator of Martial Law to make such a declaration."

Gulab Din V. A.T.Shaukat, P.L.D. 1961 Lahore 952.

48. Gulab Din V. A.T.Shaukat, Ibid., per Shabir Ahmed, at P. 961.

jurisdiction arbitrarily and in inappropriate cases. This point was developed in Zafar-ul-Ahsan V. The Republic of Pakistan. Shabir Ahmed J. made a reference to Dosso's case, where the Supreme Court of Pakistan held that fundamental rights guaranteed by the Constitution of 1956 were no longer a part of the legal order as the Constitution of 1956 had been expressly excluded from the list of the President's Order, and held :

> " Now if the fundamental rights given to 80 million citizens of Pakistan could be taken away by the President, I fail to see on what principle of law, justice, equity or common sense it should be held that the rights of the servants of the state could not be altered by the Laws (Continuance in Force) Order, 1958 as amended".[49]

His Lordship proceeded further to observe that if an administrative order was not justified on merits the remedy could be sought from the administrative authorities by way of administrative appeal or representation and not from a court of law even if the jurisdiction of courts in the matter had not been taken away. Where the right of appeal was given by rules and not by any statutory provision the right of being heard could not be enforced by action and would not be enforced by a writ even if the court had jurisdiction in the matter.[50]

From the judgment of the High Court of West Pakistan an appeal was made before the Supreme Court of Pakistan where Munir C.J. held that the jurisdiction of the Supreme Court to call in question the proceedings of a Screening Committee was barred by section 10 of the Public Conduct (Scrutiny) Ordinance, 1959, and an order made by the President under Article 6(5) (b) of the Laws (Continuance in Force) Order, 1958, could

---

49. Zafar-ul-Ahsan V. The Republic of Pakistan, P.L.D. 1959 Lahore 879, per Shabir Ahmed J. at P. 882.

50. Ibid., at P. 883.

not be called in question in any Court. His Lordship further held :

> " Where the Sereening Committee and the President both had jurisdiction exercised, the jurisdiction was exercised on the grounds mentioned in the statute and it was not alleged that the Committee acted mala fide and used the statute for an ulterior purpose, the ouster was complete and the court had no jurisdiction to call in question the order made".[51]

The similar view was expressed in Muhammad Taiyab Ali V. The Province of East Pakistan[52] in which the High Court of East Pakistan held that under Article 6(4) of the Laws (Continuance in Force) Order, 1958, (as amended), the order of the appointing authority on the ground of misconduct removing a government servant from service on the findings of the Screening Committee could not be called in question in any court. The view expressed in Zafar-ul Ahsan's and Taiyab Ali's casees found support in Muhammad Sajjad Ali V. Pvorince of East Pakistan[53] and Mirza Mohammad Ali V. Commissioner, Lahore Division and others.[54] The High Court of East Pakistan in Muhammad Sajjad Ali V. Province of East Pakistan held :

> " The mere fact that the Screening Committees have been vested with certain powers of courts do not alter their character and convert them into judicial tribunals charged with the duty of proceeding judicially in the conduct of enquiries before them".[55]

The High Court of East Pakistan in M. Siddique V. M.A.Razzaque[56] held that Martial Law Regulation No. 61,[57] issued by the Chief Martial Law Administrator, vested Magistrates of the first class with additional

---

51. Zafar-ul-Ahsan V. The Republic of Pakistan, P.L.D. 1960 S.C. 113, per Munir C.J., at P. 120.
52. P.L.D. 1960 Dacca 842.
53. P.L.D. 1960 Dacca 854.
54. P.L.D. 1960 Lahore 641.
55. Muhammad Sajjad Ali V. Province of East Pakistan, Op.cit., per Hamoodur Rahman J. at P. 867.
56. P.L.D. 1960 Dacca 512.
57. For details see P.L.D.1959 Central Statute 91.

powers to try violation of Martial Law Regulations, and where a Magistrate lawfully and rightly exercised such jurisdiction to try a martial law case, the power of appeal was taken away and the power of revision was, therefore, also taken away. But where such Magistrate purported to act otherwise than under the Martial Law Regulations, he was an ordinary inferior criminal court and as such his order was revisable by the superior court. In this connection the decision of Aziz Din V. State[58] may be mentioned. In that case Shabir Ahmed J. held that Martial Law Order 10 by implication had taken away the right of a person convicted by an ordinary criminal court in the cases mentioned in that Order — though he might have had a right to appeal under the Code of Criminal procedure and no appeal would lie in such cases unless it could be held that Martial Law Order 10 was for some reason invalid.

In Bakhshi Rustam Ali V. Province of West Pakistan the question before the High Court of West Pakistan arose whether the Laws (Continuance in Force) Order, 1958, had kept alive the jurisdiction of the Court under the provisions of the abrogated Constitution of 1956, except in matters provided for in the Order itself. In this respect Kayani C.J. held :

> " Our answer ... is that the Laws (Continuance in Force) Order, 1958, had not kept alive the jurisdiction of this court to certificates under Article 158 of the late Constitution".[59]

The learned Chief Justice mentioned that the first four clauses of Article 2 of the Laws (Continuance in Force) Order, 1958, kept alive

---

58. P.L.D. 1959 Lahore 336.

59. Bakhshi Rustam Ali V. Province of West Pakistan, P.L.D. 1960 Lahore 957 per Kayani C.J. at P. 959.

four distinct matters " not withstanding the abrogation of the Constitution" and further held :

> " It is ... obvious that only these matters were intended to be kept alive. Of course, if the jurisdiction of the Supreme Court had depended entirely on the Constitution, our angle of vision would have been different, and we would have started with assumption that other parts of the President's Order are to be read subject to that consideration".[60]

In Pahlomal-Motiram V. Chief Land Commissioner[61] the most important question for consideration arose whether the order of the Chief Land Commissioner, West Pakistan, dated the 31st May, 1960 could be reviewed by the court under its writ jurisdiction. Wahiduddin J. interpreting paragraph 27 of the Martial Law Regulation No. 64[62] found that the jurisdiction of interference in this regard by any court including the High Court and Supreme Court had been expressly and completely ousted. His Lordship, however, referred to the Supreme Court decision in Zafar-ul-Ahsan V. Republic of Pakistan and observed in clear terms that where jurisdiction was barred by a statute, the courts nevertheless could question proceedings if they were taken mala fide or if the statute was used ' as a cloak' to cover an act which purported to be done under the provisions of the statute, but in fact fell beyond the scope of that statute. In interpreting Martial Law Orders, promulgated by the Martial Law Administrator, Zone B, Hamoodur Rahman J., as he then was, in Muhammad Afzal V. The Commissioner, Lahore Division, observed that the Martial Law Administrator Zone B, had clearly acted, by promulgating

---

60. Ibid., at P. 960.

61. P.L.D. 1961 Karachi 384.

62. West Pakistan Land Reforms Regulation, Gazette of Pakistan, Extraordinary, the 3rd March, 1959, P.L.D. 1959 Central Statutes 101.

Martial Law Orders, beyond his competence to the extent of repugnancy to existing laws.

> " ... They [Martial Law Orders] were never protected by the Laws (Continuance in Force) Order, 1958, and, therefore, their validity could in appropriate cases, always be questioned if that did not amount to questioning the Martial Law Order itself".[63]

From the above it is evident that the superior courts of Pakistan became very much aware of exercising their writ jurisdiction, though not in respect of enforcing fundamental rights, but in respect of any other purposes. Even where the jurisdiction of the courts were ousted by any Order, or where the court could not call in question any Martial Law Order or Regulation, the courts went to extend their powers by calling in question any order made under any Martial Law Order, or Martial Law Regulation, or by taking the advantage on the ground that the act done under a statute was mala fide.

3. Attempts of the Courts for Restoring Fundamental Rights : Application of the Principle of Natural Justice

It has been noticed in the section I of this chapter that fundamental rights, according to the view of the Supreme Court, were no longer a part of the law of the courtry after the Proclamation issued on the 7th October, 1958, abrogating the Constitution of 1956 and declaring Martial Law. Neither the Supreme Court nor the High Courts had under the new legal order the authority to issue any writ on the ground

---

63. Muhammad Afzal V. The Commissioner, Lahore Division, (XV) D.L.R. 1963 S.C. 298, per Hamoodur Rahman J. at P. 306.

of infraction of any of the fundamental rights. It has also been noticed that A.R.Cornelius J. had pronounced, in State V. Dosso and Province of East Pakistan V. Mehdi Ali Khan, dissenting views in respect of enforcement fo fundamental rights. According to the learned Judge, as it has already been stated, a number of these fundamental rights were essential human rights which inherently belonged to every citizen of a country governed in a civilised mode and hence they did not derive their entire validity from the fact of having been formulated in words and enacted in the Constitution of 1956. To deny them on the ground that the Constitution of 1956, in which they had been incorporated, had been abrogated meant denial of elementary or basic human rights.[64]

The dissenting views of Justice Cornelius, however, were of no effect. The majority view in Dosso's case held the field from October, 1958, till about August, 1961. In the meantime, Munir C.J. Shahab Uddin C.J. and Mr. Justice Amiruddin had retired and Cornelius C.J., S.A.Rahman, Fazle Akbor, Kaikaus and Hamoodur Rahman J.J. constituted the Supreme Court. Under the leadership of the new Chief Justice, the Bench showed, it is submitted, a change in its attitude towards the authoritarian regime vis-a-vis the liberties of the citizens and a new direction in the interpretation of Martial Law Orders, Martial Law Regulations and Presidential Ordinances was clearly visible. From that time on, the position of fundamental rights took a distinct dimension, different from that which was d[illegible] maintained in Dosso's case.

This was first apparent from the views expressed in Mian Iftikhar Uddin V. Muhammad Sarfraz,[65] an appeal from the judgment and order of the

64. State V. Dosso, Op. Cit., per Cornelius J. at P. 24
65. P.L.D. 1961 S.C. 585.

High Court of West Pakistan. In the High Court of West Pakistan Shabir Ahmed J. observed that the President was not debarred "from making new laws and making amendments in laws by means of Ordinances promulgated by him".[66] Following the decision in Dosso's case the learned Judge said that if the President, under the existing constitutional set-up, enacted a law on any subject, that law could not be declared to be void by courts on the ground that he had purported to exercise a power which did not vest in him. His Lardship held :

> " It is not permissible to invoke principles of natural justice with a view to having it declared that the Ordinance was not a good law. In cases where a party has not been given by a man-made law a right of being heard ... that law can under no binding provision of any law that can be enforced by courts be declared to be invalid on the ground that the party had been deprived of a right of audience which ... is granted to every being great or small under the principles of natural justice. In cases where a right of being heard has not been specifically denied by a valid law it may perhaps be open to courts to hold that principles of natural justice require that a right of audience should be presumed not to have been taken away".[67]

On appeal before the Supreme Court Kaikaus J. held :

> " We have ourselves found no difficulty in holding that the word 'governed' in Article 2 of the Laws (Continuance in Force) Order, 1958, includes the exercise of legislative power. In its ordinary connotation the government includes legislative, judicial and executive functions and the ordinary connetation should be adopted in the absence of any indication to the contrary".[68]

The learned Judge referred to Dosso's case, in which the Supreme Court had come to the conclusion that the word 'governed' referred to the

---

66. Muhammad Iftikhar and Arif Iftikhar V. Muhammad Sarfraz, P.L.D. 1961 Lahore 842, per Shabir Ahmed J. at P. 858.

67. Ibid., at P. 860.

68. P.L.D. 1961 S.C.585, Op.cit., per Kaikaus J. at P. 597.

structure and machinery of the government and did not include legislative functions, and observed that Dosso's case had been heard on the 13th and 14th October, 1958, and the subsequent Orders of the President making amendments in the Constitution as well as the fact that the President consistently made a distinction between the Orders and Ordinances were not before the learned Judges who decided the case.

> " In the face of subsequent material what was said in Dosso's case was not sufficient for departing from the ordinary meaning of the word governed".[69]

In respect of fundamental rights the learned Judge held :

> " We have considered whether we should determine in the present case the correctness of the proposition that fundamental rights do not exist now in Pakistan and we are of the opinion that we should reserve this consideration for a more appropriate occasion because the determination of this question will not affect the decision of the present case. Even if we were to hold that fundamental rights exist the case of appellants would not be materially advanced for two reasons".[70]

The first was that if the Chief Martial Law Administrator intended by Regulation 72[71] to extend immunity to action taken under all amendments

---

69. Ibid., at P. 598.

70. Ibid., at P. 600.

71. Regulation 72 provided that any thing done or intended to be doen under the Security of Pakistan Act, 1952, on or after the 10th October, 1958, should be deemed to be done under this Regulation, as if the provisions of the said Act as amended after the said day were for the time being in corporated in this Regulation, and should have effect accordingly. The Regulation further provided that no suit, prosecution, or other legal proceedings, should lie in any court against government or any person acting under the authority of government for anyting done or intended to be done under the said Act on or after the said day, and any such suit, prosecution or other legal proceedings pending before any such court would 'abate forthwith'.

    Gazettee of Pakistan, Extraordinary, 29th July, 1959 : P.L.D. 1959 Central Statutes 275.

made by the President, then action under such amendments would be protected even if they were in conflict with fundamental rights because the powers of the Chief Martial Law Administrator to legislate were not subject to any restrictions, and it was open to him to provide that action taken under any Ordinance of the President should not be liable to be questioned in any court of law. The second reason was that even if the court found the fundamental rights to exist, a further question would arise whether the Security of Pakistan (Amendment) Ordinance, 1961, which simply provided the procedure for confirming or setting aside sale, would in any way be inconsistent with any fundamental rights.

S. A. Rahman J. who delivered a separate judgment held :

> "In Dosso's case the actual decision of this Court was that fundamental rights as embodied in chapter II of 1956 constitution, were no longer part of the law of the land, after the promulgation of the Laws (Continuance in Force) Order, 1958. The question does not fall for determination in the instant case ... The question is an important one and not free from difficulty. We did not hear the learned Attorney-General fully on this aspect of the case and if Dosso's case requires re-consideration, in this respect, the question must be reserved for decision for a more appropriate occasion".72

From the observations of the learned judges it would seem that they were prepared, if necessary, to shift from the stand taken by the court in Dosso's case regarding fundamental rights. In view of the full appreciation of the impact of numerous instruments issued and promulgated by the regime since the decision in Dosso's case the court now would not accept without reservation the contention that fundamental rights had not existed at all. But as any finding by the court of the existence of fundamental rights would not change the

---

72. P.L.D. 1961 S.C. 585, Op.cit., per S.A. Rahman J. 604.

position in the instant case, the court would rather wait for an appropriate occassion to deliberate on the issue.

In this connection the decision in Muhammad Ayub Khuhro V. Pakistan may be mentioned. Interpreting Article 3(II) of the Laws (Continuance in Force) Order, 1958, the Supreme Court held :

> "Article 3(II) which prohibits the courts calling in question any Martial Law Regulation or Martial Law Order has ... to be read with Article 2. In plain language part (II) of Article 3 means no more than that a court cannot declare a Martial Law Regulation or a Martial Law Order as invalid or ultra vires. But a calling in question an order made under a Martial Law Order is entirely different; it may or may not amount to questioning the Martial Law Order itself, the former being prohibited the latter not".73

Similar view was expressed in Sher Muhammad V. Nasir Uddin in which Shabir Ahmed J. held that a person's assertion and even his honest belief that what he was doing fell within the four corners of a Martial Law Regulation or a Martial Law Order could not deprive any court of the jurisdiction to decide the question if it arose in a proceeding which the court had jurisdiction to take. The argument that the court would not issue any writ because action was being taken under a Martial Law Order could succeed only if the court had come to the conclusion that the action intended to be taken was authorised by Martial Law Regulation or Martial Law Order. If, on the other hand, the court had come to the conclusion that it was not so authorised the jurisdiction of the court to pass an appropriate order existed because."by merely asserting that action was being taken under a Martial Law Regulation or a Martial Law Order no one can deprive any court of its jurisdiction

---

73. Muhammad Ayub Khuhro V. Pakistan P.L.D. 1960 S.C. 237, per Munir C.J., at P. 248.

to decide whether or not it had jurisdiction in the matter".[74]

A discussion of Kazi Abdul Majid V Pakistan[75] may seem relevant to this point. In this case the petitioners approached the High Court of West Pakistan with a petition praying for issue of a writ of mandamus directing the police authorities not to investigate the case against them. It was objected to on behalf of the respondent that in accordance with the provisions of Article 2(5) of the Laws (Continuance in Force) Order, 1958, the High Court had no jurisdiction to interfere by way of issuing any writ. The ruling in Ebrahim Paper Mart V. Assistant Collector of Customs[76] was placed before the Court in order to show that it could interfere at a preleminary stage in any case, and a writ could be issued if it was found that there was an infringement of fundamental right and there was no lawful authority for taking any action. In this respect M.B.Ahmed J. held :

> " There are no fundamental rights now in existence, but the principle will apply where there is a patent infringement of the lawful right possessed by a citizen".[77]

The learned Judge also took into account the rulings in Muhammad Ayub Khuhro V. Pakistan and Sher Muhammad V. Nasir Uddin, and concluded :

> " I am ... of the opinion that an order purporting to have been made under Martial Law Regulation could be investigated into by this court and a sentence or order passed if it violated the principle of natural justice".[78]

---

74. Sher Muhammad V. Nasir Uddin, P.L.D. 1960 Lahore 583, per Shabir Ahmed, J. at P. 590.
75. P.L.D. 1960 Karachi 921.
76. P.L.D. 1956 Karachi 548.
77. Kazi Abdul Majid V. Pakistan, Op. cit., per M.B.Ahmed J, at P. 924.
78. Ibid., at P. 925.

Thus from the decisions given and observations made by the courts it would be evident that though the courts would not regard the fundamental rights enumerated in the Constitution of 1956 as still valid, they were prepared to grant relief to parties aggrieved by any action or order violative of the principle of natural justice and infringement of any essential human right recognised by every civilised legal system. This development vindicated, it is submitted, the position taken by Mr.Justice A. R. Cornelius in the all-important case of the State V. Dosso, that the basic human rights, universally recognised by every civilised legal systems, could not be said to have whittled away just because the Constitutio in which they were mentioned had been abrogated and made ineffective by a Proclamation.

4. Writs against Government

In the previous three sections of this chapter we have seen how the courts in Pakistan gradually assumed and extended their powers and jurisdictions for issuing writs. The courts were tactfully regaining their earlier powers and jurisdictions as provided for in the abrogated Constitution of 1956. In this section we shall see how the courts dealt with the question of issuing writs against the government. Articles 22 and 170 of the Constitution of 1956 empowered the Supreme Court and the High Courts to issue to any person or authority, "including in appropriate cases any Government", writs, directions and orders for enforcement of fundamental rights conferred by part II of the Constitution.

Article 2(4) of the Laws (Continuance in Force) Order, 1958, enabled the Supreme Court and the High Courts only to issue writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari and omitted the words "including in appropriate cases any Government" as appeared in Articles 22 and 170 of the Constitution of 1956 as well as in section 223-A of the Government of India Act 1935. The omission of the said words led to the controversy whether under Article 2(4) of the Laws (Continuance in Force) Order, 1958, the jurisdiction to issue a writ of mandamus against the Government had been taken away. A preliminary objection to this effect was raised in Sardar Muhammad Bakhtiyar Khan V. The Province of West Pakistan.[79]

In that case S.A.Mahmood J. referred to the decision of Pakistan V. Mehraj Uddin[80] where it was held that in determining the principles governing issue of writs, guidance should be sought from the principles obtaining in England and America, and observed that it was well established in England that a writ of mandamus could not be issued against the Crown. As a writ of mandamus could not be issued against the Crown in England and the words "including in appropriate cases any Government" were ommitted in Article 2(4) of the Laws (Continuance in Force) Order, 1958, it had become a issue for the court to decide whether writs against the Goverment could be issued or not.

His Lordship also referred to the decision in Yousuf Ali Chowdhury V. the Province of East Pakistan,[81] where a writ of mandamus issued to the

---

79. P.L.D. 1960 Karachi 89.
80. P.L.D. 1959 S.C. 147.
81. P.L.D. 1959 S.C. 467.
This was a certified appeal from a judgment of the High Court of East Pakistan at Dacca refusing to issue a writ of mandamus on the province of East Pakistan and the Secretary, Finance and Revenue Devpartment, Government of East Pakistan, directing them not to take possession of the appellant's Tepakhola Gohata and a daily bazar. In that case appeal was allowed and writ issued as prayed for.

Province of East Pakistan and the Secretary of Finance in the Revenue Department not to take possession of the petitioner's Tepakhola gohata and a daily bazar in pursuance of a notification published in the Dacca Gazette, and held :

> " The power of the High Court to issue writs in similar to and co-existance with the power of the Supreme Court under sub-section (4) of section 2 of the Laws (Continuance in Force) Order, 1958 ... we hold that the High Courts have the power to issue a writs of mandamus to the government under sub-section (4) of section 2 of the Laws (Continuance in Force) Order."[82]

In this connection, the decision of Muhammad Ibrahim V. The Government of Pakistan may be discussed, In that case Kaikaus J. held : that

> " There is no bar to the issuing of writ of mandamus against the government." [83]

His Lordship made a reference to Eshugbayi Eleko V. Officer Administering the Government of Nigeria and another[84] where a writ of habeas corpus had been asked for against the Governor of Nigeria and the writ was granted. That case was one of habeas corpus but their Lordships had said that the executive could not interfere with the "liberty or property" of a subject except on the condition that he could support the legality of his action before a court of justice. His Lordship also referred to the Queen V. the Secretary of State for War[85] in which a writ of mandamus was applied for against the Secretary of State for War in order to compel him to carry out the terms of a warrant for payment of salary and allowances. The application was dismissed not on the ground that a writ

---

82. Muhammad Bakhtiyar Khan V. The Province of West Pakistan, Op.cit., per S.A.Mahmood J. at P. 91.

83. Muhammad Ibrahim V. The Government of Pakistan, P.L.D. 1960 Lahore 1073, per Kaikaus J. at P. 1086.

84. A.I.R. 1931 P.C. 248.

85. (1891) 2 Q.B. 326.

did not lie against the Secretary of State for War, but on the ground that there was no legal duty imposed on him to pay the salary and allowances. Further His Lordship referred to two cases of Secretary of State V. Oberion[86] and Rex V. Minister of Health[87] where writs were issued against the Government.

Taking into consideration the decisions of these cases the learned Judge observed that there was inconsistency involved in the proposition that a writ would not issue to the government, for it was accepted that writ could issue to all public officers who were carrying on executive functions as "delegatee" of executive power. In that case there should not be any particular reason why a writ should not issue against the government. In support of his argument His Lordship referred to Muhammad Bakhtiyar Khan V. The Province of West Pakistan and Yousuf Ali Chowdhury V. Province of East Pakistan in which cases writs were issued against Government, and concluded :

> " We are of the opinion that the continuance of Laws Order, was not intended to affect the writ jurisdiction of the court except with respect to the authorities mentioned therein".[88]

In Pakistan V. A. Hamid it was contended on behalf of the appellant that no writ of any kind could issue to any government in Pakistan since the making of the Laws (Continuance in Force) Order, 1958, which varied the constitutional provisions on the subject of writs by omitting words which empowered the superior courts to issue writs "in appropriate cases to any Government". But Cornalius J. as he then was, rejected the contention

---

86. Writ of habeas corpus.(1923) A.C. 663.
87. Writ of habeas corpus. (1930) 2 K.B. 98.
88. Muhammad Ibrahim V. Government of Pakistan. Op.cit., per Kaikaus J. at P. 1086.

and held that

> " For the purpose of Shaikh Abdul Hamid, it would be entirely sufficient that the writ should be directed to the executive head on the administrative side of the Ministry in which he is serving, namely the Ministry of Defence".[89]

In Pakistan V. Muhammad A. Hayat two arguments had been advanced in support of the proposition that a court could not issue writs to the Government. The first was that a writ in England could not be issued against the Crown and, therefore, it could not be issued to the Government of Pakistan whose position in this respect was similar. The second was that on a proper interpretation of Article 2 of the Laws (Continuance in Force) Order, 1958, which was now the source of the jurisdiction of the High Courts and the Supreme Court to issue writs, the jurisdiction to issue a writ of mandamus against the Government had been taken away. In respect of the first argument Kaikaus Jr held :

> " On the fact that in England a mandamus cannot issue to the Crown no argument can be based that it can not issue to the Government of this country. The constitutional status of the Crown is wholly different from that of the Government of Pakistan. The Crown of England occupies a unique position. As stated in Dicey's Law of the Constitution (P.529 of 1950 edition), it is a fundamental rule of English law that no action can be brought against the Crown, no process of any kind can be issued by the courts against the Crown. Another recognised principle is that 'the Crown can do no wrong'. The Crown is not responsible for its acts to anybody or authority and no legal right can be said to exist in any person against the Crown".[90]

The learned Judge then observed that nothing of what was stated above applied to the government of this country. The Government was a

---

89. Pakistan V. A. Hamid, P.L.D. 1961 S.C. 105, per Cornelies J. at P. 112.

90. Pakistan V. Muhammad A. Hayat, P.L.D. 1962 S.C. 28, per Kaikaus J., at P. 29.

creature of law with limited and defined powers. Its acts in relation to the citizens of the state were subject to scrutiny and control by the courts. It was burdened with legal duties in favour of the citizen which could be enforced in a court of law. If it acted in excess of its powers the courts could grant appropriate relief, and if it failed to perform its duties it would be obliged to perform them. Even a civil court of the lower jurisdiction could issue an injunction to the Government to perform the duties imposed on it by law.[91] His Lordship pointed out that although the Crown in England was not subject to writ jurisdiction, all public authorities even though they were servants of the Crown or functionaries of the executive government were subject to such jurisdiction, and mandamus could be issued against Ministers or other Crown servants to enforce statutory duties. In order to support his view the learned Judge quoted from Philip's 'Constitutional Law', and Wade's 'Constitutional Law' where the decisions of the Queen V. Secretary of State for War[92], the Queen V. Lords of Treasury[93], and the Queen V. Special Commissioners for Income Tax[94], were discussed for the purpose of establishing the fact that the writ of mandamus was not available against the Crown and any servant of the Crown to enforce a duty owed exclusively to the Crown. His Lordship referred also to the decisions in Rex V. Minister of Health[95], Secretary of State V. Oberion[96] and Eshugbayi Eleko V. Officer Administrating the Government of Nigeria and another[97] and observed:

---

91. Ibid., at P. 30.
92. See Supra.
93. (1872) L.R. 7 Q.B. 387.
94. (1888) 21 Q.B.D. 313.
95. See Supra.
96. See Supra.
97. See Supra.

> " To the Crown not only a mandamus but no other writ nor an injunction, or process could issue. The learned Attorney-General is not prepared to urge that no writ lies against the Government of Pakistan at all, his contention being only a mandamus does not lie. He is not prepared to contend that a writ of certiorari where the government exercise a quasi-judicial function or a habeas corpus would not lie as against the government".[98]

In respect of second argument His Lordship held that this contention could be met by the fact that in Article 2(5) of the Laws (Continuance in Force) Order, 1958, the persons against whom writs could not issue were specifically mentioned. If the intention was that the government should not be subject to writ jurisdiction it could have been mentioned in Article 2(5) of the said Order. The intention was to leave the writ jurisdiction intact, and not to add to or take away from it. That was why while the words "including in appropriate cases any Government" were omitted, no reference to the Government appeared in Article 2(5) of the Order.[99]

The learned Judge put forward another argument which made the position all the more clear.

> " ... The learned Attorney-General does not contend and in fact, cannot contend, that no writ can be issued to the government at all. He does not have any objection to the issue of writs of certiorari, prohibition, and habeas corpus, the only attack being with respect to the power to issue mandamus. But if the intention in omitting the relevant words contained in Article 170 [of the Constitution of 1956] was that the government was not to be subjected to writ jurisdiction, the result would be that no writs at all could be issued. It is not explained how the power to issue writs other than mandamus could exist against the government, if the interpretation put forward by the Arrotney-General is accepted".[1]

---

98. Pakistan V. Muhammad A. Hayat, Op.cit.,at P. 33.

99. Ibid., at P. 34.

1. Ibid., at PP. 34-35.

During the initial period of Martial Law the courts, it would appear, were too conscious about what had happened on the night of the 7th October, 1958. They gave legal recognition to the new regime and accepted the position that the Constitution of 1956 with all its provisions including the fundamental rights contained therein had been abrogated and as such was no longer enforceable. But gradually the superior courts started asserting their jurisdiction and power in the exercising their extra-ordinary power in the form of issuing writs against public authorities including government. Recognising the absolute law-making power of the President and Chief Administrator of Martial Law, the superior courts were successful in keeping the government and public authorities within the legal bounds on the basis of legal instruments issued by competent authorities.

Chapter - VI

Conclusion

The Martial Law, proclaimed on the 7th October, 1958 was withdrawn on the 8th June, 1962, when the Constitution of 1962, promulgated by President Ayub Khan in pursuance of the 'mandate' given to him by the people of Pakistan through the Basic Democrats, came into effect. During the Martial Law regime of forty-four months, President Ayub had the advantage of running the administration of the country without any constitutional and legal limitations upon his authority. Martial Law Orders, Martial Law Regulations and Ordinances issued by him were the laws of the country, which, unlike the ordinary law, could not be challenged in the courts.[1]

The Chief Administrator of Martial Law thought that he had to justify in some ways his seizure of power by 'unconstitutional means', both to the Pakistani and to the outside world. First, he had to establish clearly that the previous regimes had brought Pakistan to a disastrous condition; secondly, he had to legitimise his unconstitutional government by the Basic Democrats; thirdly, he had to show that he had not only saved Pakistan but could also get the country moving on the high road of political stability, and social and economic reforms.[2] For this a few days after assuming the presidency, General Ayub expressed his conviction that martial law methods were necessary to bring about a social change in the country.[3]

---

1. Mushtaq Ahmed, Op.cit., at P. 192.
2. K.B.Sayeed, Op.cit., at P. 93.
3. Joseph Minattur, Op.cit., at P. 73.
   In this respect Ayub himself wrote :

   "The whole pattern of social and political life in the country had to be re-organised on the democratic principles so as to ensure the participation of the people in the affairs of the country in a constructive and meaningful way".
   Ayub Khan, Friends Not Masters, at PP. 79-80.

The Martial Law regime was moderate inasmuch as it refrained from violence against the custodians of the old order. The policies, it pursued, were formulated without reference to public opinion for the ascertainment of which there was no machinery. The policies, however, did not possess a military rigidity but had a civilian flexibility about them, indicating a desire to respect public opinion on certain issues and accommodate economic, professional and social interests on others.[4]

It would, therefore, seem that although during the first days of the military rule an all-out preparation was made to conduct "a ruthless punitive operation";[5] in practice, the pre-existing civil administration was never disturbed. The civil administrators and courts were allowed to perform their normal function subject, however, to restrictions imposed by Martial Law Authorities. The initial preparation was probably made to stifle any resistance but as there was no opposition to the regime " the Army soon withdrew into the background, imposing its will mainly through civilian agencies".[6]

The Presidential Proclamation of the 7th October, 1958, however, caused an uncertainty in legal circle about the existence and status of the constitutional offices and couts established under the provisions of the abrogated Constitution. This uncertainty was attempted to be removed by the promulgation of the Laws (Continuance in Force) Order, 1958, on the 10th October, and the Order was given retrospective effect coinciding with the date of the Proclamation. The status and jurisdiction

---

4. Mushtaq Ahmed, Op.cit., at P. 193.
5. S.A.de Smith, The New Commonwealth and Its Constitutions, at P. 221.
6. Ibid.

of the superior courts were restored with all powers as provided for in the late Constitution except that they were debarred from calling in question any Martial Law Orders or Martial Law Regulations issued by the Chief Administrator of Martial Law or any person authorised by him.

In such circumstances, within three weeks of the Proclamation, the Supreme Court of Pakistan was called upon to pronounce on the legitimacy of the regime itself, to determine the position of the abrogated Constitution and to decide whether the fundamental rights incorporated in that Constition were still enforceable.[7] Mohammad Munir C.J., who gave the principal judgment of the Court, deliberated fully on the questions and considering the 'political reality' of the situation gave the regime legal recognition and accepted the Laws (Continuance in Force) Order, as the basic law. According to the Court the Order restored the Constitution of 1956 in "structure and outline" only and held that it had lost its fundamental nature making its provisions susceptible to alteration, modification repeal etc. by the Order of the President and Orders and Regulations of the Chief Administrator of Martial Law. As for the fundamental rights contained in the late Constitution the Court held that with the abrogation of the Constitution itself, these rights were no longer in existence and hence they were not enforceable. This was an extra-ordinary and historic judgment where the court preferred 'political reality' to strict legality, and caused a mixed reaction among the constitutional lawyers and jurists.

It must, however, be noted that the time, when the Court decided the cases of State V. Dosso and the Province of East Pakistan V. Mehdi Ali Khan, was critical and any decisions other than the way they were

---

7. State V. Dosso, See Supra.

decided, could perhaps, provoke the regime to extreme action. By recognising the regime and the new legal order the court became an essential part of the new order. This position was fully utilised by the court in liberally interpreting the Martial Law instruments for the advantage and benefit of the citizens. This was a gradual process and the change in attitude of the courts was distinctly visible in their subsequent judgments.

Though it was held that the fundamental rights contained in the abrogated Constitution were no longer in existence, the court indirectly began to enforce those rights not on the basis that they were written on the Constitution, but on the plea that they were essential human rights recognised by every civilised legal system. The principle of natural justice was also invoked to uphold basic rights and to grant relief to the citizens against government action.[8]

The court also used its writ jurisdiction recognised by the laws (Continuance in Force) Order to control the apparently unlimited power exercised by the officials under the authority of Martial Law, and to provide remedy for the grievances of the people.[9] The claim of the regime's law-officers that 'Government' was immune from the purview of writs because of the omission of the words "including in appropriate cases any Government" in the relevant provision of the Law (Continuance in Force) Order, was turned down by the court.[10] This was a courageous

---

8. Mian Iftikhar Uddin V. Muhammad Sarfraz, see Supra;; Kazi Abdul Majid V. Pakistan, see Supra.

9. State V. Dosso, see Supra.; Election Commissioner, Pakistan V. Sajjid Ali Khan, see Supra.; Chowdhury Manzoor Elahi V. The State, see Supra.; Zahid Umar and Company V. Chief Secretary, West Pakistan, see Supra.; Gulab Din V. A.T. Shauker, see Supra.

10. Sardar Muhammad Bakhtiyar Khan V. The Province of West Pakistan, see Supra Yousuf Ali Chowdhury V. The Province of East Pakistan, see Supra.; Muhammad Ibrahim V. The Government of Pakistan, see Supra.; Pakistan V. A. Hamid, see Supra.; Pakistan V. Muhammad A. Hayat, see Supra.

stand taken by the court which substantially restrained an authoritarian regime with absolute power and put it under a reasonable extent of judicial control.

It is true that the court avoided confrontation with the Martial Law Authority and did not entertain any direct challenge to the regime. But where there was any scope of liberal interpretation due either to the vagueness of language or inconsistency between Martial Law instruments the court would not hesitate to grant relief to the citizens. The regime, by getting its legal validity and legitimacy from the Supreme Court at the initial stage, felt, perhaps, unbecoming on its part to disown and flout the authority of the judiciary, but for whose recognition it would remain an illegal regime althrough.

The Proclamation of the 7th October, 1958, abrogating the Constitution of 1956 and declaring Martial Law throughout the country was, no doubt, politically unwarranted and legally unjustifiable. The late Constitution lost its fundamental nature, and fundamental rights contained therein did not legally exist. But the Pakistan judiciary played an important role in indirectly enforcing the fundamental rights and keeping the regime with absolute power and authority under a sort of judicial control within the frame work of the new legal order. Taking these peculiar factors into consideration one could be tempted, it is submitted, to call the period of Martial Law between October, 1958 and June, 1962, as the period of Martial Law Constitutionalism.

Appendix - I

Proclamation

[Dated 7th October, 1958, made by the President of Pakistan]

No. F. 81/Press/58, 25th October, 1958, Gazette, 31st October 1958.— The following Proclamation made by the President at 10.30 p.m. on the 7th day of October 1958, was published for general information :-

" For the last two years, I have been watching, with the deepest anxiety the ruthless struggle for power, corruption, the shameful exploitation of our simple, honest, patriotic and industrious masses, the lack of decorum and the prostitution of Islam for political ends. There have been a few honourable exceptions. But being in a minority, they have not been able to assert their influence in the affairs of the country.

" These despicable activities have led to a dictatorship of the lowest order. Adventurers and exploiters have flourished to the detriment of the masses and are getting richer by their nefarious practices.

" Despite my repeated endeavours, no serious attempt has been made to tackle the food crisis. Food has been a problem of life and death for us in a country which should be really surplus. Agriculture and land administration have been made a hand maiden of politics so that in our present system of government, no political party will be able to take any positive action to increase production. In East Pakistan, on the other hand, there is a well organized smuggling of food, medicines and other necessities of life. The masses there suffer due to the shortages so caused in, and the consequent high prices of, these commodities. Import of food has been a constant and serious drain on our foreign exchange earnings in the last few years, with the result that the Government is constrained to curtail the much needed internal development projects.

" Some of our politicians have lately been talking of bloody revolution. Another type of adventurers among them think it fit to go to foreign countries and attempt direct aligament with them which can only be described as high treason.

" The disgraceful scene enacted recently in the East Pakistan Assembly is known to all. I am told that such episodes were common occurrences in pre-partition Bengal. Whether, they were or not, it is certainly not a civilized mode of procedure. You do not raise the prestige of your country by beating the Speaker, killing the Deputy Speaker and desecrating the National Flag.

" The mentality of the political parties has sunk so low that I am unable any longer to believe that elections will improve the present chcatic internal situation and enable us to form a strong and stable Government capable of dealing with the innumerable and complex problems facing us today. We cannot get men from the Moon. The same group of people who have brought Pakistan on the verge of ruination will rig the elections for their own ends. They will come back more revengeful, because I am sure that the elections will be contested, mainly, on personal, regional and sectarian basis. When they return, they will use the same methods which have made a tragic farce of democracy and are the main cause of the present widespread frustration in the country. However much the administration may try, I am convinced, judging by shifting loyalties and the ceaseless and unscrupulous scramble for office, that election will neither be free nor fair. They will not solve our difficulties. On the contrary, they are likely to creat greater unhappiness and disappointments leading ultimately to a really bloody revolution. Recently, we had elections for the Karachi Municipal Corporation. Twenty per cent. of the electorate exercised their votes, and out of these, about 50 per cent. were bogus votes.

" We hear threats and cries of civil disobedience in order to retain private volunteer organisations and to break up One-Unit. These disruptive tendencies are a good indication of their patriotism and the length up to which politicians and adventurers are prepared to go to achieve their parochial aims.

" Out foreign policy is subjected to unintelligent and irresponsible criticism, not for patriotic motives, but from selfish view of points often by the very people who were responsible for it. We desire to have friendly relations with all nations, but political adventurers try their best to create bad blood and misunderstanding between us and countries like the U.S.S.R., the U.A.R., and the Peoples Republic of China. Against India, of course, they scream for was, knowing full well that they will be nowhere near the firing line. In no country in the world, do political parties treat foreign policy in the manner it is done in Pakistan. To dispel the confusion so caused, I categorically reiterate that we shall continue to follow a policy which our interests and geography demand and that we shall honour all our international commitments, which, as is well known, we have undertaken to safeguard the security of Pakistan and, as a peace loving nation, to play our part in averting the danger of war from this troubled world.

" For the last three years, I have been doing my utmost to work the Constitution in a democratic way. I have laboured to bring about coalition after coalition, hoping that it would stabilise the administration and that the affairs of the country would be run in the interests of the masses. My detractors, in their dishonest ways, have on every opportunity, called these attempts as palace intrigues. It has become fashionable to put all the blame on the President. A wit said the other day, "If it rains too much it is the fault of the President and if it does not rain it is the fault of the President". If only I alone were

concerned , I would go on taking these fulminations with the contempt they deserve. But the intention of these traitors and unpatriotic elements is to destroy the prestige of Pakistan and the Government by attacking the Head of the State. They have succeeded to a great extent, and if this state of affairs is allowed to go on, they will achieve their ultimate purpose.

" My appraisal of the internal situation has led me to believe that a vast majority of the people no longer have any confidence in the present system of Government and are getting more and more disillusioned and disappointed and are becoming dangerously resentful of the manner in which they have been exploited. Their resentment and bitterness are justifiable. The leaders have not been able to render them the service they deserve and have failed to prove themselves worthy of the confidence the masses had reposed in them.

" The Constitution which was brought into being on 23rd, March, 1956, after so many tribulations, is unworkable. It is full of dangerous compromises so that Pakistan will disintegrate internally if the inherent malaise is not removed. To rectify them, the country must first be taken to sanity by a peaceful revolution. Then, it is my intention to collect a number of patriotic persons to examine our problems in the political field and devise a Constitution more suitable to the genius of the Muslim people. When it is ready, and at the appropriate time, it will be submitted to the referendum of the people.

" It is said that the Constitution is sacred. But more sacred than the Constitution or anything else is the country and the welfare and happiness of its people. As Head of the State, my foremost duty before my God and the people is the integrity of Pakistan. It is seriously

thratened by the ruthlessness of traitors and political adventurers whose selfishness, thirst for power and unpatriotic conduct cannot be restrained by a government set up under the present system. Not can I any longer remain a spectator of activities designed to destroy the country. After deep and anxious thought, I have come to the regrettable conclusion that I would be failing in my duty if I did not take steps, which in my opinion, are inescapable in present conditions, to save Pakistan from complete disruption. I have, therefore, decided that :-

(a) The Constitution of the 23rd, March, 1956 will be abrogated.

(b) The Central and Provincial Governments will be dismissed with immediate effect.

(c) The National Parliament and Provincial Assemblies will be dissolved.

(d) All political parties will be abolished.

(e) Until alternative arrangements are made, Pakistan will come under Martial Law. I hereby appoint General Muhammad Ayub Khan, Commander-in-Chief, Pakistan Army, as the Chief Martial Law Administrator and place all the Armed Forces of Pakistan under his command.

" To the valiant Armed Forces of Pakistan, I have to say that "having been closely associated with them since the very inception of Pakistan, I have learned to admire their patriotism and loyalty. I am putting a great strain on them. I fully realize this, but I ask you, Officers and men of the Armed Forces, on your service depends the future existence of Pakistan as an independent nation and a bastion in these parts of the Free World. Do your job without fear or favour and may God help you."

" To the people of Pakistan I talk as a brother and a fellow compatriot. Present action has been taken with the utmost regret but I have had to do it in the interests of the country and the masses, finer men than whom it is difficult to imagine. To the patriots and the law abiding,I promise you will be happier and freer. The political adventurers, the smugglers, the black-marketeers, the hoarders, will be unhappy and their activities will be severely restricted. As for the traitors, they had better flee the country if they can and while the going is good."

Appendix - II

Proclamation of Martial Law

Government of Pakistan Notification No. 977/58 dated 7th October, 1958. Gazette Extraordinary, 15th. October, 1958

1. Whereas I adjudge it essential for national requirements to exercise jurisdiction within the international boundaries of Pakistan, I, the Supreme Commander of the Armed Forces of Pakistan, do hereby give notice as follows.

2. Martial Law Regulations and Orders will be published in such manner as is conveniently possible. Any person contravening the said Regulations and Orders shall be liable under Martial Law to the panalties stated in the Regulations.

3. The said Regulations may prescribe special penalties for offences under the ordinary law.

4. The said Regulations may appoint special Courts for the trial and punishment of contravention of the said Regulations and Orders and of offences under the ordinary law.

Mohammad Ayub Khan, HP,HJ,
General,
Supreme Commander and Chief Martial Law
Administrator in Pakistan.

Appendix - III

Laws (Continuance in Force) Order, 1958

President's Order (Post-Proclamation)

No. 1 of 1958

[10th October 1958, Gazette, Extraordinary, 10th October 1958]

In pursuance of the Proclamation of the 7th October 1958, and of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Order :-

1. ——(1) This Order may be called the Laws (Continuance in Force) Order, 1958.

(2) It shall come into force at once and be deemed to have taken effect immediately upon the making of the Proclamation of the seventh day of October, 1958, hereinafter referred to as the Proclamation.

(3) It extends to the whole of Pakistan.

2.——(1) Notwithstanding the abrogation of the Constitution of the 23rd March 1956 hereinafter referred to as the late Constitution, by the Proclamation and subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law the Republic, to be known henceforward as Pakistan, shall be governed as nearly as may be in accordance with the late Constitution.

(2) Subject as aforesaid all Courts in existence immediately before the Proclamation shall continue in being and, subject further to the Provisions of this Order, in their powers and jurisdictions.

(3) The law declared by the Supreme Court shall be binding on all Courts in Pakistan.

(4) The Supreme Court and the High Courts shall have power to issue the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari.

(5) No writ shall be issued against the Chief Administrator of Martial Law, or the Deputy Chief Administrator of Martial Law, or any person exercising powers or jurisdiction under the authority of either.

(6) Where a writ has been sought against an authority which has been succeeded by an authority mentioned in the preceding clause, and the writ sought is a writ provided for in clause (4) of this Article, the Court notwithstanding that no writ may be issued against an authority so mentioned may send to that authority its opinion on a question of law raised.

(7) All orders and judgments made or given by the Supreme Court between the Proclamation and the promulgation of this Order are hereby declared valid and binding on all Courts and authorities in Pakistan, but saving those orders and judgments no writ or order for a writ issued or made after the Proclamation shall have effect unless it is provided for by this Order, and all applications and proceedings in respect of any writ which is not so provided for shall abate forthwith.

3. -- No Court or person shall call or permit to be called in question :-

(i) the Proclamation;

(ii) any Order made in pursuance of the Proclamation or any Martial Law Order or Martial Law Regulation;

(iii) any finding, judgment or order of a Special Military Court or a Summary Military Court.

4.——(1) Notwithstanding the abrogation of the late Constitution, and subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law, all Laws, other than the late Constitution, and all Ordinances, Orders-in-Council, Orders other than Orders made by the President under the late Constitution, such Orders made by the President under the late Constitution as are set out in the Schedule to this Order, Rules, Bye-laws, Regulations, Notifications, and other legal instruments in force in Pakistan or in any part thereof, or having extraterritorial validity immediately before the Proclamation, shall so far as applicable and with such necessary adaptations as the President may see fit to make, continue in force until altered, repealed or amended by competent authority.

(2) In this Article a law is said to be in force if it has effect as law whether or not the law has been brought into operation.

(3) No Court shall call into question any adaptation made by the President under clause (I).

5. ——(1) The powers of a Governor shall be those which he would have had, had the President directed him to assume on behalf of the President all the functions of the Government of the Province under the provisions of Article 193 of the late Constitution and such powers of making Ordinances as he would have had and within such limitations had Article 106 and clauses (1) and (3) of Article 102 of the late Constitution been still in force.

(2) In the exercise of the powers conferred by the previous clause the Governor shall act subject to any directions given to him by the President or by the Chief Administrator of Martial Law or by any person having authority from the Chief Administrator.

(3) Nothing in this Article shall prejudice the operation of any Regulation made by the Chief Administrator of Martial Law or by any person having authority from the Chief Administrator of Martial Law to make Martial Law Regulations and where any Ordinance or any provision thereof made under clause (1) of this Article is repugnant to any such Regulation or part thereof the Regulation or part shall prevail.

6. All persons who immediately before the Proclamation were in the service of Pakistan as defined under clause (1) of Article 218 of the late Constitution and those persons who immediately before the Proclamation were in office as Governor, Judge of the Supreme Court or a High Court, Comptroller and Auditor-General, Attorney-General, or Advocate-General shall continue in the said service or in the said office on the same terms and conditions and shall enjoy the same privileges, if any.

7. Any provision in any law providing for the reference of a detention order to an Advisory Board shall be of no effect.

Schedule

1. The Karachi Courts Order, 1956.
2. The Federal Capital (Essential Supplies) Order, 1956.
3. The Adaptation (Security Laws) Order, 1956 (except so far as concerns the reference of a detention order to an Advisory Board).
4. The Stamp Act (Amendment) Order, 1956.
5. The Essential Services (Maintenance Adaptation) Order, 1956.
6. The Hoarding and Black Market Order, 1956.

7. The Karachi Courts (Amendment) Order, 1956.

8. The Karachi Rent Restriction Act (Amendment) Order, 1956.

9. The Requisitioned Land (Continuance of Powers) Order, 1956.

10. The University of Karachi (Amendment) Order, 1956.

11. The High Courts (Bengal)(Adaptation) Order, 1956.

12. The Karachi Development Authority Order, 1957.

13. The Karachi Development Authority (Amendment) Order, 1958.

14. The High Court Judges (Daily Allowances) Order, 1958.

15. The Federal Capital (Powers and Duties of the Chief Commissioner) (Declaration) Order, 1958.

16. The Federal Capital (Essential Supplies) (Amendment) Order, 1958.

17. The Gwadur (Government and Administration) Order, 1958 except clause (2) of Article 2.

18. The Gwadur (Government and Administration) (Application of Laws) Order, 1958.

Appendix - IV

Typical Martial Law Regulations (C.M.L.A.'s)

M.L.R. No. 1

The whole of Pakistan will be considered as the Martial Law Area.

(a) The Martial Law Area will be divided into the following Zones :-

(i) Zone A —— Karachi Federal Area including Malir.

(ii) Zone B —— Whole of West Pakistan less Zone A.

(iii) Zone C —— Whole of East Pakistan.

(b) The following Commanders of the Pak Military Forces are hereby appointed as Administrators of Martial Law in their respective Zones :-

(i) Zone A —— Major General Malik Sher Bahadur.

(ii) Zone B —— Lieut.General Mohammad Azam Khan.

(iii) Zone C —— Major General Mohd. Umrao Khan.

(c) Orders under these Regulations and additional Regulations hereinafter known as Martial Law Orders and Martial Law Regulations may be issued by me or by any Administrator or by any other officer authorised by me.

M.L.R. No. 1-A

(a) Special Courts.— Special Courts of criminal jurisdiction shall be of the following classes :-

(i) Special Military Courts.

(ii) Summary Military Courts.

Special Military and Summary Military Courts shall have the power to try and punish any person for contravention of Martial law Regulations or Orders or for offences under the ordinary law.

The criminal courts as by law established shall have power to try and punish any person for offences under the ordinary law and for contraventions of Martial Law Regulations or Orders.

(b) Special Military Courts. — An administrator of Martial Law may convene Special Military Courts in his area of administation for the trial of any offence committed in any area to which these Regulations extend; provided that the term ordinary law as above mentioned shall in each case be held to include the provisions of any special law for the time being in force in that area.

Subject to the provisions of these regulations a Special Military Court shall be constituted in the same manner, and shall exercise the same powers and follow the same procedure as a Field General Court Martial convened under the Pakistan Army Act, 1952 and the provisions of that act and of the rules made thereunder shall apply to, and govern all such proceedings; provided that :-

(i) Any person exercising the powers of a Magistrate of the first class or of a sessions judge may be appointed a member of the court;

(ii) The Court may pass any sentence authorised by law or by these Regulations;

(iii) All sentences of death shall be reserved for confirmation by an appointed Administrator of Martial Law, irrespective of his rank.

(c) Summary Military Courts.— An Administrator of Martial Law may, by general or special order, empower any magistrate of the first class or

any military or naval or air force officer provided that he has been specially selected for this particular duty to hold a Summary Military Court in his area of administration for the trial of any offence committed in that area.

Subject to the provisions of these Regulations a Summary Military Court shall exercise the same powers and follow the same procedure as a Summary Court Martial held under the Pakistan Army Act, 1952 and the provisions of that act and the rules made thereunder shall apply to, and govern, all such proceedings, provided that;

(i) No other officer shall be required to attend such proceedings;

(ii) The court shall not be required no record more than a memorandum of the evidence or to frame formal charges;

(iii) The court may try any offence without reference to superior authority;

(iv) The court may pass any sentence authorised by law or by these Regulations except death, transportation, or imprisonment exceeding one year or whipping exceeding 15 stripes;

(v) The proceedings of every Summary Court whall without delay be forwarded for review to the Administrator of Martial Law in the area in which the trial was held.

An Administrator of Martial Law may by general or special order, give directions as to the distribution among the Summary Military Courts of cases to be tried by them.

M.L.R. No. 4

Any matter touching Martial Law which is intended to be announced, published and telegraphed through radio stations, printing presses and telegraph offices in Pakistan respectively, by any person other than by an officer of Armed Forces authorised by me, will be subject to pre-censorship by the respective Martial Law Administrators. Omission to comply with this regulation is punishable. Maximum sentence 7 years R.I.

M.L.R. No. 6

If with intent to help the recalcitrants any person does any act which is designed or is likely to give assistance to the operations of the recalcitrants, or to impede operations of Pakistan Forces, or to endanger life, he shall suffer death and no less punishment.

M.L.R. No. 13

Any person who attacks, resists or injures, or causes to be attacked resisted, or injured any member of the forces, whether civil or military under my command or any civil official, shall be punishable, Maximum punishment death.

M.L.R. No. 16

No. person shall :-

(a) Disobey or neglect to obey any Martial Law order duly made in accordance with these regulations; or

(b) Obstruct, impede or interfere in any manner with any person who is acting in the execution of his duty under Martial Law; or

(c) Make any false statement which he knows or believes to be false in order to obtain a pass or permit issued under Martial Law.

Maximum punishment 14 years R.I.

M.L.R. No. 20

No person shall commit any act or be guilty of an omission or made a speech :

(a) which is to the prejudice of good order or the public safety; or

(b) which is calculated to mislead or hamper movements or of imperil the success of or tamper with the loylty of forces under my command.

Maximum punishment 10 years R.I.

M.L.R. No. 21

No person or syndicate or firm shall heard foodgrain in violation of existing orders and any orders issued under these Regulations. Maximum punishment death.

M.L.R. No. 24

No one by word of mouth, or in writing or by signals, or otherwise will spread reports, calculated to create alarm or despondency amongst the public, or calculated to create dissatisfaction towards the Armed Forces and Police, or any member thereof. Maximum punishment 14 years R.I.

M.L.R. No. 28

Child lifting and abduction of women is an offence. Maximum punishment death.

Bibliography

Abedin, Nazmul — Local Administration and Politics in Modernising Societies: Bangladesh and Pakistan, Dacca : Oxford University Press, 1973.

Ahmad, Mushtaq — Government and Politics in Pakistan, Karachi : Pakistan Publishing House, 1963.

Ahmed, Abul Mansur — Fifty Years of Politics as I saw it (Bengali), Dacca : Nawraz Kitabistan, 1975.

_____ — End of a Betrayal and Restoration of Lahore Resolution, Dacca : Khosroz Kitab Mahal, 1975.

Ahmed, Kamruddin — A Social History of Bengal, Dacca : Progoti Publishers, 1970.

Ahmed, Jamil Uddin (ed) — Speeches and Writings of Mr. Jinnah, Lahore : Ashraf, 1964.

Ahsan, Syed Qumrul — Politics and Personality in Pakistan, Dacca : Mohiuddin and Sons, 1969.

Akanda, S.A. — East Pakistan and Politics of Regionalism (Unpublished Ph.D. Thesis), University of Denver, 1970.

Ali, Choudhury Mohammad — The Emergence of Pakistan, New York : Columbia University Press, 1967.

Almond, G.A. and Coleman, J.S. — The Politics of the Developing Areas, Princeton : Princeton University Press, 1960.

Beg, Aziz — Before and After Revolution, Rawal Pindi : Pakistan Partiotic Publications, 1962.

Brohi, A.K. — Fundamental Law of Pakistan, Lahore : Malik Din Mohammad, 1958.

Bolitho, Hector — Jinnah : The Creator of Pakistan, London : John Murray, 1954.

Binder, Leonard — Religion and Politics in Pakistan, California : University of California Press, 1961.

Callard, Keith — Pakistan : A Political Study, London : George Allen and Unwin, 1967.

_____ — Political Forces in Pakistan 1947 - 1959, New York : Institute of Palific Relations, 1959.

Campbell, Robert D. — Pakistan : Emerging Democracy, Princeton : Van Nostrand, 1963.

Chatterjee, Amiya — The Constitutional Development of India : 1937 - 1947, Calcutta : Firma K.L.Mukho Padhyay, 1958.

Chaudhuri, M.A. — The Civil Service in Pakistan, Dacca : National Institute of Public Administration, 1963.

_____ — Government and Politics in Pakistan, Dacca : Puthighar Limited, 1968.

Choudhury, G.W. — Constitutional Development in Pakistan, London : Longman Group Limited, 1969.

_____ — Democracy in Pakistan, Dacca : Green Book House, 1963.

Choudhury, G.W. — Documents and Speeches on the Constitution of Pakistan. Dacca : Green Book House, 1967.

——— — The Last Days of United Pakistan. London : C. Hurst and Company, 1974.

——— — India, Pakistan, Bangladesh and Major Powers. New York : Free Press, 1975.

Chowdhury, Subrata Roy — The Genesis of Bangladesh. Bombay : Asia Publishing House, 1972.

Choudhury, Z.I. — Extra-Constitutional Action in Pakistan. (Unpublished Ph.D. Thesis). University of London, 1972.

de Smith, S.A. — The New Commonwealth and Its Constitutions. London : Stevens and Sons Ltd., 1964.

Dicey, A.V. — Introduction to the Study of the Law of the Contitution. London : Macmillan and Co. Ltd., 1968.

Edgar, A. and Cathryn, R. — Public Opinion and Constitution Making in Pakistan. Michigan : Michigan University Press, 1966.

Feldman, Herbert — A Constitution for Pakistan. London : Oxford University Press, 1955.

——— — Revolution in Pakistan. London : Oxford University Press, 1967.

——— — The End and the Beginning. London : Oxford University Press, 1975.

Finer, S.E. — The Man on the Horseback. London : Pall Mall Press, 1962.

Gledhill, Alan — Pakistan. The Development of Its Laws and Constitution. London : Stevens and Sons Ltd. 1957 and 1967.

——— — India. The Development of its Laws and Constitution. London : Stevens and Sons Ltd, 1964.

——— — Fundamental Right in India. London : Setvens and Sons Ltd, 1956.

Hoq, Abul Fazal — Administrative Policy and Politics of Bangladesh (Bengali). Dacca : Bangla Academy, 1974.

Huntington, Samuel P. — Political Order in Changing Societies. New Haven : Yale University Press, 1968.

Huq, M. Mahfuzul — Electroral Problems in Pakistan. Dacca : Asiatic Society of Pakistan, 1966.

Inayatullah — Basic Democracies, District Administration and Development. Peshawar, Pakistan Academy for Rural Development, 1964.

Iqbal, Javid — The Ideology of Pakistan and Its Implication. Lahore : Ghulam Ali and Sons, 1959.

Jahan, Rounaq — Pakistan : Failure in National Integration. Dacca : University Press Ltd., 1977.

Janowitz, Moris — The Military in the Political Development of New Nation. Chicago : University of Chicago Press, 1971.

Jennings, Ivor — Constitutional Problems in Pakistan, Connecticus, Greenwood Press, 1972.

——— — Approach to Self-Government, Cambridge : Cambridge University Press, 1956.

——— — Problems of New Commonwealth, Durham : Duke University Press, 1958.

Johnson, John J., (ed) — The Role of Military in Underdeveloped Countries, Princeton; Princton University Press, 1962.

Kahin, (ed) — Major Governments of Asia, New York : Cornell University Press, 1967.

Kapur, A.C. — Select Constitutions, Delhi : S. Chand and Co. Pvt.Ltd., 1971.

Keir, D.L. and Lowson, F.H. — Cases in Constitutional Law, Oxford : Clarenton Press, 1967.

Kelsen, Hans — General Theory of Law and State (Tr. by Anders Welberg), Harvard : Hardvard University Press, 1946.

Khan, Mohammad Ayub — Friends Not Masters, London : Oxford University Press, 1967.

——— — Speeches and Statements (6 Vols.), Karachi : Pakistan Publications, 1961 - 1964.

Khan, F. M. — The Story of Pakistan Army, Dacca : Oxford University Press, 1963.

Khan, Liaquat Ali — Pakistan : Heart of Asia, Cambridge : Harvard University Press, 1950.

Khan, Ataur Rahman — Two Years of Ministry (Bengali), Dacca : Nawroz Kitabistan, 1972.

——— Ten Years of Despotism (Bengali), Dacca : Nawroz Kitabistan, 1974.

Mahmood, Shaukat — The Constitution of Pakistan, 1962, Lahore : Pakistan Law Times Publications Ltd., 1965.

Minattur, Joseph — Martial Law in India, Pakistan and Ceylon, The Hague : Martinus Nijhoff, 1962.

Munir, Mohammad — Constitution of the Islamic Republic of Pakistan, Lahore : All Pakistan Legal Decisions, 1965.

Munir, Ahmad — Legislature in Pakistan 1947-1958, Lahore : University of the Punjab, 1960.

Munim, F.K.M.A. — Rights of the Citizen Under the Constitution and Law, Dacca : Institute of Law and International Affairs, 1975.

Moudoodi, S.A.A. — Islamic Law and Constitution, Karachi : Jamaat-E-Islami, 1955.

Newman, K. J. — Essays on the Constitution of Pakistan, Dacca : Pakistan Co-operative Book Society Ltd., 1956.

——— Essays from Pakistan, Lahore : Publishers United Ltd., 1954.

Oppenheim — International Law, London : Longman, 1967.

Pirzada, Syed Sharif Uddin — Fundamental Right and Constitutional Remedies in Pakistan, Lahore : All Pakistan Legal Decisions, 1966.

Phillips, Hood — Constitutional and Administrative Law, London : Sweet and Maxwell, 1967.

Pye, L.W. — Aspects of Political Development, Boston : Little, Brown and Co., 1966.

Rashiduzzaman, M. — Pakistan : A Study of Government and Politics, Dacca : Ideal Library, 1967.

Sayeed, K.B. — Pakistan : The Formative Phase, London : Oxford University Press, 1968.

——— — The Political System of Pakistan, London : Oxford University Press, 1967.

Salmond, John — Jurisprudence, London : Sweet and Maxwell, 1957.

Sobhan, Rehman — Basic Democracies, Work Programme and Rural Development in East Pakistan, Dacca : Oxford University Press, 1968.

Stephens, Ian — Pakistan, London : Ernest Benn, 1962.

Vorys, Karl Von — Political Development in Pakistan, Princeton : Princeton University Press, 1965.

Willims, Rushbrook — The State of Pakistan, London : Faber and Faber, 1962.

Wheeler, R.S. — The Politics of Pakistan, London : Cornell University Press, 1970.

Wheare, K. C. — The Constitutional Structure of the Commonwealth, London : Oxford University Press, 1960.

Articles

Akanda, S.A. — " The National Language Issue: Potent Force for Transforming East Pakistani Regionalism into Bangali Nationalism", (1976) I The Journal of the Institute of Bangladesh Studies, 1.

Callard, Keith — " The Political Stability in Pakistan", (1956) 29 Pacific Affairs, 5.

Cornelius, A.R. — " Judicial Reforms in the Decade 1958-1968", P.L.D. 1969 Jounral 28.

Choudhury Z.I. — " Dissolution of the Constituent Assembly of Pakistan in 1954 : Its Legal and Political Implications", (1973) 5 The Rajshahi University Studies, 229.

——— " Constitutional Courts in a Revolutionary Situation" (1975) 1 Law and International Affairs, 101.

de Smith, S.A. — " Constitutional Lawyers in Revolutionary Situation" (1968) 7 Western Ontario Law Review, 93.

Gledhill, Alan — " The Constitutional Crisis in Pakistan - 1954-1955"(1955) Indian Year Book of International Affairs.

Gledhill, Alan " Recent Constitutional Developments in Pakistan" (1962) Indian Year Book of World Affairs.

Harris, J.W. " When and Why does Grundnorm Change ?" (1971) 29 Cambridge Law Journal, 103.

Howladar, A.Q. " Judicial Statesmanship" (1979) II Rajshahi University Law Review, 84.

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

Munir, Mohammad " The Days I Remember" The Pakistan Times, 11th November, 1968.

Newman K.J. " Basic Democracies as an Experiment" (1962) 10 Political Studies, 46.

_____ " The Constitutional Evolution in Pakistan"(1962) 38 International Affairs.

Sayeed, K.B. " Collapse of Parliamentary Democracy in Pakistan" (1959) 13 Middle East Journal, 389.

Pakistan Government Publications

Report of the Basic Principles Committee, 1950.

Report of the Basic Principles Committee, 1952.

Report of the Basic Principles Committee, 1954.

Report of the Committee on Fundamental Rights of Citizens of Pakistan and on Matters Relating to Minorities, 1950.

Report of the Committee on Fundamental Rights of Citizens of Pakistan and on Matters Relating to Minorities, 1954.

Constitution of the Islamic Republic of Pakistan, 1956.

Report of the Constitution Commission, 1961.

Constitution of the Islamic Republic of Pakistan, 1962.

Constitutional Documents (Pakistan), 1964.

Table of Statutes

Acts of British Parliament.

1935 Government of India Act (26 Geo. V, C.2) ... ... 1, 7, 8, 10, 11, 10, 11, 12, 25, 26, 27, 28, 29, 30, 43, 44.

1947 Indian Independance Act (10 & 11 Geo. VI, C. 30) ...1, 7, 8, 9, 10, 12, 27, 30, 31.

Acts of the Constituent Assembly of Pakistan

1948 Indian Independence (Amendment) Act... 10

1949 Public and Representative Offices (Disqualification) Act ..23.

1950 Privy Council (Abolition of Jurisdiction) Act.... .. 11

1954 Federal Court (Enlargement of Jurisdiction) Act.. .. 11

1954 Public and Representative Offices (Disqualification) (Repeal) Act... 23

Government of India (Fifth Amendment) Act... 23,25

1955 Establishment of West-Pakistan Act... 36

Validation of Laws Act... 36

Statutes of the Central Legislature of Pakistan

1947 Order 3 Federal Court of Pakistan 11

Order 4 High Court (Bengal) 12

Order 5 High Court (Punjab) ... ...

Order 7 High Court (Lahore) ... ...

Order 22 Pakistan (Provisional Constitution) ...

1948	Order 13 Pakistan Provisional Constitution (Third Amendment)	8
1952	Act 39 Pakistan Army	100,101
1955	Order 8 Constituent Convention	30,35
Order	Order 9 Constituent Convention (Amendment) ...	35
	Order 10 Constituent Convention (Second Amendment)	35
	Order 12 Constituent Assembly	35,36
	Ordinance 9 Emergency Powers	28,29
1958	Order 1 Laws (Continuance in Force)	2, 3, 4, 5, 62, 63, 64, 65, 66, 67, 68, 69, 70, 73, 77, 98, 128, 129, 130, 132, 134, 135, 136, 137, 138, 140, 141, 142, 145, 147, 148, 151, 154, 155, 157, 158, 159, 160, 162, 165, 166, 167
1959	Order 18 Basic Democracies	104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115
	Ordinance 3 Public Conduct (Scrutiny)	145
1960	Order 3 Presidential (Election and Constitution) ...	113
1961	Ordinance 8 Muslim Family Laws	107
	Ordinance 44 Concilation Courts	107
	Ordinance 14 Security of Pakistan(Amendment) ...	153
1969	Order 3 Jurisdiction of Courts (Removal of Doubts) ..	84

East-Pakistan Statutes

1950	Act 28 East Bengal State Acquisition and Tenancy ..	50
1959	Ordinance 25 East Bengal (Emergency) Requisition of Property (Amendment)	139

Constitution of 1956

Preamble	...	42,135	Article 33	...	37
Article — 1	...	42	35	...	37
4	...	45,67,129,	36	..	37
		133,134,135,137	37	...	37
5	...	45,47	39	...	36
6	...	47	42	..	38
7	...	47,69	44	...	39
8	...	50	45	...	39
9	...	51	50	...	39
10	...	51	52	...	39
11	...	49,51	54	...	39
12	...	51	55	...	39
13	...	52	56	...	39
14	...	46	57	...	39
15	...	49,135	70	...	39
16	...	48	71	...	39
17	...	46	73	...	39
18	...	52,132	76	...	40
19	...	52	77	...	40
20	...	46	102	...	65
21	...	45,52	106	...	65
22	...	52,53,156,157	148	...	40
23	...	53	149	...	40
24	...	42	156	...	41
25	...	42	157	...	41
32	...	37	158	...	41,147

Article	159	...	41
	162	...	41
	163	...	41
	166	...	41
	170	...	41,52,156,157
	191	...	53,93
Article	192	...	53
	193	...	65,95
	194	...	95
	197	...	42
	198	...	41
	216	...	95

Constitution of 1962

Preamble		...	12 0,123
Article	6	...	126
	10.	...	121
	12	...	121
	13	...	121
	14	...	121
	15	...	121
	17	...	121
	18	...	122
	20	...	123
	21	...	123
	23	...	122,123
	27	...	122
	29	...	122
	30	...	122
	31	...	121,122
Article	33	...	121
	35	...	121
	37	...	123
	38	...	123
	39	...	123
	40	...	123
	41	...	123
	42	...	123
	43	...	123
	44	...	123
	45	...	123
	46	...	123
	47	...	123
	48	...	123
	49	...	124
	50	...	124

Article	52	...	124	Article	80	...	122
	57	...	125		82	...	122
	58	...	125		91	...	125
	63	...	125		92	...	124
	66	...	122		98	...	125
	71	...	123		131	...	124
	72	...	123		132	...	124
	74	...	123,124		133	..	124
	77	...	123		134	...	124

Martial Law Regulations(C.M.L.A.'s)

M.L.R.	1	...	99	M.L.R.	64	...	148
	1-A	...	.98,99,100, 101		66	...	101
	3	...	102		72	...	152
	61	...	146		88	...	144

Table of Cases

Abdus Sattar Khan Niazi V. Crown, P.L.D. 1954 F.C. 187 ... 3,74

Abdul Aziz V. Province of West Pakistan, P.L.D. 1958 S.C. 499 .. 69

Abu Ala Maudoodi V. Government of West Pakistan, P.L.D. 1964, S.C. 673 ... 51

Akbar Khan V. Crown, P.L.D. 1954 F.C. 87 ... 28

Asma Jilani V. Government of the Pubjab, P.L.D. 1972 S.C. 139 ... 76,77, 85

Attorney-General for Ontario V. Arrotney-General for the Dominion, 1896 A.C. 348 ... 133

Attorney-General V. De Keyser's Hotel, (1920), A.C. 508 ... 26,32

Awoornor-Williams V. Gbedemah, S.C. 1/69 Digested in 1970 Current Cases ... 83

Aziz Din V. State, P.L.D. 1959 Lahore 336 ... 147

Bakhshi Rustom Ali V. Province of West Pakistan, P.L.D. 1960 Lahore 957 ...147,148

Bates Case, (1906) 2 St. Tr. 825 ... 32

Bazal Ahmad Ayyubi V. The Province of West Pakistan, P.L.D. 1957 Lahore 388 ... 48

Bhikhaji Narain V. State of Madhya Prodesh, A.I.R. 1955 S.C. 781 .. 136

Bonanza Gold Mining Co. Limited V. The King, (1916), A.C. 566 ... 26

Carter and Others V. The Egg Pulp Marketing Board for the State of Victoria, (1942-43) 66 C.L.R. 557 ... 133

Chowdhury Manzoor Elahi V. The State, (XI) D.L.R. 1959 W.P. 111 ..143,167

Clifford and O' Sullivan, (1921) 2 A.C. 570 ... 91

Dacca National Medical Institute V. Province of East Pakistan, P.L.D. 1958 Dacca 560 ... 51

Dalmia Cement Limited V. Dalmia Cement Workers' Union, P.L.D. 1958 S.C. 153 ... 49

Dhlamini V. Carter, (1968) 2 S.A. 464 ... 80

District Magistrate, Lahore V. Reza Karim, P.L.D. 1961 S.C. 178 .. 138

Duncan V. Kahana Moku, (1946) 327 U.S. 304 ... 90

Ebrahim Paper Mart V. Assistant Collector of Customs, P.L.D. 1956 Karachi 348 ... 155

Egan V. Macready, 7(1921) 1 I.R. 265 ... 92

E.K.Sallah V. Attorney-General, Const. S.C. 8/70 Digested in 1970 Current Cases ... 82,83,85

Election Commissioner, Pakistan V. Sajjid Ali Khan, P.L.D. 1960 S.C. 235 ... 142,167

Eshugbayi Eleko V. Officer Administering Government of Nigeria, A.I.R. 1931 P.C. 248 ... 158,161

E.O.Lakanmi V. Attorney-General, Nigeria S.C. 58/69 ... 82,83

Ex parte Marais, (1902) A.C. 109 ... 91

Ex parte Milligan, (1866) 4 Wall U.S. 2 ... 91

Fazal Ahmed V. State, P.L.D. 1970 Lahore 741 ... 84

Federation V. Maulvi Tamiz-Uddin Khan, P.L.D. 1955 F.C. 240 .. 7,9,10, 26, 27

Federation V. Ali Ahmad Hussain Shah, P.L.D. 1955 F.C. 522 .. 33

Ghulam Mohammad Loond Khawar V. State, P.L.D. 1957 Lahore 497 .. 48

Governor Wall's Case, (1802) 28 St.Tr. 51 ... 91

Gulab Din V. A.T.Shawkat, P.L.D. 1961 Lahore 952 ... 144

Harkishan Das V. The Emperor, A.I.R. 1944 Lahore 33 ... 133

Hasham V. Tribunal, P.L.D. 1959 Karachi 286 ... 136,137

Hawke V. Smith, (1919) U.S.S.C.R. 64 ed. P. 871 ... 28

Holligsworth V. Virginia, (1789) U.S.S.C.R. ed P. 644 ... 28

Iftikhar Uddin V. Muhammad Sarfraz, P.L.D. 1961 Lahore 842 .. 151

Iftikhar Uddin V. Muhammad Sarfraz, P.L.D. 1961 S.C. 585 ...67,150,151, 152,153,167

In re an Arbitration between Shipton, Anderson and Co. and Harrison Brothers Co., (1915) 3 K.B. 676 ... 32

Jhumma Khan Baluch V. Government of Pakistan, P.L.D. 1957 Karachi 939 ... 48

Jibendra Kishore V. Province of East Pakistan,P.L.D.1957 S.C.9 ..46,49

Kazi Abdul Majid V. Pakistan, P.L.D. 1960 Karachi 921 ... 155

Keshavan V. State of Bombay, A.I.R. 1951 S.C. 128 ... 136

Khan of Mamdod V. Crown, P.L.D. 1950 F.C. 15 ... 28

King V. Pinney, (1932) 5 Car and P 254 ... 87

Luther V. Borden, (1849)7 Howard 1 ... 66,78

M. Siddique V. M.A.Razzaque,P.L.D. 1960 Dacca 512 ... 146

M.A.Khuhro V. Federation, P.L.D. 1950 Sind 49 ... 28

M.A.Khuhro V. Pakistan, P.L.D. 1960 S.C. 237 ...66,154,155

Madzimbamuto V. Lardner-Burke, (1966) R.L.R. 756(G.D.) ... 79,80

Madzimbamuto V. Lardner-Burke,(1968) 2 S.A. 284(R.A.D.) ... 80

Madzimbamuta V. Lardner-Burke(2),(1968) 2 S.A. 457 ... 80

Madzimbamuta V. Lardner-Burke,(1968) 3 AIL E.R. 561 ... 80

Mahdi Ali Khan Panni V. Province of East Pakistan, P.L.D. 1958 Dacca 203 ... 132,137

Malik Mir Hassan V. State, P.L.D. 1969 Lahore 786 ... 82,83, 84,85

Mirza Mohammad Ali V. Commissioner,Lahore Division, P.L.D. 1960 Lahore 641 ... 146

Mostyn V. Fabrigas, (1774) 1 S.M.L.C. 662 ... 93

Moor V. Attorney-General for the Irish Free State, 1935 A.C.484 .. 26

Muhammad Umar Khan V. The Crorm, P.L.D. 1953 Lahore 528 ... 3,32,74, 90,92

Muhammad Bashir V. Province of West Pakistan, P.L.D. 1958 Lahore 853 ... 136

Muhammad Tota Mia V. Province of East Pakistan,
P.L.D. 1962 Dacca 151 ... 139

Muhammad Taiyab Ali V. Province of East Pakistan,
P.L.D. 1960 Dacca 842 ... 146

Muhammad Ibrahim V. The Government of Pakistan,
P.L.D. 1960 Lahore 1073 ...158,159,167

Muhammad Sajjad AliV. Province of East Pakistan,
P.L.D. 1960 Dacca 854 ... 146

Muhammad Afzal V. Commissioner, Lahore,
(XV) D.L.R. 1963 S.C. 298 ...70,148,149

Murbury V. Modison 1 Cranch 137 U.S. 1803 ... 133

Nawabzada Nassarullah Khan V. Province of East Pakistan,
P.L.D. 1965 Lahore 642 ... 50

Ndwana V. Hofmeyer, 1937 A.D. 229 .. 27

Pakistan Textile Mill Owners' Association V. Chief Commissioner of
Karachi, P.L.D. 1961 Karachi 474 ... 138,139

Pakistan V. Mehraj Uddin, P.L.D. 1959 S.C. 147 ... 157,158

Pakistan V. A. Hamid, P.L.D. 1961 S.C. 105 ..159,160,167

Pakistan V. Muhammad A. Hayat, P.L.D. 1962 S.C. 28 ..160,161,162, 167

Queen V. Lords of Treasury, (1872) L.R. 7 Q.B. 387 ... 161

Queen V. Special Commissioners for Income Tas,
(1888) 21 Q.B.D. 313 ... 161

Queen V. Secretary of State for War,(1891) 2 Q.B. 326 ... 158,161

R. V. Ndholvu, (1968) 4 S.A. 515(R.A.D.) ... 81

R V. Nelson and Brand, 1867 F.Cockbern's Rep. PP. 59,79 ... 93

R V. Brisbane Licensing Court,(1920-21)28 C.L.R. 23 ... 133

R V. Hampden, (1637) 3 St.Tr. 825 ... 32

Rainsford V. Browne, 2 N.Ir.Jur.Reps. 179 ... 91

Referance by Governor-General to the Federal Court,
P.L.D. 1955 F.C. 435 ... 16,30,31,32,
33,77

Rex V. Minister of Health,(1930) 2 K.B. 98 ... 159,161

Rex V. Allen, (1921) 2 I.R. 241 ... 91,93

Sarder Mohammad Bakhtiyar Khan V. The Province of West Pakistan,
P.L.D. 1960 Karachi 89 ... 157,158,159,167

Sargodha Bhera Bus Sarvice Limited and others V. The Province of
West Pakistan,(II) D.L.R. 1959 S.C. 285 ... 136

Sakhi Delar Khan V. Superintendent Incharge, Recovery of Abducted
women, P.L.D. 1957 Lahore 813 ... 48

Salt Petre Case,(1607) 12 Co. Rep. 12 ... 32

Secretary of State V. Oberion, (1923) A.C. 663 ... 159,161

Sher Muhammad Vs Nasir Uddin,P.L.D. 1960 Lahore 583 ... 154,155

Sheppard V. Wheeling, 30 W.Va. 379 ... 133

Sobho Tanwar Mal V. The State, P.L.D. 1959 Lahore 435 ... 69

State of Iowa V. O'neil, 147 Ia 593 ... 133

State V. Dosso, (XI) D.L.R. 1959 S.C. I ... 4, 65, 70,
71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85,128,129,
130, 131, 132, 136, 139, 140, 141, 142, 145, 150, 151, 152, 153,156,
166,167

Stock dale V. Hansard, (1839) a Ad. & E. 1 ... 27

Tamizuddin Khan V. Federation of Pakistan,
P.L.D. 1955 Sind 96 ... 25,26

Tilonko V. Attorney-General of Natal, 1907 A.C. 93 ...32,91, 92

Tribunal V. Hashim, P.L.D. 1960 S.C. 260 ... 137,138

Tofazzal Hossain V. Government of East Pakistan,
P.L.D. 1965 Dacca 68 ... 50

Usif Patel V. Crown, P.L.D. 1955 F.C. 387 ... 29,30,

Uganda V. Commissioner of Prisons, Ex parte Matuvo,
(1966) E.A. 514 ... 78,82

Yousuf Ali Chowdhury V. Province of East Pakistan,
P.L.D. 1959 S.C. 467 ... 157, 158, 159,167

Wolf Tonès Case, (1798) 27 St. Tr. 614 ... 88

Wright V. Fitgerald, (1798) 27 St.Tr. 759 ... 91

Zahid Umar and Company V. Chief Secretary, West Pakistan,
P.L.D. 1959 Lahore 764 ...143,144,167

Zafar-ul-Ahsan V. The Republic of Pakistan,
P.L.D. 1959 Lahore 879 ... 145

Zafar-ul-Ahsan V. The Republic of Pakistan,
P.L.D. 1960 S.C. 113 ... 145,146,148

© This work is licensed under Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License
https://creativecommons.org/licenses/by-nc-sa/4.0/

Rajshahi University Library
Documentation Section
Document No. R-1129
Date 28/3/89