

Time is not on our side, strong will and resolution is required to rid us of this quagmire at the earliest.

Justice Marri

A black and white portrait of Mir Khuda Bakhsh Marri, an elderly man with glasses, wearing a dark judicial robe over a white shirt and bow tie. He is looking directly at the camera with a serious expression. The background is a solid blue color.

A JUDGE MAY SPEAK

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Former Chief Justice and Governor of Baluchistan

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"Based on past sad experiences, it would be in the fitness of the things, in my opinion, that the Form of Oath Taking must be changed. Pakistan is an Islamic country, therefore, in future all office holders from the President to the Judges and Generals and whosoever is required by the Constitution to take Oath of Allegiance to the country and protector of Constitution should take a Solemn Oath on the Holy Quran before he enters his office stating that he will protect and preserve the Constitution and owe allegiance to Pakistan and will do all manners of justice between man and man without fear or favor. This can easily be brought about by consensus of both houses of parliament because majority of them are Muslims and an amendment can be made in Oath Form given in the existing Constitution. In case of non-Muslims they must take Oath according to their own Holy Books or other internationally recognized norms of that community.

This will make a lot of difference—firstly it will give more serenity and sanctity to the very Oath, and secondly it will give inner strength to the person who is required to take Oath to do justice to all....."

"It needs no emphasis that in case of violation of Solemn path, Article 6 of the Constitution automatically comes into play and the punishment for treason under Article 6 is death....."

Justice Marri

ACKNOWLEDGMENT

The book deals with whole range of democratic, political, legal, courts and Constitutional processes in Pakistan. The field of study has been of necessity vast and varied, some time general, others specialized in nature. Standard works by Pakistanis and foreign authors are consulted, where necessary references are made within body of the book, and my thanks are due to them. Therefore, no separate bibliography is being issued.

My special thanks are due to following foreign and Pakistani magazines and newspapers from which I had no alternative but to quote extensively to bring home the two different approaches to the same theme.

1. *Amnesty International Report on Pakistan Year 1981* - London.
2. *Far Eastern Economic Review*-Hong Kong, 1981.
3. *Sind Quarterly* — Karachi.
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5. *The Daily Muslim* — Islamabad.
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9. *The Pakistan Legal Decisions, Journal*, Supreme Court of Pakistan.
10. *In Defence of the Continuity of Law ; Pakistan's Courts in Crisis of State* by Dr. Dietre Conrad — Director of South Asia Institute, University of Heidiberg—West Germany.
11. *Pakistan Law Journal*, Vol. XIII, 1985 - Magazine Section.
12. *Constitution of Pakistan*, 1965.
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16. *The Provisional Constitutional Order*, 1985.
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INTRODUCTION

Transitory, mundane gains and benefits, doubtless have their own charm, but to cast away time honored principles, resulting in disarray of the entire field of government, is a great disservice to the nation and to future generations. How, why, and by whom, institutions of dispensation of justice, Rule of Law, Rule by Consensus, human rights, balanced distribution of powers between centre and the small provinces and Democratic practice in this country have nearly been demolished, and rule by force and manipulation has become the accepted norm by the people? I have attempted to answer these weighty questions in this book. How far I have succeeded in my effort, it is for the readers to judge. I have made an effort to portray the malaise from which this country has come to suffer and made some suggestions in the course of the discussion. My lack of knowledge on many points may be forgivable, but at least my sincerity should not be doubted. Besides, this book furnishes some material for future historians to draw their own conclusions and perhaps also suggest some remedies. All in all, I have endeavored to provoke my countrymen to get out of their indolence and apathy and start thinking again on how to save this country from man-made misfortunes and to endeavor to build a just, democratic, tolerant society, where no one should have any fear from his neighbor but instead look for help, understanding and brotherhood from one another. I should like to say one last thing. As I was a witness to many happenings and played a part in some events, mention of my name is often inevitable as most of the records quoted have such a reference. I wish this could be avoided for this, all I can do is to offer my apologies to the generous reader. In the end my thanks are due to Mrs. Moeena Hidayatullah, a poet and writer of Karachi for going through the manuscript and correcting typing mistakes, as well as my daughters Yasmin, Nasrin, Parvin and Ruby Marri for giving many suggestions and revising the manuscript several times. Last but not the least my gratitude is due to my wife Mrs. Elsa Marri for her encouragement and patience when I was working on the book.

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CHAPTER ONE

MILITARISM & JUDICIAL ENGINEERING

(FORTY YEARS OF CONSTITUTION MAKING)

By means of the Indian Independence Act 1947, Pakistan came into existence on 14th August, 1947. Under the above Act, the Government of Pakistan would be subject to the provisions of the Government of India Act 1935 until a Constitution was enacted by the Constituent Assembly of Pakistan. Legislative functions were to be performed by the Federal Assembly, and the Governor-General was to be the Head of State. After a delay of seven years and endless debate, constitutional proposals were finally drafted and accepted by the Constituent Assembly.

Governor-General Ghulam Muhammad was fearful of the institutionalization of a constitution followed by general elections which he was bound to lose. Through politico-bureaucratic maneuvering, he dissolved the Constituent Assembly on 24th October 1954 by Proclamation on the grounds "that it has become un-representative". Thus, he murdered the first Constitution before it could become law.

If anyone should care to look back to all headlines of the so-called "National Press" of that time, he will find that a bunch of evergreen, self seeking flatterers, businessmen and politicians, in fact went to the extent of publicly calling him the "Savior of the Nation", and profusely garlanded him. I remember a feeling of gloom and anguish when a businessman of the so-called "committee" which bestowed the title, showed us photos of Ghulam Muhammad being garlanded and thus hailed. I was then a student of law in England. With some other fellow students we tried to put some sense into the head of this creature boasting of his performance but to no avail, because he had come to England armed with a permit for another Textile Mill's Machinery. Arguments only will not free a nation from the shackles of slavery-mental or physical. This was the first and fatal shot at Constitution making in Pakistan. No one, with few exceptions from among Politicians, the Judiciary, Army or Executive seemed to have given much thought to the implication of those acts. Moulvi Tameezuddin Khan, President of the Constituent Assembly, was not supported by political organizations, and had no choice but to go to the Courts and challenge the proclamation of the Governor-General, in the Sindh Chief Court. The Court by its order, dated 9th October 1955 (PLD 1955 Sindh 96) issued the writs, prayed for holding that Acts of Constituent Assembly did not require assent of Governor-General when it functioned as a Constituent Assembly rather than as the Federal Legislature. It may be noted that objection of validity of Section 223-A was raised as it did not have the Governor-General's assent.

The Federation of Pakistan challenged this judgment in appeal (Constitutional Civil Appeal No. 1 of 1955) before the Federal Court of Pakistan. It was heard by Muhammad Munir, C.J., with Akram, Cornelius, Muhammad Sharif and Rehman, J.J. (PLD 1955 Federal Court 240). The Court held (Cornelius, J., dissenting) that the Sindh Chief Court lacked jurisdiction, because Section 223-A of Government of India Act (Amendment Act, 1954) which inserted this section into Government of India Act, 1935 had not received the Governor-General's assent. Whatever the Constitutional or legal limitations, this judgment opened up a "Pandora's box", for a war of words in future Courts of law, which battle unfortunately rages to this day, involving the principle of legitimacy of past. Army rules through an imposition of successive Martial Laws. Since the effects of this judgment would have nullified many acts of the Constituent Assembly 1950, when functioning as a Legislative Assembly, Governor-General found an arbitrary and one sided short route to fill this Constitutional vacuum by issuing an Emergency Ordinance 9 of 1955 under section 42 of Government of India Act, 1935, Validating Acts of the Constituent Assembly by indicating his assent with retrospective operation. Note this ill-fated judicial and executive engineering which was perpetrated on the people of Pakistan. Had it been avoided, our present Constitutional wrangles and successive Martial Laws might not have been encouraged. But this was not to be because the principles of simple exposition of Constitutional points were not followed. Soon after the above judgment, followed the cases of Akbar Khan vs. The Crown, challenging Ordinance 9 of 1955 and Usif Patel vs. The Crown, before the Federal Court (PLD 1955, Federal Court 387). This was followed by Special Reference No. 1 of 1955 (1955 I FC 439) made by Governor-General under section 213 Government of India Act, 1935.

This reference *inter-alia* included whether Constituent Assembly was rightly dissolved by the Governor-General, to which the court gave answer that, "in special circumstances set out in the Reference the Governor-General had the powers to dissolve the Constituent Assembly and that during the interim period he had the powers under the *Common Civil Law* or *State Necessity* of retrospectively validating the Laws listed in the schedule to the Emergency Ordinance. Note the unfortunate use of words of "Proclamation". "Validation of Laws retrospectively", "State Necessity" and "Special Circumstances", which cast a gloomy and long shadow on Constitutional history, to this day.

Chief Justice Munir was at pains to observe;

"We have come to the brink of a chasm with only three alternatives before us; to turn back the way we came by; to cross the gap by a legal bridge' to hurtle into the chasm beyond any hope of rescue".

Speaking some five years later of the 1955 judgment of the Court, the same Chief Justice remarked:-

"The mental anguish caused to the Judges by these cases was beyond description no judiciary elsewhere in the world had to pass through what may be described as a judicial torture there would have been chaos in the country who could say that the coercive power of the State was with the Court and not with the Governor-General At moments like these public law is not to be found in the books; it lies elsewhere in the events that have happened.

I have come to the conclusion that the situation presented by the Reference is governed by rules which are part of the common law of all civilized states and which every written Constitution of a civilized people takes for granted. This branch of the law is the law of civil or state necessity".

(1955 1 FCE 474-5).

"The law of civil necessity and that of military necessity are both founded on a common principle". Thus he gave his unfortunate view, which was a clear indication and assiduously followed by future political adventures, that:

"The powers and responsibilities of the Head of State in preserving the State and society during an extraordinary emergency and preventing from disruption the Constitution and government of the country are analogous to the powers which an Army Commander had during the Martial Law".

"The disaster that stared the Governor-General in the face, consequent on the illegal manner in which the Constituent Assembly exercised its legislative authority, is apparent from the results described in the Reference as having followed from this Court's decision in Mr. Tameezuddin Khan's case and the consequent case of Usif Patel. The Governor-General must, therefore, be held to have acted in order to avert an impending disaster and to prevent the State and society from dissolution. His proclamation of 16 April 1955, declaring that the laws mentioned in the Schedule to the Emergency Power Ordinance, 1955 shall be retrospectively enforceable is accordingly valid during the interim period, until the validity of these laws is decided upon by the new Constituent Assembly. Needless to say that since the validity of these laws during the interim period is founded on necessity, there should be no delay in calling the Constituent Assembly."

A minority judgment was returned by Cornelius J., and Muhammad Sharif J., they maintained that the common law of civil necessity is confined to cases, where in times of war or other national disaster the executive might interfere with private rights but that it has never been extended to changes in Constitutional Law and that the statement

of the law in the leading judgment related to periods of supreme and undisputed royal power. Cornelius J. said of the latter"

"The records of these affairs are hardly the kind of scripture which one would reasonably expect to be quoted in a proceeding which is essentially one in the enforcement and maintenance of representative institutions..." (1955 I FCR 554 and 560).

Constitution Bill was adopted in the last week of February 1956, Governor-General, Iskandar Mirza saw to it that he was President, gave his assent to the Bill on 2nd March 1956, and the Islamic Republic of Pakistan came into existence on 23rd March 1956 on basis of concepts of "parity and one unit". But general elections were never held under the 1956 arrangements. In October, 1958, President Iskandar Mirza took power, abrogated the Constitution, proclaimed Martial Law throughout the country, dismissed central and provincial governments, appointed Ayub Khan as the Chief Martial Law Administrator, declaring that the Constitution is sacred but is so full of dangerous compromises that Pakistan will disintegrate internally The country must first be brought to sanity.... then it is my intention to devise a Constitution more suitable to the genius of the Muslim people.....

On 10th October 1958, the President promulgated the (Laws Continuance in Force) Order providing *inter-alia*, that the Republic be known henceforth as Pakistan, shall be governed as nearly as may be, in accordance with the Constitution All Courts (subject to Martial Law Orders Regulations) shall continue in being in their powers and jurisdiction, however giving legal protection to all ML Regulations, Orders, etc., as this has become a common pattern in later years of this country constituent history up to this day, need no recounting.

On 13th and 19th October 1958 the Constituent Criminals Appeals were argued in the Supreme Court, the leading appeal by State was against one Dosso. The question involved in each was whether the writ issued by the High Court 'abated' under clause 7 of Article 1 of Laws Continuance in Force Order of 10th October 1958. Judgment was delivered on 27 October 1958.

Chief Justice Munir after discussing theoretical assumptions observed:

"One of the basic doctrines of legal positivism, on which the whole science of 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 alterations in the Constitution, and the validity of laws made thereunder, is determined by the first Constitution. Where a Constitution present

such continuity, a law once made, continues in force until it is repealed, altered or amended in accordance with the Constitution...."

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.

If what I have already stated is correct, then the revolution having been successful, satisfies the test of efficiency and becomes a basic law creating fact. On that assumption the Laws Continuance in Force Order, however, transitory or imperfect it may be, is a new legal order and it is in accordance with that Order that the validity of the laws and the correctness of judicial decisions has to be determined Under the new legal order any law may at any time be changed by the President there being no restriction on the President's law-making power The Frontier Crimes Regulation (under which the writs in the case had been issued) had been held by the High Court to be invalid on the ground that it contravened Article 5 of the Constitution and since that Article itself has now disappeared from the new legal order that Regulation by reasons of Article 4 is still in force and all proceedings in these cases in which the validity of that Regulation had been called in question having abated, the convictions recorded are good. The remaining three Judges, i.e. Shahabuddin J., Amiruddin Ahmed J., and Cornelius J. substantially relied on Kelsen and agreed with the conclusion arrived at by the Chief Justice. The decision of Dosso case came on 27th October, 1958.

In the evening of the same day (27th October 1958) three Generals and Cabinet Ministers (Lieut-General Azam Khan, Lieut-General W. A. Burki and Lieut-General K. M. Sheikh) called upon the President Iskandar Mirza with the demand to step aside in favor of General Ayub Khan, President Mirza readily agreed to step aside and General Muhammad Ayub Khan became the President of Pakistan.

Thus came into existence and it seems for ever to be applied off and on, the unfortunate ruling of Justice Munir in Dossos case that victorious revolution is a recognized mode of (capturing power) altering Constitution, to say the least, it meant without impunity.

A Western writer Mr. Herbert Feldman when considering Dossos case opined:

"It is, of course, improbable that even if the Supreme Court had risen as one man in protest and opposition, it would not have made the slightest difference to the changes that had taken place"

No doubt Mr. Feldman is right that no practical difference would have been made had the Supreme Court risen as one man protest and opposition. But one may safely assume

that on moral and Constitutional plane, it would have made a world of difference, by awakening the public opinion, by putting judiciary in the deserved place in the eyes of its countrymen. By doing so, there may have been lurking risks of dismissal, or retirement, of confinement at the most, yet Judges did take such steps to save their country from internal turmoil's, upheld the rule of law and to exonerate their honor. Legal History of many countries are not wanting from such examples. Imam Abu Hanifa is stated to have persisted in refusing to accept the high post of Chief Qazi of Baghdad until the Sultan caused him to be beaten in order to enforce his acceptance of it, but he suffered with patience rather than accept the appointment. Because he was of the firm opinion that in the circumstances he was not capable to perform the onerous duty of doing justice according to Sharia. Alas, things are otherwise here.

In the not so distant past Sir Thomas More Lord High Chancellor of England a great personal friend of Henry VIII who appointed him to the highest judicial honor, refused in the year 1535 the royal command to be present at the Coronation of the adulteress Anne Boleyn, he also refused to take "the oath of the royal supremacy". All the clergy of England submitted to royal, command and took the horrible Oath. This he did knowing fully well that the cost not of the job, pecuniary loss, petty or large government favors but at apparent risk of losing his very head. Yet that great man did not waver for a minute from the path of righteousness as he saw it and boldly faced a mock and trumped up public trial. It is stated that so futile was the case (high treason) against him and conclusive was his defence that an acquittal seemed inevitable. At that juncture one Mr. Rich, left his place as Crown Counsel at the Bar, entered the witness box and swore on Oath that the accused had uttered treasonable words. More, preserved his calm and dignity, saying only "*In truth Mr. Rich I am more sorry for your perjury than for my peril*", he was duly sentenced to death. When his head was already on the block, he uttered the most famous of all his sayings "*wait till I put my beard aside, for that hath done no treason*".

Have we produced a Abu Hanifa, a Thomas More or a shadow of them in upholding principles of uprightness and truth? Sorry to say no. But on the contrary we are well provided with perjurers like Mr. Rich. It may be noted, he was Solicitor-General of the King. What happened later on in life to Mr. Rich, I do not know, but Mr. Riches of this country continue to thrive and apparently prosper at the cost of poor people of Pakistan. Had it not been the trial of Sir Thomas More, Mr. Rich with his odious fame would be sleeping in blissful oblivion of history. Mr. Riches of this country must not lose heart, for constitutional and political history of this country will remember these Rasputin's forever.

General Ayub Khan's, later Field Marshall; ten years rule officially called "Decade of Development", but aptly named by people of Pakistan as "Decade of Decadence" robbed the people, as is the practice with every military rule and dictatorship, of all its political opinion and organization. After tempting, thoroughly corrupting, and in the end frightening his opponents into silence by brutal force, there was left only one voice in

the Country, that of the General himself. He pontificated on every subject on earth, claiming mastery of all sciences. As long as he delivered the goods his minions justified every twist and turns of his policy, ignoring the dreaded question of Legitimacy of his rule. Blissfully ignoring gradual build up of public opinion and pressure, he suddenly found himself overwhelmed by a cackle from all sides, lost initiative, had cold feet, as is bound to be with every military rule.

.... On 24 March, 1969, President Ayub Khan wrote to General Agha Muhammad Yahya Khan, the Army Commander-in-Chief, informing him that he intended to resign from the Presidency and to hand over control of the country to the armed forces: *".... have come to the conclusion that all civil administration and constitutional authority in the country has become ineffective I am left with no option but to step aside and leave it to the Defence Forces of Pakistan, which today represent the only effective and legal instrument, to take over full control of the affairs of this country they alone can restore sanity and put the country back on the road to progress in a civil and constitutional manner"*.

It is interesting to observe that on 7th October 1958 when constitution was abrogated, one justification for doing so was *".... that the country must first be brought to sanity by a peaceful revolution"*. Here again after ten long years, dictatorship perpetrating untold harm to every known state institution, and political set up, he abrogated his own one man constitution of 1962 without any pain and pinch of conscience by stating that *..... the army can alone restore sanity"*. One wonders when Ayub Khan took hold of power in 1958 he found the country insane, by country obviously he meant people of Pakistan and after ten years dictatorship and what he and his minions did, yet when he had cold feet and surrendered power, he again found people of Pakistan as insane. Now it is a question of common sense whether a dictator with a bunch of sycophants can be more vulnerable to insanity, or millions of people? I leave the readers to use their own judgment.

Now enters General Yahya Khan in the arena. Mark that the country and people are the same except for the ten years of dehumanizing dictatorship. The fatal date and month is 25th March 1969 when Martial Law is re-imposed by General Yahya Khan, who overnight became Supreme Commander of Army, Chief Martial Law Administrator and President of Pakistan. On 26th March he spoke to the poor nation on Radio Pakistan:

".... The Armed Forces could not remain idle spectators of this state of near anarchy. They had to do their duty and save the country from utter disaster I have no ambition other than the creation of conditions conducive to the establishment of Constitutional government".

.... on 31st March he announced that he had assumed the office of President in order that certain responsibilities of a formal nature be discharged; he would relinquish the

office as soon as the new Constitution was framed by the representatives of the people. He promptly promulgated the Provisional Constitution Order 1969. It was an old page taken from Ayub Khan's Martial Law imposition order. All roads lead to Rome, as the saying is, the substance of this order is that all power to Yahya Khan. Is it not ironical that after 12 years, another Provisional Constitution Order, 1981 now known among the people as PCO 1981 was issued by the Chief Martial Law Administrator and President General Zia-ul-Haque, which is in full force to this day with some amendments made in 1985, however, with a significant difference, that the order also reduced the power and prestige of time honored judiciary, making it fully subservient to the whim of Chief Executive, all the protection and guarantees given to judiciary in any civilized country, including given by 1973 Constitution having been removed. The judiciary in Pakistan under the present Constitutional set up, is far reduced in power and prestige and protection, than it enjoyed under Government of India Act 1935. The progress, if any, is in the reverse. The losses of Yahya Khan's rule are too long and painful to be listed. Pakistan Army was defeated by Sheikh Mujibur Rehman's MuktiBahini and the Indian Army, 90,000 soldiers were made prisoners of war by India, former East Pakistan, after terrible blood-shed separated and became the independent state of Bangladesh. Yet on 28th March 1971, Yahya Khan said in his broadcast:

".... We will not allow some power-hungry and unpatriotic people to destroy this country and play with the destiny of 120 million people In my address to the Nation of 6 March, I told you that it is the duty of the Pakistan Armed Forces to ensure the integrity, solidarity and security of Pakistan. I have ordered (Forces of Pakistan) to do their duty and fully restore the authority of the Government *In the end let me assure you that my main aim remains the same, namely transfer of power to the elected representatives of the people.* As soon as situation permits I will take fresh steps towards the achievement of this objective".

Alas, no lesson was learnt by the rulers and their Chief Yahya Khan except pious hopes, promises not to be fulfilled and sticking to power at any cost even at the apparent loss of half of the country. He again sermonized in his broadcast of 28 June 1971 that:

".....in view of the present circumstances I find that there is no alternative for me but to have a Constitution prepared by a group of experts Since the nation has recently been subjected to a very severe jolt, I have decided that the National and the Provincial Governments will have at their disposal the cover of Martial Law for a period of time As regards law and order, I am glad to be able to tell you that the Army is in full control of the situation in East Pakistan. It has crushed the mischief-mongers, saboteurs and infiltrators I have full faith in the patriotism of our people and I am sure that every single Pakistani will cooperate with me wholeheartedly in the achievement of our common goal namely, the restoration of democracy in the county, preservation of its integrity and solidarity and the

betterment of the lot of the common man. May Allah grant us success in our efforts. God be with you, God bless you all".

But Allah did not obviously accept Yahya Khan's prayer. His blessings were of no avail to people of East or West Pakistan and success went to the share of our neighbor India. He again suffered the already depressed and divided people of Pakistan by another lengthy verbose broadcast on 12th October 1971 when full scale war was raging in East Pakistan. I quote: "*.... I have my plan of transfer of power The constitution will be published on 20th December and the National Assembly will be announced on 27th December 1971 National Assembly will have every opportunity of suggesting amendments to the constitution that proposed amendments will continue to be submitted to me The National Assembly will be summoned to meet on 27th December under Chairmanship of the oldest member of House who will be nominated by me. This will be followed by Oath taking*".

It seems having assured his own Presidency and '5' years rule through constitution making as stated above, in the same breath he goes on to say "*.... The stakes are so high and the danger so grave that on no account should we be diverted from our main objectives of the defence of the country and the achievement of the democratic way of life 'Let the nation stand up as one man and march ahead towards the achievement of our goal. Let us show to the world what stuff we Pakistanis are made of'. I am at a loss and unable to find words to comment.*

Sequence of fast changing events during 14 days war with India, did not give any food for thought to Yahya Khan and his henchmen except clinging to the power, come what may. When late Mr. Bhutto flew to New York, at the end of the 1st week of presentation of Pakistan's case before United Nations, President Yahya Khan faithfully continued to elaborate his proposals for a new constitution, which could confirm him in office as President, Commander-in-Chief of Army, for a further 5 years, and leave in his hand the power to proclaim Martial Law to override his ministers. One may ask what was the charm in 5 years rule. Why not for life then peace will be for all?

At 08-30 PM of 16 December 1971 the President through a broadcast announced his intention to continue the war, yet at the same time, he proceeded with his time-table for promulgation of constitution on 20th December and formation of representative government. It is worthy to note that on the fatal day of 16 December 1971 the Armed Forces of Pakistan, under General Niazi, had surrendered to General Jagjit Singh Arora, and the Instrument of Surrender of Pakistan's Eastern Command had come already into existence. Without hesitation one may concede that only a person of iron-will, like Yahya Khan, could make the above broadcast at such a perilous moment. He went on to state "*.... in such a great war (duration was only 14 days) set back on any Front does not at all mean that the war has come to an end are confident the war continues.*" Then he gratefully acknowledged the support: Peoples Republic of China and the United States, where was support one may ask? However, late in that evening a broadcast statement of Mrs.

Indira Gandhi announced that she had ordered unilateral ceasefire on the Western Front to become effective at 8-00 PM on 17th December. Very dutifully and promptly at 3.30 PM of 17th December, a statement was read out over Pakistan Radio in which Yahya Khan declared he had ordered Pakistan Forces should reciprocate the ceasefire from 7.30 PM that evening. He fully forgot what he had said a day earlier, that is on 16th December, in this case, that the war will continue on Western Front.

One may only assume a highly trained person is capable of such about-turns.

God willed otherwise. On the very day 20th December 1971, when Yahya Khan was to announce (as since has become a practice) his one man Constitution and start his 5 years rule, he stood denounced, deposed and confined to his house for many years to come, to rest and contemplate. Mr. Zulfikar Ali Bhutto became President, later Prime Minister and first civilian Chief Martial Law Administrator till promulgation of Interim Constitution and lifting of Martial Law. It is no secret that he took power with full support of Armed Forces yet in another *coup d'état*. In some quarters too much is being made out about his being a civilian Chief Martial Law Administrator, deliberately it seems, ignoring the fact that he was a duly elected leader of the majority party from West Pakistan in the National Assembly, at that time no General could take the risk of being Chief Martial Law Administrator, especially after defeat in East Pakistan. Under the Civil Administration of Mr. Zulfikar Ali Bhutto leading to a PPP Government, Pakistan acquired its first democratic constitution drafted by a directly elected General Assembly, based on universal suffrage. It established a Federal Parliamentary System of Government with Four Units and a strong Central Government, two houses of Parliament (Parts 3-5 Articles 41-159). It also provided for an independent judiciary (Part 3, Articles 175-212). The fundamental rights guaranteed by the Constitution are set in Part 2, Articles 8-28.

In November 1971 a state of emergency at the start of the Bangladesh war had been declared, which remained in force during the entire PPP Administration, severely limiting the extent to which fundamental rights would be guaranteed. Defence of Pakistan Rules formed under Defence of Pakistan Ordinance 1971 remained in force, allowed detention without trial and trial of prisoners before Special Tribunals applying summary procedures. Its provisions were frequently used against political opponents in spite of constant protests in public and National Assembly by leaders of opposition, but to no avail.

Ghost of Ghulam Muhammad's, illegal arbitrary and un-constitutional dismissal of Constituent Assembly, and his assumption of power continued to cast dark shadows, the crucial and controversial question of legitimacy of his and subsequent rules haunted both the rulers and the ruled.

The Asma Jilani case (PLD 1972 SC 139) it seems was an attempt to clear the deck from illegitimacies of the previous rule, to put to a stop imposition of Martial Law in future and continuity of Civilian Government and Constitutionalism. The case was decided by the Supreme Court on 20th April 1972 (PLD 1972 SC 139). The precise question before the court was whether the High Court had jurisdiction under Article 98 of the 1962 Constitution of Pakistan to enquire into the validity of detention under the Martial Law of Regulation No. 78 of 1971 in view of the bar created by the provisions of the jurisdiction of Courts (Removal of Doubt) Order, 1969. A further question was whether the doctrine enunciated in *The State vs. Dosso* was correct.

In considering the validity of the events of March 1969, Hamoodur Rehman, C. J. said:

".... It is clear that under the Constitution of 1962, Field Marshal Muhammad Ayub Khan had no power to hand over power to anybody he could resign his office could also proclaim an emergency and may be for the present purpose that he could also proclaim Martial Law if the situation was not controllable by the civil administration. It is difficult, however, to appreciate under what authority a Military Commander could proclaim Martial Law. Even in 1958 the Martial Law was proclaimed by the President the Military Commander had no power also to abrogate the Constitution The assumption of power by Agha Muhammad Yahya Khan as Chief Martial Law Administrator and later as President of Pakistan was an Act of usurpation, and was illegal and unconstitutional. All the legislative and administrative measures taken by this unauthorized and unconstitutional regime cannot be upheld on the basis of legitimacy, but such laws and measures which are protected by the doctrine of necessity, that is to say which were made for the welfare of the nation and for the ordinary orderly administration of the country, can be deemed to be valid Martial Law Regulation No. 78 of 1971 under which the two detenus were held is an illegal regulation which cannot enjoy the protection of a rule of necessity (PLD 1972 SC 183-204).

.... with the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice (Muhammad Munir) not only misapplied the doctrine of Hans Kelsen, but also fell into error that it was a generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone...." Having held that Yahya Khan's Martial Law Administration was illegal and invalid *ab initio*, the court had to consider whether it could legitimize any of the Acts and legislative measures made under it; with the 1955 cases and the circumstances of the Governor-General's Reference No. 1 of 1955 almost certainly in its thoughts:

"..... I am not unmindful of the grave responsibility that rests upon Courts not to do anything which might make confusion worse, confounded, or create a greater state of chaos if that can possibly be avoided, consistent with their duty to decide in accordance with law....."

The Chief Justice ended with a stern warning to those who might imitate Yahya Khan in the future and usurp the legal order of Pakistan.

"May be, that on account of their holding the coercive apparatus of the state, the people and the Courts are silenced temporarily, but let it be laid down firmly, that the order which the usurper imposes will remain illegal and the Courts will not recognize its rule and act upon them as *de jure*. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper, he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would be adventurers (PLD 1972 SC 242-3)."

The decision in Asma Jilani's case was published on 20 April, 1972, the last day of the Martial Law Administration, which President Zulfikar Ali Bhutto (who had taken over from Yahya Khan on 20 December 1971) had announced in advance on 14 April 1972.

With regard to Dosso case Mr. Justice Yaqoob Ali held *inter-alia* ".... In view of the facts narrated above, it cannot be maintained that the people had by and large, knowingly accepted the Government of Yahya Khan and his Order as legal, and by habit given obedience to his Government. He had staged no victorious revolution or successful *coup d'état*. The Kelsenian theory, of the change of the basic norm did not, therefore, apply to the facts in which Yahya Khan had come to assume the state powers. He obligated the people to obey his behests, but in law they incurred no obligation to obey him".

"Another view is that the Judges of Municipal Courts, who have taken the Oath of office to preserve, protect and defend the Constitution, will not break the Oath and declare that because of the superior will of the usurper, they have been relieved from their legal obligations. If the Judges find the executive organ of the State unwilling to enforce their decrees and orders, the only course open to them is to vacate their office. Those who are desirous of serving the usurper may take office under the Legal Order imposed by him, but this depends upon the discretion and personal decision of the Judges, and has no legal effect, if they adopt the second course they will be acknowledging that "night" is "right" and become collaborators with the usurper. The same result is achieved if they foreswear their Oath, and accept as valid the destruction of the national order, and confer recognition on the legislative, administrative and executive acts of the usurper.

It is, therefore, provided, for all persons in Pakistan, that in any case where it becomes necessary for them to assert in their interests, any provisions of the Constitution, they shall have access to the High Courts and through the High Courts to the Supreme Court as of right, and those two Courts are bound by their Oath and duty to act, so as to keep the provisions of the Constitution fully alive and operative, to preserve it in all respects safe from all defeat or harm, and to stand firm in defence of its provisions against attack of any kind.

"It should be remembered in this connection, that however, effective the Government of a usurper may be, it does not within the National Legal Order acquire legitimacy, unless the Courts recognize the Government as *de-jure*".

"Yahya Khan's government, therefore, remained *de-facto* and not *de-jure* up to 20th December 1971, when he stepped aside".

Unless this direction was complied with, no new legal order would have come into existence, neither Iskander Mirza nor Muhammad Ayub Khan could become a valid source of law-making. How could the Courts accept one or the other as law-making facts. No valid law can come into being from the foul breath or smeared pen of a person guilty of treason against the national order.

Brave words indeed, however when this Judgment was recorded it is in everybody's knowledge that poor Yahya Khan "the usurper" was safely at a distance under house arrest.

Was this judgment followed by the Supreme Court later in Begum Nusrat Bhutto case, November 1977 one may ask? Had it been followed? What would be the consequence today?

On 7 March 1977 the first general elections since the establishment of Bangladesh were held in Pakistan and when the results were announced on 9 March, the Pakistan People's Party (PPP), led by Prime Minister Zulfikar Ali Bhutto, were credited with 155 of the 200 elected, in the National Assembly; the Pakistan National Alliance (PNA) gained 36, the Independents 8, and the Qayyum Muslim League 1. Before polling day, there were few in Pakistan or elsewhere who had not expected a victory for the PPP, but the extent of the victory was generally unexpected. The PNA immediately denounced the elections as 'rigged', and protest demonstrations and strikes gradually built up to wide spread roiting, in which the deaths of over 300 people were reported. The Prime Minister agreed to talk with the opposition parties which opened on 3 June. On 2 July an agreement was reached that the National and the Provincial Assemblies would be dissolved on 15 July after the National Assembly had repealed six Constitutional amendments, which the opposition had found objectionable. There would be new elections for the National Assembly on 6 October and for the Provincial Assemblies on 8 October.

An Election Commission composed of five Senior High Court Judges, would be able to call upon the Armed Forces for the supervision of the elections. However, the PNA Council rejected the agreement as it stood and submitted 10 new demands to the Prime Minister on 3 July. The following day, Mr. Bhutto angrily accused the PNA of going back on the agreement and said he could not continue without consulting his Cabinet

colleagues, and the parliamentary members of the PPP; the PNA threatened further agitation if the talks were not reopened.

On the evening of 5 July 1977, the Chief of the Army Staff, General Muhammad Zia-ul-Haq, addressed the Nation to explain why the Armed Forces, had early that day imposed Martial Law throughout Pakistan, removed the Prime Minister from office, dissolved the National and Provincial Assemblies, and dismissed the Provincial Governors and their Ministers:

"It must be quite clear to you now that when the political leaders fail to steer the country out of a crisis, it is an inexcusable sin for the Armed Forces to sit as silent spectators. It is primarily, for this reason, that the Army perforce had to intervene to save the country But the Constitution has not been abrogated. Only the operation of certain parts of the Constitution has been held in abeyance. Mr. Fazal Elahi Chaudhary has very kindly consented to continue to discharge his duties as President of Pakistan Martial Law Orders and Instructions, when required, will be issued under my orders. I met Mr. Justice Yaqub Ali, Chief Justice of Pakistan, this morning. I am grateful to him for his advice and guidance on legal matters. I want to make it absolutely clear, that neither I, have any political ambitions, nor does the Army want to be detracted from its profession of soldiering My sole aim is to organize free and fair elections, which would be held in October this year (1977) I give a solemn assurance that I will not deviate from this schedule I hold the judiciary of the country in high esteem However if and when Martial Law Orders and Martial Law Regulations are issued, they would not be challenged in any Court of Law...."

The Petition before the Supreme Court (Constitutional Petition No. 1 of 1977) was filed by Begum Nusrat Bhutto, the wife of the deposed and detained Prime Minister; under Article 184 (3) of the 1973 Constitution; She sought to challenge the detention of the former Prime Minister and 10 other leaders of the PPP under Martial Law Order No. 12 of 1977.

Counsel for the petitioner, Yahya Bakhtiar, relying largely on Asma Jillani's case, contended that the Chief of the Army Staff had no authority under the 1973 Constitution to impose Martial Law; that his action amounted to treason under Article 6 of that Constitution; and that, as a consequence, the Proclamation of Martial Law, dated 5 July 1977, the Laws (Continuance in Force) Order, 1977 and the Martial Law Order No. 12 of 1977 were all without lawful authority.

Brohi submitted that up to 5 July 1977 Pakistan was governed under the 1973 Constitution but that on that day the Proclamation by the Chief of the Army Staff, (now CMLA) brought a new legal order into being that this new legal order, even if it were only a temporary one, had displaced the former legal order. This new Grundnorm had altered the jurisdiction of the superior Courts. It constituted a meta-legal or extra-

constitutional fact which attracted the doctrine of revolutionary legality! Sharifuddin Pirzada, in his address to the Court, supported the Brohi view of events that the actions taken on 5 July 1977 were not 'the usurpation of state power' but were intended to 'oust the usurper who had illegally assumed power' after the 'massive rigging' of the 7 March 1977 elections.

The Chief Justice then came to the core of his judgment:

- (1) That the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of State necessity;
- (2) That the Chief Martial Law Administrator, having validly assumed power by means of an extra-constitutional step, in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognized by Judicial authorities as falling within the scope of the law of necessity, namely:
 - (a) all acts or legislative measures which are in accordance with, or could have been made under, the 1973 Constitution, including the power to amend it;
- (3) That the superior courts continue to have the power of Judicial Review to judge the validity of any act or action of the Martial Law authorities if challenged in the light of principles underlying the law of necessity as stated above. Their powers under Article 199 of the Constitution thus remains available to their full extent and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Presidential Order. The Chief Justice under lined the point that:

".... I have held that the new legal order is only for a temporary period, and for a specified and limited purpose the new regime represents not a new legal order but only a phase of constitutional deviations dictated by necessity...."

The import of Begum Nusrat Bhutto's case at least on one point seemed clear that Constitution of 1973 is in existence, the judiciary has full powers of judicial review under Article 199. The Government, however, thought otherwise, inroads in power of judiciary continued to be made.

On 16 October 1979 the President issued the Constitution (Second Amendment) Order, 1979, declared political parties illegal and arrested many political leaders. The amendment added Article 212-A to the Constitution. Article 212 permits the creation of administrative tribunals, exempt from the normal process of judicial review in narrowly defined areas of civil law. The new Article 212-A greatly extended the scope of Article 212, establishing military tribunals for the trial of offences under martial law "or any other law, including special The amendment allowed cases to be transferred from ordinary courts to military tribunals. The civilian courts, including the courts of appeal, could no longer hear appeals against verdicts of the military courts. The order declared the verdicts of military courts final.

The amendment seriously curtailed the jurisdiction of the higher courts, Martial Law legislation passed in the wake of the amendment (Martial Law Order 72) extended the military courts' jurisdiction at the expense of the civilian judiciary, and allowed military courts to try a wide range of civil and criminal offences including offences under the Penal Code. In the months following the 1979 constitutional amendment more than one hundred military courts were established throughout the country. They started trying civilians, including political prisoners, using only summary procedures. Hundreds of people were sentenced to imprisonment and flogging, merely for participating in normal political activities banned under martial law.

Presidential Order No. 1 of 1980, promulgated on 27 May 1980, amended Article 199 of the Constitution. It restricted the "writ jurisdiction" of the High Court, and barred them from making "an order relating to the validity or effect of any Martial Law Regulation or any Martial Law Order or anything done, or action taken, or intended to be done or taken thereunder." The order also prohibited the High Courts from reviewing the judgments or sentences passed by military courts or tribunals, or from taking action against anyone acting with the authority of the martial law administrators. The Order stated that the higher courts' jurisdiction had been removed retrospectively, and it then declared the 1977 military takeover to be legal, as well as all subsequent orders issued by the military authorities. These included Presidential Orders, Chief Martial Law Administrator Orders, and Martial Law Orders and Regulations.

Martial Law Order 77, replacing Martial Law Order 72 which was promulgated at the same time, further extended the jurisdiction of the military courts at the expense of civilian courts. Military Courts were given exclusive jurisdiction over cases of "treason, subversion, sedition, sabotage, prejudicial activities, and seducing members of the Armed Forces". They were also empowered to try any contravention of any Martial Law Order or Martial Law Regulation, and all offences under the Pakistan Penal Code.

On 24 March 1981 President Zia-ul-Haq promulgated the Provisional Constitution Order 1981 (PCO), which claims to validate everything done by the military government since 1977 (Article 15(1) and (2)). This Order abrogates the fundamental

provisions of Pakistan's 1973 Constitution by Presidential decree. Only the provisions reiterated in the PCO are retained; the section defining the powers of the Federal Government is included, but the parts concerning elections, the Provincial and Federal Parliaments and the Constitution's fundamental rights provisions are excluded. Under Article 16, the President has assumed the power to amend the Constitution at will. The PCO ends the independence of the Judiciary and proscribes all major political parties. It prohibits any challenge in any court to anything done by the martial law Government, or to any sentence passed by a military court or tribunal. The PCO voids the Supreme Court ruling of 10 November 1977, which had conditionally validated the martial law Government but restricted its mandate. It came at a time when the Supreme Court was about to hear petitions challenging the legality of the military government and declared null and void all court decisions dealing with the legality of the martial law Government or decisions taken by military tribunals. Orders and injunctions made by the Supreme Court and High Courts relating to decisions of military courts were suspended (Article 15 (6)).

Notable among these were decisions by the Baluchistan High Court staying the executions of death sentences passed by Special Military Courts. In July 1980, it ruled that the High Courts could still decide cases challenging provisions of Military Courts: "We would therefore hold that this court has the power to examine the question whether this court has lost jurisdiction over the promulgation of Presidential Order No. 21 of 1979, and Presidential Order No. 1 of 1980, including the validity of the instruments through which such amendments were brought about." It then declared the two latest constitutional amendments to Articles 212 and 199 (Passed on 16 October 1979 and 27 May 1980 respectively) to be illegal. It described them as "drastic and fundamental" and outside the mandate of the military government, ruling that they failed to pass the test of necessity laid down in the Supreme Court's 1977 judgment. The court held that the High Courts had retained the powers of judicial review originally granted in the Constitution, despite the constitutional amendments passed by the government to the contrary. It, therefore, continues to issue order staying the execution of prisoners.

Commenting on the effects of PCO 1981 Amnesty International Report on Pakistan, states:

"The PCO has finally removed these powers. The judiciary can be longer quash detention orders of political prisoners under Martial Law Order 78 by ruling them illegal. It can no longer set aside summary convictions imposed by military courts on political prisoners, or stay floggings and executions as it had done previously, usually on the grounds that military courts did not provide adequate legal safeguards to ensure a fair trial. Since the passing of the PCO, Amnesty International has been told by the many former political prisoners who have fled the country, and relatives of political prisoners, that they fear for the prisoners'

safety, as they no longer have recourse to the courts. Lawyers who have been active in the defence of human rights of political prisoners in Pakistan are no longer able to give them any professional help. They have advised relatives that there is no point in approaching the courts. This letter, received by Amnesty International in June, 1981, is one of many; "My brother has consulted several lawyers of the High Court concerning filing a writ in the High Court but was told that the recent constitutional changes prohibit such a legal remedy.

The effect of the PCO was immediate. It led to the execution of two political prisoners.

Abdul Hameed Baluch, a 21 years old student leader from Baluchistan, had been convicted for murdering a recruiting agent, by a Special Military Court and sentenced to death. The Baluchistan High Court had granted an order on 8 December 1980 staying his execution, because of grave irregularities in his trial and conviction. The name of the man he was charged with murdering was twice changed during the trial when the alleged victim proved to be alive. As a result of the PCO (which also prompted the removal of Baluchistan's Chief Justice (Mr. Khuda Bakhsh Marri), the High Court's order, staying his execution, was suspended and Abdul Hameed Baluch was executed in Mach Jail, near Quetta in June, 1981.

As for Mr. Kamal Azfar's Article *Daily Dawn*, Karachi "showing up of Cleopatra's long nose" and Justice (Rid.) Durab Patel article, being in a "long and dark tunnel, not seeing any light at the end of it" with even little fairness one may say, that they were visible to everybody right from the day when fifth and sixth amendments were introduced by Mr. Bhutto's Government in the Constitution of 1973. This inspite of opposition inside and outside of the Parliament. The amendments ingenious and over extended tenure of office of some Judges, and curtailment of others. As a consequence, Chief Justices of Lahore and Peshawar High Courts, *due to this legislative engineering, had to retire against the terms guaranteed by the Constitution, instead of stepping down and playing the second fiddle.*

Judges were made transferable from one Province to the other for a period of one year, without their consent, removing original guarantees in the Constitution. It was during that regime, that powers of the High Courts to issue writs were curtailed, Judges were derided, through a whispering campaign, as a class of "Brahmins". Unkind words were uttered about them in the Parliament. Later on, if one was reported as 'Parochial and of strong opinion', hence not fit as Chief Justice of a Province the other was called as "Pliable suiting the government, hence fit".

The very Constitution was not fully allowed to work by the very Government. Provincial Government of Baluchistan was dismissed in a most undemocratic manner, Government of Frontier Province resigned in protest, to give just a few example. Justice Patel's "Darkness" and Kamal Asfar's long nose of Cleopatra were equally visible when

Judges of Supreme Court were made to take Oath on 22nd September 1977 under the "PRESIDENT'S (POST-PROCLAMATION) ORDER 9 OF 1977 SUPREME COURT JUDGES (OATH OF OFFICE) ORDER, 1977 at pain of ceasing to hold office forth with, if a Judge failed to take Oath at a time appointed by the President. They all took the new Oath. Justice Qaiser Khan later in his separate judgment in Begum Bhutto's case was at pains to observe "We are directed to take a new Oath or to quit. As a result of the said directive, took the new Oath in which there was no mention of the Constitution of 1973". Therefore, he was of the view that by taking that Oath, the Judges had conceded *de-facto* existence of the new Legal Order.

Again S. Anwarul Haq, C.J. referred 3 times to the taking of the new Oath in Begum Bhutto's case, "that the taking of the fresh Oath does not in any way exclude the Supreme Court Justices from examining the question of the validity of the new Legal Order and deciding the same in accordance with their conscience and the law it only indicates that the superior judiciary, like the rest of the country, has accepted the fact, which is even otherwise self-evident, that on 5th July 1977 a radical transformation took place in the pre-existing Legal Order (PLD 1977 SC 674).

".....The new arrangement, therefore, acquired its effectiveness owing to its moral content and promise of restoration of democratic institutions. I may add here that the willingness to take the new Oath after the proclamation of Martial Law was also founded upon the same consideration...(PLD 1977 SC 704)".

".... The mere fact that the Judges of the Superior Courts have taken a new oath the courts had been originally established under the 1973 Constitution and have continued in their functions in spite of the proclamation of Martial Law (PLD 1977 SC 715-6)".

Was it not a kind of personal vindication? Again one may ask, why? When Supreme Court had full opportunity, it failed to see that principles laid down in Begum Bhutto's case were not strictly complied with right from November 1977 until introduction of Provisional Constitutional Order of March, 1981. Surely no tangible reason can be advanced now, especially when on 16 October 1979, Constitution of 1973 was amended, curtailing powers of superior judiciary by introducing Article 212-A in the Constitution, Clause (3) is as under:

"Notwithstanding anything hereinbefore contained, where any Military Court or Tribunal is established, no other Court, including a High Court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of the Military Court or Tribunal extends and of which cognizance has been taken by, or which has been transferred to the Military Court or Tribunal and all proceedings in respect of any such matter which may

be pending before such other Court, other than an appeal pending before the Supreme Court, shall abate".

Was this amendment not a negation of Begum Bhutto's case? The answer is, it was. Yet no action was taken by the Supreme Court against the above amendments.

In May 1980 another Constitutional (amendment order) which drastically changed the powers of judiciary under Article 199 of the Constitution of 1973. This amendment is as under:

"(3A) Notwithstanding any judgment of any court including any judgment in respect of the powers of courts relating to judicial review, a High Court shall not under this Article (A) make an order relating to the validity or effect of any Martial Law Regulation made by the Chief Martial Law Administrator or a Martial Law Administrator or of anything done, or action taken or intended to be done or taken thereunder;

(B) Make an order relating to the validity or effect or any judgment or sentence passed by a Military Court or Tribunal;

(C) Grant an injunction make any order or entertain any proceedings in respect of any matter to which the jurisdiction of a Military Court or Tribunal; or

(D) Issue any process against the Chief Martial Law Administrator or Martial Law Administrator or any person acting under the authority of either.

"(3B) Every such order, injunction process as is referred to in clause (3A) made, granted or issued, at any time before or after the commencement of the Constitution (Amendment) Order, 1980, shall notwithstanding any judgment of any court, be null and void and of no effect whatsoever and any proceedings for the making, granting or issue of such order, injunction or process which may be pending before any court, including the Supreme Court and a High Court shall abate".

"(3C) The Proclamation of the fifth day of July 1977 all President's Orders, Orders of the Chief Martial Law Administrator, Martial Law Regulations and Martial Law Orders, made on or after the fifth day of July 1977, are hereby declared notwithstanding any judgment of any court, to have been validly made".

Any further "darkness in the tunnel" or "length of Cleopatra's nose" was required, one may ask, after these amendments in the Constitution? Was it not high time the Courts could take judicial notice as it had power, to see that its judgment is followed?

For the sake of arguments one may say, well first the courts had to be moved normally by a citizen or by government, only then it could act. Even that argument is not available either in view of unanimous Full Bench Judgment of High Court of Baluchistan's now well-known case, Constitutional Petition No. 274/78 "Suleman Qassim, etc. *versus* Chief Martial Law Administrator and President Special Military Court, etc. decided at Quetta on 2nd July 1980. *By this judgment, the court invalidated all the above stated Constitutional amendments introduced by the Government.* The Supreme Court did not decide that Appeal until 25th March 1981, when Provisional Constitution Order was issued and the courts were left with no powers.

Apart from the above, there was another opportunity, one may say, for the Supreme Court to confirm or otherwise, which it could do, in Begum Bhutto's Judgement. When Air Marshal Asghar Khan's Petition was moved before the Supreme Court, I quote a newspaper report of 21st October 1979.

"LAHORE, Oct 21: Justice Aslam Riaz Hussain of the Supreme Court of Pakistan, today referred a Constitutional Petition challenging detention of former Chief of the defunct Tehrik-e-Istiqlal, Air Marshal (Retd) Asghar Khan, at Pahot near Terbela Dam, to the Chief Justice of Pakistan to constitute a larger bench.

"The petition, filed by Malik Hamid Sarfaraz, defunct Tehrik leader, under Article 184 of the Constitution of Pakistan, stated that the CMLA had a little more authority beyond the Constitution under the Doctrine of Necessity as enunciated by the Supreme Court in Nusrat Bhutto's case. Now that the President has postponed the general elections for an indefinite period, the Doctrine of Necessity is nullified automatically, and the basic right of the people are restored. He submitted that the detention of Asghar Khan under MLO 12 was illegal and should be set aside.

The Petitioner has made the CMLA and the Federation of Pakistan respondents".

One may ask why the Supreme Court did not, when it has full opportunity, decide Asghar Khan's petition and appeal, filed by the Government against judgment of High Court of Baluchistan? Had the Supreme Court followed this course, one can safely say that the Judges and the country including the government would have been saved from introduction and consequences of Provisional Constitutional Order 1981 and one man Constitution of 1985.

It may also be noted that the judgment of Baluchistan High Court fully supported principles laid down in Begum Bhutto's case. Also by a minority of 2 to 3, High Court of Sindh fully supported Begum Bhutto's case. As far Lahore and Peshawar High Court they validated the amendments of the government stated above. Is it not an irony that again it was the High Court of Baluchistan by population and number of Judges *viz* the

smallest province of Baluchistan (generally nick named backward), unfortunately mercilessly exploited by all, that it stood firm to uphold principle of "rule of law" at the cost of too obvious risks and without taking shelter in self-preservation. Out of the 3 Judges of the Baluchistan High Court, two were retired as a consequence of introduction of PCO 1981 and the third now appointed as Supreme Court Judge as a nominee of Baluchistan Province, who incidentally with other Judges took Oath under PCO 1981 and became Acting Chief Justice of Baluchistan High Court, by principle of natural elimination, and who was later transferred to Sindh High Court as a Judge to hold office until further orders under Constitution of 1985. Similarly, simultaneously a Judge from High Court of Sindh, had been appointed as Acting Chief Justice of Baluchistan High Court and one Judge from Peshawar High Court; one wonders why?

Except for a resolution by Bar Association of High Court of Baluchistan, Quetta condemning the transfers not a word has been said, by the so-called national press, politicians in and outside the government, particularly so, when the country was stated to be ushering in yet another era of democracy and civilian rule.

As to the existence or otherwise of the Constitution of 1973, and powers of President and Chief Martial Law Administrator to review and amend it as he did every sort of opinion is being expressed and public debate is on, which will continue for some time to come. One of the Chief Authors of Begum Nusrat Bhutto's case, former Chief Justice of Pakistan S. Anwarul Haq, in the press statements of the last few months if they are correct, has stated that the President has no power to drastically amend the fundamentals of the Constitution as he did and that Supreme Court had given no such power to him. On the other hand, President General Zia-ul-Haq is on the record to say, that it was the Supreme Court which gave him full powers to amend the Constitution in Begum Bhutto's case, and he is following the same. Now which institution or person will or can resolve this controversy, one wonders? Sitting Judges of the Supreme Court, it seems, would find it difficult to resolve the issue, if a reference is made to them by the government, which of course, it did not make, because they continue to be under burden of the Oath under PCO 1981. As for the retired Judges of the Supreme Court, about them the President and his one time Minister Raja Zafrul Haq are reported to have stated, that as they are no more Judges, their opinion is that of any private citizen.

Without quoting any dictionary or Constitutions of different countries or using brave words, I find myself in full agreement with Justice Dorab Patel when he is reported to have stated (8-9 MAG Jan: 31st February, 6, 1985) "Therefore, when we heard Begum Nusrat Bhutto's writ petition, the court had before it two conflicting judgments, and I think it took a middle way, though the unkind critic might say that we fell between two stools".

No doubt this very fair admission on part of Mr. Justice Dorab Patel, former senior most Judge of the Supreme Court, yet this admission does not make the position less

unfortunate, because instead of steering a clear course on question of vital national importance, the court fell between two stools. Consequently, fell with it, rule of law, democracy, individual freedom, human rights and all norms for which an independent nation is judged.

Be that, as it may, the very fundamentals of Constitution of 1973, such as independence of judiciary, Parliamentary form of government, free and fair election, freedom of press, existence of political parties, power of both houses, etc. has been drastically changed by PCO 1981, and Constitution of 1985. Hence this leads me to the conclusion that Constitution of 1973, ceased to exist. It is dead once and for all. It cannot be revived. PCO 1981, and Constitution of 1985, promulgated by the President and Chief Martial Law Administrator, are the only Constitutional documents under which the country is being run. The end result of all this is, that after full forty years, the country still has no viable Constitution on which all Provinces are agreeable.

CHAPTER TWO

A TIMELY WARNING

A Baloch and first Chief Justice of Baluchistan High Court from December 1976 to March 1981, I along with Chief Justice of Sindh, NWFP and Punjab, was a member of Law Commission, Indus Distribution of Water Commission, Supreme Judicial Council, all headed by the then Chief Justice of Pakistan Mr. Justice Anwarul Haq. During course of many conferences, commissions and committees, after imposition of Martial Law, like many other people, I could see the coming shape of things as regard to curtailment of democratic rights of citizens, and power of judiciary. Whenever possible, I opposed these changes in the Conferences (including Constitutional) changes in the mode of dress or robes of higher judiciary and through pronounced judgments which are a part of record of Baluchistan High Court.

Most unfortunately, I could not get the necessary support, everybody it seemed was carried away by the dictates of times. It did not take long when Damocles's sword fell down heavily in shape of Provisional Constitutional Order 1, of 1981, the background and adverse effects of this Constitutional amendment are discussed in some other part of the book. However, at great risk, and as a timely warning I had written the following article, which was published in Pakistan Legal Decisions (PLD) 1980, Volume I, Supreme Court and Journal at pages 111 to 114, to draw the attention of authorities, general public, political organizations judiciary, to show that independence of judiciary was at jeopardy. It may be noted that this article would not have seen the light of day, had the author not then been the Chief Justice of High Court. When the article was published, open resentment of higher authorities was conveyed to the author, by those who had not faced a single election in their lives, yet held ministerial and other higher posts, and ironically at the same time claimed to be champions of the rights of judiciary and democracy.

The article is as under:-

JUDICIARY TO BE KEPT INDEPENDENT OF OTHER ORGANS OF THE STATE

(What a learned Kazee of Abbasid Caliphate in 10th Century AD, said about the sacred duty of Government and public to see that the judiciary be kept completely independent of other organs of the State is Equally true today in Pakistan).

By
MIR KHUDA BAKHSH BIJARANI MARRI,
CHIEF JUSTICE, BALUCHISTAN HIGH COURT

Our Prophet Muhammad (MPBUH) has said that "whoever is appointed Kazee suffers the same torture with an animal, whose throat is mangled, instead of being cut by a sharp knife". Many of the companions, moreover, declined this appointment, and Haneefa persisted in refusing it, until the Sultan caused him to be beaten in order to enforce his acceptance of it. But he suffered with patience rather than accept the appointment. Many others, in former times, have also declined this office. In fact the acceptance of the office of Kazee, with an intention to maintain justice is approved, although it be more laudable to decline it; because it is a great undertaking, and notwithstanding a person may have accepted it from an opinion that he should have been able to maintain justice, yet he may have erred in this opinion, and afterwards stand in need of the assistance of others when such assistance is not to be had. Hence it is most laudable to decline it: Unless, however, there be no other person so capable of discharging the duties of it, in which case the acceptance of it is an incumbent duty, as it tends to preserve the rights of mankind, and to purge the world of injustice. It behooves Mussulmans neither to covet the appointment of Kazee in their hearts, nor to desire it with their tongues, because the Prophet has said: "*Whosoever seeks the appointment of Kazee shall be left to himself but to him who accepts it on compulsion, an angel shall descend and give directions, and also, because whosoever desires this appointment, shows a confidence in himself, which will preclude him from instructions, and whoever, on the other hand, puts his trust in God, will be secretly inspired with a knowledge of what is right in the discharge of his office*". (Hidaya by Hamilton, Third Edition, published by Sh. Muhammad Khalil, for Premier Book House, United Printing Press, Lahore, p. 335).

It may not be something new to say that Islamic jurisprudence recognized the sanctity, independence, and separation of judiciary from Executive from its earliest days, in spite of the fact, that then there was no written Constitution defining the powers of all the three main State organs, namely, Legislature, Executive and Judiciary, as exists in our time in all the countries of the civilized world. To bring home this point, I may venture to quote from a book which was written more than a thousand years ago in the time of Abbasid Caliphate, by no less a man than a renowned jurist and learned Kazee, who inherited learning and judgeship from generations; he was Kazee of Baghdad al-Muhassin, son of Ali, son of Muhammad, son of Dawud of the tribe Tanukh. He was the son of equally famous Kazee Ali of Baghdad and was born in Basrah in 940 A.D. and died in Baghdad in 994 A.D. He started the book according to his own statement in 971 A.D. and it took twenty years to complete the same. The book has been translated from Arabic into English by D. S. Margolliouth and published by the Royal Asiatic Society, London in 1922 and is called "The Table-talk of a Mesopotamian Judge". Apart from being an eye-witness of many in stances mentioned in the book, the learned author states that he drew most of his material, during the course of ordinary conversation by the then intelligentsia in Baghdad including his father Ali, the famous Kazee from which he took notes in a book. He gave reasons for writing the book "As years passed, and the old men who had supplied these topics died off, and of their like

few remained, whose deaths would involve the loss of what they narrated, unless someone memorized them". (The Table-talk of a Mesopotamian Judge by D. S. Margolliouth, page 5).

It will be interesting to note that at page 123 of the same book, the learned author says; "Theorem: The ruin of the judicature in a State means the ruin of that State".

The learned author goes on to state: "I was told the following by Abu'l Ibn 'Ayyash; The first element in the organization of the "Abbasid Government, which was disintegrated in our time, was the judicature; for it was degraded by Ibn al-Furat, who filled the office of Judge with persons who had no knowledge nor heredity, if they guaranteed certain payments, ere a few years had passed the Vizierate became similarly degraded, being committed to unworthy holders; so much so that in the thirties of the fourth century the Vizierate of Muttaqi was committed to clerk Abul Abbas al-Ispahani, a man destitute of honor and of sense. Once, I requested an audience to him, and the porter went to him and said "Ibn Ayyash is at the door". And I heard him reply from behind the curtain "Let him enter". I said to myself: Good God, has the vizierate fallen so low as this? Nay, he would ride with no-one in front of him save Ibn Hadubna, mayor of the quarter. I once saw in Khuld Street a performing monkey, round which a crowd had gathered. Its owner asked it: Would you like to be a haberdasher? It made a sign with its head meaning, Yes. The man went on; would you like to be perfumer? Again it made the sign for Yes. The man proceeded to enumerate trade, and each time the monkey made the affirmative sign. Finally he asked it; would you like to be a vizier? This time it made the sign for No; and began to howl and run away from its master, while the people laughed".

The learned author goes on to say at page 124 "The decline of the vizierate is followed by the lowering of the Caliphate, and hence it has reached the condition in which we see it. The collapse of the Abbasid power is due to the collapse of the judicature. Ibn al-Furat first began to lower it by making a Judge of Abu Umayyah al-Akhwas, of obscure origin in Basrah; this person was a haberdasher in whose house Ibn-al-Furat took refuge, to go forth from it to the vizierate".

About the steadfastness and honesty of Kazee, who is expected to be above board, the learned author gives an example at page 128 and states, "I was informed by Qadi Aub'l Ibn 'Ayyash, that he had been told by someone, how when he was escorting the Qadi Abu Hazim, a man had come up to him, and blessed him for appointing someone Judge in his city; for, he said, he is an honest man. *Abu Hazim shouted to him to be quiet; Do you talk, he said, of a qadi being honest? This epithet might be used of a police officer, but a qadi is above it.* We moved on, he continued, and the qadi seemed for a time bewildered. I asked him what was the matter. He replied; I never thought I should live to hear this; the times are wrong, and our profession spoiled. Unfortunately people have entered into it whose presence renders the praise of an honest qadi necessary; previously it was

not needful for people to say that such a qadi is honest; but that was before - was appointed, mentioning a name which he preferred not to repeat. I asked this narrator who the man was, but he declined to say; when I became urgent, he indicated Abu 'Umar".

With regard to upholding of laws which are not to be trifled with, and that one should set God's command before that of His creatures, the learned author cites the following instance at page 129 "I was told the following, by Abu'l Hussain 'Ali son of the qadi Abu Talib Muhammad, son of the qadi Abu Ja'far Ibn al-Bahlul. The Queen-mother (mother of Muqtadir) asked my grandfather for the Trust Deed of an estate which she had purchased. This document was in the qadi's office, and she wanted to get hold of it and tear it up, so that the trust would be annulled. My grandfather, who was unaware of this brought it to the palace, and told the stewardess that he had brought the deed as ordered, and asked what next? The reply was that they wanted it in their possession. My grandfather then understood and said to the Stewardess 'Umm Musa; please make the following statement to Her Majesty. Your proposal is quite impossible. I am the Moslem's custodian of the Bureau of Judicature, and either you must empower me to guard it properly, or else you had better dismiss me and take possession of it once for all, when you can treat it as you like, and remove from it or leave in it whatever you wish. Most certainly no document shall be stolen thence through me, not if I were to be threatened with the sword. He then rose, taking the deed, and went off to his barge, not doubting that he would be dismissed. He mounted to the residence of Ibn al-Furat, who was the vizier at the time, and told him the story. The vizier said: You had better have deferred your answer and informed me so that I might have put the matter right; whereas now you are certainly dismissed, and I can do nothing for you with the Queen-mother. He continued: The Stewardess proceeded to give the message to the Queen-mother, who complained to Muqtadir. On parade day Muqtadir spoke to the qadi person ally about the affairs, and the latter explained the case and offered as before to resign his office. Muqtadir, however, said: Ahmed you are the right person to be appointed qadi: stay in your post with God's blessing. Have no fear that this will injure your reputation with us. We were told that when the Queen-mother made fresh representations to Muqtadir, he said to her, the laws are things not to be trifled with, Ibn al-Buhlul is true to us a friend of our dynasty, a pious man whose prayers are answered. Had your demand been allow able, he would not have refused it. The Queen-mother proceeded to ask her Secretary Ibn 'Abd al Hamid about the matter, and when he heard what my grandfather had said. He burst into tears, being a pious old clerk and said: Now I know that the dynasty of the Queen-mother and the Commander of the faithful will endure forever, seeing that it has a man like this saintly Sheikh, who maintained the law against the Queen-mother, and has no fear of censure where God is concerned. What would your purchase of trust be worth? Suppose you had got hold of the deed and tom it up, everyone knows about it, and God, who is above all also knows. The Queen-mother said: "It would seem then that it is unlawful"? He said to her: "It is a device of the trust-holders against the property of God"; he further informed her that

such a purchase would not be legitimated by the destruction of the deed of trust, which also is an unlawful act. The Queen-mother got back her money and cancelled the purchase. She went so far as to thank my grandfather, to whose credit the matter now resounded at Court. My grandfather after telling this story added; If a man sets God's command before that of his creatures, He assures him against any mischief they can do".

Barring a few who stood steadfastly in their writings with regard to the principles laid down by the Quaid-e-Azam, much has been written by the political opportunists and pseudo jurists and intellectuals according to the changing times thus creating a confusion in the minds of the masses. The unfortunate effects and results are for everybody to see. Avoiding customary hyperboles and high sounding principles without being acted upon, I prefer in the fitness of the things to refer to speeches of Quaid-e-Azam Muhammad Ali Jinnah and Khan Liaquat Ali Khan, the first Prime Minister of Pakistan as to what kind of Pakistan they wanted to create?

In his speech at a public reception at Chittagong on 26th March, 1948, Quaid-e-Azam said, "You are only voicing my sentiments and the sentiments of millions of Mussalmans when you say that Pakistan should be based on sure foundations of social justice and Islamic socialism which emphasizes equality and brotherhood of man. Similarly, you are voicing my thoughts in asking and inspiring for equal opportunities for all. These targets of progress are noncontroversial in Pakistan, for we demanded Pakistan, we struggled for it, we achieved it so that physically as well as spiritually we are free to conduct our affairs according to our traditions and genius. Brotherhood, equality and fraternity of man - these are the basic points of our religion, culture and civilization, and we fought for Pakistan because there was a danger of denial of these human rights in this subcontinent. (Quaid-e-Azam Muhammad Ali Jinnah speeches as Governor-General of Pakistan 1947-48 published by Pakistan Publications, Karachi page 103).

Khan Liaquat Ali Khan, the first Prime Minister of Pakistan in his speech in Town Hall of New York on 8th May, 1950 explained clearly as to what is the ideology of Pakistan. He stated "A question I am sometimes asked is what is the ideology of Pakistan as a State? I will try and tell you this in a few simple but very clear words. We Muslims believe in God and His Supreme Sovereignty. In one of the large towns of Pakistan is an educational institution built by some God-fearing people from your country. In the entrance hall is a marble table and on it the words "Except the Lord build the house, they labor in vain that built it". That is exactly what we believe in democracy, that is, in fundamental human rights including the rights of private ownership and the right of the people to be governed by their own freely chosen representatives. We believe in equal citizenship for all, whether Muslims or non-Muslims, equality of opportunity, equality before law. We believe that each individual, man or woman, has the right to the fruit of his own labor. Lastly we believe that the fortunate amongst us whether in

wealth or know ledge or physical fitness, have a moral responsibility towards those who have been unfortunate. These principles we call the Islamic way of life. You can call them by any name you like". (*Pakistan the Heart of Asia, Speeches by Liaquat Ali Khan, Prime Minister of Pakistan during a visit to the United States and Canada, May-June 1950, published by National Book Foundation, pages 32-33*).

Before concluding, let me quote our great philosopher and poet and no less than any other founder of Pakistan, Dr. Muhammad Iqbal, who has said in *PIAME MASHRIQ* (Selection *Piame Mashriq* translated in Urdu by Faiz Ahmad Faiz, published by Iqbal Academy Pakistan, Lahore, page 51).

سکندر کا علم باقی نہیں ہے
سپہ دولت حشم باقی نہیں ہے

ہیں قومیں بادشاہوں سے قوی تر
کہ ایران ہے، پرجم نہیں ہے

CHAPTER THREE

DEMISE OF RULE OF LAW

(THROUGH EYES OF FOREIGNERS)

After independence in 1947, what was needed to further strengthen the already well established, smoothly running rule of law, parliamentary, Federal or Confederal, as indicated in Lahore Resolution of 1940, democracy and its necessary components such as judiciary, one man one vote, free elections, freedom of press, respect for universal human rights and protection of economical and political rights of smaller provinces left behind by the British, and framing a new Constitution within shortest possible time, as was done by our neighbor India, instead the country was plunged into non-ending legal and constitutional quagmire. Soon after death of Mr. Muhammad Ali Jinnah, an unholy alliance of bureaucrat-cum-military and big business was formed, headed by a financial technocrat installed on the poor people of Pakistan, namely of blessed memories Mr. Ghulam Muhammad, the then Governor-General.

Politicians and political organizations were despised and berated through an organized campaign in the press by the rulers. After Mr. Jinnah's death, Muslim League a political party having left with no proper leadership, no definite goal, policy or programme before it, was forced upon the people by the then successor governments.

Within a short time, the remaining 2nd and 3rd line leadership most of whom were opportunist and petty minded, were trapped by free distribution of ministerships and other pecuniary benefits, regardless of costs which the country had to pay, with less than three decades in shape of separation of majority province of East Pakistan, now Bangladesh. Over and above, the country was visited by not less than six Martial Law governments as under:

1. 1953 – Imposed by the Federal Government.
2. 1958-1962 – Imposed by President Iskandar Mirza and General Muhammad Ayub Khan.
3. 1969 – Imposed by General A. M. Yahya Khan deposing President Ayub Khan.
4. 1971-1972 – The 1969 Martial Law administration continuing under the government of Prime Minister Zulfikar Ali Bhutto.

5. April 1977 — Local Martial Law was imposed in several large cities by Prime Minister Bhutto under Article 245 of the 1973 Constitution.
6. July-1977 — General Martial Law imposed by the Chief of the Army Staff, General Muhammad Zia-Ul-Haq.

Having no interest in the well being of people, the ruling juntas, first eliminated the identity within 4 provinces, East Bengal, Baluchistan, Sindh and NWFP, as if this would make the people united overnight and all problems of the country would be solved automatically. This was in the form of One Unit Scheme. By the same token 56% majority of East Bengal in the name of Islamic brotherhood through legislation was reduced to an unheard of compulsory parity in the National Assembly. This high-handedness caused lot of hue and cry by many political parties from 4 affected provinces except Muslim League, which was running as a department of every successive government from Ghulam Muhammad to this day. Hundreds of politicians as a consequence of this scheme suffered long term of imprisonments and many scores of people from both wings mainly students lost their precious lives in political disturbances that followed.

As the ballot-box, free election and peoples rule through representative government, were then as now fiercely dreaded by bureaucracy, military and big business, a highly misleading idea, a new slogan essentially a misnomer and concoction of vested interest, "the ideology of Pakistan," was coined. It was implanted and implemented by the rulers, which was followed by a unitary form of government. All the powers vested in the central government, regardless of right of smaller provinces, of minorities and women. There so-called Unitarians were no other than those who enriched themselves of properties left behind by Hindus, of ministership, licenses, permits, and at the same time exploitation of the highest jobs in the foreign office, UN Agencies, banks, civil services, armed forces and industry, for themselves and their next generation, thus leaving nothing for the coming generation of young university graduates, who have to content themselves with the lowest clerical jobs, suffer frustration, which lead many of them to quit the country and find livelihood in foreign countries. It is dreadful indeed to recall these sufferings of our countrymen. In this loot religious organizations, who instead of guiding people in their day to day religious matters, turned themselves into political parties, is very unfortunate to observe indeed.

The press towed the government line, as mentioned in some other chapter of this book, for their own reasons, basically commercial ones. The only exception was a group of young journalists, many of them had the misfortune to undergo the most degrading treatment of public flogging by Martial Law Courts. Their crime was factual reporting and expression of honest opinion. No newspaper owner suffered any hardship. On the contrary majority of them, started from rags and reached to riches, this at the cost of

majority of our countrymen. Such riches so fast are nothing less than miracles, and that can happen only in Pakistan. Of course, now new and fast modes of getting rich have been gunrunning, smuggling of Hashish to foreign countries, and involved as well as arrested and convicted are armymen, advocates, actors, actresses and lately a Judge from Lahore, allegedly caught red-handed in England.

Except for tenure of Mr. Altaf Hussain, a Bengali, as Editor of *Daily Dawn*, Karachi, which paper was founded by Quaid-e-Azam, to protest, propagate and safeguard the rights of the people of Pakistan, performance of this national daily remained no better than most. However, perhaps changing political climate persuaded it to pin point a few burning question which deserved quoting from its editorial column, dated 10th March 1987, under caption "Conflicting Demands of Unity and Diversity". I quote -

"We stand in need of a bold attempt to ferret out the causes of the discontent which is all too visible in the smaller provinces. The over centralization of decision-making and implementation, which is an inescapable feature of all authoritarian/military dispensations, has fostered in the smaller provinces a feeling of not being equal partners in the affairs of the federation. But let us face the fact that Unitarians are found here, not only in the military and civil bureaucracy, but also among industrial barons and in certain right-wing circles are religious groupings. The combination of excessive centralization and authoritarian rule has provided a fertile breeding ground for all sorts of different concepts; a confederation, Sindhu Desh, and nationalities. A pluralist society needs the mechanisms and devices that are supplied by federalism so as to be able to balance and accommodate the conflicting pressures of unity and diversity. And it is only in a political milieu of constitutionality, democracy and freedom that the successful outworking of these federal mechanisms and devices can be guaranteed. Separatism under any guise provides no answer to deep-rooted social and economic problems (the example of Bangladesh should be enough to drive home this lesson). For this resolution a broad political endeavor, drawing equal strength from all the provinces, is required. It is time, therefore, to conduct the entire debate on a more rational level recognize real grievances where they exist, contain forces which a vested interest in over centralization, forge a national consensus on how to reconcile the demands of diversity with the imperatives of national unity and, at the same time, eschew slogans and concepts which, while self-serving for the moment, can lead to great mischief in the long run".

To afford an opportunity to the general readers to assess and evaluate, as to how, within a period of 30 years between 1947 and 1977, people of Pakistan, gradually yet persistently, were deprived of their basic democratic rights as free citizens of a free country. I can do no better than to reproduce a very impartial and well documented resume from a report consisting of 50 pages of Amnesty International on Pakistan for the year 1981, pages 8 to 15.

POLITICAL AND CONSTITUTIONAL DEVELOPMENTS

1947 to 1977

When the Islamic Republic of Pakistan was created in 1947, the Muslim League (founded in 1906) was the only political party of the Muslims of the Subcontinent; its main platform was the demand for an independent Muslim State. Having achieved this in 1947, opposition to the League's policies was easily identified with opposition to the State, particularly when voiced by political groups which had not advocated a separate Muslim State. Successive Pakistani governments have tended to equate opposition to their policies with opposition to the State as such labeling it "anti-State activities". Democratic political structures were slow to evolve in the new State: it was not until 1973 that Pakistan acquired its first democratic Constitution framed by a directly elected assembly. The development of political parties and structures was inhibited by repeated and prolonged periods of military rule: since the creation of Pakistan, martial law has been imposed six times. Under martial law political parties were often banned and strict censorship enforced. When martial law was lifted, political parties were in most cases allowed to resume activities, but only under considerable restrictions. Leaders and members of Pakistan's political parties have frequently and repeatedly been harassed and imprisoned - usually being detained without trial, or tried by special tribunals or military courts - merely for voicing political opinions different from those of the administration in power.

The first Constitution of 1956 incorporated several Islamic provisions, and established a parliamentary system of government. However, it was short-lived, being abrogated on 27 October 1958 when martial law was declared by General (later Field Marshal and President) Muhammad Ayub Khan. The Cabinet was dissolved and all political parties and political activity banned. Martial Law remained in force until 8 June 1962. Shortly before, in March 1962, the second Constitution was promulgated providing for a Presidential form of government under a system of "Basic Democracies". Political executive and although political parties were allowed to function, their activities were severely restricted. Civil disturbances, led by students and Islamic religious forces, marked the 10th anniversary of Field Marshal Ayub Khan's rule and on 25 March 1969 he handed over power to General A. M. Yahya Khan. Martial Law was again proclaimed, but the government announced that it would hold general elections at an early date. The military defeat of the Pakistani armed forces in East Pakistan in December 1971 and the establishment of Bangladesh brought the end of Yahya Khan's military administration, and Zulfikar Ali Bhutto became the President (later Prime Minister) of Pakistan on 20 December, 1971.

THE 1973 CONSTITUTION

Under the Civil administration of Zulfikar Ali Bhutto, leading a PPP government, Pakistan acquired its first democratic constitution drafted by directly elected general assembly based on universal suffrage. Like its precursors, the Constitution of the

Islamic Republic of Pakistan of 1973 proclaims Islam as the state religion (Article 2). It provides for an Islamic Council whose main function is to encourage Muslims to order their lives in accordance with the principles and concepts of Islam (Part IX, Articles 227-231). It establishes a federal parliamentary system of government with four units but with a strong central government and two houses of parliament (Parts III-V, Articles 41-159). It also provides for an independent judiciary (Part III, Articles 175-212). The fundamental rights guaranteed by the constitution as set out in Part II, Articles 8-28. They include freedom of movement, assembly, association and speech, safeguards against unlawful arrest and detention, and prohibits torture.

In November 1971, before the Constitution was adopted, a state of emergency had been declared at the start of the Bangladesh war. It was in force when the new Constitution was proclaimed and remained in force during the entire PPP administration. The continuation of the state of emergency severely limited the extent to which fundamental rights could be guaranteed.

Article 232 of the Constitution allows fundamental rights to be suspended during periods of emergency, and High Court decisions during the emergency to a limited extent. The Defence of Pakistan Rules - framed under the 1971 Defence of Pakistan Ordinance - remained in force, and allowed detention without trial, and the trial of prisoners before Special Tribunals and Special Courts applying summary procedure. Its provisions were frequently used against political opponents of the previous government.

In its report published in May 1977 Amnesty International described the curbs on fundamental rights then in force. A series of Constitutional amendments (in particular the 1975 Fourth and 1976 Fifth amendments to the Constitution), restricted the power of the higher judiciary to protect the fundamental rights proclaimed in the 1973 Constitution. These amendments, also reduced the safeguards against interference with the independence of the judiciary. Amnesty International observed that "the continuation of the state of emergency has largely been responsible for a serious erosion of fundamental freedoms in Pakistan, which has hindered the judiciary and the Bar from up-holding the rule of law".

The main opposition to the PPP government came from the National Awami Party (NAP), whose political base was in Pakistan's two western - most provinces, Baluchistan and North West Frontier Province. The party's political programme called for a greater degree of provincial autonomy. In 1973 the Baluchistan Provincial Government, led by the NAP, was dismissed. There followed armed rebellion in two Western provinces and the federal government banned the NAP in 1975. An Amnesty International observer attended the trial of 55 NAP leaders before a Special Court inside Hyderabad Central Jail; Amnesty International's critical observations of that trial are

contained in the 1977 report. In 1975 the National Democratic Party was formed, claiming the political allegiance of the former leadership of the banned NAP. "

In March 1977 general elections were held and the PPP was returned to power. However, there were widespread allegations that the elections had been rigged. The Pakistan National Alliance (PNA), an alliance of nine opposition parties formed before the elections, demanded that Prime Minister Zulfikar Ali Bhutto resign until fresh elections were held. The alliance's demands were accompanied by widespread civil disobedience and many political arrests. Martial Law was again invoked in April 1977 when it was imposed on several large cities, and was lifted in June, 1977.

On 5 July 1977 the Prime Minister was deposed in a military *coup* and General Mohammad Zia-Ul-Haq took power as the Chief Martial Law Administrator.

AFTER JULY 1977

The military administration dismissed the Cabinet and disbanded the national and provincial assemblies and the Senate. All political activity was banned and martial law was imposed all over the country. The 1973 Constitution was officially declared to be "in abeyance". Under the Laws (Continuance in Force) Order, 1977, the Constitution was declared to be subject to the martial law orders and regulations issued by the military authorities; the fundamental rights conferred by the Constitution were suspended, as well as any court proceedings to enforce respect for them.

In his 5 July 1977 address to the nation General Zia-Ul-Haq stated:-

"My sole aim is to organize free and fair elections which would be held in October this year (1977) I give a solemn assurance that I will not deviate from this schedule I hold the judiciary of the country in high esteem However if and when Martial Law Orders and Martial Law Regulations are issued, they would not be challenged in any Court of Law...."

The new government released thousands of political prisoners arrested under the previous administration including the NAP leaders and also released PPP leaders detained immediately after the military administration took power. It allowed limited political activity and on 15 September 1977 the state of emergency, which had been in force since 1971, was lifted. On 27 September 1977 Agha Shahi, head of the Pakistan delegation to the United Nations informed the UN General Assembly of the government's firm resolve to transfer power to elected representatives of the people after the October elections. However, the government postponed the elections. It stated that former public officials - mainly from the PPP - should first be subjected to the "process of accountability. Charges were brought against many PPP officials, including former Prime Minister Zulfikar Ali Bhutto, who was tried for conspiracy to murder. He was sentenced to death by the Lahore High Court after a highly controversial trial that

aroused much international concern. His conviction was upheld by a four to three majority verdict in the Supreme Court, and he was executed in April 1979. Many PPP members and sympathizers were arrested at the time.

On 10 February 1979 General Zia-Ul-Haq, who had become President of Pakistan in September 1978 upon the resignation of President Fazal Elahi Chaudhry, announced the introduction of an "Islamic system". This included a wealth tax (Zakat) and an agricultural tax (Ushr), and the promulgation of a set of severe penalties in accordance with the Shariat (Islamic law). Offences such as adultery and fornication were to be punished by stoning to death, theft and robbery by amputation of a hand and foot, and drinking alcohol by flogging. Shariat Courts have been established at the provincial and the federal level, and three parallel systems of law operated, with Shariat benches functioning along side military and traditional civil courts.

President Zia-Ul-Haq also announced far-reaching changes to the 1962 Political Parties Act, changes which were opposed by all political parties. The Electoral Commission was empowered to refuse registration of any party it considered to be critical of the military, or of the judiciary, or not based on the ideology of Pakistan. Most political parties refused to register.

On 16th October 1979, President Zia-Ul-Haq announced the indefinite postponement of the elections. All political parties were dissolved and all political activity banned. Party offices were sealed and bank accounts frozen. Total censorship was imposed, and newspapers, which the government said had been "working against the interest of the country and poisoning the minds of the people" were closed down. Further martial law provisions were promulgated, and the powers of the military courts to try economic, criminal and political cases extended. The Constitution was amended to prevent the judiciary from staying, reviewing, or annulling, or in any other way interfering with the proceedings of military courts, which were then trying many opponents of the government and sentencing them to imprisonment and flogging. These constitutional and legal developments were accompanied by renewed political arrests. Their number had increased sharply since the beginning of 1981.

THE EROSION OF FUNDAMENTAL RIGHTS

On 5 July 1977, when the military administration took over and declared martial law, the Laws (Continuance in Force) Order stated that the Constitution would be held "in abeyance". The fundamental rights conferred in the Constitution were suspended. Among the rights suspended were: the right of life: freedom from torture: the freedom of thought, conscience and religion: and the right not to be subjected to retroactive laws. These rights are guaranteed in Article 9, 14, 20 and 12 of the Pakistan Constitution and are rights which the International Covenant on Civil and Political Rights defines as fundamental freedom, from which no state may derogate, even in times of a "Public emergency threatening the life of the nation" (Article 4).

THE LEGALITY OF MARTIAL LAW

The legality of the imposition of martial law was challenged before the Supreme Court by Begum Nusrat Bhutto, the wife of the late Prime Minister Zulfikar Ali Bhutto. The Supreme Court of Pakistan, in judgment of 10 November 1977, ruled that the July 1977 imposition of martial law was legal, calling it an "extra-constitutional step necessitated by the complete breakdown and erosion of the Constitution and moral authority of the Government of Mr. Z. A. Bhutto." However, the Supreme Court upheld the legality of the military government only within certain conditions. Applying the doctrine of the "law of necessity" to the July 1977 bloodless coup, it set strict limits on the actions the martial law authorities could legally take. Its authority to act and promulgate legislative measures was restricted to: "All such measures as would establish or lead to the establishment of the declared objectives of the proclamation of the Martial Law, namely, restoration of law and order and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution".

The Supreme Court emphasized that:

"The new Legal Order is only for a temporary period, and for a specific purpose the court has found it possible to validate the extra-constitutional action of the Chief Martial Law Administrator also, because of the solemn pledge given by him that the period of constitutional deviation shall be of as short a duration as possible, and that during this period all his energies shall be directed towards creating conditions conducive to the holding of free and fair elections...."

The Supreme Court judgment set further conditions on the legality of the martial law government. It specified that the Constitution remained the supreme law of the land and that the supervisory powers of the High Courts, including their power to issue writs of habeas corpus, could not be taken away. The courts would continue to have full powers to review the actions of the martial law authorities and the military courts. The Supreme Court observed:

"That the superior courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law authorities, if challenged, in the light of the principles underlying the law of necessity as stated above. Their powers under Article 199 of the Constitution thus remained available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or order, Presidential Order and Ordinance."

(Pakistan Legal Decisions 1977, SC 705).

Invoking these provisions, the High Courts frequently quashed detention orders and convictions of political prisoners. They stayed floggings, executions and other sentences passed by military courts, when they ruled that due regard had not been paid to the rule of law and the fundamental rights guaranteed by the Constitution.

The November 1977 Supreme Court decision which defined and limited the legal validity of the military administration had been consistently ignored by the government. Four years after the imposition of martial law elections had been postponed several times and finally postponed indefinitely. The directives in the Supreme Court judgment have in fact been nullified by a series of constitutional amendments and martial law provisions passed during the first four years and finally culminated in the 24 March 1981 Provisional Constitution Order which marked a major departure from the rule of law.

As a result of the March 1981 amendment to the Constitution, no civilian court could review any action taken by the military courts or indeed review the actions and legality of the martial law administration itself. This applied even to the High Courts and Supreme Court. Respect for fundamental rights could no longer be enforced in Pakistan and the 1973 Constitution had been effectively abolished. The President assumed the power to change the constitution at will. The independence of the judiciary whose judges in the higher courts had an impressive record of protecting fundamental rights and prevention of major human right abuses - had virtually ended.

CONSTITUTIONAL AMENDMENTS SINCE JULY 1977

Since July 1977 the following constitutional amendments have been passed, which have curtailed the powers of the higher judiciary to enforce and protect human rights in Pakistan.

On 16 October 1979 the President issued the Constitution (Second Amendment) Order 1979, declared political parties illegal and arrested many political leaders. The amendment added Article 212-A to the Constitution. Article 212 permits the creation of administrative tribunals: exempt from the normal process of judicial review in narrowly defined areas of civil law. The new Article 212-A greatly extended the scope of Article 212, establishing military tribunals for the trial of offences under martial law "or any other law, including a special law". The amendment allowed cases to be transferred from ordinary courts to military tribunals. The civilian courts, including the courts of appeal, could no longer hear appeals against verdicts of the military courts. The order declared the verdicts of military courts final. The amendment seriously curtailed the jurisdiction of the higher courts. Martial Law legislation passed in the wake of the amendment (Martial Law Order 72) extended the military courts' jurisdiction at the expense of the civilian judiciary, and allowed military courts to try a wide range of civil and criminal offences including offences under the Penal Code. In the months following the 1979 Constitutional amendment, more than one hundred military courts were

established throughout the country. They started trying civilians, including political prisoners, using only summary procedures. Hundreds of people were sentenced to imprisonment and flogging, merely for participating in normal political activities, banned under martial law.

President Order No. 1 of 1980, Promulgated on 27 May 1980, amended Article 199 of the Constitution. It restricted the "writ jurisdiction" of the High Court, and barred them from making" an order relating to the validity or effect of any Martial Law Regulation or any Martial Law Order or anything done, or action taken, or intended to be done or taken, thereunder." The order also prohibited the High Courts from reviewing the judgments or sentences passed by military courts or tribunals, or from taking action against anyone acting with the authority of the martial law administrators. The order stated that the higher courts' jurisdiction had been removed retrospectively, and it then declared the 1977 military takeover to be legal, as well as all subsequent order issued by the military authorities. These included Presidential Orders, Chief Martial Law orders and Regulations. This Constitutional amendment was passed just as the Punjab High Court was about to give judgment on a petition on behalf of retired Air Marshal Asghar Khan, the leader of the Central Political party, the Tehrik-i-Istaqlal, challenging the legality of the Martial Law administration and of the 1979 Constitutional amendment. The petition argued that the military government was bound to hold elections within 90 days, and that the government's actions restricting basic human rights and freedom were not legal.

The purpose of the May 1980 Constitutional amendment was to deprive the higher judiciary of its powers to review the decisions of military courts, the legality of martial law, or the legality of provisions issued by the authorities. The High Courts could no longer give any form of relief, for example, by granting bail, or hear appeals from political prisoners unjustly detained or convicted by military courts. Despite the amendments, some High Courts notably the Punjab and Baluchistan High Courts, continued to do so under the powers given to them in Article 199 of the Constitution. Martial Law order 77, replacing Martial Law order 72 which was promulgated at the same time, further extended the jurisdiction of the military courts at the expense of civilian courts. Military courts were given exclusive jurisdiction over cases of "treason, subversion, sedition, sabotage, prejudicial activity and seducing members of the armed forces." They were also empowered to try any "contravention of any Martial Law order or Martial Law Regulation", and all offences under the Pakistan Penal Code.

THE PROVISIONAL CONSTITUTION ORDER 1981

On 24 March 1981, President Zia-ul-Haq promulgated the Provisional Constitution Order 1981 (PCO), which claims to validate everything done by the military government since 1977 (Article 15 (1) and (2)). This order abrogated the fundamental provisions of Pakistan's 1973 Constitution by Presidential decree. Only the provisions reiterated in the PCO are retained: the section defining the powers of the Federal

Government is included, but the parts concerning elections, the provincial and federal parliaments and the Constitution's fundamental rights provisions are excluded. Under Article 16 the President has assumed the power to amend the Constitution at will. The PCO ended the independence of the judiciary and proscribed all major political parties. It prohibited any challenge in any court of anything done by the Martial Law government, or to any sentence passed by a military court or tribunal.

The PCO voids the Supreme Court ruling of 10 November 1977, which had conditionally validated the martial law government, but restricted its mandate. It came at a time when the Supreme Court was about to hear petitions challenging the legality of the military government, and declared null and void all court decisions dealing with the legality of the Martial Law government, or decisions taken by military tribunals. Orders and injunctions made by the Supreme Court and High Courts relating to decisions of military courts were suspended (Article 15 (6)).

JUDGES OF THE BALUCHISTAN HIGH COURT

Notable among these were decisions by the Baluchistan High Court staying the execution of death sentences passed by Special Military Courts. On 2 July 1980, it ruled that the High Courts could still decide cases challenging decisions of military courts: "We would therefore hold that this court has always the power to examine the question, whether this court lost jurisdiction after the promulgation of Presidential Order No. 21 of 1979, and Presidential Order No. 1 of 1980, including the validity of the instruments through which such amendments were brought about." It then declared the two latest Constitutional amendments to Article 212 and 199 (passed on 16 October 1979 and 27 May 1980 respectively) to be illegal. It described them as "drastic and fundamental" and outside the mandate of the military government, ruling that they failed to pass the test of necessity laid down in Supreme Court's 1977 judgment. The court held that the High Courts had retained the power of judicial review originally granted in the Constitution, despite the Constitutional amendments passed by the government to the contrary. It, therefore, continued to issue orders staying the execution of prisoners.

The PCO finally removed these powers. The judiciary no longer quash detention orders of political prisoners under Martial Law Order 78 by ruling them illegal. It can no longer set aside summary convictions imposed by military courts on political prisoners, or stay floggings and executions as it had previously, usually on the ground that military courts did not provide adequate legal safeguards to ensure a fair trial.

Since the passing of the PCO, Amnesty International has been told by many former political prisoners who have fled the country, and relatives of political prisoners, that they fear for the prisoners, safety, as they no longer have recourse to the courts Lawyers - who have been active in the defence of human rights of political prisoners in Pakistan - are no longer able to give them any professional help. They have advised relatives that

there is no point in approaching the courts. This letter, received by Amnesty International in June 1981, is one of many:

"My brother has consulted several lawyers of the High Court concerning filling a writ in the High Court but was told that the recent Constitutional changes prohibit such a legal remedy."

The effect of the PCO was immediate. It led to the execution of two political prisoners.

Abdul Hameed Baluch, a 21 year old student leader from Baluchistan, had been convicted of murdering a recruiting agent by a Special Military Court and sentenced to death. The Baluchistan High Court had granted an order on 8 December 1980 staying his execution, because of grave irregularities in his trial and conviction. The name of the man he was charged with murdering was twice changed during the trial when the alleged victim proved to be alive. As a result of the PCO (which also prompted the removal of Baluchistan's Chief Justice Mir Khuda Bakhsh Marri) the High Court's order staying his execution was suspended and Abdul Hameed Baluch was executed in Mach Jail, near Quetta on 11 June 1981.

THE JUDICIARY

The 1973 Constitution adheres to the principle of an independent judiciary. Both the judiciary and the legal profession have played an important and active role in protecting the rule of law and fundamental rights in Pakistan. They have resisted attempts by successive governments to restrict their independence, and curb their power to protect citizens from human rights violations. A High Court Judge wrote in December 1977 to Amnesty International members, informing them of the release of a prisoner of conscience. Declaring the prisoner's conviction by a Special Court to be illegal, he wrote:

"You will be glad to know that superior courts in Pakistan have always been fully conscious of the importance of human rights and we have always done our humble best within the limitation of law to uphold civil liberty." The Judge expressed his "deep concern for the independence of the judiciary and for human rights."

In this 1977 report Amnesty International described the constraints on the powers and independence of the judiciary imposed by the previous administration, particularly under the Fifth Amendment to the Constitution of September 1976. The Constitutional changes made by the previous administration restricted the power of the judiciary of review executive actions during periods of emergency even where the actions infringed human rights. This trend continued after the July 1977 imposition of Martial Law.

The Constitution (Second Amendment) order 1979 established a system of military courts parallel to the civilian judicial system to try offences under Martial Law and the Penal Code. Presidential Order No. 1 of 1980 further extended the jurisdiction of military tribunal at the expense of the civilian courts, and barred the higher courts from reviewing the actions of the military courts and administration. High Court Judges who continued: to pass judgments criticizing the military courts or the martial law administration, were frequently harassed: for example, 10 days after the Baluchistan High Court's judgment declaring the government's Constitutional amendments illegal, each Judge was served with a notice alleging irregularities in his income tax forms. (International Commission of Jurists, CIJL Bulletin No. 6, October 1980).

The PCO of 24 March 1981 has ended any judicial scrutiny of executive action. It marks the virtual end of the independence of Pakistan's judiciary; to ensure the judiciary's submission, the government required the Judges of the Supreme Court and the High Courts to take an oath to uphold the PCO, rather than the Constitution. Article 17 of the PCO states:-

"A person holding office as Chief Justice of the Supreme Court shall not continue to hold that office if he is not given, or does not make an oath in the form set out in the Schedule A person who has made (an) oath as required shall be bound by the provisions of this Order and, notwithstanding the judgment of any court, shall not call in question or permit to be called in question the validity of any of the said provisions."

The Oath, which all Supreme Court and High Courts Judges were required to swear on 25 March 1981, reads:

"That as Chief Justice of Pakistan (or a Judge of the Supreme Court of Pakistan or Chief Justice or a Judge of the High Court for the Province of) I will discharge my duties, and perform my functions honestly, to the best of my ability, and faithfully in accordance with the Provisional Constitution Order, 1981, and the law That I will abide by the Provisional Constitution Order, 1981...."

By requiring this Oath, which bars Judges from scrutinizing the actions of the military authorities or the military courts, the government assured itself of the loyalty of the High Court and Supreme Court Judges.

The Chief Justice of Pakistan, Anwarul Haq, and two other Supreme Court Judges, Justice Dorab Patel and Justice Fakhruddin Ibrahim, resigned, refusing to endorse the validity of the PCO. They wrote separately to the President that they were bound by the dictates of their conscience. The Chief Justice said: "Any Judge supporting the decree (i.e; the Provisional Constitution Order) is bound to protect the government and deny citizens a legal remedy for their grievances." Sixteen High Court Judges reportedly did not swear the Oath. Among them were at least five High Court Judges who were

not invited to take the new Oath. Some of these had allowed petitions challenging the legality of actions of the military government, among them Chief Justice Marri of the Baluchistan High Court, who was responsible for several decisions staying the execution of sentences imposed by Special Military Courts.

By not allowing these five Judges, to take the Oath, the government has removed them from office. It has bypassed the Supreme Judicial Council, an independent Constitutional body consisting of the Chief Justice, the two most Senior Judges of the Supreme Court and the Chief Justices of the Provincial High Courts, which provided security of tenure to the Pakistan judiciary. Judges could only be removed by Supreme Judicial Council for misconduct, under the procedure laid down in Article 209(7) of the Constitution which states: "A Judge of the Supreme Court of a High Court shall not be removed from office, except as provided by this Article." Since the government has now assumed power to remove judges under the PCO, the independence of Pakistan's judiciary has effectively ended.

Introducing the PCO, the President was quoted as saying: "A judiciary's job is to interpret the law and administer justice, not to challenge the administration." (*Far Eastern Economic Review*, 3 April, 1981). It may be noted that Amnesty International has consultative status with the United Nations (ECOSOC), UNESCO and the Council of Europe. It has cooperative relations with the Inter-American Commission of Human Rights of the Organization of American States and is a member of the coordinating committee of the Bureau for the placement and Education of African Refugees of the Organization of African Unity. It was launched as an independent organization over 20 years ago. It is open to anyone prepared to work universally for the release of prisoners of conscious, for fair trial of political prisoners, and for an end to torture and execution. The movement now has member supporters in more than 150 countries. It is independent of any government, Political group, ideology, economic interests or religious creed.

These are a few of its many commendable objects. Because its report, which covers all the countries in the world, are not easily available to the general public. The Press in Pakistan, by and large takes little notice of these reports. I felt the necessity to reproduce certain pages as above quoted.

Dr. Dieter Conard, Director of South Asia Institute, University of Heidelberg, West Germany, has written a highly learned paper on chequered history of constitution making, and its implication in Pakistan, captioned "IN DEFENCE OF THE CONTINUITY OF LAW: PAKISTAN'S COURTS IN CRISIS OF STATE He presented the paper to a colloquium on Pakistan, in its 4th decade, held at Deutsches Orient-Institute, Hamburg in May 1980. He revised and updated the paper in 1981, when CMLA passed now notorious Provisional Constitutional Order, 1981. This was published in volume 13 Pakistan Law Journal 1985, magazine section, consisting of 34

pages, and encompassing decisions on all the important constitutional cases decided by Supreme Court and various High Courts including High Court of Baluchistan up to present Martial Law regime 1977-81. In short it covers the whole range of Constitution making including the grafted and imported-Principles of Necessity, Judiciary at different times, discussion on sanctity of Oath of Judges and option open to them in case of resisting unconstitutional methods used by executive or Martial Law alike in different countries including Pakistan. For the benefit of readers, I quote certain passages from this paper as an example of impartial and unbiased opinion of a German academician of Pakistan constitutional problems. My scope of references is essentially limited and do not claim to represent the gist of this study, yet for Pakistani Constitution Lawyers and Judges, it would be of some interest.

"The presentation of a document purporting to be a Constitution is, therefore, not the last word in law. The significance of Pakistan's great Constitutional cases, lies in the fact the courts have constantly assumed the power (to say whether what had happened, was legal or illegal (164) i.e. to judge the validity of constitutional enactments. This ranges from the first assertion of judicial power against constituent aspirations, in Yusuf Patel Vs. Crown, to the wholesale legal endorsement of successful revolution in State Vs. Dosso, or the wholesale, expost repudiation of Yahya Khan's provisional Constitution order in Asma Jilani, the more detailed inquiry into enactment procedures in Zia-ur-Rehman's case, and the actual setting aside parts of a Provisional Constitution in Begum Nusrat Bhutto Vs. Chief of Army Staff. On the whole this line of cases is consistent, if implicit, repudiation of the often heard argument that the courts being creatures of the Constitution in force cannot extend their inquiry beyond this base of their jurisdiction and question is validity. (165). This question of jurisdiction being pivotal to the practical application of the doctrines of transition has to be considered explicitly here. There are really two situations to be distinguished:

(a) Where the constitutional change does not affect the courts' jurisdiction in terms, or where the continuance of the former jurisdiction is generally conformed. The Courts would then remain creatures of the pre-existing legal order, and a formal (continuance in force) provision, being merely declaratory, would not change the nature of their jurisdiction, nor affect their identity. This has been expressly decided in the interesting contempt case of Inayat Khan Vs. Anwar, concerning the identity of Pakistan's Federal and Supreme Court from 1955 to 1976.¹⁶⁶ Again, in Begum Nusrat Bhutto's case it has been held by Anwarul Haq, CJ ¹⁶⁷ that Martial Law being but a constitutional deviation and the old legal system not being totally destroyed the courts retain their jurisdiction to judge on the validity of the new regime's actions;

(b) But the new Constitution may in fact reconstitute the courts, alter their composition and jurisdiction, etc. In such a case of distinction between judicial power and jurisdiction canvassed in State Vs. Zia-ur-Rehman (168) comes into play. By their very existence courts of law have an inherent power to determine the law to be applied by

them and thus to inquire into the sources of their own jurisdiction. The result might seem paradoxical in a critical case; if the court finds its own jurisdiction, eg. the Constitution enacting it, faulty, its own composition and thus the very power of inquiry might appear to be affected. This is what lawyers have called, incomparable situation, disaster, i.e. a legal impasse which cannot be solved within the four corners of enacted text. It is in other words, the typical situation of civil necessity. There are no convincing reasons, why courts should be any less entitled than the executive to claim extraordinary powers under state necessity in order to overcome legal chaos and effect and ordered transition to legality. Thus necessity can be invoked as an independent basis of jurisdiction, if no other remedy is left; this has been held in the Cyprus case of A. G. V. Mustafa Ibrahim (169). It would normally be covered by the implied mandate of the true sovereign.

Is the position outlined affected by the particular Oath of office sworn by the Judges? This question has been discussed in the Madzimbamuto case and again in Nusrat Bhutto's case, where a new Oath of office omitting the reference to the constitution has been administered to the Judges. If the gist of our discussion here has been that the position of the courts should be defined in relation to the aggregate legal system rather than to a particular political constitution on the changed Oath of office mentioning but the responsibility towards law (in general would seem rather more apposite, and preferable to an Oath on a specific constitution. The word law should then be construed not as excluding, but as comprising the constitution legally in force for the time being. Seen thus, the general duty to uphold the law must rather be recognized as a legal reservation implicit in any Oath sworn on a specific constitution: for an Oath to administer law in accordance with such constitution could be legally imposed on a Judge only insofar as the constitution is) law itself, i.e., legally valid. A political Oath could, therefore, not restrain a court of law from exercising its inherent judicial power to inquire into the legal validity of a constitution, even his own jurisdiction is conferred by it.

POSTSCRIPT

After the outline of this paper, including the positive evaluation of the general Oath (law) had been presented to the Hamburg Colloquium in 1980, a Provisional Constitution Order has been promulgated by the Chief Martial Law Administrator on 24th March 1981, seeking to put a formal end to the necessity regime as sanctioned by Nusrat Bhutto's case. Art. 15 of this order contains an unqualified validation of all Martial Law and all other laws made on or after the 5 July, 1977 notwithstanding any judgment of any court (and specifically excludes the jurisdiction of any court to question its validity on any ground whatsoever. The obedience of the Judges is sought to be secured by imposing yet another Oath of office on them, this time referring, besides to) the law (in terms to the) Provisional Constitution Order (Art. 17 and Schedule). A substantial number of Judges, including the Chief Justice of Pakistan and the Chief justice of the Baluchistan High Court, refused to take the new Oath and lost

their office accordingly, together with others who were not called upon to take the new Oath. An interference with the composition of the superior courts and judicial independence on this scale is unprecedented in the history of Pakistan. The last sentence in the text above have been added after this event. They are meant to further clarify the legal position already indicated. This does not in any way detract from the respect owed to the Judges who refused to take the new Oath, and had to quit office. The legal position would still seem to remain. The authority to impose an Oath must itself be justified under law; it may also be less difficult to insert or remove references to the various Constitutions in the judicial Oath, then to remove the reference to law.

CHAPTER FOUR

PRELUDE TO THE FULL COURT JUDGMENT

In his impartial and exhaustive article Mr. Lawrence Lifschulz of "Far Eastern Economic Review - Hong Kong", dated 13 March, 1981, which is reported in some other part of this book, has indicated the difficulties and pressures which the Court, according to him, underwent before announcing the final judgment of 02 July 1980, at Quetta. As this judgment has by now become a very important part of this country's judicial history, it is, therefore, fair for the future historian and general readers to know a more factual account through various court orders, which are part of public record from 17 June 1978 to 2 July, 1980. These will reveal, amongst other, how the Federal and Provincial Governments through law officers, the newly appointed Deputy Attorney General Baluchistan, and Advocate General, used all delaying tactics to have a different judgment on Article 212-A of Constitution, then was delivered by us. Except for an instance, the most annoying one, amounting to contempt of court, propriety prohibits me at this stage to give other instances for the present. Nobody grudges the tactics of lawyers on both sides of the Bench to plead their case, but at least, the government's side Law Officer, has far more duty to be more truthful, and courteous to courts, as they are Law Officers of the Courts also, and must have the courage to resist pressures of their employer, the Government, because courts themselves are the most important part of the Government. The last attempt, a most shabby and clumsy one, was made by the Provincial Government through local police to pressurize the court which was in session and about to give its judgment on 2 July 1980, at Quetta, when the local police ventured to stop the official car of one Judge, which was taking his children to school, gave stern warning to the driver, and naturally harassed the children, not to use the car in future for school. The same morning the police obviously being on the lookout, challenged another Judge's car, took it to the Civil Line Police Station and detained it there. Whilst waiting for the Chillan receipt, the Judge's driver informed us at tea break and I directed the Registrar to complain to the I. G. Police, and immediately wrote a letter to Governor Lt. Gen. Rahimuddin, who was also Martial Law Administrator, on behalf of the Judges to direct the police not to use these mean tactics in future. Thereafter, the same day we passed our short order on the constitutional points involved, holding the amendment of 212-A Constitution by the President-giving vast powers to Martial Law Courts as *ultra vires* and struck it down. The detailed judgment followed on 12 July 1978, which is reported here.

Not only this, on a previous occasion when bail was granted by the High Court to an under-trial accused before a Military Court, the Presiding Major had the cheek first to phone the concerned High Court Judge and bully him, then attempted not to obey the

order. I, therefore, personally made a verbal complaint to Governor Rahimuddin in his office, and also asked him to punish the officer and let me know, as it was clear contempt of the Court. You will be surprised, nothing was heard from the Governor. Thus the tension and pressure created by the Provincial Government through Governor-cum-Martial Law Administrator continued, and people rushed in hundreds for redress. The High Court, which without fear or favor, continued to give relief to the citizen whenever possible within law. Those were trying times at least for Baluchistan High Court, and its small contingent of 3 Judges. Yet with God's help, we persevered in our attempt, to uphold the rule of law, and the rights of ordinary citizens. Both day to day, court order and the final judgments are reproduced for the readers to reach their own conclusion. It will be unfair on my part, if I fail to mention the kind gesture made by the then Law Minister Mr. Sharifuddin Pirzada, accompanied by the then Law Secretary Mr. Justice Nusrat, who came to my house sometime in September 1981, at Quetta, when I was no more a Judge, asking me to write a few lines giving my consent, so that I could be appointed a Judge of the Supreme Court immediately. After thanking them over a cup of tea, I told them that the same Oath which I had not taken at Quetta, how could I take it at Islamabad. Besides, when I was considered bad enough in the Government view whilst Chief Justice at Quetta, how could I be considered fit and good enough as Supreme Court Judge. Naturally, he was disappointed that I did not accept his friendly gesture. Maybe there was politics that only God knows. However, I suggested that the Government should issue the order of appointment first, then I would see. On this he replied, then you will reject it, and it would be against the prestige of the Government. I reminded him that if Government has its prestige, I have my honor, at that, the matter ended there.

Now, hereunder are reproduced various order of the Court during the long hearings between 1978 and 1980, and the short order, dated 02 July 1980, and Full Court judgment, dated 12 July, 1980:

IN THE HIGH COURT OF BALUCHISTAN, QUETTA

CONSTITUTIONAL PETITION NO. 274/87

1. Suleman
2. Qasim

Sons of Usman, caste Kumbar

r/o Village Kurk, Tehsil Sibi

Presently, confined in condemned prisoners cell, Central Jail, Mach

..... *Petitioners*

Versus

1. President, Special Military Court No. 3, Sibi.
2. Deputy Martial Law Administrator, Sibi.

3. Martial Law Administrator, Zone "D" Baluchistan, Quetta.
4. Chief Martial Law Administrator of Pakistan, Rawalpindi.
5. Superintendent, Central Jail, Mach,

..... Respondents.

**PETITION UNDER ARTICLE 199 OF CONSTITUTION OF PAKISTAN 1973 READ
WITH CMLA'S ORDER NO. 1 OF 1977**

"CONNECTED PETITION NOS."

- | | |
|---------------------|--------------------|
| 1. C.P. No. 365/78, | 2. C.P. No. 382/78 |
| 3. C.P. No. 24/79, | 4. C.P. No. 160/79 |
| 5. C.P. No. 249/79, | 6. C.P. No. 277/79 |

17-6-1978

1. Mr. Aslam Chishti, Advocate for the Petitioner.....

1. Allowed.

2. Parawise comments of respondents 1 to 3 to reach within a fortnight. In the meantime, the execution, if scheduled, shall be stayed. Copy of stay to be sent telegraphically at the expense of the petitioner.

Sd/-JUDGE
M. A. RASHID

2-7-1978

Mr. Aslam Chishti for the petitioner.

Comments have been received where it has been stated that the order convening the court for the trial against the accused was passed by Martial Law Administrator Zone "D". The learned Advocate General is present in the court and he is directed to produce the order convening the court in this case. Adjourned to 8-7-1978. The order of the stay passed on 17-6-78 shall continue till the next date of hearing.

Sd/- JUDGE
ABDUL QADEER CHAUDHRY

8-7-1978.

Mr. Aslam Chishti for the petitioner.

The learned AAG has stated that the relevant record of the case is lying with the Assistant Commissioner Sibi and the other relevant documents are lying with Martial Law Head quarters. They are to be produced on the next date of hearing along with the record already summoned by this court. Adjourned to 15-7-78. Till then the order passed by the respondent No. 1 shall not be executed.

Sd/-JUDGE
ABDUL QADEER CHAUDHARY.

15-7-78.

Mr. Aslam Chishti.
Mr. A. G.

It is a D. B. matter. It has to be fixed before D. B. The learned AG has shown the original order of ML Zone "D" convening the court. The order is dated 23-2-78. A copy of the same be supplied to the counsel for the petitioner by the learned A. G. The record summoned by this court be produced on the next date of hearing.

The counsel for the petitioner wants to inspect the record, but the learned A.G. has opposed the prayer let the counsel for the petitioner make an application in this behalf.

Adjourned to a date in office. The order of stay shall continue up to next date of hearing.

Sd/-JUDGE
ABDUL QADEER CHAUDHARY.

27-7-1978.

Mr. Aslam Chishti counsel for the petitioner is indisposed.

Mr. A. G. has no objection if the petition may be adjourned. Till then, the order of stay passed on the last date of hearing will continue.

Sd/-JUDGE
ABDUL QADEER CHAUDHARY
Sd/-
MIR HAZAR KHAN KHOSO

31-7-1978.

Mr. Muhammad Aslam Chishti, Advocate.
Mr. Assistant Advocate General.

1. The contention raised inter alia, is that the charge was read out to the petitioners a month before the Special Military Court was convened to try them. The submissions require examination.

Admit. Notice.

2. Mr. Muhammad Ahmed Mirza, Advocate General is away from the station and Mr. Yusuf is unable to argue it.

This application be taken up in the next week.

3. In the event of admission of this petition Mr. Yusuf, Assistant Advocate General has no objection if the execution of death sentence is stayed pending hearing of the petition. Orders accordingly.

4. Record of the Special Military Court be summoned.

5. Exempted for the present. Translation be filed within a month.

Sd/ – ACTING CHIEF JUSTICE
M. A. RASHID
Sd/- JUDGE
ABDUL QADEER CHAUDHARY

10-8-1978.

Mr. Muhammad Aslam Chishti, Advocate for the Petitioners.

Mr. Yusuf, Assistant Advocate General for the respondents.

1. The record of the Special Military Court has been brought by Mr. Yusuf, Assistant Advocate General. The AAG states that this record was obtained by him from

the Provincial Home Secretary though the requisition of the record had gone out from the court to the Special Military Court. In these circumstances Home Secretary may be informed that the record is lying detained in this court.

2. The record of the Assistant Commissioner's court should be summoned. In the meantime Mr. Yusuf, AAG would examine the application whose notice was received by him today.

To come up during the week commencing 20th August 1978.

Sd/- ACTING CHIEF JUSTICE
M. A. RASHID
Sd/-JUDGE-
ABDUL QADEER CHAUDHARY

24-8-1978.

Mr. Muhammad Aslam Chishti for the Petitioner.
Mr. Advocate General for the State.

Mr. Chishti submits that the record he wants to be summoned is that of the court of Assistant Commissioner, Sibi. According to the learned counsel, the Assistant Commissioner had already taken cognizance of the case and this record relates to such cognizance, together with the formal complaint. The Assistant Commissioner, Sibi, should again be asked to explain the nature of the record required, to send the same. At the same time a notice should go to Major Rifat of Sibi Scouts for furnishing the record sent to him by the Assistant Commissioner. Similar notice to go the President, Special Military Court, Sibi.

Mr. Chishti submits that on 15 th of July, 1978 the record of the Assistant Commissioner's court was with the Advocate General. The Advocate General strongly repudiates this contention.

Sd/- ACTING CHIEF JUSTICE
M. A. RASHID
Sd/-JUDGE
ABDUL QADEER CHAUDHARY

23-10-1979.

1. Mr. Muhammad Aslam Chishti, Advocate for petitioner.

2. Mr. Muhammad Yusuf, Assistant Advocate General, for respondents/applicants. C. Misc. 774/79: Learned Assistant Advocate General has moved an application under Article 212-A of the Constitution stating that in view of clause (3) of Article 212-A of the Constitution, all proceedings/ petitions pending before any court other than the Supreme Court of Pakistan shall abate and as such the petitions has abated. Then a further prayer is made in para. 5 of the application that as the petition has abated, therefore, previous orders of this court suspending the execution of sentence has become ineffective and in fructuous and the petition be taken up for urgent hearing. On inquiry he submitted that he has not supplied the copy of this application to the counsel for the petitioner. He is directed to supply a copy of this application to the other side. At the same time, learned Assistant Advocate General made a request for adjournment on the ground that as MLO-72 has been promulgated and he has seen it in the newspaper, he wants to obtain a copy of the same and place it before the court also, at the time of hearing to see its implications. The matter is, therefore, adjourned on his request. By consent to come up on 28-10-1979 along with the main petition for final hearing.

Sd/- CHIEF JUSTICE
MIR KHUDA BAKHSH MARRI

Sd/-JUDGE
ZAKAULLAH LODI

25-10-1979.

1. Mr. Muhammad Aslam Chishti, Advocate for the petitioner.
2. Mr. Muhammad Yusuf, AAG for respondents.

C. Misc.791/79: On 20-10-1979 learned Assistant Advocate General moved an application No, C. Misc. 774/79 of which notices were issued to the counsel for the other side and with consent of learned counsel for the parties following orders were passed.

"Learned Assistant Advocate General has moved an application under Article 212-A of the Constitution stating that in view of clause (3) of Article 212-A of the Constitution, all proceedings/petitions pending before any court other than the Supreme Court of Pakistan shall abate and as such the petition has abated. Then a further prayer is made in para. 5 of the application that as the petition has abated, therefore, previous orders of this court suspending the execution of sentence has become ineffective and infructuous and the petition be taken up for urgent hearing. On inquiry he submitted that he has not supplied the copy of this application to the counsel for the petitioner. He is directed to supply copy of this application to the other side.

At the same time, learned Assistant Advocate General made a request for adjournment on the ground that as MLO-72 has been promulgated and he has seen it in the newspaper, he wants to obtain a copy of the same and place it before the court also, at the of hearing to see its implications. The matter is, therefore; adjourned on his request. By consent to come up on 28-1 -1979 along with the main petition for final hearing."

In spite of the above orders and the case having been fixed with consent of learned Assistant Advocate General for 28-10-1979, to our surprise he moved an application after the court has risen for the day i.e. yesterday 24-10-1979 to the Registrar being an urgent application wherein he has requested that "that application, dated 20-10-1979 may kindly be allowed to be withdrawn and replaced with the prayer that the proceedings of the petition stand abated under the provisions of Article 212-A of the Constitution of Islamic Republic of Pakistan read with MLO-72 and as such be removed from the cause list."

Seeing the urgent request, although in our opinion it was ill-advised and unnecessary in view of earlier orders, we constituted a Special Bench and issued notices to the counsel for other side on the same day and fixed this application today being Thursday, a non-working day.

When this application came up for hearing, Mr. Aslam Chishti, Advocate for the petitioner filed rejoinder to the application and when learned Assistant advocate general was asked to argue, he requested for adjournment on the ground that he wants to study the rejoinder and file his reply. Over and above, he has not even produced a gazetted or certified copy of MLO-72 today, although he was directed to do so, nor he produced certified copy of amended Article 212-A of the Constitution, except for newspaper reports. We were at a loss because if this was the plea of learned Assistant Advocate General with regard to this application, this was not necessary. However, we again grant this request for adjournment and fix this application along with application No. 774/79 for 28-10-1979, as earlier ordered. Learned Assistant Advocate General may file any document in reply to the application in the meantime, if he likes and also gazetted or certified copy of MLO-72 and amended Article 212-A of the Constitution of Islamic Republic of Pakistan.

The question before us is with regard to interpretation of Article 212-A and MLO-72, its implication and extent of application to the cases pending before this court, although some of the matters already stand admitted by this court and in some cases stay were granted and people were also released on bail in some cases and it is very necessary for this court to look into the intricacies of MLO-72 and amended Article 212-A of the Constitution. It is nobody's case that by these amendments this court has been deprived of its power of judicial review without going into detail. This fact is supported by Supreme Court of Pakistan judgment in C. P. NO. 1 /1977 (Begum Nusrat Bhutto *vs.* the

Chief of Army Staff) wherein their Lordships had held at page 102, para. V of separate publication of judgement as under:

"That the superior courts continue to have the power of judicial review to judge the validity of any, act or action of the Martial Law authorities, if challenged in the light of the principle underlying the law of necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as hereto fore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order and Ordinances."

While perusing the application, dated 24-10-1979 (C. Misc. 791 /79) we regret to note the language used by the Assistant Advocate General whereby he asked for abatement of the petitions, this fact was in his knowledge that these petitions have been fixed for 28-10-1979 for disposal.

He has stated using own words "as such (the cases) be removed from the cause list." Now he should know that it is not within his province or power to remove or otherwise, a case from the cause list. This basically concerns with this court and it is courts internal administrative affair. This may amount, perhaps, in our opinion to give a direction to the court by a person who is an Officer of the Court and represents a party and paid from the public exchequer. However, we leave this question also to consider on 28-10-1979, that what action should be taken against him.

Mr. Muhammad Aslam Chishti, Advocate moved application No. 796/79 under Section 151 C.P.C. supported by urgent application, whereby he has stated that petition is fixed for hearing on 28-10-1979 and the same date has been fixed on the request of learned Advocate for State for his application No. 774/79 dated 20-10-1979 and that this court has already granted interim stay which was later on confirmed and execution of death sentence was stayed. He further submits that as death sentence has been confirmed by the Chief Martial Law Administrator who is respondent No. 4 and the implication and applicability of MLO-72 and Article 212-A of the Constitution has to be argued and considered on 28-10-1979, but a news item cutting filed published in *Daily Jang*, Quetta on 24-10-1979 wherein the Governor Baluchistan who is also Martial Law Administrator Zone "D" and respondent No. 3, is reported to have stated in reply to a question from a press correspondent that "the sentences awarded on charges of murder and which have been confirmed by President of Pakistan will soon be executed." According to learned counsel this statement by the Chief Executive of the Province has naturally created sense of despondency to the petitioner and it is likely that some executive instructions of the like nature may have been issued to the Superintendent Central Jail, Mach, respondent No. 5 and the petitioners hoped that some contradiction will be issued. In absence of such contradiction the petitioners apprehensions are further accentuated, and other development was the application filed by Assistant Advocate General No. 791/79 dated 24-10-1979 referred earlier. He, therefore, prays that in view of the

aforesaid position, it would be just if this Hon'ble Court is pleased to issue appropriate directions/clarification as to the effect of the stay order. This would be expedient so that any further plea of bona fide belief by respondents is not raised and also as question of life and death and the seriousness of the matter, it would be just if the order of this Honorable Court passed on the application is telegraphically conveyed to the respondents, in particular the Superintendent Central Jail, Mach, and that execution be stayed till decision of the application filed for 28-10-1979.

In support of his contention learned counsel addressed arguments at length and cited many case law which at this stage, we are not inclined to refer because main question will be heard on 28-10-1979. In ordinary circumstances the petitioner shall not have any apprehension when the applications are fixed for disposal with the consent of counsel for the respondents and stay of execution issued by this court has been confirmed and continues to be so till the disposal of the case on 28-10-1979. In any case, the apprehension may be genuine. We, therefore, direct learned Assistant Advocate General that he should inform the respondents to conform to the earlier orders of this court till the matter is disposed of and he undertakes to do so. As abandoned caution, issue telegraphic orders to Superintendent Central Jail, Mach and Quetta in all connected cases.

Mr. Muhammad Aslam Chishti, Advocate supplied copy of this application of the Assistant Advocate General today in the court. Let this application be fixed also along with other application for 28-10-1979.

As important Constitutional and legal points are involved, I, therefore, am of the opinion that a larger Bench be constituted and nominate Mr. Justice M. A. Rashid so as to sit with us on 28th October 1979.

Sd/- CHIEF JUSTICE
MIR KHUDA BAKHSH MARRI
Sd/- JUDGE
ZAKAULLAH LODI

28-10-1979.

Mr. Muhammad Aslam Chishti, Advocate for the petitioner.

Mr. Muhammad Yusuf Chaudhry, Assistant Advocate General for the State.

The vires of Article 212-A of the Constitution, as introduced by the Constitution (2nd Amendment) Order 1979, is being challenged, both on the touchstone of the Constitution as well as the law laid down in Begum Nusrat Bhutto's case (P.L.D. 1977 S.C. 657). In view of this position, and as prayed by the counsel for the petitioner in

Petition No. 274/78 and 365/78, as well as by the Assistant Advocate General we would direct that notice should go to CMLA and Federation of Pakistan.

The question for consideration, for the disposal of the applications moved by Assistant Advocate General as well as on behalf of petitioners, would be as follows:

1. Whether Article 212-A is intravires;
2. If the above question is answered in the affirmative then what is the effect;
(a) Article 212-A and MLO-4 as amended by MLO-72 on the power of judicial review under Article 199; and
(b) of Article 212-A on cases finally decided by Military Courts and Tribunals and cases pending before them.

The stay already granted shall continue.

We have considered the submissions made by Assistant Advocate General with respect to the observations of the Division Bench on the language used by him in his C. Misc. Application No. 791/79. The Assistant Advocate General tenders his unqualified apologies and regrets the use of the language in that application. We are satisfied with this explanation and the undertaking given by him that in future he would be more careful in the selection of his words.

Date in office
Sd/-CHIEF JUSTICE
MIR KHUDA BAKHSH MARRI
Sd/-JUDGE
M. A. RASHID
Sd/-JUDGE
ZAKAULLAH LODI

11-11-1979.

1. Mr. Muhammad Aslam Chishti, Advocate for the petitioner.
2. Mr. Basharatullah, A.G. for State.

Today when this matter came for hearing before the full Bench, learned Advocate General, Mr. Basharatullah moved an application stating that a telegraphic intimation has been received by him from Ministry of Law, Government of Pakistan that Federation will represent in this case and that the Deputy Attorney General of Pakistan is appearing before the Supreme Court of Pakistan in a case involving the same points and that he had been instructed to make request for adjournment. He has attached

telegram with his application. He requests, therefore, that in view of above, at least two weeks adjournment may be granted. Besides a telegram to this effect has also been received by office from Ministry of Law, Government of Pakistan.

Counsel for petitioner when asked, raised no objection.

We, therefore, accept this request and adjourn the matter to a date in office after two weeks.

Sd/-CHIEF JUSTICE
MIR KHUDA BAKHS MARRI
Sd/-JUDGE
M. A. RASHID
SJ/-JUDGE
ZAKAULLAH LODI

25-11-1979

1. Mr. Muhammad Aslam Chishti, Advocate for the petitioner.
2. Mr. Irshad Hasan Khan, Deputy Attorney General for Federation of Pakistan.
3. Mr. Basharatullah, Advocate General for respondents.
4. M/s. Yahya Bakhtiar, Advocate, Haji Sarfaraz Khan, Advocate and Mr. Muhammad Muqim Ansari, Advocate as Amicus Curiae.

Mr. Irshad Hassan Khan, Deputy Attorney General prays for adjournment on the ground that the question involved in these Misc: applications is before the Supreme Court; and that a Full Bench of the Supreme Court is likely to hear the matter in early January 1980. It is further submitted by Irshad Hassan Khan that a petition for Special Leave to appeal against the judgment of the Peshawar High Court, directing abatement of the petitions before it in view of Article 212-A, has also been filed before the Supreme Court, and that such petitions will be taken up in December, 1979. Mr. Irshad Hassan Khan submits that as the question raised in the Misc. applications before us turns on the interpretation of the Nusrat Bhutto's judgment, therefore, it would be fair if pronouncement of the Supreme Court, in this behalf, is awaited. Mr. Muhammad Aslam Chishti, for the petitioner and Mr. Yahya Bakhtiar, the Amicus Curiae oppose the request. Firstly because the matters to be heard by the Supreme Court in January, do not directly involve the Article 212-A; and, secondly, the High Court is not supposed to wait in such circumstances. We agree with Mr. Yahya Bakhtiar and Mr. Chishti to that extent. But in the circumstances of the present case, it would be proper if an adjournment till the end of December is allowed. We would, therefore, fix these cases for hearing on 22nd December 1979, when these applications shall be heard till they are disposed of. Stay already granted shall continue.

Sd/-CHIEF JUSTICE
MIR KHUDA BAKHSH MARRI
Sd/-JUDGE
M. A. RASHID
Sd/-JUDGE
ZAKAULLAH LODI

8-3-1980

1. Mr. Muhammad Aslam Chishti, Advocate for petitioner.
2. Mr. Basharatullah, A.G. for respondents.
3. M/s. Yahya Bakhtiar, Advocate, Muhammad Nawaz Ahmad, Advocate as Amicus Curiae.

These matters were fixed for hearing during the 2nd week of March 1980, when adjourned then, on 22nd December 1979, because of the absence of the Deputy Attorney General. Earlier, on two occasions the matter had to be adjourned either because the Deputy Attorney General was absent or because he made prayer for adjournment, in this behalf. Today again, a telegram has been received by the Registrar from Mr. Irshad Hasan Khan, the Deputy Attorney General, that he is busy in similar part-heard matters before the High Courts at Lahore and Karachi. We understood that the matter before the High Court at Lahore is being represented, on behalf of the Federation, by a private counsel. It is not understood how Mr. Irshad Hassan Khan is busy before that court. It was made clear to Mr. Basharatullah, the Advocate General, that this court is only bound to give proper notice to all the parties and to afford them a fair opportunity to arrange a representation. If, in spite of that, any of the parties choose not to be present, the court cannot wait. It would be perfectly proper for us to proceed in these matters, but only because important constitutional questions are involved, therefore, we would prefer if the Federation is duly represented. However, we cannot in our anxiety to afford such representation, wait indefinitely. We would, therefore, allow a last opportunity to the Federation to arrange its representation. The Registrar would, in this behalf, address a letter to the Federal Law Secretary, detailing the dates on which the matter had to be adjourned because of the Federation and requesting him to make proper arrangements for its representation on the next date of hearing. It should be also made clear, in such letter, that the court would proceed, from day to day, with the hearing of these matters from the adjourned date. The matters are now fixed for 29th March, 1980.

Sd/-CHIEF JUSTICE
MIR KHUDA BAKHSH MARRI
Sd/-JUDGE

M. A. RASHID
Sd/-JUDGE
ZAKAULLAH LODI

8-3-1980

In view of the important issues involved in C. P. Nos. 274/78, 365/78, 382/78, 24/79, 160/79, 249/79 and 277/79, I would like to constitute a larger bench and direct that these matters will be heard by a bench consisting of myself, Mr. Justice M. A. Rashid, Mr. Justice Zakaullah Lodi and Mr. Justice Abdul Qadeer Chaudhary.

Sd/-CHIEF JUSTICE
MIR KHUDA BAKHSH MARRI

29-3-1980

1. Mr. Muhammad Aslam Chishti, Advocate.
2. Mr. Irshad Hassan Khan, Deputy Attorney General for Federation of Pakistan.
3. Mr. Basharatullah, Advocate General.
4. Mr. Yahya Bakhtiar, Mr. Muqim Ansari, Mr. Muhammad Nawaz Ahmed and Haji Sarfaraz Khan, Advocates as Amicus Curiae.

C. MISC, 254/80: On 29-3-1980 when these petitions came for hearing, Mr. Basharatullah, Advocate General for Baluchistan on instructions from the Provincial Government, moved an application submitting "that this Hon'ble court has been pleased to appoint Mr. Yahya Bakhtiar, Advocate to assist in the case as Amicus Curiae. That it is in this behalf, respectfully to submit that not only Mr. Yahya Bakhtiar, may be found to be one whose attitude maybe partisan, but also the further fact is, that he is being tried before a Special Court for alleged rigging in the general elections, and there may thus be found justifiable reasons to conclude that he is not qualified to appear as Amicus Curiae".

In support of his submission, no material was placed before the court. He, however, relied on P. L. D. 1975 S. C. page 463 (Islamic Republic of Pakistan *vs.* Abdul Wali Khan) wherein Maulvi Mufti Mahmud moved an application before the court, to be allowed to be impleaded as a party or appear as Amicus Curiae. This application was rejected by the court, observing that "Learned counsel has lastly contended that even if the applicants cannot come in as proper parties, they might be allowed to appear as amicus curiae, as distinguished from an intervener. In support of this contention, he has referred to the definition of an Amicus Curiae given Volume III of the Americal Corpus Juris Secudum on page 1046. The same volume, however, on the next page, states that;

'One whose attitude appears to be partisan, should not be permitted to appear as Amicus Curiae. Under this rule, the petitioners would be disqualified even to appear as Amicus Curiae, because on their own averment, they are very much interested in the case of the National Awami Party'.

It may be remembered that Maulvi Mufti Mahmood was one of the components of the United Democratic Front, which along with the defunct National Awami Party, formed coalition Government in 1972, in the Province of NWFP and Baluchistan on behalf of his own party JUI, and Mr. Abdul Wali Khan was then leader of NAP in the two Provinces, and this was a reason for rejection of his request. The circumstances in the above cited judgment are different than in the present case. It is not denied that Mr. Yahya Bakhtiar, being senior Advocate, continues to be on the roll of Advocates and he continues to appear in this court as an Advocate, the fact that merely because a case is pending before a Tribunal, does not disqualify him to appear in this court as an Advocate or Amicus Curiae. Apart from above, we may mention here that along with Mr. Yahya Bakhtiar, Advocate, we requested three others Advocates namely Mr. Muhammad Nawaz Ahmed to assist the court in these important Constitutional petitions, and they have been appearing in the courts since 25-11-1979, and the objection is only now, and that, also on behalf of Federal Government, by the learned Deputy Attorney General, Mr. Irshad Hassan Khan, who has been appearing for the Federal Government all along. We may observe here that for the courts, the Provincial or Federal Government are on equal footing, *vis-a-vis*, a citizen who might be a petitioner or respondent. Any request to a counsel to appear as Amicus Curiae is always in the interest of full and complete justice, no more no less, and this discretion vests in this court by tradition, following the English Common Law. Therefore, there could not be any occasion for any part of unnecessary feel aggrieved. In support of this, we cannot do better than to rely on the very well considered judgment of the then Dacca High Court, reported in P. L. D. 1951 page 89 (Durga Nath Tarafdar and others vs. Devendra Nath Tarafdar and others), where Mr. Justice Guha has held that, "before I part with this case I feel that I should mention that the powers of this court to hear Amicus Curiae is unfettered. Amicus Curiae is a Latin expression which means 'a friend of the court' and in practice also, it is 'a friend of the court'. Amicus Curiae is 'one' who for the assistance of the court, gives information of some matter of law in regard to which the court is doubtful, or mistaken, or which the Judges has not seen or does not, at the moment, recollect. Section 2 Co. Ins. 178. This custom cannot be traced to its origin, but is immemorial in the English Law. It is recognized in the year books, and it was enacted in Henry IV (1403) that any stranger who is Amicus Curiae might move the court. Under the Roman system of law the Judex 'especially if there was but one, called some lawyers to assist him with their counsel'. This custom became incorporated in the English system, and it was recognized throughout the earlier as well as the later periods of the common law in England. Anyone as Amicus Curiae may make an application to the court in favor of an infant, though he be no relation. Iv. Sen. 313. An attorney as Amicus Curiae may move the dismissal of a fictitious suit; Halay V. Bank 12 L. R. A. 815, the term is sometimes

applied to counsel heard in a case because interested in a similar one. The subject is elaborately discussed in Eouvier's Law Dictionary, Third Edition Vol. I at pages 188 to 189. In my view the power lies in a Judge of this court to hear Amicus Curiae, where the Judge thinks that he requires assistance in deciding a cause, where he is in doubt on a point of law. In this court on one occasion a learned Advocate of this court raised a protest but the matter was not pursued and then I indicated that on a future occasion I shall express my view in the matter; hence I am expressing my view in the matter in this case, which has been heard Amicus Curiae".

For the reasons given above, we see no substance in this application which is hereby dismissed.

Sd/-CHIEF JUSTICE
MIR KHUDA BAKHSH MARRI
Sd/-JUDGE
M. A. RASHID
Sd/-JUDGE
ZAKAULLAH LODI
Sd/-JUDGE
ABDUL QADEER CHAUDHARY

02-4-1980

1. Mr. Muhammad Aslam Chishti, Advocate for petitioner.
2. Mr. Irshad Hassan Khan, Deputy Attorney General for Federation of Pakistan.
3. Mr. Basharatullah, Advocate General.
4. Mr. Yahya Bakhtiar, Advocate and Muhammad Nawaz Ahmed, Advocate as Amicus Curiae.

Heard Mr. Muhammad Aslam Chishti, Advocate for petitioner in C. P. Nos. 274/78 and 365/78 on 29-3-1980, 30-3-1980, 31-3-1980 and 01-4-1980, when he concluded his arguments. Heard Mr. Tahir Muhammad Khan, Advocate for petitioners in C. P. Nos. 249/79 and 277/79 and Mr. Ehsanul Haq, Advocate for petitioner in C. P. No. 24/79 today and they concluded their arguments. On request of Mr. Irshad Hassan Khan, Deputy Attorney General the petitions are adjourned to 6-5-1980 for further proceedings as he submitted that he has already fixed matters pending in various courts. On that date we would hear Mr. Azizullah Sheikh, Advocate for petitioner in C. P. No. 160/79 and the other side.

To come up on 6th May 1980.

Sd/-CHIEF JUSTICE

MIR KHUDA BAKHSH MARRI
Sd/-JUDGE
M. A. RASHID
Sd/-JUDGE
ZAKAULLAH LODI
Sd/-JUDGE
ABDUL QADEER CHAUDHARY

20-5-1980

1. Mr. Muhammad Aslam Chishti, Advocate called absent.
2. Mr. Muftakhir-ud-Din, D. A. G.
3. Mr. Basharatullah, A. G.
4. Mr. Yahya Bakhtiar, Advocate, Haji Sarfaraz Khan, Advocate and Mr. Muqim Ansari, Advocate as Amicus Curiae.

A telegram has been sent by Mr. Irshad Hassan Khan, Deputy Attorney General of Pakistan requesting for two months adjournment on the ground that he has been advised by the doctor for two months rest due to his heart trouble. He has shifted to Suite No. 1, Chamba House, Lahore, Similar request has also been made by Mr. Muftakhir-ud-Din, Deputy Attorney General for Baluchistan on his behalf.

We enquired from Muftakhir-ud-Din, D. A. G. for Baluchistan as to whether he would be able to argue on behalf of Mr. Irshad Hassan Khan, D.A.G. of Pakistan, he submitted that he may be given three weeks time, in the mean time he will contact Mr. Irshad Hassan Khan, D.A.G. of Pakistan to get further instructions. In case Mr. Irshad Hassan Khan is unable to argue the case, then he undertakes to argue the case as Deputy Attorney General on behalf of Federal Government. Other side has no objection. Adjourned. To come up to a date in office after three weeks.

Sd/-CHIEF JUSTICE
MIR KHUDA BAKHSH MARRI
Sd/-JUDGE
M. A. RASHID
Sd/-JUDGE
ZAKAULLAH LODI
Sd/-JUDGE
ABDUL QADEER CHAUDHARY

10-6-1980

1. Mr. Muhammad Aslam Chishti, Advocate for petitioner.
2. Mr. Muftakhir-ud-Din, D. A. G.
3. Mr. Basharatullah, A. G.
4. Mr. Yahya Bakhtiar, Advocate, Mr. Muhammad Nawaz Ahmad, Advocate, Mr. Muhammad Muqim Ansari, Advocate, Haji Sarferaz Khan, Adv: and Mr. Azizullah Memon, Advocate as Amicus Curiae.

Mr. Muhammad Aslam Chishti, Advocate for Petitioner has moved C. Misc. No. 457/80 today for recasting the issues already before the court. Copy of this application has been supplied to learned Deputy Attorney General and Advocate General today in court and both of them waive notice of the same. At the very outset, learned Deputy Attorney General raised objection that in view of President Order No. 1 of 1980 whereby Article 199 of the Constitution of Pakistan, 1973 has been amended, these petitions have abated. We note his objection and will decide this question along with previous Constitutional points raised in these petitions on the next date of hearing. Learned Deputy Attorney General submits that he needs one month's adjournment to prepare and argue these points and also to file a rejoinder to the application, and also to file some documents. He also submits that he will seek further instructions from Islamabad. Learned Advocate General, however, submits that he will be needing only one week's time, but he has no objection to the request of learned D.A.G.

Learned Counsel for petitioner submits that number of petitions are pending, involving question of validity of Article 212-A and interim orders have been passed. He submits that he is ready to argue the case. Besides, he submits that it is for the learned D.A.G. to address his arguments before the court today, as these petitions are fixed today for arguments of learned Deputy Attorney General and Advocate General only. However, we want to accommodate learned Deputy Attorney General and his difficulty may be genuine. Instead of granting one month's adjournment, we asked learned Deputy Attorney General as to whether two weeks time would be enough for him, but he submitted that three weeks time may be given.

That being the position, we adjourn the matter. To come up to a date in office after three weeks on request of learned Deputy Attorney General. We are adjourning the matter on request of learned Deputy Attorney General, therefore, the stay already granted shall continue.

Sd/-CHIEF JUSTICE
MIR KHUDA BAKHSH MARRI
Sd/-JUDGE
M. A. RASHID
Sd/-JUDGE
ABDUL QADEER CHAUDHARY

This short order was passed by Full Court on 02 July, 1980, followed by Full Court Judgment of 12th July, 1980.

02-7-1980

1. Mr. Muhammad Aslam Chishti, Advocate for petitioner.
2. Mr. Muftakhir-ud-Din, Deputy Attorney General.
3. Mr. Basharatullah, Advocate General.
4. M/s. Yahya Bakhtiar, Muhammad Muqiin Ansari and Haji Sarfaraz idian, Advocates as Amicus Curiae.

The President, by P.O. 21 1979, introduced Article 212-A of the Constitution, which empowered the C.M.L.A. to provide for the establishment of Military Courts or Tribunals. This new Article, by its clause (3) barred the High Court from granting any injunction or entertaining any proceedings in respect of matters within the jurisdiction of such Military Courts or Tribunals. At the same time this clause provides for the abatement of all proceedings, in respect of any such matters, pending before any court, except the appeal pending before the Supreme Court. The State moved this court, through the Assistant Advocate General, to declare that the present petitions have, by virtue of Article 212-A, abated. On objections raised by the other side as to the validity of this new Article, it was found necessary to refer the matter to a large Bench and, by our order, dated 28th October 1979, following questions were formulated:-

- (1) Whether Article 212-A is intravires;
- (2) If the above question is answered in the affirmative, then what is the effect of;
 - (a) Article 212-A and MLO-4, as amended by MLO-72, on the powers of Judicial Review under Article 199; and
 - (b) of Article 212-A on cases finally decided by Military Courts and Tribunals and cases pending before them.

Arguments were addressed by the learned counsel for the petitioners, and while the matters were being adjourned from day to day, to enable the learned Advocate General and the learned Deputy Attorney General to address arguments, that on 26th May, 1980, President's Order No. 1 of 1980 was introduced. This Presidential Order, besides introducing Chapter 3-A in Part VII of the Constitution, introduced Clauses 3-A, 3-B and 3-C in Article 199, thereby completely curtailing powers of Judicial Review of this court, in respect of matters failing within the jurisdiction of Military Courts.

Mr. Aslam Chishti, through an application, repeated his earlier objections as to the validity of Clauses 3-A, 3-B and 3-C of Article 199. However, it was not found necessary to reformulate the questions framed earlier, and the learned counsels on both sides, as

well as the learned Amicus Curiae were allowed to address arguments on the validity of these three clauses as well.

We heard detailed arguments from the counsel for the petitioners and the learned Amicus Curiae. The learned Deputy Attorney General and the learned advocate General found it fit only to declare that this court has lost jurisdiction in view of Clauses 3-A, 3-B and 3-C of Article 199 and chose to address no further arguments.

We have come to the conclusion that the amendments of the Constitution by way of introduction of Article 212-A and Clauses 3-A, 3-B and 3-C in Article 199 are *ultra vires* of the powers of the Chief Martial Law Administrator, as are recognized by Begum Nusrat Bhutto's case (P.L.D. 1977 S. C. 657). Consequential charges in M.L.O. 77 also suffer from the same disability. In view of such conclusions, we need not answer the second questions. The reasons for such conclusions will be recorded separately. The result is that these questions are still pending for disposal. They should now be fixed for regular hearing on merits.

In view of the fact that this case involves complicated questions of Constitutional interpretation, as well as the interpretation of Begum Nusrat Bhutto's case, we certify that it is a fit case for appeal to the Supreme Court.

Sd/-CHIEF JUSTICE
MIR KHUDA BAKHSH MARRI
Sd/-JUDGE
M. A. RASHID
Sd/-JUDGE
ABDUL QADEER CHAUDHARY

FULL COURT JUDGMENT
12 JULY 1980.

IN THE HIGH COURT OF BALUCHISTAN, QUETTA

BEFORE:- Mr. Justice Mir Khuda Bakhsh Marri, Chief Justice
Mr. Justice M. A. Rashid
Mr. Justice Abdul Qadeer Chaudhary
1. C. P. No. 274/78
1. Suleman
2. Qasim
sons of Usman, caste Kumbar
r/o village Kurk, Teshil Sibi,

presently confined in condemned
prisoners; cells, Central Jail, Mach

.....Petitioners

Versus

1. President, Special Military Court No. 3, Sibi.
2. Deputy Martial Law Administrator, Sibi.
3. Martial Law Administrator Zone "D" Baluchistan, Quetta.
4. Chief Martial Law Administrator of Pakistan, Rawalpindi.
5. Superintendent, Central Jail, Mach.

.....Respondents.

PETITION UNDER ARTICLE 199 OF CONSTITUTION OF PAKISTAN 1973 READ
WITH CMLA'S ORDER NO. 1 OF 1977.

2. C. P. NO. 365/78
1. Mir Muhammad, son of Khanan.
2. Sultan, son of Muhammad Hussain.
3. Musa, son of Nooran.
All by caste Kalandarani Marri
r/o Kohlu District,
presently confined in condemned
prisoners' cell, Central Jail,
Mach

.....Petitioners.

Versus

1. Lieutenant Colonel Muhammad Abdul Haleem, President Special Military Court No. 3, Sibi.
2. Martial Law Administrator Zone "D" (Baluchistan), Martial Law Headquarters, Lyton Road, Quetta.
3. Chief Martial Law Administrator, Pakistan - Rawalpindi.
4. Jalal-ud-Din Khoso, Sub-Inspector of Police, Station House Officer (SHO) Police Station Jhatpat, District Nasirabad.
5. Superintendent, Central Jail, Mach

.....Respondents.

PETITION UNDER ARTICLE 199 OF CONSTITUTION OF ISLAMIC REPUBLIC OF
PAKISTAN 1973 READ WITH LAWS (CONTINUANCE IN FORCE) ORDER 1977.

3. C. P. NO. 382/78

Musafir Ali, son of Israruddin, Adult, Muslim, by caste Pathan, resident of
Brewery Road, Quetta (now confined in Central Jail, Mach)

..... *Petitioner*

Versus

1. Martial Law Administrator, Zone "Z", Lyton Road, Quetta.
2. President, Special Military Court No. 1, Quetta

.....*Respondents.*

AMENDED PETITION UNDER ARTICLE 199 OF THE CONSTITUTION OF THE
ISLAMIC REPUBLIC OF PAKISTAN READ WITH CHIEF MARTIAL LAW
ADMINISTRATORS ORDER NO. 1 OF 1977.

4. C. P. No. 24/79.

Muhammad Yusuf, s/o Sher Muhammad, caste Kakar Sulemankhel, resident of
H. No. 1395/B, Steward Road, Quetta, presently confined as convict prisoner in
Central Jail, Mach

.....*Petitioner*

Versus

1. The Martial Law Administrator, Zone "Z", Baluchistan, Quetta.
2. The President, Special Military Court No. 1, Quetta

.....*Respondents.*

CONSTITUTIONAL PETITION UNDER ARTICLE 199 OF THE CONSTITUTION OF
THE ISLAMIC REPUBLIC OF PAKISTAN.

5. C.P. No. 249/79.

Afrasiab Khan Khattak, son of Muhammad Ayyub, caste Khattak, r/o Khaza Khail, Teshil and District Kohat, presently in District Jail, Quetta

.....*Petitioner.*

Versus

1. President Summary Military Court Quetta.
2. Federation of Pakistan through Secretary Interior to Government of Pakistan, Islamabad

.....*Respondents.*

CONSTITUTIONAL PETITION UNDER ARTICLE 199 OF THE CONSTITUTION OF
ISLAMIC REPUBLIC OF PAKISTAN, 1973.

6. C. P. No. 160/79.

Abdul Nasir Khan, s/o Abdul Ghaffar Khan, caste Achakzai, r/o Buldeva Road, Quetta presently detained as a convict Central Jail, Mach

.....*Petitioner.*

Versus

1. Martial Law Administrator, Zone "D" Baluchistan, Quetta.
2. Special Military Court No. 5 Quetta through its President.
3. Assistant Commissioner Sub-Divisional Magistrate, Quetta

.....*Respondents.*

CONSTITUTIONAL PETITION UNDER ARTICLE 199 OF THE CONSTITUTION OF
THE ISLAMIC REPUBLIC OF PAKISTAN READ WITH SECTION 2-A OF LAW
(CONTINUANCE IN FORCE) ORDER 1977.

7. C. P. No. 277/79.

Afrasiab Khan Khattak, son of Muhammad Ayyub Khan, caste Khattak, resident of Khaza Khail Teshil and District Kohat, Presently in Central Jail, Mach

.....*Petitioner.*

Versus

1. President Summary Military Court, Quetta.
2. Federation of Pakistan through Secretary Interior to Government of Pakistan, Islamabad

.....*Respondents.*

CONSTITUTIONAL PETITION UNDER ARTICLE 199 OF THE CONSTITUTION OF
ISLAMIC REPUBLIC OF PAKISTAN, 1973.

JUDGMENT

Date of hearing: 1st and 2nd of July, 1980.

Petitioner:

1. Suleman, 2. Qasim, s/o Usman, caste Kumbar, r/o Village Kurk, Tehsil Sibi. Presently confined in condemned prisoners' cells, Central Jail, Mach. By Mr. Muhammad Aslam Chishti, Advocate. S.A.M. Qadri, K. N. Kohli, Raja Rub Nawaz, Ehsanul Haq, Advocate, Azizullah Sheikh and Tahir Muhammad Khan, Advocate.

Respondents:

1. President Special Military Court, No. 3, Sibi.
2. Deputy Martial Law Administrator, Sibi.
3. Martial Law Administrator Zone "D" Baluchistan, Quetta.
4. Chief Martial Law Administrator of Pakistan, Rawalpindi.
5. Superintendent Central Jail, Mach. No. 1,2,3 and 5, by Mr. Basharatullah Advocate General Baluchistan, Quetta. No. 4 by Mr. Muftakhir-ud-Din, Deputy Attorney General of Pakistan. M/s. Yahya Bakhtiar, Muhammad Muqim Ansari, Haji Sarfaraz Khan, as Amicus Curiae.

M. A. RASHID. J: in all these petitions the petitioners have been tried by various Military Courts within the province. The petitioners have challenged such trials on grounds which need not be stated here, as they are not relevant for the decision of the questions referred to this Full Bench. While these petitions were pending Presidential Order No. 2 of 1979 was issued on 16th October 1979, whereby Article 212-A was introduced in the Constitution. This Article provided for the establishment of Military Court and barred the High Court from judicially reviewing their decisions. This Article reads as follows:

"212-A. Establishment of Military Courts or Tribunals. -

(1) Notwithstanding anything hereinbefore contained, the Chief Martial Law Administrator may, by a Martial Law Order, provide for the establishment of one or more Military Courts or Tribunals for the trial of offences punishable under the Martial Law Regulations or Martial Law Orders or any other law, including a special law, for the time being in force specified in the said Martial Law Order and for the transfer of cases to such Courts or Tribunals.

(2) The jurisdiction and powers of a Military Court or Tribunal shall be such as may be specified in a Martial Law Order issued by the Chief Martial Law Administrator.

(3) Notwithstanding anything hereinbefore contained, where any Military Court or Tribunal is established, no other Court, including a High Court, shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of the Military Court or Tribunal extends, and of which cognizance has been taken by or which has been transferred to, the Military Court or Tribunal and all proceedings in respect of any such matter which may be pending before such other court, other than an appeal pending before the Supreme Court, shall abate".

2. After such promulgation of P. 0.21 of 1979 the Assistant Advocate General, on 20th October 1979, moved an application claiming that by virtue of clause (3) of Article 212-A, these petitions had abated. Therefore, it was prayed that they may be taken up for urgent hearing. The Division Bench hearing with the matter directed the learned Assistant Advocate General to supply a copy of the application to the counsel for the other side, and fixed the same for hearing for 28th October 1979. However, on 24th October 1979, the Assistant Advocate General moved another application stating therein that M.L.O. 72 had been promulgated, and, according to learned A.A.G. 'whereby the scope of the Constitutional amendment has been enlarged and has been explained'. It was, thereupon, prayed that the petitions should "be removed from the cause list".

3. Mr. Aslam Chishti the learned counsel for the petitioner in C.P.No.274/78 moved two applications. One by way of rejoinder to the application of the learned A.A.G. and the other primarily because of the statement of the Chief Executive of the Province, that after the introduction of Article 212-A the executions of death penalties awarded by various Military Courts would take place; and generally to challenge the vires of that Article.

4. That the Division Bench considered these applications on 25th October 1979, and the Chief Justice, who presided over that Bench decided to constitute a larger bench to

examine the important legal points involved. The full Bench by its order dated 28th October 1979, formulated following questions for consideration:

- (1) Whether Article 212-A is intravires;
- (2) if the above question is answered in the affirmative. then what is the effect of:
 - (a) Article 212-A and M.L.O. 4, as amended by M.L.O. 72, on the powers of Judicial Review under Article 199; and
 - (b) Of Article 212-A on cases finally decided by Military Courts and Tribunals and cases pending before them."

5. Mr. Yahya Bakhtiar, Haji Sarfaraz Khan, Muhammad Muqim Ansari and Muhammad Nawaz Ahmed, Advocates were requested to assist the court as Amicus Curiae. Notice was also directed to be sent to the Federation through Attorney General of Pakistan.

6. The counsel for the petitioners had completed their arguments by 1st April, 1980, when the matter was adjourned to enable Mr. Irshad Hassan Khan, the learned Deputy Attorney General, and Mr. Basharat-Ullah, the learned Advocate General, to prepare their arguments. While the matter was thus pending another Presidential Order namely P.O. 1 of 1980 was promulgated on the 27th May 1980. By this order, besides adding a new Chapter 3-A in Part VII of the Constitution, three new clauses were added to Article 199 of the Constitution. These three clauses, which are relevant for our purposes, read as follows:

"3(A) Notwithstanding any judgment of any court, including any judgment in respect of the powers of courts relating to judicial review, a High Court shall not, under this Article:-

- (a) make an order relating to the validity or effect of any Martial Law Regulation made by the Chief Martial Law Administrator or any Martial Law Order made by the Chief Martial Law Administrator or a Martial Law Administrator or of anything done, or action taken, or intended to be done or taken thereunder;
- (b) make an order relating to the validity or effect of any judgment or sentence passed by a Military Court or Tribunal;
- (c) Grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of a Military Court or Tribunal extends and of which cognizance has been taken by a Military Court or Tribunal; or

(d) issue any process against the Chief Martial Law Administrator or a Martial Law Administrator or any person acting under the authority of either.

3(B) Every such order, injunction or process as is referred to in clause (3A) made, granted or issued at any time before or after the commencement of the Constitution (Amendment) Order, 1980 shall notwithstanding any judgment of any court, be null and void and of no effect whatsoever and any proceedings for the making, granting or issue of such order, injunction or process which may be pending before any court, including the Supreme Court and High Court, shall abate.

3(C) The Proclamation of the fifth day of July, 1977, all President's Orders, Orders of the Chief Martial Law Administrator, Martial Law Regulations and Martial Law Orders made on or after the fifth day of July, 1977, are hereby declared, notwithstanding any judgment of any court, to have been validly made."

Mr. Aslam Chishti by his application dated 9th June, 1980 again challenged the vires of amendments in Article 199. It was however found necessary to reformulate the questions referred to the Full Bench. The learned counsel for the parties were however, invited to address arguments on this new amendment as well.

7. Mr. Muftakhiruddin, the learned Deputy Attorney General prayed for time on the ground that Mr. Irshad Hassan Khan, Deputy Attorney General, Punjab was to address arguments who was entrusted with this case from the very beginning. However, Mr. Muftakhiruddin submitted that in case Mr. Irshad Hassan Khan was not able to appear on the adjourned date of hearing he would be in a position to address arguments.

8. After close of argument by Mr. Muhammad Aslam Chishti, on his fresh application the learned Deputy Attorney General was invited to address arguments. He simply submitted that in view of the amendments in Article 199 of the Constitution by Presidential Order No. 1 of 1980 the jurisdiction and powers of this court have been taken away in relation to cases arising out of or in relation to sentences and convictions passed by the Military Courts, proceedings recorded in or pending before such courts, and that the petitions in respect of such cases have abated. The learned Deputy Attorney General further stated that his instructions were that no further arguments on behalf of the State were required. Although the fact is not directly relevant, but it was quite interesting to note that the learned Deputy Attorney General was making his submissions after reading from a written text.

9. Then the learned Advocate General rose to state that for once he adopted the arguments of the learned Deputy Attorney General and that this instructions were that no petitions were pending in this court with effect from the coming into force of the Constitutional amendments, (to Article 199).

10. We would like to refrain from making any comments on such conduct of the two law officers, except that it was highly distressing to see them falling to that level. They both are very senior counsel of Quetta bar and have been chosen to represent the Federation and the Province respectively in superior courts. We can only express our anguish at their helplessness. They stated that they were making these statements on instructions. Discretion dictated them to do so. But they complied with such instructions at the peril of failing to perform their duty to this court. They have rendered no assistance to this court in the decision of such complicated questions of Constitutional law. This is besides the fact that they have not adequately represented their clients.

11. The submissions of the Deputy Attorney General and the Advocate General boil down to this that the law giver has spoken and that no more need be said by anybody including the courts. This is a stand un-heard of in a society governed by laws. Hughes, once the Chief Justice of the Supreme Court of the United State said "we are under a Constitution, but the Constitution is what the Judges say it is "(Hogg-Constitutional Law of Canada, P-46). The right to interpret the Constitution and the law has always been conceded to the courts and as Mr. Yahya Bakhtiar, the amicus curiae, stated such a right emanates from the judicial power of the courts, as distinct from its jurisdiction. Jurisdiction of a court is conferred by the Constitution or the law and it can always be taken away. This court is the creation of the Constitution and therefore it exercises its jurisdiction as is conferred by the Constitution or by law. But the right, the prerogative, or the power to determine if such jurisdiction has been taken away, is known as the judicial power. Thus the Judges become Judges in their own cause and determine if they have a particular jurisdiction or they have lost it. This judicial power is inherent in the judicial system embodies in the Principle of tracheotomy of power. I may refer to the observations of Mushtaq Hussain J. In *Yousuf Ali vs. West Pakistan Bar Council Tribunal* (P.L.D. 1972-Lahore 404), which elaborates this point very succinctly:-

"We should, however, not be understood as conceding that in a "State" as understood it is possible for the Executive to wrest from the judiciary its jurisdiction to interpret any law promulgated in the country. The (this) superior judiciary is clothed with this jurisdiction as a delegate of the Sovereign who, in the Islamic Republic of Pakistan, is God Almighty Himself exercising His will and Sovereignty through the people of this country. It is hardly possible to deny that the making of laws, their implementation and their interpretation are three separate functions performed by three independent delegates of the Sovereign in respect of its own particular field. The Legislature exercises that delegated sovereign power of the Sovereign to make laws and the

Executive exercises it to implement them, the Judiciary does, in the same manner, exercise the delegated power of the Sovereign, to interpret laws made in pursuance of the exercise of the Legislative part of the power of the Sovereign by the Legislature. The right to interpret and enunciate laws is an inalienable jurisdiction of the superior judiciary delegated to it by the Sovereign which can neither be curbed nor can it be taken away."

12. In Mir Hassan's case (P.L.D. 1969-Lahore, 786), it was held that when ordinary courts were open and functioning persons accused of offences against ordinary laws had to be brought before them and then alone to be dealt with in accordance with law. The trial of such persons by Military Courts was held to be unlawful. This judgment gave rise to the promulgation of P.O.3 of 1969. That Presidential Order was largely identical to the amendments of the Constitution now being sought to be made through introduction of Article 212-A and clauses 3-A, 3-B and 3-C in Article 199. P.O. 3, in fact went a little further. It stopped the courts, including the High Courts, and the Supreme Court, from receiving or entertaining any complaint etc; when it said that "no court, tribunal or other authority, including the Supreme Court and a High Court, shall receive or entertain any complaint, petition, application or other representation whatsoever against, or in relation to the exercise of any power or jurisdiction by, any Special Military Court or Summary Military, Court or any Martial Law authority or any person exercising powers or jurisdiction derived from Martial Law Authority". The subsequent clauses of para 3 of P.O. 3 of 1969, barred the courts from questioning the correctness of findings, sentences, orders, passed by and proceeding taken before such Military Courts or authorities, and to issue writs etc; against them. Finally this para declared that any such writ, order, notice or process, if issued by such courts, would be of no legal effect.

In spite of the use of such peremptory language, the provisions of P.O. 3 of 1969 were duly examined by the Supreme Court in Asma Jilani's case (P.L.D, 1972, S.C. 139).

The attempt of the military regime of that time to take away judicial power of the courts was termed by the Attorney General of the day as "absurdity". And the court has the following to say about such attempt:-

"This provision, as very appropriately pointed out by Mr. Brohi, strikes at the very root of the judicial power of the court to hear and determine a matter, even though it may relate to its own jurisdiction. The courts undoubtedly have the power to hear and determine any matter or controversy which is brought before them, even if it be to decide whether they have the jurisdiction to determine such a matter or not. The Superior Courts are, as is now well settled, the Judges of their own jurisdiction. This is a right which has consistently been claimed by this and other courts of superior jurisdiction in all civilized countries and it is on the basis of this very right that this court itself went into the question of the validity of the Martial Law in Dosso's case. If

Muhammad Munir, CJ. in 1958 could feel that the Courts" on being properly moved still had the right to say whether what had happened was legal or illegal "then what has happened since to take away that right. What was done in 1958 can still be done even though the result might well be different".

Judicial power again came to be explained by the Supreme Court in Zia-ur-Rehman's (P.L.D. 1973, S.C. 49). At page 69 of the report their lordships have the following to say about this power:-

"This is a right which it acquires not *de hors* the Constitution but by virtue of the fact that it is a superior court set up by the Constitution itself. It is not necessary for this purpose to invoke any divine or supernatural right but this judicial power is inherent in the court itself. It flows from the fact that it is a Constitutional court and it can only be taken away by abolishing the court itself.

In saying this, however, I should make it clear that I am making a distinction between "judicial power" and "jurisdiction". In a system where there is a tracheotomy of sovereign powers, then *ex necessitate rei* from the very nature of things the judicial power must be vested in the judiciary. But what is this judicial power. "Judicial Power" has been defined in the Corpus Juris Secundum, Vol. XVI, Paragraph 144, as follows:

"The judiciary or judicial department is an independent and equal coordinate branch of Government, and is that branch thereof which is intended to interpret, construe, and apply the law, or that department of Government which is charged with the declaration of what the law is, and its construction, so far as it is written law".

This power, it is said, is inherent in the judiciary by reason of the system of division of power itself under which, as Chief Justice Marshal put it, "the Legislature makes, the executive executes, and the judiciary construes, the law". Thus, the determination of what the existing law is in relation to something already done or happened is the function of the judiciary while the pre-determination of what the law shall be for the regulation of all future cases falling under its provisions is the function of the Legislature".

It is further observed by their lordships that while exercising this power the judiciary claimed no supremacy over other organs of the government but acts only as the administrator of the public will. And that even when it declares a legislative measures unconstitutional and void, it does not do so, because, the judicial power is superior in the degree or dignity the legislative power; but because the constitution was vested it with the power to declare what law is in the cases which come before it.

13. In Saeed Ahmad's case (P.L.D, 1974, S.C. 151) the principles of interpretation of Constitution, as laid down in Zia-ur-Rehman's case were relied upon and their lordships have re-capitulated those principles at page 165 of the report. I may only refer to the following:-

"(i)

"(ii) The Constitution is the source from which all governmental power emanates and it defines its scope and ambit so that each functionary should act within his respective sphere.

"(iii)

"(iv) Under a Constitution prescribing a system where there is a tracheotomy of sovereign powers the judicial power must from the very nature of things be vested in the judiciary.

"(v) Thus the judiciary does claim and has always claimed that it has the right to interpret the Constitution and to say as to what a particular provision of the Constitution means or does not mean even if it is a provision seeking to oust its own jurisdiction.

"(vi) In the latter case an ouster of jurisdiction is not to be readily inferred, because, the consistent rule is that provisions seeking to oust the jurisdiction of superior courts, even by a constitutional strictly with pronounced leaning against ouster".

On the authority of such clear and successive pronouncements of the Supreme court we have no doubt in our mind that there is one jurisdiction enjoyed by this court, which need not be specifically conferred by the Constitution and the law; such jurisdiction is inherent in the judicial system, which flows from the judicial power; and that is the jurisdiction to determine its own jurisdiction to hear, or not to hear a cause. We would, therefore, hold that this court has always the power to examine the question whether this court has lost jurisdiction after the promulgation of P.O. 21 of 1979 and P.O. 1 of 1980, whereby Article 212-A and clauses 3-A, 3-B and 3-C in Article 199, were added to the Constitution, including the validity of the instruments through which such amendments were brought about.

14. The constitutional scheme of this county as is evident from the Constitution of 1973 envisages tracheotomy of the functions of the three organs of the State. The legislature is entrusted with the task of law making, the executive is required to execute such laws and the judiciary those laws. Each of these organs perform their respective functions within their allotted spheres; none encroaching upon the sphere of activities

of the other; nor does it countenance the takeover of the functions of any of them by any extraneous element like the army. Such a thing is not recognized by the Constitutional scheme of this country. The Armed Forces are always subject to the control and authority of the civilian government. This principle is more pronounced in a state governed by Islamic Laws as is evident from the case of Khalid-bin-Waleed who obeyed the dictate of Caliph Umar conveyed to him through oral command. The resistance by the Armed Forces to the civilian authority is completely foreign to the Muslim polity. In fact, as submitted by Mr. Yahya Bakhtiyar the concept of Martial Law is non-existent in a Muslim State. Even an invading Muslim Army did not impose any military law upon the conquered territory; on the other hand Kazis accompanied such forces and immediately saw to the imposition and administration of the civilian law (SHARIA).

15. However, during the hearing of petition of Begum Nusrat Bhutto, the attention of the Supreme Court was drawn to the circumstances which led to the events of 5th July, 1977 and their lordships of the Supreme Court accepted the contentions put forward on behalf of the respondents in that case that circumstances existed which indicated the breakdown of the machinery of the State relating to the executive and the legislature. On the law of necessity the takeover by the Chief of the Army Staff as Chief Martial Law Administrator was found to be valid. In this behalf their lordships of the Supreme Court had the following to observe in Begum Nusrat Bhutto's case (P.L.D. 1977, S.C. 657):-

"A review of the concept of the law of necessity, as recognized in various jurisdiction, clearly confirms the statement made in this behalf by Muhammad Munir, C.). in Reference by H.E. Governor-General (P.L.D. 1955 F.C. 435) to the effect that an act which would otherwise be illegal becomes legal if it is done bonafide under the stress of necessity, the necessity being referable to an intention to preserve the Constitution, the State or the society and to prevent it from dissolution. The principle has been reiterated by the Supreme Court in Asma Jillani's case with the difference that where the court is dealing with the acts of a usurper, such acts may be condoned and not validated by the application of the law of necessity. It seems to me, therefore, that on facts, of which we have taken judicial notice, namely, that the imposition of Martial Law as impelled by high considerations of State necessity and welfare of the people, the extra-constitutional step taken by the Chief of the Army Staff to overthrow the Government of Mr. Z. A. Bhutto as well as the Provincial Legislatures stands validated in accordance with the doctrine of necessity".

16. As regards the present legal position their lordships held that present legal order is a purely temporary phase in which the Constitution is still the supreme law of the land. However, it was held that it is a state of constitutional deviation and on this basis the proclamation of 5th July 1977 as well as the laws (Continuance in Force) Order, 1977 were validated as extra-constitutional instruments. The case of Begum Nusrat Bhutto, in fact, now provides a basis for the new legal order, resulting from such Constitutional

deviation, as is permitted by the law of necessity, it defines the scope and extent of such deviation. In fact this case gives colors to the new spectrum of our Constitutional arrangements resulting out of the deviation from the old Constitutional order. This case is therefore, the essential concomitant of the new legal order and so long as this temporary phase of constitutional deviation, continues, Begum Nusrat Bhutto's case will continue provide basis and justification for all constitutional and legal steps taken by the present regime.

"17. The prerequisites for the application of doctrine of necessity, as were laid down in the Cyprus case, the Attorney General of Republic *vs.* Mustafa Ibrahim (1964-C.L.R. 195), were also referred to by their lordships of the Supreme Court. These prerequisites are:

- (a) An imperative and inevitable necessity or exceptional circumstances;
- (b) no other remedy to apply;
- (c) The measure taken must be proportionate to the necessity; and
- (d) It must be of a temporary character limited to the duration of the exceptional circumstances.

Their lordships of the Supreme Court, therefore, held that the present state of Constitutional deviation was to remain for a limited period which would be as short as the necessity of the situation would demand.

18. Having held that the takeover by the Chief of Army Staff was valid their lordships proceeded to examine the extent and scope of the powers of Chief Martial Law Administrator, which he may exercise during the temporary period for which he had taken control of the administration. Such powers are enumerated in para 3 (iii) of the legal position emerging from the present situation. This para reads as follows: –

That the Chief Martial Law Administrator, having validly assumed power by means of an extra-constitutional step, in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognized by judicial authorities as falling within the scope of the law of necessity, namely:-

- (a) All acts or legislative measures which are in accordance with, or could have been made the 1973 Constitution, including the power to amend it;
- (b) All acts which tend to advance or promote the good of the people;
- (c) All acts required to be done for the ordinary orderly running of the State; and
- (d) All such measures as would establish or lead to the establishment of the declared objectives of the proclamation of Martial Law, namely, restoration of law and order, and normalcy in the country, and the earliest

possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution".

It would be seen that while conceding power, to amend the Constitution, to the Chief Martial Law Administrator the Supreme Court has clearly laid down that he is entitled to do so only within the scope of the law of necessity.

19. In this behalf I may also refer to an earlier observation of their lordships at Page 708 of the report, when they say, "it follows, therefore, that once the assumption of power is held to be valid, then the legality of the actions taken by such an authority would have to be judged in the light of the principles pertaining to the law of necessity". Thus it would be seen that the power to amend the Constitution is not an uncontrolled power; nor can it be compared to the power of the Parliament to amend the same. This power, as and when exercised, is to be justified on the touch stone of necessity. Judging from this stand point the question would arise if the Chief Martial Law Administrator, acting as the President, could, under the doctrine of necessity, promulgate Article 212-A and add Clauses 3-A, 3-B and 3-C to Article 199.

20. These new provisions in the Constitution, on the one hand, empower the Chief Martial Law Administrator to establish Military Courts and Tribunals, and on the other deprive the superior judiciary of the power of judicial review, with respect to the proceeding taken before, and judgments passed by, such Military Courts and Tribunals. The first question, therefore, would arise, if any necessity existed for taking such a drastic step. The constitutional deviation permitted by Begum Nusrat Bhutto's case was occasioned only because the executive and the legislative organs of State had lost, to quote Begum Nusrat Bhutto's case, "their Constitutional and moral authority in the circumstances arising since the 7th March, 1977". Their lordships of the Supreme Court further observed that no such consideration had arisen in regard to the judicial organ of the State. This was the position obtaining on 5th July, 1977, because the Laws (Continuance in Force) Order, 1977 declared in sub para 2 of Para 2 "that all courts in existence immediately before the commencement of this Order shall continue to function and exercise their respective powers and jurisdiction". This fact was duly recognized by the Supreme Court in Begum Nusrat Bhutto's case. Nothing has happened, to show that the judicial organ of the State has, since then, suffered any change. On the contrary this organ has functioned, during this period, quite effectively and its Constitutional and moral authority is, by no means, affected.

21. The onus is on the respondent to show that circumstances exist, in line with the doctrine of necessity, which could entitle the Chief Martial Law Administrator to being about these amendments. This is a heavy burden, which we expected, would be discharged by the Law Officers of the Federation and the Province. But as observed earlier, they have chosen not to say anything in this behalf. In fact they have said nothing beyond telling this court that it could no longer hear the question of

amendments. Thus, while failing to discharge their duty towards this court, these Law Officers have also failed to discharge the onus which so heavily lay upon them.

22. However, the learned counsel for the petitioner has drawn our attention to the declaration made by the Chief Martial Administrator on 3rd June 1980. The press report of the address of the Chief Martial Law Administrator on Radio and T.V. indicates that there was internal stability and satisfactory law and order situation. This according to the Chief Martial Law Administrator has resulted in arresting the downward trend in the economy and that there was 100% increase in the export besides the overall situation in economy being much better. In the face of a *satisfactory law and order situation*, and with no evidence of judicial organ of the State failing, there was evidently no necessity for firstly creating Military Courts and Tribunals under the Constitutional authority, and, then keeping them beyond the scrutiny of superior judiciary.

23. As observed earlier the very validity of the present regime grows out of the pronouncement of Begum Nusrat Bhutto's case. Their lordships of Supreme Court had, in the conclusions drawn, held at page 716 of the report:-

"That the superior courts continue to have the power of judicial review to judge the validity of any act or action of Martial Law Authorities, if challenged, in the light of the principles underlying the law of necessity as stated above. Their powers under Article 199 of the Constitution thus remains available to their full extent, and maybe exercised as heretofore, *notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance*".

While holding that the power of judicial review remains with the superior courts notwithstanding anything to the contrary contained in any Martial Law Regulation or Order or Presidential Order or Ordinance, their lordships were obviously mindful of the fact that' the Laws (Continuance in Force) Order, 1977 had provided in the Proviso to sub-para (2) of Para 2 that the "Supreme Court or the High Court shall not have the power to make any order of the nature mentioned in Article 199 of the Constitution against Chief Martial Law Administrator or the Martial Law Administrator or any person exercising powers or jurisdiction under the authority of either". This position is reiterated by their lordships at page 722 of the report in the following terms:-

"(vi) That, accordingly, the superior courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law Authorities if challenged in the light of the principles underlying the law of necessity as set out in this judgment. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding any thing to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance".

24. The effect of these observations is that anything contained in these instruments, which tries to restrict the power of judicial review, is rendered null and void. While explaining the ground for maintaining that the power of judicial review of the High Courts and the Supreme Court are available to their full extent. Their lordships gave the following further reasons:-

(A) That the Courts established under the pre-existing Legal Order continue to have the power and jurisdiction to adjudicate upon validity and effectiveness of the new Legal Order.

(B) That the old Legal Order has not been destroyed and that only certain parts thereof were held in abeyance on the grounds of state necessity resulting in constitutional deviation. Therefore, the superior courts continue to remain the judges of the validity of the actions of the new regime.

(C) Constitution of 1973 provided for a clear tracheotomy of powers between the executive, legislative and judicial organs of the State. While the executive and legislative arms have lost their Constitutional and moral authority, the same was not so with the judicial organs of the State. Therefore, on no principles of necessity could the power of judicial review be taken away.

(D) Ideology of Pakistan embodies the doctrine of Divine Sovereignty to be exercised on behalf of ALLAH, as a sacred trust, by the chosen representatives of the people. This Ideology strongly militates against placing the ruler above the law and not accountable to anybody in the realm. Courts of justice, being the embodiment and a symbol of the conscience of the MILLAT provide an effective safeguard for the rights of the subjects. On this principle the power of judicial review for judging the validity of actions of the Martial Law authorities continue to remain with the superior judiciary.

(E) And lastly, the only remedy to the citizen against encroachment by Martial Law authorities in matters being litigated before the Civil Courts is by way of judicial review in the superior courts.

25. The amendment of the Constitution by way of introduction of Article 212-A and Clauses 3-A, 3-B and 3-C in Article 199, patently takes away this power of judicial review, Begum Nusrat Bhutto's case has declared that this power is a part of the new Legal Order emerging from 5th July 1977. There is no authority vesting in the Chief Martial Administrator to destroy this power.

26. The amendments in Article 199 purport to override any judgment, particularly a judgment regarding the powers of courts relating to judicial review. This is an attempt

to override the case of Begum Nusrat Bhutto. In this context Mr. Aslam Chishti, contended that by trying to override the judgment of the Supreme Court the present regime is trying to destroy the basis of its own validity and animation. I am not sure if I agree with him. Otherwise it is not a question directly before us. But the whole tenor of the judgment is that the Constitutional deviation is permissible only on the doctrine of necessity. While validating such Constitutional deviation their lordships have clearly declared that each act of the regime is to be justified on the touch-stone of necessity. It would be only the superior courts which can test and judge the actions of Martial Law authorities on such a touch-stone. If such power is tried to be taken away it would mean the power of judging the existence of necessity warranting such acts is being taken away. That would be the stage where doubts would be cast as to the continued validity of constitutional deviation.

27. Our Constitution is based on the principles of tracheotomy of power distributed among the legislative, executive and judicial organs of the State, each organ performing its allotted function within its own sphere. The role of Armed Forces as envisaged in the Constitution is only to defend the country from external aggression or threat of war and to come to the aid of civil power. The second function of coming to the aid of civil power is to be performed by the Armed Forces only when it is called upon to do so. And when it is so called upon to come to the aid of civil power, it is required to do so in accordance with the law. This is the maximum role of the Armed forces while acting internally. The present Constitutional deviation has been necessitated because of certain circumstances recognized in Begum Nusrat Bhutto's case and permitted only in accordance with the doctrine of necessity. Such deviation has been held, by their lordships of the Supreme Court, to be of a purely temporary nature. The introduction of Article 212-A and Clauses 3-A, 3-B and 3-C in Article 199, introduces the concept of Martial Law in the Constitutional scheme of the State, and recognizes the office of the Chief Martial Law Administrator. At the same time these amendments try to make Military Courts and Military Tribunals a permanent feature of the basic law of the land. This is in contravention of the original scheme of the Constitution. Additionally these changes, which are sought to be brought about by the introduction of Article 212-A and Clauses 3-A, 3-B and 3-C in Article 199, seek to destroy the principle of tracheotomy of power by directly undermining the judicial organ of the State. Such fundamental changes in the basic law of the country may not have been possible by a Sovereign parliament without a tacit mandate from the electorate. But in any case, the Chief Martial Law Administrator, who is incharge of an interim Government is, by no means, empowered to bring about such drastic and fundamental changes in the Constitutional set up of the State.

28. The normal courts which are functioning in this country for over a hundred years have established a tradition of administering justice according to law and in a completely impartial manner. They are uninfluenced in their judgments by any extraneous factors. These courts are being sought to be replaced through Constitutional

amendments, by Military Court and Tribunals. And here I cannot resist quoting the case of a student, referred to by Mr. Yahya Bakhtiar, who was accused of having participated in an illegal procession. During his trial before a Military Court witnesses did not name him nor did they point him out as the one who participated in such procession. But the Presiding Officer was helpless. He told the accused student that although the evidence does not indicate his guilt but he could not do anything as the higher authorities had sent down direction that he was to be sentenced to one year's R.I. This quality of justice is being tried to be provided in preference to the existing courts; and with such sanctity that the judgments of Military Courts and Tribunals are being sought to be kept above the judicial scrutiny of the superior courts. Such a step is not likely to promote the good of the people; nor is it required to be done for the ordinary orderly running of the State.

29. The justification bringing about these amendments in the Constitution could be shown from another stand point. The Chief Martial Law Administrator is permitted to perform all acts and take all such measures which would establish or lead to the establishment of the declared objectives of the proclamation of Martial Law. These objectives can best be explained in the language employed by their lordships of the Supreme Court in Begum Nusrat Bhutto's case, and I quote from page 723 of the report:-

"While the court does not consider it appropriate to issue any directions, as suggested by Mr. Yahya Bakhtiar, as to a definite time-table for the holding of elections, the Court would like to state in clear terms that it has found it possible to validate the extra-constitutional action of the Chief Martial Law Administrator not only for the reasons that he stepped in to save the country at a time of grave national crisis constitutional break-down, but also because of the solemn pledge given by him that the period of constitutional deviation shall be of as short a duration as possible, and that during this period all his energies shall be directed towards creating conditions conducive to the holding of free and fair elections, leading to the restoration of democratic rule in accordance with the dictates of the Constitution. The Court, therefore, expects the Chief Martial Law Administrator to redeem this pledge, which must be construed in the nature of a mandate from the people of Pakistan, who have, by and large, willingly accepted his administration as the interim government of Pakistan".

The amendments sought to be made by way of introduction of Article 212-A and Clauses 3-A, 3-B and 3-C in Article 199, would do anything but achieve such an objective.

30. There is yet another angle from which Mr. Aslam Chishti has attacked these amendments. He contends that the later amendments have been introduced malafide. In this behalf he wants us to take judicial notice of the fact that they were brought about at a time when the Lahore High Court had reserved judgment in the Constitutional Petition of Asghar Khan. This fact, by itself, is not sufficient to establish malafide, which

has to be specifically pleaded and proved as a matter of fact. The timings of the amendments in Article 199 do not lead to a conclusion of malafide because the question of validity of these amendments as held above, can always be examined by the High Courts.

31. For all these reasons we would hold that these amendments fail to come up to the tests of necessity laid down in Begum Nusrat Bhutto's case. They are, therefore, *ultra vires* of the powers of Chief Martial Law Administrator, even though he acted as President while promulgating such amendments. The result is that consequential changes in M.L.O. 4, brought about through M.L.O. 72 and 77 are of no effect.

32. As the first question has been answered in the negative we need not answer the second question.

33. The position that emerges now is the same as was obtaining before these amendments were introduced in the Constitution. This court has the same powers of judicial review under Article 199, as before; which power of judicial review is fully recognized by Begum Bhutto's case. These are our reasons for the short judgement announced by us on 2nd July, 1980.

34. These petitions should now be fixed for regular hearing.

35. Before parting with this judgment we would like to express our deep appreciation for the assistance rendered to us in the decision of these difficult questions by Amicus Curiae, Mr. Yahya Bakhtiar, Haji Sarfaraz Khan and Muhammad Muqim Ansari, and also by the counsel for the petitioners, namely Mr. Muhammad Aslam Chishti, Mr. Tahir Muhammad Khan and Mr. Ehsanul Haq.

Dated 12th July, 1980.

Sd/-M. A. RASHID
- JUDGE.

ORDER OF THE CHIEF JUSTICE

I have the privilege of reading in advance the judgment to be delivered by my learned brother Justice M. A. Rashid. I fully agree with the views expressed and conclusions reached, and have nothing to add.

Sd/-MIR KHUDA BAKHSH MARRI
CHIEF JUSTICE

ORDER OF JUSTICE ABDUL QADEER CHAUDHARY

My learned brother Mr. Justice M. A. Rashid has elaborately discussed the points in this petition. However, I add few words in support of what my brother has said". After giving his reasons the learned Judge came to the conclusions.

"... on no principle of necessity could power of judicial review vested in the Superior Courts under the 1973 Constitution be taken away" He went on to state *inter alia* "...In any case, necessity being justifiable, the present enactments were not justified by necessity. The retrospective effect of the amendment runs contrary to the conclusion recorded by the Supreme Court at Clause (5) at page 716 of Begum Nusrat Bhutto's case (PLD SC 657)".

Mr. Justice Mir Khuda Bakhsh Marri,
B.A., LL.B., Bar-at-Law taking Oath of Office on 1st appointment as Judge of Sindh and Baluchistan High Court from Mr. Justice Qadeer-ud-din Ahmed Chief Justice, High Court of Sindh and Baluchistan, October, 1970, Karachi



Mr. Justice Mir Khuda Bakhsh Marri, B.A., L.L.B., Bar-at-Law taking Oath of Office on 1st appointment as Judge of Sind and Baluchistan High Court from Mr. Justice Qadeer-ud-din Ahmed Chief Justice, High Court of Sind and Baluchistan, October, 1970, Karachi

Mr. S. N. Nusrat, President Karachi High Court Bar Association presenting his address on Author's appointment as Judge of Sind and Baluchistan High Court, 1970

Left to Right:

Mr. Qazi Isa, Justice Durab Patel, Justice Abdul Qadir Sheikh, Mr. S. N. Nusrat, The Author, Mr. Salim Akhtar and Justice Noorul Arfin can be seen



Mr. Qazi Mohammad Isa, President of Baluchistan High Court Bar Association presents an address on the Author appointed as Judge of Sind and Baluchistan High Court in 1970

Left to Right Justice Abdul Qadir Sheikh, Mr. S. N. Nusrat, Mr. Qazir Isa, the Author, Mr. Salim Akhtar



*Author at work in his office at
Governor's House Quetta,
1977*



The Author as Governor with
the C.M.L.A. General Moham-
mad Zia-Ul-Haq at Quetta
Airport, 1977



Author on pacification mission addressing in Balochi representative Jirga of Bugti Tribe at Dera Bugti, July, 1977



Author as Governor of Baluchistan on pacification mission addressing representative Marri Tribal Jirga in Baluchi at Governor's House, Quetta 1977



Author as Governor meeting Marri tribesmen at Mawand in Tribal area July 1977



Author as Governor taking salute from Army Jawans on Independence Day August 1977, at Ayub Stadium Quetta



Author as Governor receiving President Fazal Ellahi Chaudri at Quetta Airport 1978



*Author after taking Oath of Office as care taker Chief Minister of Baluchistan at Karachi
being received at Quetta Airport by General Mohammad Musa Khan,
Governor of Baluchistan with others, December, 1988*

Author as care taker Chief
Minister of Baluchistan
with Prime Minister of
Pakistan Mrs Benazir
Bhutto and Governor,
General Musa Khan at
Governor's House,
Quetta, 22nd January,
1989



CHAPTER FIVE

PAROCHIAL AND MONOPOLISTIC PRESS

(LESSON TO LEARN IN OBJECTIVE REPORTING)

Country's press, Urdu and English, taken over by Government or so-called independent one with stray exceptions, in process of time, got into the habit of not only ignoring, but unfortunately misreporting news of national importance. This is done in all probability to avoid displeasure of rulers and bosses of the Information Ministry. So as not to deprive the already over rich newspaper owners from highly lucrative government advertisements, licenses, cheap newsprint, free foreign trips, all at public expense.

Like other State Institutions, the press has also lost its credibility. The same applies to government run news media, Television and Radio news service. It is no secret that to get creditable news about happenings in this country, majority of the people switch over to British Broadcasting, Voice of America and Akash Vani services, knowing fully well that foreign news media always, has its own, interests and angle as well; yet there is no alternative. Is it not high time that the government and its Institutions are re-organized, re-adjusted, in such a way that objective reporting of news be resorted to, so as to regain people's confidence? Because it is the truth which in the end prevails, not lies, subterfuge, and bureaucratic catch-phrases and clichés. The worst enemies of Mr. Jinnah never accused him of misleading, or of untruths on important national affairs. Hence, he was followed by all the Muslims. To the newspapers, the old excuse of fear or restraints of censorship, press advice is not available, because they never stood up to it during last ten years or so, except leaving certain blank places, making black borders and that also by a few, and for a short while. They never suffered a fine, confiscation of press, or prosecution, as used to happen to pre-partition newspapers, to give a few examples - Maulana Muhammad Ali Jauhar, Maulana Zafar Ali Khan, Shorish Kashmiri. Now they have abandoned projecting public opinion, their woes and difficulties, and has turned itself into a class and an industry, and a vehicle of spreading gospels of Ministers, Government functionaries, and of a small group of urban pseudo-intellectuals, mostly their friends or of 'baradari': who oblige to write when and what is requested. Generally the same article keeps on appearing after a respectful time and distance, annually, and this is presented as public opinion of Pakistan.

On the other hand, the financially weaker newspapers or magazines, mainly run by young journalists, who pin point social and economic injustices, usurpation of rights of smaller Provinces, of minorities, or women, of defective foreign policy, and ask for

drastic reforms, eradication of corruption at all levels, do suffer closure of their newspapers, prosecution and fines. Credit, therefore, must go to these small groups, as conscience keepers of the nation. As the situation is, I am not sure my (this) book will see the light of the day, because sometime back, I had requested about eight or so well established publishers in Karachi, for a new print of my history book in English, on *Baluchis and Baluchistan*. The book has seen two English Editions, first in Karachi in 1974, second from Quetta, and two Urdu Editions from Quetta, as there was demand in the country and abroad. Some publishers said, they have enough work publishing very expensive books by Ministers, etc. some they showed to me. Some promised to give estimates, which they never did. One or two were candid enough to say that although on a business point of view, it would be a good venture, and there is enough reading public in Karachi, but otherwise, it would not be wise for them publishing something on *Baluchis or Baluchistan*, that obviously, includes being written by me.

One wonders why this taboo, this lurking fear on part of publishers? May be society, as it is, got highly polarized on 'baradari' bases high national interest, broad outlook, courage of conviction, is considered no more a virtue. On top of it the ever-growing greed to get rich by any means, and by the shortest routes, (Hashish, gun running, bribes, etc.), has taken over the nation as a whole. Thus qualities of a living and energetic nation, are replaced by clichés, religiosity, hypocrisy and plain lies. Very sad indeed.

It has been the common practice in Pakistan for the biased parochial big Urdu newspapers of Karachi and Lahore, and commercialized English press, the owners more or less are the same, to brand as parochial, unpatriotic; as if patriotism only belongs to them. The already weak and small band of leadership of small Provinces, such as Khan Ghaffar Khan, Khan Abdul Wali Khan of NWFP, Mir Ghous Bux Bazenjo, Sardar Attaullah Khan Mengal, Sardar Khair Bux Marri, deceased Abdul Samad Khan Achakzai, Sher Muhammad Marri, Mr. G. M. Syed, Mr. Mumtaz Ali Bhutto, new entrant Mr. Palejo, Mr. Jam Saqi, Mr. Hussain Bux Narejo of Sindh, and of course, once Maulana Bhashani, sometimes even Suhrawardy, and deceased Shaikh Mujib Rehman and many more. The result of this chorus we have seen, East Pakistan is no more with Pakistan. No doubt, under cover of this noise, these champions of press served their relatives and communities well, but antagonized the majority of population in small. Provinces, and we have a new slogan of Muhajaristan or the fifth nationality. Where would it lead? Only God knows, because as a nation, we have stopped thinking.

Once a friend of mine, who perhaps did not want me to be the Chief Justice of Baluchistan, although I was fully qualified, had ten years legal practice in the High Court as a Barrister, more than 6 years service as a Judge of Sindh and Baluchistan High Court, at Karachi (1970-76) and also be longed to Baluchistan, maybe he preferred a more cooperative and pliable person for the post, and having failed to find any other reason, he wrote to the then Prime Minister, Mr. Zulfikar Ali Bhutto, that I should not

be appointed, because I was parochial and would create difficulties for the Provincial Administration. However, his pleadings did not have any weight with the Prime Minister, he simply ignored it. I only came to know about the letter through the courtesy of the government, which published it in one of its bulky White Papers. One simply does not know where one should look for fairness and justice. I am pained to say, he like any other knowledgeable person knew fully well that I fought, be it in politics earlier or as a Judge, for the democratic rights of people and rule of law, all along from Ayub Khan to Mr. Bhutto's time and until I left the judiciary. In spite of his uncharitable and uncalled for negative compliments to me, to the annoyance of high ups, I openly helped him through my judgments, as he was having a raw deal from the Government, which are a matter of public record. Naturally this further added to my difficulties, and I knew fully well that it will. Yet what is right must be called right, whatever his motives, one does feel hurt for such treatment, at the hands of a friend.

On the subject of Provincialism or parochialism, let me give a couple of examples of this in Baluchistan. I was replaced by a Urdu speaking person, how much out of the way financial and other privileges, at public expense, were given to him, by the then Governor-cum-Martial-Law-Administrator - Rahimuddin, as a special favor to his family including a house. I refrain to go into detail, as he is no more in this world, but these are matters on government record. Then a Urdu speaking Sessions Judge, removed from service by the then Chief Justice of Sindh and Baluchistan High Court, on certain charges, was doing his legal practice in Baluchistan since 7 or 8 years, he was, against the wishes of High Court, brought back, first as Sessions Judge, against all norms and rules of Judiciary, and after a while appointed High Court Judge in Baluchistan, till he retired and is now living in Karachi permanently. Another Urdu speaking Advocate, was for the first and last time in history of Judiciary of Baluchistan, appointed as Deputy Attorney General, and soon after appointed Judge of Baluchistan High Court, till he retired and is now having another government job as well, and many more such examples in different departments can be given. Equally other baradaris in power continue to usurp rights of people of small Provinces without pinch of conscience or fear of public accountability. All this was done by the then Deputy Martial Law Authority-cum-Governor of Baluchistan, Lt. General Rahimuddin. Did the Urdu or English Press, for that matter, local or national, write a word of protest about it? The answer is no. Because it was matter of baradari, or what other justification was there.

I may be excused for this diversion. I was talking about subjective reporting of our press as opposed to objective reporting of foreign press. When Baluchistan High Court passed Full Court Judgement invalidating amendment of Article 212-A in Constitution of 1973, by the Martial Law Administrator - President, having far reaching consequences, reverberation of which, will be heard for a long time in this country's judicial history the *Muslim Daily* of Islamabad, casually reported on 03rd July 1980, on the 6th page, in the column reporting, 'Provincial News', it may be noted that the

judgment did not concern one Province or the other, but the whole range of Rule of Law in the entire country. The news is as under:-

"Baluchistan H. C. says;

Amendments *ultra vires*-from Masood Asif Quetta, July 2. The amendments in Articles 199 and 212-A of Constitution of Islamic Republic of Pakistan, were declared *ultra vires* by a Full Bench of the Baluchistan High Court here today.

The following is the short order of the Court:

"We come to the conclusion that the amendment of the Constitution of the Islamic Republic of Pakistan, by way of introduction of Article 212-A and Clause 3-A, B, and C of Article 199 are *ultra vires* of the powers of the Chief Martial Law Administrator as are recognized in Begum Nusrat Bhutto's case. In view of this fact, that this case involves "complicated Constitutional interpretation, we certify that it is a fit case for appeal to the Supreme Court of Pakistan."

"The decision was announced unanimously, by the Full Bench of the Court, through a short order today, after two days of hearing of the writ petitions filed by Advocate Aslam Chishfi, Ehsanul Haq and Tahir Muhammad Khan, who had prayed the High Court to give judgment in respect of the clarification of the said amendments."

"The detailed order of the High Court is expected to be recorded later on.

"The Bench comprised Chief Justice Khuda Bakhsh Marri, Justice Muhammad Abdul Rashid and Justice Abdul Qadeer Chaudhary.

"Three Senior Lawyers of Quetta, Muqem Ansari, Haji Sarfaraz Khan and Barrister Yahya Bakhtiar, acted as Amicus Curiae to argue in this matter. The Deputy Attorney General of Pakistan, Mustakhiruddin and Advocate General, Baluchistan, Basharatullah appeared on behalf of the respondents, i.e; State, from Federal and Provincial seats respectively."

On the other hand, compare the above with impartial and highly analytic rightly indicating the possible injurious retaliation by the rulers to the judiciary, objective reporting of Mr. Lawrence Lifschultz in *Far Eastern and Economic Review*, dated 13 March 1981- Hong Kong, on pages 21 to 22. It also may be noted that within two weeks of this reporting, Provisional Constitution Order (PCO), 1981, was passed by President, which virtually gave all the powers to one man. The reporting is reproduced as under:

"A fundamental debate."

Baluchistan's High Court orders executions stopped, until wider Constitutional and legal issues can be examined. By Lawrence Lifschultz.

"Quetta: Fifty miles north of Quetta, Baluchistan's Provincial capital, lies the heavily fortified maximum - security prison known as the Mach Central Jail. It looks more like a massive military fort than a prison. Behind its walls are nine men under sentence of death, whose lives have become the pivot of a Constitutional controversy which represents a microcosm of Pakistan under Martial Law.

In the latest instance of a face-off between the officers of the Province's highest judicial authorities, and to local Martial Law Administration, the presiding Judges of Baluchistan's High Court ordered a halt on December 8, 1980, to the imminent execution of one of the nine, Abdul Hamid Baluch, a 21 year old student, and an alleged member of the Baluchistan Student Organization (BSO).

The case of Hamid Baluch is one of several instances, in which, the Baluchistan High Court has stayed death sentences and other sentences handed down by the Martial Law Tribunals, operating in this huge, remote Province. The Baluchistan Court Orders, have engaged Pakistan's Judiciary in the most serious and fundamental examination on the rights and prerogatives of Pakistan's jurists, since the country's Supreme Court in November 1977 sought to define the relationship between the Constitution and the existence of Martial Law. The Supreme Court at that time granted its approval to the Martial Law regime under an unusual legal doctrine, the law of necessity. However, the Supreme Court validated the position of the Military government of Gen. Zia-ul-Haq only within a clear framework. It held Martial Law to be a temporary, but necessary, aberration, and identified the foremost responsibility of the authorities to the immediate organization of free and fair elections. The court said in its decision, that while Martial Law might continue temporarily, during this time 'the superior courts (would) continue to judge the validity of any act or action of the Martial Law authorities, if challenged, their (the courts') powers under Article 199 of the Constitution thus remains available to their full extent."

"Article 199 of Pakistan's Constitution declares, that the Provincial High Courts have the authority to issue orders, to an administrative or executive official of either desist in an act "he is not permitted by law to do", or to carry out an action which he may be required by law to implement. It is this article - and indeed many others aspects of Constitutional Law - that is now on trial in Baluchistan High important implications for the rest of the country's system of justice.

The present phase of the dispute began in late October 1979, when the Province's Military Governor, Lieut-Gen. Rahimuddin Khan, stated that 'the sentences awarded (by Military Tribunals) on charges of murder, and which have been confirmed by the President of Pakistan, will soon be executed'. The death sentences passed by Military Courts, had already been appealed before the Civil High Court on a variety of grounds, usually on the basis that the procedure of the Tribunals were without adequate safeguards for a fair trial, or that Military Courts themselves had no authority in law. While the validity of the appeals was being considered, Baluchistan's High Court had ordered that all capital sentences be stayed.

"On October 25, 1979, the day after the Governor's statement, lawyers for those in Mach Jail, were again before the High Court in Quetta, fearing their clients were about to be hanged, despite repeated High Court orders forbidding the executions. The Chief Justice of the Baluchistan High Court, Khuda Bux Marri, immediately issued a new stay order, commanding the prison authorities to desist from carrying out the sentences and to obey all previous High Court orders.

"According to legal circles in Quetta, the Provincial Military authorities ordered the prison to carry out the death sentences. However, High Court officials in Quetta, re-affirmed to the Jail Officials that any execution would be illegal and act of contempt of court. Officials at Mach Jail then reportedly informed the Provincial Martial Law authorities, that if the Military wishes to execute anyone, they should come to the prison themselves and do it, but the Jail authorities would not subject themselves to a charge of being in contempt of court; nor would they risk the prospect of eventually being arrested themselves, on murder charges for having hanged a man without lawful authority.

"Military officials in the Province were also made aware, that should any Army Officer or Soldier carry out the sentences against the orders of the High Court, both those who carried out the sentences and those who gave the orders, would be held in contempt of court, and that at some future date, all those concerned might be arrested on charges of premeditated murder. The authority of the Judges of the Baluchistan High Court stood firm, and in the end supreme. The Military Authorities made no move to carry out the sentences.

"The case of Hamid Baluch, now being appealed to Baluchistan's High Court, illustrates the many legal controversies over the legitimacy and functioning of Pakistan's various Military Tribunals. Hamid Baluch was arrested on December 9, 1979, and charged with attempting to murder Col. Khulfan Nasir, a recruiting officer from the Sultan of Oman's Army. The incident is alleged to have occurred at Turbat, in the Mekran region of southern Baluchistan. Many soldiers in the

Omani army are mercenaries, recruited from among the Mekrani Baluch, According to the prosecution, three shots were fired by Hamid Baluch, but all of them missed Nasir. Another man, named at first by the authorities as Ghulam Rasul was killed. In the confusion which broke out among several thousand prospective recruits lined up for inspection, Hamid Baluch was arrested. Although the Civil Pakistan Penal Code (PPC) covers such a crime, Baluch was brought before Special Military Court No. 4 at Turbat, headed by Lieut-Col Ikram Nabi.

According to the police, the motive for the offence was "that the accused belongs to the Baluchistan Student Organization, which has faith in democracy." According to official court records Madni told the Tribunal: "The BSO believes that all the persons being recruited by the Muscat (Oman) Government, would be used by Sultan Qaboos of Muscat, against the Zafaris who are fighting a guerrilla war in Muscat, against the Government of the Sultan for the cause of democracy. In order to stop the recruitment, the accused fired, aiming at Col. Khulfan Nasir of the Muscat Army with the intent to kill him."

"The defence maintained Hamid Baluch was innocent, and was at Turbat as a candidate for recruitment in the Omani Army. The defence argued that he had been made a scapegoat to malign the BSO! But the crucial element in the latest appeal to the High Court, was the manner in which the Tribunal handled questions of evidence and procedure. During the Military trial, after seven government witnesses had appeared and testified that Hamid Baluch had killed Ghulam Rasul, Nabi suddenly amended the charge-sheet and declared that alleged deceased was not Ghulam Rasul, but Abdul Razzaq. The defence objected, saying, that the name of a murdered person could not be changed suddenly, half-way through a murder trial. The defence filed a motion calling for the dismissal of the charges but the Tribunal rejected the motion.

"The defence then asked for the recall of all the prosecution witnesses who had testified that Hamid Baluch had killed Ghulam Rasul. Nabi rejected the request. Then the defence suddenly produced the father of the newly-named deceased, Abdul Razzaq, who told the Tribunal that his son was alive. Over strident defence objections, the President of the Military Tribunal, according to official public records of the case, immediately amended 'the charge-sheet so as to alter the name of the deceased as shown in the original charge-sheet.' In other words, Hamid Baluch was now again accused of killing Ghulam Rasul. Muhammad Aslam Chishti, Chief defence lawyer, declared there was a serious controversy about who was dead. The trial proceeded and Hamid Baluch was convicted of murder and sentenced to death.

"Technically, according to legal circles in Quetta, since the defence never permitted its copy of the charge-sheet to be altered a second time, Hamid Baluch may have been convicted and sentenced to death, for killing a man whom it has been proven is alive. In the end, half the witnesses testified that Ghulam Rasul had been killed and the other half testified that Abdul Razzaq was the victim. If the identity of the deceased is in question, many lawyers in Quetta ask how the identity of the assailant can be such a certainty.

"The case has attracted public attention, in part because of the broader issue in the High Court has raised, by considering the appeal of Hamid Baluch and others convicted by Military Tribunals. Over the past two years, Pakistani Martial Law authorities have promulgated two Constitutional amendments which have thrown the country's legal community into turmoil. The first amendment, Article 212-A, sought to remove the right of judicial review guaranteed to civilian courts by the constitution. A separate decree, promulgated in May 1980, added three provisions to Article 199 of Pakistan's Constitution. Both amendments sought to erode the powers of the High Courts, by prohibiting them from making any order regarding the validity of any Martial Law Order or Regulation, any sentence or judgment of a Military Court, or any 'thing done, or action taken, or intended to be done or taken, pursuant to a Martial Law Order or Regulation.' These decrees bar the High Courts from issuing orders against any person acting under the authority of a Martial Law Administrator (Zia was also the Chief Martial Law Administrator).

It was after the promulgation of Article 212-A, that Baluchistan's Military government publicly declared that death sentences awarded by Military Courts would be carried out. Led by Aslam Chishti, counsel for the accused immediately filed pleas for a renewal of stay orders against the executions, and then filed a broader position, challenging the basis of amendments being made to the Constitution by Military decree. Following a confrontation between the High Court and Provincial Martial Law authorities, the death sentences were halted, while a full bench of the High Court took up the broader questions of Constitutional law, and the issue of whether civil judicial authority was supreme. In a decision, that will no doubt be read for years, as one of the most important statements of the principles of jurisprudence issued by a Pakistani Court, the Baluchistan High Court declared that each of the Martial Law amendments limiting the courts' authority were without validity and had no effect.

"The Justices reminded the Martial Law authorities, that the Supreme Court had stated in 1977 that the powers of the High Courts were "available" to their full extent, and were to be exercised 'notwithstanding anything to the contrary contained in any Martial Law Regulation or Presidential Order or Ordinance.'

Justice M. A. Rashid declared, on behalf of an unanimous court; there is no authority vesting in the Chief Martial Law Administrator to destroy the power."

"A set considered arguments of petitioners challenging the validity of the Constitutional amendments, the Baluchistan High Court invited the Martial Law authorities to submit their arguments. Appearing on behalf of the Military authorities, the Deputy Attorney General simply stated, that the powers of the High Court had been taken away. He refused to elaborate, saying: 'No further arguments on behalf of the State were required.' Justice Rashid replied, on behalf of the Court: 'The submissions of the Deputy Attorney General and the Advocate General boils down to this: that the law-giver has spoken and that no more need be said by anyone, including the courts. This stand is unheard of in a society governed by laws.'"

"The High Court made only a preliminary ruling, stating that it had no doubt that it retained full power of judicial review, and that it possessed the prerogative and authority to judge, whether the Martial Law decrees amending Articles 199 and 212 were un-constitutional or not. It has not formerly rendered judgment on this issue, but is expected to hold comprehensive hearings soon, on the deeper and more poignant Constitutional questions. The paradox for Zia's government is that if its decreed amendments are struck down by the High Court, and it seeks an appeal to the Supreme Court, the only basis on which it could formulate such an appeal, would be in direct contradiction of the limits and principles the Supreme Court set down in its November 1977 ruling, stressing the interim nature of the Military regime. The Federal Military authorities are believed to be reluctant to press an appeal to the Supreme Court, lest they stand in self-contradiction to the very decision that rendered them temporary legitimacy and transitional right to authority.

"The Baluchistan High Court is the only one in Pakistan's four Provinces, which has dared to take up such a sensitive but significant issue. Many observers believe, the court's stand cannot be completely divorced from the more general political environment in the Province. In Baluchistan the issue of hanging prisoners, particularly political prisoners, is a highly sensitive and bitter one.

"In 1961, the Pakistan Military authorities hanged six Sardars (tribal leaders), who under Nauroz Khan had rebelled against Pakistan's first period of Martial Law. They were arrested and executed despite the fact, that they had come out of the mountain only on the basis of a ceasefire agreement, and total amnesty, which the Military authorities had guaranteed with a solemn Oath taken on the Koran. Today these men remain martyrs in a Province, known throughout Pakistan for its consistent demands for democratic rights, at both the National and Provincial levels. Moreover, memories of the 1973 -77 insurrection (*REVIEW*,

May 28, 1976), which was set off when the government of the Zulfikar Ali Bhutto, arrested the elected provincial leadership at the behest of the Shah of Iran, Pakistan's neighbor, which has a sizable Baluch community - are still fresh.

"The Baluchistan High Court has, so far, kept the executioner away from the province's prison gates. The same, however, has not been true for the rest of the country. Representatives of Pakistan's Bar Associations claim that in the past three and a half years, more prisoners have been hanged, than in the previous 30 years. With a grim consistency, Zia has refused the mercy pleas, saying to those who have approached his office, that since he refused Bhutto's petition for mercy, he could not be inconsistent. There has been one exception, known as the Shabnam dacoit case, where a well-known Pakistani film actress was robbed and attacked by a group of young men, all sons of senior army officers and civil servants. Their death sentences were commuted.

"Meanwhile, the Baluchistan's High Court is preparing to judge whether Pakistan's Constitution or the 'law of necessity' is what rules in the province, and in the country."

I was talking about highly biased and subjective reporting of our press and objective reporting of foreign press, and that also with regard to factual situation, political, economic or social in this country.

Let me give a few illustrations out of many, which are within my own knowledge and experience. Worse I believe may have happened to politicians, social workers and writers. On the burning question of 1985 Constitutional amendments, after partyless elections and so-called referendum, I wrote the first part of an article, articulating implications of Constitutional changes and their effect. With a view to publishing it. I phoned from my office to the Editor of an English daily of Karachi, and sent him the article. He phoned back showing his appreciation, and requested me to write the other two parts, and promised to publish it. After a full one week of hectic hard work, believing on the promise of no less than the Editor, Whom I had never met before, I completed the article, sent it to him by hand, through my office peon, and it was duly received. After waiting two weeks or so, as it did not come in the press, I again phoned him, though reluctantly, excuse was offered of his being abroad. Another week passed, I got disappointed, and sent a letter to him personally, with a request to at least return the manuscript of the article. Instead, somebody from his office signed the peon book, but did not return the article, instead told my man, that this is enough. I must say, I have not up to now, recovered from the shock, not that my article was not published, but for the fact that no less than an Editor of a prominent newspaper, so-called champion of fourth estate found no moral courage to simply tell me that article was against the policy of the newspaper, or it is confiscated by the censor, or that he has sent it to Islamabad, for clearing, yet on the receipt, without pinch of conscience, it was

shown as having been sent back to me. It is for the readers to draw their own conclusions, that whether they are justified to pay their contribution to such newspapers, when they dare not protect and agitate public rights as against harsh laws, etc. No doubt, they do not need small sums of general contributors, in presence of ever ready generous government bounty. However, they forget, it is due to general public and it is tax payers money which are making them rich, and providing them, their owners, and staff the livelihood. However, the article, as I had luckily one copy with me was published by the English daily "*The Muslim*" of Islamabad. It was a harmless article by all means, nobody could expect that a former Chief Justice would be writing anything against his country. Yet this happened. Times are really unhappy for the nation, when to express ones opinion through newspapers, one needs recommendation whilst in offices, and for every official work hard cash as bribe. When a nation or its institutions reaches to such a low ebb, one wonders can it squarely face the looming dangers from East, West or North, and even within?

Let us cite some other examples. The occasion is, passing of arbitrary Provisional Constitution Order, 1981 by the CMLA — President, on 25 March, 1981, which resulted in resignation, removal, not taking Oath, or not being given Oath to about 19 Judges of higher judiciary, including the Chief Justice of the Supreme Court of Pakistan, and a Chief Justice of Baluchistan High Court. This Constitutional amendment, was first read on National Television news. I happened to be in Karachi that night, on winter holidays and was at a dinner in deceased Pir Ali Muhammad Rashidi's house with family and some friends. Although, no names of the fortunate or unfortunate ones were enumerated in the news, at the time the order was read over, I did tell Pir Sahib in the presence of friends, that I am the first target due to my judgment in the past, and annoyance to some higher functionaries, besides, another person is ready to undo what my judgment have done, Even if invited to take the Oath, I would not oblige, in spite of 8 years pre-mature retirement, future hardships, and ten long years service as a Judge of Sindh and Baluchistan High Court, and Chief Justice of Baluchistan High Court. When next morning, I was contacted by phone from Quetta to come for taking the Oath, I told the person that I saw no hurry. The Oath could wait, besides, I had to consult my other brother Judges at Quetta, specially senior Judge Mr. Justice M. A. Rashid, who was in mourning, as his father had died in an accident only a couple of days back. Then I went to meet the Chief Justice of Sindh High Court which was arranged earlier. I found everything in shambles, rush for taking the Oath, failure to do so, meant losing the job. Two old colleagues of Sindh High Court, were told that they need not come to take the Oath at the Governor's House. When some Judges in the tea-room, before going to the Governor's House, enquired from me, I told them, I am out, and have no regrets, except for the manner and means resorted to by the government.

Now an event of such national importance, concerning independence of judiciary in future, *Daily Dawn* - Karachi, without any comment, produced the names of those who took the Oath and ceremonies. The interesting feature is that it failed, or found it

undiplomatic, even to mention the names of those Judges who resigned, refused or not given Oath of Office. They included Mr. Justice Anwarul Haq, Chief Justice of Supreme Court, Mr. Justice Dorab Patel and Mr. Justice Fakhruddin of Supreme Court, and myself, the other interesting feature of this news item is that some Judges had taken the Oath, instead of from the Governors or the President, from the then Law Ministers, and in some cases Deputy Martial Law Administrators.

The news is on first page of *Dawn*, Karachi, dated Thursday, March 26, 1981 and is given as under:

SUPREME COURT & HIGH COURTS JUDGES SWORN IN

Rawalpindi, March 25, Judges of the Supreme Court and the four High Courts of the Country, and Members of the Federal Shariat Court, took a fresh Oath of Office today, under the Provisional Constitution Order, 1981, promulgated by the President last night.

"In Rawalpindi, President Muhammad Zia-Ul-Haq administered the Oath to the Acting Chief Justice of the Supreme Court, Mr. Justice Muhammad Haleem, five other Judges of the Supreme Court, the Chairman of the Federal Shariat Court, Mr. Justice Salahuddin Ahmed, and three other members of the Court, at a ceremony held at the Presidency.

"The Provincial Governors administered the Oath to the Chief Justices and Judges of the High Courts in Lahore, Karachi, Peshawar and Quetta. The Acting Chief Justice of the Supreme Court, Mr. Justice Muhammad Haleem, who hails from Sindh Province, was one of three Judges who gave a dissenting judgment in Zulfikar Ali Bhutto's appeal in the Nawab Muhammad Ahmad Khan murder case. Besides him, the Supreme Court Judges who took the Oath in Rawalpindi were: Mr. Justice Aslam Riaz Hussain, Mr. Justice M. Afzal Ullah, Mr. Justice Dr. Nasim Hassan Shah, Mr. Justice Abdul Kadir Shaikh and Mr. Justice Shafiur Rehman.

Mr. Justice Karam Elahi Chauhan of the Supreme Court took the Oath in Lahore.

The members of the Federal Shariat Court, besides the Chairman, administered the Oath by the President were: Mr. Justice Agha Ali Hyder, Mr. Justice Aftab Hussain, and Mr. Justice Karimullah Durrani.

The Federal Minister for Law and Parliamentary Affairs, Mr. Sharifuddin Pirzada, administered the Oath to Mr. Justice Shafiur Rehman also as a Judge of the Lahore High Court.

PUNJAB

The Acting Chief Justice, Mr. Justice Shamim Hussain Kadri, and other Judges of the Lahore High Court took their Oath of Office under the Provisional Constitution Order, 1981, in Lahore this afternoon. The Punjab Governor, Lt. Gen. Ghulam Jilani Khan, administered the Oath at a simple but impressive ceremony held at the Governor's House.

SINDH

The Chief Justice and 15 other Judges of the Sindh High Court took the Oath of Office under the Provisional Constitution Order, 1981 in Karachi today. The Oath was administered by the Sindh Governor, Lt. Gen. S. M. Abbasi, at a simple ceremony at the Governor's House.

The Judges who took the Oath of Office were: The Chief Justice, Mr. Justice Abdul Hye Kureshi, Justice Naimuddin, Justice Zahoorul Haq, Justice B. G. N. Kazi, Justice Saeeduzaman Siddiqui, Justice Nasir Ahmad Zahid, Justice K. A. Ghani, Justice Zafar Hussain Mirza, Justice Ajmal Mian, Justice Sajjad Ali Shah, Justice Ghous Ali Shah, Justice Ghulam Muhammad Kourejo, Justice Zulfikar C. Villiani and Justice Saleem Akhtar.

NWFP

The Chief Justice and Judges of the Peshawar High Court this morning took the Oath of Office, under the Provisional Constitution Order, 1981, promulgated by the President Gen. Muhammad Zia-Ul-Haq, yesterday.

The NWFP Governor, Lt-Gen Fazle Haq, administered the Oath, at a solemn ceremony, held at the Governor's House. Those who took the Oath were Mr. Justice Shah Nawaz Khan, Chief Justice, Mr. Justice Burhanuddin, Mr. Justice Usman Ali Shah, Mr. Justice Ali Hussain Qizilbash, Mr. Justice Fakhre Alam, and Mr. Justice Shah Abdur Rashid.

Our staff correspondent from Quetta adds:

Mr. Justice Zakaullah Lodi, was sworn in as Acting Chief Justice of Baluchistan High Court at a simple but impressive ceremony held at Governor's House in Quetta this afternoon.

Provincial Governor Lt-Gen Rahimuddin Khan, administered him the Oath of Office under Provisional Constitution Order, 1981.

Mr. Justice Abdul Qadeer Chaudhari was also sworn in as a Judge of the High Court by the Governor.

Meanwhile the Judges of the Punjab High Court, Rawalpindi Bench, and the Judges of the Sindh High Court present in the Federal Capital, took Oath of their office under the Provisional Constitution Order 1981, in Islamabad this morning.

The Oath was administered by the Federal Law Minister, Mr. S. Sharifuddin Pirzada, at a simple ceremony.

The Judges who took Oath are: Mr. Justice Aftab Hussain, Additional Judges, Mr. Justice Muhammad Afzal Lone and Mr. Justice Mian Mahboob Ahmed of Rawalpindi Bench High Court.

The Sindh High Court Judges are: Mr. Justice S. A. Nusrat, Federal Law Secretary and Additional Judge, Mr. Justice Tanzilur Rehman, Chairman, Council of Islamic Ideology.

Mr. Justice Abdul Shakoor Salam of Lahore High Court, Multan Bench, took the Oath of office at a simple ceremony in Multan today.

Deputy Martial Law Administrator, Multan Maj. Gen. Raja Saroop Khan, administered the Oath on behalf of the Punjab Governor.

The impact and consequences of passing of Provisional Constitution Order, 1981 (President Order No. 1), stated above is reported by the foreign press, that is on 01 April 1981, by *Daily Guardian*, London, by *Daily Telegraph*, London, in issue of 02 April 1981, by Della Denman, in *Far Eastern Economic Review* - Hong Kong, dated 03 April, 1981, and again by a letter of deceased Mr. G. Safdar Shah, former Judge of the Supreme Court of Pakistan, by *Daily Guardian*, London, dated 6th April, 1981, as under. It is for the readers to draw their own conclusion, comparing reporting of Pakistani and foreign press. I quote:

**"Guardian, London-01 April, 1981 -
From Peter Niesewand in Islamabad.**

Pakistan's former Attorney General, Mr. Yahya Bakhtiar, was yesterday sentenced to five years' hard labor and a fine of about £ 5,000/- or an additional year's gaol, for alleged rigging in his constituency during the controversial general elections of 1977, which preceded General Zia's military *coup*.

"He was found guilty by a Special Court Judge, Mr. Justice Usman Ali Shah. The verdict was announced in Peshawar, although Mr. Bakhtiar lives in the Province of Baluchistan, where the alleged offence took place.

"Last October, the Baluchistan High Court condemned the Martial Law prosecution of Mr. Bakhtiar as discriminatory" and "malafide". Both Judges in

that case - Chief Justice Marri and Justice Rashid-were purged by General Zia last week.

"The Military regime quickly appealed against their judgment, and late last year, the Supreme Court of Pakistan ruled that it would decide the legality issue in due course. It said that, meanwhile, the prosecution could continue and judgment be given, although no punishment should be carried out until the appeal had been heard.

"This leaves Mr. Bakhtiar uncertain about whether he will shortly be taken off to gaol. Last week's Constitutional amendments, introduced by General Zia, forbade the judiciary to enquire into the validity of any Martial Laws, and demanded that Judges swear allegiance to the changed Constitution.

"Nineteen of them-more than a quarter of the judiciary - were either purged, by not being asked to take the Oath, or refused to swear new allegiance, on grounds of conscience.

"No one yet knows, whether General Zia will allow the Supreme Court to go through the motions of formally allowing the regime's appeal, or whether they will brush legal niceties, and merely send along the police to arrest Mr. Bakhtiar.

"The former Attorney General, who led the defence team, in the un-successful appeal against the death sentence by the deposed Prime Minister, Mr. Bhutto, suffers from angina. He has been living quietly in the Baluchistan's Capital, Quetta, under doctor's orders to rest for several hours every afternoon".

"One of his legal colleagues said: A five-year hard labor sentence will probably kill him".

"Under General Zia, the law is frequently used as a weapon of intimidation. He produced four white Papers alleging abuse of power, during the Bhutto Administration: anyone who has watched events in Pakistan over the past three years, could produce more damning and better documented cases against a regime which postures a lot but lacks moral authority.

"The bulkiest of the White Papers, produced in July 1978, dealt with charges of election rigging. It was thicker than a London telephone Directory, with 405 pages of allegations and 1,043 pages of annexures.

"The first steps to this peculiar position, were taken after Mr. Bhutto was sentenced to death in March 1978, and Yahya Bakhtiar agreed to handle the appeal himself, charging nothing for his work. He recalled: "On March 24, I filed

Mr. Bhutto's appeal as a Senior Counsel. On the 25th they registered a case of election rigging against me. When I got busy with the appeal, surveillance started, harassment started. Twice my hotel room was raided by the police, and two of my helpers were arrested and held for several months before being released without charges.

"On June 25, in the midst of arguing the appeal, I was interrogated for four to five hours".

"It is common cause that there was rigging, the only question is who was responsible? According to statements made before the Special Court, set up by General Zia, specifically to try Mr. Bakhtiar, prosecution witnesses said, that gangs broke into polling stations intimidated officials and stuffed the ballot boxes, - but all maintained the men were opponents of Mr. Bhutto's, mostly favoring the Pakhtoonkhwa NAP candidate, Mahmood Khan Achakzai.

"No charges have been brought against anyone who took part in these disruptions.

"The second round of rigging in the Constituency, took place after the polls had closed and officials, whom Mr. Bakhtiar believes were anxious about what Mr. Bhutto would say about the breakdown of law and order, stuffed the ballot boxes with voting slips, making sure that Mr. Bakhtiar won. The Military regime, however, maintains that Mr. Bakhtiar himself telephoned the officials and instructed them to falsify the result. The former Attorney General denies the charge.

"Two years later, when Mr. Bhutto had been hanged, General Zia established Special Court No. 11 A, to deal with cases against persons belonging to the Province of Baluchistan who have held the office of Attorney General".

Daily Telegraph, London-02 April, 1981.
by Bruce Loudon in New Delhi.

"The extent to which the process of law in Pakistan have been effected by last week's sweeping Constitutional changes, was highlighted yesterday, with reports of the sentencing to five years' hard labor of Mr. Yahya Bakhtiar, the Barrister who defended the late Mr. Zulfikar Ali Bhutto.

"Elderly Mr. Bakhtiar, who was British trained, and has an English wife, was also ordered to pay a fine of nearly £ 5,000. "He was, apparently, charged before a Special Military Tribunal with political misconduct, relating to the alleged rigging of the 1977 elections in Pakistan which led to Mr. Bhutto's downfall.

"At the time of the alleged offences, Mr. Bakhtiar was Mr. Bhutto's Attorney General in the Pakistan's People's Party (PPP) Government.

"The importance of the sudden conviction and sentencing of Mr. Bakhtiar, lies in the fact that last year the Chief Justice of Baluchistan, Justice Mir Khuda Bakhsh Marri, ruled that the trial of Mr. Bakhtiar was illegal and non-Islamic, because it was discriminatory.

"Last week, however, Mr. Chief Justice Marri was removed from office, following Constitutional changes by General Muhammad Zia-Ul-Haq, the Military ruler. General Zia demanded that all Judges take a new Oath of office, to a Constitution which in advance validated everything done by the Military, since it seized power in July 1977.

"Mr. Chief Justice Marri, was not even invited to take the new Oath of office, and he was replaced overnight as Chief Justice of Baluchistan. The charges against Mr. Bakhtiar were then reactivated, and he was taken before a Special Military Court.

"As far as is known, Mr. Bakhtiar pleaded not guilty. But the exact nature of the charges against him were not published, and the trial was held behind closed doors.

"It is not clear whether Mr. Bakhtiar; who is in poor health, has any right of appeal to a Superior Court, or to General as Chief Martial Law Administrator. However, this would seem unlikely.

"In terms of last week's Constitutional changes, Judges no longer have any power to challenge, or even comment upon any action taken by the Martial Law authorities since they seized power.

"Mr: Bakhtiar has long been an irritant to the Military regime. He was trenchant in his defence of Mr. Bhutto, and in the course of this, caused grave offence to General Zia and his colleagues.

"Martial Law authorities made no bones about the fact that they were dismayed when Chief Justice Marri found that the charges brought against Mr. Bakhtiar were illegal."

"Although General Zia has made sweeping charges about the alleged corruption of the 1977 election, Mr. Bakhtiar is the only Senior Member, of the former Bhutto Government, to be convicted of malpractices relating to the election."

"His swift sentencing will doubtless cause deep concern about the course of justice in Pakistan".

"The Chief Justice and colleagues who refuse to support Zia's Constitutional changes, suddenly find themselves unemployed."

Far Eastern Review - Hong Kong, 03 April, 1981.
by Della Denman

"Islamabad: Pakistan's Chief Justice and at least 19 other Senior Judges lost their posts on March 25, when they refused to endorse President Zia-ul-Haq's sweeping new Constitutional changes, which restrict civil courts, outlaw most major political parties, and further entrench his Martial Law regime."

"The new Constitutional Order, promulgated overnight, in an apparent attempt to forestall opposition from Judges who had to swear an Oath of allegiance the following morning, was condemned by anti-government lawyer groups as a treasonable act, allowing the Military to subvert and over rule Pakistan's 1973 Constitution. The new decree empowers Zia to amend the Constitution at will, and dictate the country's political future."

"Chief Justice Anwarul Haq and three other Supreme Court Judges, announced that they could not take the Oath because they were bound by their conscience, and by earlier Supreme Court rulings, giving the Military Government limited legality. The most significant Supreme Court Judgment was passed only four months after Zia deposed the late Prime Minister Zulfikar Ali Bhutto in 1977, when it legitimized Zia's Military rule on condition that he held elections within 90 days."

"This and all other court judgments on Zia's right to govern, have been declared void under the new decree, and all further challenges are proscribed. Zia has in fact given himself an open-ended mandate to remain in power."

"The balance between the rights of the individual, and the interests of the State, has now gone by the board, "Haq told foreign journalists". Any Judge supporting the decree, is bound to protect the Government, and deny citizens a legal remedy for their grievances".

"Supreme Court Judges, Fakhruddin Ibrahim, and Dorab Patel (one of three Appeal Judges who in 1979 opposed the death sentence on Bhutto), and another Judge, joined Haq in his stand. At least four Provincial High Court Judges were absent from swearing-in ceremonies, and were automatically dismissed. Zia took the opportunity to purge at least 12 Judges, involved in admitting petitions, challenging his authority, or sympathetic to the opposition's campaign for a transfer of power. They were not invited to take the Oath, and so lost their jobs. Among them was the Chief Justice of the Baluchistan High Court, Khuda Bux Marri.

"The drive against the judiciary, was the latest move in a general crackdown on the Military's political opponents, who stirred up unrest in February. Nine parties, dominated by Bhutto's Pakistan People's Party (PPP), united in a Militant Movement for the Restoration of Democracy (MRD), in an attempt to force Zia to lift Martial Law and hold elections.

"Zia used the 13-day hijacking of a Pakistani Jet in March, which he blamed on the PPP, as an excuse for mass arrests of MRD leaders, such as Bhutto's widow Nusrat, and daughter Benazir, and hundreds of other political activists, students and sympathizers.

"The new Order forbids those under preventive detention from challenging their arrest. It also empowers the government dissolve all political parties 'acting against Pakistan's ideology or security', and all those which refused to register, under restrictive conditions, for the elections promised for November 1979 but later cancelled.

Should the government lift the ban on political activity, the only approved parties, would be the narrowly-supported rightwing Islamic groups, closest to the Military. They would be able to participate in a government-nominated Federal Council provided for in the new decree. The PPP, and most other secular parties, which did not register, would be liable to be dissolved, and have their property confiscated.

"The only remaining member of the MRD, would be the centrist Tehrik-e-Istiqlal, whose leader, retired Air Marshal Asghar Khan, has been under house arrest for the past year. Its officials, mainly lawyers, have been at the forefront of any anti-government activity, and have played an important role in the MRD. Nafees Siddiqui, Tehrik's acting President and an MRD spokesman, told reporters on March 28, that his party remained committed to the aims of the movement.

"The Army has kept the unanimously adopted 1973 Constitution in abeyance for the past four years," Siddiqui said. "This new Constitutional Order is one man's whim, designed to deprive Pakistanis of their freedom and civil liberties".

"Commenting on United States President, Ronald Reagan's proposals, to bolster Pakistan against a possible threat from Soviet forces in Afghanistan, Siddiqui appealed to all Western Powers, who believed in social justice, to reconsider offer of Military and economic aid. "Any aid will be used by the Military not for defence, but against the people of this country", he said.

"Little has been disclosed of recent US-Pakistan talks, but it is believed, that the US is offering a yearly package of around US\$ 500 million, weighted in favor of military assistance to dramatize the security aspect. Zia gave a press conference on March 27, in which, he said that relations between the two countries were under active discussion. He hinted that if sufficient Western aid was forthcoming, Pakistan might allow some assistance to Afghan Guerillas based on its territory. Asked whether the Military government was planning elections, Zia said he had no intention of perpetuating his rule, but would be in power for at least another year. Defending his new decree, he said the Martial Law regime had to be run in a particular way, and could not share power with those not entitled to it..." A judiciary's job is to interpret the law and administer justice, not to challenge the administration", "The lawyers must mind their own business and not meddle in other affairs".

Justice Safdar Shah's letter to Daily Guardian, dated April 6, 1981.

"Zia's Court order without a judicial fig-leaf."

"Sir,...

Peter Niesewand's article March 28, from Islamabad quoted General Zia-Ul-Haq as saying of Pakistan's Judges: "If it is a question of sharing power with the judiciary, I will not have it. They are there to interpret the law".

"This has caused me no surprise. In fact, by his recent coup against the Constitution, when the virtually forced one quarter of the country's Judges to depart, after refusing to swear allegiance to his Martial Law, the General has simply removed the fig-leaf from the judiciary, as well as from his own dictatorial design.

"Quite some time ago, and consistently with his policy of usurpation, he had withdrawn from the High Courts their Constitutional jurisdiction to issue writs against any order passed or action taken by the Martial Law authority.

On March 23, I was invited by the Parliamentary Human Rights Group of the House of Commons, to give an address on the conditions in Pakistan. I said then, that General Zia would under no circumstances part with power willingly; in fact, he would go on taking advantage of any situation, to tighten his hold on the political life of the people. Within a couple of days he staged his latest coup against the Constitution and perhaps proved my point.

"The General's claim that the Judges are "there to interpret the law" can now only mean what he thinks or says the "law" is. However since a majority of the Judges have nonetheless sworn allegiance to his personal rule, he should have no anxiety on that score.

"The tragedy is that it took him four years to get rid of his commitment to the people, which he made in his policy speech on July 5, 1977, when he toppled the Constitutional government of Bhutto; hold the judiciary of the country in high esteem My sole aim is to organize free and fair elections which would be held in October this year (1977) I give solemn pledge that I will not deviate from this schedule."

*Sincerely,
G. SAFDAR SHAH,
Former Judge,
Supreme Court Pakistan
London W8."*

On 25th May 1981, Karachi Bar Association invited me, as their Chief guest in their Annual function. I made the following speech. There were about not less than 1,500 Advocates both of Karachi and High Court Bar Associations, who appreciated the sentiments expressed by me, and in fact, many members including the office bearers, went far ahead in their addresses to ask the government to restore democracy and lift the Martial Law. The function was held in the premises of Karachi Bar Association. It may be noted that I was the first Judge amongst retired High Court and Supreme Court Judges to be so honored by the Bar Association.

This is what I have said:

Mr. Abrar Hassan, President, Mr. Munawar Malik, the General Secretary, Office bearers and brother members of Karachi Bar Association. As you are all aware that due to sudden and drastic changes in our time, honored judiciary and judicial system brought about the recently promulgated provisional Constitution Order 1981, gave me the opportunity to rejoin the fraternity of lawyers. On my last visit to Karachi from Baluchistan a few months ago, I was invited by your Association to a reception in these very premises, and was honored to be accepted as a Member; this kind gesture on your part, in fact, kept me thinking while at Quetta on my return, that everything is not lost, there are still determined men of honor and principles to safeguard and protect the

integrity of the country, freedom of its people and of its institutions, specially the judiciary. By and large the same spirit prevails among the lawyers of all the Provinces. My presence this evening in this annual dinner, is not only another indication of your kindness to me personally, but it may show your anxiety for rule of law and democracy in the country, as allow me to thank you all again for this dinner, members hardly relish any speeches, particularly speeches, learned, - verbose and full of clinches and hyperboles, you may have been hearing since long, from politicians as well as senior members of the Bar from time to time. However, I have no intention to burden you with a lecture on morals, honesty, land patriotism, because I lack those qualities of a professional speaker, and also I hardly can say anything which I do not firmly believe. Hence, a few words which I am going to say this evening, will be with a difference.

Founder father of Pakistan, with support of the then Muslim India, in their full century's struggle have a land of their own, where they could live in a democratic, free and Islamic way, every citizen and region was to be treated equally, the weaker, backward, or poor to be protected against the money grabber, the rank opportunists, and ever ready and evergreen bureaucracy. These objects were to be achieved through a democratically elected parliament, according to the wishes of the people, through ballot box under a Constitution, and were further strengthened and protected by an independent and fearless judiciary. In a country where freedom of expression, movement and right of using his vote freely, is guaranteed by Constitution, which in turn is protected, preserved and implemented by Judiciary, there should be no fear of its disintegration by forces within or without, because a strong united nation is created by these Institutions. Unfortunately, we in Pakistan, as a nation did not have that luck, except for a few couple of years of its inception. The later history, Constitutional or otherwise, of this country, you all know, ultimately resulting in loss of its majority Province, the then East Pakistan, in spite of the fact that they were as good Muslims as ourselves.

Well such slogans were raised quite often during the successive past government with a purpose to get them more entrenched in power, yet such an attitude, creates a sense of insecurity among the people, and gradually they start to think that their very existence is in danger. This, I must say has to be avoided at any cost. As good Muslims, we must resolve to see that this country gets more united, its people more integrated and resolute to save its independence.

There is little doubt that national and international forces, and their resultant effects, are throwing long shadows on our country and nation, but I am of the firm belief that we as a nation, can withstand all this only by resorting to democratic way of life, give and take between the people and Provinces has to take place, because no particular people, class of people, or region, can arrogate to itself as the only patriots and protector of Pakistan.

A few words about the past. I wish we could as a nation have known something from the past, and particularly recent past events, so as to avoid future political and social mishaps. In the wake of partition and the influx of millions of Indian Muslims, Pakistan

looked a land of opportunities to all, but this opportunity was highly extended and exploited by the ruling cliques, and the educated group joined hands with bureaucracy, as a result, as a nation, we succeeded to build a big city like Karachi and Dam like Tarbela from nothing, but we forgot to build and mould the human material, that is the people in general, into a strong nation instead of getting integrated socially and politically in the process we got divided into small water tight compartments of communities, which resulted in general suspicion and distrust; this had got to go and we all have to change our attitude, broaden our minds, help those people and regions who need it, without any grudge or grumbling.

Let us be honest and follow dictates of our conscious and shun greed and hypocrisy in our talks and deeds. The hypocrites have been condemned in the Quran, at least more than eight times repeatedly. Thank you all."

Now the speech of mine and of other members of the Bar Association published by *Daily Dawn*, Karachi May 25, 1981, page 12. One cannot help, but must praise its brevity.

"Call to implement Quaid's teachings in letter, spirit."

"The former Chief Justice of Baluchistan High Court, Mr. Justice Khuda Bux Marri, stressed the need for implementation of the teachings and messages of the Quaid-e-Azam in letter and spirit for the well being of the people.

"Speaking at the annual dinner of the Karachi Bar Association yesterday, he said the recent changes in the judicial system, would not help the people as the Judiciary always safeguarded the integrity and security of the country.

"Speaking on the occasion, the President of the Association, Mr. Kabiruddin, urged the Bar to fight the enemies, both at home and at the borders, only through mutual trust and brotherhood among the people."

On invitation of National Students Federation, as Chief guest to address the 15th Annual Council Session, I made the following speech, on 19th March, 1985:-

"Ladies and Gentlemen,

The other day a couple of young friends, representing your delegation invited me to attend this 15th Anniversary Convention. I had no heart to disappoint young students, who are the only hope of the nation for future leadership and serving the country. So I am here.

"On occasions like this, it is customary to congratulate the organization and its office bearers, past and future, for their endeavors to serve the student community and the nation at large, which congratulation, I hereby whole-heartedly extend to them. It is also

common practice to offer a few words of advice to them to enable the young intelligentsia to make their independent decisions, as to how the affairs of their student community and of the nation should be run, avoiding mistakes and pitfalls of the past forty years or so.

"I know, the young generation, as everywhere is always in hurry, they want solid and concrete solution of national problems. They are tired and have no patience to hear common place, often repeated verbose advice. Students are intelligent enough to know all this and perhaps more. They hate to be treated like mentally retarded persons. They are full of life.

"They do not want to be lead by the nose, like dumb driven cattle, they want to think and act freely like any other citizens, not through useless and tailored speeches of endless seminars, sermons and workshops by bureaucrats, be they of Army, or of civil servants, or of a bunch of evergreen half baked politicians.

"It is common knowledge that this community was created by arguments, by democratic process, by free vote and not by Army. Quaid-e-Azam, never tolerated violence; he believed in Constitutional and legal norms. So we as a nation, have to have a liberal outlook and a tolerant society, if we want to live as a free and self respected nation.

"Monopoly of every kind, economic, social and political is abhorrent to Islam and mankind at large. Therefore, it is for the younger generation to demonopolize industry, lands, religion, press and politics. One cannot close his eyes from the demands of smaller Provinces. They want their due rights, linguistic, social, economic and political, hence any future arrangement must give concrete Constitutional provisions. One cannot cheat people for long.

"An independent judiciary, with undulated democratic rights is the demand of all political parties, there cannot be two opinions about it. The myth of Martial race exploded long ago, every Pakistani is equally Martial like any other, therefore, they must get the opportunity in Armed Forces and Civil services, banking, foreign services, in industry, in press and in all segments of the State actively.

"The community at large, must have once for all courage of conviction and honor those who suffered for democracy and a free society, some of them I see present here. They must discourage evergreen time servers, be they Punjabi, a Pathan, a Muhajir, a Sindhi or a Baloch. Accountability of real kind is a must for future governments of the country, so that before somebody embarks on another adventure with the people and country, he must think twice.

"Ladies and Gentleman, I must stop and not monopolize the time which you were kind enough to give. Hence, I thank you very much and wish your Organization good luck and God speed".

This is what was published in *Dawn* – Karachi, March 21, 1985:-

"Ex-CJ pleads for rights of smaller Provinces.

"Karachi, March 20: Mr. Justice (Retd) Mir Khuda Bakhsh Marri, former Chief Justice of the Baluchistan High Court, on Thursday, called for the rights for the smaller Provinces.

"Addressing the 17th Annual Council Session of the National Student Federation here, he maintained that monopoly of every kind, abhorrent to Islam and mankind at large, and urged the younger generation to demonologies industry, lands, religion, press and politics.

"He said there were no two opinions about the demand for an independent judiciary as per the unamended Constitution of 1973.

"The myth of a Martial race exploded long ago, and now every Pakistani must get opportunities in armed and civil services, industry, press and in all segments of State actively".

"He said the youngsters were tired of often repeated verbose advice. 'They hated to be treated like mentally retarded persons; he observed, adding that they do not want to be lead by the nose, like dumb driven cattle.

"They want to think freely, and not through useless and tailored speeches of endless seminars, sermons and workshops by bureaucrats, technocrats, be of army, or civil services or of a bunch of evergreen half-baked politicians!

"Mr. Mairaj Muhammad Khan, Chairman of Qaumi Mahaz-e-Azadi, in his detailed address criticized the present government for 'mortgaging the country's economy, defence, and foreign policy, with the imperialist forces like the United States, and making the country simply a market for others.

"Maintaining that he was not against the Armed Forces as an Institution, but was against their past role, 'of overthrowing civil governments, conquering its own areas and rendering the north-eastern frontiers of the country exposed to foreign threats.'

"Demanding restoration of the 1973 Constitution, he asserted that his party would not go for registration, even if they ban us, because then we will work out other ways to function!

"Mr. Hussain Bakhsh Narejo, Acting Convener of the MRD, said the nation was not afraid of a 4th Martial Law, as was being threatened by official quarters.

"We are in for a long struggle for achievement of basic human and democratic rights of the people, and it would continue till the total completion, he declared.

"Rejecting the present government setup, he accused the Ministers of openly receiving bribes for use of their authority. 'I know a Sindh Minister who openly asks for money, taking a bag along with him, he said.

"Others who addressed the Session included: Ms. Nargis Latif Chaudhri, Rasheed Rizvi, Khalid Hameed, Shahid Abbas, Mehmud Ali Asad, Jafarul Hassan; Altaf Sailani, Abdul Jabbar Sobhopota, Zafar Rajput, and Ayaz Butt".

On the arrest of Mr. Mumtaz Ali Bhutto, Convener of Sindhi Baluch Pathan Front, and other office bearers, I issued the following statement for publishing to APP Karachi office on 04 November, 1986:-

"Day to day political, economical and administrative adhocism since Martial Law of July 1977, has brought the country to the brink of near disaster. Latest marvel in the cap of Junejo Government, is indiscriminate arrests of Sindhi, Baluch, Pathan Front office bearers and workers, including its Convener Mr. Mumtaz Ali Bhutto. In the present political atmosphere, it is not difficult to guess the arrest of Miss Benazir Bhutto, may not be very far, which may be followed by imposition of notorious emergency laws, or another dissolution of National and Provincial Assemblies, and imposition of Martial Law Nr 8th or so."

I hope not, yet every thinking citizen apprehends as per the press statements these days suggest, such a grave situation may emerge. No doubt power corrupts and 'absolute power corrupts absolutely' as per Lord Acton. It is a pity that bunches of sycophants from each Province, under the umbrella of Martial Law, and now pseudo-civil Government, has taken over the reins of people's destiny, and in spite of rare dismissals, these power hungry, partyless elected via 1985 Referendum Ministers, not to say of deeply entrenched bureaucrats, General-cum-businessmen to have no intention to leave 100 million people of Pakistan, to take care of their own destiny.

"One may ask, Pakistan, which was made by free choice and will of its people, living in different Provinces, was made for the day that Pathan and Baluch communities should kill each other in Baluchistan, Muhajir and Pathan recklessly should murder each other in Karachi or Hyderabad, or each Baluch or Sindhi citizen be treated as a dacoit, and be ruthlessly suppressed and killed? Must Shia fight with Sunni, and shamelessly kill each other with regularity every

year? Who is doing all this? One may ask, Why did these things not happen during the first years of Pakistan's coming into being? Is it not high time for the present rulers of every hue and colors to off their hands from the God loving and poor people of Pakistan. Let people who have public following and respect, come to the fore and get them united. Let democracy and free elections under new *conditions* be arranged, without loss of a single day, so as to ward off looming internal and external danger casting long shadows on Pakistan's future, be from North, East or West. If the people of Pakistan are not allowed to play their rightful role, to rule themselves, military solution to these dangers has already been tried three times in Kashmir, and the last one in loss of East Pakistan, which was an integral and inalienable part of Pakistan, with 90,000 soldiers as POW. Be sure no American, or any other foreign soldier, will give his life to protect this debt ridden, politically imbalanced and socially divided Pakistan. It is only the people of Pakistan, if given a chance by present rulers, who can face any danger as the brave Vietnamese people did. It is high time that the gates of prison houses, Police Lock-ups and other Centres of detentions and torture, be opened wide and citizens be allowed to play their role to save the country. If that is not done by the rulers, then all one can do, is to pray God to save the country. But God says prayers must be supplemented by actions, and not by lies and worthless speeches and seminars in closed rooms, followed by fat lunches at public expense".

Here is the mutilated statement as published in *Dawn*, Karachi, dated 06 November, 1986:

"Retired Justice Mir Khuda Bakhsh Marri has criticized the arrest of the office-bearers and workers of Sindi-Baluch-Pathan Front, including its Convenor Mr. Mumtaz Ali Bhutto.

"In a statement he said it was high time that the citizens be allowed to play their role to save the country",

Here is a resolution of Sindh Bar Council dated 27th March 1981, copy of which was then sent to me, on PCO 1981. I have no idea whether it was published by any newspaper or not. However, the sentiments of the Bar Council are too obvious to comment.

"TEXT OF THE RESOLUTION UNANIMOUSLY PASSED BY THE SINDH BAR COUNCIL AT ITS MEETING HELD ON 27 MARCH, 1981".

"This meeting of the Sindh Bar Council strongly condemns the promulgation of the Provisional Constitution Order 1981. This Council does not find any justification what so ever for this extreme action on the part of the Islamic Republic of Pakistan 1973, and

exposing the whole and the Country to serious and grave dangers at this critical juncture of our national life when the unity in all ranks of life and establishment of Democratic and Constitutional representative Government is the prime need of the Country.

"We are of the considered opinion that the abrogation of the Constitution or the curtailment of the powers of the Superior Courts are not in any way in the interest of the security and integrity of our Country and welfare of the people of Pakistan.

"This Bar Council, therefore, while reaffirming and reiterating its earlier resolutions, particularly the resolution unanimously passed by this Bar Council dated 17th May 1979, and in conformity with our consistent stand, demand immediate and forthwith unconditional withdrawal of the Provisional Constitution Order 1981.

"We further demand that immediate steps be taken for the restoration of Constitutional representative Government under the Constitution of Islamic Republic of Pakistan, 1973.

"We also take this opportunity to salute the Chief Justice of Pakistan and other Judges of the Supreme Court and High Courts who in order to keep up the sanctity of the Constitution and dignity of the judiciary have as a mark of protest resigned.

"We also strongly condemn the action of the Government ousting some of the Judges of the Superior Courts in such an arbitrary and dictatorial manner".

CHAPTER SIX

DEPRIVED PROVINCES AND DEPRESSED PEOPLE

(AN OVERALL VIEW)

Pakistan came into existence as an independent State in two parts, then called West Pakistan and East Pakistan, separated by 1,000 miles of the alien territory of India. The only communication between the two wings was by sea from Karachi Port to Dacca and Chittagong. On the face of it, this arrangement was dictated by political compulsions, because Muslims were majority in these two wings. This arrangement on the face of it, politically, militarily, economically was a dubious one. Except for a great colonial empire having a strong navy like England, there is hardly any example of one State divided into two parts at such a long distance from each other. In 1947 and thereafter, Pakistan could not build a strong Navy to be able to defend both the wings in case of war.

This incapability in its defence system was too apparent for India not to take advantage of it, as it, in fact, did first in 1965 and finally in the 1971 War, when East Pakistan was by sheer force of arms, separated and 90,000 Pakistani Soldiers were made prisoners of war. Later on, Mr. Bhutto using unsurpassed diplomacy, because Pakistan was decidedly a defeated nation, succeeded in getting these men released through the Simla Agreement.

It was not only 'the 1,000 miles distance' between the two wings of Pakistan, but there were stark dissimilarities of race, language, traditions, customs, culture and so on, which divided the two people. The binding force was common faith in Islam, and fear of Hindu domination in a democratic India in absence of the British. Yet Bengali Muslims through their leaders, like Maulvi Fazl-e-Haq, Shaheed Suhrawardy, Khawaja Nazimuddin, Akram Khan and many others, took a deliberate and calculated risk to antagonize Hindu India, and vote for Pakistan.

East Bengal was over populated and economically, socially and educationally backward, compared to Bengali Hindus and Calcutta businessmen and intellectuals. The Bengalis joined Pakistan through the ballot box, with the high hopes that in a free Pakistan, the people of East Bengal, like other Provinces, will have sufficient Provincial autonomy to build their language, culture and institutions, like Judiciary, Army, Navy, Industry and Education to suit their requirements and provide sufficient opportunities to its people and safeguard against occasional famines and scarcity. They expected

guidance, active help and generous treatment from the people of West Pakistan, who were comparatively well off and well trained in industry, services and army.

Similar hopes were held by the people of Baluchistan, Sindh, NWFP and Punjab. It may not be out of place to say that after 1857, when finally the Mughal Empire was dismembered, the British had full control of India proper, including Punjab, Sindh and to some extent of NWFP. But people of Baluchistan kept the torch of freedom burning against British rule by constant revolt. This process continued, to some extent, right up to 1947. Except for a small foothold at Quetta, by establishing an Agency in 1876 against constant warfare, and building a few strategic railway lines and roads, the British could not prevail. Naturally, people of Baluchistan could not benefit in term of educational and economic developments.

Sindh lost its freedom finally in 1846, when Baloch Mirs of Talpur were defeated in a straight fight at Miani near Hyderabad and the Punjab was conquered by the British from the Sikhs in 1849.

These two Provinces being fertile became an integral part of the Indian administration and economy. Punjab supplied about 60% of the British Army, and built up a well trained civil service. Naturally, to some extent, settled areas of NWFP like Peshawar, were also benefited with educational and other institutions set up by the British, and had a good share in the British Army.

Having met the toughest resistance from the people of Sindh and Baluchistan, the British never trusted them in the army and other services. The concept that the people of a particular area are a martial race, is a myth and British concoction, except for the fact that those who readily joined the British Army and fought for the British cause be it in Baluchistan, Sindh Frontier, Afghanistan, Arabia, against the Turks and later on in Europe, were termed as martial people.

If people of Baluchistan and Sindh are given their due share in the Army, for sure they will prove better soldiers and Generals than many besides the people of these areas have great stakes in defending their country.

Right from Muhammad Ghorī till Ahmed Shah Abdali, there was not a single battle, where the people from Sindh, Baluchistan, Frontier, along with Afghans and Uzbeks, etc., did not join the fight against Hindu rule, and to support Muslim rule in India. Surprisingly, after partition, the people of these regions, specially Baluchistan are treated as backward and were continuously deprived of limited Provincial autonomy and self rule until 1971. Right up to 1971 Baluchistan was not given the status of a Province, while Quaid-e-Azam demanded the same status for the Province from the British in 1929.

Loot of Natural Resources

Economically there has been hardly any progress in the last 40 years. Educationally it is on the last rung of the ladder. Of the vast natural resources of Baluchistan, only Sui gas has been providing more than 60% of the national requirements in the energy section annually. Out of 3,000 or so foreign scholarships, in all branches of education, awarded by foreign countries, and Government of Pakistan every year, how many genuine local Baluch and Pathan boys and girls, are given any of these scholarships? Let the Government publish their names and addresses, for general information right from 1948 onwards. The result would be shocking. Most of the scholarships are granted to the sons and daughters of high provincial government Secretaries and Officers, to the deprivation of local students, of course, they manage to get domicile certificates and there are no difficulties for them. How long will this loot go on? Why is it tolerated anymore?

Pakistan petroleum saved an estimated annual gross, in foreign exchange, equivalent of Rs. 12,750 million for the country in 1983, as it supplied natural gas from Sui field. It was equivalent to about 7.76 million tons of furnace oil (about 106,000 US Barrels per day). Pirkoh gas field in the same area of Baluchistan has since then been put into operation, contribution to the national economy of this field will rise to billions of rupees annually.

Can anybody honestly say that Baluchistan is economically backward and incapable of sustaining its meager population of nearly 4.5 million people. About one million metric tons of coal annually is produced by Baluchistan. If its selling price be estimated as 600 to 700 rupees per ton, the total amount will be 600 to 700 million rupees annually. Such funds are generated also by production and export of marble, and other minerals, from different parts of Baluchistan. Even its land revenue is sufficient to support the population of Baluchistan.

If a fair share of profit from its resources had been invested in Baluchistan, by now, the expected setting up of several universities, including technical ones, army training schools, and a viable system of banking, as well as mineral based industries, would have come about. But it is not so, simply because, the funds and resources are controlled by the Federal Government and occasionally a tiny part of these funds are dished out to the Provincial Government, which in turn spends this on the salaries, travelling allowances, unnecessary foreign trips of provincial bureaucrats, and the powerless ministers. The general population is living from hand to mouth as they were living more or less 40 years ago.

Economic and Industrial Development Ignored

As for industry in early fifties, one Textile factory was set up near Quetta, and the shares were given to a top Executive of Baluchistan, Mr. Qurban Ali. After a couple of years functioning, it has disappeared from the scene; including its machinery and the

land has changed hands several times by now. The Chief Executive, then called the Agent to the Governor-General in Baluchistan, who hailed from Frontier and not from Baluchistan. Now only the broken walls of the same factory can be seen from Saria Road. Later, in Mr. Bhutto's regime, through the direct influence of the Governor, Mir Ghous Bux Bizenjo, the Government of Iran funds for two huge Textile mills, costing billions of rupees, which were setup, one at Quetta and the other at Uthal, in Lasbella District. Since the last 10 years or so, these factories have remained closed. The valuable machinery is rotting, and bureaucracy along with big business, one hears, are on the prowl, to take these industries for a song, and the liability, which must be, by now in billions, naturally will be shifted to the general public, i.e. tax payers of Pakistan. Therefore, the factories did neither benefit, nor will benefit the people of Baluchistan, or people of Pakistan as a whole, but the privileged ones; big business houses, along with new rich will be benefited.

One mini cement plant, was started near Quetta from an estimated cost of 192 million rupees in 1982, with a capacity of 250 tons a day. According to Press reports, it was only recently that this factory started trial runs, with colossal expenditure. What would be the price of one ton of cement? That is very obvious and the total cost has by now reached an estimated 600 million rupees.

Where have these colossal funds gone ? Where is accountability? Why this delay in its industrialization, one may ask? Is this the way to industrialize Baluchistan, when from Arabs, Western Countries and the U.S.A., millions of dollars are taken as loans, in the name of Baluchistan? Where do these funds disappear one may ask?

About 90% owners of mines, such as coal, marble, etc., are domiciled outsiders from the Punjab and Frontier Provinces. A huge income from exploitation of the mineral wealth, goes out of Baluchistan for investment in other Provinces and in many cases in Europe and USA.

As to employment of the labor force 90% out of the estimated 100,000 workers are imported from NWFP. The higher posts of engineers and other technical staff go to people from Punjab or Karachi. Qualified Baloch and Pathan engineers and technicians have not a ghost of a chance in these cartels of mine owners, nor any ordinary laborer, except a stray Chowkidar can be a local person. Educated local young men and people in general in Baluchistan are agitated. They do ask the awkward question, what benefit has Baluchistan been getting from its natural resources, right from 1947 onwards? Exploitation of these resources has not financially contributed anything to the Provincial economy.

Most of the technical and semi-technical staff of Sui and Pirkoh gas field are mostly imported from Karachi or from Punjab. They have air-conditioned clubs at Sui and huge bungalows, while poor Baluchis, the sons of the soil, do menial-jobs at a pittance.

There are, one can easily notice, two sets of wages for the job. The imported laborer gets a higher pay than the local one. This, and many other injustices, I noticed in 1977, When I visited Sui, as Governor. No technical school has been opened at Sui, or Dera Bugti, or in any other place of Baluchistan, for training of local young people, for the purpose of running the gas fields. They are kept in the dark, away from the benefit of their resources and completely isolated from the rest of the employees. Is this Islamic brotherhood?

Like the Choudhris in Punjab, Waderas in Sindh, Sardars in Baluchistan, Maliks and Khans in N. W. F. P. have in common background of British patronage with free grants of millions of acres of public lands, stipends, titles and other opportunity to best educational institution both civil and military to their children in return for strict loyalty to the foreign ruler. The Sardars and Maliks of Baluchistan, a class by themselves continue to remain a curse and an impediment in the way of education and enlightenment of the majority, against development of roads construction and industrialization for the people of *Baluchistan*, Pathans and Baluchis alike. With the advent of independent democratic Pakistan, with the right of one man one vote, this class should have by now faded out of existence because it has outlived its utility because their foreign patrons are no more. But, unfortunately, it was not to be, instead with the help of domiciled Pakistan's half baked bureaucrats prone to flattery and jobbery and quick promotions, this class is thriving all over the country. Its base has further increased by joining hands with other vested interest groups. Hence the masses remain as uneducated as before. What education one can have in the village with Nai Roshni Schools, where teachers are not qualified. They belong to the same villages in the same region having no supervision and discipline. They only get their pay, a kind of political bribe I may call it. But the worse is that it is de-educating the masses whereas the small group of elitist being in lacs get best available education at the cost of general public in special colleges and universities and overseas by getting scholarships. Are we not inviting a revolution by the masses as it happened most unexpectedly in Eastern Europe and now in the U.S.S.R. Revolutions in Afghanistan, Iran and in other South Asian countries in the recent past are continuing ones so would be their effects on Pakistan.

Behind the back of all these revolutions are the accumulated injustices, deprivations of the masses from their political, cultural rights and free for all economy, where rich was allowed to get more richer and the poor more poorer. We in Pakistan, in my opinion, cannot afford to ignore such drastic changes and their long shadows.

Mismanaged Banking

There is another sad story of a greater national magnitude, i.e. management or mismanagement of taken over banks and industries. By legislation bureaucrats are turned into banking and industrial wizards overnight. Having the colossal tax payers, money at their disposal, they, in 15 years, turned these supposedly important public

utility institutions, into employment exchanges for their incompetent relations, or descendents of the bosses. To further support of my contention, let me reproduce a relevant para from the Editorial column of *Dawn*, Karachi - Sunday, Sep. 28, 1986, under caption "Banking accountability." I quote:

"The nationalized banks, which are bureaucratically managed outfit employing a virtual monopoly of banking, leave much to be desired, insofar as institutional efficiency, and public accountability are concerned. Some recent disclosures about the performance of nationalized banks clearly point to the need for strengthening accountability. According to the Governor of the State Bank, a sum of Rs. 30 billion (i.e. Rs. 3,000 million, or Rs. 300 crores), is outstanding as long term loans, given to individuals and industries by the Banks. In 1985 alone, a sum of Rs. 77 million (i.e. Rs. 7 crore and 70 lacs), were written off as bad debts.

In fact, according to some knowledgeable sources, Rs. 15 billion (i.e. Rs. 1,500 crores), worth of loans were written off in the last nine years. Added to the bad debts, is the growing number of fraud cases, many of which could be pre-empted, if there were no collusion on the part of bank employees".

In other words, during the last 9 years Rs. 166 crores in loans were written off each year by the government or Banking Council, that means they will not be recovered from debtor industries or individuals. Shall the nation know, to whom went this grand outright gift, or charity, names need publishing. As all the four Provinces are parties, for good or for bad, for loss or benefit, people demand, that Province wise names of persons and industries, may be published, so as to see where this colossal amount of tax payers money went and whether the beneficiary of these gifts really deserve such generosity. No doubt, it is of great public importance. The names of the officers who disbursed this great gift of 15,000 million rupees, may also be published for every body's benefit.

By now, however some figures with the names of some of the big borrowers of funds from the banks and some other financial bungling have been brought to public notice by the Chairman of Public Accounts Committee, Mr. Hakim Ali Zardari, In his press conference, published in Daily *Dawn*, Karachi, dated 2nd July, 1989 at page 12. It may be noticed these figures seem to be incomplete besides what action the Government has taken against the wrongdoers nobody knows so far? Even then it makes interesting reading as under.

Addressing a news conference Mr. Hakim Ali Zardari, said, "it was quite obvious that financial relief had been provided to influential people, out of proportions to their real worth, and with a view to benefiting them".

He said the Government suffered a huge financial loss during the Zia regime, when four five-star hotels were sold to one person for Rs. 10 million only, though they were actually worth around to 2 Billion.

"According to our information and investigation the Pakistan Services Limited had a foreign offer for these hotels (overseas Pakistanis) of Rs. 1.95 billion.....

PLOT ALLOTMENT: The Chairman of PAC told newsmen that 95 commercial plots were allotted to influential people during the Zia period without adopting usual procedure, because of which the Capital Development Authority had to suffer a loss of Rs. 400 million. He said the findings of the inquiry in this regards had been sent to the Prime Minister for appropriate action.....

Mr. Zardari also provided lists containing names of those who got the loans written off and were allotted plots by the Capital Development Authority during previous regime.

PUBLIC SECTOR: Talking about the public sector corporations, the PAC Chairman said that, out of 16 units of the Federal Ceramics Corporation, six were running in heavy losses which now amounted to Rs. 204 millions. Similarly, he pointed out that most of the units of P1DC, Gemstone Corporation, National Construction Company, Oil and Gas Development Corporation, Karachi Shipyard and Pakistan National Shipping Corporation were running in big losses.

Responding to a question, he said a total loss of Rs. 11.77 billion had been incurred by various Government-Sponsored Organizations.

He said an inquiry into misuse and embezzlement of funds had been completed and a report sent to the Prime Minister.....

BORROWERS: PPI adds: Mr. Zardari said the previous government extended credit facilities to 12 groups of large borrowers to the tune of Rs. 9,220.965 million. The group include Ittefaq (Rs. 2,251 million: Ch. Shujaat Hussain and Pervez Illahi, Rs. 504 million: Dr. Basharat Illahi, Rs. 1,326 million, Salim Saifullah Khan Rs. 271 million) Islamuddin Sheikh Rs. 455 million; Sahaf, Rs. 374 million; Afzal Sons, Rs. 2,039 million; Akbar Piracha, Rs. 423 million; Zaibtan Textile (Haji Ghani) Rs. 251 million; East Yarn (Sikandar Halim) Rs. 351 million, and Zafar Sheikh and Mian M. Ahmed Rs. 440 million.

Naturally, this is done in favor of big businessmen and their relatives, who can pull strings from Islamabad. While small investors are penalized by compound interest, by deliberate delayed disbursement of funds, not to say of the common malady of bribes. Would the government or the Banking Council be prepared to publish the list of the persons or companies; and the amount advanced to each over 10 million rupees during

the last say 20 years, in all the four Provinces, for the general benefit of the people at large, to satisfy the agitation in the minds of people of smaller Provinces specially Baluchistan. The result would be an eye opening for us all.

In another case a small industrial plant was set up in northern Baluchistan at an estimated cost of Rs. 27 million in the private sector. The machinery was imported and installed and trial production started in 1987. This is the only organized industrial unit in Baluchistan barring Hub area which is nothing less than an extension of Karachi. As the banking systems, since it has been taken over the government got politicized, the sponsors in spite of all efforts and understanding, having not used or having no political pressure through any minister, Martial Law or the political kind, were not given funds in due time, the plant has been shutdown at this very productive stage. Bank interest may lead to 30 million.

It may be noted, however, that colossal loans were advanced to big businesses, belonging to Karachi or Punjab, to set up industries in Hub Tehsil, in Baluchistan. This investment, in no way, supplements or enhances in any way, the economy of people of Baluchistan, or job opportunities to them. Simply, due to proximity to Karachi, the outside owners, have no sympathy with people of Baluchistan. It was done, simply as an eyewash, to the foreign loan giving Agencies, to show that Baluchistan is being industrialized. One should not forget that Baluchistan comprises of 134,000 sq. miles, and it is equal to 2/3rd of the total Pakistan territory and Hub Tehsil comprises not more than 50 sq. miles. This industry; instead of Hub, in the past decade, should have been spread all over Baluchistan from Mekran in the South to Quetta and Sibi in the North, only then one could say some industrialization did take place. Even otherwise, if the list of Industrialists is published, it will be found that whatever the advances were made by the Banks, excluding Hub region, that also went to not more than 20 persons, most of them coal miners, who belong to NWFP or Punjab. Can it be called a fair deal or justice to people of Baluchistan, or distribution of national resources.

Be that as it may, my point of view, enunciated earlier in this Chapter, concerning reckless bungling with the taxpayers, money by bureaucrats of nationalized Banks, gets further support from a learned article captioned "Accountability of Nationalized Bank". *Dawn*, dated 20th September 1978, by Mr. Mushtaq Ahmed, who *inter alia* states, I quote:-

"Bringing the commercial banks under State ownership, was part of an overall scheme of nationalization of industries, in which, the Government had seen the key to end the exploitation of the masses, by a handful of industrialists, owning the productive apparatus of society, including the Banks.

"Nationalization of Banks, was a major reform of the Bhutto period.

"The bureaucrats, and the bankers comprising it, who were an integral part of the old system, were now made the custodians of the new order. From a mere change of ownership, an overnight change in outlook could not be expected of them.

"The real owners of the banks are the depositors, now numbering nearly twenty-eight million. Their deposits, amounting to roughly Rs. 218 billion, though guaranteed by the Government, are more than twice its annual budgetary revenue. The safety of the deposits, eventually lie in the efficient and profitable management of the banks, by bankers of known repute and integrity.

"A sense of public accountability does not exist in the present, either because of the absence of an element of public representation in the banking hierarchy. The depositors, or their representatives, figure nowhere in the decision-making process.

"These considerations were equally weighty in the nationalization decision in Pakistan. The policy of making big advances, had the effect of concentrating credit in fewer accounts, enhancing the risk element in the transaction, accentuating the tendency of accumulation of riches in a small class of borrowers, and posing a problem of recovery.

"Besides, the bankers entrusted with the responsibility of implementing the new policy, were trained in the old school of *laissez faire*, for whom the main function of the banks was trafficking in money. They have no social philosophy for that matter, religious philosophy, and their social contacts are confined primarily to the entrepreneurial class.

"The private sector was, and is still their main theatre of activity, whose needs they aspire to fulfill. In the advances made by the banks, they still have the lion's share. Of the total advances to the public and private sector, Rs. 74 billion, were allocated to the private sector (June 1986). About 68% of the allocations to the private sector went to 1,375 accounts of rupees one hundred crore each. The dispersal of credit is, therefore, still a far cry.

"What is more disturbing, is the recovery of advances locked up in big accounts-. The problem has become so serious that even the Chairman of the Banking Council has pleaded his inability to solve it, and made a strong plea for the cooperation of the business community, in honoring its commitments. The loans advanced for three months, he revealed, are not recoverable in three years, and probably new loans are sanctioned to pay off the old one.

"For debts going bad, many factors are responsible. Collusion and connivance, malafide intentions of the borrowers, bureaucratic influence, and political pressures, cannot be altogether ruled out.

"What is shocking is that the parties in whose favor the power of write off is exercised, are themselves solvent and prosperous. While the units maybe declared sick, their owners are thriving.

"The increasing incidence of forgeries and frauds, whose losses used to go into the expense account in the past, are now written off like bad debts, and their perpetrators are by no means exempt from the consequences of their action."

Ordinary middle class people, who intend to set up a medium industry in the interior of Sindh, or Baluchistan, have harrowing tales to tell the running from pillar to post, and have to face the arrogance of, by and large, incompetent officials of the Finance Department. Stray intelligent officers, who can speak their minds, and give new ideas, are discouraged and turned out of the Organizations.

It takes years, if one is lucky, to get a loan sanctioned, and the fund disbursed, simply because the plethora of forms and pro-formas, sometime not less than 50 typed pages - are full of unnecessarily formalities, bottle-necks, etc. All these forms and pro-formas are nearly ditto copies, thrust upon our bankers by foreign loan giving agencies, like World Bank, IMF, Asian Development Bank, etc.

Due to unnecessary delays in disbursement of funds, the very purpose of the loan gets vitiated, while in the meantime, interest and compound interest piles up. Of course, those who can pull strings, or have their means, get their work done in no time. In such a situation, prevailing since long, one can see why no medium industry, worth the name has been established in the interior, specially of Sindh and Baluchistan.

UNCHECKED CORRUPTION

One may ask where do Rs. 40,000 million public funds go annually, unaccounted in the shape of corruption at the hands of bureaucrats of all hues, as pointed out by Dr. Mahbubul Haq, former Minister for Planning. But simple pointing out a malady, is not remedy, nor is responsibility absolved. So far nobody knows if any officer has been tried, punished and funds recovered. Thus Rs. 40,000 million continue to be pilfered annually. Lastly, from newspaper report, Mr. Aslam Khattak, former Minister of Railways and Communications, improved upon this figure and upgraded it up to Rs. 52,000 millions. Yet nobody resigns in protest.

Out of scores of instances of mismanagement free for all ruthless spending of public funds not on building human material through education and character building, the bureaucrats of all hue having control on public funds. Let me give only two instances as reported in the press, they speak for themselves. *The Muslim* of Islamabad, 14 November 1987, under caption "*The Billion Rupees Folly?*"

"How could an official building estimated in 1982 to cost Rs. 250 million, after adjusting for inflation actually cost Rs. 560 million now, and around a billion when it is completed? Where the estimates for the grandiose finance and trade centre at Karachi in 1982 drastically wrong? Or did the estimates approved by the 11 public sector Organizations sponsoring it, grossly understated them ? While the official contention is that there is very little inflation in the country, how can the cost over-run be from Rs. 250 million to Rs. one billion when the controversial structure is completed? Above all, why did the 11 financial and trading Organizations in the public sector need such a costly building complex' which is not even a spectacular architectural sight?

It appears that the building, the cost of which has quadrupled is not only too costly to build but will also be costly to occupy. According to the Federal Anticorruption Committee, when those Organizations move into the new building they will be paying almost four times the rent per square foot compared to what they are paying now - from Rs. 3.5 to Rs. 14. And that can affect the profitability of the Organizations, among which many have a poor record of profitability. The PACC is also disturbed by the fact that Rs. 57.5 million was spent on the import of marble for the building while quality local marble was available.

"How did all this happen? Who approved it all initially, and then from time to time? The PACC holds two Senior Officers including a former Federal Minister responsible. It is imperative that a proper inquiry into that is to be a billion rupee folly is conducted and those found guilty appropriately dealt with."

Next is a report by *The Pakistan Times* - 15 October, 1987, under caption "Official Extravagance."

"The Auditor-General, in his report on the accounts of the Punjab Government for the financial year 1984-85, has pointed out a number of cases involving excess expenditure to the extent of several millions by a number of government departments and agencies. It says that financial irregularities amounting to Rs. 86.3 million were committed, the biggest chunk of which - Rs. 49.4 million or 57 percent for the total - falls under the category of embezzlement, theft and misappropriation. According to the report the Exchequer suffered a loss of another Rs. 12.1 million because of violation of rules.

Corruption is not only receiving money for doing an undue favor. An undue favor is itself a corrupt act. The Wafaqi Mohtasib, in his Annual Reports 1984 and 1985, had covered corruption under maladministration. In his Report for 1985, he has defined maladministration as a decision, process, recommendations, act of omission or commission which is contrary to law, rules or regulations or is a

departure from established practice or procedure, etc. The financial irregularities pointed out by the Auditor-General, Punjab, therefore, clearly fall under the head of corruption and should be regarded as such. Earlier, the Public Accounts Committee (PAC) had taken serious note of the misuse by Customs officials of the vehicles, detained, deposited seized, confiscated or waiting clearance by them. A story had also appeared in the Press that the National Deregulation Commission in its report on Wheat and Flour had stated that 80 percent of the subsidy on flour amounting to Rs. 1,500 million was shared by corrupt officials, mill-owners and ration depot holders. A Deputy General Manager of PASSCO, against whom a case was registered earlier this year, was charged besides other things, drawing lakhs of rupees against bogus vouchers and enlisting his own firms under false names. According to yet another report, even the Home and Health Departments are no exception, when it comes to financial irregularities, embezzlements, misappropriation of stores and ruthless squandering of public money without accountability. With such happening being the rule rather than the exception of various government departments we feel no amount of pious pronouncements from responsible quarters about enforcing austerity in the country and confining menus to one or two dishes can ever produce the desired results. Unless the misuse/misappropriation of public money and over spending in government departments is brought to a complete halt, no austerity measure can success in its objectives."

As to underserved, uncalled for spending of public funds on medical treatment abroad at State expense, I quote only two paras from Mr. Zafar Omar's article published in the weekly *View-Point*, Lahore, page 32, 15 October 1987. It is a mild protest though by the learned writer yet an eye-opener for the deprived majority of Pakistanis:-

"Although it would be naive terms of reducing such unnecessary expenditures as is involved in sending, at State expense, some sick persons for treatment abroad, even the richest of societies resort to symbolic demonstration of thrift. Remember the cut in the heating system in cold weather in the White House in Washington, when there was shortage of oil, or the use of a station wagon by the royalty in England, when they wanted to identify themselves with the hard-pressed public, again at time of oil shortage.

This question arises when one notices the case with which the government functionaries dole out public money to the needy and the so-called needy for treatment abroad. The practice is obviously rooted in the feudal tradition, reminiscent of days when an all-powerful king was the sole custodian of the treasury and had the right to shower his bounties on anyone who aroused his fancy. What would one say about present day government that release sizeable sums for the treatment of once-famous people. They may include people who had enjoyed successful careers and made millions in their time without probably surrendering even a small percentage of what was due to the

Exchequer or caring for their fellow beings. Is it fair to divert the taxpayers, money to help such cases only because somebody in authority is moved by their plight?

"Such actions earn wide publicity to the State functionary who doles out money because he comes out as a kind-hearted person, interested in another human being, and also creates sympathy for the beneficiary. Unfortunately, in all this process the average citizen stands as a silent spectator, massaging his ego because he feels that it was his feelings which made those in power perform humane act. Needless to say that there must be millions who are suffering from similar problems and who did not have even one-hundredth of the medical aid which was available in the country's hospitals, where doctors, nurses, medical bureaucrats and government functionaries pay scant attention to the under privileged and let them die or suffer. These people neither have the means to launch a public relations exercise nor are they important enough to be recognized, nor are they part of the establishment. They go on suffering without succor. Any student of sociology can tell us that there is a large number of economically deprived people in the country who suffer from grave diseases which quite often cannot be treated here. There is no known case where the government on its own decided to send such a person abroad for treatment.

JOBS AND SERVICES MONOPOLIZED

There are more than 300 banks and semi-government public Corporations, having thousands of branches within and outside the country, employing lakhs of people. Again the lion's share, if real enquiries are made of the jobs, goes to the relations, sons, sons-in-laws of the bosses or semi-bosses. To a Sindhi or a Baluch, jobs in these institutions are a closed book, in spite of the sham quota, supposedly fixed for these Provinces, because relatives of bosses, or their tribes men, manage to get fake certificates, or otherwise purchase domicile certificates from these Provinces, and get the desired jobs.

No doubt, useless written tests and interviews are taken for filling these jobs, but this is just to deceive the public. The jobs go to the privileged elite. Not only this, but at the public expense, send their sons and relations to the foreign training Institutions. While they are employees, keeping their jobs in these Institutions, and on their return, they get quick promotions as well.

In such a situation, is there any chance whatsoever for any ordinary University Graduate to say the least of Sindh or Baluchistan. Here one can visualize clearly two classes, one is the privileged elite, having all the benefits of education at home and abroad, at public expense, and the other is the ordinary citizen, whose degree is of no use, and he cannot find an ordinary job to maintain himself and his family. If this situation is allowed to be continued for long, the results are not far to seek. The younger generation is desperate and angry, they cannot be suppressed for long.

Are these the ideals of Pakistan ? The point will be proved if an impartial Commission, preferably composed of foreigners, who have no interests, or a Committee is appointed to go into the colossal waste of funds and mismanagement, and its report is published. For sure the report will shake the nation's conscience, if there still is one ? However, such a step can be taken only, one may assume, by a government elected by the people, and not the ruling elite. The abovementioned injustices and inequalities, only amount to the tip of the iceberg.

In high government jobs, at Federal or Provincial level, foreign services, banking, industry, army, navy, air force, PIA, Finance, Railways, Customs and judiciary, to mention a few examples, the people of Baluchistan and Sindh, have very little or no share. However, in spite of agitations by the Students Organizations, and political parties, the injustice continues. Can this be remedied? By whom, and when? And for how long, one wonders people will have patience?

If somebody attempts to point out these injustices, he is treated as unpatriotic, as happened to Maulvi Fazal-e-Haq, once Lion of United Bengal, and Shaheed Suhrawardy, and later on to Sheikh Mujeeb, Khan Abdul Wali Khan in NWFP and G. M. Syed in Sindh, Mir Ghous Bux Bizenjo, Sardar Attaullah Mengal, Sardar Khair Bux Marri, and the writer of this article in Baluchistan and many others. The nation has seen the results of such suppressions of truth during the last 40 years, in secession of East Pakistan. Let us hope, today's young generation in all four Provinces, is quite alive to the situation, and will not allow such a thing to happen again.

Repeated army action and police raids from 1960 onwards in Baluchistan, and now in Sindh, are no solution whatsoever to the problems. On the contrary, these will create a sense of deprivation and could lead to violence. Such a situation in a nation should not be allowed to develop. This needs a change of attitude, which our rulers and bureaucrats so far have been incapable of accepting, simply because they want to prevent the majority of the people from organizing their force, according to their own will and wishes. All the four Provinces of the country should be given full autonomy leaving subjects of defence, communication, commerce, foreign affairs, with the Federal Government. Within a new Constitutional framework, there should be no chance of imposing another Martial Law.

The Senate, must have the power to initiate, and reject finance bills passed by the National Assembly. It should be treated with respect and equality with the other House, as in USA. Unfortunately, the 1973 Constitution is deficient in this respect, thus the Senate became a debating society, members enjoying financial privileges, foreign tours, Ministerhsips and no powers. Had the Senate been given equal powers, perhaps the 1977 Martial Law would not have come. Thus Constitution of 1973 was deficient in this respect. It also failed to protect rights of smaller Provinces.

Let us learn a lesson, may be the last one in 40 years. The Armed Forces must go to the barracks; they should not have any role in running the civil government. They should at all times be ready to defend the country, rather than waste their energy in political squabbles, as is happening. Power must go to the people. An equitable just distribution of the national resources among the four Provinces, least interference of Central Government with the Provincial administration, and that also, within the Constitutional framework must be evolved.

NEED FOR FULL PROVINCIAL AUTONOMY

Equal representation of all Provinces in the Armed Forces is the only safety valve against future Martial Law. Immediate dismantling of giant cartels and big business, and bureaucratic banking, and its industrial empires, which are run for the benefit of the bureaucracy is necessary. Unnecessary and huge, congested industry in Hub, Karachi, Lahore, etc. should be shifted to the interior in each Province, thus giving the opportunity of jobs, and knowhow to the people there. Total reliance on agricultural produce, rather than doles and charity of food products, from foreign countries at high interest, must be corner stone policy of future government.

As mentioned earlier, Mr. Jinnah, demanded Provincial autonomy for Baluchistan in 1929 from the British, but it took an independent Pakistan government in 25 years, to accord a Provincial Status to Baluchistan in 1971.

Naturally, due to this delay of 25 years, the Province suffered from the absence of nation building Institutions. Not only this, in spite of the Provincial status in 1971, a separate High Court was allowed to be established only six years later, in December 1976. It was not a favor, but I, being the only and first Baluch from Baluchistan, having three degree to my credit, and six years experience and service in Sindh and Baluchistan High Court was appointed first Chief Justice of Baluchistan High Court. Those who know the difficulties, administrative and otherwise, in establishing a new High Court from scratch, will appreciate the hard work I had to put in, to set up the new High Court.

Initially we had to set up the High Court in a very small building, which used to house Sessions Judges Court. During my tenure of office, I got five acres of land, opposite the Provincial Assembly, for constructing a new dignified building, for which I also got funds sanctioned from the government, and also prepared the plans, and selected its architect, etc. It was only last in January 1988 that former Prime Minister Junejo, laid the foundation stone of the High Court in the same place.

Initially our strength was only three, which later on increased to five. We did our best to keep the past high tradition of the High Court of Pakistan, India and Western Democratic Courts, in dispensation of justice, between man and man, between citizen and government, and that also to our misfortune. We encountered very difficult times,

because after six months of the establishment of the High Court, the elected government of Mr. Bhutto was dismissed, and Martial Law of General Zia-ul-Haq was imposed. With Martial Law, constraints on civil liberty and human rights, were brought about, as necessary consequences of Martial Law Orders, Rules and Regulations Ordinance, etc. According to constitutional requirement and Oath taken by us, we did our best to stave off day to day encroachments of Martial Law courts, and attempted to keep them within certain limits.

This was done as a sacred duty, and in the interest of the country and citizens at large. Indeed the intellectuals and lawyers are well aware that for our four long years, from July 1977 to March, 1981, by and large, it was Baluchistan High Court which faced the brunt, and held the field against encroachments of Martial Law courts to protect the citizens and their civil rights and tried to keep extra Constitutional laws, within the four-comers of the judgment of the Supreme Court, in Begum Nusrat Bhutto's case, through various judgments, reported and unreported and legal journals.

These earnest efforts invited the displeasure of Martial Law authorities, who finally, drastically amended the already suspended 1973 Constitution, by adding Article 212-A, which gave blanket powers to Martial Law authorities, consequently, the writ jurisdiction of the High Court, became ineffective and nearly non-existent.

Yet another effort was made by us, through the Full Court judgment of the Baluchistan High Court, Petition No. 274/78, now known nationally and internationally, as *Suleman Qasim vs. Chief Martial Law Administrator*, wherein certain limits were laid down for Martial Law Courts to function, according to limits laid down in Begum Bhutto's case. To give the government of the day a chance to challenge our judgment, we allowed it to file an appeal in the Supreme Court, which in fact it did, to get the Constitutional difficulty removed, and jurisdiction of the High Court re-affirmed by the Supreme Court of Pakistan, the highest Court in the Land. On this very issue, a prominent politician, Asghar Khan, also filed an appeal before the Supreme Court, which also was pending. Surprisingly, the Supreme Court gave no decision on the appeal before it, until March, 1981, when another Constitutional amendment was made, which had no parallel in Pakistan's Constitutional history, in the shape of the Provisional Constitution Order of 1981, promulgated by the Chief Martial Law Administrator. As a necessary consequence of this amendment, out of the total of three Judges of the High Court of Baluchistan, I, the Chief Justice, and the Senior most Judge, Justice M. A. Rashid, had to abandon our posts, for not taking the new Oath. Some other Judges from Lahore High Court, and Sindh High Court, also suffered. It may also be noted, that the Sindh High Court, on the same point, gave judgment in favor of the government, by a majority of 3 to 2, as for Peshawar and Lahore High Court, they simply accepted Constitutional Amendments Article 212-A, and declared that they have no jurisdiction to interfere.

With rare exception, unfortunately, it has never been the tradition in this country to resign from a job on a matter of principle, be it a Governor, a General, a Judge or a Minister. Yet population-wise Baluchistan was the smallest Province, its High Court of Judges was only three, yet all the three Judges responded to the call of conscience, and gave the Full Court judgment, a landmark in Pakistan Judicial history.

Can our countrymen expect more sacrifice from the people of Baluchistan? Unfortunately, our sacrifices went unsung and unappreciated at the hands of citizens at large, intellectuals, politicians, and the press. After PCO, Judges had been made transferable from one Province to the other, for a period of two years, without their consent, and many other restraints have been put on them. Thus the security of service, and position of Judges was drastically curtailed, including the power of the Higher Courts. It may be mentioned that in the Supreme Court, three Judges also had to leave their jobs as a consequence of PCO 1981, for refusing to take the new Oath. PCO in fact, negated the judgment of the Supreme Court in Begum Nusrat Bhutto's case, and the Judges were made bound to carry out Orders, Ordinances, etc. of the Chief Martial Law Administrator, who assumed the full power to amend what was left of 1973 Constitution.

The National Press as the term denotes, at present does not exist, after the early 1950s. It gradually got commercialized and communalized, both vernacular and English. Like other institutions, the Press also got polarized in the process of time. About 15 newspapers and periodicals were taken over by the government in 1984. In one year 1983-84 only 158 million rupees were spent from the Central Budget to run the Government taken over Press. They serve no purposes, except to justify all actions, good and bad of the government of the day, and its functionaries.

The other so-called independent newspapers belong to 5 or 6 families. It is common knowledge that they get millions of rupees through advertisements from the government agencies, newsprint, and other privileges. As a consequence, they become highly commercial communal institutions.

Over and above, they are concentrated in Karachi and Lahore. With one or two exceptions, those who write with courage, are deprived of government favors. It will be seen that 70% of the population living in the rural areas in the country, are deprived of their local vernacular or English Press. Thus the majority of the problems, faced by the public at large, in the villages and small towns in the interior, go unheard and undetermined.

A cursory look at the list of newspapers and periodicals in pre-Pakistan days of the present Pakistan area, will show that nearly every district headquarter, or even sub-district headquarter, used to have a weekly or fortnightly, bringing to light the problems of the people. Unfortunately that is no more so, because the monopolistic

newspaper owners, simply absorb all the favor privileges and funds from the Provincial or Federal Government, in turn, they have to praise all the deeds, good and bad, of the government of the day.

This unfortunate phenomena has to be remedied, if at all, Pakistan wants to claim a fully independent democratic country. A new policy has to be laid down, and monopolies have got to be broken, and the Press in the interior has to be encouraged. This will also give a chance of development to the four languages, Baluch, Pathans, Sindhis and Punjabis. As a result, the country will have a balanced Press and solve the problems of 70% of the people in the countryside.

LANGUAGE

Sweetness of mother tongue and the ease with which knowledge and education can be acquired as against any other language is too well-known a subject, therefore, needs no elaboration on my part. The same subject is discussed by St Augustine of Hippo in his world famous "Confessions" about 1,600 years ago. He was a Berber by race, born in North Africa then a part of Roman Empire, educated at Carthage situated in present Tunisia, then a great seat of learning. Later on he travelled to Milan and Rome, for further education. His mother tongue was Latin, yet according to the prevalent system of education he had to learn Greek. How much difficulty he faced in learning a foreign tongue, let be explained by him in his own words, from a translation of his "Confessions" by Rex Warner, published by the New American Library of the World Literature Inc 1963, pages 31 to 33.

It needs no emphasis that what St. Augustine experienced between 354-401 AD, the same difficulty is felt today by a Punjabi, a Pathan, a Sindhi, a Baluchi speaking citizen of Pakistan, when he is compelled to get education in any other language than in his mother tongue. Perhaps one solution would be that all the ethnic groups mentioned above should of necessity and by law learn all the other 4 languages up to a certain level as is done in Switzerland. This necessarily will bring all the groups if implemented, more nearer to each other than they are now. The other alternate is to follow the methods applied by the USSR concerning teaching of various languages in their various provinces. One thing is sure that this problem has to be solved by some or other government because as the trends are in different Provinces in Pakistan, the sooner it is solved the better for the country. However, Government of Baluchistan through a resolution Provincial Assembly has now declared Balochi, Pushtu and Brohi, Provincial languages, therefore rest of provinces may follow. Be that as it may, St. Augustine said:-

"But I still cannot quite understand why I hated the Greek which I had to study as a boy. For I was very fond of Latin, not the elementary grammar but the literature But why, then did I hate Greek literature, which is full of such things? Homer too is skillful at putting together this sort of story and there is great sweetness in his vanity; yet when I was a boy he was not to my taste, I think that Greek children must feel just the same

about Vergil, when they are forced to study him as I was forced to study Homer. No doubt it was a question of difficulty and this difficulty of mastering a foreign language was like bitter gall sprinkled over all the sweetness of Greek, stories and fables. For I simply did not know the words, and strict measures were taken, punishments and cruel threats, to make me learn them. There had been a time too, of course in my infancy, when I did not know any Latin words either, yet simply by paying attention I learned Latin without any fear or torments: I learned it in the caressing language of my nurses and in the laughter and play and kindness of those about me. In this learning I was under no pressure of punishment, and people did not have to urge me on; my own heart urged me on to give birth to the thoughts which it had conceived, and I could not do this unless I learned some words; these I learned not from instructors but from people who talked to me and in whose hearing I too was able to give birth to what I was feeling. It is clear enough from this that free curiosity is a more powerful aid to the learning of language than a forced discipline".

The demand of the people of East Pakistan, who were in a majority of 56%, to give their language Bengali, the status of a national language, was ignored, on the other hand, Urdu has been imposed as the national language which is spoken by only 7% population, as against the rest of 93% population, speaking four different languages in the four Provinces.

Urdu is a beautiful language, but no language is more beautiful than one's mother tongue, as Pushto is to Pathan, Sindhi to the Sindh, Punjabi to the Punjab, and Baluchi to the Baluch.

There is no dispute that Urdu developed in the span of a century, in the Ganga-Jumna valley, where lay the seat of the Muslim Kings. As the Muslim Army used to be composed of Turks, Afghans, Uzbeks, Iranis, Baluchis, Arabs, Sindhis, a new language of the army was evolved, as the language of communication, between different linguistic groups. Later on Urdu, as an antidote, was used by Muslim intellectuals against the cultural invasion of Hindus, through the use of Hindi.

Obviously, now there is no fear of Hindi domination in the present Pakistan, therefore, no such religious color, as in the past, can be given to Urdu. If Urdu has to live as a language, it will be by its inherent force, as a vehicle of communication between peoples of different parts of Pakistan, and not by legislation or by the gun. Had we gone by the majority principle, Bengali should have been the national language, or today, Punjabi should be the national language, because Punjabis are more than 60% of the population. How Urdu can, or should be imposed on a reluctant 93% population of Pakistan, where languages such as Baluchi, Pushto and Sindhi have a history of 2 to 3 thousand years, while Urdu's life is little less than a century. Pakistan was won on the basis of the ballot box and not acquired by the army, or bureaucracy, or big business, or feudal landlords. A couple of thousand urbanite Punjabis, born and brought up in British colonial rule,

and their descendants, who were well entrenched in the top jobs in civil services, armed forces, preferred Urdu, fell shy to speak their beautiful language Punjabi of Heer Waris Shah. The majority of the Punjabis, even today, speak Punjabi, and are not ashamed of their language.

In any other Province, the same phenomena will be found by any observer also. These Urban Punjabis, did no service to the Urdu language, because among themselves, even today, they prefer to speak English, thereafter Punjabi, and later on Urdu. They speak Urdu with Urdu speaking persons of position, with the motive to get a favor, or to show their superiority in culture against Punjabi.

Lately, I happened to read an article in an Urdu, Karachi newspaper, by an Urdu speaking or Mohajir some prefer this nomenclature, writer. Ignorance and lack of knowledge is pardonable, but bias and prejudice is condemnable. Substance of his article, was that Baluchi and Pushto are unwritten, and tribal languages, they have no literature. This he did in unnecessary defence of Urdu language. He has the same opinion about Sindhi, Pushto and Punjabi languages. Now facts are to the contrary, and I have stated a few of them in this Chapter.

Baluch people, and their language have a history of about three thousand years. Detailed historical and linguistic discussion will be found in Chapters 3 to 7 (pages 25 to 57), for interested readers in my book "*SEARCHLIGHTS ON BALUCHIS AND BALUCHISTAN*" published by Royal Book Company - Karachi, year 1974, or in its Urdu translation published by Nisa Traders, Patel Road, Quetta.

Common notion that Baluchi language is a corrupt form of Persian, has since been dispelled, by the deciphering of old Achaemenian inscription by renowned Orientalists, which shows that Baluchi is more similar (perhaps older), to the language of Avesta, than modern Persian. In his "Grundriss Iranischen Philologie", Professor G. A. Grierson, has raised it to eminence of its own. It has preserved the old tenues in all positions, even after vowels and liquids. In this respect, accidentally, it stands on a level with the old Pahlavi. He goes on to state, that in this respect Baluchi, "resembles like most other Iranian languages, in showing a nearer relationship to the ancient language of Avesta, than the old Persian, the Avesta language of the Achaemenians, from which modern Persian is directly descended".

Dr. Raza Zada Shafaq, in his book "*Taariikh-i-Adabiat-e-Iran*" quotes an inscription dating back to 486-465 BC, reads exactly like the present Baluchi today spoken in Pakistan, as follows:-

"SHIS DARAYOSH KHASHAYARSHAIA MANA PITA VISHTASPA VISHTASPAHIA PITA ARSHAMAH: ARSHAMAHIA PITA ARYARMANAH ARYARMANHIYA PITA CHESHPESH CHESHPAISH PITA AKHAMANSH".

In modern Persian, the grammatical forms are quite different, and if the same subject matter is put into modern Persian, it will be only remotely similar to the old-text, but Baluchi formation will be exactly read as given above:

"GOYAD DARYOSH PADSHAH PIDARE MUN GUSHTASP AST PIDARE GUSHTASP ARSHAMAH PIDARE ARSHAMAH ARYARMANAH PIDARE ARYARMANAH CHESHPESH PIDERE CHESHPESH HAKHAMANASH".

We can judge the difference. In Baluchi we have the verb in the same form 'Shi' or 'Gushi'. Pit has changed into Pidar in Modern Persian, but in Baluchi it is 'Pit' till today, exactly like Avesta as well as Sanskrit.

In the same script, we find the Baluchi words 'Tom' meaning 'Seed', 'Mai' meaning 'mine', 'Zorger' meaning 'forcibly', 'Eza' meaning 'here', 'Murtia' meaning 'dead', and 'Shyatia' meaning 'happily', which in modern Persian are Tukhm, Mal-i-Mun, (the first person accusative has either not developed in Modern Persian, or it has been lost), Zorkunidah, Einja, Murd and Shadi respectively.

Also the most authentic research about Baluchi language, is done by the great orientalist apart from G. A. Grierson, Professor Minorsky of Cambridge, England, and Russian Scholar, I.I. Zarubin, to quote a few. Our Urdu speaking writers, some of them if not all, I believe are acquainted with great Firdusi's (940-997 AD) Shahnama, wherein he mentions valour of Baluch warriors, not less than a dozen times. Baluchis make their debut in Shahnama as gallant warriors, forming a part of the army of King Kaus, also known by historians as Kaikhusro (558-53 BC). He mentions Baluchs in Shahnama, in the reign of Ardsher (226-251 A.D.), and last mentions the Baluch in reign of Nausherwan (A.D. 640), with whose army they had several battles. Incidentally, he mentions that Baluchis had their own distinct language as well. Pushto and Sindhi languages have enormous literature of their own.

At the advent of British rule, Baluchi was taught as language in schools and Makhtabs, along with Farsi and Arabic, the same applies to Sindhi, which to this day is used in many government offices and police records in Sindh. How one wonders and by what reason, Provincial languages can be ignored, on the other hand, Urdu speaking people have got to learn these languages as well, because they are a part of present Pakistan, otherwise, they will be in the long run, cut off from the main stream of the population, hence, an uncalled for segregation and isolation.

During my legal studies in England, I have seen several Baluchi manuscripts, in prose and poetry, in the Oriental Section of the British Museum Library London, written by Baluchs, as long ago as 1880, and earlier. How can it be said that it is an unwritten language, or a language of nomadic people. Besides, there are scores of magazines and

books in Baluchi, published by Baluchi Academy, Quetta, written by young Baluch writers, both prose and poetry. I was a founder member and first Joint Director of Baluchi Academy in Quetta, founded in 1962, and Mr. Bashir Baluch's compilation on Jam Duruk's-Baluchi poetry in 1963, was our first publication. Today, it is quite a big organization, and so far has done a lot of work by young Baluch writers, and every year it publishes several books in Baluchi. I am a Marri Baluch, and come from Marri tribal area of Baluchistan, and Baluchi is my mother tongue. I have compiled a couple of books in Baluchi- "Qadim Baluchi Shairy" with Urdu translation, published first from Quetta in 1965, and its second edition from Karachi, in 1976. Thus to say that it has no literature is sheer ignorance. I have given my opinion, suggesting that the right status of equality, if not more, be given to Baluchi, Pushto, Sindhi and Punjabi, with Urdu, that would be to the interest of all parties concerned.

As to adoption or position of Urdu as National Language, I hereunder give representative, opinion of Sindh by Professor Ghulam Mustafa Shah, an Aligarian by education, a Scholar in Urdu English Sindhi, An educationist by profession now holding the position of Federal Minister of Education in PPP government since general elections held in November 1988. He said his speech on the subject "Sindh Society and Sindh Tomorrow," held in Press Club Karachi, published in *Sindh Quarterly* Vol IIX 1987 Nr. 4 in Conference Seminar number, few paras from pages 32-35:-

"Even today, after forty years, if you take up any Urdu or English newspaper, journal or a periodical, you will be amazed and flabbergasted at the total ignorance, and misspelling of indigenous names of men, women and children, places, castes, tribes, localities, topography, vegetation, birds and animals. Not only, they are mis-spelt, and mis-pronounced, but so written and mutilated and disfigured, that they can be offensive and insulting. The whole information and reading, becomes so faulty, defective and misleading in the context of men, places and events. So many of the so-called educated men of Pakistan, will tell you all sorts of things, from all over the world intimately, but would know nothing about Pakistan, its Provinces, or their geography. You will meet people who will mix up Dera Ismail Khan with Dera Ghazi Khan, who do not know the rivers of Pakistan, who do not know the difference between Baluchistan and Cholistan, for whom Mirpursakro is near Mirpurkhas, Sujawal is near Sann, Kandario is in Jacokabad, Khairpur Nathan Shah is in Khairpur Mirs, who mix up Nasirabad with Nasarpur, Shahdadkot with Shahdadpur, who put Thano Bullakhan in Thar, and such other titillating ignorance. They have absolutely no hesitation, fear, or compunction in shifting towns and villages from the left bank of River Indus to the right such absurdity and ignorance, which will make one laugh and sigh. After forty years I would request you all to be more careful in handling and understanding this country. It is getting tenderer, fragile and under strain every day, with our callousness, carelessness and ignorance. Indigenous Pakistan is different from what we read and see in Urdu books, and

in English and Urdu newspapers. They are meant for the elite and the rulers, who have brought this country to this pass.

Time has come, when the earth and the soil of Sindh, and Pakistan, will not tolerate and condone any irresponsibility, care-freeness, and non-challance. This ignorance will be disastrous. I shall call upon men of vision, good will and circumspection to think over the conditions that obtain and think of their generations, who will live and die here, if national approach to socio-linguistic and literary problems, does not take place, nature is not going to give any concession and countenance delay, procrastination, and vacillation. Let Urdu speak and proclaim the essence of this land, of the people of this land, who are the real land, Let Urdu come down on earth and it will grow. If it remains superficial and in the air, we all shall have to pay. Any resistance to facts, realities, and phenomena of Pakistan life and living, will prove pernicious, perhaps fatal. I have spent half a century of my life in education, teaching, and in the service, guidance and welfare of youth, and on the authority of what God had vouchsafed to me, in experience, literary effort, and sojourns, here and abroad, and in general, what life has taught me, I am convinced that time is running out, the clock is ticking away. The earth has to be accepted, and so all that goes with it, if not, we shall rue the day. The reckoning of Nature is hard, inevitable, and in-exorable indeed.

Of course we have accepted Urdu. It has in a considerable way, influenced the thinking of the educated and even the illiterate strata of our society, but it has still to find a place in the hearts, and minds of the masses of men, and to reach and achieve this status, it has a lot of travelling to do, and efforts to put in to really deserve to be national in Pakistan. It is very necessary, imperative and urgent that the Urdu alphabet be expanded to include letters, sounds, pronunciations, and inflexions, which are peculiar and characteristic, guttural or nasal, sounds of the indigenous languages of Pakistan. If not, Urdu has no fate and future here. It is the language of the masses that matters, not the languages of the priests, potentates, the elite, or the aristocracy. Urdu as a language of Chawk, Aminabad, Chandni Chawk, the battlefield and the nulls had problematical, ematical and uncertain future in Pakistan. The people of Pakistan, and democracy, will always suffer at its enforcement and currency.

As I have said, Urdu has become the language of Brahamins, dance, song, and entertainment, it is prospering on the graves and the bones of Quaid-e-Azam and Iqbal, and on semi-religious and quasi-religious writings, which are becoming monotonous, and even sometime jarring. Shall I quote Ibne-e-Khaldoon, Baladari, Tabaril Barker and Buckle. Let Urdu become a Pakistan language, and not an Indian language. As an Indian language it has no future, it must die and disappear. History tells us that languages of the Brahamins, and cities, and

restricted groups are doomed. A language must represent the spirit and soul of the people. Noise, verbosity, superficiality, cosmetics and cheating, the people of Pakistan will not accept.

I must warn that there is no Urdu culture, and through it we do not want injection of Indian culture in Pakistan. The Urdu culture, from the point of view of the indigenous Pakistan culture, is effeminate, profligate, meretricious, hypocritical, ostentatious, circumambulating, a kind of finesse to cheat and deceive, cover and camouflage. There is no candor and sincerity in Urdu culture. It is all falsehood, engendered by living among the strong, predominant, and more aggressive, and more indigenous Hindu population and culture. Indian Muslim culture was governed, regulated and evolved by either fear or flattering of the Hindu culture or traditions. Indian terminological inexactitudes are not the culture of Pakistan.

William the Conquerer, brought French from Normandy. With his advent in England, French became the language of the English elite, the aristocracy, and the English court. English became a language of the lowly, and the common people, and it was tolerated as a concession to the rude, the rustic and the common man. But in fifty years the whole atmosphere changed, and French got relegated to being a foreign language again, except, as a subject of optional study. French continued as the language of diplomacy in Europe till the fall of Napoleon, and the disappearance of French ascendancy in Europe in the second half of the 19th century, and was soon confined to France alone.

Present Urdu, has all the weaknesses not to last as the national language of Pakistan. It is the Punjab army, Punjab bureaucracy, the printing and publishing trades of Punjab, which are aiding it, and prolonging its survival artificially. It is a language to suppress and humiliate, and keep under control the masses of the Punjab. English is democratic, rational, matter of fact, and essentially a prosaic language. Urdu is *darbari*, effeminate, amatory, hyperbolic and flamboyant. Its effectiveness comes from maximum use of Arabic vocabulary, which reduces its future and acceptability, and endangers its status as a National Language of Pakistan".

Keeping in mind the general unreliability of statistics issued off and on by the Government, I quote latest language survey's statistics published in *Daily Jang*, Karachi, dated 13.8.89. It says only 7.6% people speak Urdu (that may include groups like Gujratis, Kattiiawaris whose mother tongue is not Urdu) 11.7% speak Sindhi, 48.17% speak Punjabi, 3.10% speak Balochi, 1.29% Brohi, 13.14% Pushto, 2.43% speak Hindko, 9.83% speak Saraiki and 2.81% speak other languages as their mother tongue. Be that as it may I hereby give opinion of some academicians on this issue from Sindh and Punjab.

Dr. Ikram Azam, who writes in his book, "*Pakistan Geopolitics*" published by Pakistan Futuristic Foundation and Institute and Hudaiyabia Publications (Pvt) Ltd., Islamabad, 1989.

..... And there's just no denying the fact that Pakistan is a federal (and certainly NOT unitary) nation - State - precisely because it is a multidimensional, diverse society, comprising so many regions and languages This necessitates that all the Pakistani languages should be given equal status and importance. Urdu is, no doubt, our freely chosen national language. But it has not the inborn advantages and disadvantages of a floating language - without a natural geopolitical and socio-cultural Sub-Soil habitat like the other languages. Imposing Urdu tantamount to antagonizing the other major languages and the totality of the national majority they represent. It has also created the growing feeling that those who have so far managed to rule in the name of Urdu, are now maneuvering to continue to dominate future-wise, in the name of Urdu- i.e., a, microscopic emigree population which has yet to accept the native and original sons of the soil, their values, moves cultures, languages and life style, as co-equals, considering themselves as superior beings. Or why else have there been language and socio-cultural problems in East Pakistan, Sindh and elsewhere? - except the Punjab. As for English, while the entire world is acquiring it, we are hell-bent upon shedding it- perhaps to divide and rule- and retain the colonial distance between the westernized rulers and the alienate natives being ruled. The locals feel that they have been conquered and dispossessed, just to rehabilitate the refugees - the latest being the endless Afghans. They think it is this microscopic emigree population which has yet to get properly and egalitarianly integrated with them-that is really ruling Pakistan, from 1947 to date. In every walk of life — politics, the economy and the civil and military services, they are holding the key positions. This may or may not be true. But the feeling of alienation is devastatingly destabilizing to the cause of national integration. It is for the present day rulers to wake up to it and to act creatively farsightedly.

As I have given the opinion of Professor Ghulam Mustafa Shah of Sindh, with regard to Sindhi language, somewhere in this Chapter, it would be fair to give the opinion of a representative body of Punjabi intellectuals and scholars, supporting Punjabi language and literature, as the fit language for Province of Punjab, which is reported in *Daily Dawn* - Karachi, Friday December 6, 1985, page, as under:

"Promotion of Punjabi language urged:-

Lahore, Dec. 5: Speaker at a function, sponsored by the Ustad Daman Memorial Council, on the eve of the first death anniversary of the late poet, there on Wednesday, voiced their indignation over what they called a deliberate attempt to demean Punjabi

as a language, and called for 'positive' measures to promote the language, which is the mother tongue of the majority population.

"Chaired by prominent writer Sajjad Haider, the meeting paid rich tributes to Ustad Daman, who was described as 'much bigger a poet, than most of the poets in Urdu, born in this country'.

"The speaker said Ustad would be remembered as 'identification of the Punjabi', who made deep impact on the language, as well as its cultural heritage. He was also praised for his service, through his verses to the downtrodden.

"Those who spoke on the occasion included Sain Hayat Pasroori, Professor Ghulam Rasool Azad, Hussain Shad, Shafqat Tanvir Mirza, Kishwar Naheed, Talat Mahmood, Farzand Ali, Saifullah Saif, Qamar Anjum Inqilabi and Sain Akhtar, while Ashraf Shehabpuri, Muhammad Gulzar and Pervaiz Hashmi recited the late poet's verses.

'In his address, Masood Khaddarposh deplored the social indifference towards men of letters and said, Ustad Daman was not the only poet of the Punjab who lived and died in poverty, but most of great writers met the same fate.

"He said, the British imperialists imposed Urdu in the Punjab, to suppress the culture and language of the greater Province, at it resisted the imperial authority till the last.

"He quoted the Encyclopedia Britannica (Vol: II, page 47), to prove his assertion. The citation said: 'It was interesting to note, that after the conquest of the Punjab, The British Government introduced not only hundreds of Junior Officials from what is now Uttar Pradesh (UP) but also their language Urdu. The Muslim gentry of the Punjab petitioned to the Government of India in favor of Persian, rejecting Urdu, Pakistan owes its Urdu to British legacy.'

"Masood Khaddarposh said, that since imposition of Urdu, as an official medium, it became incumbent on every Punjabi to learn this vernacular for the sake of service and official patronage. Punjabi language was thus excluded from educational curriculum, and, consequently, the Punjabis were pulled away from their cultural heritage.

"According to him, Pakistan's future could not be regarded as safe, as Punjabis, who constituted 65 percent of the population, were made to lose their identity and self respect."

Among those whose mother tongue is Urdu, have in the past blissfully ignored to acquire even ordinary speaking knowledge of any other major languages of the country, like Punjabi, Pushto, Sindhi and Balochi, hoping perhaps by constant propaganda in the press and use of government machinery in favor of Urdu since last

40 years, they will succeed in relegating the other languages of the country to the level of only spoken language and by legislation all other means will be able to install Urdu on a unwilling population, forgetting at the same time the lesson learnt from East Pakistan where right from 1984, when it was declared that Urdu will be the official language of Pakistan, the resistance movement by the Bengalis got momentum resulting in secession of that part of the country.

It is heartening to notice that lone and forthright voice of Professor Karrar Hussain, an educationist, scholar of high standing in English, Urdu, Persian, well-known for his integrity, has pin-pointed pitfalls and dangers to Urdu if it was installed forcibly on an unwilling population, who have their own centuries old languages, literature and culture. I had no chance to read his speech stated to be published in a book called "*Pakistani Mushaarah aur Adab*" published by Pakistan Study Centre, University of Karachi. I however, quote from Zeno's comments on the book captioned "*Pakistani culture and its crisis*" published in *Dawn* - Karachi, 4 September 1987, on page iv.

From the list of the names who spoke on the occasion and later on incorporated in the book, it seems that it was essentially a one-sided affair because all the speakers were Urdu speaking, yet the seminar was called "*Pakistani Mushaarah aur Adab*" as if there is no other literature in any of the four languages of the country. Besides there is no indication from the article if any Pushto, Balochi, Punjabi and Sindhi scholar was invited to represent their own point of view about their respective language and literature in spite of the fact that there is no dearth of scholars of high learning in these languages.

Be that as it may, I produce Zeno's observations of Professor Karrar Hussain speech captioned, 'Urdu Imperialism,' I quote -

"The observations of Prof Karrar Hussain as the closing address of the seminar are of great value, especially because his attitude towards the inter-lingual reality is more germane to the political situation as it has developed in the last forty years. While he is aware of the necessary role of Urdu as 'the link language' in Pakistan, he is also conscious of the conflicts aroused through the 'political use' of Urdu. He has grouped these conflicts under the blanket name of 'Urdu Imperialism'. This consciousness has arisen because of extremism in the process of supporting Urdu to the exclusion of the people's languages.

"Prof Karrar Hussain is realistic in proposing the solution of the problem of the conflict between Urdu and the local languages of the people. The problem cannot be solved, he says, by making Urdu the sole medium of education in Universities, so that only Urdu should be taught, nor that it should be the only language in the offices. It is the sense of imposition by government decree that the process becomes unacceptable. It is through the political causes - and political deprivations - that a situation has arisen where some

individuals — prominent individuals - have 'forgotten' the use of Urdu language, although they used to speak it before.

"Prof Karrar Hussain in his brief closing address has only made certain suggestions about the problems, their causes and their solutions. And as he has said, it is necessary to make use of such occasions as their seminar for candid discussions of such problems. We do not know if a free and frank discussion was allowed on this occasion. Usually good intentions are seldom carried out in practice, which is a great pity, because in this way missing opportunities becomes a habit.

The observation of Zeno in the same article that 'the problem is not so much found in the rest of the country as it is in Sindh. It is precisely true that Urdu has come into linguistic clash with the language which claimed to be possessor as proud of the heritage,' I am afraid, he is very much off the mark, because he simply ignored the emerging and resurgent literary efforts of the Sindhi, Balochi and Pushto writers and scholars. Even Punjabi scholars and writers since last 7 or 8 years are agitating for having a rightful place for Punjabi language. The point will be further proved if an observant traveler visits any town big or small in Baluchistan from Quetta to Gawadar, he will find on all the walls of the cities including government offices and buildings, even the rocks on both sides of the Bolan Pass shrieking slogans in favor of Balochi and Pushto, demanding that they must be introduced in all educational institutions as mother tongue of the people in the region.

English should remain the official language in this age of science and technology. In the absence of English, we will be a nation of illiterates. Urdu to be given an equal status with other languages of the Province, Sindhi, Balochi, Pushto and Punjabi in Schools and Colleges.

CHAPTER SEVEN

EPILOGUE

Strength or weakness of a nation is gauged by its foreign policy, which is reflected in a country's internal economic strength, political and social homogeneity, smooth running of most important State institutions i.e; Legislative, Judiciary and Executive or otherwise.

A country like ours, at present nearly ravaged by political, social, religious and ethnic factions, and to crown it all, by gross economic mismanagement, in fairness cannot claim to have effective, neutral and independent foreign policy. Mr. Muhammad Ali Jinnah, the founder of the country, had no time, as he died within one year of the country's independence, either to give a just and viable Constitution, nor could he lay the foundation of a lasting foreign policy.

Hence, immediately after his demise, Liaquat Ali Khan, the then Prime Minister, was 'Gharood' by migrant Gujrati businessmen, by hardened technocrat and bureaucrat and civil servants trained in schools of British colonialism and red tape, with shallow minds, and highly conditioned outlook, incapable of drawing up a balanced and even handed foreign policy, *viz-a-viz* the two super powers USA and USSR. They prevailed upon the Prime Minister, to reject friendly invitation extended by Russia as a neighbor. These people had then, eyes on the US Dollars, also encouraged by the army Generals, Liaquat Ali accepted the subsequent invitation of USA. No doubt he came back with a couple of hundred million dollars as aid, in reality loan, and some promises in future. It is common knowledge that the Russian never forgot that discourtesy, and Pakistan had to pay for it in the 1971 War with India on Bangladesh.

This initial tilt towards US, later on joined by West European countries, embarked the country into a major loan taking country, with very high interest. Gradually the country came to depend on these countries for highly expensive army equipment and training reckless import of foreign consumer goods, industrial machinery capable of producing only primary goods, like Textiles etc, export of cotton, jute and later on food stuff, to repay the interest on loans, called with deceptive name of 'debt servicing', so much so, that now Pakistan owes more than 15 thousand million dollars to foreign countries. It would be unfair not to appreciate the generous financial loans and assistance given by the USA, which helped the country in its initial stages. America is a very great Nation, with many large hearted people, but its diplomacy, whenever and wherever applied, always left a bitter taste in the mouth. Equally, Russians are a great revolutionary people; they have changed the face of a then backward country, and in half a century,

become a Super power. We could, and can have equal friendship with both of them, not with one at the expense of the other. This we yet have to learn. Pakistan is basically an agricultural country, if full attention had been given to this, today we would be self sufficient in food production, as has been done in India.

Be that as it may, due to heavy loans, in the name of haphazard industrialization concentrated at Karachi and a few towns of Punjab, ignoring the vast hinterland, the country was forced to enter into unfair loan aggravates, with numerous loan giving Agencies, World Bank, IMF etc. They gradually used contractual laws, as levers to have an invisible, yet definite control on the country's economic policy, price structure, export and import targets, to the extent of what crops to grow and what not. Naturally, this affected political and foreign policy, which to some extent became mortgaged with the western countries, leaving an unhappy relationship with Russia in the East.

The lure of unearned dollar loans, in abundance, was a boon for second and third line toothless Muslim League leadership, which was then controlling the government, and comprised of Urdu speaking immigrants from India, plus businessmen, and feudal landlords of Sindh and Punjab, its bureaucracy, Generals, pseudo religious mostly imported Organizations. This small group, of course, came to think it was their destiny to rule and expropriate the country's resources, all the top jobs in Central and Provincial governments; over and above, there was loot of vast properties left by Hindus, for themselves and their next generation, to the exclusion of people of East Bengal, Baluchis of Baluchistan, Sindhis of Sindh and Pathans of NWFP.

To keep them in good humor, some posts of useless Ministerships and jobs of Governors and to a few, some licenses and permits were considered sufficient. The irony of all this is, that Baluchistan, however, remained deprived of these thrown away jobs, of Ministership, or Governor, it had no High Court, no University, no Provincial election, hence no Provincial government, as it was, it was allowed to be ruled by the Centre, through an Agent until 1971.

To lull and confuse the already deprived people of these Provinces, this small group of beneficiaries, with support of the government and some foreign agencies, very cleverly embarked upon a concerted and endless propaganda barrage, through pulpit and platforms, and a ready obliging press whom almost all belonged to immigrants from India or Punjab or Islamic brotherhood of glorious past of Islam, of honesty and Jihad in Kashmir, danger from India and God knows what not was let loose on people.

Thus in the wake of this din and noise, whatever privileges, rights and future prospects were left, through this subterfuge and knavery, were taken possession of by this band of urbanite politicians and civil servants all over the country, leaving the majority of people high and dry, not only of material resources, but of moral fiber which used to be their only quality. As if that was not enough, a new slogan was started, that 'Pakistan

was the largest Muslim country in the world'. This gave no dividends, except annoyance to Indonesia and Egypt. When East Pakistan became independent, suddenly this slogan went out of circulation.

The ingenious minds of the press and bureaucrats coined another slogan that 'Pakistan is the fortress of Islam' from each platform. Another hallow and emotional claim, because, if it is and was so, Pakistan, should have been able to bring peace between warring factions, our next neighbor Afghanistan, or between Iran and Iraq, where Muslims were massacred enmass and faithfully at the hands of other Muslims.

The irony of all this is that when Pakistan's Mr. Sharifuddin Pirzada, was holding the post of Secretary General of the Organization of Islamic Countries, yet nothing could be done, Instead, all these warring Muslim countries got divided between the two super powers, US and USSR, each was arming to the teeth their clients with war machines in return for oil and other resources. They made no effort to stop this genocide. Why should they? As their armament factories are running full time and providing full employment to their citizens, at the cost of these Muslim countries. The Persian Gulf is considered home waters of Pakistan, but we cannot raise a word of protest, when the entire Gulf region is filled with US, USSR and Western countries' Naval armada. They simply watch and see which party needs more murder machines. Gradually Pakistan could slip into the ambit of this armed conflagration, but unable to make amends, lest our dollar aid be stopped by USA, or other European donors. Hence, slogan of 'fortress of Islam' also proved abortive.

To replace the above sometime back, a new slogan was coined that 'Pakistan is an Island of Peace'. When there is fire of war on all its borders, now logically, is nothing but a fallacy, wishful thinking, because when the country is surrounded by wars on all sides, how possibly can it remain unaffected, and an island of Peace.

Well this slogan also proved false, because today, not a town from Karachi to Peshawar is safe from constant blasting of bombs, at public places, government and semi-government offices. Only in one blast, in Saddar Bazar of Karachi, more than 70 innocent people lost their lives, this all at the hands of so-called enemy, according to then President, General Zia-Ul-Haq they were Indian Agents, while the then Prime Minister Mr. Junejo thought, they were Afghans, and politicians said, they were government agents. Whosoever they were, the fact remains that nobody has been caught, publicly tried and punished. It would only lead to the fact that we have a defective foreign policy, specially the Afghan one.

That besides, neither public roads and highways, or travelling by train, nor any village is safe in Sindh from the hands of organized bands of dacoits. Instances of mass murder of entire villagers, including women and children, are a common feature. People are kidnapped and released after receiving huge ransoms. The local press since 1983 is

filled nearly every day with such sad stories. Nor is Karachi town safe, everyday news of armed dacoits and looting, quite often accompanied with violence and murders.

Some of these dacoits in Karachi and in Sindh are stated to be quite young and educated people. They use lethal weapons like Kalashnikov, assault rifles, hand grenades, even buzzokas. The country gradually has been turned into a powder keg, an open market for illegal sale of Afghan, US and Russian arms. This all came in the wake of the Afghan war, and our misplaced, ill-judged generosity, to give shelter to over 3 million Afghan refugees on Pakistan soil. No house in Karachi, Lahore Islamabad, Peshawar or Quetta is safe from day to day robbery and dacoits. Violation of Pakistan's space and bombardment of villages in NWFP, resulting in huge loss of innocent lives, are a common feature; our numerous official protests sent to the Afghan Government, now must have reached in hundreds, with no results.

Another problem, which has been casting long shadows on Pakistan's stability and security, is being termed a "frontline state". One wonders against whom? This policy must be abandoned, because its continuance will unnecessarily relegate the country as a proxy power of one, or the other super powers. As soon as possible, a policy of quick and just solution, should be negotiated directly with our brothers in Afghanistan, so that the burden of 3 million refugees could be removed. This will also result in stopping the genocide of Afghans on both side of the border. The Afghans can be of immense help to us in future, as they were in the past centuries. They are a part of the Muslim Ummah.

In the present geopolitical and constitutional set up in the country, to achieve these objectives, may appear like day dreaming. Yet these are musts, for which we need big hearts and resolute minds, and a united country.

This all is due to inefficient foreign policy. Why has Pakistan failed to formulate an effective foreign policy, for so long? Only plausible answer would be, that except for 5 years rule of Mr. Bhutto's representative government, the country was ruled by bureaucrats and Generals, who due to their training, their thinking, is conditioned and controlled. They look only for orders, ready to obey, whosoever is in power. On the other hand, there is a lot of difference between thinking and vision of a politician and men from the services. Even Mr. Bhutto's enemies cannot deny that he shaped a meaningful vigorous foreign policy. However, before it could be consolidated, his government was overthrown. Foreign affairs again went to the lot of bureaucrats, who basically are always engaged in worries, how to have more privileges and prestige, not honor, and pleasing the boss, getting more jobs for friends and 'bradari' people. They leave the policy matters to the boss to decide, regardless of the long term good or ill effects on the country as a whole.

It may be recalled, that at the time of partition one Ambassador of Pakistan in India had never seen or visited Pakistan, yet the government of the time, found it fit to make such an unprecedented appointment, as if Pakistan was short of an intelligent enough person to hold a routine Ambassador's post. Answer may be sheer favoritism by those in power. Another Ambassador, after retirement, not only got employment with the British government in London, but a title to boot, and never returned to Pakistan. A Finance Minister of the Central Government, found it fit later on, to get a job in the USA, and settled there, and also got buried there. Of course, all these favors they got were due to being a Pakistan citizen. Another Ambassador, when dead, his son is promptly appointed in the same country, to the same post, as if these posts descend from father to son. There are instances of real brothers holding posts of Ambassadors. Most of these people are civil servants. They have such a hold in foreign and offices of the Central Government that it seems only God can remove them from the service, and not service rules and regulations of pension and retirement, which are so often applied against the unprivileged ones. After reaching superannuation, one finds them as Ambassadors and when that term is over, then they find another cushy job ready, in semi-government Organizations. Thus, Pakistan seems to have been created for many generations of men from the establishment.

Now what serious thinking, decision making, or formulating foreign policy, reflecting self respect of a Nation, can be expected from such people whose whole attention is concentrated on their promotion and privileges, not on people. The only quality most of such people have, is due to long service, starting from lower cadres, they know how to please the boss, have learnt some clichés of English, speak softly, dress properly and are ever ready to obey. To take a stand on a question of vital national interest, is not their forte, yet the caravan goes on. Definitely there is no dearth of educated, politically oriented, independent thinking people of good family background, in Baluchistan, Sindh and NWFP or Punjab. One wonders, why the government keeps on employing subservient men from services, since the last 40 years. It cannot be denied that people from each province are vitally affected by good or bad foreign policy of the Central government, they must of necessity, be involved and bear the responsibility of making impartial policies inside and outside the country.

The highly expensive and time consuming proximity talks in Geneva since last 8 years on Afghanistan are closed. Since then the Russians have withdrawn their army from Afghanistan. Had Russians stretched their legs, the talks would be going on today, it would have reminded one of the performance of Choudhry Zafarullah Khan then foreign Minister of Pakistan, on Kashmir issue in the United Nations.

He used to make lengthy speeches, sometime to hours at a stretch, mostly before empty chairs, in the United Nations, and this went on for 7 years or so. The results were worse for Pakistan, because as a consequence, three wars were fought with India, and we lost East Pakistan in the bargain. No doubt, our country had to pay through the nose, the

taxpayers money, for endless travelling back and forth by the bureaucrats of the foreign office, and gave a chance to many of them, including the then foreign minister, to get more lucrative appointment in the United Nations and in the country's foreign office, for their friends and relatives, to the exclusion of the people of the smaller provinces. Yet our press of the day, used to lionize Zafarullah Khan's lengthy speeches, as if Kashmir was about to be won, with concurrence of the super powers, only by speech making. Hence, we should learn from this too obvious Chapter of past performance in foreign diplomacy. *Pakistan should start talks directly with Afghanistan, and rid ourselves of the politically dangerous and explosive situation, created by 3 million Afghan refugees, which our country is undergoing since the Afghanistan conflict. We, as a sovereign nation, have to look to our own interests, and not to allow ourselves to be tied to the apron strings of US global policy, in return for 4 billion dollar loans, and some food aid by Western countries. These conflicts, are in the interest of industrial countries, they give little doles, humiliate the donee countries day and night by propaganda, and then sell arms and ammunition to them. They make enormous profits for their countries.*

It is for the Afghans, themselves and their internal matter to decide what kind of government they want; who are we? And by what yardstick to be the arbiter of Afghan conflict, so long as our borders are secure. We must cherish friendship with Afghans, USSR, Iran and India, our immediate neighbors. If we are at peace with them, only then can we claim to be an island of peace, not otherwise, USA has been an old supporter of Pakistan, there is no need to annoy or earn her displeasure, but when it comes to our own interest, Pakistan must refuse to be a client, or a proxy power, as it is considered today, and the US must be told plainly, dollar or no dollar. When we have friendly relations with our neighbors, including super power USSR, we do not need these huge expensive and unnecessary armaments; we can cut our coat according to our cloth, and no more and no less.

Any delay in mending fences with Afghanistan, and having no definite say or policy in the Iran and Iraq War, a policy on military confrontation with India, three times larger than Pakistan, would result, as the conflict grows on borders slipping - then sucking this country in foreign wars, if so, there is no guarantee for this country's physical and political integrity whatever, USA or any other country may keep on promising. *Thus we must avoid another 1971, God forbid, worse. Time is not on our side, strong will and resolution is required to rid us of this quagmire at the earliest. This also seems to be the consensus of the majority of countrymen.*

CONSTITUTION

It is tragic that since the last 40 years every new regime, after abrogating the existing constitution, starts a new experiment with fate and sentiments of the people by saying, that they are starting democracy right from the grass roots, yet it never takes root, because the next man in the saddle, is always ready to uproot it. Thus, this vicious circle goes on and in the process of experimentation, the country keeps on losing, some time a part of it, at others, their democratic rights and self respect within and without.

The constitution of 1973 has been so much mutilated due to introduction of Provincial Constitutional order 1981, otherwise known as PCO, by General Zia-Ul-Haq, then Chief Martial Law Administrator, later on by Constitutional Amendment order 1985 (P.O. 20 of 1985) that it is hardly recognizable, what to say of its proper and smooth workability. It is neither Presidential nor Parliamentary. An attempt has been made to strike a balance between the two different systems. These efforts seems to have failed simply because both the Amendments of 1981 and 1985 referred above were made at the behest of one man, General Mohammad Zia-Ul-Haq, then later were passed by non-party based elected National Assembly, under the shadow of threats of Martial Law.

The distribution of power in the latest document of 1985, now called Constitution of 1973, between the President and the Prime Minister, between The Federal government and the Provincial Government is uneven and is based on the old out-dated concept of strong center which has been repeatedly rejected by people of Pakistan wherever they had opportunity of free and fair general elections. As to contention of some people for revival of 1973 Constitution in its original form, suffice to say that in the first place it was never allowed to come into full play by Bhutto's own Government. Soon after its introduction numerous far-reaching amendments were made in it by that Government.

Besides tremendous political, social and economic changes has taken place in the country since 1973. At present there is a row for decentralization of power, there is a general clamor. In some case, like Hungary, Romania, with violence resulting in a lot of bloodshed for rights of ethnic groups-cultural, political and social. The whole of Eastern Europe and now 15 republics of Soviet Russia are passing through this fast-changing, unexpected phenomenon. No country, including Pakistan can close its eyes from this fast blowing wind of change in the year 1990 A.D.

The right solution to overcome the anomalies of one-man constitution (1985) appears to be either to frame a new constitution with the prior consent and agreement of representatives of all four provinces in both the house without applying the guillotine of 62% majority representation of Punjab in the National Assembly. An alternative, on the same time not ignoring the practical difficulties faced by the present democratically elected PPP Government at center, when no legislation could be passed due to its marginal majority in one house and vast minority in Senate. Thus basis of future constitutional dispensation should be made on the four point formula of MRD 1981, which remained valid till the election of 1988.

This will be the best solution and would be a viable and practical approach for all the provinces. In fact 62% majority province of Punjab through present Chief Minister and Cabinet is clamoring for provincial autonomy most vigorously. The other three provinces have been demanding the same since 1948 onwards. What objectives Federal government can have to refuse the demands of all four provinces on this vital issue of autonomy for all. The sooner it is done it is better for all. In fact, Punjab government has

already taken bold steps by introducing its own provincial bank for benefit of the province and now is in process of setting up its news media by establishing its own T.V. network.

Therefore each Province, including the majority Province of Punjab, must have effective control over its resources, free to frame their own economic policy, equal share in civil services and armed forces, and equal share in Central Government jobs, and be allowed to participate and frame the foreign policy of the country, and the size and strength of the armed forces, which at present is absorbing nearly 70% of the national income, may be reduced according to our needs and geopolitical situation. Provinces must raise their own Militias at their own expense, to maintain law and order in the Province, and in time of emergencies these forces can fight side by side, with the National Army against any aggression by foreign power. The resources thus saved, can be utilized for promotion of education, science and development of road and rails, and other nation building activities, within the Provinces.

To further confirm the questions raised in the book, that how people from smaller provinces are persistently deprived from top civil services, I hereby reproduce a report from *Daily News*, Karachi, dated 17 October 1987, which speaks for itself, as under:-

"The rule Pakistan."

"Lahore, October 17: Pakistan is being ruled by 1151 bureaucrats, among whom 138 belong to the Army. The bureaucrats include 509 from District Management Group (DMG) 619 from Secretariat Group, and 384 from policy services. There are 32 Grade 22 officers of Secretariat Group. Four of them are going to retire this year".

"Besides, 20 officers of Grade 22, have been re-employed after retirement. There are 88 officers of Grade 21, three of whom will retire this year. There are 219 officers of Grade 20, and two of them will retire this year".

"There are 259 officers of Grade 19. The number of officers of DMG is 509, out of whom, 197 officers belong to the Army. Moreover, there are three officer of Grade 22. One of these officers, Safdar Kazmi was suspended on June 3, 1987, owing to his involvement in Shakkargarh Co-operative Society scandal, while another officer, the former Chief Secretary of Punjab, Chaudhry Muhammad Siddique is going to retire next year. All the officers of Grade 22 belong to Punjab".

Similar or worse is the position of the minority Provinces, in foreign office, armed forces, UN, and other Agencies, in semi-government Corporations such as, taken over banking system, government controlled in duties, from Cement to chemicals, Steel, ship-building, taken over newspaper industry called National Press Trust, on this alone in one year 1985, rupees 115 million or so were spent.

Smooth running of a confederation or federation is reflected in full and practical participation of the states or provinces in affairs of the country. Mere Lip service and tall promises in-the long run would not serve the purpose. Thus sense of deprivation grows among the people with passage of time, their demands grow louder and louder with increased bitterness and militancy.

False promises through nice speeches by high ups will be ignored by the people, especially when they see no practical results. By the same token the rulers and politicians lose their credibility, which means the votes of people in the next elections.

The example of Baluchistan will apply to Sindh and N.W.F.P. where outdated formula of transfer of funds between Federation and Provinces is based on population, not as it should be according to social economic and political needs as in all organized democracies such as U.S.A., U.K and other Western Countries. Besides each province should be allocated full control of its resources to meet its requirement. It is a fair solution, yet since last 40 years Central Government remains adamant to the dire need of small provinces.

The same formula on population basis is used for small provinces in Federal services.

The existing formula in the Federal services and corporations for Baluchistan is 3.18% perhaps on 1971 census bases instead of 1981 census, by which its share should be 5.14%. Repeated resolutions in the Provincial Assembly were passed. Latest is reported on 8th February, 1990 in *Daily Dawn*, Karachi and by statements in the Assembly that on conservative estimate there should be 10,000 posts as share of Baluchistan in Federal services and corporations, while in practice there are only a few people from Baluchistan. The same practice is applied to Sindh and N.W.F.P, perhaps not so harshly as in case of Baluchistan because both the provinces have proper enlightened representation in Federal Government thus have their strong political lobbies.

Latest invention of bureaucracy is called "placement bureau". Now press is full of statements from the public, politicians, included, that about 35,000 or more posts were filled by this ingenious method by Federal Government. Ignoring the Federal Public Service Commission and the Provincial Public Service Commission which are national institution.

These Commission should be strengthened instead of being circumvented.

Would men of public opinion, politicians, intellectuals, seekers of strong centre and unitary government, and of a United Pakistan based on Islamic brotherhood, from Punjab, and other beneficiaries, raise their voice to remedy these wrongs? It is doubtful because this group of bureaucrats have entrenched themselves in power so much that

unless a basic effective change in government policy, of recruitment and retirement, are made and faithfully implemented, only then perhaps the country will breathe a sigh of relief. Mere humanitarian, grounds of justice, Islamic brotherhood neither lengthy speeches of such people, especially after retirement, preaching equality, fraternity and brotherhood when they become mellow and God-fearing for a short while would not do. Soon after they manage to get another job, mostly even after superannuation, they show their real face over again to the detriment of the deprived. God help us.

These facts cannot be denied that Pakistan came into existence through democratic process by willing and voluntary votes of Muslims of India, mainly from the regions where the Muslims were in majority that is of former East Pakistan and the present federating units of Sindh, Baluchistan, Punjab and N.W.F.P. It was Mr. Jinnah's unflinching faith, his hard work and his immense credibility among Muslims and not army action, that today we as citizens of the country are a free nation.

Therefore its future existence simply depends upon strengthening democratic norms and principles, upon rule of law, justice for all and popularly elected government in the Centre and in the provinces. Dictatorship, however benevolent Civil or Military cannot be an answer, specially based on our past experiences from Ghulam Mohammad to General Mohammad Zia-UI-Haq because, they miserably failed and in turn were rejected by people of Pakistan whenever they got the opportunity of removing them, by out voting them.

However, dictatorship and Martial Law, proved to be of universal harm not only to progress and full establishment of democracy but to the very unity of its people as a nation. Hence the present ethnic, linguistic, provincial friction and uprising of hatred among the entire Pakistani society. However taking an optimistic view of the future these are temporary setbacks which visit every country in its earlier stages. Our next door neighbor India is not free from these phenomena except that of unfortunate visitation of repeated Military rule and Civil dictatorship of the bureaucrats. According to need and requirements of the people many of provincial boundaries of former Indian States or provinces since then has been changed either for administrative or linguistic reasons.

But all through this political process by representative assemblies keeping along in view that the will of the people and not a party or a person or a general is supreme and that is the success to democracy.

It must be noted that it was the will of the people expressing its disagreement and disappointment against Zia's dictatorship in face of unimaginable cruelty. Even civil servants and journalists were not spared what to say of political activities of different parties long prison sentences, loss of jobs - and on the other hand enriching the yes

men, and flatterers - which forced him to induct civilian rule through non-party elections in 1985.

Credit must go to the Movement for Restoration of Democracy and its component parties including Peoples Party in 1981 for this concentrated effort. One must give credit to Punjab as majority of the M.R.D members from different parties were from the Punjab, resulted finally in holding of general elections in the Centre and in the Provinces after a lapse of 10 long years of one man rule.

It would be unfair, not to acknowledge the wisdom, cool headedness and Statesmanship of Mr. Ghulam Ishaq Khan who after sudden death of General Zia-Ul-Haq on 17-8-1988 in an air crash took over as caretaker President under the Constitution, first he managed to hold fair and free elections, and then against heavy pressure from many sides refused to deviate from strict constitutional norms and handed over power to Ms. Benazir Bhutto as Prime Minister because her party had thin majority seats in the Centre. As everybody knows there was sufficient scope in the 1985 Constitution for the President to nominate any other person as Prime Minister but he avoided all such methods and clearly steered the course.

Now it is neither customary nor possible to make fair assessment of the performance of both the Peoples Party which is in power in the centre nor of the opposition parties, within short life of one year's rule, while it has to serve its full term of 4 years more. Only then its failure and achievements can be weighed with fairness and detachment.

"Yet in the first year of democratic freedom after ten years of darkness, people held high hopes, that some basic changes in economic, social and political would be initiated by Peoples Government, however it seems that due to its inexperience and unexpected and sudden induction in office, confused them. One hears of dissension and disagreement on all fronts and with many established institutions by the Government functionaries and of course with leadership in the opposition. No doubt political prisoners have been released and press has been given an unprecedented freedom, even to the extent of playing the game of partisanship and not sparing personal and uncalled for attacks on those in power. But one can ignore it on the grounds that it is giving out its pent up steam and accumulated feelings of the last 10 years when the press with few exceptions used to incessantly praise the ruling junta.

In the long run I hope, they will come back to a balanced and national outlook about the affairs of the country. Student unions were revived by the present Government a good and healthy gesture. It will take some-time for the students to lay down their arms and shallow slogans and take up books and learn, as all the hopes of the nation depends upon the future generation of the country.

Having small majority in the centre the present Government as per recent events as reported has entered into an unending war of words with the opposition leaders the standard of the statements on both sides one must say is very low, personal and confusing for the general public. It failed to give sufficient ray of hope and guidance for the future, this must be stopped. By coming to some political understanding between them so that democratic process should be allowed to prosper otherwise there will be chaos and of a worse kind this time. Martial law is no remedy not only based on past experience but the attention of the army in such a situation, is diverted from its main duty of safeguarding the frontiers of the country, towards bickering of the civilian Government and ultimate involvement, always followed with the unfortunate consequences.

POLITICIANS

A word for the politicians-As a class, they have been abused by every Martial Law regime, and by a knowledgeable section of public, and by themselves as well. To some extent there is some justification. After Quaid-e-Azam Muhammad Ali Jinnah, the country continues to suffer from crisis of leadership. Instead of going the long and arduous way of molding public opinion, giving them guidance, and when in power, serving them according to individual policies, party, politicians have made a tradition of finding shortcuts, taught by bureaucrats from Ghulam Muhammad downwards, making compromises and patching up with whomsoever is in power and bargaining for ministership, etc., barring a few exceptions. The political parties suffer from petty differences, parochialism and religious squabbles, instead of organizing, helping and removing the difficulties faced by the public in general.

This being tradition, why the military or anybody else in power, should not use their petty differences and bargain with them for ministership, for other privileges, however, miserable and powerless the job may be. Hence, if the general public by its process of experience, is losing or have lost confidence in the politicians, of all hues and colors, barring a few persons here and there, nobody is to be blamed, except the politicians themselves. No change in Government can come simply by wishing by useless speeches, and by eating unending dinners.

Very recently construction of Kala Bagh Dam by the Government has become highly controversial, pregnant with what one may say highly explosive political undertones between small Provinces of NWFP, Sindh and Baluchistan on one side and Province of Punjab on the other side. Former two provinces are comparatively more vocal in their agitation in public and press due to apprehension of immediate damage to their economy. As usual people, and present Government of Baluchistan are oblivious to the fact that in case River Indus gets no or less water, how can Baluchistan get any water for irrigation. The result would be that not only Pat Feeder Canal will dry out, but no further scheme for irrigating the vast and fertile lands of Nasirabad District, can be

implemented, hence about 5 lac acres already under cultivation, will be turned into a vast desert.

As Chief Justice of Baluchistan High Court, I was official member of the Distribution of Indus Water Commission, along with other Provincial Chief Justices, headed by the then Chief Justice of Pakistan, Sheikh Anwarul Haq. Many meetings were held with the assistance of experts and lawyers representing each province, between 1979-80. As construction of Kala Bagh Dam was not among the terms of reference by the Government, I had raised objection in last meeting when Chairman brought the subject for discussion. The result was, the Chief Justice of Pakistan thereafter did not summon any meeting of the Commission until provisional Constitution Order, 1981 of 24 March, was promulgated. As a result, I remained no more a Member of the Commission.

Later on from newspaper reports, the Indus Water Commission was revived and meetings held by the new Chief justices, but its decision if any had not been published and still remains a secret with the Government.

Be that as it may, I was and am still of the opinion that the most important question of distribution of water of River Indus between the four provinces is political issue, and has to be decided by the representative governments at Centre as well as in the Provinces. The issue of Kala Bagh Dam in my view is no less important than a political settlement with Afghanistan, and sending back 3 million or so Afghan refugees back to their country. If this issue is not attended to with all wisdom and seriousness by the people of Pakistan, there would result serious consequences which may endanger the very existence and unity of the country. The public agitation and controversy concerning construction of Kala Bagh Dam, as revealed in the press, are too obvious for all right-thinking Pakistanis to ignore.

Arguments and counter-arguments give and take are a part of democracy, none should reach to a point of no return be it the ruling party or the opposition. It is the right of the opposition to use all manners of persuasion through political platform with democratic norms to replace and remove any incompetent Government - the present one included, as a political norm and practice. But the game must be played within norms well recognized all over the world.

Partisan approach to national problems by a ruling party encourages, disillusionment, resulting injustices and later on unchecked corruption not only in shape of money but nepotism, provincial and linguistic bases as well which should at all costs be avoided because there is always a tomorrow.

The credibility among the masses of a leader or a political party is its greatest asset. The credibility can only be built by implementing the *policies of the statements made* for all to see. Mere condemning corruption, inefficiency, without taking practical steps, pin

pointing and then eradicating the common national maladies would not break much ice with the masses which are now getting more vigilant, watchful and politically awake.

They want accountability not only of the past regimes but of the present one as well individually or collectively.

Unfortunately so far in spite of making tall claims to offer accountability of the previous regime and themselves they failed in succession to offer any tangible result unless that is done the credibility if any will continue to decline.

Recent unfortunate horse trading of MNA's or among MNA's by both sides the ruling party and the opposition as reported in the press is a slur not only on those who were practically involved but it is a setback to democratic process and misuse of confidence of the general voters in the country. Over and above it gives a bad name to the country abroad.

The future of the country in sum and substance lies in continuance of democratic process and changes of Governments by holding repeated general elections according to the wishes of the people through their voters and not any short cuts as happened in the past.

The corrupt, the inefficient, the political sitters on the fence, the rank flatterers will be eliminated in due course of time, from the scene they will be rejected and rebuffed by the people if democracy and its process continues unabated and the people have the will and patience on both sides of the fence to allow it to grow.

Thus slowly dawn of a new era will be ushered in when we all can live as responsible and respected citizens in harmony without fear, and suspicion or hatred of each other as it is at the present.

APPENDICES

In October, 1970, I was appointed not only first in all Pakistan but also first High Court Judge from Baluchistan in the new High Court of Sindh and Baluchistan after break up of One Unit at Karachi. After serving nearly six years as such I was appointed first Chief Justice of new Baluchistan High Court at Quetta in December, 1976. I organized from the scratch the new High Court of Baluchistan.

On 6 July, 1977 along with other Chief Justices of other provinces I was appointed Governor of Baluchistan and remained at the post till September, 1978, then went back like other Governors to parent post as Chief Justice of Baluchistan.

Due to full court judgment of Baluchistan High Court the CMLA/President passed arbitrary order known as C.M.L.A Order No. 1 (1981) discussed fully in some other part of this book; Like some other judges was prematurely removed on 25th March, 1981 from constitutionally guaranteed post of Chief Justice under which I was to retire in 1988. Copy of official notification of CMLA's Order 1981 appended marked as Appendix A.

Again in 1988 when I was convalescing after an operation in Surgeon Rahim's Clinic (O.M.I), Karachi, I was repeatedly requested through phone calls to take over as caretaker Chief Minister of Baluchistan as a National duty. This request was made to tie over as political crises arose there due to dissolution of Provincial Assembly by order of Governor Musa Khan on advice of Chief Minister Mr. Zafar Ullah Jamali, until dispute was resolved by the High Court where the warring parties were contesting constitutionally Governor's action.

Very reluctantly I accepted this temporary assignment, infact Governor Musa came over to Karachi and administered oath of office to me in Karachi hospital. (Order of my appointment by the Governor-marked Appendix B). I accepted the appointment with a clear understanding in my first press conference at Quetta that I will follow strictly the Judgment of the Court. In case the Assembly is restored I will resign, if otherwise I will hold Provincial election and then resign without contesting myself any seat in the Provincial Assembly.

On 23 January, 1989 Baluchistan High Court gave its judgment and restored the Provincial Assembly on the very day I offered my resignation as promised earlier to the Provincial Governor.

Copy of my resignation to the Governor and the letter of Governor, Baluchistan addressed to me and my letter to the President of Pakistan are attached as marked Appendices C, D, E they speak for themselves.

A similar letter of information was sent to the Prime Minister as well.

Lastly a copy of a letter to General Zia-Ul-Haq, dated October 18th 1981 year 1981 is marked Appendix F for the interest of readers which will explain my feelings about the grave political and Constitutional situation the country was going through.

APPENDIX 'A'

Government of Pakistan
Ministry of Law and Parliamentary Affairs
(Law Division)

Islamabad, the 7th April, 1981

NOTIFICATION

NQ. F. 12 (3)/81-All(B)- In pursuance of Article 17 of the Provisional Constitution Order, 1981 (C.M.L.A. Order No. 1 of 1981), the following persons do not continue to hold offices of Chief Justice and Judge of the High Court of Baluchistan, Quetta, with effect from the 25th March, 1981, namely:-

1. Mr. Justice Mir Khuda Bakhsh Marri, Chief Justice.
2. Mr. Justice M. A. Rashid, Judge.

ABDUL JALIL SIDDIQI
Section Officer

The Manager,
Printing Corporation of Pakistan Press,
Islamabad for favor of publication in
the Gazette of Pakistan Extraordinary,
Part-III.

No. F. 12(3)/81-AII(B)
Copy forwarded to:-

Islamabad, the 7th April, 1981

1. The CMLA's Sect., Rawalpindi.
2. The Secretary to the Governor, Baluchistan, Quetta.
3. The Chief Secretary to the Government of Baluchistan, Quetta.
4. Pre Registrar, High Court of Baluchistan, Quetta (with two spare copies for the persons concerned).
5. The Accountant-General, Baluchistan, Quetta.

ABDUL JALIL SIDDIQI
Section Officer

APPENDIX 'B'

ORDER

In exercise of the powers conferred by Clause (3) of Article 105 of the Constitution of Islamic Republic of Pakistan, 1973, and with the prior approval of the President of Pakistan, I, General (Retd) Muhammad Musa, Governor of Baluchistan hereby appoint Mr. Justice (Retd) Khuda Bakhsh Marri as Chief Minister of Baluchistan to head the care-taker Cabinet with immediate effect.

GEN. (RETD) MUHAMMAD MUSA HJ.
Governor Baluchistan
22-12-1988.

APPENDIX 'C'

CHIEF MINISTER BALUCHISTAN

Dear Sir,

In deference to the judgment of Baluchistan High Court dated 23-01-1989, restoring the Provincial Assembly of Baluchistan, I hereby tender my resignation and also my council of Ministers.

Thanking you,

JUSTICE (R) MIR KHUDA BAKHSH MARRI
Caretaker Chief Minister

23-01-1989

APPENDIX 'D'

Governor, Baluchistan.

D.O. NO. 0021/PS/89
GOVERNOR'S HOUSE
QUETTA

General (Retd) Mohammad Musa

24 January, 1989

My dear Justice Mir Khuda Bakhsh Marri,

I am in receipt of your letter of resignation along with your council of Ministers. Your decision to resign is strictly in accordance with democratic traditions. I deeply appreciate your whole hearted support and the hard work that you and your Ministers put in the running of the Provincial Administration so efficiently. In the interest of our people I would like you to continue to perform the responsibilities entrusted to you and your Cabinet until your successor enters upon the office of Chief Minister.

With warm regards.

Yours Sincerely
MOHAMMAD MUSA

Justice (Retd) Mir Khuda Bakhsh Marri,
Caretaker Chief Minister, Baluchistan.

APPENDIX 'E'

Quetta

25th January, 1989.

Dear Mr. President, Khan Ghulam Ishaq Khan,

As you are aware I tendered my resignation on 23rd January, 1989 the date on which the Judgment of High Court of Baluchistan was announced. The Provincial Governor has requested me to continue as Caretaker Chief Minister of the Province until my successor enters upon the office as Chief Minister.

My tendering resignation of the office of the Caretaker Chief Minister of Baluchistan was to strengthen the rule of law and help and build up process of hard won democracy after 11 years.

I was only able to do all this with your support.

A copy of my resignation along with a copy of letter dated 24 January, 1989 from the Governor of Baluchistan is enclosed for your kind information.

With profound regards,

Yours sincerely,
JUSTICE (R) MIR KHUDA BAKHSH MARRI

Mr. Ghulam Ishaq Khan,
President,
Islamic Republic of Pakistan,
The Presidency,
RAWALPINDI.

APPENDIX 'F'

Quetta,
October, 18th, 1981.
2-Jail Road Quetta.

Your Excellency
General Zia-Ul-Haq
President of Pakistan
Rawalpindi.

On the basis of my little services to the country in troubled times on more than one occasion as Chief Justice and as Acting Governor of Baluchistan and the acquaintance with your good self I take the liberty to address the following few lines for your personal consideration.

As a former Judge I suffer from many handicaps because our Prophet Muhammad (Peace be upon Him) has said that "whoever is appointed as Kazee suffers from the same torture with an animal whoso throat is mangled, instead of being cut by a sharp knife.

1. Sir without going into the legalities or otherwise I may point out that one of the fundamental injunctions of Holy Quran is that "No body shall be condemned unheard." This principle has now become a cornerstone of judiciary and social justice in all the civilized countries, including our own and was enshrined in all past Constitutions. This salutary principle was meant to protect the legitimate rights of citizens as well as the State, irrespective of political changes, and dictates of day to day policies of a particular Government at any given time, thus through judiciary sustained a link and channel of dialogue between the State and the public at large helping to run a smooth and organized administration.

2. If I recall correctly during your visit to Quetta, I drew your Attention in course of general talk that, only God's chair is strong and inviolable, and my chair is the weakest, and if for some reason I was not wanted I may be Informed before hand, I will vacate the same knowing its weakness in the present constitutional set up, but unfortunately I was denied this privilege, thus condemned unheard.

3. As far my performance of six years as Judge of Sindh and Baluchistan High Court, four years as Chief Justice of Baluchistan High Court and over a year as Acting Governor of the Province, I have no regrets, whatsoever nor owe any apology because I

followed strictly dictates of my conscious and reasonableness what I considered is in the Interest of country and brother citizens.

4. Sir, day in and day out one government functionaries mainly the ministers deliver speeches which find prominent place in newspapers that country to facing the most difficult times in its short history of 33 years, and a call is given for unity, integrity and so on. This may be so, as we are surrounded by many difficulties of enormous dimensions due to internal and external factors, and I remember when there was a sudden political change in a neighboring country I draw your attention immediately to that, how far we as a nation succeeded and will succeed in staving off the growing dangers, this is for history to tell.

5. One thing is however sure that verbose speeches and that also by professional speech makers who are past masters of "running with hare and hunting with hounds" is going to have no effect on the public at large as their changing of quick loyalties in the past is writ large on their faces, besides word's of hierocracy do not touch the hearts of the people. Thus instead of helping to unite the people, they get more divided, hence the very purpose is not served.

Remedy if any, naturally is for you as President to find.

6. Whenever there is power even at the lower range throughout the history, a bunch of flatters, psychopaths faceless self seekers gradually succeed to surround it at the cost of general public and country, because truth to them has no meaning, day and night they try to impress the power that be, sometimes by their borrowed knowledge on which they are denied by God to act or others by soft and good manners and cringing obedience, but the moment bad times come they desert the present masters as they did with their past ones. Because such people are not answerable to people they simply owe allegiance to none and say openly that they are living on their wits. To avoid such a phenomenon, one has to look for guidance to Quran and Hadees, he will not be disappointed.

7. Lastly, I may point out to the very unfortunate tendency on the part of Government specially in smaller Provinces not in size like Baluchistan that with every change of Government, its citizens are relegated overnight to second, third even 4th class citizens, and they have to prove their loyalty or patriotism before these. I am sorry to say who do not know the very meaning of the word. When in this part we were fighting with the foreign rule the British and later on supporting creation of Pakistan, we were patriotic and when Pakistan is achieved we have to prove our bonafides before every bureaucrat Provincial or Central. Sir, it does not leave a good taste in the mouth. In spite of my services to the country in the past I am no exception to this attitude. For instance my passport for renewal was withheld for more than two months as instructions from Islamabad were not forthcoming, although I was advised by my

doctor to go for treatment in August. Secondly the administration is wasting taxpayers' money on planting intelligence and C.I.D. personnel to watch me. How on earth yesterday I held the posts of highest confidence in the Province and today I am turned to a suspect, I wonder of what? All the same Sir, it gives pain.


8. Would Sir it be wrong to think that I am relegated to third or fourth class citizen but one may ask for what? Could it be personal vendetta of somebody whom I even do not know? In any case in Islam there is no vendetta, petty or otherwise because Islam essentially is a religion of forgiveness. In the end let me quote a couplet of Khwaja Hafiz Sherazi which is relevant in the circumstances.

گناہ گرچہ نبود، اختیار ما حافظ
تو در طریق ادب کوش و گناہ من است

Yours very sincerely,
(Mir Khuda Bakhsh Marri)
B.A. L.L.B. Bar At Law,
former Judge of High Court of Sindh and Baluchistan.
Chief Justice of High Court of Baluchistan and Acting Governor of Baluchistan.

H.E. General Muhammad Zia-ul-Haq,
President of Pakistan and the Chief Martial Law Administrator.
RAWALPINDI.

N.B.: Our late General Sahib was not courteous enough to send a reply.

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4. SHIPPER

Not Negotiable

"Are we not inviting a revolution by the masses as it happened most unexpectedly in Eastern Europe and now in the U.S.S.R. Revolutions in Afghanistan, Iran and in other South Asian countries in the recent past are continuing ones so would be their effects on Pakistan....."

A JUDGE MAY SPEAK

"Hence, if the general public by its process of experience, is losing or have lost confidence in the politicians, of all hues and colours, barring a few persons here and there, nobody is to be blamed, except the politicians themselves. No change in Government can come simply by wishing by useless speeches, and by eating unending dinners....."

"One may ask, Pakistan, which was made by free choice and will of its people, living in different Provinces, was made for the day that Pathan and Baluch communities should kill each other in Baluchistan, Muhajir, Sindhi, Punjabi and Pathan wrecklessly should murder each other in Karachi or Hyderabad, or each Baluch or Sindhi citizen be treated as a dacoit, and be ruthlessly suppressed and killed? Must Shia fight with Sunni, and shamelessly kill each other with regularity every year? Who is doing all this? One may ask, why did these things not happen during the first years of Pakistan's coming into being? Is it not high time for the present rulers of every hues and colours to off their hands from the God loving and poor people of Pakistan....."
