Roots of Dictatorship in Pakistan, 1954-1971

Zaharul Islam Choudhury

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Extra-Constitutional Action in Pakistan

ZAHARUL ISLAM CHOUDHURY

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Abstract

The purpose of this work has been to consider the three major constitutional breakdowns which took place in Pakistan, *viz*., the dissolution of the first Constituent Assembly by the Governor-General in October, 1954, the abrogation of the Constitution of 1956 and declaration of martial law by the President in October, 1958, and the abrogation of the Constitution of 1962 and declaration of martial law by the Commander-in-Chief of the Army in March, 1969. In order to put them in proper perspective a general survey of the constitutional development in Pakistan since independence till about the middle of 1971 had to be made. But the main focus of the deliberations, however, has been on the background of the actions taken on those three occasions and the consequent constitutional and legal implications in the subsequent development.

In the first chapter a general introduction describes the constitutional position of Pakistan at independence, followed, in Chapter II, by a discussion on the composition and function of the first Constituent Assembly and its endeavor to draft a constitution for the country. Chapter III deals with the dissolution of the Assembly by the Governor-General and his attempt to promulgate a constitution by decree, and the Courts' views of the Governor-General's action. In Chapter IV an analysis of the crisis has been made with a view to identifying the real grounds that led the Governor-General to act, as he acted.

The circumstances preceding the abrogation of the Constitution of 1956 and martial law in 1958 have been discussed in Chapter V, followed, in Chapter VI, by consideration of the functioning of the martial law administration and the Courts' view of the situation. Chapter VII deals with a reflection on the President's action and the extent of his responsibility for the breakdown. The statutory and constitutional progress made during the martial law period (1958-1962) have been dealt with in Chapter VIII.

The promulgation and working of the 1962 Constitution have been discussed in Chapter IX, while Chapter X discusses the reaction and political movement against that Constitution. Chapter XI deals with the abrogation of the Constitution and the declaration of martial law in 1969, together with the measures taken by the military regime to restore constitutional rule.

In Chapter XII, cases arising out of the similar situations in other Commonwealth countries as decided by their Courts, where leading Pakistani cases were cited, have been discussed. In the concluding chapter justification of, and objections to, the actions have been considered, and the prospect of democracy and constitutional rule, in the conditions prevailing before the India-Pakistan war December, 19710 has been generally discussed.

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Zaharul Islam Choudhury

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Abbreviations

A.C.	Appeal Cases.
All E.R.	All England Reports.
A.I.R.	All India Reporter.
Art.	Article.
C.C.	Current Cases (Ghana).
C.J.	Chief Justice.
C.L.R.	Cyprus Law Reports.
C.M.L.A.	Chief Martial Law Administrator.
C.O.P.	Combined Opposition Parties.
Cranch.	Cranch Reports (U.S.).
Cr.P.C.	Criminal Procedure Code.
D.A.C.	Democratic Action Committee.
E.A.	East African Law Reports.
E.B.D.O.	Elective Bodies (Disqualification) Order.
F.C.	Federal Court.
G.G.O.	Governor-General's Order.
Howard.	Howard Reports (U.S.).
I.A.	Indian Appeals (P.C.).
I.R.	Irish Reports.
Knapp.	Knapp Reports
L.C.F.O.	Laws (Continuance in force) Order.
M.L.O.	Martial Law Order.
M.L.R.	Martial Law Regulation.
N.D.F.	National Democratic Front.
N.W.F.P.	North West Frontier Province.
P.C.	Privy Council.
P.D.M.	Pakistan Democratic Movement.
P.L.D.	All-Pakistan Legal Decisions.
P.R.O.D.A.	Public and Representative Offices (Disqualification) Act.
R.L.R.	Rhodesian Law Reports.
S.A.	South African Law Reports.
Sec.	Section.
S.C.	Supreme Court.
Wall., Wallace.	Wallace Reports (U.S.)

Chapter I

Introduction

For the last twenty-four years of its existence Pakistan has been in the search of a stable and viable constitution. The country's leaders have so far failed to find an acceptable foundation on which a united nation can be built. The pre-independence hopes that, once independence was achieved everything would go smoothly have been shattered by experience. Since its inception the country has been faced with one crisis after another, enjoying scarcely a moment's freedom from internal or external tensions Leaving aside the impact of outside events, Pakistan has been constantly suffering internally from the lack of agreement among its leaders on the basic political and constitutional arrangement of the State.

On August 15, 1947 many of the inhabitants of the Indian sub-continent felt that now that their destiny was in their own hands they could shape it according to their hearts' desire, others, destined ever to be ruled and never to rule, accepted the withdrawal of the imperial power with comparative indifference, and still others, finding themselves on the wrong side of the new frontiers, faced a doubtful future and, in many cases, death and disaster. But on independence day India's prospects were brighter than Pakistan's, though the latter had not only escaped imperial bondage but also the prospect of Hindu domination, and Pakistanis generally looked forward to creating a country in which Muslims could live in accordance with the precepts laid down in the Koran and the Sunna. It was only too obvious that this was to be no easy task. The persona of British India was regarded as having survived in the new India, while Pakistan was a new creation. India retained the capital and most of the instrumentalities; Pakistan had to create its own instrumentalities and it had hardly come into existence before it was confronted with the problems created by the influx of refugees from India. That Pakistan survived in the initial period in the face of massive problems was regarded by many as a miracle.

Pakistan, due to wholesale migration of non-Muslim civil servants and other professional men to India, inherited only a few members of the old civil service. The government departments had to be staffed with less experienced indigenous officials and a few British civil servants who agreed to remain and serve in the new dominion. The all-out dislocation following partition put a tremendous strain on the whole governmental machinery, resulting in inevitable delay and, at times, inappropriate action on important matters. In the early days of its existence, Pakistan lost the ablest of its politicians. Its activities, at independence, were largely dominated by Jinnah, whose preoccupation with the refugee problem probably accelerated his death in September,

1948. Liaquat Ali Khan, the Prime Minister, on whom the mantle of leadership fell after Jinnah, was assassinated in October, 1951. After Liaquat Ali Khan there emerged no-one with the head and heart of a national leader to lead the people in building up the new State. The gap in the leadership, following the deaths of Jinnah and Liaquat Ali Khan, has never been filled, and Pakistan has suffered from a lack of sound political leadership more than anything else.

The imperial power before its departure from the Indian sub-continent, had made provisions to cover the period of transition before the transfer was complete. The Indian Independence Act, 1947 and the Government of India Act, 1935, constituted a provisional constitution and each of the new dominions had a Constituent Assembly, entrusted with the task of creating a new constitution. The Constituent Assembly of India had drafted a new constitution in just over two years. This constitution, which came into force on January 26, 1950, put an end to all political ties with the United Kingdom and created the instrumentalities necessary for the government of the Indian republic. In one sense, however, the task was incomplete, for, in 1956, the states boundaries were redrawn and consequential constitutional amendment had to be made. Other minor amendments also had to be adopted, but India found no difficulty in adapting the main provisions of the Government of India Act, 1935, to the purposes of the republic. The main differences between the Indian Constitution of 1949 and the Government of India Act, 1935 are the abolition of all provisions providing for external control and the insertion of a bill of rights, enforceable by the Courts. Indian politics had been dominated by Jawaharlal Nehru, just as Jinnah had dominated Pakistan in its early days, but Nehru outlasted Jinnah and he had more competent lieutenants. It was India's good fortune that Nehru lived long enough after independence to establish a democratic pattern in Indian politics, based on popular support. Though India has had its difficulties, the Constitution has worked and there is not and has not been any political movement to abolish or seriously alter it.

Pakistan has had more difficulties. In particular it has a unique geographical difficulty, which poses the question whether it can be a viable political unit. It has two languages; India has far more, but they do not create the problems which arise in Pakistan. Pakistan had, in the British period, the same political experience as India under the Constitution Acts of 1919 and 1935, but it has not been able to adapt the Act of 1935 to suit its needs in the way India has done. In the course of seven years since 1940, when the Muslim League first put forward its Specific demand for a separate state for the Muslims as a solution to the constitutional dispute in British India, till the time Pakistan was in fact achieved in 1947, the Muslim leaders had little scope to think about the constitutional set up of the future state. Their minds did not see beyond the political demand for a Muslim state. Thus, when the State actually came into existence, all sorts of political and constitutional issues appeared which had to be sorted out. There was, therefore, a delay of over seven years before any constitution was drafted, but its enactment was prevented by the dismissal of the first Constituent Assembly in October,

1954. A second Assembly in 1956 enacted a Constitution, not fundamentally different from the draft constitution of the first Assembly. Both resembled the Indian Constitution of 1949, except that they purported to create an Islamic State.

But contrary to general expectation, the politicians were unable to work the Constitution which they had adopted. It is arguable that the politicians, who were entrusted to work the Constitution of 1956, were lacking in ability and merit. The Constitution did not give universal satisfaction. While East Pakistan complained of too much centralization of power, maintaining that provincial autonomy had no significant meaning, the politicians of West Pakistan, other than those of the Punjab, complained that the territories they represented were not fairly treated. However, without attempting to handle these problems within the constitutional framework, the President abrogated the Constitution itself in October, 1958.

Before that, Pakistan had suffered from strong men, who had acted on the assumption that might was right. Governors-General Ghulam Muhammad and Iskander Mirza (later President under the 1956 Constitution) exercised power without a semblance of regard for democratic practices. Their actions were designed to establish personal rule, and the Courts had been obliged to keep the ship of the State on an even keel by finding excuses for some of their unconstitutional activities and refusing to countenance others. After the abrogation of the Constitution of 1956 in October, 1958 the country had been governed by a "martial law" regime for nearly four years; then came an authoritarian Constitution in 1962, which was brought to an end by widespread refusal of the people of Pakistan to be governed by it. Since March, 1969 the country has again been put under martial law, which became inevitable after the total collapse of the then existing political system. The last thirteen years have been a struggle for political power between the landed proprietors and officers of the armed forces on the one hand and the political intelligentsia on the other. It seems certain now that any future constitution of Pakistan will provide for Westminster type of government and a judicially enforceable bill of rights.

But there are many questions still unresolved, which include the crucial question of the extent of autonomy to be granted to the units in the future arrangement.

It is impossible for a Pakistani to regard without dismay the existing political scene in Pakistan and this thesis has been written with a view to throwing light on some of the problems, by going over the constitutional history and searching for the causes of errors. Pakistan is not the only country to have attained freedom since the end of Hitler's war, which has not been able to work the constitution left behind by the imperial power or a constitution based on it. Strong men have seized power elsewhere and if Pakistan can claim no expertise in constitution-making, its courts have found a way to exert some control over the strong men, while avoiding direct conflict with them. The courts in other countries have been glad to follow the precedent established

by Pakistan courts. The relevant cases in Pakistan and in other countries have been analyzed and discussed.

If political errors have been pointed out and discussed, it must be conceded that it has not proved possible to suggest solutions for many of the outstanding problems. But a thesis like this can only provide material for thought on these matters. The solutions, it is submitted, must be sought through mutual persuasion and agreement among the leaders of the country on basic issues.

It may be noted that the work having been completed before the *de facto* emergence of the nation of Bangladesh, all narratives, observations and comments made in this thesis are in relation to the State of Pakistan as it existed before the surrender of the Pakistan army in East Pakistan in December, 1971. But in course of the examination and analysis of the major constitutional break-downs which occurred during the short history of the nation an attempt has been made to point to the tension on the basis of regional demands that had been ever present in Pakistan. It was the disagreement over the question of regional autonomy among the military rulers and West Pakistani leaders on the one hand and East Pakistani leaders on the other that led to the army action in East Pakistan in March, 1971, which ultimately resulted in the separation of the two wings. Pakistani leaders failed to find an acceptable constitutional formula which would ensure a strong central government after satisfying the demands of the regions.

Chapter II

The First Constituent Assembly

Plans and composition of the Assembly

The Constituent Assembly of Pakistan was established primarily under the provisions of the Mountbatten Plan.[2] But the Assembly had its origin for the purpose of its composition and functions to another famous document known as the Cabinet Mission Plan.[3] The Cabinet Mission, while rejecting the Muslim League demand for "a separate and fully independent State of Pakistan", also disapproved of the Congress scheme for a united India.[4] The Mission in its plan recommended an independent 'Union of India, embracing both British India and the States' with a single central government administering allotted subjects but the Provinces were to be "free to form groups with executives and legislatures". Indicating the basic form for the future constitution, the Plan provided for the establishment of the Union Constituent Assembly as the constitution-making machine, the members of which were also entrusted with the framing of constitutions for the Provinces and for the Groups or Sections. The Union Constituent Assembly was to be composed of members elected indirectly by the existing Provincial Assemblies, each province having a quota of members proportional to its total population, roughly in the ratio of one to a million. The total provincial seats were to be divided between the main communities, according to their numbers. The Mission was aware of the desirability of direct elections, based on adult franchise, for the Constituent Assembly. But the method was discarded as it "would lead to a wholly unacceptable delay in the formulation of the new constitution."[5] In their eagerness to expedite the process of transfer of power in British India, the members of the Delegation recommended the less satisfactory method of indirect representation for the Constituent Assembly.

The All-India Muslim League Council, "in the hope that it would ultimately result in the establishment of a complete sovereign Pakistan", accepted the Cabinet Mission Plan on 6 June 1946.[6] The Congress Working Committee also accepted the scheme on 26 June. But Pandit Nehru, the new President of the Congress Party, in a press conference in

[2] The Plan for transferring power in British India announced on 3 June 1947 by the Viceroy, Lord Mountbatten.

[3] Statement by the Cabinet Mission and the Viceroy, 16 May 1946 See A. C. Banerjee: *The Making of the Indian Constitution* pp. 169-171. The Cabinet Mission, announced by the Secretary of State for India in the House of Lords on 19 February 1946 was to consist of the Secretary of State for India, Lord Pethick Lawrence, the President of the Board of Trade, Sir Stafford Cripps and the First Lord of the Admiralty, Mr. A.V. Alexander.

[4] Ibid. Para 13.

[5] Ibid. Para 18.

[6] A. C. Banerjee, *The Making of the Indian Constitution* pp. 175-76

Bombay on 10 July 1946, explained the basis of Congress acceptance in which he stressed the 'sovereign status' of the Constituent Assembly, expressed doubts about 'grouping' and forecasted increased powers for the centre.[7] Nehru's interpretation of the Plan resulted in a sharp and adverse reaction in Muslim League circles. The leaders were particularly worried about the 'sovereign' status of the Constituent Assembly and what Nehru said about the 'grouping'. They held that the sovereign powers of the Assembly was to be exercised subject to the basic-form upon which the whole scheme stood. Mohammad Ali Jinnah, commenting on Nehru's statement, said "Pandit Nehru's interpretation of the Congress acceptance of the Cabinet Mission's proposal of 16 May is a complete repudiation of the basic form, upon which the long-term scheme rests and all its fundamentals and terms and obligations and rights of parties accepting the scheme."[8] It may be noted that the Muslim League interpretation was in line with the British Government's statement, which on 6 December 1946, confirmed the intentions, expressed in the statement of the Cabinet Mission, that the basic framework would have to be accepted and stressed the need for an agreed procedure for the functions of the Constituent Assembly.[9]

The Muslim League, therefore, on the direction of Jinnah, withdrew its acceptance of the Cabinet Mission Plan and by a separate resolution called upon the Muslims of India to "resort to direct action to achieve Pakistan."[10] The elections to the Constituent Assembly were held in July and the Muslim League captured nearly all the Muslim seats but they did not participate in the Assembly proceedings.[11]

The attitude of the Muslim League and its decision not to participate in the Constituent Assembly, created a deadlock in the progress towards independence. In early December 1946 just before the first session of the Constituent Assembly, the British Government invited the leaders of the Congress, Muslim League and the Sikh community to London in a last-minute attempt to break the deadlock. But the attempt failed. On 20 February 1947, the British Prime Minister made a policy statement[12] in the House of Commons. Mr. Attlee declared that the power in British India would be transferred to Indian hands by June 1948 and that His Majesty's Government was considering "to whom the powers of the Central Government in British India should be handed over, on due date, whether as a whole to some form of Central Government for British India, or in some areas to the existing Provincial Governments, or in such other way as may seem most reasonable and in the best interest of the Indian people." The Prime Minister also

[7] *Ibid*. pp. 241-246.
[8] *Ibid*. p. 246.
[9] *Ibid*. pp. 309-312.
[10] "Proceedings of the Muslim League Council, July 29,1946". A. C. Banerjee, *The Making of the Indian Constitution* pp. 260-264.
[11] Sir Ivor Jennings, *Constitutional Problems in Pakistan,* p. 9.
[12] Statement of the British Government, 20 February 1947. See A. C. Banerjee, *The Making of the Indian Constitution*, pp. 401-405.

announced the appointment of Lord Mountbatten as the new Governor-General and Viceroy of India.

Lord Mountbatten took over from Viscount Wavell in March 1947. After strenuous negotiations with the leaders of the major Indian parties and with the approval of His Majesty's Government in England, Mountbatten announced on 3 June 1947 the British Government's plan to transfer power in British India.[13]

The Mountbatten Plan, as it was popularly known, provided for a new and separate Constituent Assembly, consisting of representatives of those areas which were unwilling to participate in the existing Constituent Assembly.[14] To ascertain their views, the Provincial Assemblies of Bengal and Punjab were to meet in two parts, one comprising members of the Muslim majority districts and the other those of the non-Muslim majority districts, to decide whether the Provinces were to be partitioned. In the event of their deciding in favor of partition, division would take place and arrangements would be made accordingly, and each part would decide whether to join the existing or the new Constituent Assembly. Next, the Legislative Assembly of Sindh would, at a special meeting, take its own decision on these alternatives. In view of the geographical situation of the North West Frontier Province, if Punjab were to decide not to join the existing Constituent Assembly, a referendum among the electors was to decide the issue. British Baluchistan would be given the opportunity of re-considering its own position. If Bengal were to be partitioned, a referendum was to be held in the district of Sylhet in Assam, to decide whether the district should be amalgamated with the new province of Eastern Bengal. It was also provided that, once the decisions for partition of Bengal and Punjab were taken, fresh elections would be held to choose new representatives to join the new and separate Constituent Assembly, on the scale of one for every million of population in accordance with principle outlined in the Cabinet Mission Plan of 16 May 1946.[15]

The Mountbatten Plan of 3 June 1947 had, in effect, paved the way for the establishment of two independent sovereign States in the Indian sub-continent, with two Constituent Assemblies to decide their future constitutions. The Plan was announced in a special broadcast and Nehru and Jinnah commended it to the nation in their broadcast speeches[16] in the same night.

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[13] The Mountbatten Plan, 3 June 1947. See A. C. Banerjee, *The Making of the Indian Constitution*, pp. 437-443.

[14] Mountbatten Plan, Para 4.

[15] Para 14. The number of representatives to which each area would be entitled were as follows:

Province	General	Muslims	Sikhs	Total
Sylhet district	1	2	nil	3
East Bengal	12	29	nil	41
West Punjab	3	12	2	17

[16] A. C. Banerjee, *The Making of the Indian Constitution,* pp. 446 & 450.

According to the plan, elections to the new Constituent Assembly were held and the Governor-General by an announcement[17] set up the Constituent Assembly of Pakistan and declared the names of the members elected thereto. By a subsequent announcement[18] the names of the members elected from the district of Sylhet were declared.

The Constituent Assembly of Pakistan, thus set up met on 10 August 1947 in Karachi for its inaugural session, when it was ceremonially addressed by the Governor-General, Lord Mountbatten. The total number of members, as authorized at that time, was sixty nine. The territorial distribution of membership was as follows:

Province	**General**	**Muslims**	**Sikhs**	**Total**
East Bengal (including Sylhet)	13	31	Nil	44
West Punjab	3	12	2	17
Sindh	1	3	Nil	4
N.W.F.P.	Nil	3	Nil	3
British Baluchistah	Nil	1	Nil	1
TOTAL	17	50	2	69

This total number included a number of persons, who, after partition, either left the country or resigned their seats.[19] To give representation to the refugees, who had come from India five Muslim seats were given to West Punjab[20] and one to Sindh.[21] Four additional seats were created for the princely states, which had acceded to Pakistan. At the end of its life, in October 1954, the first Constituent Assembly of Pakistan had seventy nine seats, territorially distributed as follows:[22]

[17] Announcement of the Governor-General dated 26 July 1947 A.N. Aiyar, *Constitutional Laws of India and Pakistan* (part I) Madras 1947, p. 24.
[18] Governor-General's announcement, 4 August 1947, Ibid. p. 26.
[19] See K. Callard, *Pakistan: A Political Study,* p. 79.
[20] Constituent Assembly for Pakistan (Increase and Redistribution of Seats) Act 1949, P.L.D. (1949)Central Statutes 179.
[21] Constituent Assembly for Pakistan (Increase and Redistribution of Seats) Act 1950, P.L.D. (1950) Central Statutes 34.
[22] Mushtaq Ahmad, *Government and Politics in Pakistan*, Karachi, 1959, p. 91.

East Bengal	44
Punjab	22
Sindh	5
N.W.F.P.	3
Baluchistan	1
Baluchistan States	1
Bahawalpur	1
Khairpur	1
N.W.F. States	1
Total	**79**

The Interim Constitution

Though the Constituent Assembly of Pakistan was born 'without the formal blessing of law'[23] it was given statutory recognition by the Indian Independence Act, 1947,[24] which defined its powers and functions. The main function of the Constituent Assembly was to prepare a constitution for Pakistan[25] and in addition to this constituent power the Assembly was to exercise, during the interim period, the powers, and discharge the functions of the Federal Legislature,[26] which was to have full powers to make laws for the Dominion, including laws having extra-territorial operation.

The Indian Independence Act, 1947, which was passed by the British Parliament and received royal assent on 18 July 1947, gave effect to the Mountbatten Plan, setting up two independent Dominions from 15 August 1947. The Act made provisions for the government of the Dominions till the respective Constituent Assemblies had framed their own Constitutions. Section 8(2) of the Act provided that each of the Dominions should be governed, as nearly as might be, in accordance with the Government of India Act, 1935[27] with such omissions, additions, adaptations and modifications as might be specified in the orders of the Governor-General who, by section 9 of the Act, was empowered to make such orders. As noted above, the Constituent Assembly was to exercise the powers of the federal legislature, and no Act of the British parliament or Order-in-Council made on or after 15 August 1947, was to have effect in the new Dominion, unless it was extended thereto by a law of the legislature of the Dominion.[28]

[23] K. Callard, *Pakistan : A Political Study,* p. 77.
[24] 10 & 11 Geo. VI. C. 30.
[25] Section 8, sub-section (1) of the Indian Independence Act, 1947, "In the case of each of the new Dominions, the powers of the Legislature of the Dominion shall, for the purpose of making provision as to the Constitution, be exercisable in the first instance, by the Constituent Assembly of that Dominion.
[26] Section 8(2), para (e) of the Act of 1947.
[27] 26 Geo.V. C. 2.
[28] sub-sections (4) and (5) of section 6 of the Act of 1947.

Section 5 of the Act provided for the appointment of a Governor-General by His Majesty for the purpose of government of the Dominion. The Governor-General was to "have full power to assent in His Majesty's name" to laws made by the Legislature of the Dominion and all powers of His Majesty relating to laws of the Dominion were made inoperative.[29]

The Governor-General, in exercise of the powers under section 9 of the Independence Act, made twenty three orders up to 14 August 1947, including the Pakistan (Provisional Constitution) Order, 1947,[30] by which the Government of India Act, 1935, was modified to suit the changed situation. After the transfer of power, the Governor-General of Pakistan and the Constituent Assembly of Pakistan also made amendments to and modifications of the Act, as and when deemed necessary. In adapting the Act of 1935, the federal structure of the state, as provided for in that Act was retained, with a parliamentary form of government both at the centre and in the provinces. The Governor-General and the Provincial Governors were to act in accordance with the advice of their respective Council of Ministers and the provisions empowering them to act in their discretion and individual judgments were deleted. The distribution of powers between the centre and the provinces was effected by three lists of subjects enumerating the central, provincial and concurrent matters, the residual powers being vested in the Governor-General.[31] But the federal legislature, under section 102 of the Act, could make laws with respect to provincial and unremunerated subjects when a "Proclamation of Emergency", declared by the Governor-General was in force. This section was amended from time to time ultimately to include in the scope of 'emergency' circumstances arising out of the mass movement of population. In the case of repugnancy between a federal law and a provincial law, with respect to matters in the concurrent list, the former was to prevail and the latter, to the extent of repugnancy, was to be void.[32]

The executive authority of a province was to be so exercised as to secure respect for the federal laws (section 122). The Governor of a Province, in choosing, summoning or dismissing his ministers, was under the general control and direction of the Governor-General.[33] Section 93 of the Act, which had been condemned in pre-independence days as an instrument hampering responsible government in the provinces, was at first omitted, but re-enacted as section 92 A in 1948 by an order of the Governor-General,[34] which provided for the suspension of the Provincial constitution by a proclamation of

[29] Sub-sections (3) of section 6 of the Act of 1947.

[30] Notification No. G.G.0.22 dated 14 August 1947.See A.N. Aiyar,(ed.) *Constitutional Laws of India and Pakistan*. Part I pp. 164-191.

[31] Section 104(1), Government of India Act 1935. Sub-section (2) of the section was omitted by the Pakistan(Provisional Constitution) Order 1947.

[32] Section 107, Government of India Act, 1935.

[33] Section 51(5), as adapted by the Pakistan (Provisional Constitution) Order, 1947.

[34] The Pakistan (Provisional Constitution) (Third Amendment) Order, 1948. (G.G.O.13 dated 19 July 1948) P.1.13. 1948 Central Statutes 428.

the Governor-General in an emergency threatening the peace or security of the country or in a situation in which the Government of a Province could not be carried on in accordance with the provisions of the Act.

In the' judicial sphere, apart from retaining the High Court of Lahore the Chief Court of Sindh and the Judicial Commissioners in North West Frontier Province and Baluchistan, a new High Court for East Bengal[35] and a new Federal Court of Pakistan[36] were established. Section 208 of the Government of India Act, 1935, providing for appeal to the judicial Committee of the Privy Council, though originally retained with modifications, was subsequently made ineffective by the Federal Court (Enlargement of Jurisdiction) Act, 1950 and the Privy Council (Abolition of Jurisdiction) Act, 1950, which transferred all appellate jurisdiction of the Privy Council to the Federal Court of Pakistan.

The interim constitution, as outlined above, comprising the Indian Independence Act, 1947 and the Government of India Act, 1935, as adapted and amended up to the promulgation of the first Republican Constitution in 1956, was designed to provide for a quasi-federal structure of the state with a strong weightage in favor of the centre. The limitations on responsible government were all removed and the form of Government, which was introduced both at the centre and in the Provinces, were of the Westminster model, in which the Governor-General or the Governor of a Province, as the case might be, would enjoy the status and position as their counterparts in other parts of the Commonwealth.[37] But it must be noted, however, that the Governor-General of Pakistan, since its birth exercised powers and authority, which are not normally exercised in the older Commonwealth countries. This phenomenon has its historical background. Mohammad Ali Jinnah, the top leader of the Muslim League Party, became the first Governor-General of Pakistan. Jinnah, the Quaid-i-Azam, commanded enormous respect and admiration as the father of the nation. There was no one in the Muslim League, who could equal the extra-ordinary status which he held in the eyes of the nation. The cabinet, that was formed at the centre, with Liaquat Ali Khan as the Prime Minister was Jinnah's creation. The Governor-General took the initiative in the formulation of cabinet policies and used to preside over its regular meetings, as well as over its Emergency Committee, of which he was the Chairman. He even called and conducted the cabinet meetings in the absence of the Prime Minister. He created the Ministry of States and Frontier Regions and retained its control in his own hands.[38]

After the death of Jinnah in September 1948, things changed. Liaquat Ali Khan, as the head of the government, became the repository of power and authority, and the Governor-General Khawaja Nazimuddin was content with the conventional power,

[35] The High Courts (Bengal) Order, 1947, (G.G.O.4 dated 11 August 1947).
[36] G.G.0.3 dated 23 February 1948. The Federal Court of Pakistan Order, 1948, P.L.D. 1948. Central Statutes 398.
[37] G. W. Choudhury, *Documents and Speeches on the Constitution of Pakistan*, p. 2.
[38] See Mushtaq Ahmad, *Government and Politics in Pakistan*, pp. 5-6.

dignity and respect usually attached to the high office. But his successor Ghulam Muhammad was an ambitious man, to whom constitutional practices had little value. At least twice he exercised extra-ordinary powers most uncommon in recent Commonwealth constitutional history. The first occasion was his dismissal of Khawaja Nazimuddin and his cabinet in April 1953 and the second was the dismissal of the Constituent Assembly itself in October 1954.

While the circumstances leading to, and the consequences that followed on, the dismissal of the Constituent Assembly will be discussed in greater detail in the subsequent chapters of this work, Ghulam Muhammad's action against the Nazimuddin Ministry needs a brief discussion. The Nazimuddin Ministry, with all its defects and weaknesses was ruling the country with the support of the legislature. Only a few days before his dismissal, the Prime Minister had his budget approved by the Assembly and there was no sign of lack of confidence; on the contrary the Ministry/leanly had the confidence of the House. When he was dismissed, the Governor-General took the view that the institutions of the Cabinet and the office of the Prime Minister had no legal sanction behind them and their existence could not be justified by conventions, wrongly "read into the text of the existing Constitution (Government of India Act, 1935) as if they were a part of it."[39] The Governor-General relied on section 10(1) of the Constitution Act which says that, "The Governor-General's ministers shall be chosen and summoned by him, shall be sworn in as members of the Council, and shall hold office during his pleasure". It may be pointed out that almost all the constitutions of the Westminster type contain similar provision in respect of the relationship between the Head of the State and the Cabinet.[40] But nowhere in the Commonwealth in recent times has the Governor-General of a self-governing Dominion exercised such a power under the pretext of legal authority. The Constitution, which is intended to provide for a parliamentary type of government, cannot be read to give the Governor-General powers to dismiss a Cabinet, which had the confidence of the legislature. In that event, the Governor-General, who is not responsible to anybody, and not the Parliament, would become the real ruler of the country, striking at the very root of responsible government. The phrase 'during pleasure' had been interpreted by the Governor-General and his advisers as the 'whim' of the Governor-General and it was argued that the cessation of the Governor-General's pleasure was a legal equivalent of the termination of appointments as such ministers "A proposition more destructive of the parliamentary system could not be advanced, as it meant that no administration could survive the displeasure of the Governor-General, however much it might enjoy the confidence of the Parliament or the people. It made the Governor-General an arbiter

[39] Comments of an official spokesman quoted in Mushtaq Ahmad, *Government and Politics in Pakistan*, pp. 30-31.

[40] The Commonwealth of Australia Constitution Act, 1900, Section 62 reads, "There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn in as Executive Councillors, and shall hold office during his pleasure."

of the fate of governments, which he could dismiss or appoint at his will or whim."[41] This extra-ordinary action of the Governor-General, Ghulam Muhammad, was never challenged either legally or politically and so we need not make a further examination of the matter. But this episode has been regarded by many as the beginning of the succession of improper executive actions, which were to follow in the same decade of the constitutional history of Pakistan.

In centre-province relationship, the conventional practice of non-interference in each other's spheres was not followed by Pakistan's rulers. Though the Provinces under the Constitution were to make their own laws and exercise executive authority over the subjects enumerated in the Provincial list, the Centre by some specific provisions[42] was given overriding and supervisory authority and in certain circumstances powers of direct interference in provincial affairs. The Muslim League leaders, who had struggled during the pre-independence period for unhindered provincial autonomy, after the achievement of Pakistan did not consider it inconsistent to vest in the Centre powers which negated the fundamental principles of regional autonomy, and even adopted almost similar provisions in the first Republican Constitution. These powers were, however, to be used in exceptional and emergent circumstances. But in practice they were frequently used by the Centre and it has been alleged that interference in the provincial affairs was often made to enhance personal and party interests. This allegedly undue interference, which greatly hampered the growth of a healthy political atmosphere in the country so essential for the working of a democracy, is regarded to be a main cause of the "failure"[43] of the parliamentary system of government in Pakistan.

Constitution Acts and the Draft Constitutions

The Constituent Assembly, by the Indian Independence Act, 1947, was entrusted with the task of making provision for the constitution of Pakistan.[44] In the course of its deliberations on different complicated issues and aspects of the future constitution and the enormous delay which occurred in finding agreed solutions to these problems, the Assembly, during its life of over seven years passed forty-four constitution Acts[45] to meet necessities as and when they arose. These Acts were passed by the Assembly in its capacity as 'Constituent Assembly' and, when adopted, were declared to become law, on being signed by the President of the Assembly and published under his authority in the official gazette.[46] The fundamental nature of these constitution Acts had a tremendous effect on Pakistan's political life and their validity in the absence of the Governor-General's assent was successfully challenged in the legal battle that was to

[41] Mushtaq Ahmad, *Government and Politics in Pakistan*, p. 13.
[42] See particularly sections 92A, 122 and 126 of the Government of India Act, 1935.
[43] *Report of the Constitution Commission* (Pakistan) 1961, p. 13.
[44] Sub-section (1) of Section 8, Independence Act, 1947.
[45] Sir Ivor Jennings, *Constitutional Problems in Pakistan*, p. 5.
[46] Rule 62 of the "Rules of Procedure of the Constituent Assembly." See Jennings, *Ibid*. p. 135.

ensue after the Governor-General had dissolved the Constituent Assembly. Before we discuss the draft constitutions that were produced by the Assembly, it is necessary, therefore, to discuss in brief the more important Acts passed by the Constituent Assembly.

One of the early Acts passed by the Constituent Assembly was the Indian Independence (Amendment) Act, 1948,[47] which amended section 9 of the Independence Act, extending to 31 March 1949 (in place of 31 March 1948 in the original Act) a provision under which the Governor-General, by order could modify or alter the provisions of the Government of India Act, 1935, and remove difficulties arising out of the transitional circumstances. Under the authority of this Amendment Act the Governor-General by order inserted section 92A in the 1935 Act, providing for the suspension of a provincial constitution in a grave emergency.

Acts were passed affecting the composition of the Constituent Assembly itself. The Indian Independence(Amendment) Act, 1949,[48] was passed, authorizing the Constituent Assembly to increase the number of its seats; subsequently the Constituent Assembly for Pakistan (Increase and Redistribution of Seats) Act, 1949,[49] and the Constituent Assembly for Pakistan (Increase and Redistribution of Seats) Act, 1950,[50] were passed providing six more Muslim seats for the Assembly, allotting five to West Punjab and one to Sindh.

To eradicate the vices of corruption, nepotism, bribery etc. from public life, the Public and Representative Offices (Disqualification) Act, 1949,[51] was passed. It provided 'for the debarring from public life for a suitable period of persons judicially found guilty of misconduct in any public office or representative capacity or in any matter relating thereto.' Under this Act the Governor-General or the Governor of a Province could refer to the courts or to a special judicial tribunal any charges of misconduct in public office. If the report of the court or tribunal proved to be adverse, the Governor-General might, by order, impose a penalty of disqualification from public office for a period not exceeding ten years, and, in making such order, the Governor-General was to act in his discretion.[52] This Act, it was alleged, had been applied against those politicians who had, for some reason or other, incurred the displeasure of the Central Government and the Act was attacked for its possible use as a political weapon.[53] In 1954 in the final stages of the show-down between the Governor-General and the Constituent Assembly, the Act was repealed by the Public and Representative Offices (Disqualification)

[47] P.L.D. 1949 Central Statutes 57.
[48] P.L.D. 1949 Central Statutes 176.
[49] P.L.D. 1949 Central Statutes 179.
[50] P.L.D. 1950 Central Statutes 34.
[51] P.L.D. 1949 Central Statutes 177.
[52] Several politicians were disqualified under this Act, viz. M.A. Khuhro, Kazi Fazlullah, Agha Ghulam Nabi Khan Pathan of Sindh and Hamidul Haq Choudhury of East Bengal.
[53] K. Callard, *Pakistan: A Political Study*, p. 103.

(Repeal) Act, 1954,[54] but the disqualification orders which were in force were allowed to remain. The Governor-General, however, by a proclamation[55] announced the termination of disqualification in all cases and dropped the proceedings under the Act against a Punjabi leader. The announcement relied on the contention that, as action was taken by the Governor-General in his discretion, it could be abandoned similarly. It was also argued that, if the Act was misused, there could be no justification for continuing penalties imposed under it.

But the most important and controversial Acts, which were challenged legally and politically and which resulted in the constitutional crisis in 1954-55, were passed by the Assembly in 1954. The Government of India (Amendment) Act, 1954,[56] inserted a new section 223A in the Government of India Act, 1935, giving writ jurisdiction to the superior courts. The last but most politically controversial Act, the Government of India (Fifth Amendment) Act, 1954,[57] was passed by the Constituent Assembly in September of that year, just over one month before it was dissolved by the Governor-General. This Act, which amended sections 9 and 10 of the Government of India Act, 1935, severely curtailed the Governor-General's power and authority in appointing and dismissing ministers and obliged him to act in accordance with the advice of the cabinet. The provisions of this Act will be discussed in more detail in the latter part of this chapter.

Turning now to the principal task of the Constituent Assembly — framing of the Constitution for the country — the Assembly, during its long life of over seven years, considered and adopted an "Objective Resolution," the report of the Committee on Fundamental Rights and matters relating to Minorities; it also considered three reports of the Basic Principles Committee and adopted the last one. But before the Assembly could finally pass the constitution, drafted on the, basis of the recommendations, the Governor-General dissolved it, thus leaving the task of the Constituent Assembly unfulfilled.

The first big step in constitution-making was taken by the Constituent Assembly, when it passed the Objective Resolution[58] in March 1949. The Resolution, attributing the sovereignty of the universe to God, pronounced that the country was to be governed by the principles of democracy, freedom, equality and social justice as enunciated in Islam. Fundamental rights were to be guaranteed to all and non-Muslims were to freely profess and practice their own religions. The judiciary was to be independent and Pakistan was to be a federal state with autonomous units.

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[54] P.L.D. 1954 Central Statutes 173.
[55] *Gazette of Pakistan extraordinary*, 20 October 1954, referred in K. Callard, *Pakistan: A Political Study*, p. 105.
[56] P.L.D. 1954 Central Statutes 152.
[57] P.L.D. 1954 Central Statutes 172.
[58] Speech by the leader of the Congress Parliamentary Party, G.W. Choudhury, *Documents and Speeches on the Constitution of Pakistan*, p. 965.

The Objective Resolution passed by the first Constituent Assembly was, with minor modifications, adopted in the 1956 Constitution as the Preamble to the Constitution and it found the same place in the 1962 Constitution. While the Hindu members expressed their opposition and concern about the position of Islam in the Constitution,[59] and the Ulema attacked its emphasis on the rights of the non-Muslims,[60] the Objective Resolution was received by the Muslim masses with acclaim.

The Constituent Assembly, on the same day that it passed the Objective Resolution, appointed a Basic Principles Committee to report on the fundamental principles and detailed recommendations as to the future constitution. The first report of the Basic Principles Committee was presented to the Constituent Assembly by Prime Minister Liaquat Ali Khan in November 1950.[61] But it had most unfavorable reception in East Bengal. It was attacked, on various aspects, particularly on the question of East Bengal's representation in the legislature and the provision for making Urdu the only official language of Pakistan.[62] The Ulema were also unhappy, as the report contained very little regarding the Islamic character of the proposed Constitution.[63] Consideration of the report was, therefore, postponed till 31 January 1951 and the public was invited to send proposals to the Special Committee appointed for the purpose of receiving and considering such proposals.

The second report c the Basic Principles Committee was submitted to the Constituent Assembly on 22 December 1952, by Prime Minister Khawaja Nazimuddin, who had succeeded to the office after the assassination of Liaquat Ali Khan in October 1951. This report was remarkable for its emphasis on the Islamic provisions, which gave power to the Ulema to pronounce on the Islamic nature of any bill.[64] Its recommendation that the Central Legislature, consisting of two houses having equal powers, should have equal representation from the East and West wings, attracted severe criticism from Punjab. Punjabi leaders complained that the Province had not been given adequate representation in proportion to her population and that East Bengal, which was only one of the units, was shown particular favor, putting it on the same level as all the other units of the west wing taken together.[65] While the Ulema hailed the Islamic provisions in the recommendations, other sections of the society expressed serious disapproval of them.[66] The public, except the Ulema, were opposed to the idea of giving a particular group the privilege of having the, final say in the making of laws.

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[59] See G. W. Choudhury, *Documents and Speeches on the Constitution of Pakistan*, pp. 23-24.
[60] G. W. Choudhury, *Constitutional Development in Pakistan*, p. 57.
[61] H. Feldman, *A Constitution for Pakistan* (O.U.P. 1956) p. 28.
[62] G. W. Choudhury, *Documents and Speeches on the Constitution of Pakistan*, p. 30.
[63] *Ibid*.
[64] Report of the Basic Principles Committee (1952),Chapter III Part I, Paras 5 & 6.
[65] H. Feldman, *A Constitution for Pakistan*, p. 35.
[66] G. W. Choudhury, *Documents and Speeches on the Constitution of Pakistan*, Introduction, p. iv.

In April 1953 Khawaja Nazimuddin was dismissed by the Governor-General, who appointed Mohammed Ali of Bogra as the Prime Minister. The new Prime Minister, within six months of his assumption of office, presented to the Constituent Assembly the last report of the Basic Principles Committee on 9 October 1953. The draft proposals envisaged Pakistan as a federation with autonomous units, the form of government both at the centre and in the provinces being parliamentary, the cabinet exercising power and the Head of the State acting on the advice of the cabinet, which was to be collectively responsible to the legislature. The federal legislature was to be composed of two houses with equal powers in respect of votes of confidence or no confidence in the ministry and the election of the Head of State. In case of dispute, a joint session of both houses should decide by a majority, which should include thirty percent of the members from each zone.[67]

If such a special majority was not forthcoming, the measure would fail but if it involved matters essential for carrying on state activities, the security of the country or stability of the federal credit, the Head of the State could, on the advice of the Ministry, dissolve both houses and order fresh elections.[68]

The Head of the State was to be a Muslim,[69] the State was to be known as the Islamic Republic of Pakistan[70] and no law was to repugnant to the Koran and Sunna. But the Supreme Court was to decide questions of repugnancy raised by any person within a prescribed period.[71]

The distribution of powers between the centre and the provinces was to be effected by three lists of subjects and the Head of the State, in consultation with the Provincial Governments, was to decide about the unremunerated subjects.[72] The federal law was to prevail over any provincial law in the event of inconsistency between the two on a concurrent subject.[73]

The judiciary was to be independent and the judges of the Supreme Court and the High Courts were to be removed by a special judicial procedure in the Supreme Court on the ground of misbehavior or infirmity of body or mind.[74]

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[67] Report of the Basic Principles Committee, Para 65. See Choudhury, *Documents and Speeches on the Constitution of Pakistan*, pp. 197-271.
[68] Mohammad Ali Formula, as contained in Prime Minister Mohammad Ali's speech in the Constituent Assembly on 9 October 1953, See G. W. Choudhury, *Documents and Speeches on the Constitution of Pakistan*, p. 142.
[69] *Ibid*. Para 15.
[70] *Ibid*. Para 12.
[71] *Ibid*. Para 6.
[72] *Ibid*. Para 147.
[73] *Ibid*. Para 152.
[74] *Ibid*. Paras 182 and 213.

The intricate question of representation at the centre was to be solved by what is known as the 'Mohammad Ali Formula'. It provided for the equal representation of each unit to the upper house and representation on the population basis in the lower house. Thus East Bengal, with a larger population, was to have ten seats in the upper house, consisting of fifty members and 165 seats in the lower house consisting of three hundred members. In a joint session, therefore, each zone would have equal strength. The requirement of a special majority, including thirty percent from each zone, was meant to check domination of one zone over the other. To meet the Bengali grievance over their language, the draft proposed that Urdu and Bengali should be the official languages of the State.[75]

The Basic Principles Committee report, presented by Mohammed Ali, was considered by the Constituent Assembly for thirteen days and on 14 November 1953 a drafting sub-committee was appointed. The draft constitution was adopted by the Assembly on 6 October 1954. It was reported that the Constitution Bill was now awaiting formal enactment. "The Prime Minister Mohammed Ali had even set the date 25 December, 1954, which was the anniversary of Quaid-i-Azam's birthday, for implementing the Constitution."[76] But that was never to happen. The first Constituent Assembly could not, or rather was not allowed[77] to, complete its task. The Governor-General by a Proclamation on 24 October 1954 dissolved the Assembly.

Difficulties in constitution-making

Pakistan, since its birth on August 1947, has suffered tremendously from lack of political leadership. 'Mohammad Ali Jinnah, as the head of the Muslim League Party, which struggled for and created Pakistan, became the first Governor-General and President of the Constituent Assembly. During the initial period, Jinnah, commanding the highest respect and prestige as the father of the nation, exercised enormous powers and authority. The Cabinet, which was his creation, used to take directions and guidance from him. It was not that Jinnah unduly imposed his will on the Cabinet, but everyone looked to him for proper guidance. It has been remarked that "as long as Jinnah was alive, he was Pakistan."[78]

But the nation did not enjoy the leadership of Jinnah for long. In September 1948, just over a year after the nation was born, Jinnah died. After his death the mantle of leadership fell on Liaquat Ali Khan, who then was the Prime Minister. With "Khawaja Nazimuddin as Governor-General, the Prime Minister and Cabinet began to wield real power. Liaquat Ali Khan was, at first, in effective control of the Government, the Muslim League Party and Constituent Assembly. But by the time of his assassination in

[75] Report of the Basic Principles Committee, Para 276.
[76] G. W. Choudhury, *Constitutional Development in Pakistan*, p. 137.
[77] G. W. Choudhury, *Documents and Speeches on the Constitution of Pakistan*, Introduction, p. vii.
[78] K. B. Sayeed, *The Political System of Pakistan* (Boston 1967) p. 62.

October 1951, he had not been able to solve any of the main problems facing the country *viz*. Kashmir, canal water, evacuee property, the state of the economy and refugees.[79] His constitutional proposals estranged the Bengalis and the Ulema. Lacking in qualities that Jinnah possessed,[80] Liaquat Ali Khan failed to give the nation the proper lead that circumstances called for.

Khawaja Nazimuddin, who stepped down from the Governor-Generalship to succeed Liaquat Ali Khan after the latter's death, lacked the prestige and popularity enjoyed by Jinnah and Liaquat Ali Khan. He did not prove a capable leader. His administration not only failed to solve the existing problems but was faced with new ones, like the food shortages and economic depression that followed the boom created by the Korean War. He was caught up in an intricate religious conflict in Punjab and the mishandling by the local authorities of the situation led to wide-spread religious riots in Lahore.[81] Nazimuddin's constitutional proposals provoked vehement opposition from the Punjab leaders and his views on the state language issue were strongly condemned by the Bengalis, resulting in general discontent in the country. The Governor-General Ghulam Mohammad dismissed him and his Ministry on 17 April 1953.

Mohammed Ali of Bogra was appointed Prime Minister to succeed Khawaja Nazimuddin. Not only was the new Prime Minister not equipped with the qualities of leadership which were needed at the time, but his appointment, when he was not the leader of the majority in the Constituent Assembly, proved an added weakness. By the time Mohammed Ali took over, the Muslim League Parliamentary Party in the Constituent Assembly had split into several factional groups and strong regional sentiments prevailed among its members. Mohammed Ali could neither bring together the factions within the party nor could he evolve any effective formula to thwart regional deviation. He was opposed on the one hand by the effective Punjabi group, supported by the civil servants and the army and even patronized by the Governor-General Ghulam Muhammad,[82] and on the other hand by the Bengali group in the Constituent Assembly. Thus, though he was able to get a draft constitution adopted by the Constituent Assembly in early October 1954, he could not put a stop to the deterioration in the political process, which had started much earlier and culminated in the constitutional crisis, following the dissolution of the Constituent Assembly by the Governor-General.

Pakistan has a unique geographical situation on the world map, having two different wings separated by over one thousand miles of a foreign country. Because of this geographical anomaly, the two wings often had different problems and the attitude of

[79] K. Callard, *Pakistan: A Political Study*, p. 21.
[80] Chaudhri Muhammed Ali in his *Emergence of Pakistan* at p. 384 observed, "Of course he (Liaquat Ali Khan was not the Quaid-i-Azam."
[81] For details see Report of the Court of Inquiry on the Punjab Disturbances, 1953, Lahore, 1954.
[82] K. B. Sayeed: *The Political System of Pakistan*, p. 71.

the people towards them differed substantially. Even among the people of the western wing, comprising four units, the differences in language, culture and outlook on life were conspicuous. Consequently, from the very beginning, the people and the provincial leaders became suspicious of one another and a bitter feeling grew. The feeling of unity, which had been remarkable during the struggle for independence had vanished with the achievement of independence and the death of Jinnah, whose towering personality had been a great unifying force.

In East Bengal the feeling soon developed that the Bengalis were not being given their due share in the administration,[83] that the industrial development of the province was being neglected, and after Jinnah's declaration about the state language in March 1948,[84] the Bengalis felt that their language and culture were not safe. The interim report of the Basic Principles Committee presented by Liaquat Ali Khan enraged the Bengalis on questions of representation in the Central Legislature[85] and provincial autonomy. There was always in the Bengali minds a fear of Punjabi domination, which had the support of the civil servants and the army.[86]

In the Punjab regional feeling was aroused by the second Basic Principles Committee Report, 1952, regarding the quantum of representation at the centre. The Punjabi leadership apprehended Bengali domination in the Central Assembly and so opposed the composition of the central legislature, as recommended in the Report.[87] In the other units of West Pakistan there was not only a general dislike of the Bengalis, but also a strong feeling against the Punjabis. But on most occasions the smaller units allied themselves with Past Bengal, to oppose Punjabi influence. The Dacca-Karachi-Peshawar axis against the Punjabis was the result of this common fear against Punjabi influence.[88]

From the brief outline of the roots of the regional conflicts it may be easily surmised that the lack of mutual trust, added to the growth of suspicion among the leaders, was one

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[83] The East Bengal Chief Minister Nurul Amin spoke in the following terms: "...I should mention another point, that is the anxiety on the part of the Central Government to encroach on every field of provincial activities.... After achievement of freedom there has been a race for centralization of powers both in India and in the Central Government of Pakistan. I consider this to be the most unsound and short-sighted policy. The provinces must be allowed to enjoy the full autonomous position, must be free from the Central Government as it is thought practical. But particularly this province of East Bengal which is so far flung from the capital of the Central Government must enjoy the fullest autonomy." Quoted in K. Callard, *Pakistan: A Political Study* at p. 175 from *East Bengal Legislative Assembly Proceedings* Vol. III p. 265 (18 March 1949).

[84] But let me make it clear to you that the State language of Pakistan is going to be Urdu and no other language.' Jinnah's speech at a public meeting at Dacca on 21 March 1948, Jamil-ud-Din Ahmad, *Speeches and Writings of Mr. Jinnah* Vol. II p. 490.

[85] "...Sir, in East Bengal there is a growing belief — I must say that it is wrong impression — that there are principles in the Report which, if adopted, will reduce the majority of East Bengal into a minority and will turn East Bengal into a colony of Pakistan..." Nur. Ahmed, *G. A. Debates* Vol. VIII p. 183 (1950) Quoted by Callard at p. 92.

[86] See K.B. Sayeed, *The Political System of Pakistan*, pp. 66-68.

[87] *Ibid*.

[88] *Ibid*.

of the main reasons why the Muslim League leaders at the national level failed to give a constructive lead, either in the constitution-making or in defining national policies. It may be noted that the charges of one group against another were not always unfounded. But the truth is that the leaders, who had the responsibility to give the country a national outlook and purpose, failed miserably to rise above the interests of themselves, their groups, or their localities.

At the time of independence, the Muslim League was the only political party in Pakistan. But it was, in fact, a movement accommodated heterogeneous Muslim leaders of India for the common purpose of achieving Pakistan. Raving achieved its Bole goal of a separate state for the Muslims of India, the party lost its sense of purpose. As the party in power the Muslim League had no specific programme except the carrying on of the general administration of the country.

Most of its able leaders assumed governmental positions and were no more interested in the party. There was virtually no opposition, either in the Assembly or outside it, except the moribund Pakistan Congress Party, whose pre-independence role, as advocated for a united India, was an embarrassment in the altered circumstances.

But the absence of any substantial opposition and the monopoly of state authority proved to be the greatest weakness of the Muslim League party, for the attack on party solidarity came from within. Factionalism, due to personal or group interest, soon showed its head, and the Muslim League Parliamentary Party in, the Constituent Assembly had to fight within itself. In all the legislatures of the west wing, though the Muslim League had an absolute majority, factionalism, group and personal interests dominated party politics.[89]

In East Bengal the Muslim League party was routed in the provincial elections held in March 1954. The opposition, the United Front, which defeated the Muslim League was, as the name suggests, a coalition[90] of various political parties, with varying programmes, combined on a compromise 21-point programme, with the sole aim of ousting the Muslim League from power. In this they succeeded but soon after the elections differences within the coalition developed and the United Front fell apart. The Awami League, a prominent partner in the coalition, withdrew its support from the coalition leader, A. K. Fazlul Haq. Interference from the Centre and internal quarrels in the United Front in a very short time rendered it ineffective and created a vacuum in the political field. In the absence the Muslim League these parties, which had been powerless up to the middle of 1954, did not fare any better when called upon to discharge responsible political obligations.

[89] G. W. Choudhury, *Constitutional Development in Pakistan*, p. 135.

[90] Composed mainly of Krishak Sramik Party, Awami League, Ganatantri Dal, Nizam-i-Islam and Khilafat Rabbani parties.

The existence of well-organized political parties is regarded as a pre-requisite for working of a democratic political system. But unfortunately Pakistan lacked such, parties. Lack of leadership, resulting in lack of well-organized and disciplined parties[91] has been the main cause for the chaos and crises that Pakistan has experienced since its inception.

The demand for a separate homeland for the Muslims of the Indian sub-continent was mainly based on the assumption that in Pakistan the Muslims would be enabled to order their lives in accordance with the tenets of Islam. While there was a general agreement among the Muslims of Pakistan that the state should be based on the Islamic principles, there were, and they exist even today after twenty three years of independence, sharp differences over its details and the degree to which those principles should be paramount. The modernist elements believe that Islam is a dynamic and progressive religion, which can be given a liberal interpretation, to fit within their concept of a democratic state. "Thus modernist leaders argue that, if the Islamic character of Pakistan's polity is incorporated in the preamble to the constitution, there need be no fear of the country's becoming a theocratic state, dominated by the Ulema."[92] The Ulema, on the other hand, wished to revert to the 'golden age' of the Khilafat — "to reproduce a society which no longer exists and a polity which was suited to the early days of Islam."[93] This view has been vehemently opposed by all others on the ground that strict adherence to early Islamic principles cannot meet the needs and requirements of a twentieth century society and state. There is another opinion among the Muslims, supported by the non-Muslims, who would like to see Pakistan a secular and progressive state, based on western democratic principles. They very often refer to the famous speech of Jinnah[94] that politically there would be no difference between a Muslim and a non-Muslim in the state of Pakistan. They further argue that any form of Islamic state was bound to give control of the state to the Mullahs.[95] This controversy is still going on. At one time it became so acute that in 1952 and 1953 religious groups in Punjab launched a serious campaign against the Ahmadis — a religious sect among Muslims — that the Ahmadis "should be declared an official minority and that all members of the sect should be removed from positions of public importance. Their demands were not met and in February 1953 wide-spread rioting occurred in Punjab, martial law being declared in Lahore."[96]

This controversial issue, the place of religion in the political structure of the State, had, therefore, to be discussed and defined. Besides the secularists, western educated liberals

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[91] *Report of the Constitution Commission* (Pakistan) 1961, p. 13.
[92] K. B. Sayeed, *The Political System of Pakistan*. pp. 161-162.
[93] G. W. Choudhury, *Constitutional Development in Pakistan*, p. 66.
[94] Jinnah's inaugural address to the Constituent Assembly on 11 August 1947, G. Allana (ed.), *Pakistan Movement: Historic Documents*, pp. 542-546.
[95] G. W. Choudhury, *Constitutional Development in Pakistan*, p. 76.
[96] A. Gledhill, *Pakistan* (2nd. ed.) p. 75.

maintain that, while the Koran and Sunna provide for most things, there are fields where the individual may exercise his own judgment and those should cover most political issues. The traditionalists, however, are not prepared to give such freedom of conscience to the ordinary citizens. The former believe that unresolved matters might be decided by a free expression of opinion, the latter insist that the learned and religious men must propound new law. In one case it is the authority of the majority, in another it is the authority of the pious and the learned few Pakistani leaders had to attempt to find an Islamic foundation for the modern concept of democracy, without revoking the customary law too much. With the lead given by the first Constituent Assembly in adopting the Objective Resolution and recommending other Islamic provisions, the second Constituent Assembly provided a more or less agreed formula. The Constitution of 1956 was not regarded by the Ulema as anti-Islamic or un-Islamic. Even Maulana Maududi accepted the broad outlines.[97]

As has been said earlier, after twenty three years of independence, the issue is still very much alive. The orthodox religious groups led by Maulana Maududi, the Chief of the Jamat-i-Islami party, is regarded as a strong force in Pakistan's political arena. But from what has happened in Pakistan in the struggle for democratic ideals, one may say that the democratic forces operating in the country should be able to accommodate the religious aspirations of the people, which derive their support from the orthodox school. The religious issue is a matter for concern no doubt, but the solutions provided for in the two late Constitutions should prove adequate.

Conditions on the eve of dissolution of the Assembly.

During the period 1947-54 political maneuvering in the provincial capitals, sometimes under the encouragement of the centre, was not at all conducive to the growth and development of the parliamentary system of government in the country. In the North West Frontier Province, just after independence, the Congress Chief Minister Dr. Khan Sahib, and his ministry was removed under the directions of Jinnah. Khan Abdul Qayyum Khan was appointed to replace him. But his autocratic rule and intolerance alienated the provincial leaders. His Ministry was also accused of jobbery, bribery and nepotism.[98] Khan Abdul Qayyum Khan in 1953 was taken to the central cabinet and in his place the Inspector General of Police, Sardar Abdur Rashid, was appointed to continue as the Chief Minister of the Province till his dismissal in July 1955 for his opposition to the integration of West Pakistan provinces.[99]

Sindh was notorious for its political instability even before independence. Factionalism in the Assembly and even inside the cabinet led to mutual recriminations. In April 1948 on the direction of Jinnah, Muhammad Ayub Khuhro and his Ministry were

[97] K. B. Callard, Political *Forces in Pakistan, 1947-1959*, pp. 17-18.
[98] Chaudhri Muhammad Ali, *Emergence of Pakistan*, p. 368.
[99] H. Feldman, *A Constitution for Pakistan*, p. 82.

dismissed.[100] A judicial tribunal, appointed to inquire into the charges of maladministration and corruption against Khuhro, found him guilty on a few counts. The Public and Representative Offices (Disqualification) Act was applied and he was later disqualified by the Governor-General for public office for three years.[101] His successor, Pir Ilahi Baksh, was also disqualified by an Election Tribunal. Yusuf Haroon succeeded, Pir Ilahi Baksh but soon resigned. After him came Kazi Fazlullah and then Khuhro, again to be dismissed by the Governor. A special tribunal found both Khuhro and Fazlullah guilty on some charges. Governor's rule under section 92A of the Constitution Act followed. Provincial elections were held in May 1953 and Pirzada Abdul Sattar became Chief Minister but was dismissed in November 1954 for his opposition to the one unit scheme.[102]

In Punjab things were not different. Rivalries within the cabinet developed at a very early stage and Jinnah himself tried to sort out the tangle. But soon Mumtaz Daultana and Khizir Hayat Khan resigned; the former became President of the West Punjab Muslim League, and organized a strong opposition against the Ministry of the Khan of Mamdot. In the beginning of 1949 the Ministry was dismissed and the Province was put under Governor's rule. Elections were held in 1951 and Mumtaz Daultana formed a government. But he was made to resign in early 1953 in the wake of serious religious riots in the province. Firoz Khan Noon, who was then the Governor of East Bengal, was brought back to head the Ministry, which continued till Noon was removed for his differences with the central authority on elections to the second Constituent Assembly.

In East Bengal, when Khawaja Nazimuddin, who was the first Chief Minister of the Province, became the Governor-General after the death of Jinnah in September 1948, Nurul Amin was appointed in his place under instructions from the Governor-General. The Muslim League Parliamentary Party was not given a chance to elect its leader.[103] Ministers were accused of corruption and maladministration and one Minister was charged and disqualified under the Public and Representative Offices (Disqualification) Act. In March 1954 provincial elections were held and the Muslim League was swept away from the provincial political scene. The United Front, which won in the elections, came to power in April, with Fazlul Huq as the Chief Minister. Differences within the United Front soon developed and the Ministry, during its life of fifty-seven days, was faced with serious industrial labor troubles and the law and order situation deteriorated. Chief Minister Fazlul Huq visited Calcutta, where he was alleged to have pleaded for greater cooperation between East and West Bengal and later made an alleged seditious statement to the correspondent of the *New York Times*.[104] The United

[100] K. B.Sayaed, *The Political System of Pakistan*, p. 63.
[101] G. W. Choudhury, *Democracy in Pakistan*, p. 63.
[102] K. B. Sayeed, *The Political System of Pakistan*, p. 78.
[103] K. B. Sayeed, *The Political System of Pakistan*, p. 65.
[104] H. Feldman, *op. cit*. pp. 58-59

Front Ministry was dismissed on 29 May 1954 and Governor's rule under section was imposed in the Province.

The political situation in the provinces had its effects on the centre and vice versa. "These political developments in the country had their undesirable effects on the progress of constitution-making. The Muslim League continued to have its majority in the Constituent Assembly, but it was no longer a unified party. It was divided into factions and groups which began to judge issues not from national point of view but from a narrow provincial outlook."[105] The whole political atmosphere was vitiated by intrigues and uncertainty; the behavior of the politicians, who were busy striving for office and vilifying one another, paved the way for the break-down of the governmental system itself, giving provocation and encouragement to the executive to strike against the very foundation of the democratic structure of the state.

The period under review (1947-1954) witnessed serious public disorders in the country. The East-West controversy, the language issue and the religious question gave rise to extreme animosity between the people, which led to violent demonstration and riots in several cities.

The language issue led to a demand by the Bengalis that Bengali along with Urdu should be a state language of Pakistan. In February 1952 violent demonstrations were organized in Dacca,[106] the capital of East Bengal, where students were killed in police firing. In March 1954 ill-feeling between Bengali workers and non-Bengali management caused serious riots in the Karnaphuli Paper Mills near Chittagong. In May of the same year serious riots broke out in the Adamjee Jute Mills near Dacca. "The central government issued directions to the East Bengal government, which it showed reluctance to implement, and public men made statements indicating questionable loyalty to the central government. 'In May the centre suspended the provincial constitution under section 92A of the Constitution Act."[107]

As has been mentioned earlier, religious controversy led to grave riots in Punjab and martial law had to be declared in Lahore in March 1953. When in April 1954 the Muslim League Parliamentary Party in the Constituent Assembly agreed to adopt Bengali as one of the state languages, violent riots and organized hooliganism reigned in the city of Karachi on 22nd and 23rd April. Urdu newspapers came out with black margins.[108] All these disturbances and disorders were manifestations of the problems and issues facing the nation. Politicians could not rise above their regional and group interests to tackle them. Their failure in this respect was exploited by those who wished to see the growth and development of democratic institutions in the country jeopardized.

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[105] G. W. Choudhury, *Constitutional Development in Pakistan*, p. 136.
[106] A. Gledhill, *Pakistan* (2nd. ed.) p. 75.
[107] A. Gledhill, *Pakistan*, (2nd. ed.) p. 75.
[108] H. Feldmen, *A constitution for Pakistan*, p. 54.

In the later part of 1954 the political atmosphere in Pakistan was heavy with rumors of possible actions and counter-actions. Factional struggle in the political power-structure reached its crisis point and each group became desperate in its designs. Giving a picture of the political situation prevailing in Pakistan at that time, *The Times* (London) wrote in October 1954: "Seldom can a political crisis have rippled more tranquilly towards dangerous rapids than in Karachi now. Pakistan is moving towards a showdown in the bitter struggle for power between two irreconcilable factions and the Constituent Assembly when it' meets on October 27, will have to take decisions which will make or mar the whole future of the country. At the moment the initiative lies with what is known as the East Bengal Group ... opposed to the East Bengal clique is the so-called Punjab clique. They are supported by the able but ailing Governor-General, Ghulam Mohammed."[109]

The Constituent Assembly, having adopted the draft constitution in September 1954, passed in the same session two very significant Acts, which curbed the Governor-General's power severely. The first of these Acts was the Public and Representative Offices (Disqualification) (Repeal) Act, which repealed the Act of 1949. This repeal Act was passed in unprecedented haste, when a number of proceedings under the statute were in contemplation.[110] "There was suggestion in some quarters that the hasty repeal of this Act was effected in order to favor some members of the Constituent Assembly. Whatever might be the motive, the repeal of this Act lowered the dignity of the Assembly which was supposed to be the sovereign organ of the country."[111]

The second Act, The Government of India (Fifth Amendment) 1954, was passed to deprive the Governor-General of his powers in respect of appointment and dismissal of the Ministers and asserted the Assembly's right in making and sustaining the Government. Under it the Prime Minister, who was to command the confidence of the majority in the legislature, and other Ministers on the advice of the Prime Minister, were to be appointed by the Governor-General from among the members of the legislature. The Ministers were to be collectively responsible to the federal legislature and were to vacate office only on want of confidence in the Assembly. The Prime Minister was given the authority to call upon any minister to resign and the Governor-General was to act in accordance with the advice of the Ministers.

The Act, which in Rill form was accompanied by a 'Statement of Objects and Reasons', which maintained that its object was to "give legislative sanction to certain accepted principles and conventions connected with the formation and working of the Government in Parliamentary system of Government",[112] drastically curbed the powers

[109] Quoted in G.W. Choudhury, *Constitutional Development in Pakistan*, p. 43.
[110] A. Gledhill, *Pakistan*,(2nd. ed.) p. 78.
[111] G.W. Choudhury, *Constitutional Development in Pakistan*, p. 142.
[112] Quoted in K. Callard, *Pakistan: A Political Study*, p. 107.

of the Governor-General, making him literally a titular head. It is true that the principles incorporated in the Act were the constitutional practices followed in the countries with Westminster type constitutions. But the procedure that was followed and the haste in which it was passed[113] naturally provoked criticism. The measure has been termed as a 'constitutional coup'.[114] The Assembly's endeavors to assert its position as the guardian of democracy in Pakistan, were by and large interpreted as the negation of democracy.[115] And this "put the Governor-General in an intolerable situation, because there was no provision in the interim constitution for the dissolution of the federal legislature and so no means whereby the Governor-General, when at issue with the Assembly, could appeal to the electorate. Had he accepted the position, he might have been indefinitely subservient to the will of a perpetual legislature, which was losing the confidence of the people."[116]

The move, which was definitely aimed at the Governor-General,[117] was taken by the anti-Ghulam Muhammad group in the Constituent Assembly to deprive him of the powers which he had used in 1953 in dismissing the Nazimuddin government. It was also feared in some quarters that Ghulam Muhammad might again exercise these powers to dismiss the existing Ministry. The Cabinet was now to be independent of the clutches of the Governor-General and solely dependent on the Assembly. But Ghulam Muhammad, who was away at the time, was certainly not the man to swallow such a snub. His reaction was 'swift and sharp.'[118] By a Proclamation on October 24, 1954, he struck at the very root of the Assembly by dissolving it.

[113] K. Callard, Pakistan: *A Political Study*, pp. 105-113.
[114] G.W. Choudhury, *Constitutional Development in Pakistan*, p. 143.
[115] H.Feldman, *A Constitution for Pakistan*, p. 64.
[116] A. Gledhill, *Pakistan* (2nd.ed.), p. 78.
[117] M. Munir, *Constitution of the Islamic Republic of Pakistan*, p. 30.
[118] M. Munir, *Constitution of the Islamic Republic of Pakistan*, p. 30.

Chapter III

Dissolution of the first Constituent Assembly

The Governor-General's Proclamation

On October 24, 1954 the Governor-General, Ghulam Muhammad, issued a Proclamation[119] by which a state of emergency was declared throughout Pakistan. The Governor-General observed in the proclamation that the country was faced with a political crisis and that the constitutional machinery had broken down. The Constituent Assembly had lost the confidence of the people and could no longer function. The representatives of the people would be elected afresh to decide all issues, including constitutional issues. Until the elections were held, the administration would be carried on by a reconstituted cabinet. The proclamation asserted that the security and stability of the country were of paramount importance and that all personal, sectional and provincial interests must be subordinated to the supreme national interests.[120]

As promised in the proclamation, the cabinet was re-formed under the same Prime Minister, Mohammed Ali of Bogra. Four of the former Ministers retained their offices. General Mohammed Ayub Khan, Commander-in-chief of the Pakistan Army, became Minister of Defence, while Major-General Iskander Mirza then Governor of East Bengal was appointed Minister of the Interior. Newcomers to the administration were Dr. Khan Sahib, brother of Red Shirt leader. Abdul Ghaffar Khan, Suhrawardy and Abu Hassain Sarkar from the new East Bengal leadership. The new cabinet did not consist of members of one political party but of persons holding a wide variety of political views. Consequently it was styled by the Prime Minister the 'cabinet of Talents'.[121]

The Proclamation also put an end to the Constituent Assembly, which had been set up under the Independence Plan seven years previously to give the country a constitution, and which, until that task was completed, was to act as the Federal Legislature under the adapted Government of India Act, 1935. The Proclamation did not refer to any power by virtue of which the Governor-General professed to act, nor did it spell out the dissolution of the Constituent Assembly in so many words.[122] It simply said that the Constituent Assembly, as then constituted, had lost the confidence of the people, so that it could no longer function. Though in the mind of the average man there was no doubt that what had been done amounted to the dissolution of the Assembly, *Dawn* of Karachi

[119] *Gazette of Pakistan*, October 24, 1954 P.L.D. 1954, Central Statutes, 202.
[120] For full text of the Proclamation see Appendix I.
[121] Prime Minister's statement, *Dawn*, October 31, 1954
[122] G.W. Choudhury, *Constitutional Development in Pakistan*, pp. 141-142

posed the question whether the Constituent Assembly had been dissolved *dejure* or whether it had merely ceased to function.[123] It was then officially declared that, following the Governor-General's proclamation, the Constituent Assembly stood dissolved.[124] It may be recalled at this stage that the Indian Independence Act, 1947, while authorizing the Constituent Assembly to make provision for the constitution of the country, did not fix any period for the purpose. There was also no provision regarding the life of the Assembly nor any method for its dissolution. It was presumed, as in fact happened in India, that the Assembly would frame the constitution and then dissolve itself, and that fresh elections to the central legislature would be held under the new constitution. This assumption was justified by events in India;[125] in Pakistan the events proved otherwise. Executive action had to intervene before the Assembly could fulfill its prime responsibility.

The Constituent Assembly, when it was dissolved, had been in existence for over seven years. In its endeavor to frame the constitution, it had considered various proposals, which had involved serious differences of opinion. Demands had been made for its dissolution, in some parts of Pakistan, particularly in East Bengal, where dissatisfaction was wide-spread and the proposals for a strong centre and the adoption of Urdu as the only state language were vehemently resented. After the provincial elections in March 1954, when the Muslim League was almost completely eliminated from the provincial political scene, there was "almost an unanimous demand ... voiced by the new members of the Provincial Assembly, that the East Bengal representatives should resign, as they had lost the confidence of the people, and any constitution framed by them would not receive the backing of the masses".[126] A resolution to this effect was passed at a meeting of the United Front Parliamentary Party held on April 2, 1954.[127]

Consequently most political leaders in East Bengal and the people at large approved the Governor-General's action. The United Front leaders welcomed the action taken against the Constituent Assembly because it was an 'unrepresentative' body and one of the components of the Front — the Ganatantri Dal passed a resolution approving the action.[128] Even Suhrawardy, the Awami League chief and one of the United Front's top three, who was convalescing in Zurich, welcomed the Governor-General's action and said: "Governor-General had accepted my contention that the Constituent Assembly was not a representative body."[129] The support for the Governor-General's action did not end in those statements. The leaders of the United Front vied with each other in protesting their loyalty to and support of the Governor-General, when he paid a visit to

[123] *Dawn*, October 27, 1954.
[124] *Dawn*, October 28, 1954.
[125] A. Gledhill, *'The Constitutional Crisis in Pakistan*', p. 1. Reprinted from the *Indian Year Book of International Affairs* 1955.
[126] K.J. Newman, *Essays on Constitution of Pakistan*, p. XXXV.
[127] A.M. Ahmad, *Rajnitir Panchash Bachar*, p. 263
[128] *Dawn*, October 26, 1954.
[129] 11 Dawn, October 27, 1954.

East Bengal in the following month and a grand public reception was organized in his honor.[130]

But this support for the Governor-General's action in East Bengal was not based on any conscious political thinking or on any solid principle. It was observed by Abul Mansur Ahmad, who was a United Front Minister in East Bengal, and later a central Minister in the Suhrawardy Cabinet, that it was merely the expression of the crude satisfaction of politicians, previously out of office, at seeing the downfall of their political opponents.[131] He admits that most of the politicians realized that the dissolution of the Constituent Assembly was outside the constitutional powers of the Governor-General. But the coterie which had been in power at the centre was regarded as consisting of the persons responsible for the sufferings of Bengal and in particular for the denial of the rightful claim of the United Front to rule the Province. The Assembly had become an instrument in the hands of this clique for furthering its own designs. A strike against this clique and its instrument would, therefore, naturally get the support of the Bengali politicians. A further immediate cause for their jubilation was that the exit of most Muslim League members from the central administration might result in the termination of Governor's rule in the Province and an opportunity of the United Front to capture power in East Bengal.

In the Punjab, political leaders readily supported the Governor-General's action as they had only contempt for the constitution which the Constituent Assembly intended to adopt at its next session, fixed for October 27, 1954. The members of the Punjab Muslim League Assembly Party, under the leadership of Chief Minister Malik Firoz Khan Noon, endorsed the Governor-General's action. In a resolution it said: "we give assurance of our whole-hearted support to the Governor-General and Prime Minister in their endeavor to give the country a stable Government."[132]

The main objection of the Punjab political leaders to the proposed constitution was directed to the 'Mohammed Ali Formula' adopted by the Constituent Assembly for representation in the central legislature. They were apprehensive of the Bengali 'domination' in the central Assembly with the help and support of members from the smaller West Pakistani provinces. Zonal Federation for the provinces of West Pakistan was, therefore, proposed to enable the West wing to balance Bengal. This was not acceptable to the Frontier and Sindh politicians.[133] When the Muslim League Parliamentary Party had adopted the Basic Principles Committee Report, a party press release said that the door for a Zonal Federation of the West wing provinces was left

[130] *Ibid*. November 17, 1954.
[131] A.M. Ahmad, *op. cit.* p. 272.
[132] *Dawn*, October 25, 1954.
[133] *Dawn*, September 16, 1954.

open. A comprehensive plan, acceptable to all the provinces when presented might be considered and adopted.[134]

From what transpired later, it appears that the Punjabi leaders favored some sort of union amongst the Western provinces. Many would regard the non-acceptability of the Zonal Federation plan by the Constituent Assembly as one of the reasons for its dissolution by the Governor-General, who, allegedly, "symbolized the Punjab".[135] The quick action taken after the Constituent Assembly had been dissolved, towards the integration of West Pakistan into 'One Unit' gives some support to this view. The Punjab leadership naturally gave its "whole-hearted" support to the Governor-General's action.

In North-West Frontier Province and Sindh, though no such attitude was apparent before the dissolution of the Constituent Assembly, as soon as this was done the politicians in power welcomed it. The Frontier Chief Minister, Sardar Abdur Rashid, said that he was convinced that the step taken by the Governor-General 'in consultation with the prime Minister' had saved the country from a catastrophe.[136] In Sindh the new Chief Minister, Khuhro, who had replaced Abdul Sattar Pirzada, dismissed on the direction of the Governor-General for maladministration, hailed the Governor-General's action as the only 'appropriate one' taken in the prevailing circumstances. The President of the Jinnah Awami League of Sindh also welcomed the dissolution of the Constituent Assembly.[137] The Working Committee of the Sindh Provincial Muslim League approved the dissolution of the Assembly, which, according to its resolution, had ceased to be a representative body, and congratulated the Governor-General on his action.[138] Till its dismissal, it may be noted, the Frontier and Sindh politicians had fully supported the Constituent Assembly and the constitution it had devised. But on its dissolution they declared the assembly overnight to be 'unrepresentative' with no authority to frame the Constitution. This change of attitude shows how easily Pakistani politicians changed their political allegiance and gave their support to those who assumed power and office. This has been the practice of most Pakistani politicians throughout the political history of the country.

Mohammed Ali of Bogra, the Prime Minister, formerly a staunch upholder of the Constituent Assembly, who had maintained that it should not be subject to any outside pressure,[139] now came out openly in condemnation of its activities. In a nationwide radio broadcast he said: "Certain actions of the Constituent Assembly have provoked a storm of indignation throughout the country. Recently, by far the majority of you have

[134] *Ibid*. September 15, 1954.
[135] *Dawn*, October 7, 1954.
[136] *Ibid*. October 26, 1954.
[137] *Ibid*.
[138] *Dawn*, January 6, 1955.
[139] Sec. G.W. Choudhury, *Constitutional Development in Pakistan*, p. 144.

seriously questioned its competence to speak for them (*sic*) with the end result that its decisions have ceased to command that general acceptance by people which is the *sine qua non* of a workable and stable Constitution."[140] Describing the recent events, the Prime Minister said that he had been watching the development while abroad and "on my return I found that a situation had developed in which the Governor-General had to take the action he has taken in the larger interest of Pakistan. The destiny of the country could no longer be left to the caprices of an Assembly, which, instead of safeguarding the interests of Pakistan, was becoming increasingly subject to internal strains and bickerings. Constitution-making is important. But more important by far is the security and stability of our country. These must at all times be fully assured."[141]

All these public exhibitions can only be explained in terms of the pattern of politics obtaining in Pakistan. The support of the leaders and of the press would unhesitatingly be forthcoming for the actions of the executive which, with the support of the bureaucracy and armed forces, was the repository of all powers and authority, Analyzing the situation, the Constitution Commission (1960) attempted to show that every executive action and every interference by the executive would be supported without the slightest opposition. On this particular occasion the Commission observed that, although everyone was surprised, there was no organized opposition.[142]

"Controlled Democracy"

By October, 1954 the Pakistani rulers seem to have become convinced that two things were essential for the effective administration of the country. The first was that the territories of West Pakistan should be merged into a single West Pakistan Province, the details of which we will discuss later; the second was that democracy in its existing form, had failed to give an effective form of administration to the country. After the dissolution of the Constituent Assembly the 'failure' of democracy was loudly proclaimed and the British system of Parliamentary Government was declared 'unsuitable' in Pakistan.

Major-General Iskander Mirza, the Minister of the Interior and the 'strong man'[143] of the new regime, came out openly against the existing democratic system. Supporting the Governor-General's action, Mirza commented that the people of Pakistan were illiterate and not interested in politics. They were bound to act foolishly sometimes and there should be somebody to rectify their blunders. He maintained that the Governor-General was justified in his action, because "somebody had to save the country from 'political scalawags".[144] He said that the people of Pakistan had had little training in democracy.

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[140] *Dawn*, October 25, 1954.
[141] *Ibid*.
[142] *Constitution Commission Report* (1961) p. 8, Para. 16.
[143] G.W. Choudhury, *op .cit*. p. 147.
[144] *Dawn*, October 31, 1954.

"They could not be expected to work successfully political institutions and forms of democratic government, evolved in a highly developed society like England. The attempt to work a democratic system in this country during the last seven years had led to disastrous results." The right to elect even wrong representatives was a "luxury" which could not be conceded in the circumstances prevailing in Pakistan.[145]

General Iskandar Mirza would strongly disagree with the view that democracy had not been given a chance in Pakistan; according to him "Democracy had run riot during seven years in Pakistan."[146] Referring to East Bengal, he said that the M.L.A.s (Members of the Legislative Assembly) had made a mess of the whole thing when they were in power for four to six weeks; they had even deprived the District Magistrates of their powers.[147] Mirza was convinced that "Pakistan is obviously not yet ripe for the practice of democracy, as the term is understood in Britain or America. There must be some measure of control to prevent flagrant abuses".[148] In the General's view: "People of this country need 'controlled democracy' for some time to come".[149]

He would recommend a Unitary form of Government for Pakistan and 'one unit' for the West Pakistan provinces. Governors, and Provincial Assemblies were "paraphernalia", involving heavy cost, which could be dispensed with by dividing the country into "commissionaires."[150] General Mirza reiterated this view time anal again during this period and explained that by "controlled democracy" he meant that "the Head of the State should have adequate powers to control an abnormal situation, whenever necessary.[151]

Such, then, was the constitutional structure which this regime would like for Pakistan. From Mirza's statement it is evident that the regime had concluded that parliamentary democracy had failed in Pakistan and that a system, more akin to the American system in which an "executive irremovable for four years was grafted on to a British system of representation"[152] would suit Pakistan. Commenting on the situation Professor Alan Gledhill said, "In February 1955, after the dissolution of the Assembly, a plan for a new constitution on the American model was foreshadowed, and it was suggested that this would be more in keeping with Islamic tradition, as it would ensure the Head of the State and his advisers a fixed tenure of office, independent of parliamentary support."[153] The Defence Minister, General Ayub Khan, who had his own ideas of a solution to the

[145] *Ibid*.
[146] *Ibid*. November 19, 1954.
[147] *Dawn*, November 18, 1954.
[148] Interview with *Daily Telegraph's* (London) correspondent published in *Dawn*, November 13, 1954.
[149] *Dawn*, October 31, 1954.
[150] *Dawn*, November 15, 1954.
[151] *Ibid*, November 16, 1954.
[152] Sir Ivor Jennings, *The Approach to Self-Government*, p. 18.
[153] A. Gledhill 'The Constitutional Crisis in Pakistan,' *op. cit.* p. 4.

country's constitutional problems, presented the outline of a constitution to the Cabinet,[154] which apparently approved of the official line.

In order to devise a constitution on the above lines the services of Sir Ivor Jennings was employed. *Dawn*, on January 2, 1955 published a news item, saying that the constitutional plan for Pakistan had taken some shape. It was likely to be finalized and published by the end of the month. The constitution was to be of the presidential type, and the President would have wide powers. Suhrawardy, the Law Minister announced in February, 1955 that the drafting of the Constitution was complete, but it would not be enforced before the decision of the Federal Court in *Tamzuddin Khan's* case.[155] But Suhrawardy did not say what type of Constitution had been drafted. Sir Ivor Jennings says that the idea of an American type constitution was later abandoned. He states, "The conclusive argument, which led to the rejection of the scheme was, however, that the people of Pakistan were so familiar with the British Constitution that any fundamental departure from it would be regarded with profound suspicion."[156]

It is difficult to say with certainty what dissuaded the regime from pursuing its declared aim of having an American type of constitution. The presence in the cabinet of Suhrawardy and other politicians, who favored a Westminster system might have had a moderating effect on Mirza and his supporters. It is, however, certain that the decision of the Federal Court in *Usif Patels'* case[157] and in the *Special Reference* case[158] definitely deterred the regime from framing and enforcing any type of constitution whatsoever on the country. The task of constitution making had to be left to the Second Constituent Assembly, which was to be summoned shortly by the Governor-General.

The Integration of West Pakistan

The plan to integrate the provinces and other territories of West Pakistan into a single province was first officially announced by the Prime Minister in a broadcast on November 22, 1954.[159] It had its statutory foundation in the Emergency Powers Ordinance, 1955,[160] and, in accordance with its declared intention, the Government proceeded to set up machinery for the reorganization. The final phase, however, had to be delayed till the second Constituent Assembly had passed the necessary Act.

The One Unit plan, apart from its obvious administrative advantages, had some political motive behind it. It has now been revealed that the scheme was conceived and

[154] M. Ayub Khan, *Friends Not Masters*, p. 192.
[155] *Dawn*, February 23, 1955.
[156] Sir Ivor Jennings, *op. cit* p.19.
[157] P.L.D. 1955 F.C. 387.
[158] P.L.D. 1955 F.C. 435.
[159] *Dawn*, November 23, 1954.
[160] Ordinance IX of 1955.

put forward by the Punjab leaders, with the support of the Governor-General, to enable the West Pakistan members in the central legislative to speak as one entity, *vis-a-vis* the East Bengal members.[161] The plan was skillfully drafted by the former Chief Minister of Punjab, Mumtaz Daltana, suggesting the process by which the opposition to the plan was to be overcome. It recommended the dismissal of the Pirzada Ministry in Sindh and support for the forces which would give approval to the scheme. To avoid suspicion, Punjab was to remain quiet, but Daultana hoped that, at a later stage, Punjab would take the lead and effective and intelligent Punjab politicians would be put in power both at the centre and at Lahore.[162]

Following this secret plan, the Pirzada Government, which was opposed to 'One Unit', was dismissal and M. A. Khuhro was installed as the Chief Minister of Sindh. The Sindh Legislative Assembly voted in favor of one unit on December 11th, 1954.[163] How the Assembly, which had previously opposed the scheme, could change its views so quickly might seem a political miracle. But for Khuhro, who excelled in political subtlety, it was not difficult. Opposition was stifled either by threat and arrest[164] of members of the Assembly or by promise of patronage and favor. The dismissed Chief Minister claimed that he was dismissed, solely because he was opposed to the One Unit scheme.[165]

In the North-West Frontier Province the Government of Sardar Abdur Rashid gave its support to the merger scheme. The Frontier Assembly passed a resolution on November 25, 1954 approving the One Unit scheme,[166] and it was widely thought that Dr. Khan Sahib was taken into the Central Cabinet, to get his support for the scheme. But for some unknown reasons, though it has been suggested that it was local sentiment and Pathan patriotism, Sardar Abdur Rashid later opposed the integration plan. Though no clear ground was given, it is thought that he was dismissed in July, 1955, for this reason.[167] The Bahawalpur State Government and State legislature also became victims of "the rock of the one unit".[168] Even the Noon Ministry in the Punjab, which had earlier given its full support to the scheme, allegedly became suspicious of the motives of some of the central Ministers and of the speed with which the merger was intended to be implemented. It was dismissed in May, 1955.[169]

In East Bengal the 'one unit' issue did not arouse much concern at that time. Suhrawardy, as the Law Minister responsible for the parliamentary draftsmanship

[161] K.B. Sayeed, *The Political System of Pakistan*, p. 77.
[162] *Ibid*.
[163] *Dawn*, December 12, 1954.
[164] *Dawn*, December 12, 1954.
[165] Feldman, *A Constitution for Pakistan*, p. 77.
[166] *Dawn*, November 26, 1954.
[167] H. Feldman, *op. cit*., p. 82.
[168] Ibid, p.84.
[169] H. Feldman. *A Constitution for Pakistan,* p. 82.

involved in the scheme could count on the support of his Awami League. The United Front, under Fazlul Huq had, by this time, entered into a deal with Prime Minister Mohammed Ali. It also did not think it wise to oppose the Centre's move. Moreover the Bengali leaders at that time were busy with their own provincial problems. Thus an important step to obstruct East Bengal's numerical majority went almost unnoticed in the Province. After the integration of West Pakistan, equal representation on the basis of the 'two units' in the central legislature was only a logical demand.

Despite the Central Government's bid for support for its plan, voices were raised in Sindh and North-West Frontier Provinces against integration. 'Sindh Day' was observed throughout Sindh with processions and protest meetings.[170] Members of the Sindh Legislative Assembly issued statements against the scheme. In the Frontier Province the Pir of Manki Sharif, a prominent public leader, called for a referendum on the issue. Khan Abdul Ghaffar Khan said that he was not opposed to the idea of having one administration for the whole of West Pakistan, but the time and the political atmosphere were not opportune. He warned that, if the scheme was imposed in an unfavorable atmosphere, without consulting the people, integration might do more harm than good.[171]

The Government, however, went ahead with the scheme and the Establishment of West Pakistan Act, 1955, was passed by the second constituent Assembly in September. One Unit for West Pakistan certainly had some advantages. It would result in a drastic reduction of administrative expenses, and uniform development of the Province as a whole would bring benefit to the less developed regions. Geographically, economically and culturally the scheme seemed viable and sound. But the tactics followed in achieving integration and the ulterior political motive behind it have not escaped criticism by the neutral observers. Many would be inclined to think that one of the, reasons why the 'Punjabi' Governor-General dissolved the Constituent Assembly, which was opposed to the integration of West Pakistan, was his strong desire, prompted by Punjabi politicians, to unite West Pakistan to Punjab's advantage. It has been remarked that, among the many causes of the breakdown of constitutional government in Pakistan, one was the integration of West Pakistan at the point of the pistol.[172] The 'one unit' involved pressure on all the Provincial and State Governments in West Pakistan before it could be implemented. Integration was not willingly accepted; it produced political upheavals in West Pakistan and was the main cause of governmental instability in the years 1956-58 both in the Province and at the Centre. After fifteen years of its existence, for good or for worse, the West Pakistan Province had to be dissolved in 1970 and the pre-1955 provincial entities were restored.[173]

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[170] *Dawn*. November 23, 1954.
[171] *Ibid*, November 19, 1954.
[172] K.B. Sayeed, *op. cit*., p. 79.
[173] Province of West Pakistan (Dissolution) Order 1970, (President's Order No. 1 of 1970), P.L.D. 1970 Central Statutes 218.

The Sindh Chief Court's view of the Governor-General's Action

The Proclamation of the Governor-General dissolving the Constituent Assembly was challenged in the Chief Court of Sindh by the Assembly's President, Maulvi Tamizuddin Khan[174], who applied to the Court under section 223A of the Government of India Act, 1935 for the issue of writs of *mandamus* and *quo warranto* with a view to: (i) restrain the Federation from giving effect to the proclamation and obstructing the petitioner in the exercise of his functions and duties as President of the Assembly; and (ii) to determine the validity of appointment of the recently appointed Ministers, who were not members of the legislature. The respondent raised the preliminary objection that section 223A of the Act of 1935, which gave powers to superior courts to issue writs, was, in the absence of the assent of the Governor-General, not a valid law. The Court, therefore, had no jurisdiction to issue the writs to the respondent. The sate objection applied to new section 10 of the Government of India Act, 1935, which purported to limit the Governor-General's discretion in his choice of Ministers to members of the Constituent Assembly. The Chief Court of Sindh unanimously held that to constitutional laws passed by the Constituent Assembly the assent of the Governor-General was not necessary and therefore the amended section 10 and section 223A of the Government of India Act, 1935, were valid constitutional laws enforceable without the assent of the Governor-General.

Interpreting sub-section (3) of section 6[175] of the Indian Independence Act, 1947, Constantine, C. J. said that "the Governor-General's full power to assent is accompanied by deletion of disallowance, reservation and suspension, and in my opinion the purport of the section is to provide that the Governor-General's power of assent is not to be controlled by Her Majesty: this is in keeping with the key to interpretation provided by the preamble — the declaration of independence — and with the purport of sections 5, 6 and 7 — the abdication of all control by Crown, Parliament, and Government of the United Kingdom. Agha, J. held[176] that subsection (3) does not provide that assent is necessary, but that, if assent is necessary, the Governor-General shall have full power to accord it. The necessity of assent was retained in the Government of India, Act in respect of the Federal Legislation; no corresponding provision necessitating consent in respect of Constituent Assembly was inserted in the Independence Act."[177] To the same effect were the findings of other Judges of the Court on the question of assent. Sub-section (3) of section 6, read as a whole, provided unrestrained power of assent by the

[174] *Maului Tamizuddin Khan v. Federation of Pakistan and others* P.L.D. 1955 Sindh. 96.

[175] "The Governor-General of each of the new Dominions shall have full power to assent in His Majesty's name to any law of the legislature of that Dominion and so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon or the suspension of the operation of laws until the signification of His Majesty's pleasure thereon shall not apply to laws of the. Legislature of either of the new Dominions.

[176] In *M.A. Khuhro. v. Federation of Pakistan*, P.L.D. 1950, Sindh 49.

[177] P.L.D.1955, Sindh 96, at p. 104.

Governor-General whenever necessary, and "the intent is not to create the necessity of assent when none has been prescribed. What subsection (3) does is to shed the existing statutory limitations to the Governor-General's power to assent."[178]

The Court also held that the Governor-General had no power under the Independence Act, 1947 to dissolve the Constituent Assembly, which had no prescribed period of duration, and could only be dissolved by the Assembly itself. The Act contained no express provision for dissolution of the Assembly. "Where legislatures have been created by statute, dissolution has been provided for by statute. (Hence the contrasting omission in the Independence Act appears deliberate). There is no case throughout the Commonwealth outside England where dissolution of a legislature takes place except by express provision in the constitution, whether granted by statute or Order-in-Council. The prerogative of dissolution in my opinion extends only to the parliament of the United Kingdom elsewhere dissolution is dependent upon statute or order-in-council."[179] The argument that, apart from section 5[180] of the Independence Act, the Governor-General had and could exercise His Majesty's prerogative to dissolve the Assembly, because the Constituent Assembly was a Legislature and the Independence Act left that prerogative unaffected by provisions, was, according to Vellani, J., untenable. The learned Judge held that "if the Governor-General has that prerogative, he has it by virtue only of being His Majesty's representative. That representation has been limited by express words for the purpose of the government of the Dominion', and the limitation shuts the door to further implications."[181] At this stage the learned Judge referred to *Bonanza Creek Gold Mining Co. Ltd* v The *King*[182] *Attorney-General* v *DeKeyser's Hotel,*[183] and *Moore* v *Attorney-General for the Irish Free State*[184] and concluded that "where there is legislation covering a field of prerogative, and it is desired to make the prerogative still available, it becomes necessary to reserve in the legislation, the power to use the prerogative concurrently with the legislation, as otherwise the legislation, so long as it is in force, precludes the exercise of the prerogative."[185] The prerogative to dissolve was governed by the express provision of section 5 of the Indian Independence Act and that section did not enable the Governor-General to dissolve the Constituent Assembly.[186]

The Federal Court's view of the Constituent Assembly's Powers

[178] Per Vellani, J. at p. 115.
[179] Per Constantine, C.J. at p. 106.
[180] "....there shall be-a Governor-General who shall be appointed by His Majesty and shall represent His Majesty for the purposes of the government of the Dominions...".
[181] at 110.
[182] (1916) I.A.C. 566.
[183] (1920) K.C. 508.
[184] (1935) A.C. 484.
[185] Per Vellani J. at 113.
[186] Per Vellani J. at p. 111.

The Federation and, other respondents filed an appeal to the Federal Court against the judgment of the Chief Court of Sindh.[187] The Federal Court, by a majority of four to one (Cornelius, J. dissenting), reversed the findings of the Court below. It held that all Acts passed by the Constituent Assembly including constitutional Acts, required the assent of the Governor-General for their validity. Since section 223A. of the Government of India Act, under which the Chief Court assumed jurisdiction to issue writs did not receive such assent, it was not yet a law, and therefore that court had no jurisdiction to issue the writs. In view of this conclusion the Court did not go into the other issues.

The principal judgment of the Court was delivered by Munir C. J. who argued that Pakistan, being a Dominion mad a member of the Commonwealth, its constitutional structure aid practice were like those of the United Kingdom all the Dominions, Legislation was the exercise of a high prerogative power add even where it was delegated by statute or charter to a legislature, in theory it was always subject to assent, whether that assent be given by the King or a person nominated by the King. That necessity was enjoined in the case of Pakistan so long as it continued to be a Dominion, though it was open to that Dominion, if the Governor-General gave assent to a Bill of secession, to repudiate its Dominion Status.[188] The Constituent Assembly was to exercise the power of the Legislature of the Dominion in making provisions for the Constitution of the Dominion under section 8(1) of the Independence Act, which laid down:

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

So, according to the Chief Justice, when the Assembly was not exercising the restricted powers of the Federal Legislature under the adapted Act of 1935, which the Assembly was enjoined to exercise by proviso (e) of subsection (2) of section 8 of the Independence Act, it was acting as the Legislature of the Dominion under section 6(1),[189] exercising powers under section 8(1) quoted above. Rejecting the contention that the Constituent Assembly, though it exercised the powers of the Legislature of the Dominion, was not itself the Legislature of the Dominion, His Lordship observed:

> "This to my mind is tantamount to a refusal to read subsection (1) of section 8, the only purport of which can be that the Constituent Assembly shall be the first Legislature of the Dominion, competent to exercise all the powers given to that legislature by section 6, including the power to make laws as to the constitution of the Dominions. Learned counsel for the appellants therefore rightly contended

[187] *Federation of Pakistan v Maulvi Tamizuain Khan* P.L.D. 1955 F.C. 240.
[188] P.L.D.1955 F.C. 240, at p. 289.
[189] "The Legislature of each of the. new Dominions shall have full power to make laws for that Dominion..."

that the plain words of sub-section (i) of section 8, that 'reference in this Act to the Legislature of the Dominion shall be construed accordingly' have the effect of substituting the Constituent Assembly for the words 'the Legislature of each of the new Dominions' in subsections (1) and (3) of section 6. That being the position, there can be no escape from the-conclusion that the Governor-General's assent to the laws made by the Constituent Assembly is as necessary as his assent to any future Legislature of the Dominion brought into existence by the constituent Assembly to replace itself. "[190]

The Chief Justice, interpreting section 5 of the Act of 1947 held that "government' necessarily included administration as well as making of constitutional laws. He observed: "If the Governor-General represents the Crown for the purposes of the government of the Dominion when he gives, assent to the laws passed by the Federal Legislature, it must *a fortiori* follow that he represents the Crown for the same purpose when he assents to constitutional laws, because in a State like ours: it is impossible to conceive of a government without there being a Constitution".[191] The learned Chief Justice declined to consider the fact that the various organs of government had previously acted on the assumption that assent to constitutional laws was not necessary. He argued that the principle of *Contemnoranea, Expositio* would only be applicable if there was any doubt as to the meaning of the provisions of the statute. The Constituent Assembly was the sovereign legislative body of the Dominion, but the Governor-General was a part of the Legislature. Every Act passed by the Assembly, therefore, required the assent of the Governor-General.[192]

Cornelius J., as he then was, in a dissenting judgment said that Pakistan, though a Dominion within the Commonwealth, was different in status from the older Dominions. The Acts of the Imperial Parliament, giving Dominion status to older Dominions, contained, restrictions on the powers of the Dominions. The existence of such restraints clearly differentiated between the status of the older Dominions and that of 'independent' Dominions of India, add Pakistan. The fact that His Majesty's Government and the British Parliament admitted that the constitution of the new Dominions were to be framed by Indians (or Pakistanis) themselves, without any restriction whatsoever, had no precedent in commonwealth history. So, other Dominions were not 'independent' Dominions in the same sense as India and Pakistan became independent in August, 1947[193] According to his Lordship, the Constituent Assembly was not a body created by the British Parliament; it was a body created by a "supra-legal" power to discharge, the "supra-legal" function of preparing a constitution for Pakistan, having inherent power in this respect by virtue of its being a body representative of the will, of the people in relation to their future mode of

[190] P.L.D. 1955 F.C. 240, at p. 289.
[191] *Ibid*. at p. 294.
[192] P.L.D. 1955 F C. 240, at p. 298.
[193] P.L.D. 1955 F.C. 240, at p. 332.

Government.[194] The Constituent assembly was not anonymous with the Legislature of the Dominion. But the Assembly was given all the powers to provide a constitution for Pakistan in which there might or might not be a "Legislature of the Dominion", and if there were such a legislature, to prescribe its powers add functions. It was, therefore, difficult to identify the constituent Assembly "clothed with sovereign power to provide a new constitution for the country, with an entirely different and as yet notional body, whose constitution and powers were yet to be shaped by the Constituent Assembly."[195]

On the question of assent, ills Lordship held that the Governor-General's power to assent under section 6(3) could not be enlarged by applying section 5 of the Independence Act; as the representative of the Crown, his prerogative power was regulated by the statute. Constitution-making was distinct from government and the Constituent Assembly, being designed to be a sovereign body exercising sovereign power including power to alter the constitution subject to which the Governor-General was to act, it would be inconsistent to suppose that it was to act subject to the "qualified negative" of assent by the Governor-General.[196] Cornelius J. further observed that all the great organs of the State had acted on the assumption that the assent of the Governor-General to constitutional laws was not necessary so that unaccented legislation of the constituent Assembly had changed the position of innumerable individuals, affecting their rights and interests. Not only had the Sid Chief Court in *M. A. Khuhro v Federation*[197] decided in 1950 that no assent was necessary, but the Federal Court also in *Khan of Mamdot v Crown*[198] and in *Akbar Khan v Crown*[199] accepted by implication, that assent was not necessary for the validity of a constitutional law.[200]

It may be noted here regarding the contention that the constituent Assembly was not the Legislature of the Dominion, Professor Gledhill has pointed out that "Legislature" under section 181 of Interpretation Act 1889, which was applicable to the Indian Independence Act 1947, meant anybody other than the Imperial Parliament, competent to make laws for British India or the relevant part of it, so it would seem that the Constituent Assembly, being a body competent to make constitutional laws for what had been part of British India, was the Legislature of the Dominion. Reference to this argument might have had some effect on Cornelius J's contention on this point. But it was never raised.[201]

The Federal Court's view of the Governor-General's Powers

[194] Ibid p. 351.
[195] *Ibid* p. 353.
[196] P.L.D. 1955 F.C. 240, at p. 368.
[197] P.L.D. 1950 Sindh, 49.
[198] P.L.D.1950 F.C. 15.
[199] 1954 P.C. 87.
[200] 1955 F.C. 240, at, 362.
[201] A. Gledhill, *Pakistan* (2nd ed.) p. 80.

As a result of the Federal Court's decision in *Tamizuddin Khan's* case, forty four constitutional Acts became, by implication, invalid for want of assent of the Governor-General. The Governor-General, thereupon, purporting to act under section 102 of the Government of India Act, proclaimed a grave emergency throughout the country on April 27, 1955. On the same day purporting to act under section 42(1) of the Act of 1935, the Emergency Powers Ordinance, 1955[202] was issued and promulgated. The Ordinance, after narrating in the preamble that the Federal Court's judgment by Invalidating certain constitutional Acts, had caused &breakdown of the constitutional machinery, purported to validate retrospectively thirty five of the Acts, listed in the Schedule to the Ordinance.

The Federal Court, however, held[203] that the Governor-General could not, by Ordinance, validate any of the laws, which had become invalid for want of his assent. The judgment of Munir C. J. held on the authority of *Tamizuddin Khan's* case, that the power of the Governor-General to make Ordinances did not go beyond the Federal Legislature's power to make laws. The power of the Legislature of the Dominion to make provision for the constitution of the Dominion could, under section 8(1) of the Independence Act, 1947 be exercised only by the Constituent Assembly and that power could not be exercised by the Assembly, when it functioned as the Federal Legislature under the Act of 1935. Therefore, if the Federal Legislature, in the absence of a provision expressly authorizing it to do so was incompetent to amend the Indian Independence Act or the Government of India Act, 1935, the Governor-General, possessing no larger powers than those of the Federal Legislature, was equally incompetent to amend either of the constitution Acts by Ordinance; The Governor-General could give or withhold his assent to the legislation of the Constituent Assembly but he himself was not the Constituent Assembly aid, on its disappearance, he could neither claim power which he never possessed nor could he claim to succeed to the powers of that Assembly.[204]

The Chief Justice referred to the statement made by counsel for the Federation in *Tamizuddin Khan's* case, regarding the constitutional position consequent upon the dissolution of the Constituent Assembly. His Lordship cited a portion which implied that immediate steps were being taken to hold elections to new Assembly. The Chief Justice observed that it might have been expected that the first concern of the Government would be to bring into existence another representative body to exercise the power of the Constituent Assembly. But his Lordship regretted that events showed that other counsels had since prevailed. The Ordinance (IX of 1955) contained no reference to elections, and all that the learned Advocate-General could say was that they were intended to be held.[205]

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[202] Ordinance IX of 1955, P.L.D. 1955 Central Statutes 63.
[203] *Usif Patel v The Crown*, P.L.D. 1955 F.C. 387.
[204] *Ibid*, p. 392.
[205] *Ibid*, p .401.

Following the judgment in *Usif Patel's* case and paying heed to the strong observations made by the chief Justice, the Governor-General on April 15, 1955 issued the Constituent Convention Order, 1955,[206] providing for the setting up of a Convention to meet on May 10, to make the Constitution for the country, and to exercise all the powers of the Constituent Assembly under section 8 of the Indian Independence Act, 1947. On the following day, the Governor-General made an Ordinance — the Emergency Powers Ordinance, 1955,[207] — assuming to himself, until other provision was made by the Constituent Convention, such powers as were necessary to validate the invalid laws in order "to avoid a possible breakdown in the constitutional and administrative machinery of the country and to preserve the state and maintain the government of the country in its existing condition". In exercise of those power the Governor-General retrospectively validated and declared enforceable the laws mentioned in the Schedule to the Emergency Powers Ordinance 1955 (IX of 1955). These powers were exercised by the Governor-General subject to-any report of the Federal Court on the constitutional position referred to it by the Governor-General under section 213 of the Government of India Act, 1935.

The question referred to the Federal Court[208] covered the scope of the Governor-General's powers and responsibilities in governing the country before the proposed convention passed the necessary legislation; and whether, in view of the Federal Court's decision in *Usif Patel's* case, the Governor-General had any power under the constitution or any rule of law, to declare the invalid laws to be part of the law of the land, until their validity was determined by the Constituent Convention. But at the instance of the Federal Court, during the hearing of the Reference, two more questions were added. One was whether the Constituent Assembly was rightly dissolved by the Governor-General, and the other, whether the Constituent Convention would be competent to exercise powers conferred on the Constituent Assembly by section 8 of the Indian Independence Act, 1947.

The majority opinion of the Court, given by Munir C. J., held that the first of these two questions was too general and need not be answered. On the second question the Court said that "in the situation presented by the Reference, the Governor-General has, during the interim period, the power, under the common law of civil or state necessity, of retrospectively validating the laws listed in the Schedule to the Emergency Powers Ordinance 1955, and all those laws, until the question of their validation is decided upon by the Constituent Assembly, are during the aforesaid period valid and enforceable."[209] In expounding the doctrine of necessity the Chief Justice referred to 'Lord Mansfield's address to the Jury in *George Stratton's case*[210] and said at page 485:

[206] G.G.'s O. VIII of 1955, P.L.D. 1955 Central Statute 118.
[207] P.L.D. 1955 Central Statutes 113.
[208] Reference by H.S. the Governor-General, P.L.D. 1955 F.C., 435.
[209] 1955 F.C. 435, at pp. 520-521
[210] 21 Howard's St. trial 1046.

> "The principle clearly emerging from this address of Lord Mansfield is that, subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done *bona fide* 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, and affirms Chitty's statement that necessity knows no law and the maxim cited by Bracton that necessity makes lawful that which otherwise is not lawful. Since the address expressly refers to the right of private persons to act in necessity, in the case of the Head of the State justification to act must *a fortiori* be clearer and more imperative."

The Chief Justice then considered the conditions then prevailing, following the Court's decision in *Tamizuddin Khan's* case and *Usif Patel's* case and held that "the Governor-General must, therefore, be held to have acted in order to avert an impending disaster and to prevent the State and the Society from dissolution."[211]

On the all-important question of the dissolution of the Constituent Assembly, the Chief Justice, examining the scheme of the Indian Independence Act, held that the absolute and unqualified prerogative right of the Crown and of the Governor-General as representative of the Crown to dissolve the Assembly had clearly been taken away.[212] Accepting the principle enunciated by the House of Lords in the *Attorney-General v De Keyser's Royal Hotel*[213] that 'where a prerogative matter has been legislated upon, the prerogative as to that matter must be deemed to have been merged in the statute to the extent that it has been legislated upon', His Lordship sail (at page 454) that when this principle is applied to the present case, it must be held that "sub-section (1) of section 8 of the Indian Independence Act, 1947 took away from the Crown by necessary implication the prerogative of dissolution to this extent, that the Crown was bound to give to the Constituent Assembly a reasonable opportunity to frame the Constitution". He further said that the instances of the power to dissolve, unqualified in law but strictly restricted by conventions, as vested in the Governor-General of other Dominions, were not relevant, because that power was expressly recognized by the constitution of those Dominions. In the case of Pakistan the Constitution Act contained no provision as to the dissolution nor was there any express reference to this power in the warrant of the Governor-General's appointment.[214]

The Chief Justice, however, said that, where statute made provisions for a, particular situation, it excluded the common law. But if the situation was entirely outside the contemplation of the statute, it would be governed by common law (p. 464). The

[211] P.L.D. 1955 F.C. 435, at p. 486.
[212] *Ibid*., at p. 452.
[213] (1920) A.C. 508.
[214] P.L.D. 1955 F.C. 435, at p. 455.

Constitution Acts assumed that the Constituent Assembly would frame a Constitution within a reasonable time; it was not given power to function as long as it liked and assume the form of a perpetual or indissoluble legislature. The prerogative to dissolve could be held to have been taken away, only if the Constituent Assembly performed the duty assigned to it. If the Assembly failed to perform its duty or functioned illegally i.e. in a manner different from the one in which it was intended to function, the prerogative, which was in abeyance, must be held to have revived, when it became apparent to the Governor-General that the Constituent Assembly was unable or had failed to provide a constitution for the Country.[215]

The Court considered the facts stated in the Reference (1) that the Constituent Assembly had failed to frame a constitution in seven years of its existence, which was a world record for framing any constitution, (2) that in view of the repeated representations that the Assembly had become, according to the Governor-General, unrepresentative of the people, (3) that for all practical purposes the Constituent Assembly assumed the form of a perpetual legislature and (4) that throughout its existence it had asserted illegally that laws passed under section 8(1) of the Independence Act were valid without the assent of the Governor-General On the basis of these facts the court came to the conclusion that "the Governor-General had under section 5 of the Indian Independence Act, legal authority to dissolve the Constituent Assembly.[216]

Dealing with the question of the competence of the proposed Constituent Convention summoned by the Governor-General Munir C. J. following the same principle that 'where the prerogative had not been excluded by statute, the common law would apply', held that so far as the Independence Act, 1947, did not provide for a Convention or composition of a fresh Constituent Assembly, the Governor-General as representative of the Crown, had the same power as was exercised by the Governor-General in 1947 in creating the Constituent Assembly.[217] The dissolved Assembly was set up by an executive order and not under any law; the new Constituent Assembly could also be set up by a similar order. But the Governor-General was not only entitled but bound to take cognizance of the altered conditions. The only legal requirement in setting up a new Assembly was that it should be a representative body. The Court held that under the Indian Independence Act the Governor-General had the authority to issue the Constituent Convention Order 1955 and that the Convention called by that Order would have all powers of the Constituent Assembly. The term "convention", being misleading, the new Assembly should be called the Constituent Assembly. It was further held that the Governor-General had no right to nominate members, though he could prescribe the electorate and the Independence Act required that arrangements for

[215] P.L.D. 1955 P.C. 435, at p. 465.
[216] P.L.D. 1955 EX. 435, at p. 486.
[217] *Ibid*., at p. 472.

representation of States and tribal areas should be made by the Constituent Assembly and not by the Governor-General.[218]

Dissenting from the majority, Cornelius and Sharif, JJ. held that the Governor-General had no authority to validate the invalid laws, whether temporarily or permanently. On the application of the 'doctrine of necessity' Sharif J. observed:

> "These have been sometimes invoked in times of war or other national disaster to infringe private rights or commandeer private property, but we have not been referred to any authority or reported case where, under the stress of circumstances created by some interpretation of law, these were extended to embrace changes in constitutional law. It might on occasions lead to dangerous consequences if in any real or supposed emergency of which the head of the State alone must be the Judge, the constitutional structure itself could be tampered with."[219]

In the Special Reference case, the Federal Court gave its opinion in the exercise of its advisory jurisdiction. The Governor-General's authority temporarily and retrospectively to validate the invalid laws, was subsequently recognized by the Federal Court in a contentious case.[220] Following the majority opinion in the Special Reference, the Court held that the Privy Council (Abolition of Jurisdiction) Act, 1950, which had been retrospectively validated by the Governor-General by his proclamation of Emergency of April 16, 1955, was now a valid law. Munir, C.J. distinguished. *Usif Patel's* case,[221] where validation by the Governor-General was held to be beyond his power "because by the validating Ordinance, the Governor-General claimed for himself the power to validate, without any reference to, and in the absence of, the legislature, whereas, in the present case, the validation is only provisional and, subject to legislation by the Constituent Assembly."[222] The end result of these judgments of the Federal Court was that *status quo* in the legal structure was to be maintained till the new Constituent Assembly decided on the issue.

The Second Constituent Assembly

The long battle that commenced with the dissolution of the Constituent Assembly by the Governor-General at last came to an end. From the judgments it becomes obvious that the Court strove hard to find legal bases to uphold the apparently unconstitutional. actions of the Governor-General. After the Federal Court had held that, under the express constitutional provisions, the Governor-General had no power to dissolve the

[218] 1955 F.C. 435, at p. 475.
[219] P.L.D. 1955 P.C. 435, at p. 519.
[220] Federation of Pakistan v Ali Ahmad. Shah, P.L.D. 1955, P.C. 5220
[221] P.L.D. 1955 P.C. 387.
[222] P.L.D. 1955 F.C. 522, at p. 529.

Constituent Assembly, it had to consider the facts set out by the Governor-General in his Reference and concluded, on the basis of those facts, that the Constituent Assembly had failed in its primary duty to provide a constitution for the country, and by its composition and illegal actions, had, ceased to be ail assembly contemplated by the Indian Independence Act, 1947, and such was liable to be dissolved by the Governor-General. The Court here applied the common law, in the absence of any express statutory provisions to bridge the gap between the law and the facts of political life.[223] It was clear, according to Professor de Smith that the decisions were a not very well disguised act of 'political judgment'. But it was to the credit of the Court that it did not give the Governor-General carte blanche, for he was not permitted to change the existing constitutional structure. The Governor-General was compelled to "re-establish the legislature.[224]

The judgment of the Federal Court in *Usif Patel's* case led to a complete breakdown of the constitutional and administrative machinery. The Emergency Powers Ordinance 1955 (IX — of 1955), promulgated by the Governor-General after *Tamizuddin Khan's* case, had not only given retrospective validity to laws declared invalid, but it also attempted to vest in the Governor-General power to make, by order, provision as to the constitution of the country.[225] The Court clearly could not recognize such power as vested in the Governor-General; and passed remarks tantamount to a direction to summon a representative body to replace the dissolved Assembly. The decision "put an end to the Governor-General's endeavor by himself to restore the constitutional machinery to life and to his intention to make the future constitution of Pakistan. The only alternative left to him was to rely on the army or to call anew Constituent Assembly".[226] For obvious reasons the Governor-General chose the latter and proceeded to summon a new Assembly.

It has been said earlier in the chapter that on April 15, 1955 the Governor-General issued the Constituent Convention Order summoning a Convention to meet on May 10, to make provisions for the constitution of the country. But in view of the remarks made by the Federal Court in hearing the *Special Reference*, suggesting the advisability of submitting to the Court the question relating to the powers and functions of the proposed convention, the Governor-General issued the Constituent Convention (postponement of Election) Order 1955,[227] postponing elections to the Convention, until the receipt of the report from the Federal Court on the Reference. Now, on the basis of the report of the Federal Court, the Constituent Assembly order, 1955[228], was issued on Nay 28, 1955. This order superseded the earlier Constituent Covention Order and

[223] S.A. de Smith, "Constitutional Lawyers in Revolutionary situations", (1968)7, *Western Ontario Law Review*, 93.
[224] G. Saver, "Political Questions" (1963) 15 *University of Toronto Law Journal*, 49.
[225] See Preamble and section 10, Ordinance IX-of 1955, 1955 Central Statutes 63.
[226] M. Munir, *Constitution of the Republic of Pakistan,* p. 41.
[227] G.G's0. XI of 1955, 1955 Central Statutes 143.
[228] G.G'sO. XII of 1955, 1955 Central Statutes 161.

provided for the setting up of a new Constituent Assembly, with all powers under the Independents Act Section 3 of the Order, however, empowered the Governor-General to summon, prorogue and also dissolve the Constituent Assembly. The Assembly was to have eighty members, including eleven non-Muslims, divided equally between the two wings of the country. Seventy two members were to be elected by the members of the existing Provincial Assemblies and other representative bodies by the method of proportional representation with the single transferable vote. Eight were to be selected according to the arrangements made by the Constituent Assembly.

The composition of the second Constituent Assembly was to be similar to its predecessor, except that East and West Pakistan were to have equal representation in it. As the Government had already announced its plan to merge the territories of West Pakistan into a single Province, equal representation in the Central legislature was provided to allay the fears of Bengali 'domination' in the legislature in the minds of Punjab leaders. East Bengal, with a majority of population, was to have the same number of representatives in the Central legislature as the province of West Pakistan. This naturally aroused resentment in East Bengal. The United Front, under the leadership of Fazlul Huq threatened to boycott the Assembly. But the Prime Minister paid a visit to the eastern Province and, in exchange for a promise of restoration of Parliamentary government in East Bengal, secured the United Front's consent. The Awami League, under their leader Suhrawardy, the Law Minister, in the central cabinet, had already accepted the parity formula.[229]

Elections to seventy two seats in the Constituent Assembly were held in June 1955. The Assembly met on July 5 at Muree. It passed the Representation of States and Tribal Areas Act, 1955[230] making arrangement for the selection of eight members for those areas. The Assembly then adjourned to meet in Karachi to undertake its primary task of making a Constitution for the country.

[229] G.W. Choudhury, *Constitutional Development in Pakistan*, p. 155.
[230] P.L.D. 1955 Central Statutes 174.

Chapter IV

Analysis of the Breakdown

"Failure" of the Constituent Assembly.

The dissolution of the first Constituent Assembly by the Governor-General was held valid by the Federal Court on the basis of facts supplied by the Governor-General in his Reference. The main reason given was that the Assembly, in spite of its existence for over seven years, which was a world record for framing any constitution in any country, had failed to prepare a constitution for the country. In the subsequent pages of this chapter we shall attempt an examination of the circumstances in which the Constituent Assembly had to function and an evaluation of its work. Later, the reasons given for the Governor-General's action will be analyzed and an endeavor made to identify what might be the real reasons for the dissolution of the Assembly.

On August 15, 1947, when Pakistan was created an independent state, the Constituent Assembly was entrusted with the task of making provision for the immediate governance of the country, in addition to its main function of preparing a permanent constitution for the nation. This situation compelled the Assembly to grapple first with the problems facing the new administration. These problems were enormous and, in tackling them, the Assembly had to postpone constitution-making for some time at least.

The immediate consequence of the creation of Pakistan was that muddle and discord prevailed in the Indo-Pakistan subcontinent during the years 1946-47. Pakistan was born in chaos and confusion.[231] While the new India suffered in the period of transition, Pakistan was virtually shattered. India inherited a working federal capital and instrumentalities, but Pakistan had to create a new federal capital and a provincial capital for East Bengal. Not only Central Government to be created but in East Bengal a Provincial Government had to be organized. The communal bitterness that preceded independence led all non-Muslim civil servants and other employees to opt for India ad leave the country. This migration of state employees created a complete vacuum, leading to serious disorganization in the administration.

The economic structure was in a state of disruption. With the end of the economic unity that had prevailed before independence, trade, commerce and communications had to be evolved anew, in conformity with the new political boundaries. To this desperate economic condition was added the burden of refugees, who came from India, in

[231] See K. Gallard, *Pakistan: A Political Study*, pp. 18-20.

millions, most of them empty handed. They had to be given food, shelter and employment. The plight of refugees moving in both directions between the two dominions imposed a heavy burden on the resources of the new state.[232]

In the face of the difficulties, relations with India were already strained over the partition arrangements. It became tense over the issue of accession of native states like Kashmir, Junagadh and Hyderabad. Over Kashmir the armies of both countries were engaged in war, until the cease fire in 1948. Then came the canal water dispute. These protracted disputes between India and Pakistan, which started soon after independence, went on for years. While the canal water dispute was settled in 1960 by an agreement reached under the auspices of the World Bank, the Kashmir issue is nowhere in sight of settlement, even five years after the suicidal Indo-Pakistan war of September, 1965.

These problems would be difficult for any established government to tackle in normal situation. But the Pakistan authorities had to deal with them in an abnormal circumstance created by unprecedented events in the sub-continent. Both internally and externally the new state was threatened with disintegration. The first duty of the government under such conditions was to organize itself, and constitution-making had to be postponed.[233] And, in facing these intractable problems, Pakistan leaders cannot be said to have failed in the initial period. One American political scientist in this connection, observed, "Somehow through those early months Pakistan survived, and it is impossible to deny that this simple fact was a major achievement."[234]

The Constituent Assembly had to provide leadership both in running the government of the country as well as in constitution-making. In the initial period the Muslim League leaders, under the guidance of Jinnah, succeeded in establishing an effective administration. But after Jinnah's death a leadership crisis ensued.[235] Liaquat Ali Khan, who succeeded Jinnah, nowhere approached Jinnah in personality and ability; the gap created by Jinnah's death could not be filled. Since then there has been no-one on Pakistan's political horizon capable of giving the country the much-needed national leadership.

This state of political leadership, created a special problem for the constitution-makers. The Muslim leaders before independence had no time to think about the future constitution of the country and after independence they developed no clear ideas. While in India the Government of India Act, 1935, provided a satisfactory basis for the new

[232] A. Gledhill, *Pakistan, The Development of its Laws and Constitution*, p. 71.
[233] G. W. Choudhury, *Constitutional Development in Pakistan*, p. 134.
[234] K. Canard, *op. cit.* p. 14.
[235] See Chapter II.

Constitution,[236] in Pakistan, it was not expected to prove appropriate, Not only was it necessary to determine the place of the Sharia in the Constitution, but Pakistan leaders were faced with a peculiar problem of their own, caused by the country's geography. "It is therefore no matter for surprise that the Indian Constituent Assembly was reaching the end of its labors when, in March, 1949, the Constituent Assembly of [Pakistan] produced its first blue-print, the Objectives Resolution...."[237]

It may also be noted that prominent members of the Constituent Assembly had become members of the Government and among other members were most of the Provincial Chief Ministers, at least three Governors, two state rulers and even ambassadors who were out of the country for years.[238] These office-holders were pre-occupied with immediate problems, to which they gave more attention than to their functions as members of the Assembly, undoubtedly one of the reasons for the weakness of the Constituent Assembly was that a high proportion of its members found themselves pre-occupied with important functions not directly related to its main task of constitution-making.[239]

Those members who were left without any official post were the least able members, who filled the back-benches and were not expected to take any initiative in constitution-making. Moreover there was no worthwhile Opposition in the Assembly. Persons capable of forming a good opposition group were deliberately precluded from participating in the proceedings. Suhrawardy was unseated in 1948 on grounds of non-residence and Abdul Ghaffar Khan was in gaol for the greater part of the duration of the Assembly.[240] Only the Pakistan Congress Party seemed capable of creating an opposition which would make the government act. But its members with their inherited political views found agreement on policy difficult, so that they were inhibited from asserting themselves. Their loyalty to the country was suspect and even sincere efforts in the Assembly by them were not treated seriously. In the absence of any effective opposition factions soon developed among the members of the Muslim League Parliamentary Party in the Assembly. They were divided into different groups, opposed to each other, each group striving to shape the future constitution according to the interest of the group or the region it represented. This group-rivalry and lack of national outlook among politicians seriously hampered constitution-making in Pakistan.

The Constituent Assembly, in its endeavor to frame a constitution for the country, had to find solutions for such complicated issues as (a) the place of Islam in the future constitution; (b) the State Languages; (c) the distribution of powers between the centre

[236] A. Gledhill, "The Constitutional Crisis in Pakistan 1954-55", Reprinted from *Indian Year Book of International Affairs*, 1955, p. 1.
[237] *Ibid*. p. 2.
[238] K. Canard, *op. cit.* p. 81.
[239] *Ibid*. p. 83.
[240] K. Callard, *op. cit*. p. 85.

and the units; and (d) representation of the units in the future central legislature. As has been stated earlier, for these problems because of Pakistan's *raison d'être* and geographical position, it was difficult to find acceptable solutions.

It must, however, be noted that at the time when the Assembly was dissolved, it seemed to have found reasonable solutions for these problems.[241] The draft Constitution of 1954 was accepted by the *Ulema* as sufficiently Islamic in character and the Jamaat executive passed a resolution in favor of its adoption forthwith.[242] Other provisions did not provoke much controversy at the time, and the Prime Minister announced in the Constituent. Assembly their unanimous acceptance by members representing all regions.[243]

But within a short time, the same old group-rivalry appeared again. The prospect of the immediate exercise of political power led to a breach in the unanimity on the question of representation in the central legislature. The 'Mohammed Ali Formula', which had formed the basis of agreement on this intricate issue, was condemned by the same groups which had been parties to it.[244] The Punjabi group put forward a proposal for consolidating the West Pakistan provinces in a single unit. The Governor-General gave his support to this move and even threatened with PRODA ["The Public and Representative Offices (Disqualification) Act] proceedings those members from the smaller provinces of West Pakistan, who would not support the integration scheme.[245] Representation to the centre was a burning issue in September-October, 1954. Because of Ghulam Muhammad's known support for the Punjabi group, which condemned the 'Mohammed Ali Formula' one is inclined to hold that the disagreement on this issue materially contributed to the crisis leading to the dissolution of the Constituent Assembly.

The Achievements of the first Constituent Assembly.

The first Constituent Assembly, in fact, failed to give a constitution to the country. As constitution-making was the main function the Assembly was intended to perform, failure in this respect might lead one to conclude that it had failed utterly. But this would be a conclusion hastily drawn, without going into the activities of the Assembly during its long life of over seven years. It would not be just to say that it lost interest in constitution-making. The Assembly due to adverse circumstances, had to start late and once it did so the Assembly was involved in other complicated problems, which had to be solved before the constitution could be dealt with. In the previous pages we have

[241] See Chapter II.
[242] *Dawn*, October 15, 1954.
[243] See K. Callard, *op. cit.* pp. 97-98.
[244] G.W. Choudhury; *Constitutional Development in Pakistan*, p. 137.
[245] K.B. Sayeed. *The Political System of Pakistan*, p. 73; See also Chapter III.

made an attempt to give a picture of the conditions and circumstances in which the first Constituent Assembly had to strive to make a constitution for the country.

The Assembly adopted the Objectives Resolution as late as March 1949, and in the following year the first Basic Principles Committee Report was produced. But the Report provoked grave resentment in East Bengal and the *Ulema* were not happy about it. Prime Minister Liaquat Khan did not live to take any further step in constitution-making. He was assassinated in October, 1951 and replaced by Khawaja Nazimuddn This change in the Government had an inevitable effect on everything and constitution-making was no exception. But Nazimuddin presented the second Basic Principles, Committee Report in December 1952. This time opposition to the Report came from Punjab and, before it could be fully considered, Khawaja Nazimuddin was dismissed by the Governor-General, Ghulam Muhammad. This change again broke the continuity and caused delay. In fact, it has been alleged that the main reason for Nazimuddin's removal was that his constitutional proposals were disliked by the Governor-General and the Punjabi politicians.

The last attempt at constitution-making by the first Constituent Assembly was made under the leadership of Mohammed Ali of Bogra, who had succeeded Khawaja Nazimuddin. The Prime Minister submitted the third Basic Principles Committee Report in October, 1953, and, after prolonged deliberations, it was adopted by the Assembly in September, 1954. The draft Constitution was to be submitted to the Assembly at its next session, fixed for October 27. The problems which had previously delayed agreement seemed to have been solved and, according to the Prime Minister's announcement, the nation was going to have the constitution in the new year. But again the same group that had opposed the Nazimuddin proposals started assailing the new proposals, although they had accepted them earlier.[246] The Governor-General, this time, did not take action against any individual. Because of the Assembly's constitutional proposals and its move directed against Ghulam Muhammad himself, the Constituent Assembly itself had to be dissolved. The work of the first Constituent Assembly will be properly appreciated if it is realized that almost all the basic solutions it gave to complete constitutional issues were adopted by the second Constituent Assembly without much change. The only major changes in the state structure provided by the Constitution of 1956 were the establishment of the West Pakistan Province and representation at the centre on the basis of parity between the two units. But it may be pointed out that the 'Mohammed Ali Formula' had also envisaged the principle of parity in a joint session of the two chambers of Parliament which was to decide major issues and controversies. Possibly the unification of West Pakistan was the one thing desired by the powerful group that caused the disruption of the first Constituent Assembly's work. The object of the unification of West Pakistan was to counterbalance

[246] For details of the proposals, see Chapter II.

East Bengal. The Punjabi group, with the support of the Governor-General, was successful in its design.

The brief discussion above would show that it was not the first Constituent Assembly itself that failed to give the country a constitution; it had all but completed this task; it was not allowed to complete it. Commenting on the subject, Professor G.W. Choudhury observed that "The comparison between the draft Constitution of the first constituent Assembly and that finally adopted by the second Constituent Assembly reinforced the conclusion that the first Assembly failed to fulfill its mission, not because of any inherent defects in the proposals which it made but because a group of politicians deliberately sabotaged its attempts to give the country a Constitution".[247]

Grounds given for its dissolution

The Proclamation of October 24, 1954 said that serious political crises had "convinced" the Governor-General that the constitutional machinery had broken down; the Constituent Assembly had lost the confidence of the people, and could no longer function. There was, therefore, according to the Governor-General's assessment, a serious 'political crisis' raging in the country in September-October, 1954. It is proposed here to discuss the political situation in the country prevailing at the relevant time.

In East Bengal, after the provincial elections in March, the United Front Party formed a Government, but within two months that Government was dismissed and Governor's rule under section 92A of the Act of 1935 was imposed. During the tenure of the United Front Government serious industrial trouble took place in the Province. The Central Government sent directions, which the Provincial Government was, reportedly reluctant to obey. The reason for the suspension of the provincial constitution was the 'serious political crisis in the Province'. Major-General Iskander Mirza, then Secretary in the Ministry of Defence, was appointed Governor of East Bengal. Under the strong rule of General Mirza 'normally' was claimed to have been soon restored and there was no sign of trouble whatsoever in the Province. The component Parties of the United Front were, however, engaged in mutually accusing each other, of misconduct, and a visible break in the polarization within the Front was taking place.[248]

It has been alleged that the central ruling clique and its Muslim League Party, which had been routed in the East Bengal elections, could not readily accept the United Front victory. Industrial trouble and problems for the Provincial Government were, therefore, fomented, and, on the pretext of its failure to tackle these problems, the Provincial Government was dismissed. This allegation may not be the whole truth. But after General Mirza's clearing up of the "mess"[249] the Provincial administration certainly

[247] G.W. Choudhury, *op. cit.* p. 140.
[248] See Chapter II.
[249] See Mirza's statement, *Dawn* November 18, 1954.

improved and there was no apparent political crisis in East Bengal. As for the suspension of the provincial constitution, it may be said that, when Governor's rule was imposed in May, it was not expected that parliamentary government would be restored in the Province till a team of East Bengal legislators acceptable to the Centre had been found.

In the West Pakistan Provinces of the Punjab, Sindh and North-West Frontier the Provincial Governments were exercising control of their respective provincial administrations. There was no sign of instability in any of the Provinces. A crisis, however, came, when, after the dissolution of the Constituent Assembly, the Centre wanted to impose its 'One-Unit' plan. The Pirzada Ministry of Sindh had to go first, for its opposition to the 'one-unit' plan; Firoz Khan Noon in the Punjab and Sardar Abdur Rashid in the Frontier met the same fate for a similar reason.[250]

At the Centre the Mohammed Ali Government, after its unconventional appointment in April 1953, had already secured the support of the Assembly. There was no known move against the Cabinet. Even those who would question the rationale of the Mohammed Ali Government were beginning to appreciate its apparent success in constitution-making. The nation was eager to have a constitution as early as possible, not because it was expected to give solutions to all problems, but because people were weary of the wrangling over constitutional issues. Any Constitution would, it was believed, put an end to this wrangling, and elections under the new Constitution would enable the nation to return representatives who would deal with other pressing problems. The country was, therefore, preparing itself to receive the Constitution at the end of December, when, on the ground of a hypothetical political crisis, the Constituent Assembly was dissolved and the nation's wish disappointed.

Demands for the dissolution of the Constituent Assembly were not altogether absent. From time to time on different constitutional issues one or other of the opposition groups would express lack of confidence in the Assembly. Opposition to the Assembly was particularly intensified in East Bengal after the provincial elections, when a call for the resignation of East Bengal Members of the Assembly was made, as it was evident from the election results that, being members of the Muslim League Party, they did not represent the people of the Province. But no heed was paid to such demands. It was said that the result of a provincial election was no ground for the dissolution of the national legislature; practices of other countries, specially Commonwealth countries, were cited. Not only did the Members of the Assembly assert their duty to frame a constitution under the 'mandate' given by the nation but even the Governor-General as 'the guardian of the Constitution' did not feel that any action was necessary.[251]

[250] See Chapter III.
[251] G.W. Choudhury, *Constitutional Development in Pakistan* p. 144.

The Constituent Assembly went ahead with constitution making and adopted the draft constitution only a month before its dissolution. The constitutional proposals, when published did not provoke much opposition from any quarter. Complete unanimity on all constitutional proposals was, however, not to be expected. The mood of the nation at that time indicated that the people at large were prepared to accept the Constitution. But when the Constituent Assembly, adopted the draft Constitution and passed Acts curtailing the Governor-General's powers, it lost the confidence of the Governor-General, who summarily dismissed it.[252]

Background of the Governor-General's attitude and Action.

From the analysis of the grounds given for dissolution of the Constituent Assembly, it becomes apparent that the real grounds were not the so-called 'political crisis' or the 'non-confidence of the people in the Assembly', but something else. In order to identify those causes, we shall, first of all, consider Ghulam Muhammad's career and his attitude towards the democratic processes.

Ghulam Muhammad succeeded Khawaja Nazimuddin as the third Governor-General of Pakistan, following the assassination of Prime Minister Liaquat Ali Khan in October, 1951. Ghulam Muhammad, started his early career as a civil servant in the pre-independence Indian Audit and Accounts Service. He later served in the autocratic Court of the Nizam of Hyderabad. After independence he was co-opted by the Muslim League Party an and was appointed a Minister in the first Pakistan Cabinet as an expert in Finance. He had no association with democratic politics or representative institutions. He was "...active, ambitious and somewhat given to intrigue, but he was also the product of the Indian Civil Service, with all its traditions of vigorous executive action, especially in times of crisis or failures of political leadership."[253] By training and temperament Ghulam Muhammad had little respect for democratic principles or the politicians. Like most pre-independence civil servants, he did not like the political processes and interference with the administration by politicians. As Governor-General he found it difficult to recognize the politicians' claim to rule the country, particularly when, in Ghulam Muhammad's opinion, the country was suffering from maladministration.

Factionalism within the ruling Muslim League Party gave Ghulam Muhammad the opportunity to exercise executive powers. The indecisiveness and inept policies of the Nazimuddin Cabinet on various national issues caused a steady decline of the authority of the politicians, so that the civil servants, led by the Governor-General himself, were in actual control of the Government. In such circumstances Ghulam Muhammad could display his power by summarily dismissing the Nazimuddin Cabinet in April, 1953,

[252] See *Ibid*. p. 145.
[253] K.J. Newman, "Pakistan's Preventive Autocracy and its Causes". (1959)32 *Pacific Affairs,* 18.

which "demonstrated without doubt who exercised effective power".[254] In his action against the Cabinet the Governor-General had the support of the civil service and the army. The dismissal of Khawaja Nazimuddin and the appointment of Mohammed Ali, as the Prime Minister showed Ghulam Muhammad's utter disregard for any democratic conventions. He himself selected the members of the new Cabinet and distributed portfolios among them and even "...decisions in the Mohammed Ali Cabinet were often made by the Governor-General in consultation with its more powerful members; he was no longer a figure-head but an active participant in the formation of Cabinet policies and decisions."[255] After this display of force, power in Pakistan rested not with the politicians belonging to Muslim League Party, but with the civil servants under the control of the Governor-General. There was no possible alternative government.

Ghulam Muhammad's idea of government was perhaps best suited to such a setup. This view gains support from the statements and utterances of Iskander Mirza about the nature of the future constitution, which he untiringly propagated as the spokesman of the regime after the dissolution of the Constituent Assembly.[256] The regime favored a unitary form of Government for Pakistan, the Head of the state having adequate powers to act whenever necessary. The Governor-General rejected the idea of becoming a titular head, as proposed in the draft Constitution. His training and his intense love for power made him a miserable misfit as the Head of the State in a parliamentary system of government. All his actions aid measures prove that "he scorned the idea of any parliamentary government in Pakistan. He pretended to favor the American system of executive but his real model was the viceregal system of the British period..."[257] Even occupation of the highest office in the state could not change Ghulam Muhammad's attitude and philosophy, which had been ingrained in him during his career as a civil servant.

The background of Ghulam Muhammad was not the only reason for his actions during the period 1953-1954. The motive behind his executive actions was possibly the cumulative effect of his lust for individual power and his strong support for a particular group of politicians and their political designs. Ghulam Muhammad, while Finance Minister in the Liaquat Ali Khan Cabinet, was regarded as the leader of the 'Punjabi Group'. "Although the apparent unity of the Cabinet system was manifested during the life-time of Liaquat, and the worst form of factionalism inside the Cabinet had not yet been manifested, yet the Punjabi-Bengali rift inside the Cabinet could be traced even in Liaquat's Cabinet. One group was headed by the Finance Minister, Ghulam Muhammad, the other by Mr. Fazlur Rahman, the Commerce Minister."[258] After the assassination of Liaquat Ali Khan, Ghulam Muhammad's nomination for the office of

[254] K.B. Sayeed, "The Political Role of Pakistan's Civil Service". (1958)31. *Pacific Affairs*, 131.
[255] G.W. Choudhury, *Democracy in Pakistan*, p. 47.
[256] See chapter III.
[257] G.W. Choudhury, *op. cit.* p. 45
[258] *Ibid*. p. 42.

the Governor-General had received the support of the Bengali group, which wished to weaken the Punjabi group both in the Cabinet and in the Assembly.

The Bengali group also thought that the appointment of Ghulam Muhammad as the Governor-General would deprive its rival, the Punjabi group, of his services but that it would be required of the person holding the high office of Governor-General that he would maintain neutrality and rise above group policies. But this expectation proved futile. As Governor-General, Ghulam Muhammad gave his support to his former group whenever it was needed.[259] The dismissal of the Nazimuddin's Government in April 1953 might be regarded as typical of his authoritarian attitude, his disregard for constitutionalism, and his allegiance to a particular group of politicians. Khawaja Nazimuddin had already earned the wrath of the Punjabi politicians for his constitutional proposals made in the Basic Principles Committee Report of 1952. He further antagonized them by effecting the resignation of Mumtaz Daultana's Government in the Punjab for its mishandling of the religious disturbances in Lahore.[260] These two issues must have combined to cause disaffection to the Prime Minister in the Punjabi group. Mushtaq Ahmad in describing the incident quoted from Ghulam Muhammad's address to the Karachi Rotarians on 8th April, 1953 where he strongly defended the Government's policies, and observed: "There were no differences between the Prime Minister and the Governor-General on matters of domestic or foreign policy. Ghulam Muhammad's public statement and speeches throughout this period did not give even the faintest hint of a rift between him and Khawaja Nazimuddin. It is impossible to suggest what impelled the Governor-General to dismiss the Prime Minister only ten days after he had put up a vehement defence of the policy of the Nazimuddin Government".[261]

The press communiqué issued on April 17, 1953 stated that "the Cabinet of Khawaja Nazimuddin has proved entirely inadequate to grapple with the difficulties facing the country." The Governor-General did not mention any facts in support of this assertion. His action can, therefore, only be explained in terms of his strong alignment with the Punjabi group, which wanted Nazimuddin's removal. His dismissal seems to have been an act of political revenge, manipulated by the Punjabi group led by Mumtaz Daultana. Once Ghulam Muhammad was convinced by the reasoning of the group, he was expected, because of his authoritarian training and attitude, to act and he did act.

Ghulam Muhammad's appointment of Mohammed Ali of Bogra, then Ambassador to the United States, as the Prime Minister also indicates the authoritarian traits in his character, as well as his group alignment. Mohammed Ali was not a member of the legislature at the time of his appointment, nor had he any close association with the Muslim League Parliamentary Party in the Constituent Assembly. But these facts

[259] *Ibid*. p. 46.
[260] See Chapter II.
[261] Mushtaq Ahmad, *Government and Politics in Pakistan* (1959), p. 11.

carried no weight with Ghulam Muhammad. He and his group wanted a Prime Minister from Bengal, who would be acceptable to them.[262] So strong was the influence of the Governor-General over the members of the Assembly that he took for granted their support for his nominee. As Governor-General of an independent Dominion, with a parliamentary form of government, Ghulam Muhammad acted on these occasions in total disregard of all parliamentary rules and coventions.

Behavior of the Assembly.

Immediately before its dissolution, the Constituent Assembly passed the two important Acts — the Public and Representative Offices (Disqualification) (Repeal) Act, 1954, and the Government of India (Fifth Amendment)Act, 1954, — drastically curtailing the powers of the Governor-General.[263] The first Act repealed an Act of 1949, which had hitherto been regarded as an effective weapon in the hands of the executive for keeping the politicians under control. The repealing Act was passed in unprecedented haste when a number of proceedings under it were contemplated. Not only had some members of the smaller Provinces of West Pakistan been, reportedly, threatened with PRODA proceedings, simply because they were opposed to the One-unit scheme,[264] but it was also rumored that "the Governor-General was actually considering twenty-two PRODA petitions, most of them against members from Bengal."[265] The hasty removal of this powerful weapon from the hands of the Governor-General naturally enraged Ghulam Muhammad.

The second Act — the Government of India, (Fifth Amendment) Act 1954 — amended the original sections 9 and 10 of the Act of 1935, severely curtailing the Governor-General's power in respect of appointment and dismissal of the Prime Minister and other Ministers. It also required him to act strictly in accordance with the advice of the Cabinet. In defence of this Amendment Act, it was said that Ghulam Muhammad was contemplating action against the Mohammed Ali Government, and Binder is inclined to assign some credibility to this assumption. He argues, "Had there been no danger that the Governor-General might use his wide powers again to dismiss the Prime Minister, and somehow prevent the adoption of the draft Constitution, there would have been no need to pass this legislation in such haste, and with such little regard for the usual procedure in the House."[266]

But whatever might be the reason for the enactment of these two Acts in September 1954, it was quite clear that the Governor-General, who was at that time away from Karachi, could not accept these measures with good grace. These measures of the

[262] See K. Callard, *Pakistan. A Political. Study*, p. 138.
[263] See Chapter II.
[264] See K.B. Sayeed, *The Political System of Pakistan*, pp. 73-14.
[265] L. Binder, *Religion and Politics in Pakistan*, p. 357.
[266] *Ibid.*

Constituent Assembly obviously aggravated the situation. But the Constituent Assembly had already earned the displeasure of the Governor-General by adopting the draft Constitution, which was to be finally adopted by the Assembly on October 27. The draft Constitution, incorporating conventions regarding responsible cabinet government, provided for a Head of the State who was merely a constitutional figure-head. Being thoroughly bureaucratic in background and in temperament, Ghulam Muhammad never liked the ideas of a parliamentary form of government, which would seriously jeopardize his position as Head of the State. He believed in vigorous and efficient administration and so preferred the pre-independence Viceregal system. The provisions in the proposed constitution relating to the Head of the State — shorn of all effective powers — were, therefore, unacceptable to Ghulam Muhammad, whose authoritarian attitude was further indicated by his desire to promulgate a constitution by order or decree of the Governor-General.[267] In the Proclamation dissolving the Constituent Assembly, fresh elections were promised. But once the Governor-General received the support of the Federal Court in Tamizuddin Khan's case, Ghulam Muhammad apparently wanted to forget about elections and intended to frame and promulgate the Constitution himself.

A further possible reason for the Governor-General's displeasure towards the Constituent Assembly was its refusal to accept a scheme of sub-federation in West Pakistan. This scheme was put forward by the Punjabi leaders to counter-balance the 'united' Bengali group in the future central legislature.[268] Ghulam Muhammad gave his support to this plan. But after the curtailment of the Governor-General's powers by the Constituent Assembly, Ghulam Muhammad found himself without any coercive power in his hands to enable him to exert any pressure on the Members.

Not only were the existing position of the Constituent Assembly and the future provisions of the draft Constitution scorned by the Governor-General, but the transitional arrangements for the period before the Constitution came into force made his own position uncertain and insecure. These arrangements provided for the continuance of the Constituent Assembly till the first meeting of the Parliament elected under the new Constitution. But the Governor-General would not serve automatically as the first President. The provisional President would be elected by the Constituent Assembly, and it was possible that Ghulam Muhammad would be dropped by a hostile Assembly. "This was an open threat on the one hand to remove the Governor-General, and on the other to extend the transitional period. The central and provincial ministers would all continue in office as before ... everyone, in fact, except His Excellency Mr. Ghulam Muhammad was assured of staying on under the new regime."[269] In these transitional provisions and the political maneuvering that was going on, Ghulam

[267] See Chapter III.
[268] *Ibid*. pp. 60-61.
[269] L. Binder, *Religion a Politics in Pakistan*, p. 356.

Muhammad read a threat to his own position. He therefore decided to act and struck at the Assembly, which he regarded as the base for launching attacks against him.

From the above discussion it is evident that several factors combined to make the political atmosphere of Pakistan tense and volatile during the later part of the year 1954. There were moves and counter-moves before the final showdown between the Governor-General and the Constituent Assembly. The repeal of PRODA and the amendments of section 10 of the Government of India Act, 1935, were the most immediate causes. But the temporary provisions in the event of the Constitution coming into effect and the provisions relating to the powers of the Head of the State in the draft Constitution were also strongly disliked by the Governor-General. Being a supporter of the Punjabi group, Ghulam Muhammad also did not like the provisions in the draft Constitution for representation in the central legislature. He gave his support to the integration of West Pakistan. The adoption and promulgation of the Constitution, as promised, would have frustrated Ghulam Muhammad's plans on all these issues. With the support of the civil service and the armed forces[270] the Commander-in-Chief of the Army General Ayub Khan became Minister of Defence in the reconstituted Cabinet — Ghulam Muhammad, by dissolving the Constituent Assembly, prevented it once and for all from adopting the draft constitution. There has been a political struggle between the Constituent Assembly, dominated by the Bengali group and the Governor-General and his Punjabi group. The Governor-General and his supporters, being in possession of the coercive powers of the State, emerged victorious.

Reflections

In considering the events and Court's decisions set out in this and the previous chapter, one is disposed to ask whether Muslims regard other laws as having the same validity as the Sharia and whether Pakistan politicians recognize that stable government demands that the views of political opponents should not be ignored and that deadlock should be avoided by compromise!

Pakistan politicians almost from the very beginning divided themselves into different groups with uncompromising attitudes on constitutional and other issues, conduct particularly reprehensible, when one considers the geographical position of the country. Mutual suspicion between individuals and groups made agreements on important issues impossible. In advancing the group or regional interest these politicians seemed to have forgotten that politics was the art of the possible and rigid adherence to one's views would not lead to any solution. It is unfortunate that the incumbent of the highest office also could not remain aloof from this curse of group alignment. Absence of goodwill and an attitude of accommodation and lack of national outlook in the political

[270] See K. B. Sayeed, *The Political System of Pakistan*, p. 74.

leaders were responsible for aggravating a situation which, even in normal conditions, would have been difficult to tackle.

In the conflict between the Governor-General and the first Constituent Assembly, it must be recognized that the latter, by its dilatory behavior and incompetence, had not acted in accordance with the spirit of the Independence Act and it was deliberately provocative in its attempt to fetter the hands of the Governor-General. It had taken advantage of a lacuna in the Independence Act to exercise powers not contemplated when the Act was passed and it deliberately brought about a crisis. But instead of seeking a less spectacular solution the Governor-General precipitated a trial of strength with the Assembly.

Though the Federation eventually succeeded in establishing that the Assembly's constitutional legislation required the assent of the Governor-General, it is to be noted that all the judges of the Sindh Chief Court and one judge of the Federal Court thought otherwise. Assent was not regarded as necessary in India and the same view had been taken in Pakistan until the Federal Court heard *Tamizuddin Khan*'s case on appeal. When in that case it was contended that the doctrine of contemporaneous exposition should be applied, the Chief Justice held that it could not be applied, because there was no doubt as to the meaning of the statute. It is submitted that the interpretation of the relevant provision until *Tamizuddin Khan's* case reached the Federal Court, shows clearly that there must at least have been a doubt.

To validate the dismissal of the Assembly, the Federal Court held that notwithstanding the absence of any provision in the Independence Act, the Governor-General could, by relying on the prerogative, dismiss the Assembly. One cannot dismiss the thought that no such argument would have been heard, if it had been raised when there was no constitutional crisis and the constitutional crisis was created by the Governor-General. It is unusual for a Court to allow a person to take advantage of his own wrong. If the politicians of Pakistan are disposed to give allegiance to those who hold power, it would seem that in Pakistan the Courts are sensitive to the difficulties of Government.

As already stated, while supporting the Governor-General, the politicians generally regarded his conduct as illegal. They do not seem to have regarded the constitutional law as a basic fundamental law, the law-creating machinery under which laws are made. It was to be pleaded when convenient, ignored when it was not. If, from the inception of Pakistan, the public men adopted such an attitude is it a matter of surprise that it proved impossible to find a constitution which they were able and willing to work?

Chapter V

Circumstances Preceding "Martial Law" in 1958

Constitution-Making — A Fresh Start

The second Constituent Assembly started to function in earnest as soon as the formalities with regard to its composition were complete. There were substantial differences between the membership of the first and the second Constituent Assembly. "Only fourteen persons who were members of the first Constituent Assembly at dissolution were returned."[271] Significant changes were particularly visible in the representation from East Bengal; Fazlul Huq and Suhrawardy, representing the two powerful political factions in the new leadership of the province, Mohammad All, the Prime Minister, and Fazlur Rahman, the veteran Muslim Leaguer, were returned from East Bengal. From West Pakistan, though changes occurred, veterans like Daultana, Gurmani, Mamdot, Chaudhri Muhammad Ali, Feroz Khan Noon and Khuhro were the leading figures. Iskandar Mirza, the Interior Minister in the 'Cabinet of talents' and Dr. Khan Sahib were new members from West Pakistan.[272]

Whereas in the first Assembly the Muslim League was the strongest party, it was a minority in the second Assembly, with only thirty-three out of eighty members.[273] Chaudhri Muhammad Ali was elected leader of the Muslim League Parliamentary Party in August, 1955 and, as Prime Minister, formed the Muslim League — United Front coalition government.

> "Plans for a coalition with the Awami League, on the basis that Mr. Suhrawardy, then Law Minister, should be Prime Minister, that there should be joint electorates and that Bengali should be a state language, gave way to a coalition between the Muslim League and the United Front, on the basis that Mr. Suhrawardy should be excluded, West Pakistan should be integrated into a single unit and there should be provincial autonomy."[274]

Suhrawardy and his Awami League, therefore, moved into opposition.

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[271] K. Callard, *Pakistan: A Political Study*, p. 119.
[272] *Ibid*.
[273] A. Gledhill, Pakistan, *The Development of its Laws and Constitution*, p. 119. Other Party strength: United Front — 16; Awami League — 13; Minorities 11; Independents — 7; See Ibid., p. 81.
[274] *Ibid*., p. 82.

The Assembly, under the leadership of the new Prime Minister, was anxious to provide constitutional machinery for the country. Its first task, therefore, was to validate constitutional legislations, declared invalid by the Federal Court but given temporary validity subject to the Assembly's decision. The Assembly passed the Validation of Laws Act, 1955[275] in October, 1955 validating retrospectively thirty-eight of the Acts passed by its predecessor. This measure formally restored the legal and constitutional continuity of the administrative machinery of the State, which had been threatened ominously by the Federal Court's judgment in *Tamizuddin Khan's* case. It may be noted that the list of validated Acts did not include those designed to curtail the arbitrary and discretionary powers of the Governor-General. For instance, the Government of India (Fifth Amendment) Act, 1954, which thoroughly amended sections 9 and 10 of the Government of India Act, 1935 seriously restricting the Governor-General's powers in respect of appointment and dismissal of ministers was not included in the list.

The next constitutional measure enacted by the second Constituent Assembly integrated the territories of West Pakistan into a single province. The regime was convinced that the removal of political boundaries between the provinces and other territories of West Pakistan would not only entail economic and administrative advantages, but would also simplify the question of provincial representation at the Centre. With only two units — East and West Pakistan — representation could be on the basis of parity between the two units. The Establishment of West Pakistan Act, 1955[276] was passed in September, 1955, creating the new province of West Pakistan, administered by a single government. Existing laws were to continue in force till legally amended, but the administration of the Special Areas[277] was to remain unchanged; legislation would only apply there if the Governor, with the Governor-General's approval, so directed.

According to the provisions of the Act, the Interim Provincial Assembly for West Pakistan was to consist of three hundred and ten members, ten seats being reserved for women. For a period of ten years, representatives from Punjab were not to exceed forty percent, of the total membership. The Interim Assembly was to exercise all powers and functions of a provincial assembly under the Government of India Act, 1935. There was to be a single High Court of West Pakistan, in which the High Court of Lahore, the Chief Court of Sindh and the Judicial Commissioners' Courts of North-West Frontier Province and Baluchistan were merged. The new High Court was to have territorial jurisdiction over the whole Province of West Pakistan, and to exercise such powers and authority as were previously exercised by the High Court at Lahore. The principal seat of the Court was to be at Lahore, with Benches at Karachi and Peshawar. The Karachi Bench was to exercise the same original civil and criminal jurisdiction as the former

[275] P.L.D. 1955. Central Statutes 289.
[276] P.L.D. 1955. Central Statutes 273.
[277] Special Areas comprised the Tribal Areas of Baluchistan, N.W.F.P. and States of Amb, Chitral, Dir and Swat; see Section 2(3) of the Act.

Chief Court of Sindh.[278] By an Order of the Governor-General of October 5, 1955,[279] the new Province came into being on October 14, 1955.

Outline of the Constitution of 1956

The Constituent Assembly then proceeded to its main task of constitution-making. Unlike its predecessor, the second Constituent Assembly did not appoint any committee to prepare a draft. Instead, the government prepared its own draft, which was published in January, 1956.[280] The government, it appears, with the tacit understanding of the House, wanted to frame the constitution without much fuss; taking notice, of course, of the agreements and understandings reached by the first Constituent Assembly. Except on the matters of provincial autonomy and the constitution of the legislatures, the Constitution Bill was not very different from the draft constitution of 1954.[281] After some amendments and lengthy deliberations, during which the Opposition walked out, when Suhrawardy's appeal for a round table conference to discuss the contentious issues was turned down,[282] the Bill was passed on February 17 and the Constitution came into effect on March 23, 1956.

The 1956 Constitution in its general framework was a logical continuation of the Government of India Act, 1935. The State of Pakistan was to be a federal Republic, with the Whitehall form of government both at the centre and in the provinces. It was a quasi-federal constitution, with a strong centre, having power to give directions to the provincial governments,[283] and to suspend the provincial constitution in an emergency.[284] The legislative powers were distributed by three lists — Federal, Concurrent and Provincial — leaving the residuary powers with the provinces.[285] The federal list took priority over the other two, but a law on an exclusive provincial subject passed by a provincial legislature could "travel" on the federal field. If a central law on a concurrent matter conflicted with a provincial law on the same subject, the former would prevail and the latter, to the extent of inconsistency, would be void, unless it had received the assent of the President.[286] The executive authority of the Federation extended to all matters on which Parliament had power to make laws and that of the provinces to all matters on the provincial and concurrent list, but Parliament could elude the provincial executive power on any matter on which it could legislate for a province.

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[278] High Court of West Pakistan (Establishment) Order, 1955 G-G's 0 XIX of 1955; P.L.D. Central Statutes, 298.
[279] Establishment of West Pakistan Act, 1955 (Order under Section 2); P.L.D. 1955 Central Statutes, 295.
[280] K. Callard, *Pakistan: A Political Study*, p. 121.
[281] A. Gledhill, *op. cit*., p. 83.
[282] K. Callard*, op. cit*., p. 121.
[283] *Constitution of Pakistan*, 1956, Article 126(2).
[284] *Ibid*., Article 193.
[285] *Ibid*., Article 109.
[286] *Ibid*., Article 110.

The executive authority of the Federation vested in the President, acting on the advice of the Cabinet except in cases where he was empowered to act in his discretion,[287] which covered the appointment and dismissal of the Prime Minister, the appointment of the Chairman and other members of the Election Commission, the Delimitation Commission and the Federal Public Service Commission. The President was to be elected by an electoral college consisting of members of the National Assembly and the two Provincial Assemblies; he had to be a Muslim and not less than forty years of age.[288] The normal term of office of the President was five years, but the President could resign and be impeached and removed by a resolution passed by the National Assembly on a charge of violation of the Constitution or gross misconduct.[289] The Supreme Command of the Armed Forces vested in the President, who appointed the Commander-in-Chief of the Army, Navy and Air Force. The President was to make rules for the allocation and transaction of business of the federal government; and the Prime Minister had the constitutional duty to keep the President informed on all affairs of the administration of the Federation and legislative proposals.[290]

The real executive powers of the Federation was, however, to be exercised by the Cabinet with the Prime Minister at its head. The Prime Minister was to be appointed by the President from amongst the members of the National Assembly, who, in the opinion of the President, was likely to command the confidence of the majority, other Ministers being appointed by the President on the advice of the Prime Minister. The Cabinet was collectively responsible to the National Assembly and the Prime Minister was not to be removed unless the President was satisfied that the former had lost the confidence of the majority in the Assembly.[291] What the Constitution contemplated was cabinet government, with the Westminster conventions and a constitutional head of State.

The same pattern was followed in the provinces. The executive authority of a province was vested in the Governor, who was to act in accordance with the advice of the Cabinet, with the Chief Minister at its head. The Governor was to be appointed by the President to hold office during his pleasure, though the normal tenure of office was five years. He had to be a citizen and not less than forty years of age,[292] but need not be a Muslim. The Chief Minister was to be appointed by the Governor from amongst the members of the Provincial Assembly; it was necessary that he should command the confidence of the majority. Other Ministers were appointed by the Governor on the advice of the Chief Minister.[293] The Governor occupied in relation to the Chief Minister and his Cabinet a position similar to that of the President in relation to the federal

[287] *Ibid*., Article 37(7).
[288] *Ibid*., Article 32.
[289] *Ibid*., Article 35.
[290] *Ibid*., Article 42.
[291] *Ibid*., Article 37.
[292] *Ibid*., Article 70.
[293] *Ibid*., Article 71.

cabinet.[294] Subject to directions from the federal government under Article 126, and the provisions for suspension of the provincial constitution under an emergency, the Constitution of 1956 provided for representative and responsible government in the provinces, where the people's representatives, forming the Cabinet, were to exercise real executive powers.

The federal legislature consisted of the President and a single chamber known as the National Assembly with three hundred and ten members, ten seats being reserved for women. One half of the total members were to be elected from each wing.[295] The President was to summon, prorogue and dissolve the National Assembly; the normal life of the Assembly was five years.[296] The President could address the National Assembly and send messages to it.[297] The Assembly was empowered to frame its own rules of procedure; the proceedings and utterances of the members within the Assembly were immune from judicial proceedings and Parliament was entitled to determine other privileges.[298] Bills passed by the National Assembly required the assent of the President to become law.[299]

Following the fundamental financial procedure in the Commonwealth, the Constitution provided for the initiation of money Bills by the executive,[300] but taxes were to be levied only by an Act of Parliament.[301] The Annual Financial Statement was to be divided into two parts, enumerating "charged" and "voted" heads of expenditure, and in respect of the "charged" expenditure the Assembly had no voting power.[302] But all appropriation of moneys out of the Federal Consolidated Fund was to be effected by an Appropriation Bill passed by the National Assembly.[303] The legislature was thus given complete control over public revenue and public finance, which is generally regarded as the strongest control which a legislature can have over the executive.

The same structure was provided for the provinces. A provincial legislature consisted of the Governor and an Assembly of three hundred and ten members.[304] The relationship between the Governor and the Provincial Assembly was similar to that of the President and the National Assembly, except that the Governor could reserve a Bill for

[294] M. Munir, *Constitution of the Islamic Republic of Pakistan*, p. 45.
[295] *Constitution of Pakistan, 1956*, Article 44.
[296] *Ibid*., Article 50.
[297] *Ibid*., Article 52.
[298] *Ibid*., Article 56.
[299] *Ibid*., Article 57.
[300] *Ibid*., Article 59.
[301] *Ibid*., Article 60.
[302] *Ibid*., Article 65.
[303] *Ibid*., Article 66.
[304] *Ibid*., Article 77.

consideration of the President.[305] The Assembly was to be summoned, prorogued or dissolved by the Governor; the normal life of an. Assembly being five years.[306]

The members of the National and Provincial Assemblies were to be elected directly by the people on the basis of universal adult franchise. But the question whether there should be a joint electorate or Hindus and Muslims should have separate constituencies was left to be decided by Parliament, after consulting the provincial legislatures.[307] This issue proved controversial and affected governmental stability. The details will be discussed later in this chapter.

The President and the Governors, following previous practice, were given power to legislate by Ordinance, but the National Assembly or the Provincial Assemblies, as the case might be, had the right either to approve or disapprove of an Ordinance.[308] The Ordinance-making powers of the President and the Governor were subject to the same constitutional limitations as the powers of Parliament and the Provincial Assembly to make law.

The judicial hierarchy under the Government of India Act, 1935, was left unchanged. The existing Federal Court became the Supreme Court under the Constitution with original, appellate, advisory and special jurisdictions. To ensure independence of the judiciary, the Constitution provided for the salaries of the judges, officers and servants of the Supreme Court and its administrative expenses to be charged on the federal consolidated fund, and those of the High Courts on the provincial consolidated fund.[309] The judges of the Supreme Court and the High Courts were to be appointed by the President to hold office till they attained the ages of sixty-five and sixty years respectively.[310] They could be removed from office only on the ground of proved misbehavior or infirmity of mind or body. While a judge of the Supreme Court could be removed by the President on an address by the National Assembly,[311] a judge of the High Court could be removed on an adverse report by the Supreme Court on a reference by the President.[312]

The Supreme Court was given, apart from its normal jurisdiction, power to issue writs for the enforcement of the fundamental rights[313] and to grant special leave to appeal from any judgment, decree, order or sentence of any court or tribunal in Pakistan except

[305] *Ibid*., Article 90.
[306] *Ibid*., Article 83.
[307] *Ibid*., Article 145.
[308] *Constitution of Pakistan*, 1956, Article 60 and 102 respectively.
[309] *Ibid*., Articles 64 and 97 respectively.
[310] *Ibid*., Articles 150 and 166 respectively.
[311] *Ibid*., Article 151.
[312] *Ibid*., Article 169.
[313] *Ibid*., Article 22.

of a court or tribunal constituted under any law relating to the Armed Forces.[314] The law declared by the Supreme Court was binding on all courts in Pakistan.[315] The High Courts were given, under Article 170 of the Constitution, power to issue writs for the enforcement of the fundamental rights and for "any other purpose". Each High Court had power of superintendence and control over all courts subject to its appellate or revisional jurisdiction; it had power to withdraw from a subordinate court any case involving a substantial question of constitutional law and either dispose of it or decide the question and return the case for disposal.[316] Both the Supreme Court and the High Courts were courts of record with power to make rules regulating the practice and procedure of the courts.

Special features of the Constitution

A special feature of the Constitution of 1956 was that the fundamental rights of the subject were enumerated and they were made justiciable. These rights appear to have been taken from the Indian and the United States constitutions.[317] They included equal protection of the law, safeguards as to arrest and detention, freedom of speech, assembly, association and vocation. Rights to property and safeguards against discrimination in any form were ensured. It was provided that any existing law was void to the extent of its repugnancy to a fundamental right; no law in violation of any fundamental right should be enacted; any law violating this rule would be void to the extent of the repugnancy.[318] The Supreme Court and the High Courts were given adequate powers to enforce these rights. It may be noted, however, that the right to move any court for the enforcement of any of these rights could be suspended by the President[319] during a Proclamation of Emergency declared under Article 191. Further they were not exempted from the general process of amendment of the Constitution under Article 216.

The Preamble to the Constitution began "In the name of Allah ..." who had sovereign authority "over the entire Universe" and declared that the people of Pakistan, exercising authority within the limits prescribed by Him, had declared Pakistan to be a democratic State based on Islamic principles of social justice. It was to be known as the Islamic Republic of Pakistan[320] and steps were to be taken to enable Muslims to order their lives in accordance with the Holy Quran and the Sunnah.[321] An institution for Islamic research and instruction was to be set up, to assist in the reconstruction of Pakistan

[314] *Ibid*., Article 160.
[315] *Ibid*., Article 163.
[316] *Ibid*., Article 171.
[317] M. Munir, *Constitution of the Islamic Republic of Pakistan*, p. 46.
[318] *Constitution of 1956*, Article 4.
[319] *Constitution of 1956*, Article 192.
[320] *Ibid*., Article 1.
[321] *Ibid*., Article 25.

society on a truly Islamic basis.[322] It was also provided that no law repugnant to the Injunctions of Islam was to be enacted and a Commission was to make recommendations for bringing existing laws into conformity with the principles of Islam and to enunciate such principles for the guidance of the National and Provincial Assemblies.[323] The personal laws and status of non-Muslim citizens were, however, not required to comply with these principles. Though the provisions relating to enforcement of Islamic principles were vague, the fact that the Head of the State had to be a Muslim and the provisions regarding Islamic principles mentioned above led the Ulema to accept the Constitution as sufficiently Islamic.

Part XI of the Constitution was devoted to the Emergency Provisions. The President could issue a Proclamation of Emergency, if the security or economic life of Pakistan were endangered by war or external aggression or internal disturbance beyond the power of a provincial government to control.[324] During such an emergency Parliament could legislate on any matter for a province and the federal executive authority would extend to giving directions to a province as to the manner in which the provincial executive authority was to be exercised; all or any of the functions of the government of the province could be assumed by the President or on his behalf by the Governor. In the case of failure of constitutional machinery in a Province the President, on a report from the Governor, could impose central rule in the province for a maximum period of six months during which Parliament could be empowered to legislate for the province.[325] Provisions were also made for a Proclamation of financial emergency, when the centre could take various measures to ensure financial stability in the country.[326]

The emergency powers were to be exercised subject to Parliamentary control. Not only had a Proclamation to be laid before the National Assembly, but the President had to act on the advice of the Cabinet, which, in its turn, was responsible to the Assembly. This was thought to be an adequate guarantee against abuse of these provisions. But the record during the two and a half years in which the Constitution of 1956 remained in force does not leave an observer free from doubts as to whether the exercise of the powers under Article 193 by the centre was bona fide.[327]

Political Instability

The Constitution came into force on March 23, 1956. Under its temporary and transitional provisions the Governors, the Prime Minister, other Ministers, provincial

[322] *Ibid*., Article 197.
[323] *Ibid*., Article 198. Effect to repugnancy clause was to be given only after the Commission had submitted its report and Parliament had considered the recommendations. The proposed Commission was never appointed.
[324] *Ibid*., Article 191.
[325] *Ibid*., Article 193.
[326] **Ibid**., Article 194.
[327] Governor's rule was imposed in West Pakistan early in 1957 to keep the Muslim League out of power. See G.W. Choudhury, *Constitutional Development in Pakistan*, pp. 255-256.

cabinets and other state organizations and functionaries continued to function under the new Constitution.[328] Only the provisional President had to be elected by the Constituent Assembly. Iskandar Mirza, then Governor-General, being the sole candidate, was elected unanimously as the first President of the Republic. It has been alleged that support for his nomination was extorted by Mirza from the members of the Constituent Assembly as the price for his assent to the Constitution and for his support to the Government, which, as Governor-General, he was in a position to dismiss.[329] Mirza would not sign the Constitution Bill without the prior assurance of his being elected as the first President.

But "the Constitution which emerged nine years after independence the product of so much turmoil and strife"[330] did not give the country the expected political stability. While the 1956 Constitution remained in force, political instability was manifest both at the centre and in the provinces. Chaudhri Muhammad Ali, to whom credit must go for framing the Constitution of 1956, continued as Prime Minister at the head of the coalition government. But soon differences cropped up between the Prime Minister and his party. After the elections to the West Pakistan Assembly, the Muslim League, which had an overwhelming majority in the House, refused to support Dr Khan Sahib as the Chief Minister. The Prime Minister accused the party of bad faith and tendered his resignation in September, 1956.[331] Chaudhri Muhammad Ali could probably have carried on with the support of the newly formed Republican Party of Dr Khan Sahib and President Mirza but he preferred to resign when his own party had disowned him.[332]

The leader of the Opposition, H. S. Suhrawardy, was called upon to form the government. His Awami League entered into a coalition with the Republican Party. Suhrawardy was unquestionably a capable man and "probably the only politician who exhibited skill in working a constitution of the Westminster type".[333] But soot he was in trouble with the Republican Party, the senior partner of the coalition, over the issue of "one unit" in West Pakistan. Suhrawardy, who favored the scheme, condemned the Republicans for their resolution to balkanize the Province. The Republicans thereupon withdraw their support and President Mirza called on the Prime Minister to resign. It may be noted that Suhrawardy, once in power, was able to build a national image for himself. He was gradually assuming the role of a national leader,[334] which the President did not like. Mirza, therefore, took the first opportunity to get rid of the potentially powerful Prime Minister.

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[328] *Constitution of Pakistan,* 1956, Article 226.

[329] Mushtaq Ahmad, *Government and Politics in Pakistan*, p. 178; and also G.W. Choudhury, Constitutional Development in Pakistan, p. 110.

[330] A. Gledhill, Pakistan, *The Development of its Laws and Constitution*, p. 101.

[331] Mushtaq Abmad, *op. cit*., p. 63.

[332] *Ibid*., p. 64.

[333] A. Gledhill, *op. cit.,* p. 102.

[334] See Kamruddin Ahmad, *The Social History of East Pakistan*, p. 149.

After Suhrawardy a coalition was formed between the Muslim League and the Republican Party and Ismail Ibrahim Chundrigar, the leader of the Muslim League, became Prime Minister on October 18, 1957. But the coalition broke up on the electorate issue. Chundrigar resigned after only two months and was succeeded by Feroz Khan Noon, who, as leader of the Republican Party, formed a government with the support of the Awami League. The Cabinet had to be expanded to an unprecedented size to ensure the continuing support of the two factions. The Noon Government was not successful in tackling the problems facing the country and it is not likely that it would have been an efficient administration but it came with a ray of hope for future political stability. The Government was committed to hold general elections in early 1959 and an election alliance was formed between Suhrawardy's Awami League and the Punjabi politicians, Noon and Daultana. It was hoped that this alliance would win the election and would be able to form administration at the centre as well as in the provinces.[335] President Iskandar Mirza, however, did not like such alliances and, on the pretext that there was a political crisis, dismissed the Noon Ministry and abrogated the Constitution.

Thus in the course of about thirty months after the promulgation of the Constitution of 1956, four Prime Ministers came and went, with the formation and dissolution of coalitions. In the provinces the picture was no better. In East Pakistan the United Front Ministry under A.H. Sarkar continued in office up to August 30, 1956, with a short spell of Governor's rule, without facing the Assembly for about fifteen months. In September the Awami League Ministry, under Ataur Rahman Khan, remained in power till March 31, 1958 when thirty-two members withdrew their support from the Ministry. Apprehending a defeat on the floor of the House, the government advised the Governor to prorogue the Assembly but the Governor, A. K. Fazlul Huq, dismissed the Ministry and installed a United Front Ministry. But the central government of Feroz Khan Noon dismissed the Governor and the Acting Governor dismissed the United Front Ministry within hours of its assumption of office and restored the Awami League government. The dismissal of the United Front Ministry was challenged in the Dacca High Court, which held that the Governor had discretionary power in this regard.[336] The government of Ataur Rahman Khan was, however, defeated in the Assembly in June, 1958 and replaced by the Sarkar Ministry, which also fell within three days! "Two Ministries were overthrown by the legislature in less than a week."[337] The result was that Governor's rule was imposed on the province for about two months and in August the Awami League again came to power. In September political bickerings and rivalry between the two contending factions went so far as to lead to riots in the Assembly Hall itself, resulting in the beating of the Speaker, a motion declaring him insane and a violent assault on the Deputy Speaker which proved fatal.

[335] See G.W. Choudhury, Democracy in Pakistan, p. 115; also K.B. Sayeed, *The Political System of Pakistan*, p. 91.
[336] The case has not been reported. But see G.W. Choudhury, *Democracy in Pakistan*, p. 119.
[337] G.W. Choudhury, *Constitutional Development in Pakistan*, p. 256.

In West Pakistan Dr Khan Sahib and his Ministry were in power when the Constitution cane into force. But trouble began when the Muslim League wanted to oust the 'nominated' Chief Minister and demanded that the leader of the Muslim League Parliamentary Party be appointed in place of Dr Khan Sahib, who was a non-Leaguer and had earlier, on March 19, 1956 announced his intention to form a new political party. In this he had the support of non-Punjabi members of the provincial legislature of West Pakistan. The demand of the Muslim League was therefore directed against Dr Khan Sahib and was not acceptable to Governor Gurmani and the centre.[338] On April 23, 1956 Dr. Khan Sahib announced the formation of the Republican Party and many Muslim Leaguers deserted their party to join it. This caused an open split between the Muslim League and the Chief Minister, which came to a head when the election of the Speaker of the Assembly took place on May 20, 1956, and the Republican candidate was declared elected by the casting vote of the Chairman. The election was challenged in the High Court which, on the basis of the facts, upheld the election.[339] The Court, however, asserted that it had jurisdiction under Article 170 of the Constitution to examine the propriety of a proceeding of the Assembly; only proper proceedings were excluded from the Court's jurisdiction and a proceeding was "not an Assembly proceeding, if it is founded on coercion, fraud or bad faith."[340]

The Muslim League, in its determination to oust the Republican Ministry, sought the support of the National Awami Party members in the Assembly by agreeing to break up the 'one unit'. Some thirty members from the Republican Party also joined the opposition, leaving the government with a minority in the Assembly. On March 21, Governor's rule was imposed to save the government from defeat and the Opposition was not called upon to form a Ministry. After about three months of Governor's rule, the Republican Party was restored to power in July, 1957.[341] On account of the chaotic state of provincial politics, the Republicans advised the Governor to dissolve the Assembly. The question was referred to the Supreme Court by the President under Article 162 of the Constitution. The advice of the Supreme Court was that the Governor had no power to dissolve the Interim Provincial Assembly functioning under Article 225, and it must continue to function till a new Assembly was elected under the Constitution.[342]

A new government was formed under the leadership of Sardar Abdur Rashid, Dr Khan Sahib having willingly given up the post of Chief Minister. The ruling party now tried to get the support of the National Awami Party by promising the break-up of the 'one unit'. Governor Gurmani who had supported the Republican party with the aid of the centre, was removed from office for his alleged anti-Republican attitude on the 'one

[338] D.N. Banerjee, *East Pakistan*, p. 86.
[339] Ahmad Saeed Kirmani v. Fazal Elahi, P.L.D. 1956, Lahore 807.
[340] *Ibid*., per Kayani, J. at p. 821.
[341] See D.N. Banerjee, *op. cit.,* p. 95.
[342] Reference by the President of Pakistan, P.I.D. 1957 S.C. 219.

unit' question. The controversy over the one-unit, as noted earlier, also led to the fall of the Awami League — Republican coalition government at the centre. When, in December, 1957 Feroz Khan Noon became Prime Minister, Sardar Abdur Rashid joined the central cabinet and Muzaffar Ali Khan Qizilbash succeeded him as the Province's Chief Minister. The above is a brief account of the governmental changes that took place between the time when the Constitution was promulgated and its abrogation in October, 1958.

The Parliamentary System — An Appraisal

It is clear from the above account that parliamentary democracy in Pakistan both at the centre and in the provinces was not functioning smoothly, even after the promulgation of the Constitution. During the two and a half years for which the Constitution was allowed to remain in force, political maneuvering and governmental instability at all levels appeared in their worst form. Politicians and political parties miserably failed to give the country a viable administration, concerning itself with the problems facing the country. The hope that, once the Constitution was adopted and elections were held, the parties would concentrate on practical measures was dashed to the ground. Instead "... though the Constitution was proclaimed and elections announced, the factional maneuvering became more and not less pronounced."[343]

During this short period, as many as four governmental changes took place at the centre, and in the provinces Ministries came and went at the will of the central authority. Coalition after coalition failed to remain in office for any considerable period of time. It is significant that the Constitution Commission held that the main cause for the failure of parliamentary government in the country was lack of leadership, accompanied by the absence of well-organized and disciplined political parties.[344] There were other factors, said the Commission, which contributed to the failure, but it argued that, if the politicians and parties were conscious of their obligations and functions, then other factors would have been automatically eliminated. The politicians, however, do not agree with this view. They, including a former Prime Minister, Chaudhri Muhammad Ali, would put almost all blame on the President, who, supported by the bureaucracy, deliberately set out to discredit and destroy the parliamentary system.[345] The question whether parliamentary system failed in Pakistan or was not given a chance to function evokes different answers. Whatever may have been the role of President Mirza, which we shall discuss in a subsequent chapter, there is no denying the fact that the politicians were mostly responsible for bringing about a situation which could be easily exploited by the enemies of parliamentary democracy to their own advantage.

[343] K.B. Callard, *Political Forces in Pakistan*, p. 15.
[344] *Report of the Constitution Commission*, 1961, p. 13.
[345] E.A. and K.R. Schuler, *Public Opinion and Constitution Making in Pakistan*, p. 70.

When the Constitution cane into force, coalition governments were in office both at the centre and in the provinces. No political party, and there were many such parties, had an absolute majority in any of the legislatures. Coalition governments are, by their very nature, weak governments. In Pakistan the situation was made worse by "the policies and actions of the self-seeking politicians, who had dominated the political scene since the death of Jinnah and Liaquat Ali Khan" reducing "parliamentary institutions under both the interim and the late constitution [of 1956] into a farce. The constitutional forms and trappings of democracy had only provided a cloak for rule by the few, who had been able to draw power into their own hands."[346]

After the rout of the Muslim League in East Bengal in March, 1954, there was no political party with an all-Pakistan following. The parties were formed on regional bases and even then had no popular foundation. The Republican Party owed its birth to the Muslim League's refusal to support Dr Khan Sahib's government in 1956. This party had no organization and no support outside the legislatures. The National Awami Party was launched in 1957, following a split within the Awami League, as a reaction against Suhrawardy's foreign policy. The *Ganatantri Dal* had merged with the National Awami Party.[347] None of the parties had any popular support and their members had no steadfast allegiance to the party to which they belonged. In fact the shifting allegiance of the legislators, to secure appointment to office and other advantages, was one of the main reasons for the rapid governmental changes during this period. Again, the shifting alliance of the National Awami Party to the *Krishak Sramik* Party of the Awami League in East Pakistan, and with the Muslim League, or the Republican Party in West Pakistan, was responsible for the fall of Ministries and a state of uncertainty in the political atmosphere from the birth of this party to the end of parliamentary government in October, 1958. The aim of this "leftist" party "appeared to be to create chaos and confusion".[348]

During this period at least three main issues seem to have determined the behavior of the politicians in their attitude towards government. The first was foreign policy. The Awami League, as a constituent party of the United Front, was committed to a "neutral" foreign policy. But Suhrawardy, the leader of the Awami League, proved himself, as Prime Minister, to be a staunch supporter of the west and his pro-west policy during the Suez crisis of September, 1956 provoked a vehement attack on him by members of his party. It required vigorous efforts by the Prime Minister to induce his party to endorse his foreign policy in June, 1957. But while the controversy proceeded Maulana Bhashani resigned from the Presidentship of the Awami League and announced the formation of a new party. In July a convention of "democratic forces" was held in Dacca, under the auspices of Bhashani, which was attended by some leftist leaders from West Pakistan. "The outcome was the formation of the National Awami Party of

[346] G.W. Choudhury, *Democracy in Pakistan*, p. 126.
[347] D.N. Banerjee, *East Pakistan*, p. 96.
[348] G.W. Choudhury, *Constitutional Development in Pakistan*, p. 256.

Bhashani with Ganatantris merging with it."[349] Thus the controversy over foreign policy led to the formation of this new party, which caused serious governmental instability in both the provinces.

The next was the "one unit" issue. Though opposition to the scheme never died down after its inception, no party openly advocated the disintegration of West Pakistan till the National Awami Party was founded. This party was prepared to support anyone who would agree to split the Province into its former constituent parts. Since the party held the balance in the West Pakistan Assembly, both the Muslim League and the Republican Party were forced to seek its support in order to command a majority in the house. In March, 1957 the Republican Ministry lost its majority in the Assembly, when the opposition Muslim League agreed to the Awami Party's demand for breaking up the West Pakistan province. The result was "the intervention of President Mirza, who imposed Governor's rule on the province".[350] Later in July, when the Republicans were restored to power, with Sardar Abdur Rashid as the Chief Minister, they agreed to support the N.A.P.'s demand. Consequently in September the West Pakistan Assembly passed a resolution recommending dismemberment of West Pakistan.[351] This attitude of the Republicans towards the "one unit" issue provoked serious criticism from Prime Minister Suhrawardy, who was for continuing the unit, at least until the general elections. His opposition to the breakup of West Pakistan cost him his premiership. As has been said earlier, the issue probably was responsible for the dismissal in August, 1957 of Governor Gurmani, who also disliked the Republican party's attitude on this issue. The National Awami Party thoroughly exploited the rivalry between the Republican Party and the Muslim League, and made the "one unit" issue a subject for political maneuvers leading to political instability in West Pakistan and the fall of at least one central government in October, 1957.

The other important issue which affected political stability was the electorate. The Constitution, as has been noted earlier, left the question of joint or separate constituencies to be decided by Parliament after consulting the two Provincial Assemblies. The East Pakistan Assembly was for a joint electorate, while West Pakistan favored separate electorates. The Republican Party, entering into coalition with Suhrawardy's Awami League at the centre, agreed for a compromise formula and the National Assembly passed The Electorate Act, 1956,[352] providing for a joint electorate in East Pakistan and separate electorates in West Pakistan. The question of joint or separate electorate was more important in East Pakistan, where the non-Muslim population formed a substantial part of the total population. Once a joint electorate had been conceded to that Province, the retention of separate electorates in West Pakistan lost its meaning. Parliament, therefore, under the leadership of Suhrawardy, removed

[349] D.N. Banerjee, *op. cit.*, p. 96.
[350] K.B. Sayeed, *The Political System of Pakistan*, p. 85.
[351] D.N. Banerjee, *op. cit.,* p. 97.
[352] Act XXINI of 1956, P.L.D. 1956 Central Statutes, 482.

this anomaly by passing the Electorate (Amendment) Act, 1957,[353] providing for a joint electorate for the whole country.

The Muslim League, adhering to its pre-independence two-nation theory, opposed the introduction of joint electorates. Along with the Nizam-i-Islam, the League promised to reverse the system, when it achieved power. After the fall of Suhrawardy's cabinet, Chundrigar became the Prime Minister, at the head of the Muslim League — Republican coalition. Though the Republican Party had given its pledge to support separate electorate, in less than two months it changed its opinion and Chundrigar had to resign as "the Republican Party went back on their pledges and promises on the electorate issue".[354]

While the politicians and parties remained busy with power politics and controversy over these issues, the country's economy and general administration deteriorated. There was an acute food shortage in both the provinces, the rate of industrial production fell due to strikes and general industrial unrest.[355] Smuggling of food grains across the border was rampant and measures taken to stop it were withdrawn under political pressure.[356] Reckless spending resulted in an adverse balance of payments and the complete breakdown of the monetary and banking system was in sight;[357] the government seemed to have neither the will nor the capacity to put a stop to this continuous process of deterioration.

The general election under the Constitution, after being postponed more than once, was fixed for February, 1959.[358] In the autumn of 1958 politicians were mainly concerned with the coming election. Vigorous campaigns of abuse and innuendo were in full swing. Some political leaders, like Khan Abdul Qaiyum Khan of the Muslim League, threatened "rivers of blood" and the party resolved in September to dislodge the government "if need be by extra-constitutional methods".[359] On the other hand an alliance was in the offing between Suhrawardy's Awami League and Feroz Khan Noon's Republican Party, and it was rumored that Suhrawardy had also reached an understanding with the powerful Mumtaz Daultana. It was believed that if these alliances were effected, Suhrawardy would be the Prime Minister and Feroz Khan Noon would be the next President. President Mirza, anxious for his own re-election, saw a clear danger to his own position. The Muslim League and the Awami League had already condemned his political activities; now the Republican Party, Mirza's main

[353] Act XIX of 1957, P.L.D. 1957 Central Statutes, 276.
[354] G.W. Choudhury, *Constitutional Development in Pakistan*, p. 255.
[355] See Mushtaq Ahmad*, Government and Politics in Pakistan*, pp. 184-185.
[356] F.M. Khan, *The Story of the Pakistan Army*, p. 177.
[357] M. Ayub Khan, *Friends Not Masters,* p. 56.
[358] G.W. Choudhury, *Constitutional Development in Pakistan*, p. 255.
[359] M. Ayub Khan, *op. cit*., p. 57.

support, was about to abandon him. The President, therefore, grew determined to frustrate the hopes of the political parties and perpetuate his own position.[360]

In such a tense political atmosphere, an actual threat to the territorial integrity of the State came in October, when the ruler of Kalat state revolted and declared the secession of his state from Pakistan. It was suggested that the Khan was instigated by President Mirza "who was setting the stage for his final action".[361] The Khan of Kalat was arrested on October 6, 1958 and the rebellion was put down.

It would appear from the above discussion that the conditions prevailing in Pakistan during the autumn of 1958 were not such as to justify confidence in the continuation of democratic government in Pakistan. People became disillusioned by the political intrigues and all-round inefficiency, corruption and mismanagement. They were stunned by the assault of the Speaker and the fatal injury caused to his Deputy in the East Pakistan Assembly in September. In all these incidents the politicians were directly involved. People apparently lost all faith in them and would support any step to prevent the politicians from adding to Pakistan's difficulties. Whether the abrogation of the Constitution and the imposition of martial law throughout the country would provide a solution to all problems, was a different matter, but the politicians had, in the eyes of the people, forfeited the right to control the affairs. They were held responsible for bringing about the lamentable condition of the country.

Position of the Armed Forces

Any discourse on the circumstances prevailing in Pakistan on the eve of "Martial Law" in 1958 would be incomplete without a brief discussion of the position in Pakistan of the armed forces at that time and their attitude towards national affairs. The armed forces in Pakistan, following the tradition prevailing during the British period, were kept out of politics and maintained a rigid neutrality towards the political upheaval during Pakistan's early years. "In the political crises before October, 1954 the armed forces played no discernible role. The army, or at least the officer corps, had been taught that its duty was to stay out of politics."[362] When in January, 1951 General Ayub Khan became the Commander-in-Chief of the Army he advised his troops "to keep out of politics" although they could and should take an intelligent interest in national affairs.[363]

The prime duty of the armed forces was to defend the country against external aggression. They were to be fully equipped with arms and training and to remain in constant readiness to repel any attack on the land. But "the armed forces were willing to

[360] See Y.B. Sayeed, *The Political System of Pakistan*, pp. 90-91.
[361] M. Ayub Than, *op. cit.,* p. 57.
[362] K.B. Callard, *Political Forces in Pakistan*, p. 20.
[363] See H. Feldman, *Revolution in Pakistan*, p. 35.

back up any administration that would govern effectively".[364] In East Pakistan the army was called in to restore order in Dacca during serious riots on language issue in February, 1952, and in 1954 to quell disturbances in the Kanaphuli Paper Mills near Chittagong and in the Adamjee Jute Mills, about nine miles from Dacca. The army was also employed to stop smuggling of jute, food-grains and other goods across the border in 1952 and 1957, and to arrange food distribution, the inequality in which had led to a crisis in 1956.[365] In Karachi, when civil commotion and student discontent led to extensive violence and hooliganism in January 1953, troops were deployed in the city. In March of the same year, during the anti-Ahmadiya riots in Lahore, martial law was declared and continued till May 15; the army took over full control of the city. Without giving further instances of army aid to civil authority, it can be said that the Pakistan army was "[a] completely non-political army [which] could be depended upon to assert the authority of any legitimate government in the centre end the provinces, and to restore law and order when required."[366]

But it must be noted that, within four years of Pakistan's independence, there occurred the first instance of military interference in civil affairs. "The affairs, known as the Rawalpindi Conspiracy case, occurred early in April, 1951 ... [it] was confined to a small group of serving officers and a few civilians, led by a major-general."[367] The conspiracy was alleged to be aimed at the overthrowing of the government headed by Prime Minister, Liaquat Ali Khan. Information leaked out; the plot was foiled and the persons involved were convicted. The move to seize power, however, was not regarded as a reflection of the attitude of the forces as a whole, and the arrest, trial and conviction of the officers took place without any fear of adverse effects upon the loyalty of the remainder of the officer corps.[368]

After this incident, early in 1951, dramatic political developments took place in the country. Liaquat Ali Khan was assassinated, Khawaja Nazimuddin was dismissed and the Governor-General dissolved the Constituent Assembly in October, 1954. The military for the first time was invited by the civilian authority to play a political role. Ghulam Muhammad appointed the Commander-in-Chief of the Army, General Ayub Khan, his Minister for Defence. Ayub Khan claims that the Governor-General asked him to take control of the country in October, 1954, which the General declined to do but he agreed to join the Cabinet as Minister of Defence.[369] This appointment was interpreted as "a gesture to the country that the army was supporting the Governor-General".[370] But it was more than that. Though, while he remained a minister there was

[364] K.B. Callard, *Political Forces in Pakistan*, p. 21.
[365] See F.M. Khan, *The Story of the Pakistan Army*, pp. 170-173.
[366] *Ibid*., p. 188.
[367] H. Feldman, *op. cit*., p. 37.
[368] K.B. Callard, *Political Forces in Pakistan*, footnote p. 21.
[369] M. Ayub Khan, *Friends Not Masters*, p. 53.
[370] K.B. Callard, *op. cit*., p. 21.

not much to suggest that he was playing a prominent part in policy-making, as soon as the new Constituent Assembly came into being, Ayub Khan relinquished his cabinet post and facts revealed by him show that he then began to take an active interest in politics and the constitutional set up of the country.

It is now known that Ayub Khan, even before he became a member of the cabinet, had given considerable thought to the constitutional problems of the country. He prepared a rough outline of a future constitution and submitted constitutional proposals to the cabinet on the basis of this outline.[371] One of the important measures which he suggested was the integration of West Pakistan, which was accomplished in 1955. The Constitution which Ayub Khan promulgated in 1962, appears to be the logical expression of his political thinking.[372]

It is evident, therefore, that, though the armed forces were supposed to remain neutral and apparently followed a policy of non-interference in the country's politics, they in fact took a keen interest and observed closely the country's plight at the hands of the politicians. As citizens, they would naturally observe things that happened around them and, by their frequent involvement in aid to the civil authority, they realized that the entire political life of Pakistan was riddled with graft and corruption. They would maturely think of possible remedies. It has been observed that initially "the military forces are called in to control situations of emergency; but soon they feel constrained to stay on, wishing to remove the chronic national maladies in order to build a secure base for economic development and national security."[373] Their training and professional work gave the men in the armed forces a patriotic outlook and, as members of a profession with strict discipline, they would despise political maneuverings. This interest in national affairs and contempt for the politicians on the part of the officers of the armed forces were easily exploited by President Mirza, when he abrogated the Constitution.

It has been suggested that the military takeover of the country in October, 1958, was initiated by the Army, and President Mirza was compelled to act.[374] But what has transpired later from the revelations of Ayub Khan himself and other army sources, one is inclined to conclude that the Army acted on the definite invitation of the President himself. Mirza was instrumental in creating a situation in the country where the Army was expected to give its support to the President's design.[375]

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[371] M. Ayub Khan*, op. cit.,* p. 53.
[372] See "A short appreciation of present and future problems of Pakistan", *ibid.*, pp. 186-191.
[373] Aslam Siddiqi, "The Role of Military in Asia", in Guy Wint (ed), *Asia, A Handbook*, p. 410.
[374] See Rushbrook Williams, *The State of Pakistan*, p. 182.
[375] See Chapter VII.

Chapter VI

"Martial Law"

Proclamation of the President

On the night of October 7, 1958 President Iskandar Mirza issued a proclamation,[376] the general effect of which was that:

(i) Constitution of the 23rd March, 1956 was abrogated;
(ii) the central and provincial governments were dismissed;
(iii) the National Parliament and the Provincial Assemblies were dissolved;
(iv) all political parties were abolished; and
(v) until alternative arrangements were made Pakistan would come under Martial Law.

The President appointed General (as he then was) Mohammad Ayub Khan, the Commander-in-Chief of the Pakistan Army, as the Chief Martial Law Administrator with supreme command over all the armed forces.

In a long statement the President explained the reasons for his action, touching almost all spheres of state activity, accusing the politicians of bringing the country on the verge of a catastrophe. The ruthless struggle for power, and corruption among the politicians, their exploitation of the simple masses and their "prostitution of Islam for political ends" had led to "a dictatorship of the lowest order". While there was a serious shortage of food and no positive action was being taken to increase production, in East Pakistan there was an organized "smuggling of food, medicines and other necessities". Import of food had become a regular feature in a country "which should really have a surplus", and valuable foreign exchange earnings were being spent on importation of food.

The President said that some politicians lately had been talking of "bloody revolution" while others committed "high treason" by directly aligning themselves with foreign countries. The foreign policy of the country was subjected to "unintelligent and irresponsible" criticism, with a view to creating bad blood and misunderstanding between Pakistan and important foreign countries; these people were screaming for war with India. "In no country in the world, do political parties treat foreign policy in the manner it is done in Pakistan".

[376] P.L.D. 1958 Central Statutes 577, for full text of the proclamation see Appendix II.

The proclamation of the President referred to the recent "disgraceful scene" in the East Pakistan Assembly resulting in the beating up of the Speaker, killing his deputy and desecration of the national flag. This was an indication of the depth to which political activities had sunk and it was inconceivable that elections would improve the situation or lead to the formation of a strong and stable government, capable of dealing with the innumerable problems facing the nation. The election would not be free or fair; it would definitely be rigged, and, after the election, the same old methods would be applied to make a "tragic farce of democracy" and create greater unhappiness and disappointment, leading ultimately to a "really bloody revolution". Civil disobedience had been threatened to break up one unit and to retain volunteer organizations; such conduct indicated the length to which the politicians would go to achieve their parochial aims.

The President's attempts to work the Constitution by bringing about coalitions had been described as "Palace intrigues". It had become fashionable to put the blame on the President for everything that went wrong. The vast majority of the people had lost confidence in the parliamentary system of government. The Constitution was unworkable, because it was full of dangerous compromises, likely to bring about Pakistan's internal disintegration. For all these reasons and to rectify them, the President said, "the country must first be taken to sanity by a peaceful revolution", and then a Constitution "more suitable to the genius of the Muslim people" would be devised which, When ready, would be submitted to the referendum of the people. The President said, "It is said that the Constitution is sacred. But more sacred than the Constitution or anything else is the country and the welfare and happiness of its people." To ensure the safety of the country and the welfare and happiness of its people, the President had abrogated the Constitution with the "utmost regret" and with the promise that the patriots and the law-abiding would, henceforth, be "happier and freer". Thus the Constitution, which came into force just over thirty months ago, after "so much turmoil and strife" was abrogated by the person who was elected to, and held office as the first President under it and who had taken a solemn oath to "preserve, protect and defend the Constitution". The activities of the politicians described by the President in his statement were substantially true. While the politicians were mostly responsible for the situation which Mirza intended to exploit, the fact remains that Mirza himself was instrumental in encouraging many politicians to behave in so reprehensible a manner. We shall discuss the role played by Mirza during his Presidency in a later chapter. Suffice it to say here that Iskandar Mirza, as the President, was, as much as any other politician, responsible for the situation, which led to the abrogation of the Constitution, and the proclamation of a kind of "martial law" hitherto unknown in the constitutional history of the Commonwealth.

Simultaneously with the President's proclamation, General Ayub Khan, as the Supreme Commander and Chief Martial Law Administrator, issued the "proclamation of Martial

Law".[377] The proclamation stated that Martial Law Regulations and Orders would be issued, the contravention of which would be punished with penalties stated therein. Special Courts would be appointed to try contraventions of the Regulations and Orders, as well as offences under the ordinary law. It is significant that Ayub Khan's proclamation did not make any mention of any delegation of power to him nor was "it anywhere said that he was issuing this declaration by virtue of any presidential appointment".[378]

On the following day Ayub Khan addressed the nation over the Radio. In his message[379] to the nation the General described the abrogation of the Constitution and declaration of martial law as a "drastic and extreme step", which was taken with "great reluctance", as the only means to save "disintegration and complete ruination of the country". He also, like the President, blamed the political leaders for the chaos and confusion the country was in, and referred to their "bitter war against each other, regardless of the ill-effects on the country, just to whet their appetites and satisfy their base motives". They shifted from one party to another without turning a hair or feeling any pangs of conscience, resulting in total administrative, economic, political and moral chaos in the country. The people had become sick of these unscrupulous politicians, and the army felt the same way. The former Governor-General had requested him to take over the government of the country on several occasions but for valid reasons the General had refused the offer.

General Ayub Than assured the people that the taking over by the army did not mean the suppression of democracy. He declared:

"Let me announce in unequivocal terms that our ultimate aim is to restore democracy but of the type that people can understand and work. When the time comes, your opinion will be freely asked. But when that will be, events alone can tell. Meanwhile, we have to put this mess right and put the country on an even keel."[380]

In administering martial law, Ayub Khan said, the civilian agencies would be used to the maximum, utilizing the armed forces as little as possible. Martial Law Regulations would be issued to tighten up the existing laws on matters like "malingering or inefficiency amongst officials, any form of bribery or corruption, hoarding, smuggling or black-marketing or any other type of anti-social or anti-State activity". The General sounded a warning against the smugglers, black-marketers and "other such social vermin, sharks and leeches", advising them to behave '"otherwise retribution will be swift and sure".

[377] P.L.D. 1958 Central Statutes 499.
[378] H. Feldman, *Revolution in Pakistan*, p. 2.
[379] Full text: M. Ayub Khan, *Speeches and Statements*, Volume I, p. l.
[380] *Ibid*., p. 5.

From the address of the Chief Administrator of Martial Law the nature of things that were to come could be anticipated. Politicians were dislodged from power; veteran leaders like Khan Abdul Ghaffar Khan, G. M. Syed and Maulana Bhashani were arrested on security grounds and politicians who had held office under the former regimes, such as Mohammad Ayub Khuhro, Hamidul Huq Choudhury, Abul Mansur Ahmed, Abdul Khalique and Sheikh Mujibur Rahman were arrested on corruption charges.[381] The country was to be ruled by the regime, relying on the army and the civil service. The civil administration was geared to the regime from the start and the civil servants, under cover of the armed forces, implemented policies formulated by the regime. General Ayub Khan claimed that the Martial Law Regime was "benign and intended to help the civil power to clear up the existing mess ..."[382]

To continue with the events that took place at the top level, a significant but not unexpected change occurred within three weeks of martial law being declared. Whereas the armed forces under General Ayub 'than might have acted with the intention of clearing up the mess created by the politicians and of providing remedies for grievances, President Mirza apparently had a different object in his mind. As has been observed in the previous chapter, his motive in declaring martial law, was to get rid of the politicians with the help of the armed forces and then to perpetuate his own personal rule. Within a week of the imposition of martial law, Mirza was thinking of withdrawing martial law and even mentioned this possibility to foreign correspondents.[383] But in a press statement made on October 17, General Ayub Khan stated that martial law would not be lifted until it had served its purpose, which was "the clearance of the political, social, economic and administrative mess" that had been created in the past.[384] Mirza had misjudged his capacity. Finding it difficult to get rid of the military in a straight forward method, he resorted to his old game of intrigue and tried to create suspicion and misunderstanding among the officers of the armed forces by playing one against the other.[385] Mirza's duplicity made the situation intolerable for General Ayub Khan and his associates. He was therefore compelled to resign on October 27, 1958, when General Ayub Khan assumed the Presidency. It is possible, though unlikely, that Ayub Khan might have been willing to share power with Iskandar Mirza. But Mirza's intrigues gave the General excuse to remove him.

Martial Law Administration

On October 9 the first installment of Martial Law Regulations[386] was published. The country was divided into three territorial Zones, each under a military officer of high

[381] H. Feldman, *Revolution in Pakistan*, p. 9.
[382] *Ibid*., p. 10.
[383] A. Gledhill, *Pakistan, The Development of its Laws and Constitution*, p. 107.
[384] M. Ayub Khan, *Speeches and Statements*, Vol. I, p. 6.
[385] See M. Ayub Khan*, Friends Not Masters*, pp. 73-75.
[386] Typical Martial Law Regulations and Orders are quoted in Appendix III.

rank as Zonal Administrator with power to issue Martial Law Orders and Regulations subject to Martial Law Regulations issued by the Chief Martial Law Administrator.[387] Punishments for contravention of Martial Law Regulations and Orders were enumerated. The word "recalcitrant" was defined to include "any external enemy of Pakistan and mutineers or rebels or rioters and any enemy agent".[388] Helping or assisting in the operations of "the recalcitrants" and persons joining or attempting to join "the recalcitrants" were to be punished with death.[389] In this connection Herbert Feldman commented that "the fact that the word 'recalcitrant' was used in Regulations 6 and 7 with the definite, rather than indefinite article, raised a supposition that there must be some recalcitrants around somewhere, but nobody could quite make out who those were. It is now a matter of history that no specific accusation of any person, to this effect, was ever made and so no one was ever charged with being such."[390]

Pre-censorship of matters affecting "Martial Law" was imposed and omission to comply with this Regulation was punishable with a maximum sentence of seven years' imprisonment.[391] Disobedience or neglect to obey any Martial Law Order or obstructing or interfering in the execution of martial law or making a false statement in order to obtain a pass or permit were to be punished with fourteen years' imprisonment.[392] Spreading reports to create alarm or despondency amongst the public or disaffection towards the armed forces or the police was punishable by imprisonment of up to fourteen years.[393] Failure to give a correct name and address when required[394] and giving false evidence or refusal to give evidence[395] carried the maximum sentence of death. As is evident, these Regulations were aimed at consolidating the regime's own position. Severe punishments were prescribed for acts and omissions designed to challenge in any manner the effectiveness of the regime.

To deal with the shortage and lack of supply of food grains and other essential commodities stringent Regulations were issued. Hoarding of food-grains carried the maximum penalty of death,[396] while adulteration of food was punishable with up to fourteen years' rigorous imprisonment. Hoarding of necessities and refusal to declare stocks of commercial commodities when required, were punishable with fourteen years' imprisonment.[397] The sale of import licenses or permits and imported raw materials by industrial consumers was prohibited; non-compliance was to be punished with

[387] Martial Law Regulation (M.L.R.) No. 1.
[388] M.L.R. No. 3.
[389] M.L.R. Nos. 6 and 7.
[390] H. Feldman, *Revolution in Pakistan*, p. 5.
[391] M.L.R. No. 4.
[392] M.L.R. No. 16.
[393] M.L.R. No. 24.
[394] M.L.R. No. 18; maximum punishment later reduced to five years by reconstituted No. 33.
[395] M.L.R. No. 19.
[396] M.R.L. No. 21.
[397] M.L.R. No. 25.

imprisonment up to fourteen years.[398] Price control of all imported goods, manufactured goods and selected food-grains was taken over by the central government. Detailed rules provided for fixing the retail prices of food-grains, textiles, drugs and medicines, cement, newsprints, sugar, tea, cigarettes and books.The prices determined under these regulations were maximum prices and contravention was to be considered as violation of specific Regulations providing maximum sentences of fourteen years' imprisonment and death.[399] Smuggling of goods in or out of the country, helping a smuggler or failure to report smuggling were punishable with death[400] while black-marketing was punishable with fourteen years' imprisonment.[401]

Martial Law Regulations were issued to deal with corruption and other vices among officials. Bribery, illegal gratifications of any kind, misuse of official position and nepotism could be punished with imprisonment for fourteen years.[402] In early November a Regulation required persons, who had submitted incorrect tax returns since the assessment year 1954-55, to submit revised returns by December 31;[403] if this was done, no action would be taken for previous incorrect returns, but for submitting a statement, as required by any tax law, which was false a penalty of seven years' imprisonment and fine could be imposed.[404] Holdings of foreign exchange in foreign countries were to be declared; anyone found holding undeclared foreign exchange was liable to suffer imprisonment up to seven years and confiscation of the whole or part of his property.[405] Taking Pakistan currency out of Pakistan and conversion of Pakistan currency into foreign currency without a permit were made punishable with up to ten years' imprisonment.[406]

Strikes, lockouts and agitation in industrial concerns and educational institutions were prohibited. Contravention was to be visited with ten years' imprisonment.[407] Organizing, convening or attending a meeting of a political nature was to be punished with seven years' imprisonment.[408] Other Martial Law Regulations were issued to ensure that evacuee property and refugees were properly dealt with. Unlawful possession, occupation and disposal of evacuee property were to be declared; false claims were to be rectified, and evacuee property in unauthorized occupation was to be surrendered by December 31; non-compliance was punishable with a prison sentence of

[398] M.L.R. No. 41; reconstituted Regulation provided for seven years' rigorous imprisonment.
[399] M.L.R. No. 42.
[400] M.L.R. No. 27.
[401] M.L.R. No. 26.
[402] M.L.R. Nos. 30 and 31.
[403] M.L.R. No. 43.
[404] M.L.R. No. 44.
[405] M.L.R. No. 45.
[406] M.L.R. No. 58.
[407] M.L.R. No. 29 as reconstituted by M.L.R. No. 60.
[408] M.L.R. No. 55.

seven years, with confiscation of the whole or part of the offender's property.[409] The Displaced Persons (Compensation and Rehabilitation) (Amendment) Ordinance, 1959,[410] was promulgated authorizing the Chief Settlement Commission to eject unauthorized persons from evacuee property. Fresh rules were framed for disposal of claims, petitions and payment of compensation. To enforce these Regulations, special courts of criminal jurisdiction, namely, Special Military Courts and Summary Military Courts were set up.[411] A Special Military Court was to be constituted in the same manner, to have the same powers and to follow the same procedure as a Field General Court Martial convened under the Pakistan Army Act, 1952. A Magistrate of the first class or a sessions judge could be appointed a member of such a court. The court was empowered to pass any sentence authorized by law or by Martial Law Regulations. A death sentence was, however, to be confirmed by an Administrator of Martial Law. A Magistrate of the first class or any military, naval or air force officer could be empowered to hold a Summary Military Court, with the same powers as a Summary Court Martial under the Army Act. A Summary Military Court could pass any sentence authorized by law or the Regulations, except a sentence of death, transportation, imprisonment exceeding one year, or whipping exceeding fifteen stripes. The proceedings of the Summary Military Courts were to be forwarded for review to the area Administrator of Martial Law. Besides these special courts the ordinary criminal courts, as by law established, were to continue to exercise jurisdiction over offences under ordinary law and also under Martial Law Regulations.[412]

The publication of these Martial Law Regulations, affecting all spheres of activity were soon having effect and, "where it was discovered that there was a reluctance to enter into the spirit of the times, police and others were on duty to remind merchants and shopkeepers of the necessity for compliance. Within ninety-six hours of the initiation of these great changes, the citizens of Pakistan were beginning to experience some very tangible consequences."[413] Information Receiving Centers were set up in Karachi and other places and members of the public were invited to give information about anti-social and anti-regime activities. Prices of goods opine down, hoarded food-grains and other articles were promptly declared, foreign exchange was surrendered; and it was estimated that the government had collected a sum of rupees twenty-four crores by way of taxes on excess income, and hidden wealth, which amounted to one hundred and thirty four crores of rupees.[414]

It must be noted, however, that, while the Regulations prescribing severe punishments were drafted in stringent terms, the Martial Law Regime generally took a lenient view

[409] M.L.R. No. 49.
[410] Ordinance No. 1 of 1959, P.L.D. 1959 Central Statutes 74.
[411] M.L.R. No. 1-A.
[412] M.L.R. No. 2.
[413] H. Feldman, *op. cit*., p. 5.
[414] *Ibid*., p. 52.

of the cases which were detected and prosecuted during; this period. This applied even to offences carrying the severest punishments. In August, 1959 nine persons were convicted under Martial Law Regulations 24 and 51, which dealt with the spread of alarm and despondency among the public and creation of dissatisfaction with the armed forces; they were sentenced to terms of imprisonment ranging from seven to ten years. But the convicts in the case, which cane to be known as "Poster case", were released after only a portion of the sentence had been served by them. In a somewhat similar case in which two former West Pakistan provincial Ministers and a Deputy Speaker of the National Assembly were involved, the convicted persons were released a few months after their conviction. An officer of the All-Pakistan civil service cadre, sentenced to seven years' rigorous imprisonment for illegal gratification and abuse of official power, was released after a few months. Even a person sentenced to life imprisonment for smuggling was released after he had served only a portion of his sentence. Giving details of these cases Herbert Feldman observed:

> "Throughout 1959, there was a series of sensational smuggling, hoarding and food adulteration cases, in which substantial terms of imprisonment, along with fines involving lakhs of rupees were awarded, but it appears that most of the convicted people were released after serving in jail for a time and that the fines imposed were not recovered."[415]

In the initial stage it appeared that the authorities had been successful in putting a stop to the lamentable deterioration in public life and in "inducing and teaching a greater sense of civic responsibility, a greater regard for cleanliness, hygiene, and civic well-being". The swift and apparently stern measures did not, however, have any lasting effect on society. After a brief lull, the old vices appeared again, bribery and corruption being more cautiously Practiced and higher rates of gratification being demanded to cover the enhanced risk of punishment by martial law. Feldman mentions a gold smuggling case in October, 1961, "three years after Martial Law had begun its anti-smuggling activities".[416]

The Laws (Continuance in Force) Order, 1958

On October 10, three days after the abrogation of the Constitution of 1956, the President issued the Laws (Continuance in Force) Order, 1958,[417] which "must be regarded as the principal constitutional document for the 'martial law' period".[418] The Order was deemed to have taken effect immediately upon the making of the proclamation of

[415] *Ibid*., p. 128.
[416] *Ibid*.
[417] President's Order (Post-Proclamation) No. 1 of 1958. P.L.D. 1953 Central Statutes 497; Full text of the Order is in Appendix IV.
[418] A. Gledhill, *Pakistani The Development of its Laws and Constitution*, p. 106.

October 7, abrogating the Constitution and declaring martial law throughout the country.

The Laws (Continuance in Force) Order, 1958, provided that, subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law, the country was to be governed as nearly as possible in accordance with the abrogated Constitution. The adjective "Islamic" was omitted from the title of the Republic, which was henceforward to be known simply as "Pakistan". All courts existing immediately before the proclamation would continue to function, exercising the same jurisdiction, except that they could not call in question the President's proclamation of October 7, any Order made under the proclamation or Martial Law Order or Regulation or finding or judgment of a military court. The Supreme Court and the High Courts retained their power to issue writs, but no writ was to be issued against the Chief Martial Law Administrator or his Deputy or any person exercising power or jurisdiction under the authority of either of them. Where a civil authority had been superseded by a martial law authority, a court could send "its opinion on a question of law raised" in lieu of a writ. All orders and judgments made or given by the Supreme Court before October 10 were valid and binding on all courts and authorities in Pakistan, but saving those, no other older or writ made or issued after October 7 would be valid, unless permitted by the Order, and all applications and proceedings in respect of any writ, which was not retained by the Order, would abate.

All laws in force, except the late Constitution and certain orders made under it, and subject to the Orders of the President and Regulations made by the Chief Martial Law Administrator, would continue in force until altered, repealed or amended. Any provision in any law providing for the reference of any detention order to an Advisory Board would have no effect.

A Governor of a province was to have the same powers as he would have had under a proclamation made by the President, suspending the provincial constitution, under the late Constitution, including power to make Ordinances. But he was to exercise these powers, subject to any directions from the President or the Chief Administrator of Martial Law. Martial Law Regulations made by the Chief Administrator were to operate unaffected by any Ordinance made by a Governor and in the case of conflict or repugnancy, the Regulation was to prevail.

All persons in the service of Pakistan or holding certain offices under the late Constitution immediately before the proclamation were continued in such service or office on the same terms and conditions and with the same privileges as before. By an amendment of the Order, the President assumed the power of suspending, in consultation with the Chief Justice of Pakistan, any judge, whose conduct was under

reference to the Supreme Court for report.[419] By a subsequent amendment any person in the service of Pakistan, if found inefficient or guilty of misconduct, was made liable to be removed or dismissed from the service.[420]

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The Laws (Continuance in Force) Order, as has been noted earlier, was the principal constitutional document promulgated by the new regime and henceforward formed the legal basis for the exercise of power by all organs of the State. All actions of the regime were examined in the light of this Order along with the President's proclamation of October 7. It, therefore, came under judicial scrutiny in the cases before the superior courts during the "Martial Law" period. We shall discuss the status and impact of this Order later in the Chapter.

In conformity with the authoritarian and unitary nature of the regime, some re-arrangements in the law-making power of the centre and the province were made. The Legislative Powers Order, 1959,[421] was made in March, 1959, giving the President exclusive power to make laws relating to military camps, cantonments and administration of cantonments, and, by an amendment of the Order, mines and matters relating to mines were also brought under the exclusive law-making power of the President. By another amendment all matters enumerated in the Provincial List of the late Constitution and any matter not enumerated in any list were Placed in the Concurrent List.[422] But all provincial laws not in conflict with any order made by the President since the proclamation were to continue to be valid. Thus all conceivable subjects were brought under the legislative and executive authority of the centre. The provincial governments were essentially made subservient to the central authority, whose writ reigned supreme throughout the whole country.

Measures relating to Public Life and Public Services

President Mirza and General Ayub Khan in their first speeches had accused the politicians of all kinds of misconduct, which, they alleged, had created an intolerable situation in the country. It was, therefore, expected that some extraordinary measures, besides arrest and detention under the existing laws, would be adopted to deal with them. In March, 1959 the Public Offices (Disqualification) Order, 1959,[423] was promulgated to deal with ex-Ministers and others Who had previously held public offices. The Order included a wide definition of the word "misconduct"[424] and provided

[419] President's Order (Post-Proclamation) No. 4 of 1958, Central Statutes 5. P.L.D. 1959
[420] President's Order No. I of 1959, Central Statutes 99. P.L.D. 1959
[421] President's Order No. 2 of 1959, Central Statutes 151. P.L.D. 1959
[422] President's Order No. 17 of 1959, P.L.D. 1959 Central Statutes 324.
[423] President's Order No. 3 of 1959, P.L.D. 1959 Central Statutes 152.
[424] It included "bribery, corruption, jobbery, favoritism, nepotism, willful maladministration, willful misapplication or diversion of public moneys or moneys collected, whether by public subscriptions or otherwise, by or at the instance of a person holding public office, and any other abuse of whatsoever kind of official power or position and abetment of misconduct." — Para. 2(a) of the Order.

for disqualification for public office by the President or a Governor of any person found guilty of misconduct, after an enquiry by a tribunal established for the purpose. The disqualification could extend to a period of fifteen years and the order could require any sum of money to be paid in compensation for money lost to the public revenue through misconduct of the person concerned.

The Public Offices (Disqualification) Order, 1959, as may be noticed, was applicable only to those politicians who had held public offices, and did not apply to those who, without holding office, had been members of various representative institutions and Ware thought to have used their positions to their own advantage or to the detriment of the State. The procedure under this Order was also considered to be lengthy and cumbersome.[425] In consequence a further Order — the Elective Bodies (Disqualification) Order, 1959,[426] was issued in August. This Order applied to any person who had held public office or position, including membership of any "elective body" since August 14, 1947. The Order provided for the appointment of three tribunals to inquire into the cases of misconduct of such persons as were referred to them by competent authorities and to report their findings to the appropriate government. The tribunals, when notifying the respondents of the charges, were to give them the option voluntarily to retire from public life until December 31, 1966. On an acceptance of this offer, further enquiry against a respondent would stop and he would stand disqualified for that period for being a member or a candidate for membership of any elective body. In a contested case, if the respondent was found guilty by the tribunal, the appropriate government would pass an order disqualifying him from holding public office until December 31, 1966 and might also order restoration of any sum of money lost to the public revenue through his misconduct. There was also a provision in the Order for automatic disqualification of certain categories of persons for holding public office until the end of 1966. These categories included those who had been dismissed or removed from service, except for inefficiency, those who had been detained under the Security of Pakistan Act, 1952, or had been found guilty of an offence under the Public and Representative Offices (Disqualification) Act, 1949, and persons who had been convicted and sentenced to not less than two years' imprisonment.

The Elective Bodies (Disqualification) Order, 1959, proved effective in eliminating the politicians from public life. It has been observed that "the intention was, no doubt, to sweep into the net every person who had been active in politics and against whom some misconduct could be proved",[427] and in this it was successful. Only a few denied the charges made against them; most of them accepted voluntary retirement. Approximately seven thousand persons were excluded from political life under the

[425] See H. Feldman, *op .cit*., p. 80.
[426] President's Order No. 13 of 1959, P.L.D. 1959 Central Statutes 288.
[427] H. Feldman, *op. cit.,* p. 80.

Order.[428] It may be mentioned here that in 1963, after the Constitution of 1962 had come into force, the President issued an amending Ordinance[429] providing that persons laboring under an EBDO disqualification order could apply for relief. This gesture on the part of the President was interpreted as a means to get support for the President's Constitution from former political leaders. It therefore became an object of controversy and did not receive approval in the National Assembly.[430]

If the politicians were thoroughly discredited, because of their corruption, inefficiency and abuse of official power, there was no doubt in the minds of the people that these vices were also rife at all levels of the public services. To deal with the public servants, the Public Conduct (Scrutiny) Ordinance, 1959,[431] was promulgated in January, 1959. The Ordinance applied to all persons in the service of Pakistan and certain other persons holding the office of Governor, Judges of the superior courts, Auditor and Comptroller General, Attorney-General and Advocates-General. It provided for the scrutiny of the conduct of any of these persons by Committees constituted by the central government. Each Committee was empowered to order a search of any premises and to order a police investigation into any matter in respect of a case coming before it. A person appearing before a Committee was barred from employing any legal adviser or friend; he was to appear personally and by himself. Under the Public Conduct Scrutiny Rules, 1959,[432] framed under the Ordinance, if an officer was found corrupt, guilty of conduct contrary to service rules or inefficient, the Committee was to submit its findings, together with the action against the person recommended by it, to the appointing authority for passing an order according to law. Under this Ordinance a total of fifty-seven Committees were set up, which implied that the conduct of a large number of officers were screened. In all 1,662 central government officials were disciplined and the punishment varied from removal from service to a "simple expression of the Government's displeasure".[433]

In order to deal administratively with appropriate cases relating to government servants belonging to the All-Pakistan services or persons engaged in the service in connection with the affairs of the federation, the Government Servants (Discipline and Efficiency) Rules, 1959[434] were framed. These rules empowered a competent authority, the head of a Department in the case of his subordinate officials, and the President in all other cases, to dismiss, remove, reduce in rank or compulsorily retire a government servant if he, in the opinion of such authority, was corrupt, inefficient, guilty of conduct

[428] Karl von Vorys, *Political Development in Pakistan*, p. 190. The number included former Prime Ministers Suhrawardy who contested the charges and Feroz Khan Noon, former Chief Ministers A.H. Sarkar (who also contested), A.R. Khan, and Mumtaz Daultana.
[429] Ordinance II of 1963, P.L.D. 1963 Central Statutes 12.
[430] See Feldman, *op. cit*., p. 82.
[431] Ordinance III of 1959, P.L.D. 1959 Central Statutes 136.
[432] P.L.D. 1959 Central Statutes 137.
[433] H. Feldman, *Revolution in Pakistan*, p. 74.
[434] P.L.D. 1959 Central Statutes 138.

contrary to service rules or engaged in subversive activity. If the charge was involvement in subversive activity, a Board of three Secretaries to government was to report to the President on the proceedings. A person, against whom an order was made under the rules, had the right of an appeal to the President, and where the order was that of the President, he could apply for review. These rules were designed to tighten the disciplinary rules regulating the behavior of public servants and provided for summary action against offending officials.

Legality of the Martial Law

During the period of forty-four months in which the country was governed by the "Martial Law" regime, the superior courts of Pakistan were called upon to give their interpretation of statutory instruments promulgated by the regime. As has been said earlier, the Laws (Continuance in Force) Order, 1958, issued by the President on October 10, restored most of the powers and jurisdiction of the courts. This short document served as the fundamental constitutional instrument, in the light of which other pieces of legislation were examined by the courts.

But first of all the Supreme Court had to decide the legality of the regime which had abrogated the Constitution, abolished the legal order under it, and brought into force a new one. In *State v. Dosso*[435] the question arose whether a writ issued by the West Pakistan High Court, under the provisions of the late Constitution, had abated under the provisions of the Laws (Continuance in Force) Order. The Supreme Court, by a majority held that it had, as the late Constitution itself had been abrogated, the Court recognized the Laws (Continuance in Force) Order as the new constitution", which "determined" the jurisdiction of all courts including the Supreme Court.

In a detailed discussion of constitutional changes, Mohammad Munir C. J. maintained that an abrupt change, not contemplated by the existing constitution, amounting to a "victorious revolution" or a "successful *coup d'état*", was an internationally recognized method of changing a constitution. The Chief Justice said,

> "It sometimes happens ... that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order."[436]

Munir C.J. pointed out that a revolution was generally associated with public tumult, mutiny and bloodshed but "from a juristic point of view the method by which and

[435] P.L.D. 1958 S.C. 533.
[436] *Ibid*., at p. 538.

persons by whom a revolution is brought about is wholly immaterial Equally irrelevant in law is the motive for the revolution ...' For the purposes of the doctrine "... a change is, in law, a revolution if it annuls the Constitution and the annulment is effective".

Regarding the "effectiveness" of a revolution his Lordship said:

> ... if the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact, because thereafter its own legality is judged, not by reference to the annulled Constitution, but by reference to its own success. On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled Constitution."

The Chief Justice continued

> "If the territory and the people remain substantially the same, there is, under the modern juristic doctrine, no change in the *corpus* or international entity of the State and the revolutionary government and the new constitution are, according to International Law, the legitimate government and the valid constitution of the State. Thus a victorious revolution or a successful *coup d'état* is an internationally recognized legal method of changing a constitution.
>
> "After a change of the character I have mentioned has taken place, the national legal order must for its validity depend upon the new law-creating organ. Even the Courts lose their existing jurisdiction and can function only to the extent and in the manner determined by the new Constitution."[437]

In support of his view Munir C. J. quoted extensively from Hans Kelsen's positivist theory of "efficacy" of the change, including the following extract:

> "From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated.
>
> "No jurist would maintain that even after a successful revolution, the old constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order — to which no political reality any longer corresponds — has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new

[437] *Ibid*., at p. 539.

> constitution. It follows that, from this juristic point of view, the norms of the old order can no longer be recognized as valid norms."[438]

On the basis of Kelsen's theory, the Chief Justice concluded that the revolution having been successful, it had satisfied the test of "efficacy" and became 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 examined."[439]

The Supreme Court of Pakistan in the above case was called upon to deal with a situation, which had no precedent in the legal history of the Commonwealth. The declaration of martial law throughout the country was accompanied by the abrogation of the Constitution. Other Commonwealth Courts from time to time and Pakistani Courts in 1953 had dealt with martial law situations of the kind recognized by the common law. But here the Court had to determine the validity of a new legal order, which had replaced the old. In such a situation, as Professor Gledhill observed, "no Crown prerogative or rule of common law could be invoked to justify what had been done. Instead resort was had to Hans Kelsen's '*General Theory of Law and State*'..."[440] He further pointed out that the Constitution of 1956 had provisions for its own amendment. And if the court had not recognized a right to change the Constitution by rebellion, it was possible that the judges would have been suspended and replaced by military courts affording fewer remedies to the citizens. "But the course taken was calculated to encourage an individual wielding supreme power to seek the approval of the courts for unconstitutional action. "[441]

A political scientist, Leslie J. Macfarlane, has also commented on the Supreme Court's decision, upholding Hans Kelsen's doctrine of "efficacy". He said that it was not clear "whether the Kelsen doctrine should be taken as simply a descriptive account of how men behave when a successful revolution takes place or whether it is to be read as providing an authoritative prescription which not merely justifies but requires obedience to the new regime." Pakistan judges, according to Macfarlane, applied the latter interpretation.

> "This interpretation is open to criticism ... for it would leave open the possibility of having a valid legal Order based on the arbitrary right of the leader or ruler to do whatever he thought fit, where all that the courts would have to determine in any case before them was what the leader had decreed, without any reference to whether the decree was promulgated, whether it conflicted with other decrees or whether it could reasonably or practically be given effect to. It would even be

[438] Hans Kelsen, *General Theory of Law and Stat*e, Quoted in P.L.D. 1958 S.C. 533, at pp. 539-40.
[439] P.L.D. 1958 S.C. 533, at p. 540.
[440] A. Gledhill, *Pakistan, The Development of its Laws and Constitution*, p. 109.
[441] *Ibid*.

> possible for the courts to be required to assist the authorities to find 'legal' reasons for establishing the guilt of innocent men, (as happened in the Moscow trial of the thirties), if this was one of the 'norms' of the new order. In such circumstances for judges to uphold the decrees of those in power in the name of law and *de jure* authority, is to mock and undermine ordinary men's confidence in the rule of law. It is one thing to argue ... that men cannot be required to behave in conformity with norms of a total legal order which has passed away; quite another to conclude, as the Pakistani and Ugandan judges have done, that this requires that the courts of the old order are required to validate the norms of its effective replacements."[442]

Leslie Macfarlane was commenting as above in the context of Rhodesian cases on the Unilateral Declaration of Independence by the Smith regime. It may be interesting to note what Chief Justice Beadle of the High Court of Rhodesia has said about the position of judges in a revolutionary situation. According to him, whether the "fundamental law" had changed at a given time or not was a question of fact and "did not in any way depend on the political view of the Chief Justices. If the 'fundamental law' had in fact changed, that was the end of the matter." In such circumstances the judges had to decide whether to go or continue in office. Even if they decided to relinquish, their decision would not have any bearing on what at that time the law was. His lordship then observed,

> "If the 'fundamental law' has in fact changed, what I consider the Judge cannot do is to purport to continue to sit under the old Constitution and declare that this constitution is still the law, when quite obviously it is not and he knows quite well it is not. Such a decision would completely divorce law from political reality."[443]

What happened in Pakistan in October, 1958, then an isolated incident in the Commonwealth, has become a pattern for the "New Commonwealth". If the Rhodesian regime, in spite of Britain's claim of legal sovereignty over the colony, could secure the *de jure* recognition of the Rhodesian High Court on the basis of the fact that it wielded effective power, ignoring the British sanctions and other measures, it seems quite understandable why the Pakistan Supreme Court had to recognize the change, when there was no effective opposition to the new regime. The recent experience in Pakistan[444] and Nigeria[445] has established the substance of Chief Justice Beadle's remark that the Court has no control over such circumstances. This is at least true in the new

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[442] L. J. Macfarlane, "Pronouncing on Rebellion: The Rhodesian Courts and U.D.I.", (1968) *Public Law* 323, at pp. 334-335.

[443] *Madzimbamuto v. Lardner-Burke* 1968 (2) S.A. 284, at p. 327.

[444] See *Mir Hasan v. The State*, P.L.D. 1969 Lahore 786.

[445] See *Lakanmi v. The A.-G.* (West), Supreme Court of Nigeria 1970, S.C. 58/69. (In both these cases the judicial decisions were overruled by executive decrees.)

Commonwealth countries, where judicial and legal institutions do not yet enjoy the same support from other institutions and the people as the wielder of political power. No doubt the judges ought to uphold the law, according to the Constitution under which they are appointed, and should not recognize any change in that Constitution, unless made bona fide and according to the proper procedure. But in the circumstances prevailing in Pakistan after the President's proclamation of October 7, 1958, it would have been difficult to do otherwise than the Supreme Court of Pakistan did. If it had declared the regime illegal and unconstitutional, its decision would have no effect at all; if the decision of the highest court is not given effect to, such a decision would not have any "real" value, nor would it enhance the prestige of the judiciary in the eyes of the people; it might result in their loss of confidence in the whole judicial system. What would have happened if the Court had not recognized the new regime may be a hypothetical question. But its recognition by the Court led the regime, on its part, to recognize the Court's authority, possibly because it realized that "a revolution in a country is complete in law as soon as its courts hold the new regime to be lawful".[446] It may be noted that, while the Supreme Court recognized that the law could be changed at the will of the President and the Chief Martial Law Administrator, there is no instance in Pakistan, during this "martial law" period, of the regime flouting any judicial decision given on the basis of the law, as it then existed.

The Courts' jurisdiction

The Laws (Continuance in Force) Order, 1958, which Munir C. J. described as the "new constitution", provided that all existing courts would continue to function and to exercise the same power and jurisdiction as before. But no court was to call in question the proclamation of October 7, 1958, any order made under it or any Martial Law Order or Regulation or any order or judgment of any Military Court. Where a writ was applied for against the judgment of a Summary Military Court, the West Pakistan High Court held that it was not in all cases that the jurisdiction of the High Court in respect of the judgment of the military court had been taken away.[447] The Court recognized that it had no authority to question any Martial Law Regulation or Order or any judgment of a military court. But there was no ouster of the High Court's jurisdiction, if the military court acted without jurisdiction. The learned judge observed"

> "If a Military Court passes a sentence on a person it could not try, or tries an offence it was not given the power to try, or passes a sentence it was not competent to pass, the order will be without jurisdiction and will not enjoy the immunity from scrutiny by this Court. My reliance in coming to the above conclusion is on the well-known principle of law that an order which is without jurisdiction cannot be treated as an order for any purpose."[448]

[446] R.W.N. Dias, "Legal Politics: Norms Behind the Grundnorm". (1968) *Cambridge Law Journal*, 233.
[447] *Manzoor Elahi v. The State*, P.L.D. 1959 Lahore 243.
[448] *Ibid*., per Shabir Ahmad J. at p. 246.

In the above case it was held that Martial Law Regulations and Martial Law Orders issued by the Chief Martial Law Administrator had the same status and were of the same effect. And in *Aziz Din v. The State*[449] the same learned judge held that Martial Law Order No. 10[450] had, by implication, taken away the right of a person, convicted by an ordinary criminal court, if the sentence had been confirmed by an Administrator, to appeal to a higher court. But the Supreme Court overruled the decisions on these points, holding that Martial Law Orders had not the same status as the Regulations and that the right of appeal where it existed "could only be taken away expressly or by necessary intendment and a mere provision of a confirming or reviewing authority in a different jurisdiction does not have the effect of destroying or taking away that right where it accrued."[451] In *Siddiq v. The State*[452] it was held that an application for revision from an order of a Magistrate in a case tried under para. 1 of Martial Law Regulation No. 61 lay to the court of session. Following the Supreme Court's ruling in *Khuhro's* case the West Pakistan High Court held that an order purporting to have been made under a Martial Law Regulation could be investigated by the High Court and a suitable order passed, if it had violated the principles of natural justice.[453] The learned judge observed that "what was not to be questioned was the Regulation or the Order itself, but any action taken under the Regulation or Order could be examined."

But whereas the courts were zealous to guard their own jurisdiction, wherever given and not expressly taken away, they gave a liberal interpretation to ouster of jurisdiction, where it had been provided by any Martial Law Regulation. The court consistently recognized that Martial Law Regulations and Martial Law Orders themselves could not be called in question. The Supreme Court, upholding the High Court's judgment in *Zafar-ul-Ahsan's* case,[454] held that a statute could provide for the exclusion of the court's jurisdiction over any order or proceeding made or taken by a statutory authority properly constituted and exercising proper jurisdiction.[455] It was, however, observed that "where the proceedings are taken *mala fide* and the statute is used merely as a cloak to cover an act which in fact is not taken, though it purports to have been taken, under the statute, the order will not ... be treated as an Order under the statute."[456] Not only could the ordinary jurisdiction of the court be taken away by an express provision of a statute made by the competent authority, but the extraordinary writ jurisdiction of the High Courts and the Supreme Court was "also subject to orders of the President and Chief Martial Law Administrator who possesses unfettered plenary power of

[449] P.L.D. 1959 Lahore 336.
[450] M.L.O. No. 10. "Proceedings of cases tried under the Martial Law Orders and Regulations by the Criminal Courts, after confirmation by the Administrator will be forwarded to Judge Advocate-General ... for review."
[451] *M.A. Khuhro v. Pakistan*, P.L.D. 1960 S.C. 237, 244.
[452] P.L.D. 1959 Lahore 769.
[453] *A. Majid v. Pakistan*, P.L.D. 1960 Karachi 921.
[454] *Zafar-ul-Ahsan v. Pakistan*, P.L.D. 1959 Lahore 879.
[455] *Zafar-ul-Ahsan v. Pakistan*, P.L.D. 1960 S.C. 113.
[456] *Ibid*., at p. 120.

legislation".[457] The Supreme Court also held that a Martial Law Regulation, issued by the Chief Administrator of Martial Law, could exclude jurisdiction, including the writ jurisdiction, for "the powers of the Chief Martial Law Administrator to legislate are not subject to any restrictions, and it was open to him to provide that action taken under any Ordinance of the President shall not be liable to be questioned in any court of law."[458]

The Laws (Continuance in Force) Order had restored to the Supreme Court and the High Courts power to issue the named writs in respect of matters provided for by that Order and all applications and pending proceedings for issue of writs, not so provided for, were to abate. In the State v. Dosso, the Supreme Court, interpreting these provisions, held, by a majority, that with the abrogation of the Constitution of 1956 the fundamental rights created by that Constitution were "no longer a part of the national legal order and neither the Supreme Court nor the High Court has under the new order the authority to issue any writ on the ground of the violation of the fundamental rights."[459]

Future writs would lie only on the ground of infraction of a law preserved or right recognized by the Laws (Continuance in Force) Order. The phrase "shall be governed as nearly as may be in accordance with the late Constitution" did not have the effect of restoring the fundamental rights, because the reference to "government" here meant only the "structure and outline of Government" and not the laws of the constitution, which had been expressly abrogated. The effect would be that all applications for writs for contravention of fundamental rights would abate. This meant that all proceedings for enforcement of such writs would also abate.

Dissenting from the majority, Cornelius J. (as he then was) held that though the fundamental rights of the late Constitution were not saved by the LCFO, proceedings commenced should not fail or abate because of the failure of those rights upon which they were based. The Order issued on October 10, 1958, had no retrospective effect, and, before October 7, the High Court had the duty to examine the validity of any legislation in the light of the provisions of the Constitution, which the High Court had done in the instant case. The provisions in Article 2(7) of the Laws (Continuance in Force) Order could not have the effect of bringing to an abrupt end the proceedings in the petitions commenced and concluded before the High Court. His Lordship observed, "I do not, therefore, consider that it is open to me to reverse the judgment of the High Court ... and to recall the writs issued by them, unless I am satisfied that the view of the High Court on the point of repugnancy to Article 5 of the [late] Constitution is not tenable."[460]

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[457] *Pahlomal-Motiram v. Chief Land Commissioner*, P.L.D. 1961 Karachi 384, 402.
[458] *Iflikhar-ud-din v. M. Sarfraz*, P.L.D. 1961 S.C. 585, 600 (per Kaikaus, J.).
[459] P.L.D. 1958 S.C. 533, 541 (per Munir, C.J.).
[460] *Ibid*., at p. 561.

In the *Province of East Pakistan v. Mehdi Ali Khan*[461] the Supreme Court, again by a majority, held that no writ would lie on the basis of, nor to enforce, any fundamental rights, which ceased to exist on the abrogation of the Constitution. Dissenting, Cornelius J. expressed his doubts that the effect of the provisions of the Laws (Continuance in Force) Order was to abruptly terminate all proceedings commenced before the proclamation. The learned judge held that the phrase that writs "not so provided for shall abate forthwith" was "applicable only to such proceedings as might constitute a threat to the supremacy of the new regime. Such proceedings might be motions of writs directed to a Martial Law authority and these are expressly excluded ..."[462]

The court was entitled to examine any action taken under any Regulation or Order and to issue the appropriate order or writ, if it was found that the action taken was not authorized, though the Regulation and Order themselves were immune from judicial scrutiny.[463] And an action under a Regulation or Order was immune from judicial review, only when it was taken by an authorized officer.[464] A writ of *certiorari* would issue directing a court to accept jurisdiction, which it refused to accept.[465] The courts' power to issue writs could be taken away by a statute issued by the President and the Chief Martial Law Administrator;[466] and the High Courts had not such wide powers to issue writs under the Laws (Continuance in Force) Order as they had enjoyed under Article 170 of the late Constitution.[467] But where it was contended that the writ of *mandamus* could not be issued to government, the Supreme Court held that, as "government" was not mentioned in the Laws (Continuance in Force) Order, as one of the authorities against whom a writ did not lie, an appropriate writ would issue against "government" in an appropriate case and *mandamus* was no exception.[468]

"Laws in Force" and the Constitution of 1956

According to the provisions of the Laws (Continuance in Force) Order, though the Constitution of 1956 had been abrogated, the country was to be governed, as nearly as possible, according to the late Constitution and all laws, other than the late Constitution, existing immediately before the proclamation were to continue in force, subject to changes made by the President or the Chief Administrator of Martial Law.

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[461] P.L.D. 1959 S.C. 387.
[462] *Ibid*., at p. 442.
[463] *Sher Muhammad v. Nasiruddin*, P.L.D. 1960 Lahore 583; *A. Majid v. Pakistan*, P.L.D. 1960 Karachi 921.
[464] *M. Siddia v. The State*, P.L.D. 1959 Lahore 769.
[465] *Zahid Umar & Co. v. Chief Secretary*, P.L.D. 1953 Lahore 764.
[466] *Iftikhar-ud-din v. M. Sarfraz*, P.L.D. 1961 S.C. 585; Pahlomal-Motiram v. Chief Land Commissioner, P.L.D. 1961 Karachi 384.
[467] *Pakistan v. M. Sayeed*, P.L.D. 1961 S.C. 192.
[468] *Pakistan v. M.A. Hayat*, P.L.D. 1962 S.C. 28.

In assessing the status of the late Constitution in the new legal order, the Supreme Court held that the late Constitution was to provide only "the structure and outline of Government" and all laws of the Constitution had been abrogated.[469] In *Mehdi Ali Khan's case*[470] it was held that the laws, which were void for being in conflict with the fundamental rights contained in the late Constitution, had been revived with full force and effect on the disappearance of the fundamental rights. A law passed by a competent legislature, but inconsistent with certain fundamental rights was not void *ab initio*, but was only void so long as such inconsistency existed. With the disappearance of the fundamental rights, it became fully effective as enacted. The Chief Justice, who gave the principal judgment of the majority cited a number of foreign authorities[471] to show that the courts did not decide the constitutionality of a law on a hypothetical case, and that laws conflicting with the paramount law were not struck off the statute book. It merely became "inoperative" to the extent of the repugnancy or was "kept in abeyance" for so long as that superior law was in force. As soon as the contravening provision of the superior law disappeared, the law would re-appear with full force.

Earlier, the West Pakistan High Court had held that laws which were repugnant to the fundamental rights before their abrogation were void ab initio and would not revive on the disappearance of those rights.[472] Kayani C.J. referred to two Indian Supreme Court cases[473] and, discarding the "eclipse" theory enunciated in the latter, held that a law was either valid or void and observed that "to say that it is not all times vagueness perfectly void in toto or not void for all purposes or for or for all persons is to introduce laxity and into the meaning of a well recognized and definite expression." But on appeal,[474] the Supreme Court reversed the findings of the High Court and confirmed its own full bench decision in *Mehdi Ali Khan's* case.

Under the new legal order there was no such distinction between "organic" or "constitutional" and "ordinary" law as had existed during the pre-revolution period. "At present two hinds of legislation are in vogue in this country. One is an ordinary legislation which is issued in the name of the President and other are Martial Law Regulations, which are issued under the authority of the Chief Martial Law Administrator. In law both of them have equal force ..."[475]

With the passage of time it seems that the courts were disposed to give a better status to the Constitution of 1956, than the Supreme Court had given in its judgment in *Dosso's*

[469] *State v. Dosso*, P.L.D. 1958 S.C. 533, 541.
[470] P.L.D. 1959 S.C. 387.
[471] *A.-G., Ontario v. A.G. Dominion*, (1896) A.C. 348; *Marbury V. Madison*, 1 Cranch 137 U.S. 1803; Carter and others vs The Egg & Egg Pulp Marketing Board, 66 C.L.R. 557.
[472] *Hasham v. Tribunal*, P.L.D. 1959 Karachi 286.
[473] *Sapir Ahmad v. State of U.P.*, A.I.R. 1954 S.C. 728; Bhikaji Narain v. State of Madhya Pradesh, A.I.R. 1955, S.C. 781.
[474] *Tribunal v. Hashim*, P.L.D. 1960 S.C. 260.
[475] *Pahlomal-Motiram v. Chief Land Commissioner*, P.L.D. 1961 Karachi 384,402 (per Wahiduddin, J.).

case, which was heard only a week after the issue of the proclamation. In *Iftikhar-ud-din's* case Kaikaus, J. pointed out that the words in Article 2 of the Laws (Continuance in Force) Order "shall be governed as nearly as may be in accordance with" were "exactly the same as in subsection (2) of section 8 of the Indian Independence Act, 1947, and may well have been lifted therefrom. In that provision these words admittedly referred to all functions of the Government and it will not be improper to infer that the Constitution was to be in force in Pakistan, in the same way as the Government of India Act was to be in force from the 14th of August, 1947."[476] The Constitution of 1956 was adopted, as the President could adopt the constitution of any other country, but this was more convenient. It was in force, not as a Constitution to which all laws and powers were subject, but as an enactment adopted by the President, subject to amendment at his will.[477]

The laws which were in existence at the time of the proclamation could only be altered by the supreme authority of the President and they had priority over the statutes made by authorities other than the President and the Chief Administrator of Martial Law. Any order of a Zonal Administrator of Martial Law or a provincial Governor would be void if it was inconsistent with the "existing" law, which was given validity by the President.[478] The provisions of the Constitution of 1956 and the laws existing immediately before the proclamation, according to the court, were to have full effect, unless they were inconsistent with the President's Orders or Regulations of the Chief Administrator of Martial Law.

With the abrogation of the Constitution of 1956 the fundamental rights enumerated therein disappeared. Though the country was to be governed as nearly as possible by the "late Constitution", that did not mean the restoration of the fundamental rights to their proper place. The "so-called fundamental rights" were no longer a part of the national legal order and no writ would lie for the violation of those rights.[479] But, according to Cornelius, J., who dissented from the above majority view, the fundamental rights enumerated in the Constitution did not derive their entire validity from the Constitution. "A number of these rights are essential human rights which inherently belong to every citizen of a country governed in a civilized mode ...", these could not be denied to citizens "at a time when they were expressly assured by writing in the fundamental law of the country, merely because that writing is no longer of any force".[480]

Following the decision in *Dosso's* case, the Supreme Court further held that not only had the fundamental rights disappeared, but all laws which were repugnant to such

[476] P.L.D. 1961 S.C. 585, 598.
[477] *Ibid*., at p. 599.
[478] *M. Afzal v. Commissioner*, P.L.D. 1963 S.C. 401.
[479] *State v. Dosso*, P.L.D. 1958 S.C. 533, 541.
[480] *Ibid*., at pp. 560-61.

rights and so void to the extent of repugnancy would recover their full force.[481] Even the writs which were issued by the East Pakistan High Court on the directions of the Supreme Court in *Jibendra Kishore's* case[482] would abate by reason of the provision in the Laws (Continuance in Force) Order. Again, Cornelius, J. dissented from the majority and held that such rights as would have prejudiced the success of the new regime would be regarded as non-existent by reason of the provision in the L.C.F.O. But other rights, though with the abrogation of the Constitution they had lost their compulsive force, as provisions of the late Constitution were not entirely devoid of validity.[483]

The judgment of the majority of the Supreme Court in recognizing the abrogation of the Constitution, and with it the disappearance of the fundamental rights, in the context of the situation, is understandable. But Cornelius, J.'s dictum that some rights, though they had lost the compulsive force as such rights, were not absolutely devoid of validity, seems vague and unenforceable. A right is either valid and enforceable or it is not. If they had "lost the operation" which was conferred on them by the late Constitution, then they must be regarded as having disappeared. To say that they had "not become entirely devoid of validity" is to invite the question of determining the quantum of validity, which it is impossible to determine and enforce.

According to the Supreme Court, however, the provisions of the late Constitution, not repugnant to any order of the President or any Regulation made by the Chief Administrator, were valid and would be enforced. But the fundamental rights contained in that Constitution were held to have disappeared with the abrogation of the Constitution. No court would allow any proceeding to enforce those rights or make any order on the basis of them.

Martial Law Regulations and Martial Law Orders

Though Martial Law Regulations and Martial Law Orders were issued by the same authority, that is, the Chief Administrator of Martial Law or any Zonal Administrator of Martial Law, the court distinguished between the status of the two instruments. The Supreme Court in *Khuhro's* case[484] held that "while the Regulations prescribe the penalties, the Orders merely provide the method of enforcing the Regulations, and in Martial Law terminology that is the correct distinction between the two." It was for the Chief Martial Law Administrator to determine whether he would describe a rule as a Regulation or an Order, but the latter would not have the same status as the former.

The Regulations and Orders issued by the Chief Martial Law Administrator, in their turn, took priority over those issued by the Zonal Administrators and Sub-

[481] *Province of East Pakistan v. Mehdi Ali Khan*, P.L.D. 1959 S.C. 387.
[482] *Jibendra Kishore v. Province of East Pakistan*, P.L.D. 1957 S.C. 9.
[483] P.L.D. 1959 S.C. 387, 441.
[484] P.L.D. 1960 S.C. 237.

Administrators of Martial Law. For convenience's sake the latter were given the general authority to issue Regulations and Orders, but "this authority was to be exercised consistently with the Orders and Regulations issued by the Chief Administrator of Martial Law. In this manner the main legislative authority was kept by the Chief Martial Law Administrator himself while the Administrators and officers were to exercise a kind of delegated legislative authority...[485]

According to the provisions of the Laws (Continuance 220 in Force) Order, 1958, the court had no jurisdiction to declare a Martial Law Regulation or Order invalid or *ultra vires.* But the Supreme Court held that "calling in question an order made under a Martial Law Order is entirely different; it may or may not amount to questioning the Martial Law Order itself, the former being prohibited, the latter not."[486] Though the court must accept a Martial Law Regulation or Order, an order passed under it by an unauthorized officer would not be immune from judicial scrutiny.[487]

With the promulgation of the Constitution of 1962 the proclamation of "Martial Law" was revoked and the Martial Law Regulations were repealed, except those saved by the Constitution itself.[488] But all acts duly done or anything suffered under any repealed statute were protected by the Constitution.[489]

The courts also would not disturb anything done during the "Martial Law" period, even if it was repugnant to the fundamental rights, incorporated in the new Constitution in January, 1964.[490] The Supreme Court followed its decision in *Dosso's* case, which was confirmed in *Mehdi Ali Khan's* case, that the fundamental rights of the Constitution of 1956 had not survived the successful "Martial Law" revolution and that all proceedings based on those rights would abate. Cornelius, C.J., who as a member of the bench in those cases had dissented from the majority on these points, expressed his reluctance to review those judgments. His Lordship said that

> "the pronouncement of the Supreme Court that writs for enforcement of the Fundamental Rights under the 1956 Constitution were not competent by reason of the Laws (Continuance in Force) Order, was an interpretation of that Order. To put it differently, that legal pronouncement became a part of Martial Law."

On the basis of this finding of the Supreme Court, numerous executive actions were performed, all in the belief that those actions were immune from challenge for repugnancy to the fundamental rights in the Constitution of 1956. To hold the contrary

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[485] *Ibid*., per Munir, C.J. at p. 247; also *N. Afzal v. Commissioner*, P.L.D. 1963 S.C. 401.
[486] *M.A. Khuhro v. Pakistan*, P.L.D. 1960 S.C. 237, 248.
[487] *Zahid Umar & Co. v. Chief Secretary*, P.L.D. 1959 Lahore, 764.
[488] *Constitution of 1962*, Article 225.
[489] *Ibid*., Article 250.
[490] *Tanbir Ahmad Siddiky v. Province of East Pakistan*, P.L.D. 1968 S.C. 185.

then would have the effect of disturbing a great many things done during the period of "Martial Law", affecting innumerable individuals and institutions. The Chief Justice said that all actions done or brought to completion during this period were covered by "Martial Law", of which the decision in *Dosso's,* as confirmed in *Mehdi Ali Kha*n's case, was an essential part. Cornelius C.J. observed, "the principle of *stare decisis* can have no more direct application than to the judicial interpretation of a major instrument by which the governance of an entire country was controlled during a limited period and within the terminal points of that period. On general grounds, therefore, it is not open to this Court to review its decision in the case of *Dosso*."[491] Consistent with its first judgment recognizing the "Martial Law" regime, the Supreme Court refused to cast any doubt on its legitimacy by questioning its actions taken during the "Martial Law" period.

The "Martial Law" regime, according to the view of Pakistan judiciary, was a revolutionary government, which had successfully overthrown the old legal order and established a new one, based on the President's proclamation of October 7 and a "new constitution" issued by the President on October 10, 1958 as the Laws (Continuance in Force) Order.The Constitution of 1956, not as the supreme law of the land but as an enactment adopted by the President, and the pre-existing laws continued in force subject to changes made by the President and the Chief Administrator of Martial Law. The Supreme Court and the High Court had the same powers and jurisdiction as before, except in so far as it had been expressly taken away by the President's Order or Regulations made by the Chief Administrator. The Martial Law Regulations and Martial Law Orders were immune from judicial scrutiny, but actions taken under them were subject to judicial review. The President and the Chief Administrator of Martial Law was the supreme law-giver, who could effect change or alteration in the existing law at his will, unrestricted by any principle or any fundamental right, which had disappeared with the abrogation of the late Constitution. Things done and actions taken during this period based their validity on the legal setup as it then existed, and became an essential part of the whole system, creating rights and obligations affecting innumerable citizens. The interim period, with its distinctive features, formed an integral part of the legal and constitutional structure of the country.

[491] P.L.D. 1968 S.C. 185, at p. 211.

Chapter VII

Reflections on the President's Action

Iskandar Mirza's background and political ideas

In the preceding two chapters we have tried to give a picture of the circumstances in which President Iskandar Mirza abrogated the Constitution of 1956 and brought the armed forces into the political arena. It has been suggested that the lamentable political conditions, on account of which the President had professedly declared martial law, were mostly his own creation, and that, in overthrowing the political system, which he was by oath bound to defend, Mirza was inspired by the ulterior motive of perpetuating his own position and establishing his personal rule. In the present chapter it is proposed to discuss the background of Mirza's attitude and ambition and the role he played during his period of office as the Head of the State, in order to determine his responsibility for the breakdown.

Iskandar Mirza started as an Army officer, one of the first young Indian officers commissioned from Sandhurst.[492] He was later transferred to the Indian Political Service. When independence came, Mirza was one of the few experienced political agents Pakistan had inherited from the old Indian services. By background and training Iskandar Mirza was an authoritarian ruler and proved himself to be an able and efficient administrator. He was a strong admirer of the bureaucratic system established by the British in India and condemned any sort of political interference in the administration. As Minister of the Interior in the Governor-General's Council of Ministers in 1954, Mirza said, "In the British system the District Magistrate was the king-pin of administration. His authority was unquestioned. We have to restore that."[493]

From the inception of Pakistan Iskandar Mirza was connected with the Defence Ministry of Pakistan. He was Secretary of the Ministry of Defence when, in May, 1954, he was appointed Governor of East Bengal, after the suspension of parliamentary government in that province. As an official in the Ministry of Defence, Mirza "played an influential role in improving the defence posture of Pakistan" which made him "fond of wielding enormous power".[494] An advocate of strong rule, Mirza insisted on the Nazimuddin government declaring martial law in Lahore in March, 1953 when violent religious riots occurred in that city. One year later, when parliamentary government was suspended in East Bengal, he was sent to Dacca as Governor to clear up the "mess"

[492] L.F.R. Williams, *The State of Pakistan*, p. 149.
[493] *Dawn*, October 31, 1954.
[494] K.B. Sayeed, *The Political System of Pakistan*, p. 89.

created by the politicians "when they were in power for four to six weeks".[495] In October, 1954, Iskandar Mirza was appointed Minister of Interior in the "Cabinet of Talents". In the following August he became the Acting Governor-General in place of the ailing Ghulam Muhammad, and in October Mirza was confirmed in that office, when Ghulam Muhammad relinquished it. When the first Constitution came into force in March, 1956, Iskandar Mirza, being the only candidate, was elected President of the Republic under the Constitution by the Constituent Assembly.

Iskandar Mirza's training and experience in the former Indian Political Service had made him an unsuitable Head of the State in the constitutional structure of Pakistan. As a Political Agent under the British Raj, "he built up a steadily growing reputation for resourcefulness and ability in that most testing of all fields, the North-West Frontier. His adroitness in confusing opponents by playing one off against the other, and getting his own way in the end, became proverbial."[496] "Mirza had never outgrown the role of Political Agent", whose traits were clearly visible in his dealings, as Head of the State, with the politicians, who were "even more manageable tools than the Pathans, for they lacked loyalty to the group or party to which they belonged".[497] He lacked and never developed the impartial attitude and broadness of mind to visualize things beyond his personal interest, which are the essential attributes of a head of state in a parliamentary democratic system. As Head of the State Mirza proved himself to be the captive of his own interests and ideas.

Iskandar Mirza might have had a strong faith in Pakistan but he did not have any faith in the democratic political system.[498] As has been said earlier, he wanted a strong and efficient administration and was an ardent advocate of the former Viceregal system. When Mirza was Governor of East Bengal and later when Minister of Interior, he publicly condemned political maneuverings and interference in the administration of the country. During the period between the dissolution of the first Constituent Assembly and the first meeting of the second Assembly, as the spokesman for the existing regime, he tried to popularize the idea of a political system which would concentrate effective powers in the hands of the Head of the State.[499] He thought that the people of Pakistan, being illiterate and having little training in democracy, could not be expected to work successfully political institutions and forms of democratic government evolved in a highly developed society like England. "People of this country need controlled democracy for some time to come",[500] where the Head of the State would have adequate powers to control an abnormal situation whenever necessary. By the year 1954 Mirza had become convinced that Pakistan was not yet ripe for the

[495] *Dawn*, November 18, 1954 (from Mirza's own statement).
[496] L.F.R. Williams, *op. cit.*, p. 149.
[497] K.B. Sayeed, *op. cit.*, p. 89.
[498] See G.W. Choudhury, *Constitutional Development in Pakistan*, pp. 137-138.
[499] See Chapter III.
[500] *Dawn*, October 31, 1954.

practice of democracy, as the term was understood in Britain or America, and that "democracy had run riot during seven years in Pakistan".[501]

As the President, under the Constitution of 1956, which provided for a federal, parliamentary form of government, Mirza openly criticized the Constitution and was opposed to the devolution of power to the provinces. He would prescribe for the country a unitary form of government, with two provinces enjoying limited powers; while remaining subservient to the centre. He was an advocate of an executive independent of the support of the legislature, and in the Republic Day Broadcast in March, 1957 declared "the Westminster system unsuitable for Pakistan and advocated the substitution of presidential government".[502] Being the constitutional Head of the State under a parliamentary system, Iskandar Mirza's expression of contempt for the Constitution, under which he held the highest office, was perhaps unique in Commonwealth constitutional history. However, "his predilection for the presidential form of government, which he vehemently advocated, were interpreted as a move for the concentration of authority in his own hands".[503] It has been remarked that at a time when everybody else seemed to be confused, Mirza knew his mind clearly and acted according to his own plan. Having been elected as President, Mirza had two aims, "to discredit the Constitution which had at long last been produced and made him President and to discredit all politicians. The latter aim was the more easily achieved."[504]

Mirza and party-politics

Immediately after Iskandar Mirza's appointment as Acting Governor-General in August, 1955, a political crisis developed at the centre. After the elections to the second Constituent Assembly, the Muslim League Parliamentary Party elected Chaudhri Mohammad Ali as its leader. There was a move for a coalition between the Muslim League and the Awami League, and the Awami League leader, Suhrawardy, "considered that he had received an undertaking that he would be invited to form a government". But instead, a coalition was formed between the Muslim League and the United Front of Fazlul Huq. It was suggested that the former move was frustrated by the initiative of the United Front leader, Fazlul Huq, to oust Suhrawardy and he was actively supported by Iskandar Mirza because "the Governor-General preferred Chaudhri Mohammad Ali".[505] The Governor-General's "preference" was purely based on his personal dislike for Suhrawardy, who, Mirza knew, would make a stronger Prime Minister than Chaudhri Mohammad Ali.

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[501] *Ibid*., November 19, 1954.
[502] A. Gledhill, *Pakistan, The Development of its Laws and Constitution*, p. 103.
[503] Mushtaq Ahmad, *Government and Politics in Pakistan* (2nd ed., 1963), p. 41.
[504] Z.A. Suleri, *Pakistan's Lost Years*, p. 119.
[505] L.F.R. Williams, *op. cit.,* p. 152.

Iskandar Mirza was a strong force behind the integration of the West Pakistan territories into a single province. To neutralize opposition to the integration scheme from smaller provinces, on his initiative Dr Khan Sahib, a non-party politician from North-West Frontier Province, was appointed Chief Minister of West Pakistan before that province came into being. Mirza, following the dictates of his own interests, developed a great attachment for Dr Khan Sahib, and tried to maintain the latter's position at all costs. When, in April, 1956 the Muslim League Parliamentary Party in the West Pakistan Assembly passed a resolution calling for the appointment of its parliamentary leader as the head of the provincial government, President Mirza who was on a visit to Azad Kashmir, cut short his tour and rushed back to Lahore. It was suggested that the President wanted to protect Dr. Khan Sahib and his ministry and through them to retain the support of the substantial majority in the rational Assembly for himself. His involvement in party politics at that time was so obvious that it created misgivings in the public mind which were not dispelled by the statement he issued from Lahore.[506]

Mirza supported the foundation of the Republican Party by Dr Khan Sahib. He wanted to wield power with the support of those members of the Assemblies who would gather around him "through the sheer magnetism of patronage".[507] But he used a different method from his predecessor in keeping the Assembly under his control. Parliament was not to be antagonized; it was to be used to concentrate powers in his own hand "by dividing his opponents and thus obtaining a free hand to deal with administrative problems".[508] Mirza, therefore, encouraged and supported Dr Khan Sahib in the formation of the Republican Party, which was reputed to have been "born in the Government Houses of Karachi and Lahore".[509] This party would look to President Mirza for guidance and proved to be an easy instrument in his hand to create political crises at his will.

It is significant to note that, after the formation of the Republican Party in the midst of frequent governmental changes both at the centre and in West Pakistan, it was never out of power, because of the manipulations of President Mirza and the support of Governor Gurmani. In West Pakistan in May, 1957 there was a possibility of the Republicans being defeated in the Assembly; Mirza promptly imposed President's rule in the province. Though it constituted a majority in the Assembly, the opposition Muslim League was not called upon to form a government. In the meanwhile, "a series of conferences took place between the Republican leaders and President Mirza at his summer resort, Nathiagali..." and the party was re-grouped so that it controlled a majority in the Assembly and could form a government. The President was accused, along with his appointee, Governor Gurmani, by the Muslim League of inducing the

[506] Mushtaq Ahmad, *op. cit*., p. 39.
[507] Z.A. Suleri, *op. cit*., p. 119.
[508] L.F.R. Williams, *op. cit.,* p. 152.
[509] G.W. Choudhury, *Democracy in Pakistan*, p. 122.

members of Muslim League Party in the central and provincial legislatures to desert their organization.[510]

President Iskandar Mirza had full control over the policies of the Republican Party and further "it was well-known that a number of Republicans were 'President's men', both at the Centre and in West Pakistan; in East Pakistan the President could depend upon the support of several influential members of the K.S.P. [Krishak Sramik Party]."[511] The Krishak Sramik Party of Fazlul Huq was initially despised by Mirza, but in 1955 he joined forces with Fazlul Huq and brought about a coalition between the K.S.P. and the Muslim League in order to keep Suhrawardy out of office. Further, he aimed at controlling and re-shaping East Pakistan politics through his supporters in the Krishak Sramik Party. When in 1957 there was a split in the Awami League over Prime Minister Suhrawardy's foreign policy, President Mirza endeavored to create a coalition between the Awami League and the Krishak Sramik Party, but the negotiations proved a failure. It has been suggested that, in order to discredit the politicians, Mirza compelled his supporters in the Krishak Sramik Party in the East Pakistan Assembly to create the political situation, which led to the tragic incident in that Assembly in September, 1958.[512]

President Mirza's direct involvement in party politics was responsible for the frequent governmental changes at the centre. His attempts to keep Dr Khan Sahib in power in West Pakistan led the Muslim League to disown its own leader in the National Assembly, Chaudhri Mohammad Ali, who was then the Prime Minister. On the Muslim League's refusal to support Dr. Khan Sahib's government in West Pakistan, the Prime Minister issued a statement in favor of Dr Khan Sahib, and accused his own party of going back on its promise.[513] While Dr Khan Sahib was unwilling to join the Muslim League, Chaudhri Mohammad Ali was unable, in the face of the President's maneuvers, to follow his own party line. Ultimately he resigned the premiership.

The next Prime Minister, Suhrawardy, had only the solid support of thirteen members of his own party. The Republicans, the larger party in the coalition, numbered twenty-one and were all President's men.[514] Suhrawardy had, therefore, to take measures agreeable to the President and the Republicans, and at the same time maintain his leadership in East Pakistan by conforming to his party's ideology. Though the Prime Minister asserted that he controlled his government's policy, it is well-known that important decisions of his government were made without reference to his ministers.[515]

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[510] See G.W. Choudhury, *Democracy in Pakistan*, pp. 111-112.
[511] K.B. Sayeed, *The Political System of Pakistan*, p. 89.
[512] *Ibid*., p. 92.
[513] G.W. Choudhury, *Democracy in Pakistan*, p. 111.
[514] See Z.A. Suleri, *op. cit*., p. 119.
[515] Removal of West Pakistan Governor Gurmani in August, 1957 was definitely made without the Prime Minister's concurrence. See Mushtaq Ahmad, *Government and Politics in Pakistan* (2nd ed., 1963), p. 41.

It must also be admitted that, during his premiership, Suhrawardy was creating a national image for himself, which was contrary to Mirza's designs. So when the Republicans withdrew their support from Suhrawardy in October, 1957, on one unit issue, Mirza took the opportunity to get rid of Suhrawardy. The Prime Minister requested that the National Assembly be summoned, expecting the support of the Muslim League and the Punjabi Republican members.[516] But his advice was rejected by the President, who demanded his resignation, threatening dismissal if he refused it.

Though under the constitutional provisions the appointment and dismissal of the Prime Minister were within the discretionary powers of the President, his refusal to summon the Assembly as advised by the Prime Minister, provoked adverse comments. It has been argued that it is unlikely that a Prime Minister under the British Parliamentary system would advise summoning the legislature, when he had lost the support of the senior partner of his coalition; it is equally difficult "to conceive that, if a Prime Minister under the British Parliamentary system should tender such advice to the Head of the State, that request would not be conceded".[517] Mirza's motive behind the refusal to Suhrawardy's request became clear when, in December, 1957, after the next Prime Minister, Chundrigar, had resigned when he lost the support of the Republicans, he was commissioned by the President, for the second time, to form a government. Chundrigar's attempt to form the government was, however, unsuccessful. It was clear that Suhrawardy's dismissal was mainly due to the displeasure with which President Mirza regarded his growing influence. The President wanted a weak Prime Minister, under his control, and Suhrawardy was making the President's own position weaker.[518] As the Republicans had always looked to President Mirza for inspiration and guidance, the withdrawal of their support of the Prime Minister was probably instigated by the President.[519]

Iskandar Mirza's designs

President Iskandar Mirza had an overweening ambition to wield political power. As constitutional Head of the State he was never happy. His design was to keep the political parties in a state of constant strife, so as to maintain control over them but he hoped to discredit not only the politicians but also the Constitution and to introduce new constitutional provisions which would perpetuate his own position. He was successful in creating a pejorative public image of the politicians; he played off one party against the other; coalitions were made and broken at Mirza's instance and it has been observed that "in the making and unmaking of Ministries, his hand was throughout visible".[520]

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[516] See K.B. Sayeed, *op. cit*., p. 90.
[517] G.W. Choudhury, *Democracy in Pakistan*, p. 114.
[518] See *ibid*., pp. 113-114.
[519] See Z.A. Suleri, *op. cit*., p. 119.
[520] Mushtaq Ahmad, *Government and Politics in Pakistan*, (2nd ed., 1963), p. 31.

The President was directly involved in party-politics. The formation of the Republican Party in early 1956 is alleged to have been engineered by him, in order to maintain control over the legislatures. It has been observed,

> "The Republican Party provided him with a convenient tool to establish his supremacy both over the Parliament and the Prime Minister ... At his [Mirza's] instance, the party gave and withdrew support from successive governments and in each crisis people were given the impression that the President alone was the one and only force of stability in the country."[521]

Politicians were represented as identified with instability and with everything inimical to the healthy growth of a sound social, economic and political system in the country.

In his campaign against the Constitution Mirza publicly declared that the Constitution was not workable in Pakistan, because most of the people were illiterate and had not enough training to work so sophisticated a system. He advocated a presidential type of constitution. He even encouraged his henchmen to propagate the idea of setting up for five years a "Revolutionary Council", of which presumably he would be the head. The streets of Karachi were plastered with huge posters making that demand.[522] In the face of the barrage of criticism from the press and the people, who were against any change of the Constitution till after the general elections, which he had promised would be held soon, Iskandar Mirza abandoned open propaganda against the Constitution, but he lost no opportunity of representing that the Constitution was unworkable.

"And so all political parties were constantly kept on tenterhooks by playing the game of musical chairs. Ministries changed from time to time and political crises were staged with monotonous regularity. This chronic situation of instability, he calculated, would itself bring his goal of all-power nearer and within reach. His juggling with political parties and his utter indifference to anything stable and enduring in political thinking did create an intolerable strain."[523]

February, 1959 had been fixed as the date for the general election under the Constitution. As this date drew nearer, President Mirza became restive, Anxious for his own re-election, he could find no political party or political group which would support his claim to the presidency. It may be recalled that, when the Constitution came into force in March, 1956, Mirza extorted support for his own election by the Constituent Assembly in consideration of his assent to the Constitution. During his presidency, by political intrigue he had already antagonized the Muslim League, which had passed a

[521] *Ibid*., p. 40.
[522] Z.A. Suleri, *Pakistan's Lost Years*, p. 122; also D.N. Banerjee, *East Pakistan*, p. 97.
[523] Z.A. Suleri, *op. cit*., pp. 122-123.

resolution against him.[524] By virtually dismissing Suhrawardy, he had alienated the Awami League; Suhrawardy publicly accused Mirza of conspiring against his party.[525] After the assassination of Dr. Khan Sahib in May, 1958, Mirza found it difficult to exercise as much influence on the Republican Party as he had done through Dr. Khan Sahib.[526] He discovered that the Republican leader, Feroz Khan Noon, had entered into an election alliance with his adversary, Suhrawardy, who had also come to an understanding with such powerful Muslim League leaders as Mumtaz Daultana and Mushtaq Ahmad Gurmani. "Thus, Suhrawardy had embarked on a bold and brilliant plan of forging an alliance between Bengal and Punjab which had not been attempted before."[527] It was expected that this election alliance would win the coming general elections and establish the strong and stable government, which was badly needed, and in the expected political line-up, it was more than likely that Iskandar Mirza would be deprived of the office of president. Furthermore, "it was widely rumored that the basis of the Suhrawardy-Noon alliance was that, after the general election, Suhrawardy would be Prime Minister and Noon would be President."[528]

In this situation Iskandar Mirza had a bleak prospect. All the political parties had experienced rough treatment at the hands of Mirza and it seemed that, despite their other differences, they were agreed on one point, and that was to get rid of Iskandar Mirza at the first opportunity. In such a situation, it was natural for a man like Mirza to contemplate the frustration of the coming election. Ayub Khan has given a fair assessment of Iskandar Mirza's designs when he said,

> "The President had thoroughly exploited the weakness in the Constitution and had got everyone connected with the political life of the country utterly exposed and discredited. I do not think that he ever seriously wanted to hold general elections; he was looking for a suitable opportunity to abrogate the Constitution. Indeed he was setting the stage for it."[529]

The "suitable opportunity" referred to by Ayub Khan came when the army, under General Ayub Khan, readily gave support to the President's design of abrogating the Constitution. So far Mirza's plan had worked successfully. He remained President in the new set up, while, as Chief Administrator of Martial Law and Supreme Commander of the Armed Forces, General Ayub Khan wielded the real power. Though, after the abrogation of the Constitution under which Mirza had held the office of President, experts in martial law were of the opinion that his position had become redundant. But General Ayub Khan did not consider the time to be opportune to remove Mirza. Mirza's

[524] See G.W. Choudhury, *Democracy in Pakistan*, p. 112.
[525] D.N. Banerjee, *op. cit.*, p. 99.
[526] *Ibid*., p. 100.
[527] K.B. Sayeed, *The Political System of Pakistan*, p. 91.
[528] G.W. Choudhury, *op. cit.,* p. 115.
[529] M. Ayub Khan, *Friends Not Masters*, p. 57.

inherent capacity for intrigue and duplicity, and for maintaining his own supremacy had to be demonstrated before he could be removed.[530]

Responsibility for the breakdown

Pakistani politicians are unanimous that Iskandar Mirza was solely responsible for the "failure" of parliamentary system under the Constitution of 1956. The Constitution Commission appointed by President Ayub Khan commented on the "undue interference by the Heads of the State with the ministries and political parties ..."[531] which, according to the Commission, had greatly contributed towards political chaos. This may be an overstatement and the politicians may have found Mirza a convenient scapegoat, because they cannot deny that they helped the President in his designs, and did as he wished. But, as has been observed,

> "it could be said with greater justice that he contributed more than anyone else to the creation of those conditions of political confusion, which he used as an argument in support of the alleged failure of the Constitution and his action in abrogating it."[532]

Ayub Khan thought on similar lines. As an explanation for Mirza's removal he noted, "he [Mirza] was too much connected with the politicians and the country's difficulties. He was as much responsible for political deterioration as anyone else."[533] Iskandar Mirza was, indeed, successful in discrediting the politicians and the political system they had established, in creating a situation in which his own position was secure and his ambition of establishing his personal rule might have been fulfilled. It is true that Mirza would not have done what he did on the night of October 7, 1958, if he had not received support from the armed forces.[534] But every fact so far revealed suggests that it was the President who voluntarily called in the armed forces.

It has been suggested that the army initiated the military takeover of the country in 1958 and President Mirza was compelled to acquiesce; that "General Ayub Khan found himself unexpectedly confronted with conclusive proof that a *coup d'état* of the kind which had brought General Kassem into control of Iraq, was being prepared."[535] But there are good reasons to believe that the initiative came from Mirza himself and the army, which had become impatient with the political situation in the country, readily

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[530] See M. Ayub Khan, *op. cit.*, pp. 73-75.
[531] *Report of the Constitution Commission*, 1961, p. 6.
[532] See Mushtaq Ahmad, *Government and Politics in Pakistan* (1963), pp. 40-41.
[533] M. Ayub Khan, *op. cit*., p. 191.
[534] *The New York Times* commented: "The real situation was that without the Army, which was loyal to General Ayub Than, President Mirza could not have dreamed of abrogating the Constitution and dissolving the political parties; without the quasi-constitutional blessing of President Mirza as the Chief of the State, the army could not have taken power smoothly and swiftly." Quoted in G.W. Choudhury, *Democracy in Pakistan*, p. 129.
[535] L.F. Rushbrook Williams, *The State of Pakistan*, p. 182.

responded under the leadership of Ayub Khan. Major-General Fazal Muqueem Khan stated that "on receipt of orders from Karachi, the Chief of the General Staff was instructed to plan the takeover".[536] And again, "It was becoming clear that President Iskandar Mirza had only used General Ayub Khan and the army to get rid of the politicians, and that, under cover of the army, he now planned to have a government of his own choice."[537] Ayub Khan's revelations also suggest that this was so. He noted, "A few days earlier President Iskandar Mirza had conveyed to me that the whole situation was becoming intolerable and that he had decided to act." And when, on October 5, 1958, the President, on being asked by the General, said that it was "absolutely necessary" to act, Ayub Khan's reaction was that "it was very unfortunate that such a desperate stage had been reached necessitating drastic action".[538]

It may be some time before we know conclusively whether the army acted on its own initiative or on the invitation of President Mirza. But even if the initiative came from the army, it is clear that Mirza was an active party to it, and, having got rid of the politicians, he wanted to get rid of the army by creating suspicion and misunderstanding amongst its officers, by playing one general against the other, in order to establish his dictatorial rule.[539] But he was soon disillusioned. Once the army had forsaken its neutral role, it asserted itself and wanted to run the country according to its own plan. Mirza's interference was not to be tolerated and in three weeks time Mirza was asked to quit, leaving the country in the exclusive control of the army.

[536] F.M. Khan, *The Story of the Pakistan Army*, p. 194.
[537] *Ibid*., p. 201.
[538] M. Ayub Khan, *Friends Not Masters*, p. 70.
[539] See F.M. Khan, *op.cit.,* p. 202.

Chapter VIII

Progress under Martial Law, 1958-1962

Land Reforms in West Pakistan

While the abrogation of the 1956 Constitution may be deprecated, it must be conceded that the proclamation of martial law made it possible to enact socially and economically beneficial legislation, which would have been difficult to get through the legislatures created by that Constitution. Pakistan inherited from the British Indian Government systems of land tenure which were not the same in different parts of the sub-continent. In East Pakistan the land tenure system had been renovated by the East Bengal State Acquisition and Tenancy Act, 1950, passed by the provincial legislature. This statute abolished all intermediary interests between government and the tenant, created by what was popularly known as the 'permanent settlement' made with the Zamindars by Lord Cornwallis in 1793. The provincial government in 1956 started taking over gradually the interests of Zamindars and other rent-receiving interests on payment of compensation, so that there is now only one kind of interest in agricultural land, that of a tenant holding directly under the government. The Act provided for the acquisition of land in excess of the statutory maximum for each tenant and ownership in the excess vested in the government. Whether the present system is the optimum from the economic point of view is a debatable question, for reform of land tenures should aim not only at the changing ownership of land, but it must also aim at the enhancement of production. The Act of 1950 has not produced any such result. Apart from the question of productivity, the abolition of the *Zamindari* system is generally regarded as a great social reform, in that cultivators, who had been under the tutelage of landlords for ages, have now been freed from their control. The tenants are assured of full occupancy rights, with the right of transfer to *bona fide* cultivators. The aim is to build up a rural society consisting largely of independent and self-reliant peasant proprietors, with changed social and political attitudes.

In West Pakistan the land tenure system differed from district to district. Without going into details of the different systems, it could be said that "while at one end of the scale 3.3, million people (65 percent of the owners) own about 7.4 million acres of land (15%) in holdings of less than 5 acres each, at the other end a little more than 6,000 people (0.1%) own as much as 7.5 million acres (a little over 15%) in properties of more than 500 acres."[540] This vast disparity in the size of holdings in a primarily agrarian society was bound to result in problems, which affected the social, economic and political

[540] *Report of the Land Reforms Commission for West Pakistan* (Government Printing, Lahore 1959), pp. 13-14.

structures of the State. These evil effects had been recognized in the British period and after independence the Muslim League, the ruling party, appointed an Agrarian Reforms Committee in May, 1949.[541] This committee recommended, *inter alia*, the break-up of the large estates and the grant of security of tenures to all tenants-at-will. The National Planning Board, in its report on the First Five Year Plan, also called for urgent land reform on the same lines.[542] But effect could not be given to these recommendations by the legislatures, owing to strong opposition from the landlords, who dominated both the National Assembly and the provincial Assemblies.[543]

When the armed forces took control in October, 1958 one of the urgent problems they dealt with was land reform in West Pakistan. On October 31, 1958 President Ayub Khan appointed the Land Reforms Commission with Akhter Husain, Governor of West Pakistan, as its chairman. The commission was asked "to consider problems relating to the ownership and tenancy of agricultural land and to recommend measures for ensuring better production and social justice, as well as security of tenure for those engaged in cultivation."[544] In less than three months the commission completed its labors and submitted a detailed report, which was unanimous, except that two members dissented from the majority in respect of the maximum area of land which a landowner should be permitted to retain. The government accepted the recommendations made by the commission, and the majority opinion with regard to the ceiling. In March, 1959, the West Pakistan Land Reforms Regulation[545] was promulgated. The regulation provided for the creation of the West Pakistan Land Commission with the Governor as its ex-officio chairman. The commission was given power to nominate one of its members as Chief Land Commissioner, responsible for implementation of the provisions contained in the regulation, subject to the supervision and direction of the commission, and to make rules, which were to be deemed part of the regulation.

The West Pakistan Land Reforms Regulation was deemed to be an Act of the central legislature and was subsequently protected from attack on grounds of violation of the fundamental rights incorporated in the Constitution of 1962.[546] It extended to the whole of West Pakistan, including the federal capital territory, but did not extend to the Special Areas. It applied to agricultural land, including buildings and structures on such land.

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[541] Mushtaq Ahmad, *Government and Politics in Pakistan* (1963), p. 195.
[542] *The First Five Year Plan* (Government of Pakistan, 1957), p. 318.
[543] In the National Assembly out of 80 members in 1958 28 were landlords, all from West Pakistan. See Mushtaq Ahmad, *op. cit.*, p. 115.
[544] *Report of the Lend Reforms Commission*, Introduction.
[545] Martial Law Regulation No. 64, P.L.D. 1959 Central Statutes 101.
[546] *Constitution of Pakistan*, 1962, Article 6(3)(ii), Fourth Schedule.

The regulation declared all transfers of land on or after October 8, 1958, by persons holding more than five hundred acres of irrigated land or 36,000 produce index units,[547] whichever is more, as void. No person was entitled to own or possess in any manner land in excess of 500 acres of irrigated or 1000 acres of unirrigated land — one acre of irrigated land being reckoned as equivalent to two acres of unirrigated land. Exceptions were made in respect of educational institutions, charitable institutions and stud and livestock farms, at the discretion of the government. A person was allowed to retain up to 150 acres of orchard land in excess of the maximum, if the entire holding consisted of compact blocks of not less than ten acres each and had been entered as an orchard in the record of rights since 1956. A landowner could transfer up to 18,000 produce index units of his land, in excess of the maximum he was entitled to retain, to his presumptive heirs. Any orchard land retained by himself and any transfer of land by way of gift made to his heirs since 14 August, 1947 was included in the transferable area. Further, the Land Commission could allow an owner to make a further gift of up to 6000 produce index units of land to such female dependents as would be entitled to a share in his property by intestate succession.

Land in excess of what a landholder was entitled to retain vested in government, free from any encumbrance or charge. The owners of the acquired land were to be paid compensation in heritable and transferable bonds, bearing four percent simple interest per annum, the sum payable as compensation being calculated according to a scale provided in the regulation.[548] The land resumed by government was offered for sale to the cultivating tenant in the first instance.

The regulation virtually abolished family *wakfs*, as defined in the Mussalman Wakf Validating Act, 1913, in respect of agricultural land. These were settlements of land in perpetuity for the maintenance of the family or dependents of the *wakif* or of the *wakif* himself. The regulation provided that land forming part of such *wakfs* should forthwith revert to the *wakif* if he was alive, or to other beneficiaries in proportion to the benefit reserved in the settlement in the case of non-heirs, and according to the law of inheritance in the case of heirs. It prohibited any further settlement of land in family *wakfs*. *Jagirs*[549] of all kinds were abolished, and all rights and interests or estates granted under any such *Jagir* reverted to government without payment of any compensation. Land held under a *Jagir* was to be regarded as land owned by the holder for the purpose

[547] The unit is used to measure the productivity of land, which varies from one assessment circle to another. The Land Reforms Commission gave an illustration of the method of calculation. Approximately 80 produce index units make a standard acre. See Appendix II of the Report.

[548] The rate of compensation was: For the first 18,000 produce index units Rs 5 per unit; for the next 24,000 units Rs 4 per unit; for the next 36,000 units Rs 3 per unit; for the next 72,000 units Rs 2 per unit; and for any balance Re 1 per unit; see Para. 17 Martial Law Regulation No. 64.

[549] "Jagir literally means an assignment of land revenue The grant of a Jagir involved the transfer by Government to an individual of the State's right to collect and appropriate a share of the produce of land. In some cases the transfer of this right was also accompanied by the transfer of the proprietary rights in land to the jagirdar." (Para. '7 of the Report).

of assessing his excess land under the regulation. Restrictions were put generally on partition of joint holdings, if any individual holding, after partition, became smaller than a "subsistence holding".[550] In the same way restrictions were put on alienation by sale or in any other manner of holdings below the minimum subsistence holding, but a person could alienate the entire area of his holding. Restrictions on partition and alienation aimed at saving wastage of land by sub-division and fragmentation of holdings and also at ensuring efficient methods of cultivation, and the production of the maximum output, which was regarded as possible only in comparatively large estates.

As a result of the regulation, some 2,547,000 acres of land were surrendered by 902 landowners; much less than the area originally estimated.[551] The total area mentioned included land which was not arable so the actual cultivable area of the surrendered land was only 2,225,563 acres, which were distributed among 150,000 cultivators.[552] In the process of redistribution, the land resumed was first offered to the tenants who had cultivated it and in the event of their refusal, other cultivators were entitled to purchase it.' Not only was the land resumed under the regulation much below the estimated area, but it was also only a small proportion of the estimated area of cultivable land, which was over 48,000,000 acres.[553] It did, therefore, not go far towards settling the millions of landless agricultural laborers in the province. This was the direct result of the provisions in the regulation, which allowed the landowners to retain orchards and to transfer land within the family by way of gift. Moreover, as was pointed, out by the Commission, the owners of large estates, even before the appointment of the commission, had already redistributed their land among members of their families, so that each member appeared to have a separate holding. This had been done in order to avoid agricultural income tax and other duties, and also "as a prudent safeguard against the possible imposition of ceilings on ownership of landed property, which has been talked about ever since the Muslim League Agrarian Reform Committee met in 1949."[554]

The Land Reform Commission, when recommending a ceiling for holdings, recognized the desirability of breaking up the existing large estates, because they created immense social, economic and political problems. But in fixing the maximum, the majority were not prepared to make it as small as that proposed by the Muslim League Agrarian Reform Committee[555] and the National Planning Board.[556] When specifying its ceiling,

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[550] The area of a subsistence holding differed from one area to another. A minimum of 12.5 acres of land formed a subsistence holding (Para. 120 of the Report). At independence, it was generally assumed that extensive cultivation was essential to maximum production but expert opinion now seems to be that in the sub-continent a small holding can be as efficient as a large farm, provided there is no difficulty in obtaining water, fertilizers and good seed.

[551] Herbert Feldman, *Revolution in Pakistan*, p. 59.

[552] Mushtaq. Ahmad*, Government and Politics in Pakistan* (1963), p. 199.

[553] Appendix I of the Report.

[554] Para. 64 of the Report.

[555] It recommended for maximum holding of 150 acres of irrigated and 450 acres of non-irrigated land. See Mushtaq Ahmad, *op. cit*., p. 195.

the commission observed that, though it was not its specific object to destroy the power of "the old ruling oligarchy with its roots in big estates", it expected that "such a consequence may follow in some measure", if its recommendations were implemented.[557] At least one member of the commission thought that the upper limit for holdings recommended by the majority was too large and would not destroy the monopolies of the big *Zamindars* or give the masses economic opportunity. The control of economic opportunity by the concentration of landed wealth in the hands of a few results in the stagnation of economic growth, hampers social progress and stratifies society. The net effect of the proposed measures, for a long time to come, according to the dissenting opinion, would be to leave the concentration of land in families instead of individuals and would not conduce to the attainment of the objectives of the reforms.[558]

It must be noted, however, that the martial law regime was conscious of the ill-effects of the concentration of large areas of land in one hand. On the eve of the promulgation of the regulation, President Ayub Zhan in a broadcast said, "In view of the special prestige, which ownership of land over large areas enjoys, political power is concentrated in the hands of a privileged few. Apart from its social consequences, such concentration of powers hampers the free exercise of political rights and stifles the growth of free political institutions."[559] But the measures adopted to remove these consequences were inadequate. It is said that the landlords only surrendered land which was not of much use to them, so that they did not lose their former power and influence. The small area of land resumed by government for redistribution among the cultivators benefited only a small number of them and, it is "difficult to trace whether the landless peasantry has received any conspicuous benefit by the change".[560] It has not reduced the economic superiority of the big landlords and their political influence has not been affected.[561] But the reform has been welcomed as a forward step towards the desired objective, and demands for a more equitable distribution, with a view to giving benefits out of the land to the people and the State will no longer be "resisted, either in the name of religion or the sanctity of private property, without making the government suspect in the eyes of the people".[562]

The Wakf Properties Ordinances

As has been said earlier, family *wakfs* of agricultural land were abolished by the West Pakistan Land Reforms Regulation, 1959. All land which had formed part of any such

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[556] Recommended for maximum holding of 150 acres of irrigated, 300 acres semi-irrigated and 450 acres of non-irrigated land. *See report on The First Five Year Plan* (1957), p. 318.
[557] Para. 37 of the Report.
[558] Para. 57 of the Report.
[559] M. Ayub Khan, *Speeches and Statements*, Vol. I, pp. 48-49.
[560] H. Feldman, *Revolution in Pakistan*, p. 60.
[561] In 1962, 58 landlords were elected from West Pakistan to the National Assembly of 150. See Mushtaq Ahmad, *Government and Politics in Pakistan* (1963), p. 273.
[562] Mushtaq Ahmad, *op. cit.*, pp. 199-200.

wakf was brought under the ordinary land law for all purposes. It was now felt necessary to tighten the law for the administration of *wakfs* which did not fall within the definition of family *wakfs*. With this end in view, the provincial government of West Pakistan promulgated the West Pakistan Wakf Properties Ordinance, 1959.[563] This Ordinance was amended in 1960 and ultimately replaced by the West Pakistan Wakf Properties Ordinance, 1961,[564] which consolidated the law relating to control and administration of *wakfs*.

To ensure tighter control and proper administration of *wakf* properties, the Ordinance provided for the appointment of a Chief Administrator of Waqfs, entrusted with authority and responsibility for the proper management of *wakf* properties. The Ordinance defined *wakf* on the same lines as the definition in the Mussalman Wakf Validating Act, 1913.[565] It empowers the Chief Administrator, when he deems it desirable, to take over by notification, and to "assume the administration, control, management and maintenance of a *waqf* property". A person aggrieved by such notification issued by the Chief Administrator may, within thirty days, petition the District Court for a declaration that the property is not *wakf* property or that it is *wakf* only within certain limits. A further appeal to the High Court can be preferred within sixty days of the decision of the District Court. The District Court and the High Court are debarred from issuing any temporary injunction pending the disposal of a petition, in the District Court against the notification, or in the High Court pending the disposal of the appeal. The decision of the District Court, where there is no appeal, and of the High Court where there is an appeal, is final.

Apart from taking complete control of *wakf* property the Chief Administrator has powers to ensure proper management of *wakfs* managed by private persons. He may require any person in charge or control of any *wakf* property which has not been taken over, to furnish returns, statements, statistics or any other information for his examination. He may issue directions or instructions to persons in charge of any *wakf* property, prescribing the manner in which such property should be managed.

Thus the martial law administration accomplished a long awaited reform for which no previous administration had been able to legislate. The Supreme Court had ruled in 1957,[566] in effect, that property under settlement as *wakf* could not be regarded as owned by the Mutawalli or the beneficiaries, and therefore, could not be acquired by the State, as legislation to enable this to be done was repugnant to the fundamental right of freedom to establish religious institutions, as set out in the Constitution of 1956. The

[563] Ordinance XXI of 1959, P.L.D. 1959 West Pakistan Statutes 202.
[564] Ordinance XXVIII of 1961, P.L.D. 1962 West Pakistan Statutes 108.
[565] Act VI of 1913. Section 2(1) defines *wakf* thus: "*Wakfi* means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable.".
[566] Jibendra Kishore v. *East Pakistan*, P.L.D. 1957 S.C. 9.

West Pakistan Land Reforms Regulation abolished this myth. Ownership of land under any family *wakf* reverted to the beneficiaries and was made liable to be resumed by government, if the total holding, including such land, of any person exceeded the ceiling. The Waqf Property Ordinance has paved the way for reform of the institutions to which it applies by ensuring efficient and progressive administration and management of such institutions.

The Muslim Family Laws Ordinance

The Muslim Family Laws Ordinance, 1961,[567] promulgated by the President in March, 1961, has codified certain principles of Muslim personal law, resulting in some fundamental change in the *Sharia*. It was enacted to give effect to certain recommendations of the Commission on Marriage and Family Laws; it extends to the whole of Pakistan and applies to all Muslim citizens, wherever they may be. The Ordinance deals with some vital principles of Muslim personal law, such as succession, marriage, dower, divorce and maintenance of a wife.

In the law of succession, the Ordinance has introduced an important innovation, giving rights of inheritance to the children of the pre-deceased son or daughter of the *propositus*. The grandchildren, in the absence of their father or mother as the case may be, are put in the same position as their father or mother would have been, if they were alive and they inherit the property of their grandparent *per stirpes*. It may be noted that grandchildren, according to *Sharia*, in the absence of any children of the *propositus*, are entitled to inherit, but where the *propositus* leaves a male child and grand-children by his pre-deceased son or daughter, the former would exclude the latter, by operation of the principle that the nearer in degree excludes the more remote. Under the Ordinance such grandchildren now have the right, to inherit their grandparent's property, along with their uncles and aunts and take as much as their father or mother would have taken. This introduces the doctrine of representation, which is generally not recognized by the classical Islamic law.

The provision has removed from the law of inheritance what has long been regarded as a harsh rule. The orphaned grandchildren of the *propositus* are relations who most need help and the Ordinance is designed to recognize this. In other Muslim countries, however, the same result has been achieved without any apparent change in the fundamental law. For example, Egypt in 1946 adopted the system known as "obligatory bequests" under which

> "notwithstanding the absence of any testamentary disposition to this effect by the deceased, the orphaned grandchildren of the deceased are entitled, in the

[567] Ordinance VIII of 1961, P.L.D. 1961 Central Statutes 209.

presence of his surviving son, to the share their own parent would have received, had he or she survived, within the maximum of one-third of the net estate."[568]

The Pakistan innovation has been criticized because it is an infraction of the fundamental classical law and also because it may lead to anomalies in certain cases.[569] However, while it is desirable that the law should be amended to meet the possible anomalies, in most cases the Ordinance has brought about a commendable change.

Every Muslim marriage is, under the Ordinance, required to be registered with the *Nikah* Registrar. A person contravening this provision is liable to suffer imprisonment up to three months or fine of one thousand rupees or both. A man may not, during the subsistence of an existing valid marriage, contract another marriage, without the previous permission of an arbitration council. An application for permission for such marriage is to be submitted to the chairman of the union council or town or union committee or such other person as is appointed by government. On receipt of the application the chairman must ask the applicant and his existing wife or wives each to nominate his or her representative to the arbitration council. If the chairman is a non-Muslim or himself an applicant or unable to act, the members of the council must elect one of their number to act for him. The arbitration council must examine the grounds and, if satisfied that the proposed marriage is necessary and just, it should grant the permission applied for, but it may attack conditions and must record reasons for its decision. Either party may appeal against the decision of the arbitration council to the Sub-divisional Officer in East Pakistan and the collector in West Pakistan; the decision of the appellate authority is final. A man who remarries without permission is liable to pay immediately the entire amount of the dower, whether prompt or deferred, due to his existing wife; and, on conviction upon complaint, is liable to be sentenced to imprisonment which may extend to one year or to fine which may extend to five thousand rupees or both. Such a remarriage has also been made a ground for the previous wife to apply for dissolution of her marriage under the Dissolution of Muslim Marriages Act, 1939.

Certain changes have also been introduced in the law of divorce. Under the Ordinance, if a man wants to repudiate his wife, he is required to give notice, as soon as may be after the pronouncement of divorce, to the chairman of the union council. The chairman constitutes an arbitration council, which is required to endeavor to bring about a reconciliation between the husband and the wife, and the divorce, if not revoked earlier, will not be effective until the expiration of ninety days from the date of notice. The divorced woman may remarry the same husband, without an intervening marriage with a third person, unless the termination of her marriage with the said husband has

[568] N.J. Coulson, "Islamic Family Law:, Progress in Pakistan" *Changing Law in Developing Countries*, J.N.D. Anderson (ed.), 240, at p. 253.

[569] For instance if the deceased left a daughter and a son's daughter, the former would get one-third while the latter, representing her father, would get two-thirds of the deceased's estate.

become effective by three pronouncements of *talaq*. The same rule applies *mutatis mutandis* where the right to divorce has been duly delegated to the wife or the dissolution is effected in any other manner.

The Ordinance has given power to the arbitration council, constituted by the chairman on an application by a wife, to specify the amount of maintenance to be paid to her by the husband, if the latter fails to maintain her adequately. The husband may, as in other decisions of the arbitration council, apply for a revision. Any amount specified as payable as maintenance, if not paid, may be recovered as arrears of land revenue. In respect of dower, the entire amount, according to the provisions of the Ordinance shall, in the absence of any details in the marriage contract, be presumed to be payable on demand.

The Muslim Family Laws Ordinance has provoked strong protests from the orthodox Ulema, who regard any change in the conventional *Sharia* as an act of heresy. They are particularly critical about the provisions restricting polygamy and the rules regarding divorce. It may be noted that polygamy is not altogether abolished, and, where there is a just ground for a subsequent marriage, permission may be granted. In regard to dissolution and attempts to reconcile the parties after pronouncement of *talaq* by the husband, it may be said that the provision has only incorporated the procedure under an approved form of repudiation known as *talaq-i-ahsan*. These provisions have not introduced any principle which is unknown to the *Sharia*, but they have certainly effected changes in the conventional practices followed by Muslims in the sub-continent. In view of the fact that no reputable Pakistani would contract a subsequent marriage during the subsistence of a valid one, or would thoughtlessly repudiate his wife so as to cause misery or cruelty to his wife, the Ordinance is regarded by some as unnecessary. But the Ordinance, it must be admitted, at least reconciled the law with the custom of most Pakistanis on the points dealt with by it. It has also introduced remedies for injustices generally done to women among the more backward sections of Pakistan society.

The Conciliation Courts

Till near the end of 1961, most criminal cases were dealt with by magistrates of the first, second and third classes and most civil disputes by subordinate courts. But even magistrates of the lowest grade and subordinate judges were stationed at the sub-divisional headquarters, which in most cases would be miles away from the scene of the crime or the residence of the parties in remote villages, not connected with sub-divisional headquarters by any modern kind of communication. This distance between the scene of the crime or the place where the cause of action arose and the seat of justice, combined with the formalities of the procedure followed in the courts, made justice expensive and dilatory. Successive governments since independence had promised reform in this regard but nothing was done till the Conciliation Courts Ordinance,

1961[570] was promulgated by the President in November. This Ordinance has brought about a general change affecting both wings of the country; it aimed at providing cheaper and local settlement of disputes in an informal atmosphere.

The Conciliation Courts Ordinance has conferred judicial powers upon the primary Basic Democracies, which consist of union councils and town and union committees. An application may be made to the chairman, by any party to a dispute referable to a conciliation court under the Ordinance, to constitute such a court, which consists of a chairman and two representatives nominated by each party. One of the nominated representatives must be a member of the council or the committee. The chairman of the council or the committee must be the chairman of the court, unless he is unable to act on account of illness or for other personal reasons or because his impartiality is challenged by any party, in which case any other member may be appointed in his place. Jurisdiction of the conciliation court is limited to disputes arising in the union territory, and to persons resident therein. The court's power extends to such minor criminal offences as are scheduled in the Ordinance; they include unlawful assembly, rioting, affray, hurt, assault, criminal trespass, killing of animals, theft, cheating and criminal breach of trust. Though the offences are exclusively triable by the conciliation court and the ordinary criminal court has no jurisdiction, where the offences are of a more serious nature or the injury caused is of a high value, the conciliation court only has jurisdiction when both parties consent to the reference to the conciliation court. It has also jurisdiction over civil cases involving properties of value not exceeding one thousand rupees. The court has no power to pass any sentence of imprisonment or impose any fine on the accused, but if it holds a person guilty of an offence specified in the schedule, it may order the accused to pay to the aggrieved party compensation up to two hundred and fifty rupees and, in certain cases, up to five hundred rupees. In civil cases the court can order payment of money up to the value of the suit and restoration of property to the person entitled to it. The court has power to punish contempt by imposing a fine of fifty rupees, and may forward a criminal case to the criminal court having jurisdiction, where it considers that the ends of justice demand that an offender should be more heavily punished.

The procedure is simple and fees are very low. Generally the provisions of the Evidence Act, 1872, and of the Codes of Criminal Procedure, 1898, and Civil Procedure, 1908, are not applicable and no legal practitioner is allowed to appear for any party before the conciliation court or any other authority exercising judicial power under the Ordinance. A *purdanashin* lady,[571] however, can be represented by a duly authorized person, who must not be a paid agent. A unanimous decision in all cases, and a decision by a majority of four to one in cases involving lesser offences, are final. Against a decision by a majority of three to two any party may apply for revision, in criminal cases to the

[570] Ordinance XLVI of 1961, P.L.D. 1961 Central Statutes 3.
[571] A woman who observes seclusion and does not appear in public.

controlling authority, who is the sub-divisional officer in East Pakistan and the collector in West Pakistan, and to the district judge in civil cases. The revisional authority may set aside or modify the decision or refer the case back for reconsideration. In the cases where the consent of parties is necessary, a divided verdict of the court has the effect of a failure of a conciliation. As has been already said, the Ordinance aimed at providing cheap and informal justice, within the easy reach of the villagers, for causes involving minor offences or small amounts of money. Different views have been held on the utility of the Ordinance. The former Chief Justice, Mr. Justice Cornelius, observed:

> "The object to be secured is to maintain the harmony of life in the union territory, and the accent is therefore, on conciliation. The types of criminal cases that a Conciliation Court may try are the relatively minor offences that are apt to occur in village or *moholla* life and which, unless appropriately settled at the initial stage, are apt to lead to feuds and consequent serious crimes and mischief."[572]

But the Ordinance is not immune from criticism. It has been pointed out that the people who are likely to constitute the conciliation court at the village level will be mostly semi-literate people without experience, so that miscarriage of justice may result and the harmony envisaged may be seriously jeopardized. There is force in this objection at present but, with the spread of education and social progress, the situation may change and the system may prove beneficial in the course of time.

The West Pakistan Criminal Law (Amendment) Act, 1963

In 1963 the West Pakistan Provincial Assembly passed the West Pakistan Criminal Law (Amendment) Act, 1963,[573] "to provide for the more speedy trial and more effective punishment of certain heinous offences in West Pakistan and also to take more effective steps for the eradication of corruption". The statute laid down a new procedure for the trial of criminal cases in West Pakistan, which had been promised by the martial law regime. President Ayub Khan in one of his major speeches said:

> "At present our legal system is cumbersome, expensive and dilatory. The delays in both civil and criminal courts are notorious. Also, these delays cost money by simply continuing Rild in the form of fees of lawyers. Men shrink from seeking justice, unless they have no choice. On the criminal side, things are worse, since the delays are to be interpreted in terms of human misery. The dispensation of justice should not be marked by these handicaps and we are giving high priority to this problem."[574]

[572] A.R. Cornelius, "Judicial Reforms in the Decade (1958-68)", P.L.D. 1969 *Journal* 28, at p. 30.
[573] Act VII of 1963, P.L.D. 1963 West Pakistan Statutes 172.
[574] 35. M. Ayub Khan, Speeches and Statements, Vol. I, p. 26.

As the Constitution of 1962 came into force in June of that year, the Amendment Act had to be passed by the West Pakistan provincial legislature.

The Act provided that, if, in the opinion of a commissioner, it was inexpedient in the interest of justice, that a case relating to offences enumerated in the statute should not be tried by an ordinary court, he might refer the case to a tribunal. The scheduled offences were mostly crimes of violence, including homicide, kidnapping, robbery, dacoity and criminal trespass. But theft, housebreaking, smuggling, corruption, taking a gift to recover stolen property, illegal abuse of official power by public servants and abduction of married women were also included. In the case of a public servant the necessary sanction of the relevant government had to be obtained. The new procedure was not applicable to all cases but only to those which the commissioner selected and referred to the tribunal for reasons to be recorded by him, which could be the difficulty of procuring evidence admissible under the Evidence Act, if the case were tried by an ordinary criminal court.[575]

The tribunal consisted of a president, who had to be a magistrate with specified qualifications and four other private individuals, who were appointed by rotation from a panel. The commissioner constituted for each district a panel of between thirty and fifty members, taking into consideration their integrity, education and social status. On receipt of a reference by the commissioner, the district magistrate nominated the members of the tribunal and their names were communicated to the parties. An objection to a nomination could be filed by any party; the objection was heard and decided by the district magistrate in his discretion, but he had to record his reasons. The members of the tribunal were required to take an oath to act impartially, honestly and to the best of their ability.

The procedure followed by the tribunal was of the simplest form. The president and at least three members formed a quorum to hear the case; they were obliged to hear any evidence adduced before the tribunal in support of the accusation and by the accused in his defence. But the tribunal had authority in its discretion to refuse to hear any evidence which it felt was being tendered "for the purpose of vexation or delay or for delaying the ends of justice". The provisions of the Evidence Act, 1872, did not generally apply to proceedings before the tribunal. For the proper disposal of a reference the tribunal could require the attendance of any witness and the production of any document. It could tender a pardon to an accomplice and examine him as an approver. There was no bar on the representation of parties by legal practitioner. And "although the Act does not say so, it is conceivable that a tribunal may hold enquiries behind the back of either party, on its own initiative in order to ascertain the truth of the matter referred to them."[576]

[575] A. R. Cornelius, "Judicial Reforms in the Decade" (1958-68) P.L.D. 1969 *Journal* 28, at p. 29.
[576] A.R. Cornelius, "Judicial Reforms in the Decade" (1958-68) P.L.D. 1969 *Journal* 28.

On completion of the trial, the tribunal submitted its findings on the guilt or innocence of the accused to the district magistrate, who might acquit the accused or refer the question back for further inquiry; if the findings were not supported by a three-fourth majority, he referred the case to a second tribunal; he might convict the accused in accordance with a finding of the tribunal by a four-fifths majority. He might pass any sentence except a sentence of death or transportation or imprisonment for a term exceeding fourteen years; any sentence exceeding seven years had to be confirmed by the commissioner. There was no appeal against any sentence under the Act but the commissioner had the power of revision; a petition also lay to government from the commissioner's order.

The tribunal had been given power to allow, with the permission of government, the composition of offences, including even murder, culpable homicide not amounting to murder and attempted murder. For the first two of these offences it was essential that the heirs of the deceased should agree and in the last case composition had to be approved by the victim himself. The statute also empowered the district magistrate to require any person to execute a bond to be of good behavior, with or without security, if he was satisfied that the person was involved in a blood-feud or was likely to cause a blood-feud. For a bond for a period exceeding one month, the recommendation of the tribunal was necessary. For an apprehended blood-feud or other cause of quarrel between families, any or all male adult members of a family might be required, after inquiry by the tribunal, to execute bonds of good behavior for a period which might extend up to three years.

The West Pakistan Criminal Law (Amendment) Act, 1963, corresponded closely to the Frontier Crimes Regulation, 1901, which was enacted "to provide a mode for suppression of crimes which fitted in with the sentiments, practices and code of honor of the tribes occupying the region on the western frontier of the sub-continent".[577] It had been impugned for having created inequality before the law, by providing a special summary procedure for cases selected by the commissioner, while the majority of crimes of violence were still being tried before the ordinary criminal courts. The courts had consistently refused to interfere in any case under the West Pakistan Criminal Law (Amendment) Act, 1963, in the exercise of their writ jurisdiction, "although they would indeed have power to correct any errors of law or legal procedure in respect of such matters as, for example, the proper authority competent to hear an appeal."[578] Although the right of equal protection of law had been incorporated in the Constitution of 1962 by the first amendment in 1964, the statute could not be impugned on that ground, as it was one of the statutes protected against attack for repugnancy to the Constitution by a special provision in the Constitution.[579]

[577] *Ibid*., at p. 29.
[578] *Ibid*., p. 29.
[579] Constitution of 1962, Article 6(3)(ii) and the Fourth Schedule.

The Act has, however, been repealed[580] by the present regime, in response to the demand of the legal profession which had attacked the statute since its enactment as discriminatory, because it drastically curtailed the rights of the accused. The statute also had the effect of curbing the powers of the judiciary because at no stage was there a right of appeal to any court against any order made under the statute.

The Basic Democracies

On the day following the abrogation of the Constitution of 1956, General Ayub Khan, it may be recalled, declared that the martial law regime's ultimate aim was "to restore democracy but of the type that people can understand and work".[581] He reiterated his promise in December, 1958, saying that a representative form of government was essential for Pakistan but "we shall have to ensure that such a representative government is so designed that its working is not marred by political instability."[582] The first official hint of the type of representative government Ayub Khan had in mind came after the Governors' Conference, presided over by President Ayub Khan, in June, 1959. A press communiqué announced that it had been decided to create "union panchayats" throughout the country, consisting of the representatives of the people, who were to participate in the implementation of development schemes in every nook and corner of the country.[583]

The structure of representative government envisaged by the regime was not only to administer local government, it was also to form the base on which the pyramid of a sound political system could be developed. This was revealed by President Ayub Khan on September 2, 1959, when he introduced the scheme of Basic Democracies to the nation in a broadcast speech. The President said that past experience had shown that certain prerequisites such as the "high degree of social and political awareness and mass literacy" necessary to work a western-type democracy were absent in Pakistani society, and this had resulted in the failure of the parliamentary system in the country. The new system of democracy, under the name of "Basic Democracy", was the result of a study of the people's needs and requirements and was based on the realities of the situation. The name "Basic Democracy" was given to the system because it was to evolve from the lowest rung of the political and economic ladder, so that "it finds its roots deep among the people, starting at the village level in rural areas, and at the *moholla* level in towns".[584] The system, as visualized by the President, would penetrate the hard core of the nation; it would enable the people to exercise the franchise in their community or

[580] West Pakistan Criminal Law (Amendment) Act (Repeal) Ordinance, 1969 (Ordinance XLII of 1969) P.L.D. 1970 West Pakistan Statutes 198.
[581] M. Ayub Khan, *Speeches and Statements*, Vol. I, p. 3.
[582] Ibid., p. 28.
[583] See M. Hasan, *Text Book of Basic Democracy and Local Government in Pakistan,* (P.L.D., Lahore, 1968), p. 39.
[584] M. Ayub Khan, *Speeches and Statements*, Vol. II, p. 24.

village, having regard to their individual and community interest; the process would create a patriotic, honest, realistic and dynamic leadership in the country.

The Basic Democracies Order, 1959,[585] was promulgated by the President on October 27; it provided for the structure and function of the institutions to be established under the system. It repealed altogether sixteen statutes relating to local government in the former provinces and "provided a five-tiered hierarchy of local government boards, with an elected majority in the lowest tier and representation in the higher tiers".[586] The Order gave legal shape to the system of representative institutions envisaged by the regime, which was to form the foundation of the political system given to the nation by the Constitution of 1962.

At the lowest tier of the five-tier hierarchy are. the union councils, for rural areas and union committees and town committees for the urban areas. Originally these consisted of a number of members directly elected by the people and a number of appointed members, whose number should not exceed more than half of the elected members. The total number of members prescribed for each union council and union. or town committee varies between ten and fifteen. Each council elects its chairman, who becomes an ex-officio member of the next higher council. The lowest council has been given a variety of functions to perform. It may undertake all or any of the functions enumerated in the Schedule, which contains thirty-seven items. The list includes such civic functions as provision and maintenance of public ways and streets, burning and burial grounds, playgrounds, public places, sanitation, conservancy, relief, regulation of births and deaths, increased food production, promotion of education; and any other function declared appropriate by government or delegated by the district council.

The council is responsible for village defence, by enrollment of a rural police force, which also assists the regular police in maintaining law and order in the union. The chairman is to assist the village revenue officials, the police and other government officials and furnish all information required by them. But he is not to interfere in the officials' performance of their duties. The union council has the power to levy taxes, with the prior sanction of the commissioner, on any of the twenty-nine items enumerated, which include taxes on the annual value of buildings and lands, transfer of immoveable property, professions, trades and callings, marriage and feasts. All money collected is paid into the council fund. A budget is prepared and sanctioned by the council, but the controlling authority may modify it.

In the next tier is the *thana* council in East Pakistan and *tahsil* council in West Pakistan. Such a council is composed of the chairmen of the union councils and town committees within its area, who are ex-officio representative members and other official and

[585] President's Order No. 18 of 1959, P.L.D. 1959 Central Statutes 364.
[586] A. Gledhill, *Pakistan: The Development of its Laws and Constitution*, p. 116.

appointed members who must not together outnumber the representative members. The sub-divisional officer and, in his absence, the circle officer is the chairman of this council. The purpose of the *thana* or the *tahsil* council is to coordinate the activities of the councils of the lower grade and to perform such other functions as are delegated by the district council.

The third step in the hierarchy is the district council, consisting of official members, comprising the chairmen of *thana* or *tahsil* councils and representatives of government departments, and at least an equal number of appointed members, half of whom should be chairmen of the lowest councils. The collector is the chairman. The district council is an executive body, with compulsory and optional functions. The compulsory functions include the provision for and maintenance of libraries, hospitals, bridges, public roads, sanitation and relief. Seventy prescribed optional functions include education, culture, social and economic welfare, public health and public works. The district council must coordinate local councils' activities and formulate and recommend development schemes to the divisional council and other authorities. Like the union council it has, with the sanction of government, taxing power over twenty-nine subjects, enumerated in a schedule; the money collected is applied to the maintenance of the council and the discharge of its functions.

The divisional council is a coordinative body, consisting of the chairmen of the district councils, municipal and cantonment boards and representatives of government departments, and at least an equal number of appointed members, half of whom must be chairmen of the lowest councils. Its function is to coordinate activities of the district councils and formulate and recommend development schemes to higher authorities.

At the apex of the structure, according to the original Order, was the provincial development advisory council, consisting of official members from among the heads of government departments, and a number of appointed members, at least one-third of whom were chairmen of the lowest boards. The Governor was the chairman of this council, the function of which was to advise the government on matters relating to local councils and other local authorities, including grants made to them. In view of the prospective establishment of provincial assemblies under the Constitution of 1962, the provincial development advisory council was omitted from the structure by the Basic Democracies (Second Amendment) Order, 1962.[587] This amending order also abolished the provision for appointed members" in the councils and provided for election of members at all levels.

Such was the structure, powers and functions of the Basic Democracies. For the purpose of election to the local councils or committees, each union territory was divided into wards and members were elected by the electors on the electoral rolls, prepared on the

[587] President's Order No. 22 of 1962, P.L.D. 1962 Central Statutes 634.

basis of universal adult franchise. But after the promulgation of the Constitution of 1962, this part of the Basic Democracies Order was incorporated in the Electoral College Act, 1964,[588] enacted by the National Assembly. For the purpose of this Act, each province was divided into forty thousand electoral units, each of which was to elect one member to the Electoral College of Pakistan. The President, the members of the National Assembly and the two Provincial Assemblies under the Constitution were elected by the members of the Electoral College. The Act provided that, after they had discharged their function as electors, the members would form union councils and union or town committees to perform functions of local government bodies under the Basic Democracies Order. After the abrogation of the Constitution of 1962 in March 1969, it is presumed that the basic democrats have reverted to their former position of constituting local bodies, without having to function as members of the Electoral College.

Basic Democracies were established to perform the dual functions of discharging the duties of local government bodies and serving as the basis of the electoral system introduced by the Constitution of 1962. These were expected to become

> "the nerve centre of their areas, where all local problems of development and civic responsibilities [could] be studied at close range and their solutions discovered and applied with concentrated attention;"

and replace in due course of time "the purely official agencies as the traditional '*Mai Baap*' [Mother and Father] of the people."[589]

The system has been compared with local government system introduced by the British administrators in the nineteenth century in India.

> "The philosophy of the new order was also similar to that of the Ripon school of local self-government enthusiasts: it was hoped, through actual experience of the working of public services at a local level, leaders could be trained to manage national affairs. In the Ripon period this was often called 'political education'; President Ayub named his experiment 'Basic Democracy': democracy 'of the type that people can understand and work'."[590]

There are opinions Which hold that democratic structure of government established in the Indo-Pakistan sub-continent after independence in 1947 was premature and too sophisticated for the comprehension of politicians, who were entrusted with the working of the system. A training and apprenticeship at the local government level

[588] Act IV of 1964, P.L.D. 1964 Central Statutes 95.
[589] M. Ayub Khan, *Speeches and Statements*, Vol. II, pp. 24-25.
[590] Hugh Tinker, "Tradition and Experiment in Forms of Government", in C.H. Philips (ed.), *Politics and Society in India,* pp. 171-172.

would provide aspiring politicians with opportunities for gaining experience of the actual functioning of representative institutions. It has been observed that it was "probable that considerations of this kind were current, when the President made the Basic Democracies Order on October 27, 1959."[591]

But Basic Democracies have been criticized for their role both as a system of local self-government and also as the basic tier in the new electoral system. As local government bodies, they were not given enough freedom of action and the hands of official control were too obvious to inspire any self-confidence and sense of responsibility among the members. The government had a general power of supervision and control over the local councils. The controlling authority could modify the budget, quash any proceeding, suspend or prohibit execution of any measure, and require a local council to take such action as was specified.[592] It is extremely doubtful whether this "paternalistic control" would help to develop among the basic democrats a spirit of responsibility, independence and service, which was so essential for the successful working of the local government bodies.

As the basic tier of the electoral system under the Constitution of 1962, the Basic Democracies were attacked as a means for perpetuating Ayub Khan's supremacy and continuing the autocratic system that he introduced. The "so-called mandate" given to the President by the basic democrats in January, 1960, to give the nation a new Constitution was regarded as the root of this undemocratic and autocratic political system. Indirect election to high political office by basic democrats had not only deprived the people of any say at the higher level; it was also alleged that the basic democrats were made to vote for the existing establishment by official influence. The basic democrats, as members of local government bodies being under strict official control, as members of the Electoral College they were unlikely to exercise a free choice as electors. The attack in the country-wide movement of 1968-1969 was, therefore, against the whole system. "Basic Democrats were made the target of hatred and no distinction was made in the functions that they performed as members of a local body and their functions as members of the Electoral College ... They were just the symbols of the Constitution of 1962."[593] Obviously the type of politicians who sought election to the national and provincial assemblies would be resentful of the powers exercised by the basic democrats. Though there was a strong demand for abolition of the Basic Democracies, along with the political system established by the Constitution of 1962, the new martial law regime has decided to retain them as a system of local self-government.[594] As it is proposed, in the new system to be established after the conclusion of the present martial law period, to have elections for central and provincial assemblies based on universal adult franchise, the members of Basic Democracies

[591] A. Gledhill, *op. cit*., p. 116.
[592] Basic Democracies Order, 1959, Articles 73-75.
[593] S.M. Zafar, *Through the Crisis*, p. 18.
[594] *Pakistan Observer*, January 5, 1971 (Editorial).

would not then function as members of an Electoral College. They would function exclusively as local government bodies; official control and supervision might be relaxed and they might be able to function with more independence and freedom.

The Constitution Commission

Within three months of the abrogation of the Constitution of 1956 and declaration of "martial law" President Ayub Khan said: "As soon as the major problems facing the country have been solved, the reforms have been put into operation and the administration rehabilitated, the best constitutional brains in our country will be asked to apply themselves to the question of framing a constitution."[595] He reiterated his intention of appointing a constitution commission "consisting of the best brains in the country" on January 15, 1959, when he told the Karachi High Court Bar Association that the future constitution should suit the circumstances and conditions of the country and that it should not admit of political instability in any circumstances.[596] In the meantime reforms were introduced or contemplated, which were "in fact designed to prepare the base on which an upward pyramid of a sound political system can be developed", and with this end in view the Basic Democracies scheme was introduced. Elections to local councils under the Basic Democracies Order, 1959 commenced in December, 1959 which continued till mid-January, 1960.

On January 13, 1960, the Presidential (Election and Constitution) Order, 1960,[597] was made, providing that, on completion of elections to local councils under the Basic Democracies Order, the elected members would be asked to declare by secret ballot whether or not they had confidence in President Ayub Khan. If the majority declared confidence in the President, he would be deemed to have authority to take all steps for making a constitution and also to have been elected President for the first term under that constitution. The Order gave legal effect to a cabinet decision made earlier but not announced until January 8, 1960. The election, in substance a vote of confidence, was held on February 14 and 95 percent of the votes cast were in the affirmative.[598] Three days later the President was inducted into office, and, after the swearing-in ceremony, the President announced the appointment of an eleven-man Constitution Commission, with Mr. Justice Shahabuddin, then the senior most puisne judge of the Supreme Court, as its chairman.

The terms of reference to the Constitution Commission were to examine the progressive failure of parliamentary government in Pakistan leading to the abrogation of the Constitution of 1956, to identify the causes of the failure, suggesting measures to prevent their recurrence; and to submit, taking into consideration all factors and

[595] Speech delivered in Karachi on December 25, 1958, M. Ayub Khan, *Speeches and Statements*, Vol. I, p. 28.
[596] *Ibid*., p. 41.
[597] President's Order No. 3 of 1960, P.L.D. 1960 Central Statutes 30.
[598] E.A. and K.R. Schuler, *Public Opinion and Constitution Making in Pakistan*, p. 48.

circumstances, constitutional proposals which would ensure a democracy adapted to changing circumstances and based on the Islamic principles of justice, equality and tolerance, consolidation of national unity and a firm and stable system of government.[599]

The Constitution Commission soon after its appointment got down to work and prepared a questionnaire containing forty questions, asking for the causes of the failure of the 1956 Constitution and inviting suggestions for the future setup. The questionnaire also contained explanatory notes on the terms and provisions of the late constitution to facilitate understanding of them by those invited to answer the questions. The questionnaire was widely distributed and the public was invited to procure the questionnaire and send their replies to the Commission. In addition, the Commission toured extensively in both East and West Pakistan, interviewing people selected from different walks of life. In this process, a total of 565 people was interviewed and 6269 replies to the questionnaire were received. The Commission analyzed the opinions and views expressed before it, compiled a report, which was unanimous except for a note of dissent by one member on some points; it was submitted to government on April 29, 1961.

The Commission concluded that the parliamentary system of government had failed in Pakistan and therefore recommended a presidential system. We shall comment on the Commission's conclusion later in the chapter. In recommending the presidential type of government, the commission discarded the views of 50.6 percent of those who had given them, which favored the parliamentary system and accepted, for its own reasons, the view of the 47.40 percent, who favored the presidential system. The presidential system, according to the commission, would give stability to government and firmness to the administration, which were essential for the success of any form of government. It would avoid possible clashes between the Head of the State and Prime Minister, which were bound to occur in a parliamentary system. The presidential system would give a stable executive "where there is only one person at the head of affairs, with an effective restraint exercised on him, by an independent legislature, members of which, however, should not be in a position to seriously interfere with the administration by exercising political pressure for their personal ends".[600] The president should have powers of partial veto over the appropriation bill and to make law by Ordinance, when the legislature was not in session. There should be a vice-president, to whom the president could delegate some of his functions. The commission accepted the opinions expressed by 65.5 percent of the respondents for a federal form of government with the existing two units, and recommended that "the government should be of the same pattern as that of India and Canada and not unitary as in Great Britain".[601] The character of government, however, would not be strictly federal and there would be some degree

[599] Report of the Constitution Commission, p. 1.
[600] *Report of the Constitution Commission*, Para. 49, p. 28.
[601] *Report of the Constitution Commission*, Para. 68, p. 40.

of control by the centre over the provinces, both in the legislative and executive fields. 35.5 percent of the opinions received favored a unitary form of government and the official delegation[602] strongly advocated the same, to avoid growing opposition of the provinces to the centre, resulting in administrative friction. The commission did not accept this view and advocated three lists of subjects, 'as in the late constitution, with some modifications, giving the centre power to legislate on any subject in circumstances of absolute necessity and in emergencies. The residuary powers should be with the centre, and, in the event of repugnancy between a central law and a provincial law on any subject, the former should prevail and the latter to the extent of repugnancy be void.[603]

The commission recommended a bi-cameral legislature for the centre, though 74.1 percent of the opinions received favored a unicameral parliament. The upper chamber, to be known as the Senate, should consist of forty members elected by the lower house and the two provincial legislatures and eight members nominated by the president. The Senate should be able "to act as a check on the impetuosity of legislation by the Lower House, and also exercise a healthy influence, by its utterances, both on the members of that House and the public".[604] The provincial legislatures were, however, to be unicameral, with one hundred members directly elected by the people. Although the commission deprecated interference in the administration by the legislature, it favored an independent legislature within its own sphere. It observed that, whatever modifications on the American presidential system, where the legislature was entirely independent, might be adopted, "we cannot, if we want to have a democratic form of government, make the legislature ineffective. It should be in a sufficiently strong position to act as a check on the exercise by the executive of its extensive powers, without at the same time affecting the firmness of administration."[605]

As regards the judiciary, the commission recommended the retention of most of, the provisions of the late constitution. While the High Court should have the same power and jurisdiction as in the late constitution, the Supreme Court should not have original writ jurisdiction, though it would have appellate jurisdiction over such cases. The value of causes giving a right of appeal to the Supreme Court in civil matters should be raised to twenty thousand rupees. The High Courts should have jurisdiction to issue a writ, if either the place where the cause of action arose or where the defendant was resident was within its territorial jurisdiction in original causes, the choice being given to the plaintiff. A judge of the Supreme Court was to be removable by impeachment in the Senate, but a judge of the High Court should be removable by the president on an

[602] A body of officials appointed for placing before the Commission the official views on different constitutional questions.
[603] *Report of the Constitution Commission*, Para. 71 of the Report.
[604] *Report of the Constitution Commission*, Para. 75, p. 45.
[605] *Ibid*., para. 49, p. 28.

adverse finding by the Supreme Court, after judicial investigation into a reference received from the president.[606]

The commission recommended direct elections for the president, vice-president, the lower house of parliament and the two provincial legislatures, the franchise being exercisable only by citizens who had attained specified standards of literacy or possessed sufficient property. It advised that these standards should be fixed according to the recommendation of a Franchise Commission, to be appointed in the immediate future. The commission rejected the principle of universal adult franchise on the ground that illiteracy was widespread among the masses and observed that "the extension of franchise should, as in England, go hand in hand with the spread of education....[607] It also rejected the official preference for indirect election through an electoral college, consisting of the basic democrats, but recommended that the first parliament and the provincial legislatures should be indirectly elected by the basic democrats, in order to avoid delay in establishing constitutional government.[608] Although 55.1 percent of the answers to the questionnaire favored joint electorates, the commission recommended separate electorates for elections to the Lower House of parliament and the two provincial legislatures.[609]

The Constitution Commission advised incorporation in the constitution of the fundamental rights of the late constitution but recommended that the West Pakistan Land Reforms Regulation, 1959 and the Frontier Crimes Regulation, 1901 should be exempt from avoidance for repugnancy to those rights.[610] The preamble of the late constitution with suitable modifications was to be adopted and the Islamic Research Institute, established under the old constitution, continued. As regards conformity of existing laws with Islamic injunctions, it recommended the appointment of a commission, which, after a study of the different schools, should define such basic principles of Islam as could be regarded as setting the standard, to which the laws of the country should conform.[611]

Political parties, according to the commission, were inevitable and essential to representative government. It rejected the contention of the official delegation that political parties could be dispensed with and observed: "If we want to have a democratic form of government, our endeavor should be to create conditions in which parties based on principles can emerge..."[612] As long as a representatives form of government had to be worked, the existence of political parties was unavoidable.

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[606] *Ibid*., para. 139, p. 90.
[607] *Ibid*., para. 108, p. 68.
[608] *Ibid*., para. 120, pp. 78-79.
[609] *Ibid*., para. 117, pp. 76-77.
[610] *Report of the Constitution Commission*, para. 163, p. 103.
[611] *Ibid*., para. 194, p. 124.
[612] *Ibid*., para. 121, p. 80.

Regarding the method of amending the constitution, the commission favored a comparatively easy procedure, in view of the fact that the constitution was not going to be promulgated by a constituent assembly. It recommended that an amendment should require the support of two-thirds of the total members of both houses, sitting together, and the assent of the president. If the president withheld his assent, his veto could be nullified by a three-fourth majority. For amending certain articles relating to provincial legislatures, the legislature affected was to be consulted, as was provided in the Constitution of 1956.[613]

As has been said earlier, the Constitution Commission, after considering the eleven years of working the system, reached the conclusion that the parliamentary system had failed and would not work in Pakistan. In view of the prime need for stable and firm government in the country, the commission rejected the parliamentary system and said: "We shall be running a grave risk in adopting the parliamentary form, either in its purity or with the modifications suggested, and we do not think that we can afford to take such a risk at the present stage.[614] Analyzing the opinions expressed, the commission indicated three main causes for the "failure" of parliamentary government. These causes were:

> "(1) Lack of proper elections and defects in the late constitution.
>
> (2) Undue interference by the Heads of the State with ministries and political parties, and by the Central Government with the functioning of the governments in the provinces.
>
> (3) Lack of leadership, resulting in a lack of well-organized and disciplined parties, the general lack of character in the politicians and their undue interference in the administration."[615]

The commission in its conclusion gave emphasis to the third cause mentioned above, and identified it as "the real cause" of the failure of the parliamentary system of government in Pakistan, and recommended a presidential form of government as more suitable to the genius of the people and more likely to work in the conditions and circumstances in Pakistan.

It would seem, from a reading of the report, that the Constitution Commission despised the attitude and activities of the politicians and political parties during the period under review. There were no well-organized political parties and after the death of Jinnah and Liaquat Ali Khan, the gap in political leadership was never filled. The members of the

[613] *Ibid*., para. 197, pp. 127-28.
[614] *Ibid*., para. 37, p. 20.
[615] *Ibid*., para. 10, p. 6.

legislatures were apt to shift their allegiance from one party to another to further their own advantages and interests. Neither they, nor their parties would stand up to authoritarian Heads of the State. As a result of their unscrupulous behavior, the country suffered from instability of government and maladministration. If the politicians had acted properly, according to the commission, things would have been different. A presidential system, with a head of the government independent of the support of the members of the legislature, would be more likely to ensure stability and firmness in the administration than a parliamentary system.

The commission, it may be noted, though it recommended a presidential system, did not accept the official view that political parties and politicians should be dispensed with. Instead, it stressed the necessity for political parties, subscribing to specific Political principles, in any democratic setup. It might have been argued, therefore, that the politicians who were responsible for past "failure", would be likely to form new parties, pledged to sustain the new system. But if they had lacked in character in the past, they would not be likely to turn into ideal politicians, just because there had been a change in the form of government. Secondly, the president visualized by the commission, under the new constitution would inevitably be a politician. If the former Heads of State, only armed with the limited constitutional powers given by the parliamentary system, could act with impunity, ignoring the principles and spirit of the constitution, an unscrupulous individual holding the office of the president under a presidential system, would be an even greater danger to the country and, as the politicians apprehended when giving their views to the commission, the system would deteriorate into dictatorship of the kind prevalent among some of the Latin American countries.[616] That a presidential system of government, in the absence of well-developed and respected conventions, can be reduced to dictatorship is recognized by most authorities in constitutional law. In advising the Pakistan authorities about the form of government for the country in 1955, Sir Ivor Jennings had to "admit that the American system could easily be converted into a dictatorship..."[617] These arguments would seem unanswerable in Pakistan, unless the commission expected things to remain indefinitely as they were when Ayub Khan was president and an entirely new political leadership would be evolved. But such considerations should not form the basis of constitutional proposals for a country which had undergone such strains and stresses as Pakistan since independence. Political leadership cannot be an isolated phenomenon distinct from the society in which it exists, for it is the product of that society, though it is responsible for giving a lead in political thinking.

The commission did not think that the Constitution of 1956 was an unworkable instrument. It observed: "As for the defects in the late constitution, which has also been mentioned as one of the causes of the failure, we do not see any that could have

[616] See Schuler, *op. cit.,* p. 72.
[617] Ivor Jennings, *The Approach to Self-Government*, p. 19.

effectively prevented its being worked successfully."[618] The commission, therefore, rightly stressed that the failure of the 1956 Constitution was due to the behavior of the people who were entrusted to work it. We have already discussed the role played by the politicians and the Head of the State during the two and a half years that the Constitution of 1956 survived.[619] The politicians themselves said, in their replies to the Commission's questionnaire, that the constitution and parliamentary system it introduced did not have a chance to show that it could be made to work properly. Chaudhri Mohammad Ali, a former Prime Minister, said: "In a parliamentary democracy, where free elections are of its essence, it is wholly unfair to judge a constitution after an experience of only two and half years, when not even one election had been held under it."[620] A constitution, to be judged properly, should be in operation for a considerable period of time and all its provisions should be enforced; the various organs set up by it should be allowed to function unhindered. Only then would its weaknesses and faults appear; these could be amended unless a complete change was obviously desirable.

> "A constitution when written does not breathe. It comes to life and begins to grow only when human elements get together and work it. As time passes, it almost imperceptibly changes in form and content and assumes a new shape and even a new meaning. This comes of the nature and temper of those who work it. Time and circumstances do have their impact on it. Yet, it is men, more than anything else, who shape and mould the destiny of a written constitution,"

Observed N. V. Pylee.[621] The same author quoted Dr B. R. Ambedkar, who was the chairman of the constitution drafting committee in the Indian Constituent Assembly. Dr Ambedkar, in one of the debates of the Assembly observed:

> "However good a constitution may be, it is sure to turn out bad, because those who are called to work it happen to be a bad lot. However bad a constitution may be, it may turn out to be good, if those who are called to work it happen to be a good lot. The working of a constitution does not depend wholly upon the nature of the constitution. The constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of these organs of State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their policies."[622]

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[618] *Report of the Constitution Commission*, para. 12, p. 7.
[619] See Chapter V, and Chapter VII.
[620] Quoted by G.W. Choudhury, *Democracy in Pakistan*, p. 138.
[621] N.V. Pylee, *Constitutional Government in India*, p. 700.
[622] C.A.D. X, p. 975. Quoted in Pylee, *ibid*.

Professor G.W. Choudhury, while admitting that parliamentary democracy in Pakistan was not functioning in the same way as in England or in other older members of the Commonwealth, commented that it must be borne in mind that the ways of democracy were often slow.[623] He also referred to Professor R. M. MacIver's observation that a people cannot bring democracy into immediate being by a sudden change of attitude and that democracy attains its fuller development after many experiments, some of which may be abortive or at best only partially successful.[624] For improper functioning of a form of government, the constitution is not entirely to blame. It depends upon the people who are called to work it and the circumstances under which they are required to work. In Pakistan there was no general election under the Constitution of 1956, in the absence of which political parties were functioning without any object in view. There was no opportunity, without election, for the polarization of views on problems and issues. The Constitution of 1956 was, therefore, never tested in the light of public opinion. The Constitution Commission does not seem to have paid due heed to these points when it reached its conclusion about the "failure" of the parliamentary system in Pakistan.

The most important point, which the Constitution Commission overlooked in recommending a presidential form of government, was the composition of society in Pakistan. Not only was it a plural society, in the sense that it comprised various racial and ethnic groups with their own language and culture, but the two wings of Pakistan were geographically separated by over a thousand miles of a foreign country. The differences between the two wings and the apprehension of the domination of one wing by the other were already causing anxiety, when the commission was considering its constitutional proposals. Moreover, politicians had seriously made the point before the commission that under presidential system

> "when a President is elected from one wing, the other wing will surely feel that people have not been represented in the government. Active and effective participation by the people in the affairs of government is a *sine qua non* of an ideal pattern of government that is only possible in a Parliamentary system of Government and impossible in any form of Presidential Government."[625]

That the sense of participation on the part of the people was essential in working any form of government was admitted by President Ayub Khan, who was the strongest advocate for the presidential form of government in Pakistan. The lack of that sense among the people, and among East Pakistanis in particular, was identified by the President as the cause of popular dissatisfaction with the Constitution of 1962. In a broadcast on February 21, 1969 he said, "I realize also that the intelligentsia feels left out

[623] G.W. Choudhury, *Constitutional Development in Pakistan*, p. 257.
[624] R.N. Haclver, *Web of Government* (1949), pp. 188-92.
[625] Reply to Constitution Commission questionnaire, quoted in G.W. Choudhury, *Democracy in Pakistan*, pp. 151-152.

and wants a greater say in the affairs of the State. People in East Pakistan feel that in the present system they are not equal partners..."[626] In a plural society such as in Pakistan, collective leadership is desirable and such leadership is only possible in a parliamentary system. As Sir Ivor Jennings said, in a plural society "Cabinets can be mixed in respect of race, religion, caste, tribe or clan. In Ceylon it is usual to have at least two Tamils and one Muslim. The Indian Cabinet is drawn from the several racial groups in India. Pakistan has to give due weight both to East and West Pakistan."[627]

Cabinet government, with the administration answerable to a popularly elected legislature, appears more responsible than presidential government. A parliament which has direct control over government and power to overthrow it, can effectively reflect public opinion in the country at any time, but a president under the presidential system may be remote from public opinion and he is not easy to remove.[628] This may lead to serious deadlock, resulting in political chaos and disorder or even to a revolutionary situation. This factor should be kept in mind when prescribing a constitutional formula for a heterogeneous society. The constitution commission, obsessed with their contempt for the misdoings of the politicians under the parliamentary system, seem to have overlooked this.

It has been noted that one of the main reasons why the commission favored the presidential system was to avert clashes between the Prime Minister and Head of the State. But in a presidential system such as was recommended by the commission, there is the danger of a clash between the president and the legislature, if the conventions, which are essential to such a constitution, in practice are not accepted by the political leaders. Professor Jennings anticipated such a clash in Pakistan under a presidential system, when he said, "It could not be assumed that the conventions accepted in the United States would be acceptable in Pakistan, and accordingly it was necessary to provide means for solving, for instance, conflicts between the executive and the legislature."[629] Considering all these factors and assuming that people of Pakistan want a democratic form of government, one would be inclined to conclude that the parliamentary system is the only answer to Pakistan's protracted political problem.

A Brief Review of the Period 1958-1962

Political scientists and lawyers assume that the object of a martial law administrator is to restore public order and restore civil government as quickly as possible, but "martial law" in Pakistan in the period 1958-1962 was different from martial law as understood in the Commonwealth earlier. It was described by Chief Justice Munir as a successful

[626] *Keesing's Contemporary Archives* (1969-70), p. 23221.
[627] Sir Ivor Jennings, *op. cit.,* p. 158.
[628] No United States president has ever been removed from office. The impeachment to remove President Andrew Johnson in 1868 failed by one vote.
[629] Sir Ivor Jennings, *The Approach to Self-Government*, p. 18.

revolution. But the administration set up by Field Marshal Ayub Khan, and which effectively governed Pakistan during the years 1958-1962, differed from most other revolutionary governments. The typical revolutionary government claims, though often without much justification in fact, to have destroyed the powers of evil, the citadel of inefficiency, corruption and exploitation, and established the order of justice, righteousness and peace. But Ayub Khan, from the moment of taking over, represented himself as a caretaker, his government as an interim affair; immediate measures would be taken to create a constitution suitable to the genius of Pakistan.

Unless one is to say that such a government as Ayub Khan's military regime is bound by no law, human or divine, one is entitled to ask whether legislation considered in this chapter comes properly within the scope of such powers as are exercisable by such a regime. Should it have imposed such important innovations on the general body of law as a ceiling for agricultural holdings, which affected the vested interests of an influential body of Pakistanis, far-reaching alterations to procedural law, which the legal profession would not approve, and changes in the personal law which conservative Muslims would regard as blasphemous? Should not these laws have been referred to legislatures set up under the new Constitution? Ayub Khan would say that these were essential for the good of Pakistan and could not have been enacted by the legislatures set up by the 1956 Constitution. This would seem to mean that he intended to force Pakistan to do for its own good what it did not want to do. But if one declares that Pakistan is a democracy, even a "controlled" democracy, one cannot impose on its population the most desirable legislation, for its own good, if a majority or even a large minority do not want it. Interference in personal law has traditionally provoked protests from conservative sections of society in the Indo-Pakistan sub-continent and the regime could not have enhanced its popularity with the people generally by further interference with the personal law. It should not be forgotten that the National Assembly elected under the 1962 Constitution lost no time in restoring the adjective "Islamic" which the regime had removed from the title of Pakistan.

The much-publicized land reforms in West Pakistan, as explained above, have to a great extent failed to accomplish their purpose. The regime pushed these reforms through, though the impossibility of achieving their object had already been demonstrated in India. There the plans were made by the Centre but had to be implemented by State legislatures. The Zamindars controlled most State legislatures and so the necessary legislation was delayed. But, when enacted, various loopholes were left, the consequences of which were only discovered later and the revenue officials interpreted the provisions of the legislation so as to benefit the landlords. The effect was that a few bigger Zamindars lost a little, the tenants gained nothing and the real beneficiaries were the middle-sized landholders.[630]

[630] See H.C.L. Merillat, *Land and the Constitution in India*, Chapter 5.

With regard to the establishment of the Constitution Commission, one may ask whether a third constituent assembly should not have been summoned. The Indian Independence Act, 1947, to which Pakistan legally owed its existence, provided that the then existing Constituent Assembly should enact the constitution and it alone could amend the Independence Act. After it had been dissolved, the Federal Court held that, to enact a constitution a new Assembly must be summoned. The Independence Act must be obeyed, except' in matters for which it had not provided. In making the Constitution of 1956, the provisions of this Statute had been followed as far as possible, but the setting up of the Constitution Commission was something new. It is true that it did endeavor to sound public opinion on the relevant questions but its recommendations were made in its discretion; some of them were opposed to public opinion and not all of them were accepted by Ayub Khan, who claimed the right to impose his will on the people of Pakistan by virtue of a plebiscite, in which only the basic democrats participated and they were unlikely, at that time, to oppose Ayub Khan's will.

To the question whether the Constitution should not have been referred to a newly summoned Constituent Assembly, Ayub Khan and his advisors would probably say in reply, that the two previous Constituent Assemblies had not performed their duties in such a manner as to encourage a third experiment of this kind. To this the retort must be that there was nothing wrong with the 1956 Constitution in itself and it was enacted with considerable speed; the fault was not in the Constitution but in those who swore allegiance to it and violated their oaths. In any case Ayub Khan's recipe for constitution-making eventually proved inadequate. No longer are its special features, presidential government, indirect elections and the integration of West Pakistan regarded as possible parts of a future constitution. The process commenced by the abrogation of the Constitution of 1956 seems, at present, to have landed the country into an extremely grave political crisis which may be very difficult, if not impossible, to solve.

It is difficult, therefore, to maintain that any promised benefit accrued to Pakistan from the establishment of martial law in 1958. Would it not have been better if the Constitution of 1956 had been preserved and elections held under it? The proposed election under that Constitution in February, 1959, contrary to President Mirza's view, could have resulted in a political stability leading to an understanding between leaders of different regions. This would have ensured governmental stability and national unity. It could have been otherwise indeed, but signs in the autumn of 1958 were indicative of a better picture.

Chapter IX

The Constitution of 1962

Outline of the New Constitution

The Constitution Commission, it may be recalled, submitted its report in May, 1961. The report was thoroughly examined by the President and his Cabinet. A cabinet sub-committee then formulated the principles on which the new constitution was to be based. Finally a drafting committee, with Manzur Quadir, the Minister for External Affairs, as chairman, drafted the constitution,[631] which was announced in a broadcast by President Ayub Khan on March 1, 1962. As will be seen, the Constitution, as it finally emerged, differed from the recommendations of the Constitution Commission on some fundamental points, such as the fundamental rights, the role of judiciary, the system of election and adherence to federal principles. The commission's recommendation regarding the form of government was accepted, but the kind of presidential system that was introduced by the Constitution of 1962 was substantially different from the pure presidential form envisaged by the commission.

President Ayub Khan, in his introductory speech,[632] recalled his promise made on October 8, 1958, that the ultimate, aim of the martial law regime was "to restore democracy but of the type that people can understand and work". The Constitution of 1962, which the President gave to the nation, was the fulfillment of his promise. It provided for the presidential system, as it was "simpler to work, more akin to our genius and history, and less liable to lead to instability — a luxury that a developing country like ours cannot afford". The parliamentary system was discarded, not because the system itself was defective, but because certain pre-conditions essential for its successful operation were absent in Pakistani society. Not only were certain intellectual attainments necessary to work the parliamentary system but "above all, you need really cool and phlegmatic temperament which only people living in cold climates seem to have". Nations other than Britain and the Scandinavian countries have failed to work it, The President, therefore, observed, "So, don't let us kid ourselves and cling to clichés and assume that we are ready to work such a refined system, knowing the failure of earlier attempts. It will be foolhardy to try it again, until our circumstances change radically."[633]

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[631] See G.W. Choudhury, *Constitutional Development in Pakistan,* (2nd ed.), p. 178.
[632] Text of the speech, *Dawn*, March 1, 1962. Constitution Supplement, p. II.
[633] *Ibid*.

Taking into consideration the prevailing conditions and the genius of the people, Ayub Khan thought that the presidential system was the correct answer to Pakistan's constitutional problems, which would "release the Chief Executive from obligation of having to be sustained artificially so as to enable him to get on with the functions entrusted to him for the benefit of the people at large". The philosophy behind the new political system was the "blending of democracy with discipline, the two prerequisites to running a free society with stable government and sound administration".

The new Constitution came into force on June 8, 1962 with the first meeting of the National Assembly, when the President declared the lifting of martial law. Apart from a kind of presidential system, the Constitution provided that Pakistan should be a 'form of federation', with the provinces enjoying such autonomy as was consistent with the unity and interest of the country as a whole. The principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, were to be fully observed, while the legitimate interests of the minorities and the independence of the judiciary were to be adequately safeguarded.[634] The State, to be known as the 'Republic of Pakistan', was to consist of two units — East Pakistan and West Pakistan and such other territory as might be included in Pakistan.[635] Instead of justiciable fundamental rights, such as were enumerated in the 1956 Constitution, a chapter entitled "Principles of Law-Making and of Policy" was incorporated in the Constitution, but the responsibility to uphold them was left to the legislatures and no law was to be void on the ground of violation of these principles.[636] In his inaugural address to the National Assembly on June 8, 1962, President Ayub Khan said "The Constitution that comes into force from today represents my political philosophy in its application to the existing conditions of Pakistan and it deserves a fair trial."[637]

The executive authority of the Republic was vested in the President, who exercised all powers either directly or through officers subordinate to him in accordance with the Constitution and the law.[638] The President under the Constitution of 1962, was the "central figure", the ruler of Pakistan, not responsible to nor dependent on the support of a majority in the central legislature.[639] He was elected indirectly by the members of the electoral college,[640] and held office normally for five years. As under the late Constitution, the President was to be a Muslim, qualified to be a member of the National Assembly, and at least thirty-five years of age.[641] He could be impeached in the National Assembly for willful violation of the Constitution or gross misconduct; he could be removed from office for physical or mental incapacity. Votes of three quarters

[634] *Constitution of 1962*, Preamble.
[635] *Ibid*., Article 1.
[636] *Ibid*., Article 6 (Before amendment).
[637] Text of President's Speech, *Dawn*, June 9, 1962, p. 4.
[638] *Constitution of 1962*, Article 31.
[639] A. Gledhill, *Pakistan, The Development of its Law and Constitution*, p. 136.
[640] *Constitution of 1962*, Article 165.
[641] *Ibid*., Article 10.

of the total membership of the Assembly were required for his exit, but if in the final voting at least half of the total members did not vote for the resolution, the members who initiated it would cease to be members of the Assembly.[642]

The Supreme Command of the Defence Services was vested in the President, who appointed the Commanders-in-Chief of the services, granted commissions and raised and maintained the armed forces.[643] The President appointed provincial governors, parliamentary secretaries and the Attorney-General. The chief justices and judges of the Supreme Court and the High Courts were appointed by him. To assist him in the performance of his functions the President appointed a council of ministers who were directly responsible to him. According to a provision of the Constitution, if a member of an Assembly was appointed a Governor or a Minister, he was to cease to remain a member of that Assembly.[644] After the first Assembly elections in 1962, President Ayub Khan faced difficulties in appointing ministers from among the members of the Assembly. The members refused to serve as ministers, if thereby they lost their seats in the Assembly. The President, therefore, promulgated the Removal of Difficulties (Appointment of Ministers) Order, 1962,[645] by which "Ministers" were exempt from the application of Article 104 of the Constitution. The Order was made in purported exercise of the President's power under Article 224(3) to remove difficulties, which might arise in bringing the Constitution into operation. On a writ preferred by a member of the National Assembly, the East Pakistan High Court held that the "difficulty" faced by the President in appointing ministers was not the kind of difficulty envisaged by Article 224(3), and the President's Order was, therefore, ultra wires the Constitution.[646] The government appealed to the Supreme Court, which upheld the decision of the court below and observed that the President's power to remove difficulties in bringing the Constitution into operation did not extend to "altering the Constitution itself". The important provision setting up the presidential form of government was a fundamental feature of the Constitution and any change in this fundamental structure could not be regarded "as one in aid of bringing the integral provisions of the Constitution into operation".[647]

Under the Constitution of 1962 the President enjoyed enormous legislative powers. Not only did all bills passed by the National Assembly require his assent but he was also a legislature himself, more powerful than the National Assembly. The President could legislate by Ordinance when the Assembly was not in session. The Ordinance was to be placed before the Assembly, which could approve or disapprove of it. If within forty-two days after the re-assembly of the legislature or one hundred and eighty days of the

[642] *Constitution of 1962*, Articles 13 and 14.
[643] *Ibid*., Article 17.
[644] *Ibid*., Article 104.
[645] President's Order No. 34 of 1962. P.L.D. 1962 Central Statutes 647.
[646] *Muhammad Abdul Haque v. Fazlul Quader Chowdhury*, P.L.D. 1565 Dacca 669.
[647] *Fazlul Quader Chowdhury v. M. Abdul Haque*, P.L.D. 1963 S.C. 486.

promulgation of the Ordinance the Assembly approved it, it was deemed to be an Act of the legislature. If before the end of the above period, the Assembly disapproved it, it was repealed forthwith. If the Assembly did nothing or if the Ordinance was not put to the Assembly, it would be deemed repealed at the expiry of the period mentioned.[648] The President could issue a Proclamation of Emergency under Article 30 of the Constitution, if he was satisfied that the security of Pakistan was threatened by war or external aggression, or that the economic life of the country was endangered by internal disturbances. During the emergency he had power to make Ordinances, which remained valid till the proclamation was revoked. The National Assembly had no power to disapprove of such an Ordinance. The President was the sole judge as to the necessity for the proclamation and the revocation of an emergency, and his satisfaction was not subject to the court's scrutiny.[649] He had the power to grant pardon, reprieves and respites, and to remit, suspend or commute any sentence passed by a court, tribunal or any other authority.[650]

The executive authority of a province was vested in the Governor,[651] who was appointed by the President and performed his functions subject to the directions of the President.[652] The Governor, in order to assist him in the performance of his functions, appointed ministers with the concurrence of the President;[653] he also appointed parliamentary secretaries from amongst the members of the Provincial Assembly. The Governor, like the central ministers, held office during the pleasure of the President and could be removed by him at any time without assigning any cause.[654] Like the President at the centre, the Governor performed all executive functions vested in the province. Like the President, he had power to legislate on provincial subjects by Ordinance,[655] and all bills passed by the Provincial Assembly required his assent to become law.[656]

The provincial executive was similar to the central executive but subject to control and direction of the President. It has been observed, "Though the pattern of the central executive is generally followed in the provinces, the position of the Governor is very different from that of the President, for the provincial governments are now subordinate governments, as they were before the Government of India Act 1935, came into force. The Governor is an assistant of the President and their relations are similar to those between central Ministers and the President."[657]

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[648] *Constitution of 1962*, Article 29.
[649] *Abdul Baqi Baluch v. Government of Pakistan*. P.L.D. 1968, S.C. 313.
[650] *Constitution of 1962*, Article 18.
[651] *Ibid*., Article 80.
[652] *Constitution of 1962*, Article 66.
[653] *Ibid*., Article 82.
[654] *Ibid*., Article 118.
[655] *Ibid*., Article 79.
[656] *Ibid*., Article 77.
[657] A. Gledhill, *Pakistan, The Development of its Laws and Constitution*, p. 143.

The new Constitution, like the Constitution of 1956, provided for a central legislature consisting of the President and one house, known as the National Assembly. The Assembly consisted of one hundred and fifty-six members, equally divided between the two provinces of East Pakistan and West Pakistan. Six seats three from each wing were reserved for women.[658] The members of the Assembly were elected indirectly by the members of the electoral college from constituencies created by grouping the electoral units they represent. The normal life of the Assembly was five years,[659] but the President could dissolve it at any time, unless the unexpired portion of the term of the Assembly was less than one hundred and twenty days or a notice for impeachment or removal of the President was under consideration of the Assembly. It was, however, provided that if the President dissolved the Assembly, he himself ceased to hold office unless reelected.[660]

The President summoned the Assembly and He prorogued it could address or send messages to his the Assembly; ministers and the Attorney-General had the right to participate in the proceedings, though they were not entitled to vote in the Assembly.[661] A bill passed by the Assembly required the assent of the President to become law. In the event of the President withholding his assent, a majority of two-thirds of the total membership could override his veto and the bill could be represented to the President. In such circumstances the President, within ten days, if he still disagreed with the Assembly, had to refer the bill to the members of the electoral college. If the majority of votes cast in the referendum were for the bill, the President would be deemed to have assented to the bill.[662] The referendum to the members of the electoral college, as provided by Article 24 of the Constitution, was a device to resolve any conflict between the President and the National Assembly.

There were to be at least two sessions of the Assembly within a year and not more than one hundred and eighty days should intervene between two sittings.[663] The Assembly was to make its own rules of procedure,[664] and members and officers of the Assembly were to enjoy the conventional immunities from judicial proceedings for anything spoken or done in the Assembly.[665] But novel provisions obliged the Speaker of the Assembly to arrange for instruction of its members about their functions, and to refer any breach of rules by any member to the Supreme Court.[666] If, after enquiry, the court found the member guilty of misconduct, he would cease to be a member. Similar

[658] *Constitution of 1962*, Article 20. The total membership was later increased to 218 by the Constitution (Eighth Amendment) Act, 1967.
[659] *Ibid*., Article 21.
[660] *Constitution of 1962*, Article 23.
[661] *Ibid*., Article 25.
[662] *Constitution of 1962*, Article 27.
[663] *Ibid*., Article 109.
[664] *Ibid*., Article 110.
[665] *Ibid*., Article 111.
[666] *Ibid*., Articles 112 and 113.

provisions applied to the provincial assemblies, but the reference would be to the High Court of the relevant province. Money bills[667] and bills relating to preventive detention[668] were to be introduced in the Assembly only with the previous consent of the President.

The provision that consent of the President was necessary for the introduction of a money bill to the National Assembly was in line with the practice followed in all Commonwealth countries. But the new Constitution significantly deprived the legislature of the control over the finance, which is generally regarded as a necessary check on the executive and one might regard such a check as being essentially desirable in the kind of presidential form of government introduced in Pakistan, where the President had untrammeled executive power and effective legislative power. The President was obliged to cause the annual budget statement to be laid before the National Assembly. The budget was divided into "charged" and other expenditure. The other expenditure was again sub-divided into recurring and non-recurring expenditures, the "new expenditure" being shown separately among the "other" items.[669] The National Assembly was entitled to discuss the items on "charged" expenditure but could not vote on them.[670] It could discuss and reduce the demand for a grant on other items not shown as "new expenditure", only with the consent of the President.[671] Only in respect of sums shown as "new expenditure" did the Assembly have full authority to assent, reduce or refuse a demand.[672] But an increase of up to ten percent on the previous year's expenditure on a project was not regarded as "new expenditure".

It would seem that these provisions were enacted in the Constitution in order to avoid any possibility of government coming to a standstill by refusal of a financial grant by a hostile Assembly. The President was made independent, not only in the legislative sphere by giving him the Ordinance-making power, but he was largely independent of the legislature in financial matters.[673] The legislature under the Constitution of 1962 was a chamber of discussion rather than a chamber of decision. It could discuss matters of public importance when summoned by the President but was powerless to do anything, unless the President agreed.

Each province had a provincial legislature consisting of the Governor and the Provincial Assembly. A Provincial Assembly consisted of one house of one hundred and fifty-five

[667] *Constitution of 1962*, Article 47.
[668] *Ibid*., Article 26.
[669] *Ibid*., Article 40.
[670] *Constitution of 1962*, Article 41(1).
[671] *Ibid*., Article 41(4).
[672] *Ibid*., Article 41(5).
[673] It was reported that in June 1962 when the expenditure of Rs. 1170 million on the armed forces was brought before the Assembly, the Assembly could exercise its control only over Rs. 60 million, which represented the "new expenditure". K.B. Sayeed, "Pakistan's Constitutional Autocracy", *Pacific Affairs* (1963), p. 365, 370.

members, five seats being reserved for the women members.[674] All provisions concerning the relationship between the President and the National Assembly, including the financial procedure at the centre, were reproduced with necessary modifications in relation to the Governor and the Provincial Assembly. But, while a conflict between the President and the National Assembly had to be resolved by a referendum to the electoral college, a conflict between the Governor and the Provincial Assembly was settled by the National Assembly. And if the National Assembly decided in favor of the Governor, he could dissolve the Provincial Assembly with the concurrence of the President.[675] Like the National Assembly, the Provincial Assembly was designed to play an insignificant role, while the Governor exercised enormous executive powers, effective power of legislation by Ordinance, and was virtually independent in financial matters, but he was under the direct control and direction of the President.

The Constitution of 1962 retained the structure of the judiciary as it existed before. At the apex of the judicial hierarchy was the Supreme Court, and there was one High Court for each province, which exercised control and supervision over all other courts subordinate to it. Appointments of judges to the Supreme Court and the High Courts were made by the President as before, but their removal was to be effected on the recommendation of the Supreme Judicial Council.[676]

The Supreme Court retained exclusive original jurisdiction over any dispute between the central and provincial governments.[677] It had appellate jurisdiction over the decisions of the High Courts, if the High Court certified that the case involved a substantial question of law as to the interpretation of the Constitution, or the High Court had sentenced a person to death or transportation for life or imposed punishment for contempt of itself.[678] It could also grant special leave to appeal from any decision of a High Court. The Supreme Court had advisory jurisdiction, under Article 59, on any question of law referred to it by the President for its opinion. It had no original writ jurisdiction as was given by Article 22 of the Constitution of 1956, though it had appellate jurisdiction from the decisions of the High Court over such matters. The Supreme Court's appellate jurisdiction in civil matters was curtailed, in that no appeal lay as of right, whatever might have been the property valuation of the suit. The two High Courts retained their previous jurisdiction, including the writ jurisdiction, which was in substance incorporated in Article 98 of the Constitution without giving the writs their ancient names.

[674] *Constitution of 1962*, Article 71.
[675] *Ibid*., Article 74.
[676] *Constitution of 1962*, Article 128.
[677] *Ibid*., Article 57.
[678] *Constitution of 1962*, Article 58.

But the important feature in this part of the Constitution was that the superior courts were deprived of the power of deciding the constitutionality of any legislation enacted by any legislature.[679] The concept that the judiciary was the guardian of the Constitution, particularly a written constitution with division of legislative powers between the centre and the regions, did not find a place in the Pakistan Constitution of 1962. The responsibility of deciding whether a legislature had power under the Constitution to make a law lay on the legislature itself. As the Supreme Court in 1963 said, obiter, that the interpretation of the of the Constitution was the prerogative as well as the duty of the superior courts,[680] this prerogative was, presumably, applicable to the question whether a provincial law inconsistent with a central law was void to the extent of inconsistency.[681] The central legislature could make a law on any matter by invoking Article 131(2), and the court had no jurisdiction to declare such law *ultra vires* the central legislature.

As has been noted earlier, the preamble to the Constitution described it as a "form of federation" with provinces enjoying such autonomy as was consistent with the unity and interest of Pakistan as a whole. The principles of federalism which in the case of Pakistan had been regarded as the "dictates of geography" were virtually discarded in the new Constitution. Though there were provincial governments and legislatures separate from the central institution$, they were subordinate to the central authorities. We have already seen that the provincial executive, headed by the Governor, was completely under the control of the centre. The Governor, who was a presidential appointee, had a constitutional obligation to comply with the directions of the President.

The division of powers between the centre and the provinces was effected by setting out a single list of subjects, on which the centre had exclusive power to make laws.[682] The list of forty-nine central subjects incorporated in the third schedule included all important matters of state activity and important heads of revenue, guaranteeing adequate finance for the centre. The provinces were given power to make laws on any subject not enumerated in the exclusive central list.[683] But the centre was given an overriding power of making law on any unremunerated subject, if the national interest required it in relation to the security, including the economic or financial stability of Pakistan, planning or coordination, or for the achievement of uniformity in respect of any matter in different parts of Pakistan.[684] It would, therefore, seem that the centre

[679] *Ibid*., Article 133.
[680] *Fazlul Quader Chowdhury v. M. Abdul Hague*, supra.
[681] *Constitution of 1962*, Article 134.
[682] *Constitution of 1962*, Article 131(1) and Third Schedule.
[683] *Ibid*., Article 132.
[684] *Constitution of 1962*, Article 131(2).

would be able to legislate on any provincial subject under the doctrine of "national interest", and the court had no power to declare such a central law as void.[685]

The centre's power to legislate in the "national interest" was given an expansionist interpretation by the courts. When the Industrial Disputes (Amendment) Ordinance, 1962, promulgated by the President, was impugned as *ultra vires* the President, as industry was a provincial subject, the court pointed out that the centre had power to legislate on any subject in the "national interest".[686] It was held to be in the national interest to bring about "uniformity" in the law relating to industrial disputes in different parts of Pakistan. The court held that the distribution of legislative powers between the centre and the provinces under the Constitution of 1962 rested "on an entirely different basis" from that in the Government of India Act, 1935, and the Constitution of 1956. While the centre had limited legislative powers over the subjects enumerated in the third schedule, the provinces had powers to make laws on all unremunerated subjects, including subjects previously dealt with by the centre.[687] But, in the "national interest", the central legislature was competent to make laws in all conceivable legislative fields, and the court would uphold them as valid central laws.

The central legislature could also control legislation on purely provincial matters by a provincial legislature, for it was the arbiter in a conflict between the provincial Governor, who was a central appointee, and the Provincial Assembly. The Provincial Assembly could be kept subservient to the centre's will by the threat of dissolution, which the Governor was empowered to do with the concurrence of the President. Further, when a provincial law was inconsistent with a central law, the latter would prevail and the former, to the extent of inconsistency, would be invalid.[688]

Generally the executive powers of the centre and the provinces covered the same field as their respective legislative powers. But the Governor, in whom the executive power of a province vested, was only the agent of the President, who could remove him any time without assigning any reason. He was, in the performance of his functions, subject to the direction of the President. It is, therefore, clear that the Constitution of 1962 virtually established a unitary form of government, with provinces exercising so much executive and legislative power as the centre was pleased to allow. It has been aptly observed: "The allocation of powers indicates that there is no effective constitutional limitation on the invasions in the provincial legislative sphere by the centre and that, in the executive sphere, the Governors and other provincial authorities are subject to

[685] *Ibid*., Article 133. After the first Amendment the court had power to declare any law or part of it as void if the law violated the fundamental rights incorporated by the Amendment.
[686] *Chittagong Mercantile Employees Assoc. v. Chairman, Industrial Court of East Pakistan*. P.L.D. 1963 Dacca 856.
[687] *Manzoor Ahmad v. Commissioner, Lahore Division* P.L.D. 1964 Lahore 194; *Azizuddin v. Abdul Ghafoor Arain*, P.L.D. 1964 Karachi 88.
[688] *Constitution of Pakistan* 1962, Article 134.

central direction. These features would be inadmissible in a federal system."[689] The Constitution provided that the State should be known simply as the Republic of Pakistan and the adjective "Islamic", which was in the late Constitution, was dropped. But the President was to be a Muslim, and, according to a principle of law-making, no law repugnant to Islam was to be enacted, and state policy was to be directed to enabling the Muslims of Pakistan to order their lives in accordance with the fundamental principles and basic concepts of Islam. An Advisory Council of Islamic Ideology was to be set up by the President,[690] with members having the understanding and appreciation of Islam and of the economic, political, legal and administrative problems of Pakistan. Among its functions, the Council was to make recommendations to the central and provincial governments as to the means of enabling and encouraging the Muslims of Pakistan to adopt the Islamic way of life. It was to advise the National Assembly, the Provincial Assemblies, the President and the Governors, about the repugnancy to Islamic principles of any proposed law.[691] There was also to be an Islamic Research Institute, established by the President to undertake research and instruction in Islam for the purpose of assisting the reconstruction of Muslim society on a truly Islamic basis. Elections to the office of President and to the central and provincial assemblies were to be made by the members of the electoral college.[692] Each province was to be divided into forty thousand territorial units and each unit was to elect, on the basis of adult franchise, a person known as the "elector" for that unit. All the "electors" together were to constitute the electoral college of Pakistan. While the President was to be elected by all the members of the electoral college, for the purpose of elections to central and provincial assemblies each province was to be grouped into seventy five and one hundred and fifty constituencies respectively. Political parties, which had been abolished by the proclamation of October 7, 1958, still remained under the ban and could not be revived until permitted by legislation of the central legislature.[693] This meant that at least the first election held in April-May, 1962 was made on a non-party basis, and any person holding himself out as a party-member or having the support of any party in that election was to be punished.

Defects of the Constitution

Even before the Constitution of 1962 was promulgated by President Ayub Khan on 1 March, 1962, public opinion in Pakistan became restive, and apprehensions of its probable contents were expressed.[694] While the President himself and the whole regime were organizing propaganda against the parliamentary system of government and other aspects of the Constitution of 1956, public leaders, in spite of the strict ban on

[689] A. Gledhill, *Pakistan, The Development of its Laws and Constitution*, p. 132.
[690] *Constitution of 1962*, Article 200.
[691] *Constitution of 1962*, Article 204.
[692] *Ibid*., Articles 165 and 168.
[693] *Ibid*., Article 173.
[694] See D,P. Singhal, "The Constitution of Pakistan" (1962) 2 *Asian Survey* 14.

political discussion, were expressing views in favor of the old system. As early as 1960 Z. H. Lari, then President of the Karachi High Court Bar Association, listed several provisions essential to "willing acceptance" of any constitution, such as (a) fundamental rights enforceable by the courts, (b) an independent judiciary, (c) supremacy of parliament, (d) direct elections based on adult franchise, (e) elections to all offices and legislatures after the withdrawal of martial law, and (f) authority of parliament and parliament alone to change the Constitution.[695] As has already been said those who had earlier been active in Pakistan political affairs, when giving their opinions to the Constitution Commission, unanimously favored the parliamentary, system, as established by the Constitution of 1956. Apprehensions were expressed that the presidential system, which was favored by Ayub Khan, was likely to result in a kind of Latin American dictatorship, and would not be suitable for a plural society like Pakistan's. Their opinions were published in the newspapers and aroused strong controversy on constitutional issues. The government had to issue a warning against "playing politics" when replying to the questionnaire issued by the Constitution Commission.[696]

The controversy over constitutional issues never really died down. Rather, as the date for announcement of the new constitution drew nearer, the opposition to what was feared to be coming was intensified. The regime was aware of this development. A former prime minister, Suhrawardy, was arrested on January 30, 1962 on a charge of sedition. Commenting on the grounds for the arrest, President Ayub Khan said, "Now that the new Constitution was going to be launched, we want people to be benefited by it and get it to work."[697] Students in Dacca and other cities in East Pakistan demonstrated against Suhrawardy's arrest and made such political demands, as lifting martial law and establishing representative government under a parliamentary system. Violent demonstrations in support of these demands raged in most towns in the province for over a week.[698]

It was, therefore, not entirely unexpected that, as soon as the new Constitution came into effect on June 8, 1962, demands for its "democratization" were voiced in all quarters. On June 24, 1962, nine political leaders of East Pakistan, including three former Chief Ministers, issued a statement calling for the establishment of a Constituent Assembly composed of elected representatives of the people to frame a constitution for the country. The statement said that a constitution, to be democratic and to command the loyalty of the people, must be framed by the representatives of the people. "The present constitution lacks this basic strength, *viz*. the popular consensus enshrined in basic laws framed by the people's representatives." It pointed out the undesirability of indirect elections, which were based on a "distrust of popular will". Besides, the

[695] See Z. H. Lari, "Address of Welcome to the Minister of Law", (1960) 5 *Pakistan Bar Journal* 56.
[696] See E.A. and K.R. Schuler, *Public Opinion and Constitution Making in Pakistan*, p. 58.
[697] *Dawn*, February 1, 1962.
[698] *Ibid*., February 14, 1962.

assemblies created by the Constitution were given practically no power to decide anything without the agreement of the President. "Whereas the President, after the initial start, can rule without any agreement of the Assembly, both in the legislative and executive fields. Experience of barely three weeks' working have already demonstrated that the present scheme is unworkable, unless it is radically remodeled and changed." As the leaders were calling for the establishment of a constituent assembly, with popular representatives, to frame a constitution, they would not comment on the form of the constitution. But they maintained that "by far the largest volume of opinion is for the parliamentary form. The reasons are historical. Our long association with experiences of the working of this system predisposes us to it."[699]

The statement of nine political leaders was the first organized reaction to the presidential constitution. By calling for a new constituent assembly, they indirectly questioned the right of any individual to impose a constitution on the country and demanded the replacement of the authoritarian presidential system by a liberal parliamentary system. Sardar Bahadur Khan, the brother of President Ayub Khan, who became the leader of the opposition in the National Assembly, called the new Constitution "a thoroughly undemocratic" instrument, which did not suit the genius of the people. He said that the presidential system was doomed to failure in Pakistan, because of the "unique geographical, social and economic conditions of the two wings", and reiterated the plea for reverting to the parliamentary system, which would "best meet the requirements of both wings by ensuring them due share in political authority".[700] Chaudhri Mohammad Ali, a former Prime Minister, described the Constitution as "of the President, for the President and by the President". He condemned the system established by the Constitution as designed to concentrate and retain all political powers in one hand.[701]

There was, therefore, in opposition circles, a unanimous demand not merely for the removal of the undemocratic features of the Constitution but, for the total abolition of the presidential system and its replacement by the parliamentary system, with which, it was argued, the people and their leaders were familiar.

One of the grounds of attack on the Constitution was the absence of justiciable fundamental rights. Even those who were prepared to give a trial to the presidential form of government were disappointed that these rights were now dependent on the good will of the legislature. "No feature of the Constitution was more severely attacked or criticized than this particular provision. The issue of fundamental rights has created a storm of controversy and insistent demands have been made on behalf of the people to make these 'principles of law-making' justiciable and enforceable by the courts..."[702]

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[699] *Dawn*, June 25, 1962.
[700] *Ibid*., April 2, 1962.
[701] *Dawn*, April 2, 1962.
[702] G.W. Choudhury, *Democracy in Pakistan*, p. 264.

President Ayub Khan in his inaugural address at the Pakistan Lawyers' Convention on September 30, 1960, said that the fundamental rights must be "preserved and protected" unimpaired; this was beyond question. But whether the legislature or the court was to be entrusted with their protection was for the Constitution Commission to recommend; what they would propose he would not anticipate.[703] The Constitution Commission on its part examined the question thoroughly and accepted the opinion of 98.39 percent of those who, in answer to the questionnaire, had said that the fundamental rights, as in the Constitution of 1956, should be incorporated in the new Constitution. The Commission observed, "we do not think we can follow the example of England in this regard because, there, the tradition that has grown, and the genius of the people, make it almost certain that the Parliament, though it is supreme in the sense that it can pass any law, which the English Courts have no power to declare as void, would not infringe the fundamental rights, except in grave emergency and that, too, only to the extent strictly necessary."[704] But the new Constitution did not incorporate the commission's recommendation and left the rights at the mercy of the legislature. The nationwide feeling about the absence of justiciable fundamental rights in the Constitution soon took the shape of a concrete political demand from all quarters. In every statement and speech concerning the Constitution, political leaders were obsessed with the deprivation of the basic rights of the people. The Council of the Muslim League at its meeting in Dacca on October 28, 1962, passed a resolution to pursue a minimum demands programme, which included the restoration of justiciable fundamental rights.[705] But strangely enough Manzur Quadir, an eminent lawyer, who is credited with the final drafting of the Constitution, tried to defend the position by saying that the charter of the fundamental rights was there in the shape of "principles of law-making" and, that there were "definite checks and balances" to make sure that they were not violated at any stage.[706] But the members of the National Assembly, who had been elected under the new Constitution did not agree with Manzur Quadir. Mohammed Ali of Bogra, a former Prime Minister, who had replaced Manzur Quadir as External Affairs Minister, said in the National Assembly within three days of its inauguration that the "omission of fundamental rights" was one of the many "objectionable and obnoxious features" of the new Constitution. Mohammad Ali, however, said that, had President Ayub Khan been left alone, these features would not have been there. They were there "due to the evil influence of a political upstart Can obvious reference to Manzur Quadir J. who was the proto-type of Russia's Rasputin."[707] At a public meeting at Lahore, several members of the National Assembly demanded the restoration of civil liberties by making fundamental rights fully justiciable.[708] While there were members who wanted the complete abolition of the Constitution and a reversion to parliamentary

[703] M. Ayub Khan, *Speeches and Statements*, Vol. pp. 30-31.
[704] *Report of the Constitution Commission* (1961) Para. 161, p. 101.
[705] *Dawn*, October 29, 1962.
[706] *Ibid*., March 7, 1962.
[707] *Dawn*, June 12, 1962.
[708] *Ibid*., June 26, 1962.

system, there were others who wanted to retain the broad structure of the Constitution but to democratize it by incorporating essential liberal features, such as justiciable fundamental rights.

Along with the demand for the restoration of fundamental rights, a demand for the enhancement of powers of the judiciary was also pressed. As has been said earlier, under the new Constitution, though the Supreme Court had been given original jurisdiction over disputes between the governments, it was provided that the validity of any law could not be questioned on the ground that legislature by which it was made had no power to make the law.[709] The concept that the judiciary should prevent the different organs of the state from exercising their constitutional powers beyond the constitutional limitation was discarded in the new system. The responsibility of deciding whether a legislature has power to make a law was entrusted to the legislature itself and the court was denied the right to examine the *vires* of any legislation. Articles 57 and 58, which gave power to the Supreme Court to hear inter-governmental disputes and to grant special leave to appeal were said to conflict with Article 133, which barred the judiciary from questioning any law. It was asked "How can the judiciary settle disputes between the central and a provincial government, or interpret the Constitution, if it has no power to decide the legality of enactments passed by any legislature?"[710] To place the judiciary in its former position with powers to examine the legality of any legislation, and to safeguard the fundamental rights from encroachment by any authorities including legislatures, was, therefore, a strong and extremely popular demand.

The system of indirect elections to the office of the President and to the National and Provincial Assemblies, as provided in the Constitution of 1962, attracted probably the most intense criticism in all circles. It was interpreted as a deprivation of people's basic right to elect their rulers. President Ayub Khan in his broadcast on March 1, 1962, said that the indirect system of election was adopted, because the direct system would involve delay in establishing constitutional government in the country and was far too expensive. He implied that ordinary voters were incapable of exercising their franchise in a proper manner, with a conscious understanding of national and international issues. The President said, "Anyhow the voters will be less liable to be exploited and misled in this system than in direct elections, where they were driven as cattle to polling booths."[711]

But criticism of the indirect system of election was wide-spread. The nine East Pakistani leaders in their joint statement said that "the present document [the Constitution of 1962] is framed on a distrust of popular will. Whatever be the justification put forward for that, a body of 80,000 electors have been provided as the base of the system in a

[709] *Constitution of 1962*, Article 133(2).
[710] G.W. Choudhury, *Constitutional Development in Pakistan* (1969), p. 238.
[711] *Dawn*, March 1, 1962, Constitution Supplement, p. II.

population of more than 80 million."[712] Other leaders also joined in the demand for establishing the "democratic right" and "sovereignty of the people".[713] The Council Muslim League under Khawaja Nazimuddin included direct elections on the basis of adult franchise in their minimum six-point political demands for democratization of the Constitution. The National Democratic Front, which combined all the opposition elements under the leadership of Suhrawardy, demanded that the people should be given their democratic right to elect their representatives.[714]

The Constitution Commission, it may be pointed out, while recommending a presidential form of government, with heavy responsibilities imposed on the President, advised his direct election, though on a restricted franchise. It also recommended direct election to the central and provincial assemblies.[715] The indirect system provided by the Constitution was attacked as a means of perpetuating the existing regime, and it was said that President Ayub Khan "had no faith in the people, the masses who had won Pakistan".[716] An eminent Australian scholar, commenting on the Constitution of 1962, said, "In view of Ayub's avowed professions of democracy, this document, which grants the President extensive powers on one hand and denies people the right to elect him or members of parliament in direct elections, falls much too short of general expectations. In fact this constitution is based upon the distrust of the people, the repercussion of which may be far-reaching." The writer further observed

> "By outlawing general elections based on adult franchise, President Ayub may well precipitate what had already caused so much chaos. Direct elections, through public debates and ideological conflicts only, clarify issues and lead to firm decisions by popular choice. In contrast, indirect elections, conducted in a much smaller body — in this case 500 basic democrats electing one member of parliament — must admit of personal pressures, parochial interests, and even bribery."[717]

The indirect system of elections through basic democracies came to be regarded as symptomatic of the undemocratic nature of the Constitution, and opposition to it became almost universal in Pakistan.

It has already been observed, while discussing the legislatures under the new Constitution, that the Assemblies — both central and provincial — were chambers of discussion rather than of decision. The National Assembly was dependent upon the President's will even for its own sittings, unless there was a requisition by at least one-

[712] *Ibid*., June 25, 1962.
[713] Suhrawardy's statement, *Dawn*, September 24, 1962.
[714] *Dawn*, October 5, 1962.
[715] *Report of the Constitution Commission* (1961) para. 109, pp. 68-69.
[716] Richard Wheeler, "Pakistan, New Constitution, Old Issues", (1963) 3 *Asian Survey* 107.
[717] D.P. Singhal, "Democracy with Distrust", (1962) 8 *The Australian Journal of Politics and History*, p. 200.

third of the total membership and it was summoned by the Speaker.[718] Though it was provided that there must be two sessions of the Assembly within a year, the President, having absolute power of legislating by Ordinance, was not likely to be keen on summoning it, and when the Assembly was summoned by the President, it was he who prorogued it. The Assembly's law-making power was subject to Presidential veto, and the President in any conflict, could appeal to his electors over the head of the legislators or even dissolve the Assembly. But it was in financial matters that the Assembly's role was made most insignificant. Only a very negligible portion of the total budget — only the new expenditure and new taxation — was subject to its control. The rest could be discussed by the Assembly but could not be voted. The Assembly had, therefore, little scope for influencing the executive's policy. Explaining the provisions regarding financial procedure under the Constitution, President Ayub Khan in his introductory speech said,

> "In order to reduce chances of conflict between the Assembly and the President and to prevent paralysis of the administration and to ensure continuance of ongoing schemes, it has been laid down that the previously passed budget shall not be altered without the permission of the President, and new taxation shall not to levied without the consent of the National Assembly. This is based on the theory that the President is finally responsible to the country for administration and the members of the National Assembly represent the feeling of the people who have to pay the taxes."[719]

But it is obvious that the "feeling of the people" in respect of the "previously passed" taxes and expenditure had no chance of being expressed in the Assembly.

In view of this position, the demand for the extension of Assembly's powers received enthusiastic popular support. The statement of the nine leaders mentioned earlier pointed out that the Assembly was absolutely powerless *vis-a-vis* the President and it could not do anything unless the President agreed. The minimum six-point demand of the Council Muslim League included giving "full" powers to the Assemblies, including control of finance.[720] The opposition leaders, when talking of a "democratic constitution", in contrast to the Constitution of 1962, were demanding direct elections on the basis of adult franchise to Assemblies, which should have adequate control over the executives. The members of the National Assembly, who had been elected under the Constitution, started clamoring for increased powers for the Assembly. Even those who supported President Ayub Khan's programme refused to accept ministerial office, if it meant losing their seats in the Assembly. The politicians, who had been elected to the National Assembly, attached high importance to their status as members of parliament,

[718] *Constitution of 1962*, Article 22(2).
[719] President's Broadcast on March 1, 1962. *Dawn*, March 1, 1962. Constitution Supplement.
[720] *Dawn*, October 29, 1962.

which they thought should be allowed to exercise effective legislative powers with substantial control over the executive.

But President Ayub Khan was, apparently, not willing to concede so much, though he acceded to their demand for retention of their seats in the Assembly; this, however, was frustrated by a decision of the Supreme Court.[721] "The President has often not only dismissed the doctrine of popular sovereignty as emotional and unrealistic in the context of developing areas, but has also been disdainful towards the idea of the executive being accountable to the wishes of or demands of the parliament." Writing in 1968 the same writer recorded that "the common complaint is that under the present system the National and Provincial Assemblies have not been taken into the government's confidence in either the formulation or discussion of government policies."[722] The issue became synonymous with the demand for a parliamentary system of government and proved to be a major obstacle in any dialogue between the regime and the opposition in the country.

We have already said that the framework of the Constitution was designed to provide for a strong centre, with provinces enjoying only limited powers at the pleasure of the centre. In the legislative sphere, though there was an exclusive list of central subjects and the province had power to make law on any unremunerated subject, in the name of national interest which was stretched to include the security of the country, planning, coordination and the achievement of uniformity, the central legislature could ignore the third schedule and legislate on any matter. And in the case of conflict between a central law and a provincial law, the former was to prevail. In a conflict between a provincial Assembly and the Governor, it was the central assembly that would resolve the conflict; the provincial assembly was in every way subservient to the central assembly. In the executive sphere the Governor, who wielded the provincial executive power, was an appointee of the President and, in the performance of his duties, he was subject to control and direction of the President. The provincial ministers were appointed by the Governor, with the concurrence of the President. The ministers' role was diminished by a provision in the "Rules of Business" that, if there was any disagreement between a minister and his departmental secretary, the matter had to be referred to the Governor for final orders![723]

So, by any standard the Pakistan Constitution of 1962 was not federal. The centre had predominance in every field and provincial authorities had to act like local authorities in a unitary system. The question of regional autonomy was one of the issues which hampered constitution-making in Pakistan during the period 1947-1956. Even after the promulgation of the Constitution of 1956, politicians from East Pakistan protested against the excessive concentration of power at the centre. During the period of martial

[721] *Fazlul Quader Chowdhury v. M. Abdul Hague*, supra.
[722] K.B. Sayeed, "Pakistan: New Challenges to the Political System" (1968) 8 *Asian Survey* 97.
[723] K.B. Sayeed, "Pakistan's Constitutional Autocracy", *Pacific Affairs* (1963) p. 365.

law (1958-1962), when most powers were exercised by the President, supported by the army and the civil service, which was mainly recruited in West Pakistan, public opinion in East Pakistan demanded complete control over her own affairs. The Constitution Commission, in its report, recognized this feeling in East Pakistan and advised a greater degree of autonomy for the provinces. It said prophetically, "It is our considered opinion that, if we impose a unitary form, ignoring the state of feeling in East and West Pakistan, we would be driving the average Muslim of East Pakistan into the arms of the extremists and the disruptive elements, which are active in that province."[724]

The issue proved too difficult to admit of any political solution. The question of having a greater degree of control over her own economic affairs has been a burning issue in East Pakistan since 1947. The East Pakistan Awami League leader, Sheikh Mujibur Rahman, put forward his now famous and controversial six-point autonomy programme before the All-Party National Conference, held with all opposition leaders in February, 1966, at Lahore. But the programme did not find support in the Conference.[725] It is the degree of autonomy, which has threatened the political unity of the two wings. Further, people from the smaller provinces of West Pakistan became restive over, what they called "Punjabi domination" in the one unit of West Pakistan. They refused to accept one unit as a fait accompli and there were agitations for the breakup of the West Pakistan Province and the restoration of the pre-unification provincial entities, with autonomous powers over their own affairs. The demand for autonomy, therefore, became a popular ground for attacking the Constitution of 1962.

With the proclamation of "martial law" on October 8, 1958, all political parties were abolished and politicians were subjected to various restrictions under the martial law regime. President Ayub Khan waged a ceaseless campaign against the politicians and political parties, and envisaged a no-party state. The President, in his nationwide broadcast on March 1, 1962, said that the sad experience of the past had proved the undesirability of having political parties, which, if allowed to reemerge, would not be "any different from what they were before". He said, "In our case, political party activity only divides and confuses the people further and lays them open to exploitation by the unscrupulous and demagogues. So, I believe that, if we can run our politics without the party system, we shall have cause to bless ourselves, though I recognize that like-minded people in the Assemblies will group themselves together. That is not serious, but what is dangerous is for these groups to have tentacles in the country."[726] The President restated his view in his inaugural address[727] to the National Assembly, where he said, "Being only concerned with the means, fair or foul, of acquiring power, political parties have been our bane in the past." They were responsible for the chaos and

[724] *Report of the Constitution Commission* (1961), Para. 63, P. 37.
[725] *Dawn*, February 12, 1966.
[726] *Dawn*, March 1,1962, Constitution Supplement.
[727] *Dawn*, June 9, 1962. Full text of President's speech at page 4.

instability in the past and for these reasons the President said he was "personally opposed to the idea of political parties".

The Constitution, by Article 173, put restrictions on revival of political parties and empowered the central legislature to decide the issue. The Constitution Commission, it may be recalled, advised recognition of political parties, based on principles, which the Commission thought were essential for working any form of representative government.[728] The Commission's strong plea for allowing political parties to function was not incorporated in the Constitution. The ban on the parties was criticized as an attempt to prevent public opinion being mobilized on important national issues. It was pointed out that, while the regime had its media for propagating its ideas and views through government agencies, the people were denied this opportunity in the absence of organized political parties.

Not only did the opposition raise its voice against the ban on organizing political parties, but the members of the Assembly who supported President Ayub Khan and his programme also demanded the removal of this restriction. Shortly after the Constitution came into force, the revival of political party activity became a popular demand. It was then observed that "Ayub's attitude in this respect is very confusing; he is prepared to let like-minded people assemble, discuss and decide common problems, yet he is not prepared to allow them to take the natural next step of self-imposed discipline of a party. The President has indeed taken his distrust of the party system much too far to give rise to genuine hope that he will ever willingly step aside and allow its rejuvenation."[729] The 'President's attitude towards party organization was represented as a means of safeguarding his own position by preventing any organized opposition.

Attempts to Liberalize the System

By giving a Constitution to the country, President Ayub Khan had expected that the people, after so much political tutelage during the previous three and a half years, would accept his system without reservation. Efforts were made by Presidential words and action "to impress the population that the President and through him the armed forces were committed to the Constitution and would not permit trifling with it."[730] But, as has been said above, almost simultaneously with the launching of the Constitution came demands for a new constitution or at least modifications of the existing one. Though everything possible had been done to malign the politicians and political party activity during the previous forty-four months, including the promulgation of such statutes as the Political Organizations (Prohibition of Unregulated Activities) Ordinance, 1962,[731] which forbade all political activities till permitted by Act of the

[728] Report of the Constitution Commission (1961) Para. 121, p. 80.
[729] D.P. Singhal, "Democracy with Distrust", (1962) 8 The Australian Journal of Politics and History, p. 200, 209.
[730] K. Von Vorys, *Political Development in Pakistan*, pp. 208-09.
[731] Ordinance XVIII of 1962, P.L.D. 1962 Central Statutes 228.

central legislature the elections to the Assemblies in April-May, 1962, showed that the politicians retained their prestige and influence.

> "The electors demonstrated no aversion for the politicians of past regimes. Although political parties had been prohibited, the vast majority of successful candidates had a clear record of political affiliation. Most impressive was the performance of the Muslim League. In East Pakistan, for example, where the party had been practically wiped out in 1954, no less than 43 out of 76 National Assembly members from the province had been actively associated with the League in the past.[732]

The members of the National Assembly, immediately after their election, started organizing themselves into "like-minded groups" as President Ayub Khan had anticipated. But contrary to Ayub Khan's expectations, different groups demanded in chorus "democratization" of the Constitution. They were, however, divided amongst themselves as to the degree of democratization. On the one hand there were those who wanted the annulment of the new Constitution and the establishment of a parliamentary form of government; on the other hand there was a section of the Muslim Leaguers, which wanted to liberalize the new system by removing such undemocratic features as the suspension of the justiciable fundamental rights, the ban on political parties, and the system of indirect elections. This section "expressed their willingness to support the President in exchange of his acceptance of 'liberalization-of-the Constitution' proposal".[733]

President Ayub Khan, in the face of the mounting opposition to his system both inside and outside the Assembly, agreed to a liberalization programme. This, it was thought, would isolate the group, which wanted the wholesale scrapping of the Constitution and take the offensive out of the hands of the opposition outside the Assembly. It would also rally the support of a strong group inside the Assembly and their followers outside, for the President's system.

The first step in the "liberalization" programme was the enactment of the Political Parties Act, 1962[734] which was passed by the National Assembly at its first session. The Act defined a political party as a group of persons operating for the purpose of propagating political opinions or indulging in any other political activity. While a political party could be formed to function under prescribed conditions, no party could be formed with the object or acting in a manner prejudicial to the Islamic Ideology, the integrity or the security of Pakistan. Nor could any party be formed at the instance of, or with financial aid from, any government of or party in a foreign country. The central government could refer to the Supreme Court the question whether a political party

[732] K. Von, Vorys, *op. cit*., p. 238.
[733] K.P. Misra, et al., *Pakistan's Search for Constitutional Consensus* (1967), p. 37.
[734] Act III of 1962, P.L.D. 1962 Central Statutes 698.

came within the mischief of the Act. If the Supreme Court found against the party, it would automatically stand dissolved and its funds and property would be forfeited to the central government. Certain classes of persons, including those disqualified under the Elective Bodies (Disqualification) Order, 1959, were debarred from joining any political party, either as members or office-bearers. Any such person associating with any political party was liable to suffer imprisonment up to two years, or fine or both.

After the enactment of this statute, the old political parties were revived one after another. The All-Pakistan Muslim Leaguers' Convention, held in Karachi on September 4, 1962, decided to revive the Muslim League and adopted a three-point scheme for the party reorganization.[735] The initiative in reviving the party was taken by the ministers and the party, which later came to be known as the Convention Muslim League, gave full support to the presidential constitution. President Ayub Khan joined the party in May, 1963, and became its president in the following December. The next step was the revival of the "council" Muslim League, which, at its Dacca Conference in October, 1962, adopted a six-point demand for liberalization of the Constitution. Other parties followed suit. But, with the exception of the Convention Muslim League, all other parties joined forces with Suhrawardy's National Democratic Front. The Front was described, to avert action under the Political Parties Act, as a "movement" and not a party, which was working for the democratization of the political system and the realization of fuller democracy in the country.[736]

The next important step in "democratization" of the Constitution came when in March, 1963, a bill was introduced by the government in the National Assembly which would, in effect, convert the original "principles of law-making" into justiciable fundamental rights. The bill was the first amendment to the Constitution proposed. While its object was to make the enumerated rights enforceable by the courts all regulations and laws promulgated during the martial law period were to be protected from avoidance for repugnancy to those rights. There were hundreds of such regulations and laws. The Opposition in the National Assembly was not willing to support a constitutional amendment which would protect the numerous undemocratic measures promulgated in the past. The clause purporting to protect such measures, therefore, provoked a storm of controversy and the government was unable to muster the two-thirds majority necessary for amending the Constitution. After much controversy, the government agreed to reduce the number of protected statutes to thirty-one, and, with the support of a splinter opposition group, the Constitution (First Amendment) Act, 1963[737] was passed in December, 1963.

The first amendment also added the adjective "Islamic" to the title of the Republic, making it similar to that in the Constitution of 1956. For the original chapter on

[735] *Dawn*, September 5, 1962.
[736] See Mushtaq Ahmed, *Government and Politics in Pakistan* (1963), p. 284.
[737] Act I of 1964, P.L.D. 1964 Central Statutes 33.

"Principles of Law-Making and of Policy" was substituted one entitled "Fundamental Rights and Principles of Policy". The rights enumerated in the chapter included the right to life and liberty, safeguards against unlawful arrest and detention, freedom of movement, freedom of assembly, association and vocation, freedom of speech, of religion and right to acquire, hold and dispose of property. One right declared all citizens equal before law and guaranteed equal protection of the law. Safeguards against discrimination in the public services on the grounds of race, religion, caste, sex, residence or place of birth were provided, and every section of citizens had the right to preserve its own culture, script and language. These rights were generally to be enjoyed subject to reasonable restrictions imposed by law on such grounds as national security, public order and morality.

It was provided that laws, customs and usages, having the force of law, inconsistent with the enumerated fundamental rights, would, to the extent of inconsistency, be void, and that the State should not make any law which would take away or abridge any of the rights. Laws made in contravention of this provision would, to the extent of the repugnancy, be void.[738] Laws relating to the Defence Services and other forces with the responsibility for maintaining public order, and laws specified in the Fourth Schedule, were exempted from the operation of the above provision.[739] The Fourth Schedule listed thirty-one statutes, which included the Public Offices (Disqualification) Order, 1959, the Basic Democracies Order, 1959, the West Pakistan Land Reforms Regulation, the Muslim Family Laws Ordinance, 1961, the Political Parties Act, 1962, and the West Pakistan Criminal Law Amendment Act, 1963. It is significant that the statutes which had aroused public controversy during the martial law period were all protected.

To enforce the fundamental rights the High Court was given power to make, on application from an aggrieved party, any appropriate order or direction to any person or authority, including any government, exercising any power or performing any function within the territorial jurisdiction of that court.[740] Article 133 of the Constitution, which forbade courts to question the constitutionality of any law passed by any legislature was amended so as to give the High Court power to determine the validity of any law, when enforcing a fundamental right. It is to be noted that, differing from its position under the Constitution of 1956, the Supreme Court was not given original jurisdiction to enforce the rights. As in the previous Constitution, the President was empowered to suspend, during a Proclamation of Emergency under Article 30 of the Constitution, the right to move a High Court for enforcement of any right specified, and proceedings pending in court for the enforcement of such rights could also be suspended.[741] The President declared an emergency on 6 September, 1965, at the commencement of the war with India, and the operation of certain fundamental rights

[738] *Constitution of 1962*, Article 6(1) and 6 (2).
[739] *Constitution of 1962*, Article 6 (3).
[740] *Ibid*., Article 98(2)(c).
[741] *Constitution of 1962*, Article 30(9).

was suspended by a presidential order. Article 30 was further amended in November, 1965 to enable the State to make, during the continuance of emergency, any law or take any executive action derogatory to the rights of freedom of movement, assembly, association, vocation, speech and the right to property. Any law made or action taken in pursuance of this provision was to remain valid till the revocation of the proclamation.[742] The power of the President under Article 30 to proclaim an emergency could be exercised when there was a threat to the security and economic life of the country, but such wide and vague terms imposed very little restraint on the President, whose action could not, in any case, be called in question in the court. As the period of validity of the proclamation was unnecessarily prolonged the rights incorporated in the Constitution proved to be of little value. The operation of the rights was suspended in September, 1965 and was not restored till February, 1969, when, due to violent demonstrations, the proclamation of emergency had to be revoked!

To examine the system of elections the President appointed the Franchise Commission in August, 1962, with Akhter Hussain, the Chief Election Commissioner, as its chairman. The five-member commission completed its work in six months and submitted its report in February, 1963. The majority report recommended that "universal adult franchise should be the basis of elections for the President and members of the National and Provincial Assemblies ..."[743] It argued that to obviate the danger of illiterate voters being misled by unscrupulous party propaganda, the proper remedy was a stringent law against such exploitation and not "in depriving a substantial section of the country's adult population of their rights to vote on the ground of illiteracy". The majority made the point that the President with his "wide powers and tremendous responsibilities" under the Constitution could inspire and command the confidence of the people only if he was elected by popular vote in a direct election.[744] But, as a gesture of compromise towards the regime, the commission recommended that the next presidential election should be held indirectly, through an electoral college,[745] but the number of electors should be 120,000 instead of eighty thousand.[746]

The minority, including the chairman himself, recommended the retention of the indirect system of election, as provided by the Constitution. The report was, however, not presented to the National Assembly until August, 1963. The Opposition strongly criticized the delay, which reflected the government's dilatory attitude on the issue, and demanded the enactment of the necessary statute, incorporating the commission's recommendations. But the recommendations of the majority came as a' surprise to the government, and the President and his advisors were not prepared to change the

[742] *The Constitution* (Fifth Amendment) Act, 1965, Act No. XVII of 1965.
[743] *Report of the Franchise Commission* (1963), para. 10.
[744] *Report of the Franchise Commission* (1963), para. 11.
[745] *Ibid*., para. 15.
[746] *Ibid*., para. 17.

system of election. So, on the plea that the commission's recommendations were not unanimous, the report was referred to a Special Committee set up by the Ministry of Law which was required to examine and analyze the recommendations. The Special Committee held that universal adult franchise had been conferred on the people by the Constitution, but in view of the conditions prevailing in the country, that right should be exercised on an indirect basis. It, therefore, recommended the retention of indirect election of the President and the Assemblies by an electoral college which "should be sufficiently broad-based".[747] On the basis of this recommendation, the Electoral College Act, 1964, was passed, providing for an electoral college consisting of eighty thousand members for the purpose of electing the President and the members of the Assemblies. The number of electors was increased to one hundred and twenty thousand[748] only after the presidential election of 1965, being part of the second installment of "liberalizing" measures in the latter half of the decade.

Despite the consistent demand for enhancement of the powers of the Assemblies, the attitude of the regime seemed unrelenting though the government had a clear majority in the Assemblies after the 1962 election and an overwhelming majority after 1965, the President was unwilling to give in to this demand. Even members of his own party were not satisfied with the position of the Assemblies, which, *vis-a-vis* the executives were insignificant. It did not take long for members to realize the actual position and become conscious of the impotence of the Assembly. It was reported that, during a general discussion on the budget for the year 1963, the National Assembly had to be adjourned for want of a quorum.[749]

After the elections of 1965 government circles seemed in favor of increasing the power of the Assemblies. The first minor concession came when the Constitution (Seventh Amendment) Act, 1966,[750] was enacted, giving powers to the Assemblies to make, when necessary, amendments to the Ordinances by the President or a Governor. The amended Ordinance, however, was subject to the assent, as the case might be, of the President or the Governor. By the Constitution (Eighth Amendment) Act, 1967,[751] the number of members of the Assemblies was increased to two hundred and eighteen. It was also reported that President Ayub Khan was willing to give more power, including financial power, to the Assemblies, if the leaders of the opposition groups would make an agreed recommendation to that effect.[752] Talk of more powers for the Assemblies was finding favor with the members of the government during 1967-68. But the nation-wide movement against the system as a whole led to the abrogation of the Constitution itself in March, 1969.

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[747] *Report of the Franchise Commission 19*63 — An Analysis (1964), para. 54.
[748] The Electoral College (Second Amendment) Act, 1967 Act No. XVII of 1967, P.L.R. 1968 Statutes 3.
[749] K.B. Sayeed, "Pakistan's Constitutional Autocracy", *Pacific Affairs* (1963), p. 365.
[750] Act No. XXVI of 1966, P.L.D. 1967 Central Statute 65.
[751] Act No. XVIII of 1967.
[752] G.W. Choudhury, *Constitutional Development in Pakistan* (1969), p. 206.

Failure of the Constitution of 1962.

The Constitution given to the country by Field-Marshal M. Ayub Khan was said to provide for a presidential form of government. But except for a vague structural similarity with other presidential constitutions of the world, such as that of the United States of America or de Gaulle's fifth republic, the new Constitution was a unique combination of a variety of political institutions, designed to concentrate all effective powers in the President, who was the key-figure in the whole political setup and ruled the country without any real check from any quarter whatsoever. It was observed, "The Constitution has been styled as prescribing a presidential form of government in Pakistan, but it would be misleading to liken it to the American system." There was very little substantial resemblance between the two, and Ayub Khan wielded more power than the American President. "Not even de Gaulle, the French President under the fifth republic, can match Ayub's authority."[753]

As the chief executive of the State, the President, under the Constitution of 1962, had unlimited executive powers, which were not subject to any control by the legislature. Not only was his power unlimited in the central executive field, but a provincial governor who exercised provincial executive powers, was the President's nominee and was bound to comply with the directions of the President.[754] The President's legislative powers to make Ordinances was also enormous. This power could be exercised independently of the legislature. Though, when in session the Assembly could disapprove of an Ordinance, there was nothing to prevent the President from re-promulgating the same Ordinance. The law-making power of the Assembly was subject to the President's veto and, in extreme circumstances, he could dissolve the Assembly without consulting anybody. The President was independent of the legislature in financial matters. The National Assembly had limited powers to alter items in the annual budget of "new expenditure" or "new taxation", but these items constituted only a small part of the whole budget, the bulk of which related either to the "charged" or "recurring" items which were outside the control of the Assembly. The impotence of the Assembly in financial matters really made the President all-powerful.

The President had emergency powers without parallel in any other constitutional framework. He was the sole judge of when to proclaim an emergency and when to revoke it.[755] During such an emergency the President could exercise absolute executive and legislative powers, and the National Assembly had no power to disapprove of presidential Ordinances while the proclamation remained in force. He could, by order, suspend the right to move a High Court for enforcement of fundamental right specified

[753] D.P. Singhal, "Democracy with Distrust" (1962) 8 *The Australian Journal of Politics and History*, p. 200, at pp. 211-12.
[754] *Constitution of 1962*, Article 66.
[755] *Constitution of 1962,* Article 30.

in the Order, and stay all pending proceedings for enforcement of these rights. In such circumstances all other institutions became subservient to the President's will. Even the judiciary would lose its vital jurisdiction of enforcing the fundamental rights.

The wide authority given to the President under the Constitution made him a dictator. Such extensive power, it was observed, would not have been conceded to by Ayub Khan himself to anyone else.[756] Furthermore, the Constitution strongly entrenched the position of the President. It was unlikely that a President elected under the Constitution would ever have been removed or successfully impeached. Not only was a three-fourths majority of the National Assembly required for success of any such resolution, but the penal provision that if, in the voting, at least one half of the members did not vote for the resolution the members who initiated the move would lose their seats,[757] made the President's position almost unchallengeable. It has been remarked that the Constitution attached more importance to securing the President in office than to preserving the constitution itself. "For amending the Constitution only a two-thirds majority is required, whereas to impeach the President a three-fourths majority is essential. This obviously makes the President more important than the Constitution."[758]

The unusual concentration of power in the hands of the President led the critics of the Constitution to express doubts as to whether President Ayub Khan had really intended to transfer any power which he had been exercising since the imposition of martial law in October, 1958. It has been said that "because of the fear of growing resentment in the army against his personal rule, Ayub has devised a constitution which gives him civilian support to sustain him against army rebels, without requiring him to surrender even a part of his authority to civil control in return."[759] Professor K. J. Newman, a keen observer of constitutional development in Pakistan, said, "The document bears all the hallmarks of a constitution devised by the Executive, to be imposed through the Executive, and for the Executive."[760] Commenting on the motive behind the system he said, "What emerges ... is the fact that the constitution has been drafted in such a way as to perpetuate the present regime, and to eliminate the competition of political parties for a long time to come."[761] With all power concentrated in his hand, the President under the Constitution of 1962 was described as a "constitutional dictator" with the added advantage that he exercised absolute powers on the authority of a written constitution.

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[756] D.P. Singhal, "The New Constitution of Pakistan" (1962) 2 *Asian Survey* 14.
[757] *Constitution of 1962*, Article 13(7) and Article 14(9).
[758] Biswanath Singh, "Theory and Practice of Controlled Democracy in Pakistan", *The Modern Review* (1963), P. 375, 379.
[759] D.P. Singnal, "Democracy with Distrust", *op. cit.*
[760] K.J. Newman, "The Constitutional Evolution in Pakistan", *International Affairs* (1962), Vol. 38, p. 353.
[761] K.J. Newman, "Democracy under Control", *The Times* (London), March 16, 1962, p. 13.

The next important feature which had far-reaching consequences was the unitary form of the Constitution. The preamble to the Constitution declared that "Pakistan should be a form of federation" and it was generally assumed that a federal form of government for Pakistan was a "dictate of geography", but in the body of the Constitution there was nothing which could be related to the federal principle. Not only was the provincial executive headed by the Governor, an agent of the central government, but, in the Legislative sphere also, the provinces were subordinate to the centre. While the provincial legislative field was wide, the centre could at any time invade the provincial field in the "national interest". It has been observed,

> "... in any case the central power of legislation is exclusive on the matters enumerated in the third schedule and the impediments to its intrusion into the provincial field are not insuperable. In case of conflict, the central law prevails. The provincial legislative power subsists at the pleasure of the central legislature; the federal principle does not receive even lip-service."[762]

The provincial institutions under the Constitution were in the position of local authorities under a unitary constitution.

These features of the Constitution — the concentration of all powers in one hand and the unitary nature of the political setup provoked severe opposition from all quarters. In East Pakistan and in the former provinces of Sindh and North-West Frontier, the demand for full regional autonomy was particularly strong. In East Pakistan it was alleged that, in spite of a constitutional provision to ensure that disparities between provinces were removed,[763] in practice nothing substantial was done towards that end. It was argued that, unless the provinces were given control over their economic matters, East Pakistan would continue to suffer at the hands of the West Pakistan dominated central government. This sense of suffering and deprivation of political power led to the formulation of the six-point autonomy programme of the East Pakistan Awami League, the controversy over which had raised the question of the very existence of a united Pakistan in March-April, 1971. It is difficult to say with certainty where the crisis of 1971 will end. But it seems clear that, whatever the outward appearance of Pakistan may be after this crisis, it will never be the same nation as existed before the crisis. Centralization of power has been the root cause of dissatisfaction in East Pakistan. The Constitution of 1962, without trying to remove the cause, further entrenched it in the political system.

The Constitution of 1962 has been described as a document which did not put any trust or confidence in any person or institution except the President.

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[762] A. Gledhill, *Pakistan, The Development of its Laws and Constitution* (1967), p. 131.
[763] *Constitution of 1962*, Article 145(4).

> "Distrust in the keynote of this document, distrust of the people, of politicians, of parties, of direct elections, of a vice-president and of the parliamentary system."

The writer then observed

> "Actually the complexities of democracy have been far too much overrated; it is about time that the myth of democracy as being the creed of the educated or of advanced societies was exploded. The theme of people's incompetence to work democratic institutions has been overplayed already, continuation of which would either plunge the nation into a general revolt or reduce them to a state Of permanent submissiveness, habitual acquiescence to authority and political apathy."[764]

Despite the eight amendments enacted by December, 1967, the character of the Constitution was not changed. The reluctance of the regime to concede powers to constitutional institutions in the face of strong demands led to the general revolt of the people in the latter part of 1968. The result was the abrogation of the Constitution, and the imposition of martial law for the second time in just over ten years.

The abrogation of the Constitution of 1956, resulting in martial law rule for over four years and then imposition of the authoritarian Constitution of 1962, which concentrated all political powers in one hand, did more than anything else to alienate the people of East Pakistan against the West Pakistan ruling coterie. Ever since October, 1958, East Pakistan virtually had no share in political authority; this helped to develop a growing sense of deprivation and lack of participation in the government of the country, leading to an utter sense of frustration among the people of the Province. It is unlikely that this would have occurred under a parliamentary system. Whatever may be the defects of that system it definitely provides a forum, where popular leaders representing different regions can meet and attempt to reach agreement on different issues. This is what has been conspicuously absent in Pakistan since 1958. If the parliamentary system had been allowed to continue, the popular representatives from East Pakistan would at least have had the opportunity of discussing their problems at the highest level with the Cabinet and their parliamentary counterparts in West Pakistan. Dialogue at the policy-making level was the only means which could have led to understanding between the leaders of the two wings. This became impossible under Ayub Khan's regime, the mainstay of which was the West Pakistan army and the West Pakistan dominated civil service.

Twelve years (1958-1970) of deprivation of political power and alleged economic exploitation led the people of East Pakistan absolutely to distrust their rulers, so the demand for provincial autonomy became inevitable. During these years, due to the political system, true representatives of the people of both wings had no opportunity to

[764] D.P. Singhal, "Democracy with Distrust", *op.cit.*

sort things out. The political leaders were too busy with the movement for "democratization" of the Constitution of 1962 to direct their attention to the real issues. The present crisis (since March, 1971), therefore, can be traced back to 1958 when, without resorting to constitutional means to overcome current difficulties, President Iskander Mirza, for his own selfish ends, with the help and support of his friends in the armed forces overthrew the Constitution.

Chapter X

The Political Movement Against the Constitution of 1962

Origin of the movement

It has been seen in the last chapter that, as soon as the Constitution of 1962 was implemented, all opposition elements in the country demanded its modification on liberal and democratic lines. Even the group of politicians, who had pledged their support to the presidential system, wanted a "democratization" of the Constitution. In order to isolate those who wanted to abolish the presidential system and substitute a parliamentary form of government, President Ayub Khan agreed to meet the demands of those who gave general support to his regime. But the President and his advisors were not prepared to go far enough to meet the general aspirations of the people. Up to the time when the Constitution was abrogated in March, 1969, the two main demands, *viz*., direct elections on the basis of adult franchise, and more powers for the legislatures, were not met, though these even had the support of a section of the President's own party.[765]

Public opinion in opposition to the Constitution of 1962 first found its organized expression in the joint statement by nine East Pakistan leaders who pleaded for the convening of a constituent assembly, composed of representatives of the people, to frame a constitution.[766] A former Prime Minister, Suhrawardy, who had been arrested in January, 1962, on his release in August, joined other opposition politicians and endeavored to form an alliance of those who were opposed to Ayub's political system. He defined his policy by saying

> "The problems at present before the country are very specific and quite different from the problems that confronted political parties before the advent of Martial Law. If we want this country to progress and be stable and united, it is necessary to re-construct democratic institutions and restore democratic values, and all those interested in doing so should get together to achieve this objective. This is not a struggle for power."[767]

[765] The West Pakistan Finance Minister said in July, 1963 that the "consensus of opinion" among his party-men was that the next elections for Assemblies should be on adult franchise basis. Dawn, July 8, 1963; also for the Central Law Minister's view see S.M. Zafar, "*Through the Crisis*" (Lahore 1970), pp. 8-20.
[766] See Chapter IX, supra.
[767] *Dawn*, August 24, 1962.

Suhrawardy's efforts led to the formation of the National Democratic Front (NDF) — a loose alliance of the entire opposition forces from both East and West Pakistan.[768] The Front was launched in October, 1962, to secure "a democratic constitution in which the will of the people would be paramount". The leaders of the National Democratic Front emphasized that the Front was not a political party struggling for power, it was a "movement" for achieving democratic rights of the people. Nurul Amin, one of its prominent leaders, declared at a public meeting that the leaders of the National Democratic Front were prepared to give a written undertaking that they would not seek political offices, if the present regime would only acknowledge the sovereignty of the people and allow them to frame a constitution of their own choice and thereby establish full democracy in Pakistan.[769]

The N.D.F. leader, Suhrawardy, when launching the movement, stressed the need for mutual consultation between the government and the Opposition, in order to reach an understanding for bringing about a democratic political system. He appealed to the President personally to give thought to the matter, and suggested a round table conference to discuss possible amendments to the Constitution.[770] But Ayub Khan rejected the proposal for a dialogue with the "so-called leaders". In a letter to the editor of a Karachi magazine, "Mirror", which, in an editorial supported the proposal for a round table conference, the President said that the Constitution that had been promulgated was "based on the democratic principle of representative institutions and periodic accountability of elected representatives, and there are specific provisions for making changes", It was the Constitution which "suits our condition best" but

> "wholesome changes, when required, should be made through the Assembly in a lawful manner ... So, to say that I should hold a 'round-table conference' with so-called leaders and agree to bypass the Assembly would be tantamount to defying the Constitution and entering into a conspiracy. This is the last thing that I would do."

With obvious reference to the demand for a return to the parliamentary system the President said "the so-called leaders ... want a system of 'democracy' in which complete lawlessness prevails, as in the past, so that they have license to indulge in the activities habitual to them, activities that brought notoriety and chaos in the country."[771]

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[768] The National Democratic Front was supported by the "Council" Muslim League (a splinter Muslim League faction organized in opposition to the official "Convention' Muslim League which gave support to the regime), the former Awami League, the National Awami Party, the Krishak Sramik Party, the Nizam-i-Islam party, the Jamaat-i-Islami, and the Republican Party.

[769] *Dawn*, October 20, 1962.

[770] *Ibid*., October 5, 1962.

[771] Text of the President's letter, *Dawn*, October 11, 1962, p. 9.

President Ayub Khan reiterated his views on a conference with the opposition in his broadcast to the nation on October 27, 1962. He said that, though it was he who had given the Constitution, he could not now amend it as he liked. He advised "the leaders of the people" to persuade the members of the Assembly to adopt concrete proposals for amending the Constitution by the required majority. It was only then that he would come into the picture. He said:

> "When a Bill so passed is placed before me for assent, it is my duty, in view of the oath I took as President, to consider to what extent the will of the majority reflects the will of the people, and what would be its effects on the nation, if it became law. It is obvious that, in judging the will of the people and the national interests, I cannot be influenced by the public utterances of individuals, however vocal or important they may be..."[772]

There seemed, therefore, no possibility, at least in the immediate future, of any understanding between the government and the opposition on constitutional issues. In the meantime, however, the programme for liberalizing the system, to the limited extent acceptable to the regime, had been implemented by enacting the Political Parties Act, 1962, and later incorporating the justiciable fundamental rights into the Constitution. The President refused to go any further. The National Democratic Front, under the leadership of Suhrawardy, and individual political parties, which had been revived after the enactment of the Political Parties Act, continued the campaign for the direct elections on the basis of adult franchise, more power for the Assemblies and powers for the courts to put an effective check on the powers of the executive. The Front leader, Suhrawardy, claimed that it was wrong to suggest that democracy had failed in Pakistan. He said that democracy had never been tried in Pakistan since its inception and the Constitution of 1956 had never been given a chance of "democratic implementation".[773]

The "Council" Muslim League,[774] on its revival in October, 1962, under the Presidency of Khawaja Nazimuddin, a former Governor-General and Prime Minister, in its six-point political programme, demanded, among other things, effective provisions for the full realization of Islamic ideology and the abolition of restrictions on membership and democratic functioning of the political parties. The party called for a united effort to achieve its objectives and pledged its full support for the National Democratic Front.[775]

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[772] Text of the President's address, *Dawn*, October 27, 1962, p. 11.
[773] *Dawn*, October 18, 1962.
[774] After the Political Parties Act, 1962, allowed party activity, the old Muslim League was revived, but in two factions. The one, popularly known as the Convention Muslim League, so-called because it owed its origin to a convention of workers held in Karachi in September, 1962 and was later joined by the President himself, gave support to the Ayub regime. The other, known as the Council Muslim League deriving its name from the meeting of the old council of the party which decided the revival of the party, joined other forces opposed to the regime, and itself became a prominent opposition party.
[775] *Dawn*, October 29, 1962.

The opposition leaders made extensive tours of the two provinces and a convention of the Front leaders was scheduled to be held in Karachi in January, 1963. Apart from the popular movement led by the N.D.F. and other opposition parties, members of the different opposition groups inside the National Assembly formed themselves into a loose alliance for "democratization" of the Constitution. Sardar Bahadur Khan, brother of President Ayub Khan, became its leader.[776]

So, the attack on the Constitution came from all directions, and the President appeared to have been left with the support of the office-aspiring politicians, the civil service and the armed forces only. This was the pattern of politics in 1962, when the Constitution came into force and it remained substantially the same for so long as it survived. In spite of the elections under the Constitution in 19651 which were fought by the Opposition with the clear objective of abolishing the existing political system, the Constitution of 1962 never took root or achieved general acceptance by the people.

In view of the President's rejection of the plan to seek an understanding with the opposition on constitutional issues, and the latter's determination to continue the movement against the Constitution, the regime resorted to measures to stifle the opposition. On January 7, 1963, two presidential Ordinances were promulgated. One of them, the Political Parties (Amendment) Ordinance, 1963,[777] defined a "political party" so as to include any group or combination of persons, who were operating for the purpose of propagating any political opinion or indulging in any political activity, and provided that no person, who was disqualified under any law, should associate himself with any political party. The Ordinance also provided that, if, in the opinion of the central government, a disqualified person was indulging or likely to indulge in any political activity, it could, by Order, restrain him for up to six months from addressing any meeting or press conference or issuing any statement of a political nature to the press. The restriction could be further extended for another period of six months. Contravention of these provisions was punishable with imprisonment not exceeding two years or with fine or with both. The second Ordinance, the Elective Bodies Disqualification (Removal and Remission) Ordinance, 1963,[778] empowered the President to remove or reduce the period of disqualification of a person for election to any elective body on application made to him by any person disqualified under the original order.

These two Ordinances provoked a storm of protests from all quarters. They were represented as machinery for suppressing political opinion on the one hand and of compelling the support of the opposition leaders on the other. All political leaders condemned the two Ordinances. Suhrawardy's comment was that "this is a most blatant form of corruption on the one hand, coercion and suppression on the other".[779] Even

[776] *Dawn*, October 28, 1962.
[777] Ordinance I of 1963, P.L.D. 1963 Central Statutes 11.
[778] Ordinance II of 1963, P.L.D. 1963 Central Statutes 12.
[779] *Dawn*, January 8, 1963.

Dawn, the leading Karachi daily, which had given strong support to President Ayub Khan since he seized power in 1958, was ruthless in its criticism of the measures. An editorial said "It was a sad moment, when the President of Pakistan consented to the promulgation of the two new Ordinances published yesterday, which relate to the activities of persons disqualified under the Elective Bodies Disqualification Order. Sad for democracy, sad for elementary civil rights in a civilized society, sad for Pakistan, sad for the Government and sad for the President." On the President's power of remission or reduction of sentences under the Elective Bodies Disqualification Order, the editorial commented

> "In other words the Ordinance will be seen as a further weapon in the hand of the Government, to be used for winning over politicians now opposed to them ... As enacted, the Ordinance will be regarded as an instrument of coercion, rather than an opening for large-heartedness and clemency."

The editorial concluded "In the sum total, therefore, the new law or 'decrees' will deepen the political gloom in the country and make people wonder whether it was necessary at all to lift Martial Law — if THIS was to follow.[780] Such comments from a pro-government newspaper indicate the intensity of the resentment with which the country received these Ordinances.

But the government, oblivious of these reactions, proceeded with its plan of political repression. The N.D.F. convention was held, as scheduled, in January, 1963 at the residence of Suhrawardy at Karachi, though he was then sick in hospital. It was attended by representatives from all political parties opposed to the regime. The convention was mainly concerned with the formal launching of the Front, whose modus operandi was adopted and approved by the various parties and groups. The police opened cases on charges of sedition against a number of politicians who attended the convention, and in May, arrested eight prominent opposition leaders.[781] The National Democratic Front, however, was weakened by the death of its leader Suhrawardy, in December, 1963 and the illness of Maulana Bhashani another leader. After Suhrawardy's death, the different parties which had composed it were revived and pursued their own programmes in opposition to the regime, but the Front continued to serve as a refuge for disqualified political leaders.

The two Ordinances were clearly promulgated to curb the activities of politicians who were suffering under the disqualification laws and who now took the lead in opposing President Ayub Khan's system. It has been remarked that "the tightening of grip over the activities of the EBDOed politicians showed that they were neither politically

[780] *Dawn*, January 9, 1963.
[781] *Dawn*, May 8, 1963.

forgotten nor discredited enough for President Ayub to ignore them. The move was to liquidate the NDF and the EBDOnians acting under its cover."[782]

In pursuance of the Government's repressive policy against the opposition, its leaders were arrested and detained in both wings of the country and section 144 of the Code of Criminal Procedure[783] was constantly used to prevent the opposition from holding public meetings to mobilize public support. The orthodox Jamaat-i-Islami was banned on January 6, 1964. The two provincial governments in identical press notes declared the party to be an "unlawful association" throughout Pakistan under section 16(i) of the Criminal Law Amendment Act, 1908.[784] The party's chief, Maulana Maudoodi and other members of the executive were arrested on the allegations of having tried "to subvert the loyalty of the people" and planned "to seize power and set up a fascist regime".[785] The government's action was challenged in the High Courts in East and West Pakistan. While the Dacca High Court held that the provision under which the party was banned was repugnant to the fundamental right of the freedom of association and therefore void,[786] the West Pakistan High Court held that the action of the government on January 6, 1964, was not affected by the subsequent incorporation in the Constitution of the fundamental rights on January 10, 1964. The Court upheld the provision of the Criminal Law Amendment Act, 1908, as being an emergency measure, designed to stop immediately the unlawful activities of an association so that it could not be declared void for repugnancy to section 3 of the Political Parties Act, 1962, which contemplated total disbandment of an association.[787]

The Supreme Court, on appeal, upheld the decision of the Dacca High Court, declaring the provision of the Criminal Law Amendment Act void because it was inconsistent with the fundamental right to freedom of association; that it also overlapped provisions of the Political Parties Act, 1962; as that Act was passed subsequent to the Criminal Law Amendment Act and was designed to deal with all political party activity, it should prevail in so far as it was inconsistent with the Criminal Law Amendment Act. The Act of 1908, it was said, conferred "a naked arbitrary power" on a provincial government and "has the potentialities of becoming an engine of suppression and oppression of an opposition political party at the hands of an unscrupulous party in power."[788] The government action against an opposition political party was thus frustrated, but its action against individual opposition politicians and workers went on unabated.

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[782] D.N. Banerjee, *East Pakistan*, p. 135.

[783] The section of the Code meant to maintain public order empowers magistrates to prohibit an assembly of five or more persons in a public place.

[784] The provision of the Act (XIV of 1908) empowers a provincial government, by notification, to declare an association unlawful, if in the opinion of the government, the association interferes, or has as its object interference with the administration of law and order or that it constitutes a danger to the public peace.

[785] *Keesing's Contemporary Archives*, 1963-64, p. 19883.

[786] *Tamizuddin Ahmed v. Government of East Pakistan*, P.L.D. 1964 Dacca 795.

[787] *Abul A'la Maudoodi v. Government of West Pakistan*, P.L.D. 1964, Karachi, 478.

[788] *Abul A'la Maudoodi v. Government of West Pakistan*, P.L.D. 1964 S.C. 673.

As well as opposition politicians, newspapers critical of government policies were subjected to restrictions. The editor of a Lahore Urdu weekly "*Chattan*" was banned[789] from entering the district of Gujarat under the West Pakistan Maintenance of Public Order Ordinance, 1960. Similar measures were often taken against journalists and opposition politicians.[790] The President himself was intolerant of journalists critical of him. He deprecated "a propensity on the part of some newspapermen, who seemed to be wearing colored glasses and anything to them looked black and gloomy". The President said that such newspapermen served no good purpose for the people of the country they professed to serve. On the other hand they engendered dissatisfaction and created lack of confidence among the people.[791] The President's sentiments were echoed by his followers, including Choudhry Khaliquzzaman, the chief organizer of the Muslim League faction which Ayub Khan had joined in May, 1963; Choudhry even advocated suppression and control of the press. The Council of Pakistan Newspaper Editors strongly protested against this suggestion,[792] and most newspapers published editorials protesting against any move on the part of the government to restrict freedom of the press.

In September, 1963, the two provincial governments simultaneously promulgated identical Press and Publication Ordinances, which, keeping intact the existing provisions regarding security deposits and other provisions restricting printing or publishing anything prejudicial to the maintenance of peace and public order, put restrictions on the publication of proceedings of the Assembly and the courts; only the official versions of these proceedings were to be published. The Ordinance required every printer and publisher to maintain regular account books, and empowered the government to appoint a commission to inquire into the affairs of any printing press or newspaper, and, in particular, to report on whether the newspaper under investigation was in receipt of any extraneous aid from a Pakistan or foreign source.

These measures against the press aroused strong resentment in all sections of the people. Opposition political leaders strongly criticized the press "curb"; the Karachi Union of Journalists, demanding withdrawal of the Ordinances, called for a general strike on September 9 of all working journalists throughout Pakistan in protest against the restrictions.[793] *Dawn* of Karachi, in an editorial, bitterly criticized the "curbs" and said that the measures were particularly unfortunate, when the Council of Pakistan Newspaper Editors had adopted a "Code of Ethics" for guidance of journalists, which was to be implemented voluntarily under the supervision of a court of honor, presided

[789] *Dawn*, July 1, 1963.
[790] Mir Jafar Khan, a Sindh politician, was served with an externment order from Quetta-Pishin district, *Dawn*, July 9, 1963.
[791] *Dawn*, July 7, 1963.
[792] Ibid., July 18, 1963.`
[793] Dawn, September 7, 1963.

over by a High Court judge. The editorial concluded: "The 'curbs' have come too soon and are out of proportion to any faults and failings of even the extreme section of the press."[794]

Journalists throughout the country observed a one day strike on September 9, 1963 and no newspaper was published on the following day. A deputation of newspaper editors waited on the President on September 10 and urged him not to take any action under the ordinances for at least one month; in the meantime they would consider constructive suggestions for removal of the difficulty. The President was reported to have agreed, and recommended the proposal to the provincial Governors.[795] On October 10, 1963 the revised and consolidated press laws were promulgated; they allowed publication of all Assembly and court proceedings, except those whose publication had been prohibited by the authorities. The consolidated Ordinances kept intact the provisions relating to security deposits, closure and forfeiture of newspapers and press for any offensive publication. The government seemed determined to punish the non-conformist newspapers and journalists, and was not prepared to allow them to publish anything which, in its opinion, was irresponsible and destructive criticism of its policies. The press laws indicate the strength of public opinion against the regime and its policies, and government's intolerant attitude towards opposition propaganda.

It has been said earlier that, after the death of Suhrawardy in December, 1963, the National Democratic Front lost much of its force as a united opposition to the regime. Almost all the political parties that existed before October 7 1958 were revived and each party was campaigning for the "democratization" of the Constitution and the implementation of other party programmes. But a move for united action was made as the presidential and assembly elections drew near. A joint meeting of representatives of all opposition parties, the Awami League, the National swami Party, the "Council" Muslim League, the Nizam-i-Islam Party, and the banned Jamaat-i-Islami, was held in Dacca in the third week of July, 1964; it decided to put up a joint candidate in the forthcoming presidential election. The meeting also issued a nine-point programme, which, among other things, demanded direct elections, curtailment of the President's power, enhancement of the Assemblies' powers, and the withdrawal of restrictions on the functioning of political parties.[796] On the other hand the "Convention" Muslim League, of which Ayub Khan became the President in December, 1963, was trying to propagate an idea of allowing the President to be elected unopposed in the national interest. The Central Minister for Communications, Khan A. Sabur, appealed to the opposition parties "to refrain from the unholy alliance ... of setting up a candidate against President Ayub Khan".[797] After Ayub Khan had been adopted officially as a

[794] Ibid., editorial, September 7, 1963.
[795] Dawn, September 11, 1963.
[796] *Dawn*, July 25, 1964.
[797] *Dawn*, July 27, 1964.

presidential candidate by his party, the leading Pakistan daily in an editorial pleaded for "unanimous and unopposed" election of President Ayub Khan.[798]

In September 1964 the Combined Opposition Parties (COP) met in Karachi and adopted Miss Fatima Jinnah as the joint opposition presidential candidate.[799] Her nomination was denounced as "un-Islamic" by the Jamaat-Ulema-i-Pakistan, an orthodox religious party, on the ground that a woman could not hold such an important office as President or "Khalifa" in an Islamic state.[800] But the Majlis-i-Shura of the opposition Jamaat-i-Islami passed a resolution upholding the election of a woman as Head of State "in the present circumstances".[801] Miss Jinnah declared that she was fighting the election with the object of establishing true democracy in the country. Direct election of the President and the Assemblies on the basis of an adult franchise, freedom of thought, speech and association, and a free press were the basic ingredients of a democracy.[802] In the Basic Democracies elections, which preceded the presidential elections, the Combined Opposition Parties supported a programme calling for a fully democratic system of government, direct elections to the Assemblies, representative government and provincial autonomy. The Convention Muslim League — the ruling party to which President Ayub Khan belonged, without officially adopting the candidates, advised the electors to consider their own interest, pointing out that the Opposition parties were committed to the destruction of the basic democracies system. The success of the Opposition would, therefore, mean abolition of the system in the existence of which the interest of the basic democrats lay. The party also decided to "own the person who wins the election" for the forthcoming presidential election.[803]

The presidential election was held on January 2, 1965 and was overwhelmingly won by President Ayub Khan. Just before the election the President, in a personal message to the members of the electoral college, expressed the hope that the electors would not vote for their own "strangulation". He pointed out that, if the opposition won, the basic democrats would be deprived of their "most important" powers of electing the President and the assemblies.[804] Other issues were almost ignored and, therefore, "the largest single factor in the President's victory was the fact that in voting Ayub the electors were voting for themselves".[805] In his victory message Ayub Khan said that "through these elections the people have endorsed their verdict in favor of the Constitution and given me a clear mandate to pursue my internal and external policies,

[798] *Ibid*., editorial, August 21, 1964.
[799] *Ibid*., September 18, 1964.
[800] *Ibid*., September 27, 1964.
[801] *Ibid*., October 3, 1964.
[802] *Ibid*., October 2, 1964.
[803] Sharif al-Mujahid, "Pakistan's First Presidential Election" (1965) 5 *Asian Survey*, p. 280.
[804] *Dawn*, January 1, 1965.
[805] Sharif al-Mujahid, *op. cit*., p. 293.

which they have approved."[806] He said that there should be no more controversy over the Constitution and the political system it had set up.

But the opposition alleged that the elections were not free and fair; the opposition had been handicapped by the Government's frequent use of restrictive measures;[807] government agencies like the radio and television were extensively utilized for Ayub Khan's election propaganda and similar facilities were totally denied to the opposition candidate. Miss Jinnah condemned the government role in the elections in much stronger "terms.

She said,

> "Instances of serious irregularities and malpractices committed at polling stations throughout the country are well known ... The entire conduct of these elections has been marred by flagrant official interference, police high-handedness, intimidation, corruption and bribery. Moreover, they were held under the shadow of section 144, the provisions of which applied, in practice, only to COP workers. In these circumstances the claim that the elections were fair and impartial is absolutely untenable."[808]

The defeat of the Combined Opposition Parties by President Ayub Khan in the election seemed to have shattered the opposition forces, at least for the time being. The opposition had taken part in the election and had tried to demonstrate the unpopularity of President Ayub Khan's political system, but, officially at least, it had been defeated in its constitutional struggle. This election thus marked the end of the first phase of the movement against the Constitution of 1962 by constitutional means. It also marked the beginning of the mass movement, which adopted a violent form three years later.

The Second Phase of the Movement

After the presidential election, the Combined Opposition Parties met in Dacca to take stock of the situation and to plan for the future. Differences cropped up as to whether they should participate in the next assembly elections. Those who wanted to boycott the elections felt that the elections were bound to be "flagrantly rigged" and that they should not be "partners in a farce worse than the last". They had lost faith, not only in the basic democracies, but also in the electors, who could be "intimidated, coerced and bribed".[809] The opposition was actively considering a "mass movement for democracy"

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[806] *Dawn*, January 3, 1965.

[807] The. Combined Opposition's first call to observe "Protest Day" on September 29, 1964 against government's repressive measures, and to mobilize public opinion in its favor was disrupted by prohibitory orders passed under section 144 Cr.P.C. in Karachi and other places. See *Dawn*, September 28, 1964.

[808] *Dawn*, January 4, 1965.

[809] Sharif al-Mujahid, "The Assembly Elections in Pakistan", (1965) 5 *Asian Survey*, p. 538.

in preference to "frustrated attempts" at the polls. They were convinced that, under the existing system of elections, it was not possible to subvert the regime and to establish democracy. In spite of this skepticism, however, the opposition ultimately decided to contest the elections to the National Assembly. In the course of the election campaign, and particularly during the last week, there were large scale arrests, intimidation and coercion of opposition political workers and electors who supported the opposition. Chaudhri Mohammad Ali, after visiting a number of districts, complained that it was the police who were fighting the elections "with police methods".[810]

The result of the National Assembly elections, as expected, was a thumping victory for Ayub Khan's Muslim League and a crushing defeat for the Combined Opposition.[811] The opposition was now more than ever convinced that, in the face of the built-in advantage of the system in favor of the regime, it was impossible to change the system itself by participating in its operation. Demoralized by the election results, the opposition felt that it had won morally by exposing the inherent weakness of indirect system of elections.[812] It was, therefore, decided not to contest elections to provincial assemblies on the common platform, though individual parties were allowed to put up candidates against the ruling party candidates. Instead of fighting a losing battle, the Combined Opposition should, it was felt, explore other ways to prepare the country for the ultimate restoration of "the birthright of democracy of the people".[813]

The presidential and the assembly elections early in 1965 seemed to indicate that the regime was ruling the country in accordance with the Constitution. The opposition had apparently failed to demonstrate that the people were opposed to this system. The reality was, however, different from the appearance. During the campaign for the presidential election, the enthusiastic popular support given to opposition cause proved unmistakably that the majority of the basic democrats elected belonged to the opposition camp. But, when the vital hour came, a majority of them voted for President Ayub Khan for the simple reason that on his victory depended their own survival. So, after a period of disillusionment, the opposition started again demanding direct elections on the basis of adult franchise and the restoration of the parliamentary system of government in the country.

The next unified forceful move, however, did not come till after the signing of the Tashkent Declaration in January, 1966, after war with India in September 1965. The war with India and its conclusion by the Tashkent Declaration caused diverse reactions in the two wings of the country. While the opposition in the western province felt that the signing of the declaration was a defeat for Pakistan's claim on Kashmir, in East Pakistan the cessation of war was generally welcomed, but the wisdom of starting it was

[810] *Ibid*., p. 546.
[811] Only 15 seats in a house of 155 were captured by the Opposition.
[812] Sharif al-Mujahid, "The Assembly Elections in Pakistan", *op. cit*., p. 547.
[813] *Ibid*.

seriously questioned. It was said that the war had exposed the weakness of the defenses of the country, and that East Pakistan, during the 17-day war, was at the mercy of India.[814] The inner reaction of the opposition from both wings was, therefore, anti-government, though for different reasons. An All-Party National Conference of opposition elements was held in Lahore in February, 1966. It was attended by over seven hundred delegates from both wings, and a resolution was passed condemning the Tashkent Declaration, which, the resolution said, was detrimental to the interest and honor of Pakistan and had adversely affected the prospects of a solution of the Kashmir problem.[815] After the conference there were anti-government demonstrations in Lahore and other places, resulting in clashes between the demonstrators and the security forces. The political atmosphere became tense and anti-government feeling grew.

But the significant outcome of this conference was the concrete political demands, on behalf of East Pakistan, of the leader of the Awami League, Sheikh Mujibur Rahman, Who placed before the Conference his now-famous and controversial six-point programme[816] for acceptance as a basis for the constitutional struggle against the regime. But his proposals did not find support in the conference. Sheikh Mujibur Rahman, thereupon, dissociated his Awami League from the other parties at the Conference, published his programme in public and expressed his intention to struggle for the realization of his demands,[817] the most important of which was full autonomy for East Pakistan in her internal affairs. President Ayub Khan denounced the autonomy demand, as aiming at the breakup of the country and warned the people to prepare for the "civil war", if it was forced upon them by the "nefarious activities" of some opposition elements.[818] The Muslim League Council, which the President was addressing, passed a resolution calling upon the government to take adequate steps in order to meet the challenge of the "treasonable campaign and pressure" and to protect the "ideology of Islam and the integrity of the Muslim home-land".

Sheikh Mujibur Rahman, along with a few colleagues, was arrested on May 8, 1966, under the Defence of Pakistan Rules.[819] The Awami League called for a general strike on June 7, 1966, throughout the province of East Pakistan, in protest against government repression and to show public support for its six-point programme. The strike was observed, but disturbances took place in Dacca and Narayanganj, where ten people were killed and several injured when the police opened fire. During the day traffic could not move on the streets, cars were burnt, trains were detained and railway signal lines were cut at different points.[820] The East Pakistan Awami League announced its

[814] See S.M. Zafar, *Through the Crisis*, pp. 72-73.
[815] *Dawn*, February 6, 1966.
[816] See Appendix V.
[817] *Dawn*, February 12, 1966.
[818] *Dawn*, March 21, 1966.
[819] *Ibid*., May 10, 1966.
[820] *Ibid*., June 8, 1966.

decision to observe "anti-repression days" for three days starting from June 17, 1966, to "voice protest against government's repressive measures".[821] The provincial government arrested the editor of the pro-Awami League Bengali daily, "*Ittafaq*" and by a notification under the Defence of Pakistan Rules, forfeited the New Nation Printing Press which was publishing the paper.[822] The closure of the New Nation press affected the publication of two other newspapers — the English language weekly "Dacca Times" and the Bengali weekly "*Purbani*". A joint committee, representing the Council of Pakistan Newspaper Editors, the All-Pakistan Newspaper Society and the Pakistan Federal Union of Journalists, condemned the government action and called upon all concerned to observe a token strike on July 5, 1966, as a protest against government action against the newspapers.[823] The strike was, however, postponed when government gave an assurance of due consideration of the matter.

These actions of the government, which aroused strong resentment throughout the country, led the opposition leaders to explore once again the possibility of evolving a common programme to fight the regime for the "establishment of democracy" in the country. Representatives of six opposition parties met on July 31, 1966, discussed the matter and announced their intention of making continuous efforts in this regard.[824] The discussion resulted in the formation of the Pakistan Democratic Movement, an alliance of five opposition parties; only one recognized opposition party, the National Awami Party headed by Maulana Bhashani, remained outside the alliance. The eight-point programme of the Movement included the establishment of a federal, parliamentary system of government, direct elections on the basis of adult franchise, full regional autonomy, fundamental rights, a free press and an independent judiciary.[825] The formation of the Pakistan Democratic Movement from among the Opposition parties provoked a sharp reaction in government circles; it was represented as a "movement" against the interest and integrity of the country.[826] Though it did not prove to be very, effective in its activities, the Pakistan Democratic Movement nevertheless provided a common platform for opposition politicians to meet and discuss political and constitutional issues. It started holding public meetings and issuing press statements, inviting support for its eight-point programme of constitutional, political and economic demands.

In the later part of 1967 a new phenomenon was observed in Pakistan opposition politics. Zulfikar Ali Bhutto, who was Foreign Minister till April 1966, resigned from the government and became a vocal opponent of the regime, which he condemned for its

[821] *Ibid*., June 15, 1966.
[822] *Dawn*, June 18, 1966.
[823] *Ibid*., June 29, 1966.
[824] *Ibid*., August 1, 1966. The parties were: the National Democratic Front, National Awami Party, Nizam-i-Islam Party, Awami League, Jamaat-i-Islami and Council Muslim League.
[825] *Dawn* May 2, 1966.
[826] *Dawn*, May 4, 1967. In its editorial Dawn gave "it's real meaning" as "Pakistan Disintegration Movement".

adherence to the Tashkent Declaration. He eventually became a strong critic of the whole political system, which he had upheld and served for a long time. Bhutto organized a political party of his own, the Pakistan People's Party, and formally launched it after a convention of his workers at Lahore in December, 1967, with the objective of achieving the "fundamental rights" for the people, which had been denied them under the Ayub Constitution.[827] The emergence of Bhutto's People's Party, which had strong support among young people, particularly the students, proved to be a turning point in Pakistan politics.

The government, on its part, was not prepared at that stage to concede the opposition demands for changing the political system. The emergency declared on September 6, 1965, at the start of the war with India, was not lifted and opposition leaders were being arrested and detained without trial under the Defence of Pakistan Rules, promulgated under the emergency powers. But, in the exercise of its discretionary powers of arrest and detention, the government suffered a serious setback at the hands of the judiciary. The Supreme Court discarded the contention that a person could be preventively detained under the Defence Rules on the subjective satisfaction of the detaining authority, and held that the detaining authority must satisfy the court of the reasonableness of the grounds on which his satisfaction of the necessity of the detention was reached. Article 2 of the Constitution conferred on the citizens the right to be treated strictly in accordance with law, and Article 98 had authorized the High Court to probe into the exercise of power by executive authorities and to ensure that power in the treatment of a citizen was exercised in a lawful manner.[828]

The decision was followed in a subsequent Supreme Court case.[829] But the government, in an attempt to frustrate the effect of these judgments, amended the law by giving the detaining authority power to arrest and detain a person if he "is of the opinion" that detention was necessary. In the case that followed it was argued on behalf of the government that the detaining authority was not required to act honestly, reasonably or on reasonable grounds, so that its satisfaction was purely subjective and could not be controlled by the High Court. But Hamoodur Rahman J., as he then was, pointed out in his judgment that the High Court's power under Article 98(2) was to see that a citizen was treated in accordance with law, and "law" here used was in a generic sense. It was in this sense that mala fides or colorable action under a statute, or action on extraneous or irrelevant considerations, or without any ground at all or without proper application of the mind of the detaining authority, would be an action taken in an unlawful manner. The detaining authority was given a power coupled with a duty. Here the duty was to apply its mind to the question whether the action of the person sought to be detained would fall reasonably within the mischief of the statute. Until such opinion was formed by the honest application of the mind of the detaining authority, there was

[827] *Dawn*, December 3, 1967.
[828] *Malik Ghulam Jilani v. The Government of West Pakistan*, 1967 S.C. 373.
[829] *Abdul Baqi Baluch v. The Government of Pakistan*, P.L.D. 1968 S.C. 313.

no jurisdiction to make the order of detention. The Court was, therefore, entitled to examine the reasonableness of the grounds and to satisfy itself that the detention was necessary.[830] These judgments of the Supreme Court certainly boosted the morale of the opposition, while putting a check on the arbitrary exercise of powers by the executive.

An important development in early 1968, which had a great impact on the mass movement and insurrection later in the year and early next year, was the so-called "Agartala Conspiracy" case. On January 6, 1968, the central Home Ministry announced that twenty-eight persons, including two top civil servants and a few service personnel, had been arrested on a charge of conspiracy to bring about the secession of East Pakistan from the rest of the country in concert with and help from the Indian authorities.[831] Sheikh Mujibur Rahman the Awami League leader, who was already in detention, and a few others, including another senior civil servant, were later implicated in the case. The accused, numbering thirty-five in all, were put in military custody. The trial of the case began in June 1968 before a Special Tribunal appointed under the Criminal Law Amendment (Special Tribunal) Ordinance, 1968.[832] The Special Tribunal consisted of a retired Chief Justice of the Supreme Court and two High Court judges. The Ordinance made special rules of evidence applicable to this case. The Tribunal was empowered to admit any statement made by an accused or a witness, which had been recorded by a police officer in the course of the investigation of the case. This provision was, however, amended by a subsequent amendment of the Ordinance.

The "Agartala conspiracy" case had to be withdrawn under pressure from the opposition movement in February 1969. The case was viewed by the people generally as having no substantial basis and the implication of Sheikh Mujibur Rahman as an afterthought was regarded as only a move to crush the demand for autonomy in East Pakistan.[833] There was no immediate open comment on the case but when the movement against Ayub system in 1968-69 became widespread it served in East Pakistan as the main cause for demonstrations and disturbances. The National Executive of the Pakistan Democratic Movement, however, as early as February 1968, passed a resolution calling upon the government to hold the trial of the "conspiracy" case in open court under the ordinary law of the land.[834]

Such was the political condition of the country and the position of the government *vis-a-vis* the opposition political demands on the eve of the insurrection that flared up late in the. year. 1968. The, mass, movement that started in late 1968 and continued for about five months resulted in the end of the Ayub regime. It was actually sparked off by students agitating in West Pakistan for educational reforms, who on October 15, 1968

[830] *Government of West Pakistan v. Begun Agha Abdul Karim Shorish Kashmiri*, P.L.D. 1969 S.C. 14.
[831] *Dawn*, January 7, 1968.
[832] Ordinance V of 1968, P.L.R. 1968 Statutes (Sec. B) 35.
[833] See S.M. Zafar, *Through the Crisis*, pp. 84-85.
[834] *Ibid*., p. 82.

observed "Education Day" to voice demands, which included the repeal of University Ordinances, which provided for forfeiture of a degree on the ground of the student's subversive activities, withdrawal of the Hamoodur Rahman Report, reduction of tuition fees and extension of other facilities to students.[835] Antigovernment feeling among students was reinforced when on November 8, 1968, one student was killed by the police when they opened fire in Rawalpindi. The students of Rawalpindi, on that day, formed a procession to protest against the behavior of Peshawar customs officials towards a students' party, returning from a tour. The situation deteriorated when the police tried to prevent students from gathering near the Hotel Intercontinental, where the Peoples' Party chairman, Bhutto, was expected. The demonstrators became violent, damaged property, burnt cars and set fire to buses. A curfew was imposed in the city and all educational institutions were closed.[836] Feelings, instead of cooling down, flared up and more disturbances took place in the city; two more persons being killed when the police opened fire. The disturbance spread to Lahore, where Bhutto's arrival was marked by clashes between the police and his supporters, and to Lyallpur, Ginjranwala, Bahawalpur, Peshawar and other places.[837]

On November 10, 1968, two shots were fired by a student at a public meeting at Peshawar and it was said that they were aimed at President Ayub Khan.[838] Demonstrations accompanied by violence took place in protest against police action in most cities of West Pakistan. Bhutto, Wali Khan, the National Awami Party leader, and eleven other opposition politicians were arrested on November 13, 1968, and detained under the Defence of Pakistan Rules.[839] More arrests were made on the following day. The arrest and detention of the political leaders in the wake of the students' agitation and violence created a mass uprising, which was joined by all the opposition political forces, factory and industrial workers, teachers, journalists and all other disaffected sections of the people, who demanded a change of the political system and the redress of their class grievances.

At Peshawar, Lahore and Multan even lawyers formed processions in protest against the arrest of the political leaders.[840] Dacca followed suit. About this time Air Marshal (retired) Asghar Khan, a former Air Force chief, made his debut in politics by making a statement accusing the government of corruption, incompetence and suppression of civil liberties.[841] He was followed by S. M. Murshed, a former Chief Justice of the Dacca High Court, who entered the political field with a view "to assist all those forces that seek to establish the basic freedom of life". In December Lt.-General Azam Khan, one

[835] *Dawn*, October 16, 1968.
[836] *Dawn*, November 9, 1968.
[837] *Ibid*., November 10, 1968.
[838] *Ibid*., November 11, 1968.
[839] *Dawn*, November 14, 1968.
[840] *Ibid*., November 16, 1968.
[841] *The Times* (London), November 20, 1968.

time friend of President Ayub Khan and one of the architects of the martial law regime in 1958, joined the opposition forces and called for a combined "mass movement" for the restoration of democracy. The General said that he had been opposed to the Constitution of 1962 from the beginning. "The people alone have the right to choose their leaders, the hype of constitution and the mode of government they find most suitable."[842] The active participation of these persons of such high standing and previous political independence gave great encouragement to the opposition movement. It now became a universal popular movement against the existing political system, irrespective of party considerations.

The attack on the Constitution of 1962 was further strengthened by a statement made by M. Shahabuddin, a former Chief Justice of Pakistan, who was the chairman of the Constitution Commission appointed by President Ayub Khan in 1960. The former Chief Justice accused the government of representing to the people that the Constitution was in full accord with the Commission's recommendations. He said,

> "I wish to emphasize that there are fundamental differences between our recommendations and the present Constitution. Even a cursory reading of our report would make this clear. We recommended a fully democratic presidential form of government, and we provided effective checks and balances, which do not find place in the present Constitution."[843]

The students' agitation, originally directed to educational reforms, due to clashes with the forces of law and order, took a serious and violent turn by mid-November, when other anti-regime forces joined, and turned it into a mass opposition movement. The government's attempt to suppress the students' agitation by arresting and detaining opposition political leaders, stimulated support for the opposition. People from every walk of life joined in the attack of the regime and its repressive policies. The West Pakistan High Court Bar Association, at an emergency meeting on November 26, 1968, adopted a resolution urging the government to withdraw immediately the declaration of emergency, condemned arbitrary arrest and detention without trial of political leaders, advocates, workers and students, and demanded their immediate release.[844] In almost every town lawyers marched in procession protesting against the suppression of civil liberties, and demanded the release of all political prisoners and the acceptance of students' and workers' demands. The movement, in its initial stage, was hostile to the Muslim League and offices of the ruling party were damaged and set on fire in many places. People belonging to the party were subjected to harassment and violence.[845] Serious violence in both wings followed and, particularly at a later stage in East

[842] *Dawn*, December 19, 1968.
[843] *Ibid*., December 9, 1968.
[844] *Dawn*, November 27, 1968.
[845] The first incident of arson took place at Bahawalpur, where the Muslim League office was set on fire on November 27, 1968. *Dawn*, November 28, 1968.

Pakistan, basic democrats and known government supporters were singled out as targets.

The President in his first-of-the-month broadcast on December 1, 1968, announced that legitimate grievances of students would be redressed and that he had given direction for amendment of the university Ordinances.[846] On the following day at Lahore the President said that he was always ready to discuss national problems with the opposition parties, provided they had any constructive suggestion. The President also denied any plan to amend Articles 2 and 98 of the Constitution. It may be noted here. that since *Shorish Kashmiri's* case government circles had considered an amendment of the Constitution to make the High Court's jurisdiction under Article 98 subservient to the emergency laws, and that the meaning of "law" in Article 2 should be restricted to statutory law and not to include the generic law.[847] But the President's declaration of his readiness to talk was no longer credible when on December 6, he warned the nation that any attempt to change the fundamentals of the existing system would spell disaster for the country.[848]

Demonstrations and disturbances throughout the country continued unabated. On December 7, 1968 at least two persons were killed and several injured in Dacca in clashes between the police and demonstrators. The Opposition in the National Assembly, which was in session in Dacca, staged a walkout when its demands for a discussion of the situation were rejected on the plea that the primary duty of the legislature was to legislate, while the maintenance of law and order was the responsibility of the provincial government.[849]

A general strike in Dacca, Chittagong and other places was observed on December 13 to protest against police excesses and the repressive policies of the government. Processions marched in Rawalpindi, Lahore, Karachi, Hyderabad, Peshawar and other places.[850] Violence, killing and damage to public and private property became part of everyday life in Pakistan. Troops were called out in different places and curfews were imposed. But people became frenzied and no action seemed adequate to quell the riots and disturbances. Students and demonstrators defied the curfew and clashed with troops on several occasions. The death-toll in clashes during these months was estimated in hundreds. Educational institutions, factories and industrial concerns remained closed for months. The country was in a state of economic and political chaos.

In the midst of this insurrection several moves were made to induce the President to hold talks with the opposition. Justice Murshed made an appeal on December 11, 1968,

[846] *Dawn*, December 2, 1968.
[847] See S. M. Zafar, *Through the Crisis*, p. 78.
[848] *Dawn*, December 7, 1968.
[849] *Dawn*, December 8, 1968.
[850] *Ibid*., December 14, 1968.

urging the President to create conditions conducive to holding talks with the opposition by releasing the political prisoners and accepting the principle of direct elections to the assemblies.[851] On December 30 the President admitted that there was "room for improvement in the present constitutional setup", which was open to "genuine and beneficial" amendments in accordance with the wishes of the people. But he insisted that the presidential system was the only means which could ensure political stability and. national progress. To those who held that the parliamentary form was the only democratic system of government, the President harshly remarked that they suffered from an inferiority complex and a "slavish mentality", which had developed under British rule.[852] The President defended the Constitution of 1962 in his monthly broadcast, when he said that the Constitution had been promulgated by him, following; the mandate given to him by the people in 1960. He said that the last two general elections (in 1962 and 1965) were "in fact in the nature of a referendum" on the Constitution, which in the process had received "solid support" from an overwhelming majority of the people. "There can hardly be a more popular and democratic procedure of adopting a Constitution."[853]

The opposition, which was leading a mass movement for the abolition of the Constitution of 1962, naturally did not agree with the President. They differentiated the basic democrats, an overwhelming majority of whom had voted in the elections for Ayub Khan, from the people at large, who, they maintained, were against the Constitution. The Lahore District Bar Association called for a general boycott of the coming elections to the Assemblies under the existing system.[854] The. National Executive of the Pakistan Democratic Movement, after days of discussion in Dacca, announced, on January 6, 1969, its "firm decision" not to participate at any stage in the coming elections under the present "wholly unacceptable Constitution". It called upon the people for their united and determined support in its struggle to achieve "full democracy through direct elections based on adult franchise". The Executive outlined five points as essential for a fair and free election; they were that elections should be direct, that assemblies should enjoy full powers, that the declaration of emergency should be immediately withdrawn, that all political prisoners should be released, and that all cases against politicians, workers and students should be withdrawn. It denounced the Constitution of 1962 and declared all "so-called elections" held under it to be deceitful and a fraud practiced on the people with the sole object of keeping the present regime in power.[855]

The Dacca meeting of the opposition parties led to the formation of the Democratic Action Committee (D.A.C.), comprising representatives of eight opposition parties. The

[851] *Dawn*, December 12, 1968.
[852] *Ibid*., December 31, 1968.
[853] *Dawn*, January 2, 1969.
[854] *Ibid*., January 2, 1969.
[855] *Dawn*, January 7, 1969.

committee announced an eight-point programme for the realization of "full and complete democracy and restoration of sovereignty to the people", which included the establishment of a federal, parliamentary form of government, direct elections on the basis of adult franchise, immediate withdrawal of the declaration of emergency and the restoration of civil liberties. The Democratic Action Committee resolved that, unless these demands were met, the opposition parties would not participate in the elections, and it urged the people to boycott them.[856]

The Democratic Action Committee became the central organization directing the mass movement against the regime. But, as transpired later, the committee was too broadly based to keep all the opposition forces together for long or to give a clear direction to the movement. It, however, proved its ability to create disruptions in all spheres of life by calling for strikes and demonstrations, and thus to make things difficult for the government. On January 17, 1969, "Demands Day" was observed throughout the country on a call from the Action Committee. Clashes between students and police occurred in Dacca on that day and disturbances continued. The death of a student. in Dacca on January 20 when the police opened fire aggravated the situation. Protest processions and demonstrations continued to be held every day and in almost all cases, ended in violence. The crowd on January 24, 1969 attacked the East Pakistan secretariat, ransacked and set on fire the offices of the Press Trust newspapers, the "*Morning News*" and the Bengali daily "*Dainik Pakistan*" and the house of a pro-Ayub member of the National Assembly. In dispersing the violent crowd the police had to resort to shooting, killing several people. Troops were called out and a curfew was imposed in the city.[857]

The insurrection spread to all cities and towns throughout the country. In Karachi clashes occurred between the police and demonstrators, where a curfew was imposed.[858] The Army was called out in Karachi and Lahore to assist the civil administration. Reports of death and destruction caused by anti-government demonstrations were coming from all over the country, and the administration seemed incapable of coping with the grave situation, or restoring law and order. In the face of this violent and wanton destruction, the regime retreated. On January 27 the Governor of West Pakistan said over the radio that the government was "willing to discuss any issue which are agitating the minds of the people".[859] A senior minister had talks with the opposition leaders in Dacca and it was reported that the President would shortly

[856] *Ibid*., January 9, 1969. The parties represented in the D.A.C. were: the Council Muslim League, the National Awami Party (Wali Khan group), the Nizam-i-Islam Party, the Jamaat-i-Islami, the Jamiatul Ulema-i-Islam, the National Democratic Front, the Awami League and the six-point Awami League. The Awami League after its revival in 1964 split into two factions. The one led by Nasrullah Khan joined the P.D.M. in 1967, while the other led by Sheikh Mujibur Rahman adhered to its six points demands. Now both factions joined the D.A.C. The parties which remained out were: The Pakistan People's Party and the National Awami Party (Bhashani group).
[857] *Dawn*, January 25, 1969.
[858] *Ibid*., January 26, 1969.
[859] *Ibid*., January 28, 1969.

send an invitation to opposition political leaders to attend a meeting in order to "thrash out with them the whole constitutional issue".[860]

The Round Table Conference

In his first-of-the-month broadcast on February 1, 1969, President Ayub Khan announced that he would shortly invite the opposition leaders to a conference to discuss constitutional issues. The President said "The Constitution is no word of God. It can be changed. It is not something immutable or static ... I am always ready to welcome any sensible proposal to improve the present Constitution in the light of public opinion." He continued

> "During the last few days certain proposals have been put forward; obviously various aspects of the proposals will have to be considered and in this connection it would be necessary to exchange views and hold consultations with representatives of responsible political parties. My political party, my colleagues and I are ready to discuss the proposals; we shall have no hesitation in agreeing to any settlement that is arrived at through mutual discussion. For this purpose I shall shortly invite representatives of responsible political parties for talks."[861]

So, after nearly seven years, the President agreed to talk to the "so-called" leaders about changes in the political system, that he had given the country in June, 1962. The President's announcement was generally welcomed in the country, though his mention of representatives of "responsible" political parties provoked some criticism. The convener of the Democratic Action Committee, however, required four conditions to be fulfilled before any dialogue between the government and the opposition could be held. They were the withdrawal of the declaration of emergency, the restoration of civil liberties, the lifting of curfews, and the immediate release of all political prisoners.[862] The President on February 5, 1969 wrote to Nawabzada Nasrullah Khan, the convener of the Democratic Action Committee, requesting him "to invite on my behalf whomsoever you like to attend a conference in Rawalpindi on the 17th of February, 1969 at 10.00 a.m., if this is suitable and convenient to you". In the course of an interview with newspaper correspondents, the President also expressed his willingness to meet party leaders outside the Democratic Action Committee such as the leaders of the National Awami Party (Maulana Bhashani's faction) and the People's Party, and independent opposition leaders like Air Marshal Asghar Khan.[863] It was disclosed by the Central Law Minister that there would be no more action under the emergency laws and that the state of emergency would be lifted soon. The government began releasing political prisoners; and the ban on publication of the Dacca daily "*Ittefaq*" imposed in

[860] *Ibid*., January 30, 1969.
[861] Full Text of President's Speech, *Dawn*, February 2, 1969.
[862] *Dawn*, February 2, 1969.
[863] *Ibid*., February 6, 1969.

1966, was withdrawn.[864] Zulfikar Ali Bhutto was released from jail and put under house arrest.

The executive of the Democratic Action Committee met in Dacca on the 9th and 10th of February to consider the invitation sent by the President. Its convener met the Awami League leader, Sheikh Mujibur Rahman, who, as an accused in the "Agartala Conspiracy" case, was in military custody in Dacca cantonment. It was reported that the Awami League, the most powerful party represented on the Committee, insisted that Sheikh Mujibur Rahman must be present at the talks and demanded that the "conspiracy" case should be withdrawn. Sheikh Mujibur Rahman was reported to be unwilling to accept an offer of parole or personal amnesty, and instructed his party to boycott the conference, if charges against all the accused people were not dropped.[865] The President was reluctant to drop the case as "the case was one of conspiracy" involving the security of the country. The issue had nearly divided the Democratic Action Committee and created a deadlock in the holding of the round table conference.

On February 14, 1969, a general strike was observed throughout the country at the call of the Democratic Action Committee to demonstrate the people's "solidarity in support of democracy". No newspapers were published on the following day. Disturbances took place in many places, and in Karachi alone four persons were killed. On the same day the Law Minister declared that the emergency would cease on February 17; and Bhutto, Wali Khan and other politicians were released from detention.[866] But on February 15, 1969 Sergeant Zahurul Huq, an accused in the "Agartala Conspiracy" case, in what was alleged to be an attempt to escape, was shot and killed by a sentry in the Dacca cantonment.[867] This incident caused a serious commotion among the people. Clashes occurred in the wake of his funeral procession in Dacca on February 16. The houses of three ministers and the State Guest House, where the chairman of the Special Tribunal trying the "conspiracy" case was living, were set on fire by violent crowds. Maulana Bhashani, leader of the left-wing National Awami Party, at a public meeting gave the government an "ultimatum" that, unless the students' demands were met within two months and the "conspiracy" case was withdrawn immediately, his party would launch a "violent movement" against the regime. The Maulana called for a general strike on the following day.[868] Widespread rioting took place on that day and three persons were killed in Karachi, where a curfew was re-imposed.[869]

The Democratic Action Committee on February 16 accepted the invitation of the President to attend the round table conference, as the pre-conditions were fulfilled and

[864] *Ibid*., February 10, 1969.
[865] *The Times* (London), February 12, 1969.
[866] *Dawn*, February 16, 1969.
[867] *Ibid*.
[868] *Ibid*., February 17, 1969.
[869] *Ibid*., February 18, 1969.

the government agreed "to make Mr. Mujibur Rahman available for the conference". The Committee suggested that invitations should be sent to Maulana Bhashani, to Bhutto, and to three independent leaders, Asghar Khan, Murshed and Azam Khan.[870] The President sent the invitations accordingly, but Asghar Khan, Murshed and Azam Khan refused to attend, unless Sheikh Mujibur Rahman also attended the conference, while the latter would not attend unless the whole "conspiracy" case was dropped. Maulana Bhashani and Bhutto declined the invitation "as the exercise would be futile", unless the government accepted the "basic" demands.[871] The law and order situation continued to deteriorate throughout the country. A teacher of Rajshahi University was shot on February 18, 1969, when he went to the street to persuade the students not to defy prohibitory orders. This led to defiance of the curfew by students at Dacca and riots in many other places. Several people were killed and wounded by the police and the army during the four days of riots and violent demonstrations which followed.[872]

The round table conference, the date of which was shifted from February 17 to February 19 on the DAC's request, was postponed, as the opposition would only agree to send its convener, Nawazada Nasrullah Khan, to meet the President. The Awami League refused to meet the President until the "Agartala Conspiracy" case was withdrawn.[873] The government's readiness to solicit the opposition's help and cooperation was manifested when the pro-government press called for "national government", composed of moderate opposition leaders and members of Ayub Khan's nearly defunct Muslim League, who, it was suggested, could cooperate in getting over the "constitutional hurdles" and containing the upsurge of extremist forces. This gesture was seen as an indication that President Ayub Khan was prepared to concede the opposition demands, including the grant of direct adult franchise, if the right-wing opposition would support him in an interim national government.[874] But the response from the Opposition was not encouraging. It insisted on the unconditional acceptance of its demands.

In the face of this situation, President Ayub Khan on the night of February 21, made "the ultimate sacrifice"[875] to end fifteen weeks of agitation against his rule and announced that he would not contest the presidential election in the following year. In a nationwide radio broadcast President Ayub Khan summarized the popular grievances by saying:

> "I am fully conscious of the dissatisfaction that exists in the country with the present system of elections; people want direct elections on the basis of adult

[870] *Dawn*, February 17, 1969.
[871] *Ibid*., February 19, 1969.
[872] *Ibid*., February 20, 1969.
[873] *The Times* (London), February 20, 1969.
[874] *Ibid*.
[875] *Ibid*., February 22, 1969.

franchise. I realize also that the intelligentsia feels left out and wants a greater say in the affairs of the State. People in East Pakistan feel that in the present system they are not equal partners and also that they do not have full control over the affairs of their province. There is also the feeling that the National and Provincial Assemblies do not possess the powers they are entitled to have under a democratic system."[876]

In order to find an agreed solution to these problems, the President had convened the round table conference. The agreed formula would then go to the National Assembly for enactment. If the round table conference failed to reach an agreement, the President said that he would then place directly before the people his own constitutional proposals. Regarding his retirement the President said "I have decided to announce today that I shall not be a candidate in the next elections. The decision is final and irrevocable. All doubts, suspicions and misgivings must end with this announcement." At the end of his speech the President said that he was trying to remove "difficulties" which had delayed the holding of the round table conference, so that all political parties and leaders could participate in it.

The President's speech indicated that he had clearly and correctly identified the problems which he was ready to remedy. It also indicated that the last hurdle in holding talks between the government and the opposition, the "Agartala Conspiracy" case, would soon be removed. The Ordinance establishing the Special Tribunal for trial of the case was repealed[877] on February 22, 1969 "on the ground that the restoration of the fundamental rights [following the lifting of emergency] had cast doubts on the validity of. the Ordinance".[878] All the accused in the case were released from military custody on the same day. The government's surrender to this last but most crucial demand showed that they were ready to concede to all constitutional demands, once the opposition united to place them on the negotiating table. But signs of division within the opposition had already appeared and their differences on basic political issues were clearly manifest in the proceedings of the round table conference.

In spite of Maulana Bhashani's refusal to attend the talks unless the students' demands were met, and Bhutto's unwillingness to go to the round table conference "as a passive observer",[879] the conference between the government and the opposition opened on February 26 and sat for only forty minutes; then, on a request made by the convener of the Democratic Action Committee, it was adjourned till March 10. Before the conference met again, a split within the opposition was reported on the issue of representation on the basis of population at the centre, regional autonomy, and the dismemberment of

[876] Full Text of President's address, *Dawn*, February 22, 1969 at p. 7.
[877] Criminal Law Amendment (Special Tribunal) (Repeal) Ordinance, 1969 (VIII of 1969), P.L.D. 1969 Central Statutes 124.
[878] S.M. Zafar, *Through the Crisis*, p. 90.
[879] *Dawn*, February 25, 1969.

West Pakistan. One section of the Democratic Action Committee maintained that these three matters, as well as direct elections and parliamentary government were not negotiable and must be accepted, subject to working out of the details.[880]

The round table conference reassembled on March 10 and the convener of the Democratic Action Committee put forward the two agreed demands of the opposition. They were, first, the country should have a federal, parliamentary system of government with regional autonomy, and second, the assemblies should be elected on the basis of direct adult franchise. Sheikh Mujibur Rahman presented another set of demands based on his party's six-point programme.[881] He was supported by some East Pakistani delegates, and also by the Frontier leader, Wali Khan, who demanded that West Pakistan must be disintegrated forthwith and that a decision must be taken on the issue of representation on a population basis. He said that "if we keep these issues open for the next elections, they will harm our body politic".[882] Other West Pakistan Opposition leaders were, however, not willing to discuss or decide the issues at the conference table, and insisted on the President's acceptance of the two agreed demands.

The Conference came to an end on March 13, 1969, with the President announcing the acceptance of the proposals for direct adult franchise and a parliamentary system of government. In a written statement to the delegates the President said that the unresolved issues could be settled by the representatives of the people, to be elected by direct adult franchise.[883] While most of the Democratic Action Committee leaders welcomed the President's announcement, Sheikh Mujibur Rahman said that he and his party would work "peacefully and constitutionally" for the realization of the remaining demands, complete regional autonomy, dismemberment of West Pakistan and representation on the basis of population. Wali Khan, describing the President's announcement as "historic", said that a decision should have been taken on the issues of the dismemberment of West Pakistan and regional autonomy.[884] After the conclusion of the round table conference the Democratic Action Committee was declared dissolved by its convener "as its task had been accomplished".

The Awami League of Sheikh Mujibur Rahman had earlier severed its connection with the Democratic Action Committee on the ground that the latter had "failed" to support the basic demands of the people, and was not pledged to continue to work for their realization. Maulana Bhashani, who had declined the invitation of the President to attend the conference, said that the President's acceptance of the two demands mentioned above would not solve the problems confronting the masses. He declared that his party would continue the struggle till all the students' and people's demands

[880] *Ibid*., March 9, 1969.
[881] *Ibid*., March 11, 1969.
[882] S.M. Zafar, *Through the Crisis*, p. 153.
[883] *Dawn*, March 14, 1969.
[884] *Dawn*, March 14, 1969.

had been met. Zulfikar Ali Bhutto expressed his dissatisfaction with the outcome of the round table conference and demanded that Ayub Khan should step down in favor of a neutral caretaker government, which should hold elections to a constituent assembly on the basis of direct adult franchise, to frame a fresh constitution for the country.[885]

After the President's announcement, it was expected that law and order would be restored. But, instead of appreciating what had been achieved, the opposition leaders, with a few exceptions, directed attention to the issues which had not been tackled at the conference. Bhutto and Maulana Bhashani were openly against making constitutional amendments incorporating the agreement reached. The situation continued to deteriorate daily; there was complete disruption of normal life throughout the country, due to strikes by government servants, doctors, factory and transport workers. Serious clashes were reported, not only between the demonstrators and the security forces, but between workers and supporters of different parties. Appeals for peace by different leaders were of no avail. Certain leaders, however, would not admit the existence of any danger in this absolutely abnormal situation. Bhutto, commenting on it said,

> "The law and order situation has deteriorated because the people have risen in revolt against the regime. Normal conditions can arise in the country only after the rejected regime steps aside. The people of the country have not shown alarm over the situation. Only the regime and handful of vested interests are alarmed and they are determined to frustrate the struggle of the people for better economic and social conditions."[886]

It was reported that the government had finalized its proposals to amend the Constitution in accordance with the President's announcement at the round table conference.[887] But due to utter lawlessness prevailing in the country and the high emotion with which the political atmosphere was charged, it was generally felt that the round table conference had failed and that the implementation of the agreed formula by an amendment of the Constitution would not help to restore normality. When the President resigned and handed over power to the army on March 25, 1969, that fear was vindicated and the work of the round table conference was shown to have been done in vain.

Collapse of the Civil administration

The round table conference convened by President Ayub Khan to resolve constitutional issues with the opposition seemed doomed to failure even before the conference had actually started. As soon as it was clear that the President was prepared to concede the opposition demands, basic differences among the opposition leaders on other political

[885] *Ibid*.
[886] *Dawn*, March 23, 1969.
[887] *Ibid*., March 18, 1969.

issues became manifest. The Democratic Action Committee, when deliberating on its policy when dealing with the President, had been unable to reach agreement about demands for regional autonomy, representation on population basis and the dismemberment of West Pakistan. This disagreement among the leaders of the movement and the determination of a few of them to continue the struggle for the realization of these demands did not help to abate the lawlessness in the country; in fact it aggravated the whole situation..

Sheikh Mujibur Rahman, on returning to Dacca after the round table conference, said that, had other East Pakistan delegates supported him in his demands for East Pakistan's cause, the President would have been compelled to accept them. He gave the names of the delegates who, he alleged, had not given their support.[888] This statement, made at a time when the political atmosphere was extremely hot, naturally enraged East Pakistani sentiment against these leaders. One of them, Mahmud Ali, on his return from West Pakistan, was allegedly kidnapped by Bengali extremists and later rescued by the police.[889] Members of the National Assembly belonging to tie Awami League, on instructions from Sheikh Mujibur Rahman, drafted a constitution amendment Bill, incorporating the party's six-point programme and submitted it to the Assembly secretariat to be considered at its next session.[890] This move on the part of the Awami League was seen as the party's strategy "to seek to achieve through private members' Bills in. the National Assembly what it has failed to achieve at the round table conference".[891]

In West Pakistan, for the smaller units the burning issues were dismemberment of the province and regional autonomy. A prominent Sindh leader, Z. H. Lari regretted that these "problems of explosive nature" had not been settled at the round table conference. Lari particularly blamed Chaudhri Mohammad Ali who, according to Lari, ignored the unanimous decision of the DAC sub-committee and "sought shelter behind technicalities to perpetuate injustice committed by him in the past".[892] The Sindh anti-one unit Front leader, G. M. Syed, outlined an eight-point programme to implement the breakup of the province. It was also reported that six members of the National Assembly from Sindh would move a Bill in the next session of the Assembly, to disintegrate West Pakistan. The draft Bill was released to the press.[893] Wali Khan, the North-West Frontier leader warned that failure to break up West Pakistan before the elections would create serious problems in the country. He demanded an immediate breakup.[894]

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[888] *Dawn*, March 15, 1969.
[889] *Ibid*., March 25, 1969.
[890] *Ibid*.
[891] *Ibid*., March 15, 1969.
[892] *Dawn*, March 16, 1969.
[893] *Ibid*., March 16, 1969.
[894] *Ibid*., March 20, 1969.

Public demonstrations in support of these demands in both wings created an extremely dangerous situation. Demonstrators attacked everything that symbolized authority, damaged public buildings and other properties and set them on fire, clashed violently with each other, and attacked persons of known loyalty to the regime.

The situation was further aggravated by the campaign of those who had refused to participate in the round table conference. Maulana Bhashani about this time came to West Pakistan on a tour. In Lahore he said that piecemeal amendment of the Constitution would only enhance bitterness, and demanded a settlement of the constitutional and economic issues on socialistic lines.[895] In reply Maulana Maudoodi of the orthodox Jamaat-i-Islami called on members of his party to form committees to "smother the tongue" that uttered the word "socialism".[896] Two days later Maulana Bhashani was attacked by four youths at Sahiwal in a railway carriage. A general strike on March 17 was observed in East Pakistan and places in West Pakistan to protest against the assault on Maulana Bhashani.[897] The Maulana said in Karachi that elections would not be allowed to be held in the country, until all the demands of the people were accepted. He said that the polling booths would be burnt and those who participated in the elections would do so at the risk of their houses being burnt. The Maulana advised the government and the industrialists to accept the demands of workers and students, otherwise workers would be compelled to take "drastic action" to get their demands accepted.[898] He said that the time had come for the common man to take up arms and step up their struggle against the "capitalists and imperialists".[899]

Zulfikar Ali Bhutto, who had great influence over the younger people in West Pakistan, was openly opposed to the implementation of any constitutional formula by amendment of the 1962 Constitution. He demanded the immediate resignation of President dub Khan, followed by elections to a constituent assembly, which should frame a constitution for the country. He rejected the government's claim to be endeavoring to effect a peaceful transfer of power. Commenting on the suggestion that a "broad-based" cabinet should be appointed, Bhutto said that it would be "illogical and immoral" that a person who had been rejected by the people should be the head of any cabinet, and accused the government of encouraging civil war in the country.[900] Referring to the Home Minister's warning of stern action against the law-breakers, Bhutto said,

[895] *Dawn*, March 15, 1969.
[896] *Ibid*.
[897] *Ibid*., March 18, 1969.
[898] *Dawn*, March 18, 1969.
[899] *Ibid*., March 19, 1969.
[900] *Ibid*., March 17, 1969.

> "The Home Minister has threatened the people with dire consequences, but he should remember that these threats have failed to intimidate the people who are struggling for their rights. The regime is again lifting its head to repeat its past follies, only because a part of the opposition has come to a tacit agreement with the regime at the cost of the people."[901]

The policy pursued by these opposition leaders and their public statements were not calculated to stop insurrection; in fact they were likely to provoke breaches of the peace and disturbances of public order. The situation was made worse by the public statements of members of President Ayub Khan's own party. These men had given unqualified support to the regime throughout, but now, under pressure from opponents of the regime, they expressed critical opinions on highly controversial issues. In mid-February thirty-seven members of the ruling party in the National Assembly and the East Pakistan Assembly issued a statement demanding, in essence, a parliamentary form of government and representation on the basis of population at the centre. The statement also roundly blamed the East Pakistan Governor for his "provocations, misjudgment and mishandling" of the situation, which had led to so much bloodshed and large-scale damage to property.[902] About the same time, five Muslim League members of the National Assembly from Sindh submitted a memorandum to the President, urging the dismemberment of West Pakistan, as experience had shown the miserable failure of the merger of the former provinces, which had caused discontent among the people of the smaller units.[903]

All these declarations might have been made "in order to save one's life and property" — as one member of the government party said.[904] But there is no denying the fact that the whole ruling junta had become demoralized and the administrative machine was not capable of coping with the fast-deteriorating situation. The Governors of the provinces were thoroughly discredited.[905] The people had lost all confidence in the government's capacity to maintain law and order and nobody heeded its appeals to keep the peace. Though the two Governors were replaced later,[906] the new appointments came too late to stem the tide of events.

All-round chaos and disturbance prevailed throughout the country. Killing, arson and looting were on the increase. A report from East Pakistan published in The Times on March 20, 1969 said that "an unchecked reign of terror is rapidly spreading through the rural areas of East Pakistan, where hundreds of villages have been razed; thousands of

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[901] *Dawn*, March 23, 1969.
[902] *Ibid*., February 11, 1969.
[903] *Dawn*, February 12, 1969.
[904] S.M. Zafar, *Through the Crisis*, p. 176.
[905] *Ibid*., p. 178.
[906] New Governors were sworn in on March 20 and March 23, 1969 in West Pakistan and East Pakistan respectively.

Bengalis have been left homeless, and more than 150 people have been slaughtered during 10 days of mob executions." The targets, according to the report, were in most cases thieves or suspected criminals, who bolstered up the ruling Muslim League's authority in the rural areas. The villagers turned on unpopular police officials, rent collectors and the basic democrats. In many villages students set up "people's courts" to fine basic democrats and supporters of the ruling party. Police stations were attacked and officials clubbed to death. Industry, commerce and government business had come to a standstill. The situation was, no better, in, cities.

> "Abdul Monem Khan, the Governor, has not ventured out of his residence for several weeks; his writ does not extend beyond his office walls, while a police uniform has not been seen in the streets of Dacca for a fortnight."[907]

In West Pakistan the condition was not different. Clashes between rival political groups, demonstrations and strikes of all kinds of people, including government servants, continued apace. Houses belonging to basic democrats and government supporters were set on fire. The President of the Chamber of Commerce and Industry disclosed that in Karachi alone 1000 million rupees were lost in monetary terms during the previous five months.[908] The Home Minister on March 19 gave a grim picture of the situation in the country. He confirmed that murder, arson, looting and intimidation of government servants were taking place. Economic life had been paralyzed and labor unrest was fast spreading. Politicians were instructing mobs to shout the slogans 'Gherao' and 'Jalao'.[909] The forces of disruption and disintegration were on the rampage and a general feeling of insecurity and uncertainty had gripped the country. The minister described the prevailing condition as "much worse" than it was on October 7, 1958. He said that generally speaking there was no law and order in the country; "mob rule is the order of the day".[910]

Some efforts were made by certain leaders and students to stop the insurrection and restore peace and order. But their efforts had no effect on the frenzy that possessed the people. Accusations were made of the absence of effort by government to contain the upsurge. Sheikh Mujibur Rahman expressed his "unqualified condemnation for the situation which has been created by the total abdication of the Administration of the responsibility for protecting the rights of the ordinary citizens." He called upon all democratic forces "vigorously to work for the maintenance of peace and protection of the rights of the citizens".[911] The chairman of the All-Party Students' Action Committee

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[907] *The Times* (London), March 20, 1969.
[908] *Dawn*, March 22, 1969.
[909] "Gherao" literally means "encirclement" but is used as a special term meaning confinement of government officials or factory managers to their offices, sometimes without food or water, till they gave in to employees' demands. "Jalao" means "burning out" and is used to mean burning of factories or offices to terrorize employers into accepting employees' demands.
[910] *Dawn*, March 20, 1969.
[911] *Dawn*, March 20, 1969.

of East Pakistan criticized Maulana Bhashani for preaching violence, and appealed for peace. In West Pakistan the Pakistan Democratic Movement leaders, Nawabzada Nasrullah Khan, Chaudhri Mohammad Ali, Mumtaz Daultana and Maulana Maudoodi appealed for restoration of "peace and tranquility". Dacca lawyers took out a procession in support of peace and held a meeting which passed a resolution appealing for maintenance of law and order.[912]

But all these activities proved futile, though signs of improvement appeared on the eve of the imposition of military rule. The country was just not in the mood to return to sanity. The machinery of the civil administration appeared to be totally exhausted and incapable of re-asserting itself after it had collapsed in the face of total defiance of its authority. The regime had lost all hopes of restoring order and normality. The only other alternative was to call in the army and hand over the country to it.

The conditions prevailing in Pakistan on March 25, 1969 no doubt warranted drastic action. But there were some among the opposition who alleged that

> "the serious situation as regards law and order, aggravated by the complete withdrawal of the police and armed forces in recent weeks, was created specially by the establishment to justify martial law. Sindhis, Baluchis, Bengalis and Pathans will see the decision as a conspiracy of bureaucracy, industry, and particularly the Punjab, to re-establish the traditional power structure of Pakistan which was threatened in recent months."[913]

Whatever might have been the reason, the situation undoubtedly called for a declaration of martial law, as understood in the conventional sense. If "martial law" of 1958 had little semblance of justification, martial law in 1969 was certainly, beyond any question, justified.

Thus the movement sparked off by students' agitation in November, 1968 and later utilized and strengthened by the opposition for political purposes, was successful in compelling the Ayub regime to abdicate, but failed to bring about any positive victory in the form of a political solution to the problems facing the country. The opposition could not consolidate its achievements at the round table conference, due, mainly, to its own divisions and weakness.

The Democratic Action Committee, with the leaders of which the President negotiated, was organized by the opposition leaders in January 1969, in the midst of violent disturbances throughout the country, when emotion, rather than practical thinking, ran high. In their strong antagonism to the regime the opposition leaders had been able to

[912] *Ibid*., March 21, 1969.
[913] *The Times*, March 27, 1969.

sink only temporarily their own basically different attitudes towards different constitutional and political issues; they were united on the sole aim of dislodging the regime. The Action Committee thus accommodated heterogeneous elements like the "Council" Muslim League and Jamaat-i-Islami, both of Which wanted a strong centre, and the six-point Awami League, which wanted complete autonomy for the units. It was, therefore, not unexpected that they should fall apart as soon as their common enemy was eliminated from the scene.

By the time it became apparent that the Ayub system was on the verge of collapse, the infighting among the opposition parties on their diverse attitudes to different problems became manifest. The Democratic Action Committee proved incapable of containing the strong feelings of its constituent parties and failed to produce agreed solutions on the issues. This disagreement, clearly manifest by each individual party's commitments to continue the struggle, was thoroughly exploited by the forces opposed to any settlement by agreement reached at the round table conference, The Democratic Action Committee miserably failed to give proper direction to the movement calculated to ensure unity of purpose. Due to obvious differences among its constituent parties, it had to be dissolved when it was most needed to secure united action to restore peace and order. It may be argued that even a united attempt by the leaders of the Democratic Action Committee would have been frustrated by the forces belonging to Bhutto's and Maulana Bhashani's parties. But a forceful re-assertion of power by the administration in full cooperation with the Action Committee opposition parties would have had a good chance of restoring law and order. But due to internal rifts in the opposition, like the regime, it succumbed to insurrection, which it had encouraged but which it was now incapable of controlling. The Pakistan politicians, once again, proved their failure to find a solution to the constitutional problems which had been facing the country since its inception. Their reluctance to understand each other's points of view coupled with total lack of imagination and foresight created a situation in March, 1969, in which martial law became inevitable.

Chapter XI

Martial Law in 1969

The President's resignation and declaration of martial law

In the evening of March 25, 1969, General A.M. Yahya Khan, the Commander-in-Chief of the Pakistan Army, by a proclamation, declared the abrogation of the Constitution of 1962 and imposed martial law throughout the country. Earlier, on March 24, President Ayub Khan had addressed a letter[914] to General Yahya Khan, in which the President described the chaotic situation prevailing in the country, his attempts to restore order, and having concluded that these attempts had failed and the civil administration collapsed, conveyed his decision to hand over power to the armed forces. The President in his letter explained his attempts to resolve the crisis that was raging throughout the country from one end to the other by all possible civil and constitutional means. He said that he offered to meet "all those regarded as leaders of the people" in a conference and, when assembled, asked them to evolve an agreed formula. But due to their internal differences, they could only agree on two points. The President said,

> "I accepted both of them. I then offered that the un-agreed issues should all be referred to the representatives of the people, after they had been elected on the basis of direct adult franchise. Thy argument was that the delegates in the conference, who had not been elected by the people, could not arrogate to themselves the authority to decide all civil and constitutional issues, including those on which even they are not agreed among themselves."

The President said that he had decided to call the National Assembly to consider the two agreed points, but

> "it soon became obvious that this would be an exercise in futility. The members of the Assembly are no longer free agents and there is no likelihood of the agreed two points being faithfully adopted. Indeed, members are being threatened and compelled either to boycott the session or to move such amendments as would liquidate the Central Government, make the maintenance of the Armed Forces impossible, divide the economy of the country and breakup Pakistan into little bits and pieces. Calling the Assembly in such chaotic conditions can only aggravate the situation. How can anyone deliberate coolly and dispassionately on fundamental problems under threat of instant violence?"

[914] Full Text of the President's letter, *Dawn*, March 26, 1969.

The President said that it was beyond the capacity of the civil government to deal with the prevailing complex situation and that the Defence Forces must step in.

President Ayub Khan, continuing, said that every single instrument of administration, and every medium of expression of sane public opinion was subjected to "inhuman pressure". The economic life of the country had all but collapsed. In such circumstances the President had come to the conclusion that "all civil administration and constitutional authority in the country had become ineffective. If the situation continues to deteriorate at the present alarming rate, all economic life, indeed, civilized existence will become impossible." The President continued,

> "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 the country ... They alone can restore sanity and put the country back on the road to progress in a civil and constitutional manner."

On the eve of the declaration of martial law on March 25, 1969, President Ayub Khan explained the situation in a radio broadcast to the nation.[915] He repeated most of what he had written to General Yahya Khan and said that, after his announcement of retirement on. February 21, he had hoped that the situation would improve. But the condition continued to deteriorate from bad to worse. The President referred to the round table conference, his acceptance of the two agreed demands of the opposition and proposed that the issues, on which no agreement had been reached, should be left for decision by a directly elected Assembly. "But this proposal," said the President, "was not acceptable to the political leaders. Every one of them was insisting for the immediate acceptance of their demands without even waiting for the election of the people's representatives."

The President maintained that the acceptance of all these demands would spell the liquidation of the country. He reminded his listeners, "I have always told you that Pakistan's salvation lay in a strong centre. I accepted the parliamentary system, because in this way also there was a possibility of preserving a strong centre." He continued, "But now it is being said that the country should be divided into two parts. The centre should be rendered ineffective and a powerless institution. The defence services should be crippled and the political entity of West Pakistan be done away with." The President declared that it was impossible for him "to preside over the destruction of our country". The integrity of the country should take precedence over everything else and fundamental and basic constitutional issues could only be settled in a peaceful atmosphere, which was completely absent. He admitted that

[915] Full Text of the President's address, *Dawn*, March 26, 1969.

> "the situation now is no longer under the control of the Government. All Government institutions have become victims of coercion, fear and intimidation. Every principle, restraint and way of civilized existence has been abandoned. Every problem of the country is being decided in the streets. Except for the armed forces, there is no constitutional and effective way to meet the situation."

In view of these circumstances, the President said that he had decided to hand over power to General Yahya Khan, who had the Navy and the Air Force with him. The President thought the army should be allowed to "carry out freely their legal duties" without any impediment, and, in view of this, he decided to relinquish the office of President. Thus President Ayub Khan's period of power ended in a nationwide insurrection; it began over ten years previously in a time of internal political crisis maneuvered by his predecessor, President Iskandar Mirza.

Shortly after Ayub Khan's speech, General Yahya Khan issued a proclamation,[916] placing the whole country under martial law and assuming to himself "the powers of the Chief Martial Law Administrator and the command of all the Armed Forces of Pakistan". The proclamation said that Martial Law Regulations and Orders would be made by the Chief Martial Law Administrator or any person or authority empowered by him; contravention of the Regulations would be punished by Military Courts set up by the Regulations and duly authorized ordinary criminal courts. The Constitution of 1962 was declared abrogated, but all laws in force immediately before the abrogation were continued. All existing courts and tribunals would continue to exercise the same powers and jurisdiction as before, but no court was to call in question any Martial Law Regulation or Order or any judgment of any Military Court, and no writ or order was to be issued against the Chief Martial Law Administrator or any person exercising powers under his authority.[917]

Under the proclamation, the persons holding office as President, the Governors, and members of their Councils of Ministers ceased to hold such offices, and the National Assembly and the Provincial Assemblies were dissolved. with those exceptions, all persons holding offices or who were in the service of Pakistan, unless otherwise directed by the Chief Martial Law Administrator, were to continue in their offices or service, and all other authorities constituted or established under the Constitution were to exercise their normal powers and perform their normal functions. The proclamation, therefore, by abrogating the Constitution of 1962, abolished the legal order established by it. But it required the administrative and judicial machinery to function normally, subject to the direction, and with the support, of the martial law authorities. In the face

[916] For full text of the Proclamation, see Appendix VI.

[917] Contrast the Proclamation of October 7, 1958, which did not make any provision regarding the existing laws and the courts.

of the nationwide chaos and disturbances, Martial Law Regulations and Orders would be issued with a view to stop insurrection and restore peace and order.

On the day following the proclamation of martial law, General Yahya Khan, now the Supreme Commander of the Armed Forces and the Chief Martial Law Administrator, in a broadcast[918] to the nation, referred to the chaotic situation in which President Ayub Khan had called upon him to carry out his "prime duty" to save the country from disaster. He said that the army had hoped that "sanity would prevail" and the extreme step of declaring martial law would not be necessary. But shattering this hope the situation had drifted from bad to worse; the normal methods of law enforcement had proved ineffective and had almost completely broken down. The General said that the armed forces had to step in to save the country from "utter disaster". His sole aim in imposing martial law was "to protect life, liberty and property of the people and put the administration back on the. rails". He said

> "My first and foremost task as the Chief Martial Law Administrator, therefore, is to bring back sanity and ensure that the Administration resumes its normal functions to the satisfaction of the people. We have had enough of administrative laxity and chaos and I shall see to it that this is not repeated in any form or manner."

As for his own and his administration's role in establishing the future constitutional structure, the General said

> "I wish to make it absolutely clear to you that I have no ambition other than the creation of conditions conducive to the establishment of a constitutional government. It is my firm belief that a sound, clean and honest administration is a prerequisite for sane and constructive political life and for the smooth transfer of power to the representatives of the people, elected freely and impartially on the basis of adult franchise. It will be the task of these elected representatives to give the country a workable constitution and find a solution of all other political, economic and social problems that have been agitating the minds of the people."

But the Chief Martial Law Administrator warned that the country was passing through the most fateful period of its history. "The recent events have dealt a serious blow to our national prestige and progress. The Martial Law Administration cannot and will not tolerate agitational and destructive activities of any kind."[919]

So, unlike his predecessor, General Ayub Khan, who, on the abrogation of the Constitution of 1956 just over ten years earlier, took upon himself the task of designing

[918] Full Text of the Speech, *Dawn*, March 27, 1969.
[919] *Dawn*, March 27, 1969.

and putting into operation a kind of democracy, which "the people can understand and work", General Yahya Khan's announcement made it clear that it would be for the people's representatives "to give the country a workable constitution". The Martial Law Administration would ensure that conditions for their election prevailed in the country and the administration functioned honestly, impartially and effectively. The General, differing from Ayub Khan, significantly did not put any blame on the politicians for the existing serious situation in the country, but he expressed his determination to put an end to chaos and disturbances and to restore normality. All political activities were banned, but the political parties were not abolished. This was indicative of the regime's intention to allow political activities, once peace and order were restored. Contrary to the fears felt in some quarters, the imposition of martial law was followed by the immediate re-establishment of order. Virtually all the strikers returned to work peacefully on March 26. Schools, colleges and universities reopened after months of inactivity; and the martial law authorities encouraged and took steps which helped to secure a quick return to normality. Certain concessions were made to students and it was announced that wage agreements, made, before martial law was proclaimed, would generally be honored There was no press censorship except for military details about deployment and units.[920]

Five days after the imposition of martial law throughout the country, the Chief Martial Law Administrator, General Yahya Khan, on March 31 by a proclamation[921] assumed the office of President, left vacant since President Ayub Khan relinquished the same on March 25, 1969. To maintain continuity" his assumption of the presidential office was made retrospectively effective since it fell vacant. In a separate press note the reasons for the Chief Administrator's assumption of presidential office was explained. The press note pointed out that certain functions such as the certification of budgets, issue of laws and ordinances, confirmation of appointments could only be performed by the President as Head of State. Similarly in international relations, only the President was competent to receive and issue certain documents, appoint representatives abroad, receive foreign envoys and ratify international treaties and agreements. It was

> "for the performance of essential acts of State, that the Chief Martial Law Administrator, in his capacity of Head of State and Administration, is required to perform, it is necessary that he should have a designation, which enables him to discharge these responsibilities within the framework of the country's laws and in accordance with the requirements of international practice and usage."[922]

To keep in step with what was being done at the centre, the President and the Chief Martial Law Administrator, by a notification,[923] on April 10, 1969, directed that the

[920] *Keesing's Contemporary Archives*, 1969-70, p. 23357.
[921] Text of the Proclamation, P.L.D. 1969 Central Statutes 41.
[922] *Dawn*, April 1, 1969.
[923] P.L.D. 1969 Central Statutes 62.

Zonal Martial Law Administrators of East and West Pakistan would exercise all powers and perform all functions of the provincial Governors under the Constitution of 1962. The order was to be deemed as effective retrospectively since March 25, when the Constitution was abrogated. These measures enabled the Chief Martial Law Administrator and the Zonal Martial Law Administrators to function as heads of the central and provincial administrations respectively and, as such, exercise powers in accordance with the provisions of the abrogated Constitution.

The Martial Law regime

In administering martial law the Yahya Khan regime followed the precedent established by Ayub Khan's administration during the martial law period of 1958-1962. Martial Law Regulations and Martial Law Orders were issued by the Chief Martial Law Administrator or Zonal Administrators. But the Regulations and Orders made by the Chief Administrator took precedence over those made by other authorities. By the first of these Regulations the Chief Martial Law Administrator appointed three Deputy Chief Martial Law Administrators, two being the chiefs of the air and naval forces and the third the senior-most general in the army. Each of the two provinces was placed under a Zonal Administrator, who was authorized to issue Martial Law Regulations and Orders.[924] Breach of these regulations was to be met with punishments which ranged from death, imprisonment, whipping and fine to forfeiture of property.[925]

By one of these regulations, criticism of the imposition of martial law or its operation, bringing into contempt or hatred or exciting disaffection towards the Chief Martial Law Administrator or any martial law authority was made punishable by a sentence of ten years' imprisonment.[926] As in the earlier martial law period the term "recalcitrant" was defined to include "any external enemy of Pakistan and mutineers or rebels or rioters and enemy agents".[927] Assisting in any way or harboring a recalcitrant was punishable with death,[928] while withholding information about a recalcitrant was punishable with four teen years' imprisonment.[929] It may be noted that until the beginning of 1971, no one was prosecuted under these regulations.

Because martial law was proclaimed to suppress a nationwide insurrection, it was provided that the crimes of looting, arson or dacoity would be punished with death.[930] Spreading reports to create alarm or despondency amongst the public, or to create dissatisfaction towards the armed forces was made punishable with imprisonment of

[924] Martial Law Regulation (M.L.R.) No. 1.
[925] M.L.R. No. 4.
[926] M.L.R. No. 6.
[927] M.L.R. No. 7; cf. M.L.R. No. 3 (1958).
[928] M.L.R. No. 10; cf. M.L.R. Nos. 6 and 7 (1958).
[929] M.L.R. No. 13.
[930] M.L.R. No. 9.

up to fourteen years.[931] Strikes, lockouts and agitations in educational institutions and industrial concerns were prohibited; contravention could be visited with fourteen years' imprisonment.[932] Giving false evidence or refusal to give evidence in any investigation or trial held under martial law regulations was made punishable by imprisonment for fourteen years.[933] Smuggling of goods, helping a smuggler and withholding or failing to render a report regarding a smuggler carried the death sentence.[934] Provision was made for rewarding an informant about smuggling or black-marketing out of the fine realized from the convict,[935] but false information to acquire any advantage was punishable with imprisonment for five years.[936]

As in 1958, special courts with criminal jurisdiction, namely Special Military Courts and Summary Military Courts, were established to enforce the martial law regulations and also to try offences under the ordinary law.[937] An Administrator of Martial Law was empowered to convene a Special Military Court, which was to be constituted in the same manner, to have the same powers and to follow the same procedure as a Field General Court Martial under the Pakistan Army Act, 1952. A magistrate of the first class or a session judge could be appointed a member of such a court. It had the power to pass any sentence authorized by law or by the regulations; a death sentence, however, required confirmation by the Chief Martial Law Administrator. A magistrate of the first class, or any military, naval or air force officer, could be empowered to hold a Summary Military Court to exercise the same powers as a Summary Court Martial under the Army Act. It had power to pass any sentence authorized by law or by the regulations, except a sentence of death, transportation, imprisonment exceeding one year, or whipping exceeding fifteen stripes. The proceedings of every Summary Court were to be forwarded for review to the Administrator of Martial Law of the area in which the trial was held.

Besides these Military Courts, the ordinary criminal courts, as by law established, were to exercise their existing jurisdiction to try all offences not connected with the disturbances preceding martial law. But they were empowered to try cases connected with those disturbances, if they were transferred to them for trial under the martial law regulations.[938] A Zonal Martial Law Administrator was authorized to order such transfers. The proceedings of these trials were to be submitted to the Martial Law Administrator for his confirmation and then forwarded to the Judge Advocate General for final review.[939] The provisions relating to the jurisdiction of the ordinary :criminal

[931] M.L.R. No. 17; cf. M.L.R. No. 24 (1958).
[932] M.L.R. No. 18; cf. M.L.R. No. 29 (1958).
[933] M.L.R. No. 15; cf. M.L.R. No. 19 (1958) which provided for death sentence for similar offence.
[934] M.L.R. No. 23; cf. M.L.R. No. 27 (1958).
[935] M.L.R. No. 31.
[936] M.L.R. No. 27.
[937] M.L.R. No. 2.
[938] M.L.R. No. 3.
[939] Martial Law Order (M.L.O.) No. 12.

courts were revised by a subsequent regulation, which empowered them to try all ordinary offences and cases relating to offences created by martial law regulations, which were transferred to them for trial.[940] Another regulation provided for the transfer of pending cases under the ordinary law from an ordinary criminal court to a Military Court for trial.[941] These provisions came up for interpretation before the West Pakistan High Court and will be dealt with later in this chapter.

On April 4, 1969, the Chief Martial Law Administrator issued the Provisional Constitution Order,[942] which was given retrospective effect from the abrogation of the Constitution and the imposition of martial law. The general effect of this Order, like the Laws (Continuance in Force) Order issued by the President in October, 1958, was the validation of all laws, other than the Constitution of 1962, existing before the proclamation, the restoration of the courts' jurisdiction, and a further direction that the country should be governed as nearly as possible in accordance with the abrogated constitution. But, unlike the Order of 1958, the new Order attempted to give specific directions about the abolition of certain fundamental rights, the abolition of which had given rise to doubts in 1958.

Article 3 of the Provisional Constitution Order provided that, notwithstanding the abrogation of the Constitution of 1962, but subject to any regulation or order made by the Chief Martial Law Administrator, the State of Pakistan should be governed, as nearly as possible, in accordance with the provisions of that Constitution. The Chief Martial Law Administrator, as President of Pakistan, would perform all functions of the President under the abrogated Constitution. Out of the nineteen fundamental rights guaranteed by the Constitution, eleven were declared abolished. They were, the right to safeguards against arrest and detention, the right to protection from retrospective punishment, the rights to freedom of movement, assembly, association, to carry on a trade, business or profession and freedom of speech, the right to acquire, hold and dispose of property, the right to equality, and protection against discrimination in the public service. The courts were forbidden to issue any judgment, decree or writ to the Chief Martial Law Administrator and his deputies, or any martial law authority exercising powers and jurisdiction under their authority.

The limitation on the durability of any Ordinance made by the President or a Governor, prescribed by the late Constitution, was abolished. The proclamation of martial law, any order made in pursuance of the proclamation, any martial law regulation or order, and any finding, sentence or order of a military court were to be immune from examination by the courts. Generally the Supreme Court, the High Courts and all other courts and tribunals would continue to exercise the same powers and jurisdiction as they had immediately before the proclamation. But para. (1) of Article 6 of the

[940] M.L.R. No. 3, reconstituted by M.L.R. No. 45.
[941] M.L.R. No. 42.
[942] P.L.D. 1969 Central Statutes 41.

Provisional Constitution Order, by giving the Supreme Court power to accept criminal appeals in specified circum stances only, seemed to have taken away its extraordinary jurisdiction in appeal by grant of special leave. The Supreme Court, however, in interpreting the provision in Article 6(1), which apparently confined its criminal appellate jurisdiction to specified cases, held that the word 'appeal' in that paragraph "meant and was manifestly intended to mean an 'appeal' as of right" so that the Supreme Court had, as before, the jurisdiction to grant special leave to appeal from any judgment or order of the High Court.[943]

The Provisional Constitution Order provided that nothing in that Order would prejudice the operation of any martial law regulation made by the Chief Martial Law Administrator or any person authorized by him. In the event of a conflict between a regulation and an Ordinance promulgated under this Order, the regulation was to prevail. To ensure untrammeled power of arrest, and detention in suppressing disturbances, it was provided that any pro vision in any law, providing for the reference of a detention order to an advisory board, would be of no effect. Lastly, the President was empowered to make any provisions, including constitutional provisions, which appeared to him to be necessary for the administration of the country.

The Provisional Constitution Order would, therefore, seem to have added nothing much to what had already been provided by the proclamation of martial law issued by the Chief Martial Law Administrator on March 25, 1969. But it provided for the exercise of President's power under the abrogated Constitution, which was necessitated by the subsequent assumption of the presidential office by the Chief Martial Law Administrator on March 31. The Order also made it clear that not only were the provisions of the Constitution of 1962 subject to regulations and orders made by the Chief Martial Law Administrator, but that he, in exercise of the authority of the President, would have power to make any constitutional provision necessary for the purpose of the administration of the country.

While in 1958 the Martial Law Administration was designed to meet an apprehended breach of peace in defiance of the imposition of martial law, the 1969 Administration had to deal with actual insurrection, which had been raging the country for over four months. But as has been noted earlier, the declaration of martial law was followed by the immediate restoration of peace and order. Only a few incidents were reported. In Karachi on March 27 twenty-one people were arrested on suspicion of instigating strikes; eight people, who continued a fast outside a factory in support of their wage demand, were arrested and charged with attempted suicide under the Code of Criminal Procedure, and a clash between the troops and workers in the Quetta mining area was also reported.[944] These were only minor incidents, compared with the situation which

[943] *Muhammad Ismail v. The State*, P.L.D. 1969 S.C. 24 .
[944] *Keesing's Contemporary Archives*, 1969-70, p. 23357.

prevailed before March 25. The regime immediately granted some concessions to students and promised to investigate the students' and workers' grievances and to formulate far-reaching educational and labor policies. President Yahya Khan's announcement that elections would be held as soon as normality returned, of representatives of the people, who would be asked to tackle the country's constitutional and political problems, helped the rapid restoration of peace and order.

One of the main public grievances against Ayub's administration was corruption and nepotism among officials, including the top civil servants. The new regime, therefore, immediately after taking over, took stringent measures to eradicate these vices, and screened officials, who were found guilty of these charges. Bribery and corruption among public servants were made punishable with fourteen years' imprisonment and confiscation of property.[945] A person misusing his official position to bestow patronage or favor to any individual or firm was to suffer the same prison sentence.[946] Further, to deal with the public charge that top officials, during the past regime, had acquired wealth and property through corruption and bribery, the President made and promulgated the Improper Acquisition of Property (Special Committee) Ordinance, 1969.[947]

The Ordinance, as originally promulgated, required public servants, not below the rank of joint secretary of the central government, to submit returns of their earnings since October 7, 1958, and statements of their property and assets, both moveable and immoveable, to the Special Committee appointed under the Ordinance for its scrutiny. For the purpose of inquiring into the conduct of a person, and the propriety of the acquisition of properties by such person, a Special Committee, consisting of a serving judge or an ex-judge of a High Court or the Supreme Court as the chairman, and two other members, one of whom was a high ranking military officer, was to be appointed. It was empowered to scrutinize the correctness of the returns and statements submitted by the officers and submit its findings, together with its recommendations as to the punishment, if any, to the President.

The Ordinance was amended[948] in June so as to extend its scope and application to all officers and holders of public offices equivalent to Class I officers of the provincial governments. The category of officers subject to the Ordinance thus included corporation officials and even university teachers. A Special Committee was set up for each province, with serving or retired High Court judges as chairmen, to scrutinize the returns and statements and to submit their reports to the Governors. The amended Ordinance provided an opportunity for an officer to explain any fact or circumstances appearing against him. A person appearing before a Special Committee was, however,

[945] M.L.R. No. 22; cf. M.L.R. Nos. 30 and 31 (1958).
[946] M.L.R. 1,o. 29; cf. Ibid.
[947] Ordinance No. IX of 1969, P.L.D. 1969 Central Statutes 125.
[948] Ordinance No. XII of 1969, P.L.D. 1969 Central Statutes 130.

to appear personally and by himself, and no friend or legal adviser was allowed to be present with him. No order, proceeding or finding of a Committee was to be called in question in any court.

A martial law regulation[949] called upon all those, who had ill-gotten properties and assets, to surrender them to government; if this were done, no penal action would be taken. But failure to surrender such properties carried a punishment of imprisonment for fourteen years and confiscation of property. The same regulation prescribed imprisonment for seven years for failure to submit or for knowingly submitting a false statement of assets, as required by the Improper Acquisition of Property Ordinance. To supplement these provisions, another regulation was promulgated in December, 1969 authorizing "the authority", which included the President and the provincial Governors, to dismiss, remove, reduce in rank or prematurely retire an officer from government service on the grounds of inefficiency, misconduct, corruption or for subversive activity.[950] Ordinarily action under this regulation was not to be taken without giving the officer an opportunity to explain his case before a tribunal, but it was provided that the opportunity could be denied in certain circumstances.

To enquire into the conduct of the judges, the Judges (Declaration of Assets) Order, 1969[951] was issued in July, 1969. The Order required all judges of the superior courts to submit statements of properties and assets held by them to the Supreme Judicial Council for its examination. The statement was to show the property and assets of a judge acquired or transferred since October 7, 1958 or if he had assumed office on a later date, from that date till April 22, 1969. The Supreme Judicial Council, on receipt of the statements, was to examine them and submit its report to the President.[952]

It is, therefore, significant that, while the Martial Law Administration of 1958 had taken prompt and peremptory prohibitory measures against the politicians, the new regime lost no time in showing the public that it was aware of the allegations publicly made against the Ayub administration. On the other hand, no action was taken, at least in the first instance, nor apparently contemplated, against the politicians. The regime represented itself as a caretaker government, intent on its duty of restoring peace and order and creating conditions conducive to the holding of elections. It would be for the representatives of the people to find solutions to the country's long standing problems. In its attempt to clean the administration, some top aides of President Ayub Khan were

[949] M.L.R. No. 37.

[950] M.L.R. No. 58, Removal From Service (Special Provision) Regulation. A total of 303 officers were suspended. Out of them 196 were dismissed and 71 retired. Out of 39 officers of the Pakistan Civil Service, 25 were dismissed, 13 were retired and only 1 was reinstated.

[951] President's Order No. 4 of 1969, P.L.D. 1969 Central Statutes 120.

[952] It was reported that the President, on the basis of the report had directed the Supreme Judicial Council to investigate the conduct of two High Court judges. The Pakistan Observer, September 24, 1970. Mr. Justice Shaukat Ali, a permanent judge of the Lahore High Court has since been removed for "gross misconduct" on the recommendation of the Supreme Judicial Council. P.O., July 17, 1971.

either dismissed or removed from office, and were called on to answer charges before a tribunal. The charges against these officers ranged from personal corruption and misuse of power to the manipulation of official funds for political purposes.[953] By taking no action against politicians but taking drastic action against corrupt officials, public confidence in the administration had been generated. It was regarded as an administration genuinely interested in the removal of public grievances and having no political ambition.

Judicial views of the regime

It has been observed earlier that the judicial structure and the exercise of the judicial power by the ordinary courts were left generally undisturbed by the proclamation of martial law. The proclamation itself said that all courts and tribunals in existence immediately before the abrogation of the Constitution would continue to exercise all their powers and jurisdiction as before. All judges of the Supreme Court and the High Courts were continued in office. The Provisional Constitution Order also confirmed that the superior courts would have, and exercise all the powers and jurisdiction they had immediately before the proclamation. The doubt about the Supreme Court's power to accept appeal by grant of special leave was also resolved by the Court by giving a ruling that it had the power to do so.[954]

But these documents, while allowing the ordinary courts to function normally, also imposed some restrictions on their power, which were inevitable in the changed circumstances. The proclamation of martial law stipulated that special military courts would be set up to try criminal cases and that the ordinary courts would be authorized to try and punish contraventions of martial law regulations, and also that a martial law regulation could bar the jurisdiction of ordinary courts from trying specified offences.[955] The proclamation also forbade all courts to call in question any martial law regulation or order or any judgment or finding of a military court or issue any writ or other order against the Chief Martial Law Administrator or any person exercising power under his authority. The subsequently issued Provisional Constitution Order also contained provisions regarding the judiciary and its powers to the same effect. The Order, however, empowered the President to make, when necessary, any provision, including a constitutional provision, for the administration of the country.[956]

The first occasion involving the interpretation of these provisions relating to the High Courts' power and the determination of the nature of martial law, arose in a case which was decided by the West Pakistan High Court in June, 1969. The case, *Malik Mir Hasan*

[953] *The Times* (London), April 20, 1970.
[954] *Muhammad Ismail v. The State*, supra.
[955] Proclamation of Martial Law, Clause 3.
[956] The Provisional Constitution Order, Article 8.

v. The State,[957] arose out of an order made by a martial law administrator, transferring a criminal case from the court of a special judge to a Special Military Court for trial, in pursuance of Martial Law Regulation No. 42, which empowered an administrator to effect' such transfer. A petition relating to the case was, however, pending before the West Pakistan High Court for disposal under section 561-A of the Code of Criminal Procedure.[958] It was argued for the petitioners that the Provisional Constitution Order had preserved all the powers and jurisdiction of the High Court, including its inherent power under section 561-A Cr.P.C., to prevent any abuse of the process of law. The Provisional Constitution Order, being a constitutional regulation, no ordinary martial law regulation or order could override its provisions; no change in its provisions could be made by a martial law regulation or order; it could only be done by an amendment of the Order itself. A martial law regulation or order repugnant to the Provisional Constitution Order was, therefore, *ultra vires* of the Order. The order transferring the case would amount to a "curb" on the jurisdiction of the High Court which had been preserved, and particularly so when the High Court had already taken cognizance of the case.

In dealing with the case, a full bench of the West Pakistan High Court attempted to determine the true nature of martial law, which had been imposed on the country on March 25, 1969. It held that the meaning of "martial law", as the will of the military commander, was not applicable in Pakistan.

> "In a country, where the army takes over to suppress riots or disorder and restore peace and order by the proclamation of Martial Law, it would be described as the law of necessity, which must surrender to the rule of law. Therefore, it follows that, even if there is a Martial Law rule in the country, such rule is not arbitrary or uncontrolled by principles nor is it the simple and pure will of the commander. In this country, Martial Law was introduced to secure general peace, to curb riots and to stop resistance to the law. The person assuming the power is to ascertain the will of the people, their settled habits and sentiments and to make laws and Regulations to gain its ends. Thus in our view, where the army of a country proclaims Martial Law to curb riots, tumults and violence to law, sovereignty still continues with the people."[959]

It was observed that the proclamation of martial law did not say anything, which would imply that the country would be run arbitrarily or without any basis of law. Martial Law was imposed for restoring sanity and saving the country from internal disorder and chaos and to ensure that the civil administration resumed its normal functions.

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[957] P.L.D. 1969 Lahore 786.

[958] The section provides: "Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise secure the ends of justice."

[959] *Malik Mir Hasan v. The State*, P.L.D. 1969 Lahore, 86, at p. 816 per Bashiruddin Ahmad, J.

Following the precedent established during the previous occasion in 1958, the court held that the martial law regulation and order themselves could not be questioned in the court. But the court had the power to interpret martial law regulations and orders. Bashiruddin Ahmad J. observed,

> "It is the inherent jurisdiction of the superior courts of the country to interpret law. If an order is passed by a Martial Law Authority or a Military Court, which is in excess of or without jurisdiction, its legal position is open for examination by the High Court, or the Supreme Court, though these courts would not and could not interfere, if the order in question was one with jurisdiction and had the sanction of the Provisional Constitution Order behind it."[960]

Regarding the power and jurisdiction of the court under martial law, the court maintained that the Proclamation and the Provisional Constitution Order both had preserved the position prior to the Proclamation. It was observed,

> "There is not one word either in the letter of the former President to the Commander-in-Chief, or in the speech of the Chief Martial Law Administrator, or even in the Proclamation of Martial Law to suggest that the existing machinery for dispensing justice was found wanting or that it was to be subject to curbs or that a state of affairs was to be brought about in which the will of the Martial Law Commander was to be enforced. The Martial Law Authorities, and even the Chief Martial Law Administrator himself, are bound by the Proclamation, Regulations and Orders as any other citizen of the country. No one, including the Chief Martial Law Administrator, can transcend or deviate from the sole purpose of restoring law and order and democracy and it needs no gainsaying that curbing the jurisdiction of the established judiciary is not a step in that direction..."[961]

The contention that the provisions in Martial Law Regulation No. 42 caused the abatement of all proceedings pending before any court including a High Court, in respect of cases transferred under this regulation to a military court, was not acceptable to the court. The court pointed out that Martial Law Regulation No. 31 reconstituted by Martial Law Regulation No. 45, had conferred on the ordinary court's jurisdiction in respect of a particular class of cases. Any transfer of such a case to a court of an entirely different jurisdiction would amount to depriving the ordinary court of its power and jurisdiction. The court observed that

[960] *Ibid*., at p. 819.
[961] *Ibid*., p. 808, per Mushtaq Hussain J.

> "a general and recognized rule of law is that 'the jurisdiction of superior courts is not taken away, except by express words or necessary implication and that such jurisdiction cannot be excluded, unless there is clear language in the statute which is said to have that effect.' It is, therefore, not open to anyone to argue that such jurisdiction can be affected, as if it were by a side wind, by a statute containing no express words to that effect in it."[962]

Further, the provision in Martial Law Regulation No. 42 for the transfer of cases by a martial law administrator must give way to the provision of the later Regulation No. 31 as reconstituted by Martial Law Regulation No. 45, "which makes it incumbent upon a court to exercise its jurisdiction" in respect of a class of cases.

The Provisional Constitution Order had kept intact Article 2 of the Constitution of 1962, which provided that every citizen was entitled to the protection of law, and to be treated in accordance with law. The Article further declared that every public functionary must show some legal basis for his action concerning the rights of a citizen. By preserving this Article of the abrogated Constitution, the Chief Martial Law Administrator had made it clear that the intention of the government was to act in accordance with law. The court, therefore, held that "the action of any authority, including a Martial Law Authority, howsoever high he may be, if it had not the backing of a constitutional provision, was not immune from being struck down by the courts of the country."[963] A right to appeal or file an application to the High Court under section 561-A Cr. P.C. was a "vested right" accruing to a person as soon as the case was instituted. This right could not be taken away without express words or necessary implication of a statute. And even if the law was changed during the pendency of an action, "the principle that governs the situation would be that the rights of the parties are to be decided according to the law as existed when the action was begun, unless the new law shows a clear intention, either by express word or by necessary intendment, to vary such rights." The court, in view of these findings, concluded that neither the citizen's right to the protection of law and to be treated in accordance with law, nor the court's power and jurisdiction, which had been preserved by the Provisional Constitution Order, could be taken away, without an amendment of that Order, which could be done by the President and the Chief Martial Law Administrator alone.

The decision in *Malik Mir Hasan's* case was an attempt by the West Pakistan High Court to contain the unlimited power of the Martial Law Authorities within the prescribed limit of a constitutional structure prescribed by themselves. It was also an attempt to point out the sphere, namely, the restoration of peace and order in the country, for which the martial law regime had a special responsibility, so that the machinery of the civil administration could resume its normal functions. While the court would not

[962] *Ibid*., p. 800, per Mushtaq Hussain J.
[963] *Ibid*., p. 815, per Bashiruddin Ahmad, J.

interfere in the administration's measures for the restoration of law and order, it was expected that other state organs would be allowed to perform their normal functions without any hindrance. The nature of the martial law regime was not arbitrary; it must follow the basic principles laid down by itself, and exercise powers within the limit prescribed by those principles and law. Commenting on the judgment R.W.N. Dias observed that the Pakistan judiciary had emerged with more credit in upholding individual rights than did its Rhodesian counterpart.[964] But as will be seen presently, the decision was rendered ineffective by an order of the President, which reasserted the regime's authority to exercise unrestrained powers, and to be the sole judge of its own actions.

The court, it may be pointed out, did not question the validity of the abrogation of the Constitution by the Chief Martial Law Administrator. It recognized the regime, which assumed power by an extra-legal method, by agreeing to function in accordance with the proclamation of martial law and the Provisional Constitution Order, and exercise power and jurisdiction as accorded in those documents. These documents certainly curtailed the power of the courts, in that they could not now issue any writ against the Chief Martial Law Administrator, or call in question any martial law regulation or order. The proclamation specifically provided that a martial law regulation could bar the jurisdiction of ordinary courts over specified offences. It would, therefore, seem within the authority of the Chief Martial Law. Administrator to redefine the jurisdiction of the courts, after recognizing the fact that he had successfully and validly overthrown the previous constitutional and legal order, which was the source of the courts' power and jurisdiction.

Again, the Provisional Constitution Order, which formally restored the powers and jurisdiction of the Supreme Court and the High Courts, specifically provided that nothing in that Order or in any law would prejudice the operation of any martial law regulation made by the Chief Martial Law Administrator or by any person having authority from him.[965] The same instrument empowered the President, who was also the Chief Martial Law Administrator, to make such provisions as wore necessary, including a constitutional provision, for the administration of the affairs of the State. It would therefore seem that a martial law regulation made by the Chief Martial Law Administrator should have been given effect to, unless two regulations were clearly contradictory to each other and upholding the one would prejudice the operation of the other.

Martial Law Regulation No. 42, providing for transfer of certain cases from the ordinary courts to military courts for trial, could be construed as not taking away the powers and jurisdiction of the ordinary courts. It could be interpreted to mean that the ordinary

[964] R.W. Dias, "The Grundnorm Again — Martial Law and Fundamental Rights in Pakistan", (1970) 28 *Cambridge Law Journal* 49.
[965] The Provisional Constitution Order, Article 7(1).

courts had full powers over cases, which were left to be tried by them. The regulation did not bar the ordinary courts from trying criminal offences; it provided for the transfer to military courts of cases which were calculated to assist the regime's attempts to restore normality quickly and create public confidence in the machinery of the administration. Normally, where the ordinary courts were given jurisdiction, they were allowed to function without any interference. Further, on the strength of the Supreme Court decisions in *Dosso's* and *Mehdi Ali Khan's* cases[966] decided after the abrogation of the Constitution of 1956, it could be said that the provision in the regulation for abatement of all applications and proceedings in any court, including a High Court relating to transferred cases, had a reasonable basis for acceptance by the court.

Regulation No. 42 reasserted the supreme authority' power to provide for the administration of justice. And once the Chief Martial Law Administrator's authority to break the whole constitutional edifice was recognized, his authority to provide for the administration of justice could not perhaps be challenged. The Chief Martial Law Administrator did not derive power from any constitutional document; his authority was based on his successful over throw of the previous legal order, and his ability to enforce obedience to his will. The only limitation on his exercise of supreme power was his own conscience and principles recognized by him. The crude reality of the extraordinary circumstances and the fact that legality followed power had to be recognized.[967]

On the same day as the judgment in *Mir Hasan's* case was delivered, the President made and promulgated the Jurisdiction of Courts (Removal of Doubts) Order, 1969.[968] The Order reiterated that no court, including the Supreme Court and the High Courts, should entertain any complaint or application in relation to exercise of any power or, jurisdiction by any military court or any martial law authority, issue any writ or order against the exercise of such power or jurisdiction, and declared that a decision in contravention of this provision would be deemed to be of no effect. All questions as to the correctness, legality or propriety of the exercise of any power or jurisdiction by a military court or a martial law authority or any person deriving power from a martial law authority were to be referred to the Chief Martial Law Administrator, whose decision was to be regarded as final. For an interpretation of any martial law regulation or order the issuing authority was to be referred to, and the interpretation given by such authority was to be final and exempt from examination and scrutiny by the courts.

The President's order made the judgment in *Mir Hasan's* case infructuous. The regime did not think it necessary to follow the court's direction to change the legal structure by amending the Provisional Constitution Order, which would have amounted to admitting a limitation on the Martial Law Authority's exercise of power within the

[966] See Chapter VI.
[967] For further discussion on the subject, see next chapter.
[968] President's Order No. 3 of 1969, P.L.D. 1969 Central Statutes 119.

framework of that document. It asserted that the Martial Law Authority was the supreme law-giver, which would not give effect to any decision of the courts contrary to its own policy or declaration. In the case[969] that followed the court accepted this position. It was observed that "whatever may have been the wisdom in enacting the President's Order No. 3 of 1969, it is not for this court to make surmises when the language is plain. The court has to administer a statute as it is."

The learned judge in *Fazal Ahmad's* case said that the intention of the law-giver, as expressed in the Order, was very clear. He observed,

> "After the promulgation of this declaratory statute, there is no doubt left in my mind that the Martial Law Authorities are the sole Judges of both law and facts of the matters before them. I dare say that, though Martial Law Authorities themselves are the creatures of statute, even if they do not act within the well-defined area of their authority, or act in total absence or excess of jurisdiction, this court cannot review their actions. It was a recognized concept that the superior courts of the country have inherent jurisdiction to interpret the law, but unfortunately this power has been taken away by this declaratory statute."[970]

The learned judge referred to an Irish case,[971] where Molony, C. J. held that, though the court had a duty to protect the life and liberty of the subjects, during an armed insurrection, when the conflict was still raging, the court should not interfere with the administration in taking measures to quell the insurrection and restore peace and the authority of the law. It may be pointed out that Molony, C. J. was dealing with a case when the insurrection was still raging in the realm. In Pakistan there was no such resistance to law and order under the martial law regime, and the observation made by the learned judge in consenting to uphold even an unauthorized action of a martial law authority does not seem to be covered by the decision of the Irish case. In Pakistan, during the long spell of martial law between 1958 and 1962, it had been firmly established that, though the court had no power to question any martial law regulation or order itself, actions taken under such regulation or order were subject to the court's scrutiny. It could not be the intention of the law-giver that every action under a statute, even actions contrary to the intention and purpose of the statute itself, should go unchallenged.

In another case,[972] where it was contended that, notwithstanding the proclamation of martial law, the Chief Martial Law Administrator, by his assumption of the presidential office and exercising the presidential powers under the abrogated Constitution, had

[969] *Fazal Ahmad v. The State*, P.L.D. 1970 Lahore 741.
[970] *Ibid*., p. 746, per Shawkat Ali, J.
[971] *Rex v. Allen*, (1921) 2 I.R. 241.
[972] *Riasat Ali v. Government of Pakistan*, P.L.D. 1971 Lahore 115.

made himself subject to the provisions of that Constitution, the court held that the contention was "misconceived". The court said,

> "The source of the present legal order is the proclamation of the 25th of March, 1969. It has two aspects, one that the Constitution was abrogated and the other was that the country was placed under Martial Law. It was not a proclamation simpliciter for imposing Martial Law."

The fact to be noted was that the Constitution was abrogated and the source of power for the Chief Martial Law Administrator was the proclamation and the absolute authority that had been assumed. The proclamation had vested overriding powers in the Chief Martial Law Administrator, and he could make any martial law regulation or order contrary to anything appearing in the Constitution of 1962. His lordship held that

> "the provisions of the Constitution of 1962 are, therefore, not applicable for the governance of Pakistan in all circumstances and in all situations. They are subject to any Martial Law Regulation or Order made by the Chief Martial Law Administrator, who is the only source from which all power flows. If any order made by him is contrary to the Constitution of 1962 it will have an overriding effect and the provision to be applicable would be that Order and not the Constitution of 1962."[973]

The martial law regime, as established on March 25, 1969, according to the judicial decisions, had its foundation on the proclamation issued on that date. Under the new legal order, the President, who is also the Chief Martial Law Administrator, is the supreme law-giver, from whom all legal powers emanate. Though the courts have powers and jurisdiction exercised by them before the proclamation, they cannot call in question any order or regulation made by the President and the Chief Martial Law Administrator or by any person authorized by him. Even the court's power to interpret the provisions of any regulation or order, according to the ruling of the West Pakistan High Court discussed earlier, has been taken away by the President's Jurisdiction of Courts (Removal of Doubts) Order. This is a departure from the position in the earlier martial law period of 1958-1962. The provisions of the Constitution of 1962, which have not been expressly abrogated, are still in force, but they are subject to regulations or orders made by the Chief Martial Law Administrator. The Chief Martial Law Administrator's authority is not subject to any constitutional limitation or fundamental law; he can make any provision Whatsoever for the administration of the country.

Measures to restore constitutional rule

[973] *Ibid*., p. 125.

As has been said earlier in this chapter, the Martial law regime of 1969, unlike the previous occasion in 1958, did not abolish the political parties, though all activities of political nature were banned. A martial law regulation prohibited all meetings and processions without prior written permission from the authorities. Contravention of this provision was punishable with imprisonment for seven years.[974] In his first broadcast to the nation on March 26, the Chief Martial Law Administrator, General Yahya Khan, emphasized that the regime's role was to restore peace end order and create conditions conducive to the holding of elections. And it would be for the elected representatives of the people to find solutions of the country's problems. It was therefore, assumed that, once conditions were normal and the regime could feel that elections could safely be held, the political parties would be allowed to resume their normal activities.

The General reiterated his view at his first press conference on April 10,1969. He said that his administration was fully conscious of the needs and aspirations of the people and that it would take steps to meet those needs and fulfill those aspirations. The Chief Martial Law Administrator said,

> "These steps will take us forward in the appointed direction, namely, the election of the representatives of the people on the basis of adult franchise. It will be for the representatives of the people to give the country a workable constitution. I have no doubt that a constitution, worked out in this manner, will enjoy the support of the people and will have the acceptability and sanctity which a constitution must have."[975]

He confirmed that political parties had not been banned, in the hope that sober thinking would start in the country after tempers had cooled down; their activities had been restricted for the time being and would be allowed again, as soon as passions aroused during the political agitation had subsided. President Yahya Khan said that, before announcing the composition of parliament and the pattern of election, he would move about "among various sections of the people to take their consensus", and might also call a conference of political leaders at a later stage.[976]

The President held a series of talks with party leaders on constitutional and political problems during the next three months, and on July 28, 1969 issued a statement over the radio.[977] He again said that, though banning of political parties would make "the task of Administration a little simpler ... it would delay the achievement of our goal, namely, that of smooth transfer of power to the elected representatives of the people. I,

[974] M.L.R. No. 21.
[975] *Dawn*, April 11,1969.
[976] *Ibid*.
[977] Full Text of the President's speech, *Dawn*, July 29, 1969, p. 6.

therefore, not only did not ban political parties but permitted and even encouraged limited activity in this field." Soon the martial law regulations on the subject would be amended to allow political activities in an extended form. The President said that it was agreed by all that "a sound base in the country, capable of sustaining vigorous political activity before such activity is allowed to be launched" must be created, and that "not only preliminary arrangements but the actual elections should be held under the overall supervision of the Martial Law Administration". The President, however, warned that propaganda and activities prejudicial to "the basic principle of Islam and the ideology and integrity of Pakistan" and unity and solidarity of the people would not be tolerated.

On the constitutional issues the President said there was no unanimity among the leaders. There were strong diversity of opinions, particularly on parity between the two wings, representation on a population basis, and on the issue of "one unit". The suggestion that, once the elections were held, these issues would be resolved, was not acceptable to the President. He said, "the answer obviously is that these must not become points of conflict during the election campaign. If these are not resolved in a satisfactory manner and within a reasonable period of time, I may have to go to the nation to obtain its verdict on the basis of a constitution before elections are held."[978] The President announced that a judge of the Supreme Court, Mr. Justice Abdus Sattar, had been appointed as the Chief Election Commissioner to prepare fresh electoral rolls and to delimit constituencies. These should take about twelve to eighteen months, after which, the President hoped, the elections could be held.

Just after four months, on November 23, 1969, the President, in a nationwide broadcast,[979] announced far-reaching constitutional measures, which would lead to the restoration of constitutional rule and the transfer of power to the representatives of the people. The President regretted that the politicians could not reach agreement on the various constitutional issues. He, however, appreciated their difficulties and said that "while no formal consensus has been. produced, I am now fully aware of the views that various people hold on these issues." He identified "three main issues that face us as a nation in the constitutional field" which were "firstly the question of 'one unit', secondly, the issue of 'one man one vote' or parity between the two wings, and thirdly, the relationship between the centre and the federating Provinces." The President maintained that the questions of representation at the centre and 'one unit' had to be decided before the elections, as they affected the basis of the elections and the setting up of the National Assembly.

The President declared that the "one unit" would be dissolved and the previous provincial entities restored in West Pakistan, and that the elections would be held on the basis of "one man one vote", which was "a basic requirement of any democratic form

[978] *Ibid*.
[979] *Dawn*, November 29, 1969.

of government". On the other issues, whether there should be a federal, parliamentary form of government, with direct adult franchise, whether there should be fundamental rights of the citizens and whether they should be enforced in law courts, whether there should be a judiciary acting as the custodian of the constitution, and the Islamic character of the constitution, which preserve the ideology on which Pakistan was created, according to the President, there was no disagreement.[980]

On the third issue, that is, the relationship between the centre and the provinces, the President's observations indicated that this was a matter, the details of which would have to be worked out in mutual discussion. He said,

> "As for the relations between the Centre and the Provinces, you will recall that, in my July broadcast, I pointed out that the people of East Pakistan did not have their full share in the decision-making process on vital national issues. I also said that they were fully justified in being dissatisfied with this state of affairs. We shall, therefore, have to put an end to this position. The requirement would appear to be maximum autonomy to the two Wings of Pakistan, as long as this does not impair the national integrity and solidarity of the country."[981]

These were indications of President Yahya Khan's sympathy with the East Pakistan demand for autonomy. He further elaborated his view by saying,

> "One of the main aspects of the whole relationship between the Centre and the Provinces in Pakistan today lies in the financial and economic spheres. Federation implies not only a division of legislative powers but also that of financial powers. This matter will have to be dealt with in such a manner as would satisfy the legitimate requirements and demands of the Provinces, as well as the vital requirements of the nation as a whole. People of the two regions of Pakistan should have control over their economic resources and development, as long as it does not adversely affect the working of a National Government at the Centre."[982]

The President declared that elections to the National Assembly would be held on October 5, 1970. The Assembly would be required to frame the constitution within one hundred and twenty days from its first sitting. If it failed, there would be fresh elections.

> "After the Assembly has completed its task and the constitution made by it has been duly authenticated, it will assume the character of Pakistan's Parliament. The stage would then be set for the formation of the new government."

[980] *Dawn*, November 29, 1969.
[981] *Ibid*.
[982] *Ibid*.

Full political activities would be allowed from January, 1970, but no obstruction in the way of restoration of democracy would be tolerated. President Yahya Khan said "Throughout these activities Martial Law will remain supreme, in order to give support to the programme of peaceful transfer of power to the elected representatives of the people."[983]

As promised by the President, the Political Activities Regulation[984] was issued on December 21, 1969, allowing freedom of political activity, including the holding of meetings, processions and propagation of political

ideas. But it provided that no political party or group should indulge in any activity which would involve violence, create hatred, racial, tribal or regional enmity, or obstruct the activities of other political parties. The Deputy Commissioners were empowered to regulate such activities to ensure peace and order, but without hindering the legitimate and peaceful activities of any party. By a subsequent regulation the earlier Martial Law Regulation restricting public meetings and processions was rescinded.[985] Political parties resumed their open activities on January 1, 1970, and except for a few incidents in which rival groups clashed, the political atmosphere in the country remained comparatively calm and elections were held without much interruption.

Towards the end of March, 1970, the President announced that an Order, outlining the basic principles on which the elections would be held, and other provisions relating to the composition and functions of the National Assembly and the Provincial Assemblies, would be issued.[986] The President declared that the West Pakistan Province would be dissolved with effect from July 1, 1970, restoring the previous provincial boundaries, and that, while the elections to the National Assembly would be held on October 5, 1970, the elections to the Provincial Assemblies would take place not later than October 22, 1970. As announced by the President, the Legal Framework Order, 1970,[987] issued on March 29, contained not only the provisions relating to elections and Assemblies, but also the "fundamental principles" on which the future constitution was to be based.

The Legal Framework Order provided that the National Assembly would have three hundred general seats, distributed amongst the provinces and the Centrally Administered Tribal Areas, in proportion to the population, and thirteen seats which were reserved for women.[988] The election to the general seats would be by direct adult

[983] *Dawn*, November 29, 1969.
[984] M.L.R. No. 60.
[985] M.L.R. No. 61.
[986] *Dawn*, March 29, 1969.
[987] President's Order No. 2 of 1970, P.L.D. 1970 Central Statutes 229.
[988] Schedule I to the Order provided for the composition of the National Assembly, as follows:

franchise, and the women members would be elected by the members of the Assembly, divided into provincial units for the purpose of electing the number of women members allocated to each province. The five Provincial Assemblies[989] were to be elected on the same principle.

The function of the National Assembly elected under the Legal Framework Order was to frame a constitution for the country within a period of one hundred and twenty days from the date of its first meeting, and its failure to do so would render the Assembly dissolved.[990] Until a constitution had been framed and authenticated by the President, the national Assembly would not meet for any other purpose. But once the constitution came into force, the National Assembly would function as the first federal legislature, for the full term, and if the legislature was to consist of two Houses, the Assembly would be the Lower House of the federal legislature. A provincial assembly was not to be summoned till the constitution came into force.

The Order outlined the "fundamental principles" of the constitution on the basis of which the National Assembly was required to frame the constitution. These principles included the Islamic provisions of the late Constitution, adherence to basic principle of democracy ensuring periodic elections, the fundamental rights of the citizens and independence of judiciary in the matter of dispensation of justice and enforcement of the fundamental rights. One of the principles provided that the division of power between the centre and the provinces would be effected in such a manner that the provinces should have the maximum autonomy in the legislative, administrative and financial fields, but the federal government should also have adequate power in these fields "to discharge its responsibilities in relation to external and internal affairs and to preserve the independence and territorial integrity of the country". The Legal Framework Order was received by the people and political parties with satisfaction, though the provision relating to the authentication of the Constitution by the President

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Provinces	**General Seats**	**Women's Seats**
East Pakistan	162	7
The Punjab	82	3
Sindh	27	1
Baluchistan	4	1
North-West Frontier Province	18	1
Centrally Administered Tribal Areas	7	-
TOTAL	**300**	**13**

[989] Schedule II of the Order provided for the composition of the Provincial Assemblies as follows:

Provinces	**General Seats**	**Women's Seats**
East Pakistan	300	10
The Punjab	180	6
Sindh	60	2
Baluchistan	20	1
North-West Frontier Province	40	2
TOTAL	600	21

[990] Legal Framework Order, Article 24.

gave rise to a little controversy.[991] President Yahya Khan, however, gave his assurance that, if the National Assembly framed the constitution on the basis of the fundamental principles laid down in the Order, there should be no reason for his refusal to authenticate. The provision was there only to meet any unforeseen contingency. The West Pakistan Province was dissolved by the Province of West Pakistan (Dissolution) Order, 1970.[992] The reunification provincial boundaries were restored. The East Pakistan demand for representation on the basis of population was met by accepting the principle of "one man one vote". Only one main issue, the relationship between the centre and the federating units, was left to be settled by the future National Assembly, though the President himself, and the Legal Framework Order advocated maximum autonomy for the units within the framework of a viable central government.

So, by March, 1970 everything was set for the general elections, the first of its kind in Pakistan since the nation's inception twenty-three years earlier. But the elections scheduled to be held on October 5, 1970 had to be postponed to December 7, 1970, because of the colossal damages caused by floods in East Pakistan in the months of July and August. The postponement was opposed by the Awami League and Bhutto's People's Party, on the ground that this would delay the transfer of power to a civilian government.[993] But their immediate reaction was not hostile; other parties had been pressing for the postponement to give them more time to consolidate their position. In November, again, elections in nine National Assembly constituencies had to be postponed, due to the devastation caused by a cyclone that swept through the coastal districts of East Pakistan.

The general elections and after

The election campaign of the political parties went fairly well, without many incidents. The authorities showed that they would not tolerate any gross violation of laws and election rules, which might disrupt the elections. President Yahya Khan, in a broadcast on December 3, 1970, reminded the nation that the elections were being held under the cover of martial law and that the government was determined "to see these elections through".[994] Regarding the purpose and sequence of the election, the President said,

> "The elections are only the first phase of our plan. The next phase will be the framing of the Constitution, and the final phase would be the transfer of power to the elected representatives. Sovereignty would pass to the National Assembly on the conclusion of the last phase and on the lifting of martial law. Needless to

[991] Article 25 of the Legal Framework Order provided that the Constitution Bill adopted by the National Assembly would have to be authenticated by the President, and in the event of President's refusal, the Assembly would stand dissolved.
[992] President's Order No. 1 of 1970, P.L.D. 1970 Central Statute 218.
[993] *The Times* (London), August 17, 1970.
[994] *Dawn*, December 4, 1970.

say, until this whole process is complete martial law will remain supreme in the country."

Visualizing the difficult task that lay ahead, the President called upon the party leaders to "usefully employ the period between their election and the first session of the National Assembly in getting together and arriving at a consensus on the main provisions of our constitution". The President observed, "This will call for a spirit of give and take, trust in each other, and realization of the extreme importance of this particular juncture in our history..."[995]

Apart from a few incidents, the election campaign and the voting took place in a peaceful atmosphere, and all parties, including those which were defeated, agreed that the elections were both free and fair.[996] In all, twenty-three parties put forward over a thousand candidates for the National Assembly seats. On the eve of the election, however, over sixty candidates, belonging to different parties in Nast Pakistan, withdrew, ostensibly as a protest against the government's handling of relief operation in the cyclone-devastated area; they were generally believed to have done so in order to avoid defeat by the Awami League candidates.[997]

Although it had been anticipated that the Awami League in East Pakistan and the People's Party of Zulfikar Ali Bhutto in West Pakistan would fare well in the polls, their sweeping victory in their respective regions was totally unexpected. While the Awami League won all but two seats allocated to the eastern province, Bhutto's party won eighty-one out of one hundred and thirty-eight general seats in West Pakistan. The People's Party's performance appeared most surprising to those observers who had estimated that the party would win at most forty seats in the National Assembly. Apart from these surprises, the elections also revealed four striking features of the contemporary political trends in Pakistan. First, the electorate decisively demonstrated its repudiation of Field Marshal Ayub Khan's political system by the overwhelming defeat of the candidates belonging to the ex-President's Convention Muslim League, which won only two seats in the Assembly. Secondly, the older parties, except the Awami League, and the established politicians, including the former ministers, were generally rejected by the voters. Thirdly, the right-wing religious parties, such as the Jamaat-i-Islami, received little support, suggesting that the influence of the Mullahs even in the rural areas, was much less than had been believed. The Jamaat-i-Islami won only four seats in the Assembly, none from East Pakistan. Lastly, candidates from the armed forces were generally unsuccessful, suggesting a popular distaste of military dabbling in the country's politics.[998]

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[995] *Dawn*, December 4, 1970.
[996] *Keesing's Contemporary Archives*, (1971-72), p. 24413.
[997] *Ibid*.
[998] Cit. *Keesing's Contemporary Archives*, (1971-1972), p .24413

So far everything had gone well. It was much to the credit of the martial law administration of President Yahya Khan that the elections were held successfully in a peaceful atmosphere. The results of the elections, in a way, belied the fear that, due to the numerous political parties with varied opinions on different issues, it would not be possible for any single party to win a substantial number of seats in the Assembly, and that an Assembly composed of a number of small factions would cause a deterioration of the political situation to that prevailing in 1958. The voters, on the whole, showed that a party with a genuine programme would secure their support. The fantastic victory of the Awami League in East Pakistan was due to the Popularity of its demand for maximum autonomy for the province. Bhutto's success in West Pakistan, particularly in the Punjab, was attributed to his party's combination of economic radicalism and anti-Indian nationalism. But the overwhelming success of the Awami League in East Pakistan without securing a single seat in West Pakistan, and the People's Party's success in 'jest Pakistan without securing a seat in the other wing showed the strong regional sentiments of the voters and their diverse attitude towards national politics. No political party and no political leader secured national support, or developed a national image. The strength of the two parties in their respective regions proved to be their greatest weaknesses in the events that followed.

After the elections, it was expected, as the President indicated in his broadcast on December 3, that the party leaders would try to reach an understanding on the constitutional issues. But as it happened, instead of endeavoring to reach an agreement, the leaders of both the Awami League and the People's Party proceeded to make announcements showing their hard-line attitude on these issues. The differences between the Awami League leader, Sheikh Mujibur Rahman, and the People's Party leader, Zulfikar Ali Bhutto, were fundamental and called for tact, rood will and a spirit of compromise, if they were to be resolved. While Bhutto wanted a strong centre and demanded an intensification of the confrontation with India on the Kashmir question, going to the length of calling for "a thousand year war if necessary", Mujibur Rahman demanded maximum autonomy for the provinces as set out in his party's six-point programme; this implied a weak centre, and the resumption of normal diplomatic relations with India, which had deteriorated since the 1965 war. His soft policy towards India was prompted by the economic benefit that East Pakistan would get from trade with India, which had been disrupted since the war.

On the autonomy issue, Bhutto on December 15 said that he would not agree on any arrangement "at the cost of Pakistan's unity, solidarity and integrity".[999] Sheikh Mujibur Rahman, on the other hand, asserted that the constitution should be based on his party's six-point programme. The people of East Pakistan, by electing his party, had given him a clear mandate to implement his six-point programme but his party could not frame

[999] *Dawn*, December 16, 1970.

the Constitution alone, even though it had a majority in the Assembly.[1000] President Yahya Khan, in an attempt to bring about a compromise, met both the leaders at the end of January; Bhutto and Sheikh Mujibur Rahman also met on several occasions at the beginning of February, 1971. But as the election campaign had shown the two men were bent on achieving rigid and diametrically opposed ends; their meetings made it clear that there was hardly any common ground between the two parties in the Assembly. In mid-February President Yahya Khan announced that the National Assembly would meet on March 3, 1971, at Dacca; there was still little sign of the end of the deadlock between the two parties. On February 17, 1971 Bhutto declared that it was pointless "under the present circumstances" for his party to attend the Assembly session, merely to endorse a constitution, in the framing of which they would have no say. He referred to the Awami League leaders' insistence that the constitution must be based on the party's six-point programme and said that, if a "viable" constitution was to be framed, his party must have a hand in its framing.[1001]

Sheikh Mujibur Rahman on February 241 1971, described as "utterly false" the allegation that his party was seeking to impose its programme on West Pakistan. He said that the six-points were for safeguarding the interests of the federating units and, under such a framework, the central government would not be left at the mercy of the provinces. He pointed out that his programme sought to give the units control of those matters, which made it possible for one wing to exploit the other, which had, in the past created so much mistrust between the wings.[1002] With both sides remaining adamant, the deadlock remained indissoluble, and Bhutto announced his party's boycott of the Assembly session and intimidated other West Pakistani politicians who were planning to travel to Dacca.[1003] In the face of this pressure, the President on March 1, 1971, announced the postponement of the opening of the Assembly. The President, in his broadcast, said that he had postponed the Assembly session, because the People's Party, the leading party in West Pakistan, had announced that it would not attend the Assembly meeting. He said, "with so many representatives of the people of West Pakistan keeping away from the Assembly, if it were to go ahead with the inaugural session on March 3, the Assembly itself could have disintegrated and the entire effort could have been wasted."[1004] The President squarely put the onus for the difficulties on the political leaders for the "hard attitudes" they had adopted, and implied that only the politicians could 'untie the knot they had tied.

The President, according to observers, made his first mistake by not consulting the leader of the majority party, Sheikh Mujibur Rahman, in taking the decision to postpone the Assembly session, for this was represented as the President's surrender to Bhutto

[1000] *Ibid*., January 4, 1971.
[1001] *Dawn*, February 18, 1971.
[1002] *Dawn*, February 25, 1971.
[1003] Peter Hazalhurst, "Background to the Failure of Negotiations", *The Times* (London), June 4, 1971, p. 14.
[1004] *The Financial Times*, March 2, 1971.

and the Punjabi pressure.[1005] The President's announcement sparked off unrest and disturbances in Dacca, though the Awami League leader had called for the observance of a non-violent *hartal*, to show resentment against the postponement of the Assembly session. Security forces opened fire on several occasions to quell riots, resulting in heavy casualties. It was announced that Sheikh Mujibur Rahman would declare his future plans on March 7, 1971. In the meantime, the situation in East Pakistan became extremely tense, with a general strike and widespread non-cooperation; mob violence and action of the security forces resulted in the deaths of a number of people. All government offices and courts remained closed.

In an attempt to resolve the crisis, the President called to a round table conference in Dacca on March 10, the leaders of twelve parliamentary groups.[1006] Sheikh Mujibur Rahman rejected the invitation, alleging that the army was shooting down unarmed Bengalis in the streets of Dacca and declared that "with a military build-up [in East Pakistan] continuing and the harsh language of weapons ringing in our ears, the invitation to such a conference is in effect being made at gunpoint."[1007] Nurul Amin, the only other leader invited from East Pakistan also declined the President's invitation. The President on March 6 announced that the National Assembly would now meet on March 25. Bhutto expressed his willingness to attend the session.[1008] But by this time things had already gone too far.

Sheikh Mujibur Rahman on March 7, ignoring militant cries for "independence", outlined four pre-conditions for further talks. He demanded the immediate ending of martial law, the return of all troops in East Pakistan to their barracks, an inquiry into the deaths which had occurred during the previous few days, and the transfer of power to the elected representatives of the people.[1009] He also called upon the Bengalis to continue their non-violent non cooperation movement till these demands were met. Life in the entire province had been disrupted and the Bengalis showed their solid support for Sheikh Mujibur Rahman's demands. In the midst of such a distressing situation, President Yahya Khan arrived in Dacca on March 15 to negotiate with the East Pakistani leader.

The President, it was reported, made two alternative offers to resolve the crisis. The first was that he was willing to restore power to the elected representatives immediately, if Sheikh Mujibur Rahman was willing to form provisional governments, both at the national and provincial levels. Secondly, the President was willing to restore power to the provinces, while an interim government, led by the President himself, would

[1005] *The Times* (London), June 4, 1971.
[1006] *The Times* (London), March 4, 1971.
[1007] *Keesing's Contemporary Archives* (1971-72), p. 24566.
[1008] *The Financial Times*, March 8, 1971.
[1009] *The Financial Times*, March 8, 1971.

administer the day-to-day needs of the country, until a constitution was framed.[1010] At the time the two leaders had said there was room for optimism. But when Bhutto had heard of these proposals, he publicly declared that "West Pakistan would go up in smoke, if the People's Party was not included in the proposed coalition government". He launched a massive and violent campaign in the Punjab to prove his point.[1011]

As the talks between the President and Sheikh Mujibur Rahman progressed, Bhutto joined in on March 21. On the following day the President announced the postponement of the Assembly session "in consultation with leaders of political parties from both wings".[1012] The announcement was taken to mean that time was needed for further elaboration of the arrangements before the actual meeting of the Assembly, or that the progress of the negotiations not being satisfactory and there being no agreement among the political leaders, the meeting of the Assembly had to be postponed. In the midst of varying speculations and rumors, the President suddenly flew back to West Pakistan, as also did all the West Pakistani leaders, including Bhutto, on the night of March 25, 1971. The army then went into action in East Pakistan.

The talks clearly had reached a deadlock and the President in a broadcast[1013] to the nation on March 26, 1971, recapitulated the attempts he had made to make the political leaders agree on some principles on which the future constitution could be based and power could be transferred to the elected representatives of the people. He blamed Sheikh Mujibur Rahman and his party for the serious turn of events during the three weeks of March. The President said,

> "Sheikh Mujibur Rahman's action in starting a non-cooperation movement is an act of treason. He and his party have defied lawful authority for over three weeks. They have insulted Pakistan's flag and defiled the photograph of the Father of the Nation. They have tried to run a parallel government. They have created turmoil, terror and insecurity."

The President said that he would have taken action earlier but he had to try his utmost not to jeopardize his plan for a peaceful transfer of power. But Sheikh Mujibur Rahman's "obstinacy, obduracy and absolute refusal to talk sense can lead to but one conclusion — the man and his party are enemies of Pakistan, and went East Pakistan to break away completely from the country."

The President disclosed that Sheikh Mujibur Rahman had asked for the withdrawal of martial law and the transfer of power before the meeting of the National Assembly; he also demanded that the Assembly should meet in two committees — one composed of

[1010] Peter Hazelhurst, "Background to the Failure of Negotiations", *The Times*, June 4, 1971, p. 14.
[1011] *Ibid*.
[1012] *The Guardian* (London), March 23, 1971.
[1013] Full Text of the President's Speech, *Dawn*, March 27, 1971.

the members from East Pakistan and the other composed of the members from West Pakistan. The President said that, despite some serious flaws in the scheme, he himself was prepared to agree "in principle" to the plan. But the West Pakistan political leaders felt that the transfer of power before the meeting of the National Assembly would be illegal and would create a vacuum; the splitting of the National Assembly into two parts "would encourage the divisive tendencies that may exist". The President had agreed with this view but Sheikh Mujibur Rahman was adamant on all these points.

In view of the grave situation, the President said, he had placed a ban on all political activities throughout the country, and had completely banned the Awami League as a political party. The President concluded, "Finally 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 the situation permits, I will take fresh steps towards the achievement of this objective."[1014] The President reiterated his view in a press conference on May 24, 1971. He said that the regime had done a lot of hard work to enable the elections to be held and this would not be allowed to go to waste. The President disclosed that in two or three weeks' time he would announce his new plan, to transfer power to the elected representatives of the people.[1015]

On June 28, 1971, the President, in a nationwide broadcast,[1016] announced his plan of setting up civil governments both at the centre and the provinces. He said that, because of the unhappy history of the attempts to frame a Constitution by an Assembly in Pakistan, the constitution would now be drawn up by an expert committee on the basis of the principles laid down in the Legal Framework Order. ' The President announced that, after investigation, a list of Awami League members of the National and Provincial Assemblies disqualified because of "anti-State activities", would be published. By-elections would be held to fill these vacancies but the rest would retain their seats as independents. After the by-elections and the adoption of the new constitution, National and Provincial Assemblies would be convened and national and provincial governments formed. The President said that these governments would

> "have at their disposal the cover of martial law for a period of time. In actual practice martial law will not be operative in its present form, but we cannot allow chaos in any part of the country, and the hands of the governments need to be strengthened until things settle down."

The President expressed his hope that power would be transferred within four months but it would "naturally depend on the internal and external situation"..

[1014] *Ibid*.
[1015] *The Financial Times*, May 25, 1971.
[1016] *The Guardian* (London), June 29, 1971.

In the middle of 1971, the political scene looked like a total frustration of the two years' preparation for the transfer of power from the military regime to the representatives of the people. The failure of the talks between the leaders and the army's action in East Pakistan on March 25, 1971 aggravated the situation and widened the differences between the two wings. The militant Bengalis now feel that self-rule for East Pakistan can only be attained outside the framework of Pakistan. Apart from the President's speech on March 26, it would, at this stage, be difficult to ascertain at what stage the negotiations were abandoned. The protagonists of Sheikh Mujibur Rahman and his party maintain that the President and the now outlawed Awami League leader had reached agreement on all points, that even the proposal for splitting the National Assembly into two parts was accepted by Sheikh Mujibur Rahman, to accommodate Zulfikar Ali Bhutto. Bhutto, according to this view, feared that "in a joint session of the Assembly Mujib might join hands with the Pathan and Baluch and some of the smaller anti-Bhutto parties in the Punjab to neutralize Bhutto and even impose the six-points on West Pakistan".[1017] It is therefore maintained that there was no question of a breakdown in the talks, because the President and his team never issued an ultimatum or laid down their minimum terms for a settlement.

Whatever may have been the reason, there is no denying the fact that it was the inflexible attitude of the political leaders since their election on December 7, 1970, that precipitated the whole crisis. It is suggested in some quarters that the army never intended to surrender power to the politicians. But from the time President Yahya Khan assumed power on March 25, 1969, till the crisis in March, 1971, there was no reason to entertain doubts about his promises to transfer power to the representatives of the people. The armed forces are no doubt an important factor in Pakistan. But the fact remains that the army came in, because the politicians failed to do their duty to the people and created conditions calling for the army's interference.

After the President's promulgation of the Legal Framework Order in March, 1970, there remained only one constitutional issue to be decided by the politicians in the National Assembly, the issue of centre-province relationship, which is as old as the country itself.[1018] This issue had always been the background of the drastic action taken by the executive against the politicians, starting with the dismissal of Khawaja Nazimuddin in April, 1953. After so many years, by the end of 1970 the politicians should have been able to find a solution for this intractable problem. But the axiom that "politics is the art of possible" seems to be unknown to Pakistani politicians. It was their adamant stand on this issue that resulted in the tragic events that have followed since March 25, 1971.

It is not for me to justify the army's action in East Pakistan, which started on March 25, 1971, and it is too early to predict the consequences of this action. But an analysis of the

[1017] Rehman Sobhan, "Prelude to an Order for Genocide", *The Guardian* (London), June 5, 1971, page 2.
[1018] See N.B. Naqvil "West Pakistan's Struggle for Power", *South Asian Review* (1971) Vol. 4, p. 213.

developments before that date points to the inescapable conclusion that the situation was precipitated by the words and actions of the politicians. If Sheikh Mujibur Rahman's programme was not negotiable and the only programme that could keep Pakistan united was to concede to the provinces their due rights, as he claimed, he failed to convince Bhutto and the other West Pakistani leaders. If, on the other hand, Bhutto had an alternative scheme, which would have ensured a strong centre and at the same time would satisfy the provincial demands for autonomy, he failed to secure its acceptance by the Awami League leaders. If President Yahya Khan made a mistake in postponing the meeting of the National Assembly, he did so under pressure from Bhutto and his party. The army, it is true, has its own view of the kind of constitution which Would give the armed forces their proper place. It would like to see them entrenched in the constitution and it has been too much involved in politics to adopt an attitude of neutrality on the constitutional provisions. But so far, the army has not flouted any agreement reached by the political leaders. If the political leaders of the two wings had found a solution, it is unlikely that the army would have declined to implement it. The politicians, as in the past, failed to rise to the occasion or appreciate the gravity of the situation, through their lack of mutual trust, political goodwill and above all imagination and political foresight.

Chapter XII

Reaction in Commonwealth Courts

The Cyprus Case

The principles followed and the conclusions reached by Pakistan's Federal Court in 1955[1019] and the Supreme Court in 1958,[1020] found approval, and in some cases aroused vivid discussion in other Commonwealth courts, including the Judicial Committee of the Privy Council, when dealing with legal questions in similar situations. In the first of these cases the Supreme Court of Cyprus was called upon to determine the *vires* of a law, which purported to have been passed by the Cyprus legislature, providing for the administration of justice, including the establishment of the Supreme Court itself. Following the disturbances and the armed insurrection in Cyprus starting at the end of 1963, the Turkish section of the government machinery had ceased to function. Not only had the Turkish Vice-President and Turkish members of the legislature ceased to participate but the Turkish judges of the superior courts also absented themselves from the courts; the neutral presidents of the Supreme Constitutional Court and the High Court resigned, resulting in the virtual collapse of the administration of justice.

Accordingly, the President of the Republic, with the Greek remnant of the legislature, purported to pass legislation, setting up a new system of courts, and merging the Supreme Constitutional Court and the High Court into a new unified Supreme Court, consisting of the existing judges of the two superior courts. The law[1021] was passed by the legislature, at the instance of the executive, to remedy the situation temporarily and, as the preamble said, "until such time as the people of Cyprus may determine such matters". In the *Attorney-General of the Republic V Mustafa Ibrahim*[1022] the jurisdiction of the new court was challenged on the grounds that it had no constitutional existence and that the law, under the provisions of which the court was purporting to function, was *ultra vires* the constitution and therefore a nullity.

The legislation in question was, in fact, passed by the legislature without the participation of the members representing the Turkish community, and furthermore, constitutional provisions relating to establishment of superior courts were among the "basic articles" of the Constitution, which were unalterable by any means whatsoever. The Administration of Justice (Miscellaneous Provisions) Law, 1964 was apparently an

[1019] Reference by the Governor-General, P.L.D. 1955 F.C. 435, Discussed in Chapter III.
[1020] *The State V Dosso*, P.L.D. 1958 S.C. 533, Discussed in Chapter VI.
[1021] The Administration of Justice (Miscellaneous Provisions) Law (Law 33 of 1964).
[1022] (1964) C.L.R.195 S.C.

unconstitutional enactment and the Cyprus Supreme Court was faced with the question whether, in the extraordinary circumstances obtaining in Cyprus during 1963-1964, apparently unconstitutional legislation was valid in law, on the ground that it was designed to preserve the State and Cyprus society.

In dealing with the case the judges took judicial notice of the "recent events" that had occurred in Cyprus, which had paralyzed the whole machinery of constitutional government in the island. In the judicial sphere the two superior Courts ceased to function and "together with them the whole system of the administration of Justice in the Republic was in danger of collapse".[1023] The judges felt that the court could not allow the administration of justice to collapse. Necessity demanded that the courts should function in order to preserve the state and the society. Consequently it was held that the Supreme Court was not an unconstitutional creation, although its establishment was not authorized by the Constitution of 1960. The constitution had to be read subject to the implied rule of necessity and a situation had arisen which it was impossible to meet in terms of the constitution, and the rule of necessity had to be invoked to fill the vacuum created by the abnormal situation in the country.

The judges unanimously held that an apparently unconstitutional legislation would be justified in law, if it could be shown that it was enacted only in order to avoid consequences which could not be otherwise avoided and that no more was done than was reasonably necessary for the purpose. Triantafyllides, J. said that "the doctrine of necessity in public law is in reality the acceptance of necessity as a source of authority for acting in a manner not regulated by law but required in prevailing circumstances, by supreme public interest, for the salvation of the State and its people. In such cases '*sulus populi*' becomes '*suprema lex*', That being so, the doctrine of necessity has developed in accordance with the situations which have given rise to its being propounded or resorted to".[1024]

Referring to the Constitution of 1960 the learned judge observed that "where it is not possible for a basic function of the. State to be discharged properly, as provided for in the Constitution or where a situation has arisen which cannot be adequately met under the provisions of the Constitution then the appropriate organ may take such steps within the nature of its competence as are required to meet the necessity. In such a case such steps, provided that they are what is reasonably required in the circumstances, cannot be deemed as being repugnant to or inconsistent with the Constitution, because to hold otherwise would amount to the absurd proposition that the Constitution itself ordains the destruction of the State which it has been destined to secure".[1025] But it must be pointed out that prima facie the appropriate organ was not competent to pass the impugned law. It seems better to say that in a situation of grave emergency the

[1023] Per Vassiliades, J., at p. 207.
[1024] (1964) C.L.R. 195 S.C. at pp. 230-231.
[1025] *Ibid*. at p. 234.

legislature or such part of it as can be summoned is competent to make any law necessary genuinely intended to meet the emergency not going beyond what is necessary for that purpose.

Josephides, J. elaborated the doctrine of necessity by providing prerequisites to be satisfied before the doctrine was applied to examine the legality of any measure. He said, "In the light of the principles of the law of necessity, as applied in other countries, and having regard to the provisions of the Constitution of the Republic of Cyprus..., I interpret our Constitution to include the doctrine of necessity in exceptional circumstances, which is an *implied exception* to particular provisions of the constitution; and this in order to ensure the very existence of the State. The following prerequisites must be satisfied before the doctrine may become applicable:

(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.

A law thus enacted is subject to the control of this court to decide whether the aforesaid prerequisites are satisfied, i.e. whether there exists such a necessity and, whether the measures taken were necessary to meet it".[1026]

The principle of necessity, enunciated in the Cyprus case, was the same as that which the Pakistan Federal Court applied[1027] in upholding the Governor-General's proclamation purporting to give temporary validity to thirty-five statutes in 1955. The Pakistan decision was, however, not cited in the Cyprus Court. The Pakistan Federal Court held, as the Cyprus Supreme Court did in the instant case, that the Governor-General had acted as he did "in order to avert an impending disaster and to prevent the State and society from dissolution".[1028]

But the similarity between these decisions should not obscure the difference in the basic circumstances in which the apparently unconstitutional measures were taken. While in Cyprus the situation in which the Administration of Justice (Miscellaneous Provisions) Law was enacted, was created by factors beyond the control of either the executive or the legislature of the Republic, and they had to resort to extraordinary measures in order to prevent the administration of justice from collapse. In Pakistan the situation was directly caused by the Governor-General's action in dissolving the first Constituent Assembly, and the plea of "necessity" was put forward to meet a situation, which was the Governor-General's own creation.

[1026] *Ibid*. at p. 265.
[1027] Reference by the Governor-General, P.L.D. 1955 F.C. 435.
[1028] *Ibid*. per Munir, C.J. at p. 486.

Now, it is an accepted principle of natural justice that the plea of necessity would not justify an illegal action by a party to meet an abnormal situation created by that party by its previous action. It should, however, be noted that the Federal Court did not allow the Governor-General to assume to himself, following the dissolution of the Constituent Assembly, all powers, including the constituent powers hitherto exercised jointly by that Assembly and the Governor-General.[1029] It was only when the Governor-General made provisions for setting up a new Constituent Assembly to exercise all the powers and perform all the functions of its predecessor, that the Federal Court upheld the Governor-General's action and then only accorded validity to his action until such time as the matters could be considered by the new Assembly.

The Uganda Case

In Uganda between 22 February 1966 and 15 April 1966 a series of events took place which resulted in the abolition of the Independence Constitution of 1962 and its replacement by a new one, adopted contrary to the procedure provided for constitutional amendment in the previous Constitution. In *Uganda V Commissioner of Prisons, Ex parte Matovu*[1030] the High Court of Uganda was faced with the question of determining the legality of the new constitution. In the course of deciding the case the court had to consider the events that had occurred during the material time, which effected the change. On 22 February 1966 the Prime Minister of Uganda made a statement declaring that in the interests of national stability and public security and tranquility, he had, with immediate effect, taken over all powers of the government of Uganda. By subsequent statements the Prime Minister suspended the Constitution of 1962, saving the provisions relating to seven subjects and assumed to himself all powers exercised and functions performed previously by the President and the Vice-President.

On 15 April 1966 the National Assembly, at an emergency session, passed a resolution abolishing the Constitution of 1962 and adopted a new constitution as "the Constitution of Uganda until such time as the Constituent Assembly established by Parliament enacts a constitution in place of this Constitution". On adoption of the Constitution of 1966, the Prime Minister automatically became the executive President of the Republic and the commander-in-chief of the sovereign state of Uganda. Oaths of allegiance under the new Constitution were administered to all members of the National Assembly and others concerned, but the judges were deemed by the Constitution to have done so.

In determining the legality of the new Constitution, the court, first of all, had to establish its jurisdiction to go into the question. For the state it was contended that the court was not competent to enquire into the legality of the Constitution on the grounds,

[1029] See *Usif Patel V The Crown*, P.L.D. 1955 F.C. 387. Chapter III.
[1030] (1966) E.A. 514.

mainly, that, as judges of the High Court of Uganda, they were precluded by their judicial oaths from questioning the validity of the Constitution; secondly, constitution-making being a political act, it was beyond the jurisdiction of court, or alternatively, the court was bound to declare the Constitution valid, if it should undertake to enquire into the question of validity, because the Constitution was the product of a successful revolution.

The court rejected these objections as to its jurisdiction. On the point of "political question" the Chief Justice, Sir Udo Udoma, who delivered the judgment of the court, pointed out that the question raised before the court was not a question of political nature. His lordship said, "The Government of Uganda is well-established and has no rival. The question that was raised by the court was not as to the legality of the Government, but as to the validity of the Constitution". The Chief Justice distinguished the American case, *Luther V Borden*[1031] where Taney, C. J. of the United States Supreme Court held that it was not for the court to decide which of two contending constitutions was in force at a given time. The Judiciary had to follow the decision of the political department. But whereas in the American case there were two competing groups for the control of the government of the State of Rhode Island, in Uganda there was no such competition and the Government of Uganda had no such rival.

Referring to the first objection the learned Chief Justice said that the judges are bound by their judicial oath to administer justice according to the Constitution as by law established. One of the main functions of the High Court prescribed by the Constitution was to interpret the Constitution itself. His lordship said, "If it is the duty of this court to interpret the Constitution of the Sovereign State of Uganda, it seems to us an extraordinary proposition to submit that this court cannot enquire into the validity of the Constitution. It would be difficult to sustain such a proposition. In our view, since it is the duty of the judges of this court to do right to all manner of people, in accordance with the Constitution of the Sovereign State of Uganda as by law established, it must follow as the night follows the day, that it is an essential part of the duty of the judges of this court to satisfy themselves that the Constitution of Uganda is established according to law and that it is legally valid".[1032] The, judges, therefore, had jurisdiction to go into the legality of the Constitution in order to discharge their judicial duty to do justice to all manner of people in accordance with the Constitution.

Dealing with the Attorney-General's alternative submission, that the Constitution of 1966 was a valid Constitution, because it came into existence as a result of a revolution or a *coup d'état* both of which were recognized in international law as proper and effective means of changing governments or constitutions in independent, and sovereign countries, the Chief Justice referred to the "four cardinal requirements"

[1031] (1849), 7 Howard I.
[1032] (1966) E.A. 514, at p. 530.

outlined by the Attorney-General which had to be fulfilled for such a change to be valid. These requirements were:

1. That there must be an abrupt political change, i.e. *a coup d'état* or a revolution.

2. That change must not have been within the contemplation of an existing constitution.

3. The change must destroy the entire legal order except what is preserved; and

4. The new Constitution and the Government must be effective.

The Chief Justice also noted the series of events that took place in Uganda since 22 February 1966, the Attorney-General's reference to Hans Kelsen's positivist theory and the Pakistan case of *The State V Dosso*, and counsel's claim that, since the adoption of the new Constitution, the people had accepted it and had unanimously given obedience to it so that, by reason of the effectiveness of the constitution, the machinery of government had been functioning smoothly. His lordship then observed, "These submissions are doubtless irresistible and unassaible. On the theory of law and state propounded by the positivist school of jurisprudence represented by the famous Professor Kelsen, it is beyond question, and we hold, that the series of events, which took place in Uganda form February 22 to April, 1966 ... could only appropriately be described in law as a revolution. These changes had occurred, not in accordance with the principle of legitimacy, but deliberately contrary to it. There were no pretensions on the part of the Prime Minister to follow the procedure prescribed by the 1962 Constitution in particular for the removal of the President and the Vice-President".[1033]

In support of his contention that what took place in Uganda was a "revolution", Sir Udo Udoma quoted extensively from Hans Kelsen's *General Theory of Law and State*, as did Pakistan Chief Justice Muhammad Munir in *The State V Dosso*, and said that the effect of Kelsen's principles was that the Constitution of 1966 "was the product of a revolution. Of that there can be no doubt. The Constitution had extralegal origin and therefore created a new legal order. Although the product of a revolution, the Constitution is nonetheless valid in law, because in international law revolutions and *coups d'état* are the recognized methods of changing governments and constitutions in sovereign states",[1034]

[1033] *Ibid*. at p. 535.
[1034] *Ibid*. at p. 537.

Apart from Hans Kelsen, the Uganda Chief Justice found support of his view about the extra-legal origin of every constitution in Salmond on *Jurisprudence*. His lordship quoted from Salmond:

> "Every constitution has an extralegal origin, the best illustration being the United States of America, which in open and forcible defiance of English law, broke away from England and set up new states and constitution, the origin of which was not merely extra legal but was illegal".
>
> "Yet, as soon as those constitutions succeeded in obtaining *de facto* establishment in the rebellious colonies, they received recognition as legally valid from the courts of the colonies. Constitutional law followed hard upon the heels of constitutional facts. Courts, legislatures and law had alike their origin, in the constitution and therefore the constitution cannot derive its origin from them. So also with every constitution that is altered by way of illegal revolution. By what legal authority was the Bill of Rights passed, and by what legal title did William III assume the Crown".[1035]

The learned Chief Justice then discussed the Pakistan case, *The State V Doss*o, and agreed with Munir C. J., that the events in Pakistan on 7 October 1958 had the effect of the annulment of the Pakistan Constitution of 1956 and constituted "an abrupt political change" amounting, in law, to a revolution which was not within the contemplation of the annulled constitution, and that a victorious revolution was an internationally recognized legal method of changing a constitution.

His lordship, on the point of the legality of the new Constitution, concluded, "Applying the Kelsenian principles, which incidentally form the basis of the judgment of the Supreme Court of Pakistan in *The State V Dosso*, our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution, having been abolished as a result of a victorious revolution, in law does no longer exist nor does now form part of the Laws of Uganda, it having been deprived of its *de facto* and *de jure* validity. The 1966 Constitution, we hold, is a new legal order and has been effective since April 14, 1966 when it first came into force".[1036]

So, where the preexisting legal order had been successfully overthrown and replaced by an effective new order, obtaining universal obedience from the people, and without any rival, the judges of the High Court of Uganda recognized the change as a hard political fact. The method of change was immaterial in such circumstances and Sir Udo Udoma, C. J. noted that the change in Uganda had not come about in accordance with the

[1035] J. Salmond, "*Jurisprudence*" (11th edition by Glanville Williams), p. 101
[1036] (1966) E.A. 514, at p. 539.

principle of legitimacy, but "deliberately contrary to it". Both the Supreme Court of Pakistan in 1958 and the High Court of Uganda in the instant case, accepted the change as a "revolution" constituting a new law-creating fact. The High Court of Uganda asserted that it had power to examine the legality of the Constitution and found, on the basis of political facts, that the new Constitution was the effective Constitution of Uganda which replaced the old one.

The Rhodesian Cases

Following the Unilateral Declaration of Independence by the Smith Government in November 1965, the High Court of Rhodesia was called upon to determine the legality of the new order. In a series of cases the High Court, at first giving *de facto* status to the rebel government, ultimately gave *de jure* recognition to it and accepted, on the basis of the facts that appeared in the course of three years, that the overthrow of the old order had been effective and complete. The Rhodesian High Court, as well as the Judicial Committee of the Privy Council, referred to the Pakistan Case of the *State V Dosso* and agreed with the conclusion reached by the Supreme Court of Pakistan in that case.

In the first[1037] of the Madzimbamuto series of cases, it was contended for the Smith Government in the General Division of the High Court of Rhodesia, that the legal tie with Britain had been successfully severed by the Unilateral Declaration of Independence on 11 November 1965, and that the Constitution of 1965, as adopted by the legislature at the instance of the rebel Government, was the effective Constitution of Rhodesia. But the court rejected this argument, and, tracing the constitutional history of Rhodesia, came to the conclusion that Rhodesia was still linked to Britain by a legal tie. Noting the fact that the mother country, was committed to end the rebellion, which it was potentially able to do, it was observed that it could not be said "that the 1965 Constitution is the lawful Constitution or that the present Government is a lawful Government, until such time as the tie of sovereignty vested in Britain has been finally and successfully severed".[1038]

Discussing the positivist theory of Hans Kelsen, Lewis, J. said that the doctrine propounded by Kelsen might well be correct, "and there is no difficulty in applying it in the normal situation, where one has a state which is already a sovereign independent state, changing its form of government or its constitution by a successful internal revolution, whether peaceful or otherwise. All that need happen is the complete displacement of the old order within the territory itself by the new order. In those circumstances, provided that the order has completely disappeared, the existing judges of the courts are in no difficulty. Their former allegiance to the old order disappears with its complete annihilation, and it is then a simple step to recognize their allegiance

[1037] *Madzimbamuto V Lardner-Burke*,(1966) R.L.R. 756 (G.D.)
[1038] *Ibid*. at p. 794, per Lewis, J.

to the new order and to continue to function as if they had been appointed under the new order".[1039] According to the learned judge, such was the situation in the Pakistan case, the *State V Dosso*. He quoted passages from the judgment of Munir, C.J. and said that the Pakistan judges could reach the conclusion as they did, because Pakistan by 1958 had enjoyed for some years independent sovereign status, and the success of the revolution was complete and absolute, when it succeeded within the boundaries of Pakistan.

The situation in Rhodesia was different. Even though the existing regime was in effective control of the internal government of the country, it could not have a fully *de jure* status, until it broke the tie of legal sovereignty of the mother country. But the court recognized the fact that the rebel government was exercising the effective authority over the territory and all public servants and the armed forces were carrying on their ordinary duties in obedience to the laws and directions of the rebel Parliament and the Government; that no British legislation would, even if duly promulgated, be enforced by the appropriate authorities. On the other hand the judges, along with others, had been instructed by the Governor, by whom they were appointed on behalf of the Queen, to maintain law and order and to carry on with their normal task, subject to their refraining from "all acts which would further the objectives of the illegal authorities."

The judges recognized the dilemma facing them in such an extraordinary situation. Lewis, J., in this context, observed, "In this unique situation, therefore, the only way in which this court can continue to function as a court, consistently with the Governor's instruction and consistently with its duty to the State, is to invoke the maxim '*salus populi suprema lex*,' which is, in effect, a doctrine of State necessity, and to recognize such laws and such administrative actions [of the existing regime] as are designed for the purposes" of the preservation of peace and good government and the maintenance of law and order.[1040]

In coming to this conclusion the learned judge referred to the American Civil War cases, in one of which Chase, C.J., said that acts "necessary to peace and good order among citizens... which would be valid if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful government."[1041] The Rhodesian judges, it would seem, had recognized the political facts as they then existed in respect of Rhodesia, in reaching their conclusions. They would not give the rebel regime, in the face of the British commitment to end the rebellion, its full recognition. But, they would enforce such of the regime's measures, both legislative and administrative, as could lawfully have been taken by a lawful government under the 1961 constitution.

[1039] *Ibid*. at p. 788.
[1040] *Ibid*. at p. 811.
[1041] *Texas V. White*, (1869), 7 Wallace 700, 733,

On appeal, the Appellate Division of the Rhodesian High Court by a majority recognized the Smith Government as the *de facto* government in complete administrative and legislative control of the country.[1042] But Sir Hugh Beadle, C.J., refused to accept the 1965 Constitution adopted by the rebel regime as the lawful constitution. The learned Chief Justice went into the events which had occurred since the declaration of independence, particularly taking note of Britain's commitment to end the rebellion and reached the conclusion that, though the regime was in effective control of the territory and was "likely" to continue so, 0 that stage, on the basis of evidence before the court, it could not be said "to be so 'firmly established' as to justify a finding that its status is yet that of a *de jure* government; because ... I find that the evidence on what is likely to happen in future is not yet sufficiently conclusive."[1043]

The, Chief Justice referred to the two grundnorm cases, *State V Dosso* and the Uganda case of *ex parte Michael Matovu*, and held, in agreement with these decisions, that a domestic court had jurisdiction to enquire into the legality of the new order. He rejected the argument that those cases were examples of judges' "joining the revolution" and maintained that, had the judges regarded themselves simply as judges of a revolutionary court, their detailed enquiry "whether or not the old grundnorm had been superseded by the new would have been wholly unnecessary." In both these cases, observed his lordship, a revolution took place and "the courts found, on the facts, that the revolution had succeeded and that the old grundnorm had been replaced by the new. In consequences of this, the courts held that the laws of the new grundnorm were valid."[1044]

Beadle, C.J., then dealt with the question whether a revolution or an abrupt change could be regarded as lawful method of changing the constitution. He accepted the proposition that a successful revolution, replacing the old grundnorm with a new one, would establish the revolutionaries as a lawful government. But "success" here must be equated with the words "firmly established". Because, according to the learned Chief Justice, "no revolution can be said to have succeeded until the revolutionary government is at least 'firmly established'; using the word 'succeeded' in this sense, the determining factor is whether or not it can be said with sufficient certainty that the revolution has succeeded."[1045]

The learned Chief Justice referred to various authorities, including Professor Hans Kelsen's theory, which indicated that legality of the change in the basic norm must follow the political reality, and found himself in agreement with the findings of the courts in Pakistan and Uganda. If the fundamental law had changed, the court had to

[1042] *Madzimbamuto V Lardner-Burke*, 1968 [2] S.A. 284 (R.,A.D.).
[1043] *Ibid*. at p. 326.
[1044] *Ibid*. at p. 313.
[1045] *Ibid*. at p. 315.

recognize it. But his lordship rejected the view, adopted in the court below, that all these authorities could be applicable only to an independent sovereign state. His lordship referred to an American case where it was held that independent sovereign status of the union of American States was not dependent on any concession made by the British King. They "became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and ... they did not derive them from concession made by the British King. The treaty of peace contains a recognition of their independence, not a grant of it."[1046] Following this decision Beadle, C.J., argued: "It cannot therefore be assumed that the ultimate success of the present revolution must necessarily depend on some express or implied acquiescence by Great Britain or on recognition of the present Government by other states. At what particular stage it can be said that the revolution had succeeded and the constitution changed is a question of fact and must depend entirely on the particular circumstances obtaining at a particular time."[1047]

Regarding the method of change of the basic norm, the Chief Justice accepted the contention that the validity of the new constitution did not depend on whether the old constitution had been changed by a lawful method or by an unlawful revolutionary method. According to his lordship, the only fundamental difference in the two methods of change was the demarcation of the precise timing of the change; and in a revolutionary change it was difficult to determine exactly at what time the revolution had succeeded. But once it was clear, Beadle, C. J., observed, "that the revolution has in fact succeeded, the ultimate result is the same, The validity of the new constitution does not depend on the method of change; it depends on the existing factual situation, which determines, as a question of fact, whether the old constitution has disappeared, and the new constitution, in the sense of the new norm, has become the norm."[1048]

The learned Chief Justice in the course of his long judgment included a valuable discussion of the position of, the judges of a preexisting court after a revolutionary change. He referred to the Pakistan and Uganda cases, where the change had followed successful *coups* and said that the judges in those cases, were satisfied that the revolution had succeeded and the fundamental law had changed; they properly so held on the basis of the facts before them. The judges had to recognize the facts and whether or not they would continue to act under the new constitution was a matter for their personal decision. If they decided to relinquish their offices they could do so, "but this would not have had any bearing on what at that time the law was." The Chief Justice held, "If the 'fundamental law' has in fact changed, what I consider the judge cannot do is to purport to continue to sit under the old constitution and declare that this

[1046] *M'ilvaine V Coxe's Lessee*, (1808), 4 Cranch. 209.
[1047] 1968[2] S.A. 284, at p. 319.
[1048] Ibid. at p. 328.

constitution is still the law, which quite obviously it is not, and he knows quite well it is not. Such a decision would completely divorce law from political reality."[1049]

'When the change has in fact taken place, the validity of the grundnorm does not depend on the political views of' the judges. But the effectiveness of the change has to be determined by the judges, on the basis of actual facts as they appeared before them. Beadle, C. J., further emphasized this point when he said, " If an old constitution is completely gone, it is gone for all purposes; and ... the method of its demise matters not, If a judge remains under the new norm, he must accept that norm and cannot remain and seek to declare the law of a non-existent norm. He has no right to elect which norm he will apply."[1050]

But Fieldsend, A.J.A., dissented from the view of the Chief Justice in forceful language. He argued that judges appointed under a written constitution must not admit of any change in the law, unless the procedure prescribed by that constitution for such change had been strictly followed. This applied to any illegal change, whether peaceful or revolutionary. The learned judge referred to the South African cases,[1051] and said that, there "the courts were obliged to stand in the way of what might be termed a legitimate attempt to override the constitution; *a fortiori* must a court stand in the way of a blatantly illegal attempt to tear up a constitution." Fieldsend, A.J.A., held: "A court created by a written constitution can have no independent existence apart from that constitution; it does not receive its powers from the common law and declare what its powers are; it is not a creature of Frankenstein, which, once created, can turn and destroy its maker. It is a matter of the supremacy of the common law as in England, where there is no fundamental difference between constitutional law and the rest of the law."[1052] The learned judge, however, held that certain acts of the Smith Government, which were necessary for the ordinary running of the administration and not designed to defeat the constitution of 1961, would be given validity on the basis of the doctrine of necessity.

The "political reality" referred to by Beadle, C.J., in his long judgment was subsequently recognized by the court in two later cases.. In *Madzimbamuto V Lardner-Burke*(2)[1053] where the applicant prayed for a declaration of her right to appeal to the Privy Council, the court rejected her prayer. The learned Chief Justice, on the basis of the evidence, was convinced "that any decision of the Board, so far as granting any relief to the applicant's husband is concerned, which was the purport of her case, would be a mere *brutum fulmen*, and whatever its academic interest might be, and I have no doubt it would be

[1049] Ibid. at p. 327.
[1050] Ibid. at p. 329.
[1051] An obvious reference to: *Harris V Minister of the Interior*, 1952 [2] S.A. 428, and *Minister of the Interior V Barris*, 1952 [4.] S.A. 769.
[1052] 1968 [2] S.A. 284 at p. 430.
[1053] 1968 [2] S.A. 457.

great, it would not result in giving the applicant the relief for which she asked."[1054] For the same reason the High Court again refused to declare the right of the applicants, who had been sentenced to death, to appeal to the Privy Council against their sentences, and also a prayer for extending the period of a temporary interdict, ordering the respondents to desist from carrying out the execution of the sentences. The learned Chief Justice, on the basis of facts, was satisfied that the rebel government would not give effect to any decision of the Privy Council.[1055]

The Judicial Committee of the Privy Council, which granted special leave to appeal from the determination of the Rhodesian High Court, was not prepared to recognize any change in the constitutional status of Rhodesia, after the Unilateral Declaration of Independence.[1056] The Board discussed the constitutional developments in Rhodesia and taking into consideration the fact that "the British Government, acting for the lawful sovereign, is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed," held the Smith Government and its Constitution of 1965 to be unlawful, and that the United Kingdom Parliament's Southern Rhodesian Act, 1965 and the Southern Rhodesia (Constitution) Order-in-Council, 1965, had full legal effect in. Rhodesia.

The Board unanimously refused to accept the existing Rhodesian Government as a *de facto* government. Lord Reid, who delivered the majority judgment, observed that the terms *de facto* and *de jure* government were "conceptions of international law and in their lordships' view they are quite inappropriate in dealing with the legal position of a usurper within the territory of which he has acquired control." In determining the status of a new regime in a foreign country, the court must ascertain the view of Her Majesty's Government and act on it as correct. Lord Reid said, "In practice, the government have regard to certain rules, but those are not rules of law. And it happens not infrequently that the government recognizes a usurper as the *de facto* government of a territory, while continuing to recognize the ousted Sovereign as the *de jure* government. But the position is quite different, where a court, sitting in a particular territory, has to determine the status of a new regime, which has usurped power and acquired control of that territory. It must decide. And it is not possible to decide that there are two lawful governments at the same time, while each is seeking to prevail over the other."[1057]

Discussing the Pakistan case, the *State V Dosso*, and the Uganda case, *ex parte Matovu*, Lord Reid indicated that as in both cases the revolution was completely successful and the new regimes had no rival in any field, the judges were right in holding the

[1054] *Ibid*., at p. 462. The Chief Justice did not refuse to declare the right to appeal to the Privy Council on the basis of Smith Constitution of 1965 which abolished such appeals. But he recognized the fact that the rebel regime would not enforce any Privy Council judgment.
[1055] *Dhlamini V. Carter*, 1968[2] S.A. 464.
[1056] *Madzimbamuto V, Lardner-Burkel* 1968 [3] All E.R. 561 (P.C.).
[1057] *Ibid*., at pp. 573-574.

annulment of the old constitutions and their replacement by the new ones. His Lordship, however, pointed out : "It would be very different if there had been still two rivals contending for power. If the legitimate government had been driven out but was trying to regain control, it would be impossible to hold that the usurper, who is in control is the lawful ruler, because that would mean that by, striving to assert its lawful right, the ousted legitimate government was opposing the lawful ruler."[1058]

After the Judicial Committee's decision the Rhodesian High Court had to determine finally the legal position of the 1965 Smith Constitution.[1059] Because the court recognized that, after the Board's ruling, that the Smith regime was unlawful and that the Southern Rhodesia (Constitution) Order-in-Council 1965, had full legal effect in Rhodesia, it was impossible for any court appointed under the 1961 Constitution to function in Rhodesia "without, at least, acquiescing in infringements of the Order-in-Council." Sir Hugh Beadle, C.J., who delivered a long judgment, said that the Privy Council, examining the factual and legal position of Rhodesia, had come to the conclusion that the existing Rhodesian government had not established itself as a lawful government. But he pointed out that the Board did not canvass the question what a Rhodesian court sitting under the 1961 Constitution should do, if it came to the conclusion that the 1961 Constitution had been annulled by the efficacy of the change, or what the Board itself would have done had it, on the basis of facts, come to such a conclusion.

The learned Chief Justice, attempting an answer to this problem, said that the Privy Council, as an English court sitting in England, was bound to acknowledge the sovereignty of the British Parliament, irrespective of the view it took Of the Rhodesian situation. And it was not possible for their Lordships consistently to acknowledge both the sovereignty of the British Parliament and the lawfulness of the existing government of Rhodesia. But for a 1961 Constitution court sitting in Rhodesia, the position would be different. His lordship observed "If a 1961 Constitution court, embarking on the factual enquiry, which the Board did, came to the conclusion that the 1961 Constitution had been annulled, because of the efficacy of the change, it would have to decline further jurisdiction as a 1961 Constitution court, because, in Taney, C. J,'s words, it would have ceased to exist as a court. If, after arriving at the conclusion that the change had been effective, the court nevertheless continued to sit and adjudicate on the matters before it, it could only do so as a court different from a court sitting under the 1961 Constitution. Its character would have undergone a transmogrification, as it were."[1060]

The Chief Justice's reference to Taney, C. J,'s opinion relates to the latter's judgment in *Luther V Borden*[1061] where the American Chief Justice held that it was not for the court to

[1058] *Ibid*., at p. 574.
[1059] R.V. Ndhlovu and others, 1968 [4] S.A. 515
[1060] *Ibid*., at p. 522.
[1061] (1849), 7 Howard 1.

decide which of the two competing constitutions was in force in the State of. Rhode. Island, at the material time.. It was :a political question to be settled by the political factions and once the decision was manifest, the court was bound to follow it. According to Taney, C. J., "The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government, under which it is exercising judicial power."

Following the judgment in the American case and in support of his own view, Beadle, C. J., referred to the Pakistan and Uganda cases. His lordship said that the judges in those cases commenced their sittings as judges appointed under the old constitutions and as such enquired into the status of the new revolutionary governments. "When, however, they continued to sit after they had found as a fact that as a result of successful revolutions the old constitutions had been effectively overthrown and replaced by new constitutions, they, by continuing to sit, accepted the new constitutions, and when they held that the new constitutions were *de jure* constitutions, they gave these decisions as Judges sitting under the new constitutions and not as Judges sitting under the old. By continuing to sit after they found the old constitutions had disappeared, they sat as Judges in the new situation and as the new situation was that the new constitutions were the *de jure* constitutions they sat as Judges under those constitutions."[1062]

In the light of these decisions, Beadle, C. J., after examining the facts as they existed in Rhodesia in the autumn of 1968, said, "... I can now predict with certainty that sanctions will not succeed in their objective of overthrowing the present Government and of restoring the British Government to the control of the Government of Rhodesia. The use of force has been excluded, and I can foresee no other factor which, in the foreseeable future, is in the least likely to enable the British Government to regain control. I conclude, therefore, that today I can predict with certainty that the British Government will not succeed in gaining control. This being so, it follows that I must come to the conclusion that the 1961 Constitution has been annulled by the efficacy of the change."[1063]

The learned Chief Justice pointed out that, in the case before the Privy Council, the Board undertook a factual and legal enquiry to determine the status of the rebel regime.

[1062] 1968 [4] S.A. 515, at 522.
[1063] *Ibid*.

And on the basis of the evidence their Lordships came to the conclusion that the regime was unlawful. While on the basis of the facts before the court in the instant case, the High Court of Rhodesia reached the conclusion that the overthrow of the old order had been successful and a new effective order had taken its place. So, the approach by the two courts to the vital question was the same, though they had come to different conclusions. The legality of the new constitution was dependent upon the fact of the successful overthrow of the old order and the effectiveness of the new.

After arriving at the conclusion that the old constitution had been annulled and replaced by the new constitution, whether a judge should continue in his office was, according to Beadle, C. J., a personal question, a matter of judicial conscience. The judges, in the new situation, could not function as the old constitution court. If they decide to carry on with their functions, they would have to recognize the new constitution as the only lawful constitution. On the question of choice whether to go or to continue, the learned Chief Justice observed, "The choice which faces a judge in Rhodesia today may be an agonizing one, but the choice itself is straightforward enough. It is simply this : Is it better to remain and carry on with the peaceful task of protecting the fabric of society and maintaining law and order, or is it better to adhere to the old 1961 Constitution and go with it ... "[1064] And considering the consequences that might follow the resignation of the judges in such a situation, Sir Hugh Beadle, C. J., would prefer the first alternative.

The Nigerian Case

In January 1966 a section of the Nigerian Army rebelled, put two Regional Premiers to death and captured the Federal Prime Minister, who was taken to an unknown destination. His body was later discovered. The head of the Nigerian Army, however, having rallied his men around him, had been able to put down the rebellion. But the situation created by the rebellion and consequent army action resulted in the establishment of a Federal Military Government in place of the preexisting constitutional government in Nigeria. This was done in an apparent "transfer" of power by the Acting President on the "advice" of the Council of Ministers, which met without the Prime Minister, The Acting President, in a speech broadcast on 16 January 1966, said that the administration of the country was being voluntarily handed over to the Armed Forces of the Republic with immediate effect, and called upon all citizens to give their full support and cooperation to the army.

The General Officer commanding the Nigerian Army in a broadcast said that "the Government of the Federation of Nigeria having ceased to function, the Nigerian Armed Forces have been invited to form an interim Military Government for the purposes of maintaining law and order and of maintaining essential services," The

[1064] *Ibid*., at p. 534.

General said that the invitation had been accepted and that he had been vested with the authority as the Head of the Federal Military Government, and the Supreme Commander of the Nigerian Armed Forces, The Federal Military Government then issued directions suspending the provisions of the Federal Constitution relating to the offices of the President and the Prime Minister and establishment of Parliament, and similar provisions in the Regional Constitutions.

In *E.O. Lakanmi V Attorney-General(West)*,[1065] the Supreme Court of Nigeria was faced with the question whether or not the events that took place in Nigeria was a revolution, which could be regarded as having annulled the Republican Constitution of 1963. The case arose out of a Decree issued by the Federal Military Government in 1968, which was attacked as an exercise of judicial power, reserved to the judiciary by the constitution and not affected by, the events in January, 1966 or anytime thereafter. It was contended for the petitioners that the Armed Forces, on invitation from the Acting President, had formed an interim Military Government to restore peace and order, and in the process certain provisions of the constitution of 1963 were suspended. The interim Military Government was required to uphold the constitution and could only derogate from it, if such derogation was justified by necessity.

The respondents, on the other hand, argued that what took place in Nigeria in January 1966 was not just an ordinary transfer of power to, the army; it was a revolution and the Federal Military Government was a revolutionary government, which had seized power on 15 January 1966. It, accordingly, had an unfettered right from the start to rule by force and by means of decrees; its exercise of power was not subject to any provision of the Constitution of 1963. Section 3(1) of Decree No. 1[1066] of 1966 gave the Federal Military Government an unlimited power of legislation on any subject by Decree, which could not be controlled by any part of the Constitution which had not been suspended; no such constitutional provision could be cited to nullify a Decree. Once a document purporting to be a Decree was signed by the Head of the Federal Military Government, it could not be challenged and no court had any jurisdiction to adjudicate on its validity.

The court, whose judgment was delivered by Sir Adetokunbo Ademola, C. J., went into the events leading to the establishment of the Federal Military Government, and agreed with the appellants' contention that "the invitation to the Armed Forces, which was duly accepted, was to form an *interim Military Government*, and, it was made clear that only certain section of the Constitution would be suspended. It was evident that the Government thus formed is an interim government which would uphold the Constitution of Nigeria, and would only suspend certain sections as the necessity arises."

[1065] Nigeria S.C.58/69.

[1066] Section 3(1) "The Federal Military Government shall have power to make laws for peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever".

The learned Chief Justice rejected the argument that there took place a revolution in Nigeria in January 1966. He accepted the dictionary meaning of, the word "revolution", which meant "an overthrow of an established government by those who were previously subject to it" or "a forcible substitution of a new ruler or form of government," and held that neither of these, according to the facts, had happened in Nigeria. A rebellion by a section of the army caused the Acting President to hand over power to the Armed Forces. In this context Ademola, C. J., saw the position thus: "We venture to put the attitude of the Acting President and the Council of Ministers to the head of the Army thus — your men have started a rebellion, which we fear may spread; you have the means to deal with them. We leave it to you to deal with them and after this, return the administrative power of the government to us."

At this stage the learned Chief Justice referred to Pakistan case, the *State V Dosso*, and Uganda case, *Uganda V Commissioner of Prisons*, and quoted from the judgment of the Pakistan Chief Justice, Muhammad Munir, who had described the abrogation of the Pakistan Constitution of 1956 and the military takeover in October 1958 as an "abrupt political change." But the situation in Nigeria was different and, according to Ademola, C. J., in Nigeria "it is not a case of seizing power by the section of the Armed Forces which started a rebellion. The rebellion had been quelled, the insurgents did not seize power nor was it handed over, to them. In Pakistan the President had issued a proclamation annulling the existing Constitution. There was a disruption of the Constitution and the national legal order by an abrupt political change not contemplated by the constitution. Such a change is a revolution."

Distinguishing thus the Pakistan and Uganda cases, on the basis of facts, the learned Chief Justice held that "the Federal Military Government is not a revolutionary Government. It made it clear before assuming power that the Constitution of the country still remains in force, excepting certain sections which are suspended." The country was being governed by the Constitution and Decrees which, from time to time, were enacted when the necessity arose. The Decrees, made out of necessity, would prevail over the provisions of the Constitution. But "the necessity must arise before a Decree is passed ousting any portion of the Constitution. In effect, the Constitution still remains the law of the country and all laws are subject to the Constitution, excepting so far as by necessity the Constitution is amended by a Decree." The Federal Military Government was not empowered to enact a Decree in excess of "the requirements of demands of the necessity of the case," The court had the jurisdiction to examine the "necessity", and any Decree going beyond that necessity and inconsistent with the Constitution would be declared void.

The judgment of the Supreme Court provoked an immediate reaction by the Military Government, which issued the Federal Military Government (Supremacy and

Enforcement of powers)Decree, 1970[1067] nullifying "as of no effect whatsoever" any judgment purporting to invalidate any Decree or Edict. The Supreme Court's attempt to make the Federal Military Government subject to the Republican Constitution of 1963 was thus frustrated by the wielder of political power, which asserted its supreme authority, and the judiciary was expected to remain satisfied with what was allowed by the sovereign political power.[1068]

Discussing the instant Nigerian case, Abiola Ojo argued[1069] that the changes occurred in Nigeria in January 1966 were not in accordance with the principle of legitimacy. They were deliberately contrary to it. There were no pretentions on the part of the head of the Nigerian army to follow the procedure prescribed by the Constitution of 1963, and the Constitution provided neither for a transfer of power nor for a military government. The speech of the General Officer commanding the army, announced his assumption of power without any fetter. The Federal Military Government could have chosen to set aside the Constitution of 1963 completely and replace it with another, or amend it to suit the new situation which, it did, or rule by any constitution whatsoever.

Following Hans Kelsen's theory, Ojo further argued that a revolution occurred whenever the legal order of a community was nullified and replaced by a new order "in an illegitimate way, that is, in a way riot prescribed by the first legal order itself. The new men who are brought to power by a revolution would usually annul only the constitution and certain laws of paramount political importance, putting other norms in their place. A great part of the old order would "remain" valid, but their validity would now depend not on the "old norm"; they were new laws whose import coincides with that of the old laws. They were not identical with the old laws, because the reason for their validity was now different. This was what happened to the Constitution of 1963 after the events in January 1966. It had lost its constitutional and fundamental nature and it only remained valid so far as the new regime allowed its enforcement by the courts.

The Supreme Court of Nigeria distinguished the Pakistan and Uganda cases on the ground that, in those cases, the Constitutions were expressly nullified, which amounted to an abrupt political change, whereas in Nigeria there was only a "transfer" of power. But in view of the state of affairs in Nigeria since the establishment of the Federal Military Government, Ojo commented that "the ground on which the Supreme Court refused to see a revolution in 1966 ... was the technical and fictional exercise of transfer. Even then, it can be plausibly argued that assuming it is agreed with the Supreme Court that there was a 'valid transfer' of power, this should not be taken to exclude the fact of a revolution because, it is submitted, that even where there was a *voluntary* transfer, we

[1067] Decree No. 28, May 1970.
[1068] cf. Pakistan case *Mir Hasan v. the State*, and the President's order, supra pp. 440-4.
[1069] Abiola Ojo "The Search for a Grundnorm in Nigeria — The Lakanmi case", *The International and Comparative Law Quarterly* (1971) Vol. 20 p. 117.

are clearly in a realm where power is taking ascendancy over law to a degree where it becomes impossible to disregard the actual factors of power and obedience in determining legal validity itself."[1070]

The Ghana case

On 24 February 1966 the Government of ex-President Nkrumah was toppled in a military *coup d'état*. The army and police, who assumed the business of governing Ghana, formed a body called the National Liberation Council for this purpose. The National Liberation Council, by a proclamation, suspended the Constitution of 1960, under which Dr. Nkrumah and his government had operated. In April 1970, when the second. Republican Constitution of 1969 had already come into effect, the Supreme Court of Ghana was called upon to determine the legal implications of the *coup d'état* on the preexisting legal system. The Pakistan case was not referred to in the court, but Hans Kelsen's theory of "change of basic norm", which formed the basis of the Pakistan' Court's judgment, was unsuccessfully pleaded by the respondents.

The case[1071] arose out of the interpretation of a provision of the Transitional Provisions of the Ghanaian Republican Constitution of 1969. The provision in question provided that persons appointed to public offices established by or in pursuance of the proclamation of the constitution of the National Liberation Council or in pursuance of any Decree or any authority exercised by that Council, should be deemed to have been appointed from the date of coming into effect of the Constitution of 1969, for a period of six months, unless before or on expiration of that period any such person had been appointed by the appropriate authority to hold that office. The plaintiff received a letter terminating his appointment with the Ghana National Trading Corporation to which he had been appointed in October 1967. The dismissal was challenged on the ground that the plaintiff's appointment did not fall within the purview of the provision of the Transitional Provisions of the Constitution. Though he was appointed during the continuance of the authority of the National Liberal Council, the Trading Corporation itself and the post he was holding were not created by the Council; the Corporation was originally established in 1961 and when the *coup* came in 1966, it was already a legal entity.

The Attorney-General, following Hans Kelsen, argued that the February 1966 *coup d'état* destroyed the grundnorm of the previously existing legal order, namely, the Constitution of 1960 with all its paraphernalia. "Legal Order" from this viewpoint did not mean merely the constitution of a state, but it meant the whole legal system. Once the legal order was nullified and replaced by a new order, in a way which the former had not anticipated, it was a revolution in law. After such a revolution, though a great

[1070] Abiola Ojo "The Search for a Grundnorm in Nigeria — The Lakanmi case," *The International and Comparative Law Quarterly* (1971) Vol. 20 p. 133.
[1071] *Sallah v. The Attorney-General*, Const. S.C.8/70, Digested in 1970 "*Current Cases*".

part of the old order would remain valid within the frame of the new order, its validity now depended, not on the old order, because that order had been annulled, but on the new order, which had replaced the old.

It was argued on the basis of this theory propounded by Professor Hans Kelsen that, with the suspension of the Constitution of 1960, the Act which established the Corporation had also lost its validity, and it regained its validity only when the National Liberation Council, by its proclamation of February 26, 1966, permitted the preexisting institutions to continue. The post, which was being held by the plaintiff, should, therefore, be regarded in the light of this analysis, as established under the authority of the National Liberation Council, bringing it within the purview of the Transitional Provisions of the Constitution of 1969.

The Supreme Court, by a majority, rejected, by implication, the Kelsen doctrine of one total legal order being replaced by another in Ghana. Archer, J. A., observed that, if Kelsen's theory of a "basic norm" was accepted in the case of Ghana, it would mean that, with the suspension of. the 1960 Constitution the old basic norm, a new basic norm had been established. Ile declined to accept the proclamation the new constitution; it lacked predictability, which was a basic qualification of a constitution, whereas the proclamation was subject to the wishes of the National Liberation Council. According to the learned judge, what happened in Ghana on 24 February 1966, was just the beginning of a. "revolution", which culminated in the promulgation of the 1969 Constitution, which annulled or revoked the earlier Constitution of 1960.

The learned judge maintained: "The question whether or not the Proclamation created a new legal order, I am afraid, can only be answered first of all by finding out what we mean by 'legal order'? Is it the legal system of the courts? Is it the administrative machinery or is it the political organization? The answer depends, therefore, on what one means by "legal order". "Legal order" I, understand to mean the constitution of state. The Proclamation cannot be classified as the new constitution of Ghana on 24 February 1966."

The majority, it would seem, based their conclusion on the assumption that a successful *coup d'état* would only destroy the political organization of the state and would not affect the legal system, based on subordinate norms. Mile the upper structure of the constitutional setup would be overthrown, there would remain a continuity of the subordinate legal system. In this sense, the new order would not be regarded as establishing or creating anew all the preexisting laws of Ghana. To permit continuance of a law was to acknowledge its preexistence. Anin, J., who gave a dissenting judgment, on the other hand, accepted the argument, based on the Kelsen's theory, and held that the *coup* established a new legal order, replacing the old, and all laws, after the *coup*, owed their validity to the new law-creating body. The reason for their validity was not

the old constitution but the new legal order which had, by permitting them to continue, created them anew.

It may be pointed out that neither the majority nor the dissenting judgments, in rejecting and accepting Kelsen's theory, have given convincing reasons and arguments for their conclusions. Commenting on the majority judgments, S. K. Date-Bah said[1072] that "critical readers of the judgments of the two learned judges would want to know whether they accept the Kelsenite view of how a legal system is structured, but think that a legal system can survive the destruction of its Grundnorm, or whether they totally reject the Kelsenite view of the source of the ultimate validity of rules in a legal system."

The majority reached the conclusion that, despite the proclamation of 24 February 1966, which suspended the Constitution of 1960, the preexisting laws continued to remain valid. But the learned judges have not elaborated reasons for their conclusion. Date-Bah pointed out : "It would be possible for the learned judges to argue that there is a policy interest in maintaining continuity in legal systems and consequently that whatever is the true ultimate source of the legal validity of rules within a legal system, it is socially desirable, and practical necessity demands, that the law should hold that all rules within a legal system, except those specifically abrogated, survive *coups d'état*."[1073]

The above argument would be, it is submitted, in line with the view taken by the Pakistan courts, after the *coup d'état* in October, 1958. But this line of argument would recognize the supreme authority of the new regime brought to power by the revolution, and replacing the old order. Because all preexisting laws would then be continued, modified or repealed, according to the wishes of the new regime and not on their validity under the old order. This view, despite the decision in Sallah's case, seems to have received the approval of the Ghana. Supreme Court. In an earlier case[1074] where it was argued that the National Liberal Council Decree, which abolished the right to appeal to the court against the finding of an inquiry Commission, was against the letter and spirit of the constitution, the Supreme Court rejected this contention. It was held that, although the general judicial power was expressly preserved during the period of military government, it was only by Decree of the National Liberal Council that this was so, and. there would have been no power in the courts to strike down Decrees as unconstitutional during the life of the National Liberal Council. The court also pointed out that the Constitution of 1969 had no retrospective effect.[1075]

[1072] S. K. Date-Bah, "Jurisprudence's Day in Court in Ghana", (1970) 20 *I.C.L.Q.*, p. 315.
[1073] S. K. Date-Bah, "Jurisprudence's Day in Court in Ghana", 1970 20 *I.C.L.Q.* at p. 321.
[1074] *Awoonor-Williams v. Cbedemeh*, Const, S.C. 1/69, Digested in 1970 Current Cases.
[1075] For a discussion of the case, see James S. Reed, "Judicial Power and the Constitution of Ghana", (1971) 3 *Review of Ghana Law.*

In Gbedemah's case the Supreme Court recognized the supreme authority of the National Liberation Council, which suspended the old Constitution. The court accepted the fundamental nature of Decrees issued by the Council, which were not subject to any other superior norm or principle. In Sallah's case, acceptance of the Attorney-General's argument that, on the basis of Kelsen's theory, every law, every institution and every public office after the February, 1966 *coup*, was to be regarded as a new creation of the military government, was perhaps too much to expect from judges trained in the common law tradition. It may, however, be noted that these cases came before the Supreme Court after the military government had ceased to exist and the new Constitution of 1969 had come into effect. If the Supreme Court had decided as it did in Sallah's case during the military regime 1966-1969, what would be the reaction of the regime to such a decision is now a hypothetical question. But experience in other countries[1076] suggests that it would not be difficult for the regime to nullify the effect of the judgment by simply resorting to a decree issued by the National Liberation Council. An authoritarian regime of any kind is naturally apt to react sharply to the slightest attack on its authority from any quarter.[1077] Effective and unrestricted exercise of power without any vocal opposition is its only claim to govern the country.

Reflections

In the above discussion of the Grundnorm cases in Commonwealth Courts, it is noticed that in Uganda and Rhodesia the courts, like the Pakistan Supreme Court in 1958, found, on the basis of facts, that the old legal order in their respective countries had been successfully overthrown and replaced by new orders. Once the courts came to this conclusion, they gave legal recognition to the new order as the new law-creating organ. In all three jurisdictions Pakistan, Uganda and Rhodesia — the courts, in recognizing the new law-creating body, applied the positivist theory of Professor Hans Kelsen and quoted extensively from his famous work '*General Theory of Law and State*', Kelsen's definition of revolution, a change in the legal order in a manner not prescribed by the preexisting order and outside the scope of the principle of legitimacy, has been accepted by the courts. Referring to such a change Kelsen says:

> "A revolution ... occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been the 'legitimate' organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through action from those

[1076] In Pakistan after *Mir Hasan's* case in 1969, and in Nigeria after Lakhmi case in 1970.

[1077] In Ghana in December 1964 Dr. Nkrumah flouted the verdict of the Special Criminal Court in the famous treason trial, and ultimately dismissed Sir Arku Korsah, the Chief Justice of Ghana, who presided over the Special Court.

> in government positions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had nit itself anticipated. Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old order 'remains' valid also within the frame of the new order. But the phrase 'they remain valid', does not give an adequate description of the phenomenon. It is only the contents of those norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force; it is replaced by new constitution which is not the result of a constitutional alteration of the former."[1078]

Kelsen, then, observes: "No jurist would maintain that even after a successful revolution the old constitution and the laws based thereupon remain in force, on the ground that have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order — to which no political reality any longer corresponds — has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new constitution. It follows that, from this juristic point of view, the norms of the old order can no longer be recognized as valid norms."[1079]

A further important passage from Kelsen's work has been cited by all the three courts with approval:

"(D) Change of the Basic Norm: It is just the phenomenon of revolution which clearly shows the significance of the Basic Norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic state, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals, whose behavior the new order regulates, actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal. Rut this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a

[1078] Hans Kelsen, *General theory of Law and State*,(1945) p. 117.
[1079] *Ibid*. at p. 118.

constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm."[1080]

The courts' application of Kelsen's theory in according legality to the change has led to hostile discussion of their decisions in legal periodicals.[1081] In a recent article J. W. Harris has summarized[1082] the criticisms advanced so far against the judgments, in four categories. They are, firstly, the courts, in according validity to the new legal order on the basis of "efficacy" of the regime, were wrong, in as much as Kelsen stipulated that efficacy was only a, necessary condition of validity, and not identical with validity. Secondly, it was difficult to accord validity to a recent revolution simply on the basis of Kelsen's theory of efficacy, free from political considerations. Thirdly, Kelsen's conception of efficacy referred to a "total" efficacy, and only the court's recognition of the new order constituted such efficacy. And finally, Kelsen's theory, being purely descriptive of legal science, it had nothing to do with the role of the judge in a revolutionary situation.

Harris, in a detailed discussion of the criticisms, showed that the three relating to "efficacy" of the new order were to a great extent unfounded. He argued that "effectiveness" of a legal order was a question of fact and it was true "that soon after the occurrence of a revolution, they may be future questions of fact, but that does not make apolitical judgments about them impossible or impracticable, only more subject to error."[1083] The judge's decision relating to efficacy would depend on the circumstances. "It depends on the relative importance of his decision as against other present and future elements in the efficacy of the revolutionary norms. If a judge believes that the success of the revolution may turn on what he gives in a case before him, then clearly he cannot decide as to the efficacy of the change without first making a political choice, whether or not to join the revolution. If he believes, however, that, whatever he decides the revolution is likely to succeed (if need be by his dismissal and appointment of an acquiescent judge), then his decision that the revolution will be efficacious is not necessarily politically motivated."[1084]

Regarding the last objection that the judge's role has no relation to Keleen's theory of legal science, Harris referred to Kelsen's contention that every act of law application, which is the function of the judge, is an act of law-creation, and as such the judgment of a court is simultaneously an act of applying the law and an act creating law. In this

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[1080] *Ibid*.

[1081] See, e.g. J. M. Eekalaar, "Splitting the Grundnorm", (1967)30 M.L.R. 156; Claire Palley, "The Judicial P:ocess: U.D.I. and the Southern Rhodesian Judiciary", (1967)30 M.L.R. 263; S.A. De Smith, "Constitutional Lawyers in Revolutionary Situations",(1968)7 Western Ontario L.R. 93; L. J. Macfarlane, "Pronouncing on Rebellion:. The Rhodesian Courts and U.D.I.", (1968) Public Law 323; Claire Palley, "Rethinking the Judicial Role,"(1969)1 Zambian L.J., 1; F.M. Brookfield, "The Courts, Kelsen, and the Rhodesian Revolution", (1969)19 *University of Toronto* l.J. 326.

[1082] J.W. Harris, "Men and Why does the Grundnorm change?" (1971) 29 *Cambridge Law Journal,* 103, 105.

[1083] *Ibid*. p. 120.

[1084] *Ibid*. at p. 122.

sense judges have a socially useful and desirable role as legal scientists; and legal science will continue to be socially useful, so long as the judges indulge in it. If judges persistently ignore the hierarchy of the constitution, statutes, contracts etc., the sort of legal science described by pure theory will become pointless. Harris argued: "Courts frequently pronounce upon their jurisdiction in particular cases, and there is no reason, in logic, why a court should not embark on an inquiry as to whether or not there has been a change in the grundnorm, even though, until the inquiry is completed, it is uncertain whether the court's jurisdiction rests on old grundnorm rules or new grundnorm rules."

According to Harris :"The grundnorm changes when the legal norms effective within a territory change in such a way that a legal scientist can only interpret them as a logically consistent field of meaning by presupposing a new grundnorm, which refers to new sources of law. It changes then because, only if he describes effective legal norms, does a legal scientist fulfill his role." He concluded: "The judges in Pakistan, Uganda and Rhodesia were acting properly in the role of legal scientists, when they found that the revolutionary regimes were legal, because they were confronted with very strong evidence that, whatever. decisions they reached, the revolutions would be successful."[1085]

That the success of the revolution and the efficacy of the, post-revolution legal order do not depend on the opinion of the judges has been manifestly demonstrated by the treatment received by the judgments of the recent Pakistan cases of *Mir Hasan v. The State*,[1086] and Nigerian case of *Lakanmi v. the Attorney-General*.[1087] In the former the court, without questioning the validity of post-revolution regime and the legal order, attempted to contain its unlimited exercise of executive and judicial powers within the framework of the Provisional Constitution Order promulgated by the regime itself. In the latter, the court, refusing to see revolution in the events which took place in Nigeria in 1966, attempted to prevent the Federal Military Government exercising power contrary to the provisions of the Constitution of 1963 except in circumstances arising out of justiciable necessity. In both these cases the respective military regimes nullified the effect of the judgments by executive orders. It would be unlikely for a regime, founded on the debris of an old constitutional order, with sheer force as the only basis for its authority, to accept any limitation on its exercise of power. The judgment of the latest Ghana case, *Sallah v. the Attorney-General*, would perhaps have met the same fate if it had been decided during the continuance of the military regime.

It is a long established principle that courts function within the limited sphere of state activity allocated to them by the legislature at the instance of the executive. They are to apply the laws as they are, which "presupposes an established government capable of

[1085] *Ibid*. at p. 132.
[1086] P.L.D. 1969 Lahore 786; see chapter Xi., pp. 490-499.
[1087] Nigerian Supreme Court 58/69; see supra.

enacting laws and enforcing their execution."[1088] They cannot create law in the sense in which the legislative organ of government can, and even then their function to apply and interpret the law is entirely dependent upon the government, if their decisions are to have any social utility as distinguished from their value. And in an underdeveloped country like Pakistan, where the loyalty of citizens is not so much towards the country or the constitution as it is towards the government, a judgment of only academic interest would not serve any useful.

This important factor, loyalty towards government rather than towards the constitution was the main cause of political instability as well as the authoritarian type of rule experienced by Pakistan since its inception. The wielder of political power could ignore with impunity constitutional legal requirements without risking any adverse reaction from the people. And the people had little opportunity of expressing their views in the absence of general elections. The courts, in such circumstances, would appear to be in the weakest possible position to insist on legality. They did not have either resources or the ability, in discharging their judicial duty, to challenge the usurpers of political power.

It would not be proper, it is submitted, to compare the court's role in South Africa in the 1950's in standing up against Parliament's Attempt to amend the entrenched sections of the' Constitution Act, with that of the courts in politically backward countries in situations considered in this chapter. In South Africa, where there was no revolution, no breach of legal continuity, not even a change of government, the court could rule that the repeal of the entrenched constitutional provision, removing the Cape colored voters from the common roll, was void in so far as Parliament did not follow the prescribed procedure required by the Constitution in such circumstances.[1089] In the subsequent case that followed the court ruled that the Act constituting the "High Court of Parliament" which was nothing but the two houses under another name, was invalid, in that it intended to abrogate by indirect means the protection accorded by the entrenched sections of the Constitution Act.[1090] But when Parliament passed the necessary legislation following the prescribed procedure, though the required two-thirds majority could only be secured by appointing fresh Senators, the court held the legislation valid.[1091] The court, whatever might have been its views about the government policy of apartheid", would not assume an overtly political role in the judicial capacity. The point to be noted in these cases is that the South African Parliament was purporting to act constitutionally and the court properly upheld legality in the first two cases. But where the usurper of political power, far from pretending to act within the constitution acts deliberately contrary to it, without

[1088] *Luther v. Borden*, (1849), 7 Howard I, per Taney, C.J.
[1089] *Harris v. Minister of the Interior,* 1952(2) S.P. 428.
[1090] *Minister of the Interior v. Harris*, 1952(4) S.A. 769.
[1091] *Collins v. Minister of the Interior*. 1957 (1) S.A. 552.

provoking any opposition whatsoever outside the court, the court, it is submitted, is bound to give recognition to the new political reality.

In connection with the status and role of the judiciary in a governmental framework, Chief Justice Beadle made valuable observations. His lordship said: "A court cannot derive its authority from a piece of paper, on which may be written the provisions of some defunct or suspended constitution. In normal times a court originates either from an effective constitution, as was the case of the High Court [of Rhodesia] before the revolution, or from a special statute, as is the case of many of the English Courts, or perhaps from existence from time immemorial, as was the old English Court of Arundel; but it derives its real authority from the fact that the governmental power recognizes it as a court and enforces its judgments and orders. Ultimately it must derive its authority from recognition by the governmental power and from the fact that the governmental power enforces its orders. If it was not so recognized, and its orders not enforced, its proceedings would have no more authority than a 'mock trial' deciding academic questions of law.[1092] This description of the courts' authority and functions, it is submitted, is true in all circumstances. A judgment devoid of factual reality may be of high academic interest, but would be of little use to contending parties, who want judicial redress of their grievances.

It may be pointed out, when discussing the judge's role in a revolutionary situation, that controversy regarding it increased when the Rhodesian High Court after initially diving *de facto* status to the Smith regime, ultimately accorded to the Smith Constitution legal validity. It was contended that this change of attitude' after originally accepting the United Kingdom Parliament's claim of legal sovereignty over Rhodesia, because the British Government was expressly committed to restore constitutionality in the territory was illogical. Ultimately the Rhodesian High Court felt that, barring the use of force, which was unlikely the British Government's objective of ending rebellion would not succeed and the revolution, in the circumstances, had been successful.

But the Judicial Committee of the Privy Council found, on the basis of Rhodesia's constitutional history and the fact that the United Kingdom Government was committed to end the rebellion, that the revolution was not successful and the Smith Constitution of 1965 had no legal validity. Lord Reid, giving the judgment of the majority, however, accepted the proposition that a constitution establishing legal order was susceptible of change by extra-constitutional method and that the court would accord validity to such change. His lordship observed: "It is a historical fact that in many countries — and indeed in many countries which ire or have been under British sovereignty — there are now regimes, which are universally recognized as lawful but which derive their origins from revolutions or *coups d'état*. The law must take account of that fact. So there may be a question how or at what stage the new regime became

[1092] *Madzimbamuto v. Lardner-Burke*, 1968(2) S.A. 284, at pp. 329-330.

lawful."[1093] On the basis of this legal dictum the Board agreed with the decisions of Pakistan and Uganda cases.

It would, therefore, seem clear that courts generally accept the proposition that every constitution may be of extra-legal origin,[1094] and in a revolutionary situation the court at some stage will recognize the new legal order as lawful. In the grundnorm cases the courts, including the Privy Council, asserted their competence to determine the legality of the constitution and held that, when they were satisfied that the new government was firmly established, they would recognize it as lawful. It is on this principle, which is accepted by other Commonwealth Courts, that the Pakistan Supreme Court in October, 1958, found the revolution successful and effective; there being no rival whatsoever cave it the legal validity. Whether or not the abrogation of the preexisting Constitution of 1956 was politically justified, it was not for the court to decide. By giving legal recognition to the new order, the Supreme Court accepted the political reality that the revolutionary regime, which had overthrown the old constitution, was now the new law-creating organ of the state.

As has been said earlier, once a judge comes to the conclusion that the old order under which he was appointed has been successfully overthrown, it is his personal decision either to continue in office or to go with the old constitution. The validity of the new order would not depend on his personal views about that order. It has been revealed that "he Rhodesian judges considered the effect of U.D.I. on their own position. Beadle, C. J., after a study of American cases and taking into account the caliber of persons who might replace the judges if they went, decided to continue in order "to save the machinery of justice."[1095] But later two judges, Mr. Justice Fieldsend and Mr. Justice Dandy Young, resigned in 1968. But their resignations did not have any effect on the Rhodesian situation and their brother judges thought it proper on their part to continue under the Smith Constitution. Analyzing in this context the situation in Pakistan in 1958, the judges of the Supreme Court of Pakistan, it is submitted, acted properly in according legality to the new legal order.

[1093] *Madzimbamuto v. Lardner-Burke*, (1968)3 All E.R. 561(P.C.), at p. 574.
[1094] See Sir John Salmond, "Jurisprudence" (12th edition, 1966 by P.T. Fritzgerald) pp. 84-85; G.W. Paton, "*A Text-Book of Jurisprudence*", (2nd edition, 1951) p. 12.
[1095] Claire Palley, "The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary", (1967) 30 *M.L.R*. 263, at p. 269.

Conclusion

In the foregoing chapters we have discussed three major constitutional breakdowns that occurred in the short constitutional history of Pakistan. In discussing those episodes separately, we have attempted to describe the political backgrounds leading to the crises, in so far as they are relevant to our purpose, and analyzed them to show the justification of and objections to the measures taken on those occasions. As has been seen, on at least two occasions the measures were impugned in the highest Court of the country, and the Court, after full deliberation, gave legal validity to the action taken. in the third, the action itself was not questioned but the court's attempt to restrict the regime's exercise of power within a prescribed limit was frustrated by a martial law order. In the present chapter it remains for us to make a summary of the conclusions already reached in the course of our deliberations and to add new points wherever necessary. At the risk of repeating things already written, it is thought necessary for a clear perception of the events considered to give a summary of the conclusions, and to comment on the future of constitutionalism and democracy in the country.

In October 1954 the Governor-General of Pakistan, Ghulam Muhammad proclaimed a state of emergency throughout the country on the plea that "the constitutional machinery has broken down". The proclamation said that the Constituent Assembly having lost the confidence of the people "can no longer function".[1096] The proclamation of the Governor-General dissolved the first Constituent Assembly which, after seven long years of protracted deliberations, was about to enact a constitution for the country. In less than two years this was Ghulam Muhammad's second strike against constitutional rule in the country. In April 1953 he had dismissed the Government of Khawaja Nazimuddin, without assigning any specific reason for such an extraordinary action.[1097] He appointed as Prime Minister Mohammed Ali of Bogra, who was not even a member of the legislature at the time of his appointments Ghulam Muhammad's action in April 1953 showed that political power in Pakistan was no longer in the hands of the members of the legislature. It was being effectively wielded by the bureaucrats, headed by the Governor-General himself and supported by the armed forces.

The dismissal of the first Constituent Assembly was challenged by its President in the Sindh Chief Court, Which unanimously held that the Governor-General had no power to dissolve the Assembly. But on appeal the Federal Court, without going into the merits of the case, held that section 223 A of the Government of India Act, 1935, under which the Sindh Chief Court purported to exercise writ jurisdiction, had not received

[1096] See Chapter III supra and Appendix I for the Proclamation
[1097] See Chapter IV.

the assent of the Governor-General, and, therefore, was not a valid law.[1098] The unanimous decision of the Sindh Chief Court was thus reversed. The Chief Justice, Muhammad Munir, who gave the principal judgment of the Court, found that Pakistan, being a Dominion within the British Commonwealth, having an interim constitution of the Commonwealth type, must follow the practice followed in other Commonwealth countries. The Governor-General, as the representative of the Crown, had the authority to assent to all laws passed by the Constituent Assembly, including constitutional laws. In a subsequent case,[1099] in its advisory jurisdiction the Federal Court held that, though the Governor-General had no statutory power to dissolve the Constituent Assembly, his prerogative power, as the representative of the Crown, to dissolve it had revived on the "failure" of the Assembly to frame a constitution in over seven years. The Governor-General had, therefore, legal power under section 5 of the Indian Independence Act, 1947 to dissolve the Assembly.

These decisions of the Federal Court have met with a mixed reception from academic commentators. While Professor K. C. Wheare regards the Federal Court's finding regarding assent of the Governor-General to constitutional laws as "correct",[1100] Professor S.A. de Smith regards these decisions as "not very well disguised acts of political judgment". According to Professor de Smith "it was very important for the Court not to come to a conclusion adverse to the Governor-General on the main issues".[1101] Professor Alan Gledhill, taking into consideration the Court's endeavor "to hold the balance fairly between the Executive and the Assembly" does not regard the judgments "as political decisions".[1102]

The Chief Justice, Muhammad Munir, in finding the Governor-General's assent necessary to all Bills passed by the Constituent Assembly, refused to accept the traditional and contemporary interpretation of the relevant provisions of the Independence Act, on the ground that there was no doubt about the meaning of the statutory provisions, which were in clear and unambiguous terms. But since independence both India and Pakistan had acted on the assumption that the Governor-General's assent was only essential for Bills passed by the Assembly, acting as the Federal Legislature, and no such assent was necessary to constitutional legislation passed by the Constituent Assembly acting as such, because it was a self-contained sovereign body when making provisions for the constitution of the country. The Pakistan Constituent Assembly, as early as May, 1948, adopted a resolution regarding constitutional bills which read "when a Bill is passed by the Assembly, a copy thereof

[1098] *Federation of Pakistan v. Maulvi Tamizuddin Khan*, P.L.D. 195, F.C. 240; see Chapter III.
[1099] Reference by H.E. the Governor-General, P.L.D. 1955 F.C. 435; Chapter III.
[1100] ICC. Wheare, "*The Constitutional Structure of the Commonwealth*", p. 100.
[1101] S.A. de Smith, "Constitutional Lawyers in Revolutionary Situations", (1968) 7 *Western Ontario Law Review*, p. 93.
[1102] A. Gledhill, "The Constitutional Crisis in Pakistan (1954-55)", *Indian Year Book of International Affairs* 1955, Reprint, p. 21.

shall be signed by the President, and it shall become law on being published in the Official Gazette of Pakistan under authority of the President."[1103] During the hearing of *Tamizuddin Khan's* case it was revealed to the Court that the Maw Ministry had advised in 1948 that, even in Constitutional Bills, the assent of the Governor-General was necessary. But nobody acted on that advice. Sir Ivor Jennings said that it was not explained why the advice was overruled but "it seems possible that the fact that [Jinnah] was both Governor-General and President of the Constituent Assembly was a material factor."[1104] Jennings seems to imply that what really mattered was the signature of Jinnah to a Bill, and not whether he signed it as the Governor-General or the President of the Assembly. But Jinnah, who was strictly legalistic in all matters, cannot be expected to have acted on so specious an assumption. However, Jinnah died in September, 1948 and was succeeded in the two offices by two different persons. But the practice followed during the lifetime of Jinnah continued and state functions were carried out on the authority of constitutional statutes passed by the Constituent Assembly without the assent of the Governor-General. As Cornelius, J., as he then was, pointed out, in his dissenting judgment, the Constituent Assembly's actions in disregard of Law Ministry's advice emphasized the fact that the Assembly deliberately rejected it, when making Rule 62 of the Rules of Procedure.

Munir, C.J., in his judgment observed that the Constituent Assembly wrongly and "thoughtlessly" assumed the role of a sovereign legislature and the Court was not concerned with the resultant "disaster" that might fall upon the country when the Court assumed a legal position contrary to the traditional interpretation. But as Professor Gledhill pointed out, "in attributing responsibility for the crisis exclusively to the Constituent Assembly, the Court has overlooked the contributions of other organs of the State."[1105] The executive, until the crisis, not only initiated important legislation on the assumption that the Assembly's view was correct, but actually asserted that assent to constitutional Bills was unnecessary. It was on the basis of arguments put forward by counsel for the Federation that Agha, J. held[1106] in 1950 that the assent of the Governor-General was not necessary to constitutional laws. In this case the appellant's main contention was that the Public and Representative Offices (Disqualification) Act, 1949, passed by the Constituent Assembly, was void for want of assent of the Governor-General.

After the Sindh Chief Court had held positively that assent was not necessary in constitutional laws, the question was indirectly raised in the Federal Court in at least two cases.[1107] In these cases it was contended that the statutes in question should have been passed by the Federal Legislature and should, therefore, have the assent of the

[1103] Rule 62 of the Rules of Procedure of the Constituent Assembly of Pakistan.
[1104] Sir Ivor Jennings, *Constitutional Problems in Pakistan*. P. 24.
[1105] A. Gledhill, op. cit., p. 21.
[1106] M.A. Khuhro v. Federation of Pakistan, P.L.D. 1950 Sindh 49.
[1107] Khan of Mamdot v. Crown, P.L.D. 1950 P.C. 15; Akbar Khan v. Crown, P.D.L., 1954 F.C. 87.

Governor-General, without which they had no legal effect. But the Federal Court accepted the submission made on behalf of the Federation that they were constitutional laws and so were fully valid without the assent of the Governor-General. It was, therefore, clear, before the Federal Court heard *Tamizuddin Khan's* case, that since the inception of Pakistan, the legislature passed laws, the judiciary enforced them, and the executive acted upon them on the conscious belief and full understanding that the Governor-General's assent was not necessary to constitutional legislation. This was a sufficiently strong ground for the Court to apply the principle of contemporaneous exposition.[1108] As Maxwell has said:

> "It is said that the best exposition of a statute or any other document is that which it has received from contemporary authority. *Optima est legum interpres consuetudo. Contemporanea expositio est optima et fortissima in lege*. Where this has been given by enactment or judicial decision, it is of course to be accepted as conclusive."[1109]

The illustrious author then gives authorities in which the courts interpreted the statutes upholding the meaning given by 'usage', and said:

> "In all these cases, a contrary resolution would have been an overruling of the justice of the nation for years past. The understanding, which is accepted as authoritative on such questions, however, is not that which has been speculative merely, or floating in the minds of professional men. It must have been long acted on in general practice, and publicly."[1110]

The unbroken public practice by all the organs of the State in Pakistan that assent was unnecessary in constitutional legislation consciously for a long period of time was perhaps more than what was required to justify the Court in upholding such practice.

The Federal Court then found that, as the Constituent Assembly had "failed" to frame a constitution for the country in seven years, the Governor-General had the legal authority to dissolve it. Munir, C. J., on the basis of facts supplied to the Court in the Reference by the Governor-General, declined to enquire into those facts, though they were challenged in the counter-affidavits submitted by the respondents. The Chief Justice said "The Governor-General has taken the responsibility of asserting certain facts and has merely asked us to report to him what the legal position is, if those facts are true." But the Chief Justice, in the course of his judgment, gave a table[1111] containing statistical information about the time taken to frame constitutions by some twenty countries. This shows that the Chief Justice himself was convinced and tried to

[1108] See A. Gledhill, *op. cit*., p. 20.
[1109] Sir P.B. Maxwell, *The Interpretation of Statutes* (11th ed.), p. 296.
[1110] *Ibid*., p. 300.
[1111] Reference by the Governor-General, P.L.D. 1955- F.C. 435, at pp. 466-467.

demonstrate that the Pakistan Constituent Assembly had in fact failed to frame a constitution. This contention is true, if one regards the situation as it stood on October 24, 1954. It is true that the Assembly had not adopted the constitution formally and the country was still being governed by the interim constitution. But, as Sir Ivor Jennings, who was at that time closely involved in constitution-making in Pakistan, has said "A Draft Constitution prepared on the instructions of the Drafting Committee would have been ready for signature on 25 October and would have been reported to the Assembly on 27 October."[1112] Not only that, the Prime Minister had already declared that the new constitution would come into effect on December 25, 1954, the birth-anniversary of Jinnah.[1113] The Constituent Assembly had no doubt taken a long time to reach that stage. But it had to tackle intricate issues, that were unique in the constitutional history of any country. When it was dissolved, it had reached unanimity on the complicated question of the place of religion in the Constitution, and full agreement was reported on the issue of representation at the centre, by a novel device based on what is known as the "Mohammed Ali Formula". The whole country was anxious to receive the constitution which, it was thought, would give political direction to the nation. But Ghulam Mohammad did not allow this to happen.

It has been said that Ghulam Mohammad dissolved the Constituent Assembly, not because it failed to produce a constitution, but because it was about to produce one.[1114] What really happened was that the draft constitution, which had been adopted by the Assembly, was not to the liking of Ghulam Muhammad, who particularly resented its provisions which made the Head of the State merely a constitutional head. Moreover, his own future position, once the constitution came into force, was uncertain. Because of his record as the Governor-General, who dismissed with impunity the *bona fide* Government of Khawaja Nazimuddin in 1953, the Muslim League Parliamentary Party in the Constituent Assembly was reluctant to give any assurance of his election as the Head of the State under the new Constitution. The Governor-General, therefore, was planning to take similar action against Mohammed Ali's Government, which had led the Constituent Assembly to curtail the Governor-General's discretionary powers in the previous month. A vicious struggle for supremacy was going on between the Constituent Assembly, composed of people's representatives and the autocratic Governor-General who, because of his own ambitious designs, indulged in power politics. With the support of the civil servants and the armed forces, Ghulam Muhammad triumphed over the Assembly, which was summarily dissolved on October 24, 1954. The Governor-General, no doubt, had the support of a group of Punjabi politicians. But Ghulam Muhammad's personal ambition weighed predominantly in his action and the politicians, who were dissatisfied with some provisions of the draft constitution, only played into his hands.

[1112] Sir Ivor Jennings, *op. cit*., p. 3.

[1113] See Chapter II supra.

[1114] See S.A. de Smith,The New Commonwealth and its Constitution, p. 21; E. J. Newman, The Constitutional Evolution in Pakistan" (1962) 38 International Affairs, p. 353.

Now, a Governor-General, assuming he has the authority to dissolve an Assembly, can resort to dissolution on his own initiative only under certain conditions. E. A. Forsey on this subject has said:

> "It is probably safe to say that, under modern conditions, forced dissolutions will take place only if the Crown considers them necessary to protect the Constitution or to ensure that major changes in the economic structure of society shall take place only by the deliberate will of the people. In other words, the power to force dissolution is now likely to be used only negatively, preventively; never as a means of bringing about some positive end desired by the King himself or his representative."[1115]

And yet, as will be seen presently, it was exactly for the "positive end desired" by the Governor-General that he dissolved the Constituent Assembly.

The Governor-General's proclamation effecting the dissolution of the Assembly declared that elections would be held soon. But once Ghulam Muhammad had consolidated his own position with the support of the civil servants, and had the backing of the army, the commander-in-chief of the army General Ayub Khan, was appointed the Defence Minister, the Governor-General apparently forgot about the election. He had his own ideas about the constitution, which should preserve effective powers for the Head of the State. These were publicly propagated by his Minister of the Interior, General Iskander Mirza, and at one stage it was reported that the constitution had already been drafted.[1116] It was anticipated that the constitution would be promulgated by the Governor-General's decree. This fear was strengthened by the language used in the Preamble and section 10 of the Emergency Power Ordinance, 1955,[1117] which was issued after the Federal Court's decision in *Maulvi Tamizuddin Khan's* case. The Ordinance empowered the Governor-General to make, by order, such provisions as appeared to him to be necessary or expedient for the future constitution of Pakistan. It was the strong criticism of Chief Justice Munir in *Usif Patel's* case, which dissuaded the Governor-General from exercising the powers under the Ordinance, and compelled him to issue a subsequent Ordinance, providing for the convening of the second Constituent Assembly to make a constitution. There is, therefore, strong evidence that the Governor-General and his supporters wanted to give the country a constitution of their own choice without regard for popular feeling and aspirations. In dissolving the first Constituent Assembly, Ghulam Muhammad had no intention of establishing another Assembly to take the place of the previous one.

[1115] E.A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, p. 270.
[1116] See Chapter III.
[1117] Ordinance IX of 1955, P.L.D. 1955 Central Statutes 66.

The proclamation also said that the Assembly, as at that time constituted, had lost the confidence of the people. It is true that, after the provincial elections in East Bengal in February, 1954 there were demands for the dissolution of the Constituent Assembly. But these demands were rejected on the ground that the Assembly had a mandate to give the country a constitution, and that an election should not affect the composition of the Constituent Assembly, About six months later, however, the Governor-General found that it had "lost the confidence of the people". Professor G.W. Choudhury on this point argued:

> "If it had been dissolved immediately after the election in East Pakistan, there might have been some justification, but its dissolution after its attempt to curb the undemocratic and arbitrary powers of the Governor-General seems to indicate that the real motive of the Governor-General in dissolving the House was personal rather than any regard for democratic principles or traditions. His subsequent attempt to give the country a constitution by decree rather than by Constituent Assembly seems also to substantiate his personal motive rather than any concern for the people's representation or rights."[1118]

The Constituent Assembly was dissolved, it is submitted, not because it had "lost the confidence of the people", nor because it "failed" to frame a constitution for the country, but because in October, 1954, it was most certainly going to adopt a constitution which ran counter to the wishes of the Governor-General. Ghulam Muhammad, an autocrat by nature and training, would rather flout all standards of constitutionalism than allow the adoption of a constitution based on principles different from his own authoritarian ideas.

The second major crisis in constitutional development in Pakistan was the abrogation of the Constitution of 1956 and the declaration of "martial law" throughout the country by President Iskander Mirza, in October, 1958. The President considered the Constitution, which was adopted by the second Constituent Assembly in March, 1956, after nine years of toil and turmoil, as "full of dangerous compromises". He came to this conclusion even before a single general election could be held under the Constitution. In his proclamation abrogating the Constitution, the President referred to the deteriorating political condition in the country and said that "to rectify them, the country must first be taken back to sanity by a peaceful revolution". By abrogating the Constitution, under which Iskander Mirza held the office of president, he initiated the "revolution" and put the country under "martial law".

This was a unique action taken by any head of the state in any country within the British Commonwealth. Because, though martial law as an emergency measure was not unknown in the Commonwealth, the special feature of the President's action was the

[1118] G.W. Choudhury, *Democracy in Pakistan*, p. 75.

abrogation of the Constitution itself, with the object of providing another constitution "suitable" to the genius of the people. "Martial law", declared by Iskander Mirza, was only a means to achieve that objective. At a very early stage of "martial law" the Supreme Court of Pakistan was called upon to determine the legality of the President's action, and held that the old legal order, under the Constitution of 1956, had been successfully overthrown by the President's abrogation of the Constitution and a new legal order established in its place by the "success" of the revolution.[1119] This decision of the Supreme Court is sometimes misconceived as upholding the declaration of martial law when there were no circumstances justifying its imposition. But the Supreme Court, it may be pointed out, found in essence that the old legal order had been destroyed, and gave legal validity to the newly established order, which happened to be a military regime ruling the country under "martial law".

The imposition of martial law in October, 1958 was, it is submitted, totally unjustified by the prevailing condition of Pakistan at that time. The country was in a state of peace and tranquility under the constitutional government and was preparing for the first general election ever to be held in the country since independence, in February, 1959. Political crisis, which the President put forward as the ground for his action, had never been recognized as a reason for the imposition of martial law in any part of the Commonwealth.

Martial law, as is generally understood in the Commonwealth, is "the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot or generally of any violent resistance to the law".[1120] This concept of martial law has been recognized in every part of the Commonwealth as "the law of self-defence or the law of necessity" put in force in times of public danger "when in consequence it becomes necessary for the military authorities to assume control and to take the law into their own hands for the very purpose of preserving that constitution which is the foundation of all the rights and liberties of its subjects".[1121] When there is "actual war" not "mere riot or disturbance neither so serious nor so extensive";[1122] where there is a "deliberate organized resistance by force and arms to the laws and operations of the lawful Government, amounting to a war or armed rebellion"[1123] that the operation of martial law is justified. "Martial law Cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and the civil administration."[1124] That martial law would not be justified in a territory where the courts were open and functioned normally, as enunciated by the United States Supreme Court in *ex parte Milligan*, and which later found support in the

[1119] The *State v. Dosso*, P.L.D. 1958 S.C. 533; Chapter VI.
[1120] A.V. Dicey, *Law of the Constitution*, p. 288.
[1121] *Queen v. Bekker, Queen v. Naude*, (1900) 17 S.C. 340 (S.C. of Gape of Good Hope).
[1122] *D.F. Marais v. General Officer Commanding*, ex parte Marais, (1902) A.C. 109.
[1123] *The King v. The Military Governor*, Irish Reports 32.
[1124] Ex parte Milligan (1866) 4 Wallace 2; (1866) 71 U.S. Reports.

Irish court in *R. v. Military Governor*, was rejected by the Judicial Committee of the Privy Council, when it said "The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging."[1125] But the Board asserted that there must be "actual war" raging in the realm to justify a declaration of martial law, and the necessity of the declaration would be justiciable in the ordinary court of law. When martial law is necessitated by the circumstances, namely war caused by attack from external enemy or by internal rebellion, a formal proclamation of martial law is not essential for its operation. As has been observed "A proclamation of martial law is not ... in any way essential to the exercise of these powers: it is a convenient notification to the inhabitants that the commander has assumed control of the district, but it in no way affects the legality or illegality of his action."[1126] Legal justification of the exercise of power under martial law must be found in the necessity of the circumstances; its exercise "requires to be justified on every occasion by necessity of the cases".[1127]

The concept of martial law as a part of the common law of necessity was well-known to the court of the Indo-Pakistan sub-continent. During the period of British rule in a series of cases[1128] arising out of emergencies declared in areas disturbed by riots and insurrection, the courts recognized the legality of a declaration of martial law and examined the circumstances alleged to justify the exercise of powers under martial law having regard to the conditions prevailing at the material times. After independence the Pakistan courts had to deal with the situation following the declaration of martial law in Lahore in March, 1953. According to the High Court of Lahore, martial law meant "the rights and obligation of the military, under the common and statute law of the country, to repel force by force, while assisting the civil authorities to suppress riots, insurrections or other disorders in the land."[1129] But while the armed forces exercise unlimited powers during the period of martial law,

> "the legality or excusability of any action taken by the military will be judged by 'necessity' and ... such judgment will lie with the civil courts *ex post facto*. Thus martial law is the law of Military necessity, actual or presumed in good faith."[1130]

The Federal Court gave a similar definition of martial law when the military forces exercised their discretion in dealing with abnormal situations. In *Abdus Sattar Khan Niazi v. The Crown*[1131] it was observed that

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[1125] Ex parte Marais, (1902) A.C. 109, 114.

[1126] H.E. Richards, "Martial Law", (1902) 18 Law Quarterly Review 133, 139; see also Tilonko v. Attorney-General, [1907] A.C. 93.

[1127] Sir Frederick Pollock "What is Martial Law?", (1902) 18 *Law Quarterly Review* 152, 153.

[1128] Elphinstone v. Bedreechand, [1830] 12 English Reports, 1 Knapp P.C.; Bugga v. Emperor, [1920] 47 I.A. 128; Kalinath Roy v. Emperor, 48 I.A. 96; Govindan Nair v. Emperor, A.I.R. 1922 Madras 499; Chanappa v. Emperor, A.I.R. 1931 Bombay 57.

[1129] *Muhammad Umar Khan v. Crown*, P.L.D. 1953 Lahore 528.

[1130] *Ibid*., p. 539, per Munir, C. J.

> "under the general principles of constitutional law, the right of the military to take measures to protect others and themselves against the harmful activities of the civil population cannot be doubted; there must be given some discretion and liberty of action to the military when the martial law is in force. Indeed, the right to repel force by force for the purpose of suppressing riots, disturbances and insurrections is a part of the civil law and no exception can be taken to it."

So, when the Pakistan Supreme Court in 1958 was called upon to examine the validity of the new regime established in consequence of the President's proclamation of October 7, it cannot be said that the judges were in any doubt as to the nature of "martial law" that came into force on the abrogation of the Constitution. It was not martial law *simpliciter*, as recognized by the Pakistani Courts in 1953. It was a change of the legal Order by a successful and effective military *coup*, and according to the fathers of the coup there was no going back to the old Order, no restoration of the Constitution of 1956, which had been abandoned forever as unsuitable for the country. In such circumstances the Supreme Court of Pakistan had to recognize the "abrupt political change" and the consequent new law-creating body in the context of the new political situation.[1132]

The decision of the Supreme Court in according validity to the new regime has been criticized on the ground that the Court should not have given validity to the President's action in abrogating the Constitution, which he had absolutely no authority to do. But the Court, it is submitted, never held that the President had power to abrogate the Constitution. What the Court recognized was the fact that, after the President's action, the Constitution of 1956 had lost its validity and force, and that it had been replaced by an effective new legal order. Whether there was any justification for the President's extraordinary action was a question not for the Court to decide. Such a question must be debated and settled outside the Court. In a newly independent country even in normal times the judiciary is in a delicate position when enforcing limitations on governmental powers. As has been observed

> "In virtually every new nation, independence was granted to a government endowed with massive popular support. Under the circumstances, courts charged with enforcing limitation on governmental power, having no comparable popular support of their own, were cast in an exceedingly delicate role [and] it would have been a foolish judicial strategist who would have urged the courts of the new nations into decisive confrontation with the politicians in these early years of independence."[1133]

[1131] P.L.D. 1954 F.C. 187.

[1132] See the preceding chapter for detailed discussion of the subject.

[1133] Thomas M. Franck, *Comparative Constitution Process: Cases and Materials*, Introduction, pp. III — VIII.

In the abnormal situation of a revolution, the courts cannot be expected to take a stand against the revolutionaries. "To debate whether a revolution is unconstitutional is pointless sophistry, and a political, and not a legal answer can be given"[1134] to the question of justification of the revolution and its effects on the legal norms.

The events in Pakistan in October, 1958 created a unique situation, never before adjudicated on by any Commonwealth court. If the judges of the Supreme Court had adhered to strict legality and ignored the political fact of change, they might have faced dismissal by the new regime. The courts, in that event, would have been filled with military judges and supporters of the regime, which would have provided little protection for the rights and liberties of the people against a government with absolute power. On the other hand the Supreme Court's recognition of the effect of the revolution of October 7 enabled the judiciary to maintain its position and authority under the martial law regime. The presence of an organization like the Supreme Court, with an established hierarchy of subordinate courts with a high judicial reputation was itself an effective check on the indiscriminate exercise of State power. The Courts were able, by judicial interpretation of martial law instruments, to define and restrict the powers of the martial law authorities, and to develop a martial law "constitutionalism". This was a valuable contribution made by the Supreme Court of Pakistan to the concept of a court's function to uphold judicial review in abnormal circumstances. As has been seen in the preceding chapter, other Commonwealth Courts followed the precedent in dealing with similar situations.

In the political sphere it has already been seen[1135] that the *coup* came at a time when the country was preparing for the first general election to be held under the Constitution. It was never claimed that the Constitution of 1956 was absolutely perfect and immune from criticism. But there is no such thing as a perfect constitution and every constitution is subject to amendment. By the time the Constitution had been abrogated, almost all the issues which retarded the framing of the Constitution for nine long years had been settled. Even the controversial electorate issue, left undecided by the Constituent Assembly, had been resolved satisfactorily. All the existing political parties with the exception of *Jamaat-i-Islami* had already held office under the Constitution, and were fully committed to participate in the ensuing election. And the *Jamaat-i-Islami* had hailed the Constitution as being sufficiently Islamic in character,[1136] and, therefore, acceptable to its members. In the circumstances, it is evident that everybody concerned was committed to work the Constitution of 1956, which was to be fully implemented by the first general election.

[1134] *Ibid*., p. 22.
[1135] Chapter VII supra.
[1136] S.A.A. Maududi, The Islamic Law and Constitution, see Appendix IV at p. 405 for the resolution adopted by the Majlis-e-Shura.

But President Iskander Mirza was not happy about the way things were going. Anxious to be re-elected to the office of the President, he could find no political party or group to support his candidature. In the period of over three years during which he had been Head of State, he had exploited each and every political party to his own advantage and alienated all of them by his political intrigues.[1137] In spite of their own differences, all the political factions of the country were agreed at least on one point, that Mirza should not be allowed to continue as Head of State after the general election. The President, in the circumstances, moved by his inherent love of power, became desperate and ready to go to any length to secure his own position. He was looking for a "suitable opportunity"[1138] to abrogate the Constitution. That opportunity came when General Ayub Khan, then Commander-in-Chief of the army, gave support to the President's design. Ayub Khan himself was also not happy with the Constitution of 1956. He had already drawn up an outline of a constitution in 1954, which was different from the existing Constitution[1139] and apparently was not acceptable to the politicians who dominated the Cabinet at that time. Ayub Khan might have been genuinely dissatisfied with the Constitution, and in Iskander Mirza's scheme he probably saw an opportunity to implement his own ideas about the nature of a viable constitution. The personal ambition of President Iskander Mirza supported by the army chief was, therefore, the real cause for the overthrow of the Constitution.

Bearing in mind this background and considering the subsequent political development in the country one can say that the President's action in abrogating the Constitution Of 1956 was absolutely without justification. If there had been any genuine necessity for a change in the Constitution, that could have been effected by the normal procedure for amendment of the Constitution. The political crisis to which Mirza referred could have been settled by the ordinary law-enforcement machinery. Contrary to Mirza's allegation that the election would not have improved the situation, there were healthy signs of understanding between different political parties and groups, which could have resulted in political stability after the election. Professor K. J. Newman in the context of constitutional crisis in 1954 and in 1958 commented

> "It happened in 1954, when the first Constituent Assembly was dissolved, not because it failed to produce a constitution, but because it was about to produce one. It happened again in 1958, not because the Constitution of 1956 was unworkable, but because it was to be fully implemented by the first elections in the country."[1140]

President Iskandar Mirza and his supporters, for their own ambitious designs did not want the Constitution to take root by the success of the general election. Apprehending

[1137] See Chapter VII.
[1138] M. Ayub Khan, *Friends Not Masters*, p. 57.
[1139] *Ibid*., pp., 186-191, "A short appreciation of present and future problems of Pakistan".
[1140] K.J. Newman, "The Constitutional Evolution in Pakistan", (1962) 38 *International Affairs* 353.

frustration of his own ambitions, Mirza struck against the Constitution which, as President, he was bound by his oath to protect. His reference to the unworkability of the Constitution and a political crisis in the country were without any factual basis, which would justify the extreme action he took in October 1958. The President's action, which he alleged was intended to overcome the political instability in the country, landed Pakistan in a situation of continuous political uncertainty. After four years of "martial law" rule, President Ayub Khan, who replaced Iskandar Mirza just after three weeks of the "revolution", gave the nation a constitution of a presidential type, which proved unacceptable to the people, and had to be abrogated in March, 1969. After the abrogation of the Constitution of 1962, it was generally agreed that the country should revert to the parliamentary system enshrined in the Constitution of 1956 but abandoned because President Mirza said it was unsuitable for Pakistan. Iskander Mirza's action in October, 1958 must, therefore, be viewed as the most ruthless action ever taken against democracy by a constitutional head of a state, and is the basic cause of the acute constitutional and political crises which Pakistan faces today.

The last constitutional breakdown we have discussed in the preceding chapters was the abrogation of the second Constitution of 1962 on March 25, 1969, and the declaration of martial law throughout the country. Unlike what happened in 1958, the action in the spring of 1969 was the result of a nationwide mass movement against the political system introduced in the country by the Constitution of 1962. This Constitution had been promulgated by President Ayub Khan, because he thought it more consonant with the traditions of the people and therefore congenial to their genius.[1141] The Constitution of 1956, which provided for a parliamentary form of government was, according to his school of thought, alien to the Pakistani tradition and too sophisticated to be understood and worked by the people. But the irony of the situation was that the mass movement, which began in November, 1968 as a student agitation against some academic grievances, developed into a violent political movement throughout the country, demanding a return to the parliamentary system. This unanimous popular demand was conceded by President Ayub Khan before his abdication in March, 1969. Whether a parliamentary constitution will work well in Pakistan is a different question. But the President and other exponents of the presidential system were convinced by the unprecedented countrywide movement that the type of constitution given to the nation in 1962 was not acceptable to the people of Pakistan.

The mass movement of 1968-1969 was a direct reaction against the authoritarian system introduced by the Constitution of 1962. From the very beginning the political opposition demanded the liberalization of the system by an entente between the Government and the Opposition, but President Ayub Khan and his supporters were unwilling to pay any heed to these demands.[1142] The opposition tried to effect liberal

[1141] For a discussion of the Constitution of 1962 see Chapter IX supra.
[1142] See Chapter X.

reforms through the legislatures but due to the intransigent attitude of the Government, their attempts proved futile. The presidential and assembly elections of 1965 convinced the Opposition that any attempt to make effective constitutional changes by means provided in the Constitution or to induce the regime to change its intransigent attitude or to vote President Ayub Khan and his adherents out of office was futile. After the landslide victory in the elections of President Ayub Khan and his party the opposition believed that only a mass movement could affect desirable constitutional reforms. The opposition political leaders, therefore, seized the opportunity created by the students' agitation in the later part of 1968, and exploited it to their advantage, with the result that President Ayub Khan was compelled to concede their political demands.

But when President Ayub Khan was willing to concede any agreed opposition demand, the same old factionalism, mutual distrust and group-interest appeared among the politicians. They failed miserably to consolidate the victory they had won through the mass movement in compelling the Ayub regime to abdicate. Though preparations were under way to give effect to points agreed at the round table conference by constitutional amendments, individual political parties both in East and West Pakistan started pressing regional demands. Instead of an abatement of agitation after the round table conference, which ended on March 13, 1969, the situation deteriorated daily. The administration throughout the country was reduced to a standstill; there was no security for life and property; there was an almost anarchic situation. Though some people professed to see signs of a gradual abatement of lawlessness, the majority regarded the situation as hopeless and thought that drastic action was essential to restore normality. The President, in such a desperate situation, resigned and handed over the administration of the country to the commander-in-chief of the army, who, on assumption of power, declared martial law throughout the country. The declaration of martial law on March 25, 1969 was, it is submitted, justified by the necessity of the circumstances prevailing in the country at that time.

The nature of the "martial law" declared in March, 1969 was not different from that generally recognized in the Commonwealth. The object was to suppress insurrection and violent disturbances, to protect life and property, and to establish the authority of law. But the declaration differed from the ordinary promulgation of martial law in that it also abrogated the Constitution of the country. Normally a martial law authority would, after suppressing lawlessness, restore constitutional rule in the country. But the situation in which martial law had to be declared in Pakistan was different from that recognized elsewhere in the Commonwealth as justifying it. The movement for political reforms which took a violent turn early in 1969, though it warranted the declaration of martial law, was primarily directed against the Constitution itself. The main purpose of the movement, was to demonstrate that the Constitution of 1962 was unacceptable to the people at large, and that it must be replaced by a new one. This could have been done through the process of amendment in the existing constitution, if there were mutual understanding and goodwill among the politicians. But owing to their

differences on basic issues, it became evident that a peaceful transition from the Constitution of 1962 to another one broadly acceptable to all parties, was impossible. Hence it was necessary that the Constitution, against which there was universal opposition in the country, should be abrogated.

Some constitutional progress was made under the martial law regime till March, 1971. The West Pakistan demand for dismemberment of West Pakistan Province, and the East Pakistan demand for representation in the Central legislature on the basis of population instead of parity between the two wings had been accepted and implemented. The first general election in the country since independence was held in December, 1970, and it was intended that the National Assembly should frame the new constitution. But the old issue of regional autonomy stood in the way. The disagreement among the political leaders and military rulers on the extent of the autonomy to be accorded to the provinces resulted in the apparent frustration of the constitutional progress so far made, and forced the country into a state of unprecedented misery with an unpredictable constitutional future.[1143]

Pakistan, after twenty-four years of independence, is without a constitution. The country is still under "martial law". In all these years there has been no progress towards a viable democratic Constitution. Starting at the same time India was able to launch her new constitution in January, 1950, Pakistan failed to agree on a constitution till the later part of 1971. It is true that since it came into existence, Pakistan had had to face enormous problems even to secure its bare survival, and complicated constitutional issues have remained unsettled in the constitutional debate throughout this period.[1144] But it must be admitted that the story of constitutional crises and deadlock in constitutional progress in Pakistan is lamentable and the failure of political leadership in the country is deplorable. After Jinnah and Liaquat Ali Khan, there was no one who could command such authority over and respect from the nation as was essential for national unity and political understanding between the opposing interest-groups. For the politicians "almost from the beginning there was no clear sense of purpose or direction".[1145] Owing to the extreme weakness of political leadership, the bureaucracy usurped political power. The persons appointed to political offices, being merely experts in technical fields, started exploiting the weakness of the political leadership to their own advantage. The politicians were unable to thwart the bureaucratic ascendancy and became easy victims of bureaucratic maneuvers.

This official clique, since the death of Liaquat Ali Khan in 1951, proved to be a stumbling block to progress towards constitutional and democratic rule in the country. The dismissal of Khawaja Nazimuddin Government in April, 1953, the dissolution of the first Constituent Assembly in October, 1954 by Governor-General Ghulam

[1143] See Chapter XI.
[1144] See S.A. de Smith, *The New Commonwealth and its Constitutions*, pp. 218-219.
[1145] *Ibid*., p. 217.

Muhammad, and the abrogation of the Constitution in October, 1958 by President Iskander Mirza were the results of bureaucratic conspiracies, hatched by occupants of the highest offices of the State. These two bureaucrat-politicians exploited the weakness of the political leadership to the fullest extent and resorted to extremely unconstitutional measures without any consideration for the country's constitutional future. They took action on the plea that democratic rule had failed, but the situation was otherwise; throughout the period frustrating executive action came whenever there was a prospect of popular and constitutional rule. It has been remarked that "the ailment of Pakistan was not democracy but the attempts to block it."[1146] Ghulam Muhammad and Iskander Mirza's designs were based on their personal ambition and distrust of the people.

In analyzing the causes of political instability in the country up to 1958, the failure of politicians are, it is submitted, often overemphasized. The politicians, no doubt, were not free from blame. But the evil effects of the role played by the bureaucrats generally and by those who were placed in the highest offices of the State cannot be underestimated. They certainly had a duty towards the constitution and to respect and support constitutional rule, which they designedly failed to discharge. Their contempt for popular rule grew out of the tradition left by the civil servants of the colonial period in which the "administration" and popular aspiration were irreconcilable. The bureaucrats and the nationalist politicians viewed each other with antagonistic attitude. This state of affairs continued after independence and could not be corrected because of failure on both sides. Suhrawardy, in analyzing the political condition as it stood in 1957 and the prospect of democracy in Pakistan, said "Administration must unlearn its scorn of politics. Politics must overcome its hostility to administration. Only in this way can a government and the people governed communicate confidence to each other and learn that they can count on each other."[1147] This observation is a lucid exposition of the tension that existed in the relationship between the bureaucrats and the politicians. Not only did both sides fail to discharge their constitutional duties but the administration maintained its contempt for politics and always endeavored to discredit politicians. This attitude certainly did not help the growth of healthy politics or inspire respect for the political process among the people.

Failure to hold a general election was another factor, Which largely contributed towards the people's lack of enthusiasm and confidence in the politicians and their rule. During the long period of over a decade there had been frequent changes of government at the centre. These changes were effected, not on the basis of any popular mandate, but solely on the basis of parochial and group interests among the politicians, and mainly at the whim and instance of the Head of the State. In such circumstances the people became bored with seeing the same faces again and again at the helm of the ship of State,

[1146] D.P. Singhal, "Democracy with Distrust", (1962) 8 *Australian Journal of Politics and History*, pp. 200, 209; see also G.B. Marshall, "Reflections on a Revolution in Pakistan", (1959) 37 *Foreign Affairs* 247.
[1147] H.S. Suhrawardy, "Political Stability and Democracy in Pakistan", (1957) 35 *Foreign Affairs* 422.

irrespective of their success or failure as administrators; there seemed to be no instrument which would enable the people to replace them. This resulted in the alienation of the politicians from the masses and kept them in ignorance of the trends of popular thought. It is true that the delay in adopting a constitution had a direct effect on the postponement of the general election. But it was a failure on the part of politicians, who could not appreciate the danger which lay in suspending the opportunity for the expression of popular will on national issues for an unlimited period of time. Absence of the process of accountability of government to the people for so long a time induced frustration in the minds of the people, and did not inspire that sense of participation which is the main basis of a democratic system.

The prospect of democracy and popular rule in Pakistan, due to various factors discussed above, has never been bright. The illiteracy of the common masses has been suggested as the main reason for the failure of democracy in the country. But if the problem is regarded from a practical angle, it is manifest that the people who have been directly responsible for the government of the country and who were not illiterate by any standard — the politicians have lamentably failed to perform their functions and duties. It is true that unscrupulous men at the top have been able to resort to undemocratic measures without any fear of popular recrimination, mainly because of the absence of any organized and effective public opinion in the country. But the fact is that the people have rarely been given an opportunity to express their will; and on a few occasions when they have had such an opportunity, the people cannot be said to have shown ignorance or lack of realization and understanding of the issues. It is clear, therefore, that the men who were entrusted with the task of erecting a scepter of democratic government failed because of the lack of will to work it and their lack of political understanding and failure to engender mutual trust and goodwill.

The political condition obtaining in Pakistan in late 1971 does not encourage hopes of the restoration of democratic rule in the country. The crisis in East Pakistan appears to have overwhelmed plans for immediate constitutional rule in the country. But considering the popular feeling and the public commitments of the military regime, military rule cannot continue for an unlimited period. One can say that, once a satisfactory political solution to the existing desperate crisis is found, the future of democracy itself should not be gloomy. In this connection the observation made in 1962 by Professor D. P. Singhal, when commenting on the future of democracy after the promulgation of the Constitution of 1962 is noteworthy. He said that, though democracy had been having a rough time in Pakistan, due to various reasons, its future in the country was not so gloomy, because the politically conscious section of the population wanted democracy as the basis of government. "Hope is sustained by a variety of historical reasons, above all by the fact that the validity of the doctrine itself has not been seriously disputed, and that attempts to restore representative institutions

have been made in [the country]."[1148] This hope is still sustained in the face of the grave political crises, because President Yahya Khan has promised more than once that power would be transferred to the people's representatives as soon as circumstances allowed such transfer, and also because no voice has yet been heard which opposes the restoration of popular rule or now says that democracy is unsuited to the people of Pakistan. With almost the same background and political traditions, the people of India have been able, so far, to work democracy. The democratic system there seems to be strong enough to successfully absorb the strains of grave political and economic crises, common to all underdeveloped countries. Given the political will on the part of the leaders, there seems no reason, therefore, to think that the people of Pakistan will lag behind and will not be able to work democracy.

The establishment of democratic rule will, however, depend on the political goodwill and understanding between persons representing regional or group interests. Constitutional and political issues will have to be solved by discussion among political leaders and military rulers, who must display more willingness to compromise than has been manifest in the past. The military has been directly involved in ruling the country for the last thirteen years and cannot be expected to remain isolated and play the role of a neutral observer in any constitutional arrangement in the country. In the present state of affairs, the views of the armed forces will obviously get predominance. But every party would do better if it realized that only through mutual understanding by the process of persuasion can the goal of peaceful constitutional rule be achieved. As Thomas Franck has observed:

> "The few African and Asian governments which have tried to create unity through force, rather than through persuasion and compromise have found that force turned inward upon themselves. Even, or particularly, the military revolutionaries in the new nations are coming to realize that Africa and Asia cannot compel itself to progress; but perhaps it can persuade itself."[1149]

If the leaders of Pakistan determined to find satisfactory political solutions of the political problems facing the country, and genuinely desire to work democracy, they will certainly find the people willing to give them support and cooperation. What needs emphasis here is that the will on the part of the masses to participate in the democratic process is not lacking. Lastly, the type of democratic constitution which would be suitable for Pakistan is no longer a question for controversy. Through the countrywide mass movement during 1968-69 the people have most clearly demonstrated that only a parliamentary form of government is acceptable to them. A crisis-free political atmosphere and the will to work democracy among the leaders are essential for the establishment of popular rule, its continuance and success in the future.

[1148] D.P. Singhal, "Democracy with Distrust", (1962) 8 *Australian Journal of Politics and History* 200.
[1149] Thomas M. Franck, *Comparative Constitutional Process: Cases and Materials, Introduction*, p. XXXIV.

Appendix I

Proclamation by Governor-General

The following Proclamation was issued by the Governor-General on 24th October 1954. The Governor-General having considered the political crisis with which the country is faced, has with deep regret come to the conclusion that the constitutional machinery has broken down. He therefore has decided to declare a state of emergency throughout Pakistan. The Constituent Assembly as at present constituted has lost the confidence of the people and can no longer function.

The ultimate authority vests in the people who will decide all issues including constitutional issues through their representatives to be elected afresh. Elections will be held as early as possible.

Until such time as elections are held, the administration of the country will be carried on by a reconstituted Cabinet. He has called upon the Prime Minister to reform the Cabinet with a view to giving the country a vigorous and stable administration. The invitation has been accepted.

The security and stability of the country are of paramount importance. All personal, sectional and provincial interests must be subordinated to the supreme national interest.

Appendix II

Proclamation

[Dated 7th October 1958 made by the President of Pakistan]

"For the last two years, I have been watching, with the deepest anxiety the ruthless struggle for power, corruption, the shameful exploitation of our simple, honest, patriotic and industrious masses, the lack of decorum and the prostitution of Islam for political ends. There have been a few honorable exceptions. But being in a minority, they have not been able to assert their influence in the affairs of the country.

"These despicable activities have led to a dictatorship of the lowest order. Adventurers and exploiters have flourished to the detriment of the masses and are getting richer by their nefarious practices.

"Despite my repeated endeavors, no serious attempt has been made to tackle the food crisis. Food has been a problem of life and death for us in a country which should be really surplus. Agriculture and land administration have been made a hand maiden of politics so that in our present system of government, no political party will be able to take any positive action to increase production. In East Pakistan, on the other hand, there is a well organized smuggling of food, medicines and other necessities of life. The masses there' suffer due to the shortages so caused in and the consequent high prices of, these commodities. Import of food has been a constant and serious drain on our foreign exchange earnings in the last few years, with the result that the Government is constrained to curtail the much needed internal development projects.

"Some of our politicians have lately been talking of bloody revolution. Another type of adventurers among them think it fit to go to foreign countries and attempt direct alignment with them which can only be described as high treason.

"The disgraceful scene enacted recently in the East Pakistan Assembly is known to all. I PM told that such episodes were common occurrences in pre-partition Bengal. Whether they were or not, it is certainly not a civilized mode of procedure. You do not raise the prestige of your country by beating the Speaker, killing the Deputy Speaker and desecrating the National Flag.

"The mentality of the political parties has sunk so low that I am unable any longer to believe that elections will improve the present chaotic internal situation and enable us to form a strong and stable Government capable of dealing with the innumerable and

complex problems facing us today. We cannot get men from the Moon. The same group of people who have brought Pakistan on the verge of ruination will rig the elections for their own ends. They will come back more revengeful, because, I am sure that the elections will be contested, mainly, on personal, regional and sectarian basis. When they return, they will use the same methods which have made a tragic farce of democracy and are the main cause of the present widespread frustration in the country. However much the administration may try, I am convinced, judging by shifting loyalties and the ceaseless and unscrupulous scramble for, office, that election will neither be free nor fair. They will not solve our difficulties. On the contrary, they are likely to create greater unhappiness and disappointments leading ultimately to a really bloody revolution. Recently, we had elections for the Karachi Municipal Corporation. Twenty percent of the electorate exercised their votes, and out of these, about fifty percent were bogus votes.

"We hear threats and cries of civil disobedience in order to retain private volunteer organizations and to break up One Unit. These disruptive tendencies are a good indication of their patriotism and the length up to which politicians and adventurers are prepared to go to achieve their parochial aim.

"Our foreign policy is subjected to unintelligent and irresponsible criticism, not for patriotic motives, but from selfish view of points, often by the very people who were responsible for it. We desire to have friendly relations with all nations, but political adventurers try their best to create bad blood and misunderstanding between us and countries like the U.S.S.R., the U.A.R., and the Peoples Republic of China. Against India, of course, they scream for war, knowing full well that they will be nowhere near the firing line. In no country in the world, do political parties treat foreign policy in the manner it is done in Pakistan. To dispel the confusion so caused, I categorically reiterate that we shall continue to follow a policy which our interests and geography demand and that we shall honor all our international commitments, which, as is well known, we have undertaken to safeguard the security of Pakistan and, as a peace loving nation, to play our part in averting the danger of war from this troubled world.

"For the last three years, I have been doing my utmost to work the Constitution in a democratic way. I have labored to bring about coalition after coalition, hoping that it would stabilize the administration and that the affairs of the country would be run in the interests of the masses. My detractors, in their dishonest ways, have on every opportunity, called these attempts as Palace intrigues. It has become fashionable to put all the blame on the President. A wit said the other day. 'If it rains too much it is the fault of the President and if it does not rain it is the fault of the President.' If only I alone was concerned I would go on taking these fulminations with the contempt they deserve. But the intention of these traitors and unpatriotic elements is to destroy the prestige of Pakistan and the Government by attacking the Head of the State. They have

succeeded to a great extent, and, if this state of affairs is allowed to go on, they will achieve their ultimate purposes.

"My appraisal of the internal situation has led me to believe that a vast majority of the people no longer have any confidence in the present system of Government and are getting more and more disillusioned and disappointed and are becoming dangerously resentful of the manner in which they are exploited. Their resentment and bitterness are justifiable. The leaders have not been able to render them the service they deserve and have failed to prove themselves worthy of the confidence the masses had reposed in them.

"The Constitution which was brought into being on 23rd March 1956, after so many tribulations, is unworkable. It is full of dangerous compromises that Pakistan will soon disintegrate internally if the inherent malaise is not removed. To rectify them, the country must first be taken to sanity by a peaceful revolution. Then, it is my intention to collect a number of patriotic persons to examine our problems in the political field and devise a Constitution more suitable to the genius of the Muslim people. When it is ready, and at the appropriate time, it will be submitted to the referendum of the people.

"It is said that the Constitution is sacred. But more sacred than the Constitution or anything else is the country and the welfare and happiness of its people. As Head of the State, my foremost duty before my God and the people is the integrity of Pakistan. It is seriously threatened by the ruthlessness of traitors and political adventurers, whose selfishness, thirst for power and un-patriotic conduct cannot be restrained by a government set up under the present system. Nor can I any longer remain a spectator of activities designed to destroy the country. After deep and anxious thought, I have come to the regrettable conclusion that I would be failing in my duty, if I did not take steps, which in my opinion, are inescapable in present conditions, to save Pakistan from complete disruption. I have, therefore, decided that:-

(a) The Constitution of the 23rd March 1956 will be abrogated.
(b) The Central and Provincial Governments will be dismissed with immediate effect.
(c) The National Parliament and Provincial Assemblies will be dissolved.
(d) All political parties will be abolished.
(c) Until alternative arrangements are made,

Pakistan will come under Martial Law. I hereby appoint General Mohammad Ayub Khan, Commander-in-Chief, Pakistan Army, as the Chief Martial Law Administrator and place all the Armed Forces of Pakistan under his command.

"To the valiant Armed Forces of Pakistan, I have to say, 'That having been closely associated with them since the very inception of Pakistan, I have learnt to admire their

patriotism and loyalty. I am putting a great strain on them. I fully realize this but I ask you Officers and men of the Armed Forces on your services depends the future existence of Pakistan as an independent Nation and a bastion in these parts of the Free World. Do your job without fear or favor and may God help you.'

"To the people of Pakistan, I talk as a brother and fellow compatriot. Present action has been taken with the utmost regret but I have had to do it in the interests of the country and the masses finer men than whom it is difficult to imagine. To the patriots and the law abiding, I promise you will be happier and freer. The political adventurers, the smugglers, the black-marketers, the hoarders will be unhappy and their activities will be severely restricted. As for the traitors, they had better flee the country if they can and while the going is good."

Appendix III

Typical Martial Law Regulations

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M.L.R. No. 6. If with intent to help the recalcitrants any person does any act which is designed or is likely to give assistance to the operations of the recalcitrants, or to impede operations of Pakistan forces, or to endanger life, he shall suffer death and no less punishment. [The word 'recalcitrant' being defined in Regulation No. 3 as to include "any external enemy of Pakistan and mutineers or rebels or rioters and any enemy agent, ..."]

M.L.R. No. 13. Any person who attacks, resists or injures, or causes to be attacked, resisted or injured any member of the forces, whether civil or military under my command or any civil official, shall be punishable. Maximum punishment death.

M.L.R. No. 15. No person shall damage, tamper with or interfere with the working of roads, railways, canals, aerodromes, telegraph, telephone, wireless installations or with any other government property. Maximum punishment death.

M.L.R. No. 18. Every person shall when required to do so give his correct name and address and produce his permit or pass to any military or civil officer or any soldier or policeman. Failure to comply shall be punishable. Maximum punishment death.

M.L.R. No. 19. No person shall willfully give false evidence or refuse to give evidence in any investigation or trial held under these regulations. Maximum punishment death.
M.L.R. No. 21. No person or syndicate or firm shall hoard food-grain in violation of existing orders and any orders issued under these regulations. Maximum punishment death.

M.L.R. No. 22. Willful adulteration of all kinds of food shall be punishable. Maximum punishment 14 years R.I.

M.L.R. No. 24. No one by word of mouth, or in writing or by signals, or otherwise will spread reports, calculated to create alarm or despondency amongst the public, or calculated to create dissatisfaction towards the Armed Forces and Police, or any member thereof. Maximum punishment 14 years R.I.

M.L.R. No. 27. Smuggling of all kinds is prohibited. Anyone caught in the act of smuggling or found helping a smuggler with money, goods, shelter, food, drink, transportation or with any other type of assistance or withholds any information about the smugglers or fails to pass on such information without delay to military and civil authorities shall be punishable. Maximum punishment death.

M.L.R. No. 28. Child lifting and abduction of women is an offence. Maximum punishment death.

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M.L.R. No. 6. No person shall by word, either spoken or written, or by signs, or by visible representation, or otherwise, criticize the imposition or operation of Martial Law or bring or attempt to bring into hatred or contempt or excite or attempt to excite disaffection towards the Chief Martial Law Administrator or any Martial Law Authority. Maximum punishment 10 years R.I.

M.L.R. No. 7. If with intent to help the recalcitrants any person does any act which is designed or is likely to give assistance to the operations of the recalcitrants, or to impede operations of Pakistan Forces, or to endanger life, he shall suffer death or such less punishment as provided in Regulation No. 4. In this Regulation (a) the word 'recalcitrant' includes any external enemy of Pakistan and mutineers or rebel or rioters and enemy agents

M.L.R. No. 10. No person shall assist or harbor any recalcitrant by giving him information or by supplying him with shelter, food, drink, money, clothes, weapons, ammunitions, stores, forage or means of conveyance, or by assisting him in any way to evade apprehension. Maximum punishment death.

M.L.R. No. 12. Any person who attacks, resists or injures, or causes to be attacked, resisted or injured any member of the forces, whether civil or military under my command or any civil official, shall be punished. Maximum punishment death.

M.L.R. No. 15. No person shall willfully give false evidence or refuse to give evidence in any investigation or trial held under these Regulations. Maximum punishment 14 years R.I.

M.L.R. No. 17. No one by word of mouth, or in writing or by signals, or otherwise will spread reports, calculated to create alarm or despondency amongst the public, or calculated to create dissatisfaction towards the Armed Forces and Police, or any member thereof. Maximum punishment 14 years R.I.

M.L.R. No. 21. No person shall organize or convene any meeting or procession without prior permission of the local Martial Law Administrator. This permission will be obtained in writing. No person will attend or take part in any meeting or procession which has not been sanctioned by the Martial Law Authority concerned. Maximum punishment 7 years R.I.

M.L.R. No. 23. Smuggling of all kinds is prohibited. Anyone found guilty of smuggling or of helping a smuggler with money, goods, shelter, food, drink, transportation or with any other type of assistance or who withholds any information about the smugglers or fails to pass on such information without delay to military and civil authorities shall be punishable. Maximum punishment death.

M.L.R. No. 29. Whoever uses, behaves, or tries to use his official position to bestow patronage or favors to the advantage of a person or persons, relatives or friends, trading firms or concerns or other agencies in such a manner as to the disadvantage of the State or by such act of nepotism, deprives legitimate right or rights of other person or persons shall be punished with R.I. which may extend to 14 years.

M.L.R. No. 39. Whoever kidnaps from lawful guardianship any minor under fourteen years of age, if a male, or under sixteen years of age, if a female, shall be punished. Maximum penalty death.

Appendix IV

Laws (Continuance in Force) Order, 1958

[10th October, 1958]

In pursuance of the Proclamation of the 7th October 1958, and of all powers enabling him in that behalf the President is pleased to make and promulgate the following Order: —

1. (1) This Order may be called the Laws (Continuance in Force) Order, 1958.

(2) It shall come into force at once and be deemed to have taken effect immediately upon the making of the Proclamation of the seventh day of October 1958, hereinafter referred to as the Proclamation.

(3) It extends to the whole of Pakistan.

2. (1) Notwithstanding the abrogation of the Constitution of the 23rd March, 1956 hereinafter referred to as the late Constitution, by the Proclamation and subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law the Republic, to be known henceforward as Pakistan, shall be governed as nearly as may be in accordance with the late Constitution.

(2) Subject as aforesaid all Courts in existence immediately before the Proclamation shall continue in being and, subject further to the provisions of this Order, in their powers and jurisdictions.

(3) The law declared by the Supreme Court shall be binding on all Courts in Pakistan.

(4) The Supreme Court and the High Courts shall have power to issue the writs of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari*.

(5) No writ shall be issued against the Chief Administrator of Martial Law, or the Deputy Chief Administrator of Martial Law, or any person exercising powers or jurisdiction under the authority of either.

(6) Where a writ has been sought against an authority which has been succeeded by an authority mentioned in the preceding clause, and the writ sought is a write provided

for in clause (4) of this Article, the Court notwithstanding that no writ may be issued against an authority so mentioned may send to that authority its opinion on a question of law raised.

(7) All orders and judgments made or given by the Supreme Court between the Proclamation and the promulgation of this Order are hereby declared valid and binding on all Courts and authorities in Pakistan, but saving those orders and judgments no writ or order for a writ issued or made after the Proclamation shall have effect unless it is provided for by this Order, and all applications and proceedings in respect of any writ which is not so provided for shall abate forthwith.

3. No Court or person shall call or permit to be called in question —

(1) the Proclamation;

(ii) any Order made in pursuance of the Proclamation or any Martial Law Order or Martial Law Regulation;

(iii) any finding, judgment or order of a special Military Court or a summary Military Court.

4. (1) Notwithstanding the abrogation of the late Constitution, and subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law, all laws, other than the late Constitution, and all Ordinances, Orders-in-Council, Orders other than Orders made by the President under the late Constitution, such Orders made by the President under the late Constitution as are set out in the Schedule to this Order, Rules, by-laws, Regulations, Notifications, and other legal instruments in force in Pakistan or in any part thereof, or having extra-territorial validity, immediately before the Proclamation, shall, so far as applicable and with such necessary adaptations as the President may see fit to make, continue in force until altered, repealed or amended by competent authority.

(2) In this Article a law is said to be in force if it has effect as law whether or not the law has been brought into operation.

(3) No Court shall call into question any adaptation made by the President under clause (1).

5. (1) The powers of a Governor shall be those which he would have had had the President directed him to assume on behalf of the President all the functions of the Government of the Province under the Provisions of Article 193 of the late Constitution and such powers of making Ordinance as he would have had and within such

limitations had Article 106 and clauses (1) and (3) of Article 102 of the late Constitution been still in force.

(2) In the exercise of the powers conferred by the previous clause the Governor shall act subject to any directions given to him by the President or by the Chief Administrator of Martial Law or by any person having authority from the Chief Administrator.

(3) Nothing in this Article shall prejudice the operation of any Regulation made by the Chief Administrator of Martial Law or by any person having authority from the Chief Administrator of Martial Law to make martial Law Regulations and where any Ordinance or any provision thereof made under clause (1) of this Article is repugnant to any such Regulation or part thereof the Regulation or part shall prevail.

6. All persons who immediately before the Proclamation were in the service of Pakistan as defined under clause (1) of Article 218 of the late Constitution and those persons who immediately before the Proclamation were in office as Governor, Judge of the Supreme Court or a High Court, Comptroller and Auditor General, Attorney-General or Advocate General, shall continue in the said service or in the said office on the same terms and conditions and shall enjoy the same privileges, if any.

7. Any provision in any law providing for the reference of a detention order to an Advisory Board shall be of no effect.

SCHEDULE

1. The Karachi Courts Order, 1956.

2. The Federal Capital (Essential Supplies) Order, 1956.

3. The Adaptation (Security Laws) Order, 1956 (except so far as concerns the reference of a detention order, to an Advisory Board).

4. The Stamp Act (Amendment) Order, 1956.

5. The Essential Services Maintenance (Adaptation) Order, 1956.

6. The Hoarding and Black Market Order, 1956.

7. The Karachi Courts (Amendment) Order, 1956.

8. The Karachi Rent Restriction Act (Amendment) Order, 1956.

9. The Requisitioned Land (Continuance of Powers) Order, 1956.

10. The University of Karachi (Amendment) Order, 1956.

11. The High Courts (Bengal)(Adaptation) Order, 1957.

12. The Karachi Development Authority Order, 1957.

13. The Karachi Development Authority (Amendment) Order, 1958.

14. The High Court Judges (Daily Allowances) Order, 1958.

15. The Federal Capital (Powers and Duties of the Chief Commissioner) (Declaration) Order, 1958.

16. The Federal Capital (Essential Supplies) (Amendment) Order, 1958.

17. The Gwadur (Government and Administration) Order, 1958 except clause (2) of Article 2.

18. The Gwadur (Government and Administration) (Application of Laws) Order, 1958.

Appendix V

Six-Point Programme

1. The Constitution should provide for a Federation of Pakistan in its true sense on the basis of Lahore Resolution, and Parliamentary form of Government with supremacy of Legislature directly elected on the basis of universal adult franchise.

2. Federal Government shall deal with only two subjects *viz*. Defence and Foreign Affairs, and all other residuary subjects shall vest in the federating states.

3. A. Either, two separate but freely convertible currencies for two wings may be introduced, or

   B. One currency for the whole country may be maintained. In this case effective constitutional provisions are to be made to stop flight of capital from East to West Pakistan. Separate Banking Reserve is to be made and separate fiscal and monetary policy to be adopted for East Pakistan.

4. Power of taxation and revenue collection shall vest in the federating units and the Federal Centre will have no such power. The Federation will have a share in the state taxes for meeting their required expenditure. The Consolidated Federal Fund shall come out of a levy of certain percentage of all state taxes.

5. (i) There shall be two separate accounts for foreign exchange earnings of the two wings.

   (ii) Earnings of East Pakistan shall be under the control of East Pakistan Government and that of West Pakistan under the control of West Pakistan Government.

   (iii) Foreign exchange requirement of the Federal Government shall be met by the two wings either equally or in a ratio to be fixed.

   (iv) Indigenous products shall move free of duty between two wings.

   (v) The Constitution shall empower the unit Governments to establish trade and commercial relations with, set up trade missions in, and enter into agreements with foreign countries.

6. A militia or a paramilitary force be set up for East Pakistan.

[From an article by Sheikh Mujibur Rahman entitled "Six-Point Formula" published in the *Morning News,* Dacca (Special Supplement) January 3, 1971.]

Appendix VI

Proclamation of Martial Law

[25th March 1969]

Whereas a situation has arisen in the country in Which civil administration cannot effectively function;

And whereas in the interest of national security it has become necessary to place the country under Martial Law,

Now, therefore, I, General AGHA MUHAMMAD YAHYA KHAN, H. PK., H. J., do hereby declare that the whole of PAKISTAN shall be under Martial Law with immediate effect and assume the powers of the Chief Martial Law Administrator and the command of all the Armed Forces of PAKISTAN.

1. Martial Law Regulations and Orders shall be made by the Chief Martial Law Administrator or any officer or authority empowered by him and shall be published in such manner as is convenient.

2. Any person contravening Martial Law. Regulations or Orders shall be liable to such penalties as may be prescribed by the Regulations.

3. Martial Law Regulations may —

(a) provide for setting up Military Courts for the trial and punishment of any offence for the contravention of Martial Law Regulations or Orders and of offences under the ordinary law,

(b) prescribe any special penalties for offences under the ordinary law,

(c) authorize ordinary Courts to try and punish the contravention of any Martial Law Regulation or Order,

(d) bar the jurisdiction of ordinary Courts from trying any offence specified in this behalf.

4. (1) The Constitution of the Islamic Republic of PAKISTAN, hereinafter referred to as the Constitution, shall stand abrogated.

(2) The persons holding office as President, Members of the President's Council of Ministers, the Governors of the Provinces and Members of their Council of Ministers shall cease to hold office with immediate effect.

(3) The National Assembly and the Provincial Assemblies shall stand dissolved.

5. Notwithstanding the abrogation of the Constitution and subject to Regulations or Orders made by the Chief Martial Law Administrator —

(a) all laws, including Ordinances, Martial Law Regulations, orders, rules, bye-laws, regulations, notifications and other instruments, in force immediately before the abrogation of the Constitution shall continue in force,

(b) all courts and tribunals in existence immediately before the abrogation of the Constitution shall continue and exercise all their powers and jurisdiction which they would have exercised had the Constitution not been abrogated;

(i) no court shall call in question any Martial Law Regulation or Order or any finding, judgment or order of a Military Court; and

(ii) no writ or other order shall be issued against the Chief Martial Law Administrator or any person exercising powers or jurisdiction under the authority of the Chief Martial Law Administrator.

(c) all persons who, immediately before the abrogation of the Constitution, were in office as the Chief Justice or a Judge of the Supreme Court or of a, High Court, the Comptroller and Auditor-General, the Attorney-General or Advocate-General or were in service of PAKISTAN as defined in the Constitution shall, unless the Chief Martial Law Administrator otherwise directs, continue in the said office or in the said service on the terms and conditions as were applicable to them before such abrogation and shall continue to exercise their powers and perform their functions;

(d) unless the Chief Martial Law Administrator otherwise directs, all other officers and authorities appointed, constituted or established under the Constitution shall continue and shall exercise and perform all powers and functions which they would have exercised and performed had the Constitution not been abrogated.

A.M. YAHYA KHAN,
General,
Rawalpindi, 31st March 1969.
Chief Martial Law Administrator.

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