TESTAMENT OF A LIBERAL

DORAB PATEL

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Sani H. Panhwar

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THE MAKING OF THE FIRST CONSTITUTION

The concept of human rights is a changing concept. In the nineteenth century in this subcontinent, it meant civil and political rights, such as the right to vote, the right to freedom of speech and expression, including freedom of the press. It also meant the right to a fair trial by an independent judiciary, especially in criminal cases, ensuring that the principal burden of proving the guilt of a person accused of a crime is, on the prosecution, as also the right of *habeas corpus*. The right to vote was governed by election laws. These laws were liberalized so slowly, that the provincial elections of 1946 were held on a limited franchise. Most other rights were contained in the Penal Code, in the Civil and Criminal Procedure Codes, and the Evidence Act which we inherited from our British rulers. Unlike the rights conferred by a constitution, the rights conferred by laws can be altered and even repealed by amendments in the laws or by subsequent laws. The right to a fair trial in criminal cases conferred by the Evidence Act and by the Criminal Procedure Code had been curtailed before 1947 by special laws, including detention laws. Similarly the right of freedom of press had been curtailed by laws regulating the publication of newspapers, and some of these laws were very harsh. It was not possible to challenge these repressive laws on the ground that they infringed human rights, because the Government of India Act, 1935, which was our Constitution until 1956, did not confer political or civil rights.

The Universal Declaration of Human Rights of 1948 has enlarged the concept of human rights. Human Rights now include economic and cultural rights as well as the rights of minorities. The rights of minorities were protected even before 1947 by election laws, which prescribed separate electorates for Muslims and some other minorities. But India was too poor to afford meaningful economic rights, such as the rights of free primary education, unemployment insurance, old age pensions, etc. However, the welfare legislation of the inter-war period had conferred some rights on labor employed in factories and mines. There were restrictions on the maximum number of hours of work in factories and mines, restrictions on the employment of children, while the Workmen's Compensation Act provided for the compulsory payment of compensation to workmen injured in the course of their employment. The law also conferred on workmen the right to form trade unions. These benefits could be curtailed at any time by subsequent legislature, and for example the right to form trade unions was curtailed during the Second World War. But the other economic rights have been enlarged over the years.

The Government of India Act, 1935 had created a federal system of Government for India with a clear division of powers between the Federal Government and the Provincial Governments. As the Indian States did not join the proposed Indian Federation, the Governor-General remained in complete control of the Federal Government. But self-government was given at the provincial level, and in accordance with the British Parliamentary system, the political party with a majority in a provincial assembly formed the Government of the province and had to resign if it lost its majority. In 1947 Mr Attlee, the British Prime Minister, realized his hope of granting independence to India. In view of the agreement between the Muslim League and the Indian National Congress to partition India, the British Parliament passed the Independence Act,

1947 (hereinafter called the Indian Independence Act) by which the British Government transferred its sovereignty over India to the new Dominions of India and Pakistan, which were to be independent democracies. This Act did not confer any rights on citizens. But according to Sections 6 and 8 of the Act, the legislatures of the two Dominions had a dual capacity and would function as the Federal Legislatures of the Dominions and also as their Constituent Assemblies for framing their Constitutions. Section 9 of the Act conferred power on the Governor-Generals of the Dominions to make adaptations and alterations in the Government of India Act in order to implement the objects of the Independence Act.

According to the Memoirs of Mr. Hamidul Haq Choudhury (who was our Foreign Minister in 1956), the first Prime Minister of Pakistan Mr Liaquat Ali Khan, had 'got a major change made in the federal system of Government by surreptitiously amending the Act of 1935'. Mr. Hamidul Haq Choudhury states on page 151 of his Memoirs:

> Mr. Liaquat Ali had the Act of 1935 amended giving the Prime Minister power to appoint and dismiss provincial cabinets. The dependence of the provincial cabinet on the support of the provincial assembly was removed. The amendment was made through an Executive Order of the Governor General without the aid of the Constituent Assembly. The change was not made public and remained in the files of the central government.
>
> The change completely destroyed provincial autonomy and made the province a branch of the central government. Under it no Chief Minister could afford to disagree with the central government, refuse to implement its orders or stand up to it in the interests of the province.
>
> I came to learn of these changes when the question of appointing the chief minister for East Bengal arose after Khwaja Nazimuddin was appointed to the post of Governor-General on the death of Jinnah. According to the 1935 Act (before amendment) the leader of the majority party in the Assembly was to be

> called upon to form the Cabinet. I had succeeded Nazimuddin as leader of the Muslim League Party in the Assembly. I called a meeting of the party to formally appoint a leader with a view to forming the government. It was taken for granted that I would be elected without any contest. However, Sir Frederick Bourne, the Governor of East Bengal at that time, showed me a letter from Liaquat Ali Khan directing him to appoint Nurul Amin as the chief minister and other ministers of the cabinet. The amendment to the Act of 1935, which Liaquat Ali had surreptitiously made, was then shown to me.

This amendment was, in my opinion, *ultra vires* of Section 9 of the Independence Act, as the amendment did not further the implementation of the Independence Act.

Mr. Liaquat Ali Khan had dismissed the government of Dr. Khan Sahib in the Frontier Province within the first week of independence on the ground that Dr Khan was not loyal to the country. But within seven years, the same Federal Government hailed Dr Khan Sahib as a patriot and made him a minister in the Federal Cabinet. Dr Khan Sahib had belonged to the Indian National Congress before independence, but unlike most leaders of West Pakistan, he did not jump on the Muslim League bandwagon and its success in the elections in India in 1946. Not content with dismissing a non-Muslim League Government, Mr Liaquat Ali Khan also exercised his power under the Order of 1948 to dismiss Muslim League Governments in other provinces. Almost immediately after the provincial assembly of Sindh had expressed its confidence in Mr. Khuhro, the Chief Minister, by approving his budget, the Prime Minister dismissed him. In the Punjab, the Prime Minister did not like the chief minister, the Nawab of Mamdot. He dismissed him and appointed Mr Daultana in his place.

The practices of the founding fathers of a country become its traditions, and Mr Liaquat Ali Khan's practice of interfering in provincial governments has been followed by almost every subsequent Prime Minister. This attempt to run a federation as a unitary state was a violation of the rights of the people and was resented, especially in East Bengal. What led Mr. Liaquat Ali to act in this manner? He said in a speech in the election campaign for the elections to the Punjab Assembly in 1951 that a vote against the Muslim League would be a vote against Pakistan. As Chairman of the Muslim League, his speech was a repudiation of democratic norms, but it had the support of people in the Punjab and in Sindh. Society did not recognize the right of dissent, therefore, opposition parties had a very difficult time; their leaders were often detained under safety laws, which could not be challenged under the Government of India Act, 1935. Therefore, subject to one qualification, it was almost impossible to challenge illegal detentions before the promulgation of the 1956 Constitution. This qualification was that repressive laws can be humanized by Judges with a vision, and the first Chief Justice of India, Sir Maurice Gwyer was such a Judge. He transformed the definition of sedition of the Pakistan Penal Code. Section 124-A reads:

> Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, (the Central or Provincial Government established by law shall) be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.
>
> Explanation 1 — The expression 'disaffection' includes disloyalty and all feelings of enmity.
>
> Explanation 2 — Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.
>
> Explanation 3 — Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Section 124-A had been used to silence criticism of the British Government in the first quarter of this century, and in *Majumdar v Emperor* (AIR 1942 FC 22), Majumdar had been convicted under Rule 34 of the Defence of India Rules by a tribunal on the basis of judgements of Indian High Courts on Section 124-A. As the definition of the offence under Rule 34 was very similar to section 124-A, the judgements of the Indian High Courts on section 124-A had placed a liberal interpretation on this section. Sir Maurice Gwyer, who wrote the judgement of the Federal Court, pointed out that the object of the Government of India Act, 1935 was to put India on the road to democracy, therefore, words interpreted as seditious in the first quarter of the century should not be treated as seditious after the Government of India Act had come into force, because it was the right of citizens to criticize Governments in a democracy. He observed

> ... Hence, many judicial decisions in particular cases which were no doubt correct at the time when they were given may well be inapplicable to the circumstances of today. The time is long past when the mere criticism of Governments was sufficient to constitute sedition, for it is recognized that the right to utter honest and reasonable criticism is a source of strength to a community rather than a weakness. Criticism of an existing system of Government is not excluded, nor even the expression of a desire for a different system altogether.

Majumdar's conviction was set-aside. This judgement was a landmark in the development of our jurisprudence, but an appeal was filed in the Privy Council against this judgement. The Privy Council allowed the appeal, but as this was after independence, the Privy Council's judgement was only of persuasive value in our

Courts, which could have followed Sir Maurice Gwyer's judgement, because it was the correct statement of the law. Unfortunately there is no mention of this judgement in the reported cases of our Courts in which detention orders were challenged, and there are hardly any reported cases on detention orders, because these orders could only be challenged until 1954 in *habeas corpus* petitions under Section 491 of the Criminal Procedure Code. The scope of a challenge under this section, however, is limited to allegations of *malafides* and to patent violations of detention laws on account of gross negligence.

The proposition that *malafides* could be a ground for quashing detention orders was rejected by the Federal Court in *Arbab Hashim Khan v Crown* (PLD 1954 FC 1) and by the East Bengal High Court in *Khairat Hossain MLA and another v the Government of East Bengal* (PLD 1954 Dacca 51). In both these cases, a different view could have been taken, especially in Arbab Hashim Khan's case. But Judges are part of the society in which they live, and newly independent countries are often hypersensitive about criticism of the Government if they think they have a hostile neighbour.

The facts in Arbab Hashim Khan's case were that the Arbab had filed a *habeas corpus* petition in the judicial Commissioner's Court at Peshawar, because it was a High Court under the Government of India Act, 1935, for the release of two detenues. The appeal before the Federal Court of one of the detenues was dismissed, as it was pressed on the ground of *malafides*, which the Court held had not been proved. The appeal on behalf of the other detenue, Mr Wali. Khan, was also pressed on the ground of a patent error in the last order of detention dated 10.12.1952. Mr. Wali Khan was arrested on 15.6.1948 for a case registered under the Frontier Crimes Regulation 1901, but as soon as the Frontier Government promulgated the. Public Safety Ordinance of 1948, the case under the Frontier Crimes Regulation was dropped, and an order of detention for one year was passed against him under the 1948 Ordinance. As the Ordinance was replaced by a statute, an order for Mr. Wali Khan's detention for six months was passed under the Public Safety Act on 17.5.1949. The order was extended for periods of six months on 17.11.1949 and on 17.5.1950 and 17.11.1950. On 17.5.1951 a fresh order was passed for Mr. Wali Khan's detention for one year and another for the same period. Although this order was to expire on 17.5.1953, a fresh order of detention was passed on 8.6.1952 for a period of six months. The next order for his further detention for a period of six months was passed only on 10.12.1957. But as the order of 8.6.1952 had expired on it was argued that the order of 10.12.1952 was illegal, as an order which had expired could not be extended. The Acting Chief Justice rejected this argument with the observation that 'mere technical errors or formal defects' were not sufficient ground for setting aside a detention order. This view was contrary to the settled law that penal orders, and especially detention orders, should be construed strictly. Fortunately Justice Shahabuddin and Justice Cornelius followed the law, set aside the detention order of 10.12.1952 and allowed the appeal. Gross negligence on the part of the Government had enabled Mr. Wali Khan to get freedom.

In *Hakim Sharif-ud-din v the Government of the Punjab* (PLD 1954 Lahore 364), the District Magistrate, Sargodha had arrested the petitioner under Section 3 of the Punjab Safety Act on 17.1.1954 and the petitioner could be detained until 16.6.1954. According to Section 3 of the Punjab Safety Act, a District Magistrate can arrest a person immediately if the person arrested is acting or is likely to act in a manner prejudicial to public safety or to the maintenance of public order. But if the District Magistrate arrests a person, he has to refer the detenue's case forthwith to the Government for orders, and it was the petitioner's case that this was not done. The Government had to place before the Court the District Magistrate's reference to it about the petitioner, as the reference was a document in its possession, or some evidence to show that the District Magistrate had complied with Section 3. As the Government did not produce any evidence whatever to show that the provisions of Section 3 had been complied with, the Court allowed the petition. The petitioner was released on account of the gross negligence of the Government. But as gross negligence was unusual in the fifties, detenues seldom sought relief from the Courts.

However, the early fifties saw an improvement in the field of economic rights in East Bengal. The Government enacted legislation for land reforms. The amount of agricultural land (including interests in agricultural land) which could be owned by a person was fixed by law, and land owned in excess of that amount was taken over by the Government for distribution amongst poor villagers. The Punjab Government also attempted to carry out land reforms, but abandoned its attempt, because landlords obtained *fatwas* from the *ulema* that land reforms were un-Islamic.

Clouds were gathering on the political horizon by this time, and the tide began to turn in favor of human rights. On 6 July 1954 the Constituent Assembly amended the Government of India Act by inserting Section 223-A into the Act. This section read:

> Every High Court shall have power throughout territories in relation to which it exercises jurisdiction to issue to any person or authority including in appropriate cases any Government within those territories, writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari or any of them.

The writs mentioned in this section had been developed by the English Courts over the centuries, and the writ jurisdiction conferred on High Courts was a great step forward, because they provide the most effective weapon for enforcing the rule of law by controlling arbitrary action by governments and by public authorities. But it had taken the Constituent Assembly nearly seven years to confer this basic right on the people of Pakistan, although the Constituent Assembly had many members who were lawyers and who must have known the importance of these writs for the protection of human rights and for the proper enforcement of the law. Similarly at least some of the members

elected to the Constituent Assembly from East Bengal knew about writs, because the Presidency High Courts of Calcutta, Madras and Bombay had inherited the writ jurisdiction of the Supreme Courts of which they were the successors. It is obvious that the Constituent Assembly did not promulgate Section 223-A for purely altruistic motives. By the summer of 1954, it was clear that the power-hungry Governor-General had fallen out with the coterie controlling the Constituent Assembly and was preparing his offensive against the Constituent Assembly. It was therefore in the interest of the members of the Constituent Assembly to confer the writ jurisdiction upon High Courts.

It took the Constituent Assembly more than seven years to prepare a draft Constitution, although this draft Constitution was based largely on the Government of India Act, and on the provisions for Fundamental Rights in the Indian Constitution, with some additions and changes. After the dismissal of Dr Khan Sahib's Government in the Frontier Province, the Muslim League had a clear majority in the Federal Assembly and in the Provincial Assemblies and Muslim League Governments were formed at the Centre and in the Provinces. But very soon there were differences between the Federal Government and the Governments of Sindh and the Punjab, because of the Federal Government's interference in provincial affairs. For the same reason, within a few years of independence, the Muslim League totally lost the confidence of the people of East Bengal. As the Constituent Assembly was also the Federal Assembly, the delay in preparing the Constitution prolonged life, and the result was that the Federal Government and the Federal Assembly remained in power, even though it had lost the mandate of the people. It must also be borne in mind that the Provincial Assemblies of British India had been elected in 1946 on a very limited franchise. After the announcement by Lord Mountbatten, the last British Governor-General, of the Plan of 3 June 1947 for the transfer of power to India through a partition of the country, the members of what became the Provincial Assemblies of the Dominions of India and Pakistan elected the Dominion Legislatures of India and Pakistan. As Balochistan did not have a Provincial Assembly, Lord Mountbatten made special arrangements for its representation in the Legislature of Pakistan. Except in the Frontier Province, the Muslim League had swept the polls, and the Constituent Assembly was dominated by the Muslim League. After the introduction of adult franchise, elections had been held in 1951-2 for the Provincial Assemblies of West Pakistan, namely the Punjab, the Frontier Province and Sindh. The Muslim League was successful in these elections. But the newly elected Assemblies of the Punjab and of the Frontier Province passed resolutions that the members of the Constituent Assembly elected in 1946 to the Constituent Assembly from these provinces should resign and be replaced by members elected by the new Assemblies. (These resolutions have been reproduced at page 149 of Mr. Sharifuddin Pirzada's book *Dissolution of Constituent Assembly*.) The Sindh Assembly had passed a similar but far stronger resolution against the Constituent Assembly after its dissolution by the Governor-General in which it welcomed the Governor-General's order dissolving the Constituent Assembly (page 152 of Mr. Sharifuddin Pirzada's book). Finally although 56 percent of the country's population lived in East Bengal,

elections for the East Bengal were delayed by the Muslim League Government of East Bengal, as it had lost the confidence of the people of the province. Elections were held in March 1954 and the Muslim League won only ten seats in an Assembly of 309. The coalition of parties called the United Front obtained about 66 per cent of the votes, while less than 34 per cent of the votes were divided between the Muslim League and other parties. The United Front therefore passed a resolution (page 142 of Mr Sharifuddin Pirzada's book), according to which the Constituent Assembly had,

> progressively lost whatever representative character it possessed, and whereas it could not have been within the contemplation of the framers of the Indian Independence Act that the Constituent Assembly will take such a time in framing the Constituent and thus prolong its existence, and...whereas the people of East Bengal have demonstrated that they have no confidence in the Muslim League and in the members of the Constituent Assembly representing East Bengal Legislative Assembly; and whereas it is now clear that the Muslim League is not a political party carrying any weight in the country, but is a coterie of persons; and whereas the representatives from East Bengal are in majority in the Constituent Assembly and thus their presence there had made the Constituent Assembly as a whole unrepresentative in character,...

The United Front called upon the Constituent Assembly to 'dissolve itself' and make provision for a directly elected Constituent Assembly. The resolution called upon the members representing East Bengal in the Constituent Assembly to resign forthwith and to contest elections again, if they so wished.

Mr. Tamizuddin Khan and the Muslim League members elected to the Constituent Assembly from East Bengal refused to resign and stand for elections again. They claimed that they were entitled under the Independence Act to hold on to power until the Constituent Assembly had approved of a constitution for the country. This claim was not supported by the Independence Act which on the contrary, had created a Constituent Assembly for the Dominions for the purpose of framing democratic constitutions, and norms of democracy as well as of morality required the members of the Constituent Assembly to resign, if it became clear that they had lost the confidence of their electors. But there was also another reason for the determination of these Muslim League members to hold on to power. There were wide differences between the East Bengal Muslim League and the United Front of East Bengal about important questions such as separate electorates, the national languages of the country, etc. Necessarily, therefore, by holding on to power, the Muslim League members of East Bengal had sought to impose on the country a constitution against the wishes of the majority province.

However, the Governor-General Mr. Ghulam Mohammad, came to Mr. Tamizuddin Khan's rescue by dismissing the United Front Government within a few weeks of its

taking office and by imposing Governor's rule upon East Bengal. This was a temporary reprieve for Mr. Tamizuddin Khan and the Muslim League members from East Bengal in the Constituent Assembly. But their determination not to resign had created a constitutional deadlock, and the only way out of this was for the Governor-General to dissolve the Constituent Assembly.

In September 1954, the Constituent Assembly curtailed the Governor-General's powers by amending the Government of India Act. The Governor-General was indignant at this. He was suddenly converted to democracy and made the belated discovery that the functioning of the Constituent Assembly was a repudiation of democracy, because it had lost its representative character. So, with the zeal of a convert, he decided to dissolve the Constituent Assembly and hold elections for a new Constituent Assembly. He managed to get the approval of the Prime Minister for the dissolution as the Statute of Westminster 1931 laid down that the dissolution had to be on the advice of the Prime Minister. On 24 October 1954 the Governor-General issued a proclamation that he 'has with deep regret come to the conclusion that the Constitutional machinery has broken down and that the Constituent Assembly as at present constituted has lost the confidence of the people and cannot function any longer.' He therefore dissolved the Constitutional Assembly and stated that elections for a new Constituent Assembly would be held 'as early as possible'. Pending these elections, the Governor-General stated in his proclamation that he had called upon the Prime Minister to re-form his Cabinet and the proclamation gave the names of the Ministers appointed by the Prime Minister to his new Cabinet.

Mr. Tamizuddin Khan decided to file a writ petition in the Sindh Chief Court against the Federal Government to challenge the dissolution of the Constituent Assembly as well as the appointment of the new Cabinet. The Governor-General then behaved in an unbelievable manner. The relevant particulars have been given in Mr. Sharifuddin Pirzada's book, page 53. Mr Tamizuddin had to reach the High Court on 8 November 1954 to verify his affidavit in support of the Writ Petition he was filing, and the Petition was to be presented to the Court by one of his advocate Mr. Manzar-e-Alam. According to the learned author, as Mr. Tamizuddin Khan feared his arrest by the police, he left his house 'through the back door disguised as a *burqa*-clad woman and in a rickshaw reached the High Court through the side-gate'. But his advocate Mr. Manzar-e-Alam entered through the main gate, and was taken into 'protective custody' by the police. Police officers then went to the office of the High Court, and Mr. Roshan Ali Shah, the Deputy Registrar of the High Court, informed the Chief Justice, Sir George Constantine, on the telephone about the arrival of the police and the arrest of Mr. Manzar-e-Alam. The Chief Justice told the Registrar to telephone the Inspector General of Police to release Mr. Manzar-e-Alam immediately, or he would take action in contempt against the police. Mr. Manzar-e-Alam was released immediately. The police then tried unsuccessfully to intimidate Mr. Sharifuddin Pirzada, who was helping Mr. Tamizuddin Khan in his writ petition.

The hearing of Mr. Tamizuddin Khan's writ petition began in the Sindh Chief Court in November 1954 and arguments were concluded in January 1955. According to the Governor-General's proclamation, the Constituent Assembly was dissolved, because it had lost its representative character, yet Mr. Tamizuddin Khan had not challenged this in his writ petition, presumably because there was overwhelming evidence to show that this was indeed true. Therefore the real question in the writ petition was whether the Governor-General had the power to dissolve the Constituent Assembly under the Independence Act or under the common law, which was part of our jurisprudence. The Advocate-General argued this point, but he placed far greater stress on a preliminary legal objection. This objection was, firstly, that the common law was part of our jurisprudence and the Independence Act had to be read with the principles of the common law. Secondly, that the prerogative of the Crown to assent to bills passed by the Legislature was a part of our jurisprudence as it was a principle of the common law. Thirdly, that the prerogative of assent vested in the Dominions in the Governor-General and was exercised by them on the advice of their Prime Ministers. I agree with this statement of the law, but not with the further submission that the prerogative of assent could be abolished only by an express provision, and that as no Statute had abolished it, all amendments in the Government of India Act by the Constituent Assembly, including Section 223-A, were illegal.

The learned Judges rejected this submission by their judgement in *Moulvi Tamizuddin Khan v Federation of Pakistan* (PLD 1955 Sindh 96). They held that the Advocate-General's submission was not supported by the

Independence Act, but were influenced in their interpretation of the Independence Act by several considerations. They were of the view that the Independence Act had given complete freedom to the Constituent Assemblies of India and Pakistan to frame whatever constitution they wished. They were also of the view that the common law prerogative of the Crown had ceased to apply to Pakistan, because it was an independent country and also because the Constituent Assembly was a sovereign body. But the question was of the interpretation of the Independence Act passed by the British Parliament before independence, therefore, the independence of Pakistan and India could not alter the fact that the common law was the basis of our jurisprudence before independence, and the common law remained a part of our jurisprudence long after independence. In this background, it was not necessary for the British Parliament to provide in the Independence Act for every difficulty that might arise in the framing of the constitution of the new Dominions, because these difficulties could be resolved in the light of the principles of the common law. Section 6 of the Independence Act, in so far as it is relevant, read:

> 6 (1) The Legislature of each of the new Dominions shall have full powers to make laws for that Dominion...

(2) .....

(3) The Governor-General of each of the new Dominions shall have full power to assent to any law of the Legislature of that Dominion...

Section 8 of the Act, in so far as it is relevant, read:

> (1) 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, and reference in this Act to the Legislature of the Dominion shall be construed accordingly.
>
> (2) Except in so far as other provision is made or in accordance with a law made by the Constituent Assembly of the Dominion under subsection (1) of this section, each of the new Communions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935.

Section 8 also repealed some of the provisions of the Government of India Act which were inconsistent with the sovereignty of the new Dominions. The British Parliament was aware that the common law, including the prerogatives of the Crown under the common law, was a part of our jurisprudence, and sub-section 3 of Section 6 of the Independence Act stated that the Governor-Generals of the new Dominions 'shall have full power to assent to any law of the Legislature of that Dominion'. But Section 8 did not state that the Governor-General's assent was necessary for laws passed by the Constituent Assemblies of the new Dominions. The fact that Section 8 did not contain a requirement about the Governor-General's assent to laws passed by the Constituent Assemblies of the new Dominions manifested the intention of the British Parliament that the Governor-General's assent was not necessary for bills passed by the Constituent Assemblies. The Governor-General's power of giving assent or withholding assent to bills passed by the Constituent Assemblies had been abolished by necessary implication. I therefore agree with the conclusions of the learned Judges, but for the reasons which I have given.

The learned Judges had also given other cogent reasons for their conclusion, and I will refer to one of these reasons, because it ultimately provided the solution for the deadlock created by the refusal of the Constituent Assembly to resign. Forty-four amendments had been made in the Government of India Act between 1947 and 1954 when Mr. Ghulam Mohammad dissolved the Constituent Assembly. All the Governor-Generals during this period, including Mr. Ghulam Mohammad, had never advanced the claim that their assent was necessary to validate bills passed by the Constituent Assembly. On the contrary, they had promulgated laws in pursuance of the powers conferred on them under these amendments, and provincial laws also had been

promulgated on the basis of these amendments in the Government of India Act. The learned Judges therefore rightly held that on the footing that there was some ambiguity in the Independence Act, the conduct of successive Governor-Generals in accepting the amendments made in the Government of India Act as valid was fatal to the Advocate-General's submission. They also stressed that many thousands of transactions had been completed on the basis of the amendments made in the Government of India Act and the laws promulgated thereunder. Therefore they rejected the Advocate-General's contention on the ground that its acceptance would lead to legal chaos and administrative breakdown. They held that Section 223-A was valid and that our superior Courts were competent to issue writ against the Government. But the Governor-General's proclamation of 24 October 1954, had not referred to this plea that the Governor-General's assent was necessary to validate amendments in the Government of India Act. The claim in the proclamation was that the Constituent Assembly had been dissolved because it had lost its representative character.

The learned Judges held that the Constituent Assembly could not be dissolved as it was a sovereign body, but they did not refer to any law, or custom or practice according to which a Constituent Assembly cannot be dissolved, nor am I aware of any such law or custom or practice. On the contrary, sovereignty is the attribute of a state, and no institution within a state can claim to be sovereign. A Constituent Assembly cannot be a sovereign body, because it is an institution within a state. Secondly, the concept of a Constituent Assembly depends on the legal and political system of a country. A Constituent Assembly appointed to frame the constitution for a one party state is not accountable to the people of that state. But a Constituent Assembly elected to frame a democratic constitution is accountable to the people of that country, or to its electors, if the Assembly has been elected on an indirect basis, as our Constituent Assembly was. As it became clear after the East Bengal Elections of 1954 that the Constituent Assembly had lost its representative character, the question before the learned Judges was whether a Constituent Assembly, which had lost its mandate to frame the country's constitution, could be allowed to continue to function. The answer to this question can only be in the negative for a country claiming to be a democracy, and it was unfortunate that the learned Judges did not give even a passing thought to the rights of the people of East Bengal. But Judges are a part of the society in which they live and we did not have a democratic culture in the fifties. This perhaps explains why the learned Judges made a fetish of legal technicalities. They pointed out that according to Section 18 of the Government of India Act, five years was the maximum term of the Federal Assembly. But this provision was repealed by an amendment in the Government of India Act, on a date not stated in the judgement, by the Governor-Generals of India and Pakistan by the Independence Act to make in the Government of India Act the amendments necessary for the transition of the two countries from a semi-colonial status to that of independent democracies.

Further as independence was achieved through the partition of India, the leaders of the Muslim League and of the Indian National Congress knew that no matter how carefully the partition of India was affected, there would be millions of Hindus who would have to go on living in Pakistan and there would be millions of Muslims who would have to go on living in India. Necessarily this meant that the partition of India would not solve the problems of minorities, as there would be a substantial non-Muslim minority in Pakistan and a larger Muslim minority in India.

They therefore gave the most solemn assurances that India and Pakistan would be democratic countries, which would respect the rights of minorities in their countries. The Independence Act was passed on the basis of these assurance, and as the question is construing the intention of British Parliament in passing the Independence Act, it is clear that the intention of the British Parliament in passing the Independence Act was to create independent Dominions which would be governed democratically.

Sections 18 and 19 of the Government of India Act had codified the Crown's prerogative to summon, prorogue and dissolve the Federal Parliament set up under the Government of India Act. The Federal Parliament in that Act was bicameral, consisting of the Federal Assembly and an upper chamber called the Council of State. As the Council of State was abolished after independence, Sections 18 and 19 were amended, but these sections also dealt with the Federal Assembly, and sub-section 5 of Section 18 and sub-section 2 (c) of Section 19 defined the Governor-General's powers of dissolving the Federal Assembly. Both Section 18 (5) and Section 19 (2) (e) were omitted by an amendment of these sections. Sub-section 5 of Section 18 had read:

> Section 18
> Every Federal Assembly, unless sooner dissolved shall continue for five years from the date appointed for the first meeting and no longer, and the expiration of the period of five years shall operate as a dissolution of the Assembly.

Sub-section (2) of Section 19 had read:

> Section 19
> Subject to the provisions of this section, the Governor-General may in his discretion from time to time :
> a) Summon the Chamber...
> b) Dissolve the Chamber...
> c) Dissolve the Federal Assembly.

The provision in Section 18 that the life of the Federal Assembly could not be more than five years was very reasonable and in accordance with democratic norms. So was the Governor-General's power of dissolution under Section 19 (2) (c). But as the Governor-General was the representative of the Crown, it was contended that the exercise of this power was derogatory to the dignity of an independent country. The contention was

frivolous, because as a result of the Statute of Westminster 1931, the Governor-General had to exercise his power of dissolving the Assembly on the advice of the Prime Minister of Pakistan. This was in strict accordance with the practice of all parliamentary democracies. On the other hand, the repeal of Section 18 (5) and 19 (2) (c) would make the Federal Assembly a perpetual legislature and a perpetual legislature is a repudiation of democracy. There was therefore no justification for omitting Section 18 (5) and Section 19 (2) (c) from the Government of India Act. But if, these provisions had been made by amendments in the Government of India Act by the Constituent Assembly, the Courts would have been bound by them. Section 9 empowered the Governor-General to make amendments in the Government of India Act which were necessary or expedient for bringing the provisions of the Independence Act into effective operation and for removing difficulties in connection with the transition of India and Pakistan from their semi-colonial status to that of independent democracies. These amendments in Section 18 (5) and 19 (2) (c) of the Independence Act were made by an executive order under the power delegated to the Governor-Generals of the Dominions by Section 9 of the Independence Act, and can therefore be valid only if they are within the powers delegated to the Governor-Generals under Section 9 of the Independence Act.

The question before the learned Judges was whether this limitation of five years on the Federal Assembly's term was reasonable, as it was also our Constituent Assembly.

Unfortunately this aspect of the case escaped the attention of the learned Judges. However, in the litigation arising in consequence of Mr. Tamizuddin Khan's case, Justice Munir gave in one of his judgements in the Federal Court a list of twenty recently liberated countries, out of whom thirteen framed their constitutions within one year, six within two years and India took the longest time i.e. two years and ten months. In the circumstances, the period of five years under Section 18 was more than sufficient for framing a constitution, however complicated. Similarly the Governor-General's power to dissolve the Assembly in his discretion, which meant on the Prime Minister's advice, was also a very reasonable provision, and in the majority of countries which follow the parliamentary system of democracy, the head of the State has the power to dissolve the Assembly in his or her discretion. The omissions made in Sections 18 and 19 of the Government of India Act were neither necessary for bringing the Independence Act into operation, nor for removing any difficulties in connection with our transition from a semi-colonial country to an independent country. The omission of Section 18 (5) and of Section 19 (2) (c) from the Government of India Act by the Governor-General was, therefore, *ultra vires* of the powers conferred on them by the Indian Independence Act. But as a corollary of these omissions, the Constituent Assembly had passed Rule 15 under which it could dissolve itself by a two-thirds vote of its members. This was an arbitrary rule, and it was on the basis of this rule that the Constituent Assembly, which was also a Federal Assembly, had refused to dissolve itself after the debacle of the Muslim League in the East Bengal elections. The

consequence of this rule and of the amendments made in Sections 18 and 19 was that the Muslim League Government remained in power, although the people of the East Bengal had all but annihilated the Muslim League in the 1954 elections.

Finally, except for the writ of *habeas corpus*, a writ is a discretionary remedy. As the learned Judges held that the Governor-General could not dissolve the Constituent Assembly, they should have considered the further question whether it was a fit case for the issue of a writ. According to the settled law, a writ is not issued if it leads to injustice and oppression, and I cannot conceive of greater injustice and greater oppression than the issue of a writ to restore a Constituent Assembly which had lost its representative character. Unfortunately the learned Judges did not consider this question either, and the writ issued by them was a violation of the rights of the people of East Bengal.

The Federal Government filed an Appeal in the Federal Court against the Sindh Chief Court's judgement. The Advocate-General was assisted in the Federal Court by Mr. Diplock QC and the arguments advanced in the Federal Court appear to have been much more sophisticated than in the Sindh Chief Court. The Advocate-General and Mr. Diplock persisted in repeating the contention that Bills passed by the Constituent Assembly were not valid without the Governor-General's consent, but Mr. Diplock also challenged Mar Tamizuddin Khan's claim that the Constituent Assembly was a perpetual legislature, which could be dissolved only when it decided to do so under Rule 15 by a two-third majority of its members. Mar Diplock's submission was that this claim was a total repudiation of democratic norms and in a brilliant discussion of the meaning of democracy, Justice Munir observed in *The Federation of Pakistan v Tamizuddin Khan* (PLD 1955 FC 240 at p. 316):

> The first essential of a democratic constitution therefore is that the entire people must be represented in the legislature by their nominees to be elected periodically by them... The second and by far the most important requirement of a democratic constitution is the need for periodic accountability of the representatives of their electors. In modern times within a few years political events of great and unanticipated importance may happen in a country and the mental horizon of the whole people may change by a sudden international or domestic event, the importance and implications of which may not have been present to the minds of the people when elections were held. It is, therefore, necessary that old representatives should seek re-election either because of their having ceased to reflect in the legislature the progressive or changing outlook of the people or because of their having ceased to represent the views of the people on a particular issue... The basic principle is that no representative body can continue indefinitely and that its composition must admit of change from time to time by means of an appeal to the people. An irremovable legislature is the very

> antithesis of democracy and no democratic constitution is known in the world where elections are for life or for an indefinitely long time.
>
> It may incidentally be mentioned here that in the Act of 1947 there was no express provision for the dissolution of the Constituent Assembly, and it was alleged before us by Mr. Chundrigar on behalf of the respondent that the only way to get rid of the Assembly if it did not dissolve itself, was force or revolution, thus admitting that extra legal acts like revolution, coup d'état and other unconstitutional acts become legal concepts where the people, deprived of political sovereignty which in a democracy is their birth-right, seek to assert that right against an indissoluble Assembly.

It is obvious from these observations that Justice Munir was of the view that the Constituent Assembly was rightly dissolved. And that is why he questioned Mr. Diplock on the Governor-General's intention about holding elections for a fresh Constituent Assembly. Mr. Diplock's reply was that when the Governor-General issued his proclamation of 26-10-1954, his intention was 'and still is his intention to summon a fresh Constituent Assembly elected so far as the Provinces which have got Legislative Assemblies by members of those Assemblies'. He also said that the Governor-General would have taken action immediately after his proclamation to hold elections 'if litigation had not started'. Finally, when questioned about the time required by the Governor-General for holding indirect elections Mr. Diplock's reply was clear, he said: 'Indirect elections could be done within a week or two. There are the Provincial Assemblies. They have to be recalled back to select their representatives.' In view of this assurance about elections, Justice Munir allowed the appeal only on the ground that Section 223-A of the Government of India Act, which had conferred the writ jurisdiction on the superior Courts, was not a valid amendment of the Constitution because the Governor-General had not given his assent to the insertion of Section 223-A in the Government of India Act. This was unfortunate, because the Governor-General went back on the assurance given by him to the Federal Court through Mr. Diplock and took no steps, whatsoever, to hold elections for a new Constituent Assembly.

The consequences of the Governor-General's dishonesty were appalling, because all the amendments made in the Government of India Act by the Constituent Assembly, together with the laws promulgated under those amendments had suddenly became invalid. This would have led to legal chaos and administrative breakdown. Therefore by the Emergency Power Ordinance, 1955, the Governor-General purported to give his assent with retrospective effect to most, but not all of the amendments made by the Constituent Assembly in the Government of India Act. The validity of this Ordinance was immediately challenged.

Mr. Yusif Patel and others had been directed to furnish security under the Sind Control of Goondas Act, but as they were not able to furnish the required security, they were

imprisoned. They challenged the orders passed against them under the Sind Control of Goondas Act, but as they were unsuccessful, they filed appeals in the Federal Court. As the Sindh Control of Goondas Act had been promulgated on the basis of an amendment in the Government of India Act, the submission of the Appellants was that this Act had become illegal in consequence of the Federal Court's judgement. Their further submission was that the Emergency Power Ordinance was illegal, because neither the Independence Act nor the Government of India Act had conferred any power on the Governor-General to amend the Government of India Act. This submission was also correct and the appeals were allowed. In allowing the appeals, Justice Munir observed:

> It is therefore not right to claim for the Federal Legislature power of making provision as to the constitution of the Dominion—a claim which is specifically negatived by sub-s (1) of Section 8 of the Indian Independence Act. If the constitutional position were otherwise, the Governor-General could by an Ordinance repeal the whole of the Indian Independence Act and the Government of India Act and assume to himself all powers of legislation. A more incongruous position in a democratic constitution is difficult to conceive, particularly when the Legislature itself, which can control the Governor-General's action, is alleged to have been dissolved.

In the last para of his judgement allowing the appeals before the Court, Justice Munir expressed his regret at the Governor-General's behavior and observed:

> It might have been expected that, conformably with the attitude taken before us by responsible counsel for the Crown, the first concern of the Government would have been to bring into existence another representative body to exercise the powers of the Constituent Assembly so that all invalid legislation could have been consistent with constitutional practice in relation to such a situation as has arisen. Events, however, show that other counsel have since prevailed. The Ordinance contains no reference to elections and all that the learned Advocate-General can say is that they are intended to be held.

The Governor-General was at last cornered by this judgement. The consequence of the Federal Court's acceptance of his claim to give assent to constitutional legislation had led to legal and administrative chaos, and he realized that he had no alternative but to go cap in hand to the Federal Court under its advisory jurisdiction to help him out of the imbroglio facing the country. Realizing that he would not be able to outwit the Federal Court a second time, on 15 April 1955 he summoned a Constitutional Convention for the tenth of May to frame a constitution for the country. The next day, he issued a proclamation assuming such powers as were necessary to validate and enforce laws that were needed to avoid a break-down in the constitutional and administrative machinery of the State. But he clarified in the proclamation, that he had assumed these powers to himself only until other provisions were made by the

Constituent Assembly. He also stated that he was exercising these powers subject to the opinion of the Federal Court under Section 213 of the Government of India Act. The learned Judges of the Federal Court reframed the questions sent by the Governor-General and gave their opinions on the questions as re-framed by them. The opinions are reported as *Special Reference No.1 of 1955* (PLD 1955 7C 435) (Vol. 1, p. 595).

The Judges were of the view that the Assembly to frame the constitution should be called the Constituent Assembly, not the, Constituent Convention, as suggested in one of the Governor-General's questions. But the two basic questions in the Reference which were interconnected were whether the Governor-General had the power to dissolve the Constituent Assembly and to constitute a new one. Justice Munir observed on page 635:
It is clear that the provisional constitution granted to Pakistan by the Indian Independence Act, 1947, and the adapted Government of India Act, 1935, was, until its nature was altered by a law made by the Constituent Assembly, a democratic constitution. It therefore cannot possibly be contended that the Constituent Assembly had been given the power to function as long as it liked and assume the form of a perpetual or indissoluble legislature. The only reasonable construction of subsection (1) of Section 8 of the Indian Independence Act, 1947, is that the subsection gave to the Constituent Assembly the power to perform the duty assigned to it by the Act. If the Act did not intend to install that Assembly as a perpetual legislature, the prerogative of dissolution 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. It could certainly not be the intention of the Indian Independence Act that in the guise of a constitution making body the Constituent Assembly could function as the Legislature of the Dominion indefinitely until it became necessary to remove it by a revolution.

Justice Munir also examined the Governor-General's claim to dissolve Constituent Assembly on the ground that it had lost its representative status and observed:

> Therefore dissolution on the ground that the Assembly had become unrepresentative can be held to be illegal only if it be found that the intention of the Indian Independence Act, 1947, was to retain the Assembly as the Legislature of the Dominion, however unrepresentative of the people it became by the flux of time. Since I am unable to read any such intention in the Act, it follows that the prerogative right to dissolve was not excluded by the Act in the circumstances mentioned. And the reason for the dissolution of an unrepresentative Constituent Assembly is that since the constitution made by it, if it makes one, cannot be acceptable to the people, the Assembly becomes incapable of discharging the duty assigned to it by the Statute. Here again it is obvious that if the Assembly cannot function in furtherance of the intention of the Act, the case is one of *cassus omisuss*, in the sense that the prerogative of dissolution cannot be held to have been ousted by the Act.

Justice Munir then examined the question whether the Governor-General had the power to constitute a new Constituent Assembly and he observed that 'the power to dissolve a representative legislative institution implies the right to convene another Assembly, the power exercised in both cases being a prerogative power. Here again the matter is governed by the principle that where the prerogative has not been excluded by the statute, the common law applies.' After pointing out that a case unprovided for in a statute and given to oblivion must be disposed of according to common law, the learned Chief Justice observed

> that under the Indian Independence Act, 1947, there is no provision relating to the convention or composition of a fresh Constituent Assembly. It follows therefore that the Governor-General must, as representative of the Crown, exercise the same powers as were exercised by the Governor-General in 1947 on behalf of the Crown, the only difference between the two cases being that whereas in 1947 the Governor-General exercising the powers was responsible to His Majesty's Government in the United Kingdom, the present Governor-General having been appointed to represent the King for the purposes of the government of the Dominion, is not responsible to any agency outside the Dominion, though in law the source of the authority in both cases is the Crown. The dissolved Constituent Assembly was set up by an executive order and not under any law and the new Constituent Assembly also can be set up by a similar order.

Mr Chundrigar and Mr D.N. Pritt QC had expressed the fear that the Governor-General might nominate persons of his choice to the new Constituent Assembly, therefore, Justice Munir recorded Mr Diplock's submission at page 652 and observed:

> ...that the duty of the Governor-General being to bring into existence a representative Assembly, he has no right to nominate members, though consistently with the all-important principle of representation of the people and areas on as wide a basis as possible he may determine the manner in which members are to be chosen.
>
> With respect to the representation of States and tribal areas, the matter is governed by the Indian Independence Act itself. Under the proviso to subsection (3) of Section 19 of that Act, arrangements for the representation of these territories have to be made by the Constituent Assembly and not by the Governor-General.

Justice Munir's answers to the two questions whether the Governor-General had the power to dissolve the Constituent Assembly and to convene a new Constituent Assembly were approved by the majority of the other Judges of the court and so

became the Federal Court's advice to the Governor-General which he implemented. The only other question for consideration was of the validation of laws consequent upon the finding that the Constituent Assembly's amendments of the Government of India Act had been illegal. Justice Munir referred to the Latin Maxims *salus populi suprema lex* and *salus republica est suprema lex*, which means respectively that the state of the people is the supreme law and that safety of the State is the supreme law. Justice Munir then examined English judgements in which these maxims had been followed. He agreed with these judgements and observed at page 676:

> 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 of 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 in the same way as if they had been valid from the date on which they purported to come into force.

Justice Cornelius and Justice Sharif did not agree with this answer by Justice Munir. Their opinion was that the Governor-General had no power to legislate on constitutional matters in view of the Court's judgement in Yusif Patel's case. Justice Munir had therefore invoked the doctrine of necessity, but Justice Cornelius and Justice Sharif were of the view that the doctrine of necessity should not be extended to a crisis created by an interpretation of a law. As the other Judges of the Court agreed with Justice Munir, his opinion became the law, and so this majority opinion put the country back on the road to democracy, from which it had deviated after the East Bengal elections of March 1954.

Elections for the new Constituent Assembly were held on 21 June 1955, and it met on 6 July. It completed its task by the end of February 1956, and the new Constitution came into force the next month. The Constitution contained guarantees for protecting the tenure of civil servants, and of Judges of the High Court and of the Supreme Court (which was the successor to the Federal Court). But the most important provisions in a Constitution are those which confer rights on persons living in the country, and the heading of Part II of the Constitution was 'Fundamental Rights' while the heading of Part III was 'Directive Principles of the State Policy'. These expressions were borrowed from the Indian Constitution, and as in the Indian Constitution, these Principles of State policy could not be enforced through the courts. But the rights conferred under Part II were enforceable through the superior courts, and as they were a part of the Constitution, they could be altered or repealed only in the manner prescribed in Article 216. According to Article 216, an amendment of the Constitution had to be passed by a majority of the total members of the National Assembly and by the votes of not less than two-thirds of the members of the Assembly present and voting and had to be

assented to by the President. According to Article 4, which is in Part II of the Constitution

> 4 (1) Any existing law, or any custom or usage having the force of law, in so far as it is inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void. (2) The State shall not make any law which takes away or abridges the rights conferred by this Part, and any law in contravention, of this clause shall, to the extent of such contravention, be void.

The scope of this Article was examined by the Supreme Court in province of *East Pakistan v Mehdi Ali Khan & others* (PLD 1959 SC 387) and Justice Munir held that the word void in the Article meant that whenever a law was inconsistent with Fundamental Rights, that law was not in operation or not enforceable as long as Fundamental Rights were enforceable, but the law became enforceable whenever Fundamental Rights were not available, and the constitution permitted the suspensions of Fundamental Rights if an Emergency was proclaimed by the President.

Article 5 conferred the Right of Equality and declared that all citizens were equal before law and were entitled to equal protection of law and that no person could be deprived of life or liberty save in accordance with law. The next Article prohibited the creation of offences with retrospective effect and of retrospective punishments. According to Article 7, every person who was arrested and detained in custody had to be produced before the nearest Magistrate within twenty-four hours of his arrest and was to be informed of the grounds of his arrest and of his right to consult and be defended by an advocate. But these benefits were not available to enemy aliens, and although the heading of the Article stated 'Safeguards as to Arrest and Detention', the Article expressly legitimated what was called preventive detention. But a person could be detained for more than three months only if the appropriate Advisory Board reported before the end of this period of three months that there was sufficient cause for his detention, and the detenue had to be supplied the grounds of his detention as soon as possible. The appropriate Advisory Board in the case of detentions under a Central law consisted of persons appointed by the Chief Justice of Pakistan, while the Advisory Board for detentions under a provincial law consisted of persons appointed by the Chief Justice of the High Court of the province.

The other important rights conferred by Part II of the Constitution were the right to freedom of speech and expression, to freedom of assembly, to freedom of association, to freedom to move freely in the country and to hold and dispose of property in the country. But these rights were subject to reasonable restrictions which could be imposed by law. However, the right to carry on a trade or profession could be subjected to a licensing system. Article 15 prescribed that no property could be acquired for public purposes except by a law which provided for compensation for the acquisition of the property. But the benefit of this Article was not applicable to existing laws, to laws

about evacuee property and to laws for the acquisition of the property for preventing the injury to life or property or health. Article 17 prohibited discrimination in the services of Pakistan on the ground of race, religion, caste, sex, resident or place of birth. Article 18 protected the rights of citizens to profess and practice their religion and to manage their religious institutions, but this right was subject to law, public order, and morality. The rights conferred by Part II could be enforced through the writs referred to earlier by filing a writ in the Supreme Court, but the High Courts also had the power of issuing writs to enforce Fundamental Rights and to strike down illegal orders of the Government or of any public authority.

The Frontier Crimes Regulation, 1901 was in force in many areas of Balochistan and the Frontier Province. This was one of the repressive laws inherited by us in 1947. It was based on tribal custom and was challenged almost as soon as the Constitution came into force in *Khair Mohammad and others v the Province of West Pakistan* (PLD 1956 Lahore p. 668). Khair Mohammad and the other petitioners were arrested for an offence under the Explosive Substance Act, 1908. The Political Agent, Quetta referred the question of their guilt or innocence for the alleged offence to a Council of Elders under Section 11 of the Frontier Crimes Regulation and as the old name for the Council of Elders was the *jirga*, I will use the word jirga for the Council of Elders. *Jirgas* did not allow advocates to appear before them, while the Legal Practitioners Act did not entitle them to appear before a *jirga*, because it was not a court under the Legal Practitioners Act. However, as Khair Mohammad and the other petitioners wanted to be defended by an advocate before the *jirga* which was trying them, they filed a writ of habeas corpus in the West Pakistan High Court in which their only prayer was that they should be allowed to be defended by an advocate, as Article 7 of the Constitution stated that every person who was arrested had the right to be defended by a legal practitioner of his choice. There was no ambiguity about Article 7. Justice Kayani, who wrote the judgement of the court, held that a trial before a *jirga*

> so far as it relates to the presence of a counsel is inconsistent with Article 7 of the Constitution. We do not, however, think that the Frontier Crimes Regulations has become unlawful because it does not provide for the appearance of a legal practitioner. From now, on we should treat Article 7 as a part of every law relating to trial for an offence. We shall, therefore, issue a direction that no evidence shall be heard or recorded against the accused before they have been given an opportunity of defending themselves by a pleader, and this shall be the rule in future.

Although the petition was allowed, Justice Kayani went on to discuss the salient features of a trial under the Frontier Crimes Regulation and observed with regret that a *jirga* could record evidence in secret, behind the back of an accused. His observations clearly indicated that a trial before a *jirga* discriminated against the accused and was a

violation of Article 5 of the Constitution. But the Frontier Crimes Regulation was not challenged on this ground until 1958.

The first challenge to a law on the ground that it was discriminatory and therefore void under Article 5 of the Constitution was made in East Bengal. The East Bengal State Acquisition and Tenancy Act (hereafter called the said Act) together with its amendments had been enacted, as the preamble to the Act stated, in order to provide for the acquisition by the State of the interests of rent-receivers in land and to acquire certain other interests in land in East Bengal in order to distribute the land acquired under the Act 'among tenants with uneconomic holding, *bargadars* and agricultural labourers'. Compensation for the rent-receiving interests and lands acquired was paid on a sliding scale with the rate of compensation decreasing as the income of the landlord increased, and the East Bengal Government acquired the interests of certain rent-receivers and the lands in their possession before the Constitution came into force. After the Constitution came into force, the Government issued notifications district-wise acquiring the interests of the remaining rent-receivers and their lands. The rent-receiving interests and the lands thus acquired included *waqf* and debutter properties. Many landlords therefore filed writ petitions in the High Court of Dhaka to challenge the acquisition of their lands and rent-receiving interests on three grounds. The first was that the compensation paid discriminated against landlords with a higher income. The second was that the notifications for the acquisition of rent-receiving interests and lands had been issued under Section 3 of the said Act, that this section conferred an arbitrary power on the Provincial Government to pickup for expropriation any rent-receiving interests etc., it liked, and as this could lead to discrimination, Section 3 was hit by Article 5 of the Constitution. The third was that *waqf* and debutter properties could not be acquired as their acquisition was a violation of Article 18 of the Constitution. All these contentions were rejected and as all the writ petitions were dismissed the petitioners went in appeal to the Supreme Court, which decided these appeals by its judgement in *Jibendra Kishore and others v the Government of East Pakistan* (PLD 1957 SC 9).

Compensation had been paid to the appellants under a law passed before the Constitution came into force and as Article 15, which protected the right to own property, did not apply to a pre-constitution law, the appeals which challenged the quantum of compensation paid to landlords were dismissed. As the vires of Section 3 had been challenged, Justice Munir, who wrote the judgement of the Court, pointed out that the declaration in Article 5 of the Constitution that all citizens were equal before law and were entitled to equal protection of law was derived from the Fourteenth amendment of the Constitution of the United States and that Article 14 of the Indian Constitution was similar to Article 5. He then examined at great length the American and Indian case law on the concept of the equality of citizens before law and their right to equal protection of law and observed at p. 38:

> One of these propositions is that equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances, in their lives, liberty and property and in pursuit of happiness. Another generalization more frequently stated is that the guarantee of equal protection of the laws requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in liabilities imposed. In the application of these principles, however, it has always been recognized that classification of persons or things is in no way repugnant to the equality doctrine provided the classification is not arbitrary, or capricious,, is natural and reasonable and bears a fair and substantial relation to the object of the legislation. It is not for the Courts, in such cases, it is said, to demand from the legislature a scientific accuracy in the classification adopted. If the classification is relevant to the object of the Act it must be upheld unless the relevancy is too remote or fanciful. A classification that proceeds on irrelevant considerations, such as differences in race color or religion will certainly be rejected by the Courts.

Justice Munir also held that a law would violate Article 5 if it was *ex-facie* discriminatory, but not if it was capable of being administered in a discriminatory manner. And as even the contentions of the Appellants was that the said Act could be administered in a discriminatory manner, the Court dismissed all the appeals based on the contention that Section 3 of the said Act violated of Article 5 of Constitution.

Finally Justice Munir examined the question whether the acquisition of *waqf* and debutter properties was a violation of Article 18. According to this Article, every religious denomination and every sect had, subject to law, the right to establish, maintain and manage its religious institutions. Justice Munir therefore observed on p. 41 that the acquisition of *waqf* and debutter properties 'strike religious institutions at their very root'. But the fundamental right guaranteed by Article 18 was subject to law, therefore, the East Bengal Government's contention was that the guarantee of Article 18 was not available to *waqf* and debutter properties, as the said Act, under which they had been acquired, was a law. Justice Munir rejected this submission with the observation:

> The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens of Pakistan to say that a right is fundamental but that it may be taken away by the law...
>
> We consider it to be a fundamental canon of construction that a Constitution should receive a liberal interpretation in favour of the citizen, especially with respect to those provisions which were designed to safeguard the freedom of conscience and worship. Consistently with the language used, constitutional

> instruments should receive a broader and more liberal construction than statutes...
>
> If the language is not explicit, or admits of doubt, it should be presumed that the provision was intended to be in accordance with the acknowledged principles of justice and liberty... In the light of these rules of construction of constitutional instruments it seems to me that what Article 18 means is that every citizen has the right to profess, practice and propagate his religion and every sect of a religious denomination has the right to establish, maintain and manage its religious institutions, though the law may regulate the manner in which religion institutions are to be established, maintained and managed. The words 'the right to establish, subject to law, religious institutions' cannot and do not mean that such institutions may be abolished altogether by the law.

The appeals were therefore allowed and the provisions in said Act for acquiring properties attached to religious institutions were declared illegal. This interpretation of the word law was a charter for the rights not only of religious minorities, but also of political minorities, because many of the fundamental rights guaranteed in the Constitution were declared to be subject to law.

In *Waris Meah and others v The State and the State Bank of Pakistan* (PLD 1957 SC p. 157) the Supreme Court struck down the penal provisions of the Foreign Exchange Regulation Act, 1947. The appellants were exporters from Pakistan to India and they were required by the Foreign Exchange Regulation Act to repatriate to Pakistan the sale proceed of their exports. As they failed to do so, they were tried and convicted under Section 22-A read with Section 23-B of the Foreign Exchange Regulation Act. When this Act was promulgated in 1947 (before independence) persons who committed an offence under this Act were tried under Section 23 of the Act in the Sessions Court or in the Court of Magistrate of the first or the second class. Section 23 was amended after independence by the insertion of Section 23-A. Section 23-A created a new and alternative forum for the trial of offences under the Act. Persons charged for an offence under the Act could also be tried by an Adjudication Officer appointed by the Central Government. Thereafter Section 23 was again amended by the insertion of Section 23-B. Section 23-B created a third forum for the trial of offences under the Act. There were, therefore, three alternative forums for the trial of offences under the Act and the powers of these forums to impose punishments were different. Neither the Act nor its amendments contained any guidelines for the selection of the forum in which persons alleged to have contravened the Act could be tried. The contention of the appellants, therefore, was that Sections 23, 23-A, 23-B were inconsistent with the equality clause in Article 5 of the Constitution, because the power conferred on the authorities to prosecute persons under this Act was arbitrary. Justice Munir accepted this submission and observed at p. 167:

> It was contended on behalf of the State that in the present cases, it could not be said that discretion had not been exercised in a fair and reasonable manner by the State Bank, in electing to send the cases to a tribunal. On the allegations, the cases were of a serious character, and merited severe punishment. The mischief of the Act is, however, not susceptible of so simple a cure. It confers discretion of a very wide character upon stated authorities, to act in relation to subjects falling within the same class in three different modes varying greatly in severity. By furnishing no guidance whatsoever in regard to the exercise of this discretion, the Act, on the one hand, leaves the subject, falling within its provisions, at the mercy of the arbitrary will of such authority, and, on the other, prevents him from invoking his fundamental right to equality of treatment under the Constitution.

Accordingly the Supreme Court allowed the appeals and set aside the convictions of the appellants.

Justice Munir's judgement in Jibendra Kishore's case and in Waris Meah's case led to another challenge of the Frontier Crimes Regulation in *Mohammad Akbar v The Political Agent of Quetta and others* (PLD 1957 Quetta, p.12). The Political Agent had referred a case against the petitioner to a jirga under Section 11 of the Frontier Crimes Regulation. Later he had allowed the petitioner's application to be defended by an advocate before the *jirga*, but on the day on which this order was passed, the *jirga* completed the hearing of the case against the petitioner and passed a decree against him. The petitioner then challenged the reference of his case to the jirga in a writ petition in the West Pakistan High Court on the basis of Justice Munir's judgements in Jibendra Kishore and Waris Meah's case. His contention was that Section 11 of the Frontier Crimes Regulation was arbitrary, as it did not given any guidelines to the Deputy Commissioner as to when a case should be transferred to a *jirga* from the regular courts. He also submitted that Section 11 violated the guarantee of equality in Article 5 of the Constitution, because the selection of the members of the *jirga* was left to the whim and fancy of the Deputy Commissioner, therefore, they followed the Supreme Court's judgement in Waris Meah's case, declared Section 11 of the Frontier Crimes Regulation illegal and allowed the petition.

In *Perveen Zehra v The Province of West Pakistan and others* (PLD 1957 Lahore p.1071), the West Pakistan High Court set aside the elections for the District Board of Lyallpur held in 1955 on the ground that the rules under which these elections had been held were discriminatory. In 1952 all adults who had reached the age of twenty-one, were given the right to vote in elections for District Boards in the Punjab and elections had been held in many District Boards of the Punjab on the basis of joint electorates for men and women. But in 1955 the District Board of Lyallpur framed rules creating separate electorates for men and women. Many writ petitions were filed in the West Pakistan

High Court challenging the system of separate electorates on the ground that it violated the equality clause in the Constitution, and it was also contended that the rules for separate electorates discriminated against women.

The claim of the District Board was that separate electorates had been created for women in order to protect their rights. But the rules gave women three seats on the District Board and eighty-four seats to men! In allowing the petitions, Justice S.A. Rehman, the Chief Justice, observed at 1081:

> Mr. S.A. Mahmud, who appeared for the first respondent, the Government of West Pakistan, suggested that the rule making authority had merely considered the realities of the situation and instead of leaving the women to contest all seats with men for the) District Board elections, had thought it fit, in their wisdom, to provide that there should be segregation of sexes in the elections and that three seats would be secured for women as against eighty four for men. He suggested that this was a reasonable classification as there was no law requiring that the number of the size of constituencies should be equal or uniform. Of course a dead equality or uniformity in this respect must not be insisted upon but, as had been observed above, there must be some principle on which the allocation of constituencies or their formation is based, and in the present case we have been unable to discover one. The assignment of three constituencies to women and eighty-four to men, each category of constituencies covering the whole District Board area, appears to be an entirely arbitrary and capricious decision of the rule making authority...The right to vote, as argued by Mr. Mahmud, is subject to delimitation of constituencies which may be territorial or based on special interests, but qua citizenship and membership of the District Board, we have not been shown any real ground for assuming that the interests of men and women are different, justifying the impugned measure.

The most important judgement of the West Pakistan High Court under the 1956 Constitution in its efforts to build up human rights was Justice Kayani's judgement in *Khan Ghulam Mohammad Khan Loondhawar and others v The State* (PLD 1957 Lahore p. 497). The petitioners had filed writ petitions in the West Pakistan High Court against their detention under the Public Safety Act 1948 of the Frontier Province. Section 3 of the Act empowered the Provincial Government to arrest and detain persons indefinitely if the Government was satisfied that they had committed or were likely to commit a prejudicial act, and a prejudicial act was defined as an act likely to prejudice the Government's relations with foreign powers, or to endanger public safety, or the maintenance of public order, or to promote feelings of enmity or hatred between different classes of people.

The Provincial Government's power to arrest and detain persons under this Act had been delegated to District Magistrates, and a District Magistrate had passed orders for the detention of the petitioners on the eve of the Chinese Prime Minister's visit to the Frontier Province. The petitioners had challenged these orders on three grounds, all of which were accepted by the Court. The grounds of detention had been supplied to the petitioners after two weeks, although clause 5 of Article 7 of the Constitution imposed an obligation on the detention authority to communicate 'as soon as may be' the grounds of detention to the persons detained. Justice Kayani held that the grounds of detention should have been supplied promptly to the petitioners and the period of two weeks which had been taken to supply the grounds of detention to them amounted to unreasonable delay, therefore he declared the detention orders illegal. He also held that some of the grounds of detention relied upon by the District Magistrate had not been communicated to the petitioners, therefore their detention was illegal on this ground also. But one of the grounds of detention had been communicated to the petitioners, and as according to the Government, there was evidence in support of this ground of detention, it opposed the writ petitions.

In *Liversidge v Anderson*, a judgement pronounced during the Second World War, the House of Lords had, by a majority judgement, held, on a proper construction of the relevant war-time regulations, that the Home Secretary was entitled to detain a person if he was satisfied that the detention was necessary in the public interest. It was also held that the test for determining whether the Home Secretary was satisfied about the grounds for detaining a person was a subjective test, therefore, a detention order could not be questioned on the ground that it was not supported by evidence. The majority view in Liversidge's case was followed for much more than a decade by most Courts in common law countries. But in a couple of sentences, marked by his usual wit, Justice Kayani rejected the view taken in Liversidge's case and observed at p. 504:

> ...and it is pertinent to remark that the halo of subjectiveness and immunity from judicial scrutiny with which judicial authority has surrounded it since the last Great War, both here and in England, has suffered perceptibly in visual charm by reason of this constitutional safeguard. It is as though the Constitution were saying to the detaining authority: 'I appreciate the occasional urgency of a situation when you may be called upon to take away the liberty of a citizen on your own responsibility for law and order, but my experience of your past, what with your implicit trust in police reports and what with your doubtful morals in the political field, constrains me to rely on your discretion for no more than three months.'

Justice Kayani therefore examined the evidence on record including the evidence recorded before him and held that it was not sufficient to justify the detention order. The Court therefore allowed the writ petitions and ordered to release of the detenues.

As the Constitution also conferred Fundamental Rights on citizens about the right to own property and to carry on trade, industry, etc., the validity of the Control of Shipping Act was challenged directly in the Supreme Court in *East and West Steamship Company v Pakistan, the Shipping Authority and the District Magistrate, Karachi* (PLD 1958 SC p. 41) on the ground that this Act violated the Fundamental Rights guaranteed in Articles 5, 11 (b) and 12 (a) of the Constitution. The petitioner owned ships registered in Pakistan, and on reaching the ports for which it had a licence, the ships had sailed to foreign ports, therefore, the District Magistrate Karachi had filed prosecutions against the petitioner under Section 8 of the Control of Shipping Act. No ship could sail from any port, whether in Pakistan or outside Pakistan, without a licence granted under Section 3 of this Act by the Shipping Authority appointed under this Act. The Shipping Authority could, under Section 3 of the Act, grant a licence for a single voyage or a general licence, and the Shipping Authority could attach limitations and conditions to the licence granted by it 'with respect to the trades in which the ship may engage and the voyages it may undertake, and such limitations and conditions may be imposed so as to apply to a ship whenever it may be'. The Shipping Authority could also 'in its discretion at any time, revoke, cancel or revoke a licence.' Section 5 of the Act empowered the Shipping Authority to give directions in writing with regard to the routes which the ship had to follow, the classes of passengers and of cargo which it could carry, and even the order of priority in which passengers and cargo could be taken on the ship or put off the ship at any port. The Central Government could, under Section 6 of the Act, fix the rate at which the ship could be hired, and the rates which it could charge for the carriage of passengers and of cargo.

The Act also contained a very elaborate statement of its objects and was renewed from time to time and as a freight war had started between carriers by 1954, the statement of objects in the 1954 Act was that it was necessary to renew the Act, as a freight war had started between ships plying between Pakistani ports. The Act conferred very wide discretion on the Shipping Authority to grant and cancel licences, but as it was not alleged that the Shipping Authority had discriminated against the petitioner, the Court rejected the contention that the Act violated the equality clause (Article 5) on the basis of its judgement in Jibendra Kishore's case. But the petitioner also relied on Articles 11 (b) and 12 (a).

Article 11 read:

> Subject to any reasonable restrictions imposed by law in the public interest, every citizen shall have the right...
>
> (b) to acquire, hold and dispose of property.

Article 12 read:

> Every citizen, possessing such qualifications, if any, as may be prescribed by law in relation to his profession or occupation, shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business subject to...
>
> (a) the regulation of any trade or profession by a licensing system, or...

Article 12 protected the right 'to conduct any lawful trade or business' but as clause (a) of the proviso permits the regulation of a trade or profession, it was contended that the Control of Shipping Act was *ultra vires* of Article 12 (a) because shipping was a business, not a trade. Justice Munir rejected this contention and held on the basis of the case law of the courts of the USA that the word trade was wide enough to include a business and that the regulation of a trade was generally effected by a licensing system. The petitioner then submitted that the power to regulate a trade did not include the power to stifle or prohibit that trade, and according to the petitoner's learned counsel, the powers of the Shipping Authority were so wide that they amounted to a power to stifle and prohibit the trade of shipping. This submission overlooked the difficulties faced by the country, because its two parts were separated from each other by more than one thousand miles of Indian territory. Justice Munir observed at p. 55:

> From these provisions it seems to b e perfectly clear that the Act proceeds on a definite policy, namely the policy of placing the ships, for the period of the emergency, substantially at the disposal of the Government to enable it to direct what classes of cargo or passengers may be carried, to claim priority for Government cargo and passengers, to fix rates and freights, and to know the exact position of a Pakistan ship at a particular time so that if any urgency arises it may be called back for home service. This policy could successfully be carried out only if full powers which could not be controlled by rules, were given to the Shipping Authority, and the licensing system contemplated by the Act is merely a means for the Shipping Authority to requisition shipping space to satisfy urgent and exceptional trade needs of the country. Financial injustice to the owners is avoided by the provision for a Board to advise the Central Government in respect of rates.

These observations are based on the assumption that the right of carry on any trade or business must be subject to the restrictions for protecting the integrity of the country and welfare of the people. Justice Munir also held that Article 11 could not help the petitioner's case because the controls it challenged were the controls placed on its right to carry on 'the business of carriage of merchandize by sea' and therefore its case fell under Article 12.

Justice Cornelius wrote a dissenting judgement. He examined the powers of the Shipping Authority and observed that (p. 67)

> complete control is vested in the Shipping Authority. Clearly, the Act by express words purports to interfere with the conduct of the trade of shipping. It purports to curtail what the main part of Article 12 expressly confers as a fundamental right upon the citizens of Pakistan.

But Justice Cornelius's conclusion that the Control of Shipping Act destroyed the right conferred by Article 12 was based on his view of the nature of the right to carry on a trade, and the learned Judge's view of the nature of this right was based on a judgement of the House of Lords in the Moghul Steamship Company case (1892 AC 25) and of the Privy Council in the Adelaide Steamship Company case (1913 AC 781). The observation in the Moghul Steamship Company case was 'that a trader in all matters not contrary to law may regulate his own mode of carrying on his trade according to his own discretion and choice.' This judgement does not support the view that the trade of shipping cannot be controlled by law in order to protect the public interest and to promote social justice. However, the observations of Lord Parker in the Adelaide Steamship Company case, quoted by Justice Cornelius, read:

> At common law every member of community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interest, and in as much as every right connotes an obligation, no one can lawfully interfere with another in the free exercise of his trade or business, unless there exists some just cause of excuse for such interference...Speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom.

Justice Cornelius agreed with these observations. His concept of the rights of traders to carry on their trade was thus based on the common law, as it stood in the nineteenth century.

The nineteenth century was the heyday of laissez-faire capitalism and as England had become one of the biggest industrial powers of the world, *laissez-faire* capitalism had an appeal for Indians. The theory of *laissez-faire* capitalism was that the pursuit of self-interest, unfettered by any considerations of the public interest or of social and economic justice, would in the long run lead to economic development. *Laissez-faire* capitalism was a stimulus to industrial development, but it was also responsible for heavy cyclical unemployment and for many social and economic evils. Therefore, the concept of property rights, including the rights of traders, began to change with the First World War, and after the Second World War, the concept of property rights in the Adelaide Steamship Company case had become obsolete not only in England but also in this subcontinent. Justice Cornelius's interpretation of a licensing system for traders in Article 12 of the Constitution was thus based on the philosophy of an age which had

ended with the First World War, and I have no doubt that our Constituent Assembly did not intend to enshrine in the Constitution of 1956 the concept of property rights of the nineteenth Century. Justice Cornelius summed up his conclusions and observed:

> ...With respect to individual ships, the State has authority to regulate what passengers shall be carried and in what classes, what cargo shall be carried, and which shipper's cargo, in what priority passengers and cargo shall be taken on or set down, and finally the rates of the fare and freight 'applicable to any ship' are within the authority of the State to settle.

He then said that these provisions reduced the owner of a ship 'to a position of mere servitude'. But these provisions were necessary for ensuring the movement of essential cargo and passengers between the two wings of the country. Fortunately as the other judges of the Court have agreed with Justice Munir, his judgement became the judgement of the Court, and it will become very useful when we can afford to build a welfare State.

Rights under the Common Law

Constitutional guarantees of Human Rights are not the only means of protecting Human Rights. The principles of the common law also protect Human Rights. One of these principles is the Latin maxim *audi alteram partem*, which means no one shall be condemned unheard. This principle has become a part of our jurisprudence. It was first approved by the Supreme Court in *Chief Commissioner, Karachi v Ms. Katrak* (PLD 1959 SC 45). The respondent owned a block of flats in Karachi which had been requisitioned under Sindh (Requisition of Land Act, 1947) by the Rent Controller appointed under this Act. The respondent had challenged the Rent Controller's order in an appeal under Section 10 (2) of the Sindh Requisition of Land Act which read 'The Provincial Government shall then call for the report of the case from the Controller and after perusing such record and making such further enquiry as it thinks fit, may reverse, modify or conform the order made by the Controller'. As the Chief Commissioner dismissed the appeal without hearing the appellant or her counsel, she filed a Writ Petition in the High Court at Karachi. The writ was allowed. The High Court held that the Chief Commissioner's order dismissing the respondent's appeal was illegal as he had not heard her or her advocate. The Chief Commissioner filed an appeal in the Supreme Court which was dismissed. In dismissing it, Justice Munir approved of English judgements and observed at p. 50:

> The rule *audi alteram partem* is not confined to proceedings before Courts but extends to all proceedings, but whomsoever held, which may affect the person or property or other right of the parties concerned in the dispute. As a just decision in such controversies is possible only if the parties are given the opportunity of being heard, there can be as regards the right of hearing, no difference between

> proceedings which are strictly judicial and those which are in the nature of judicial proceeding though administrative in form.

There was a cleavage of opinion between the Judges as to whether the rule *audi alteram partem* was applicable to administrative proceedings. The controversy was set at rest by the Supreme Court's judgement in *Saiyyad Abul A'la Maudoodi, Misbahul Islam Faruqi and Umer Farooq v the Government of West Pakistan etc.,* (PLD 1964 SC 673). The Jamaat-i-Islami had been declared an unlawful association by the Governments of East and West Pakistan under Section 16 of the Criminal Law Amendment Act, 1908. Section 16 reads:

> If the Provincial Government is of opinion that any association interferes or has for its objects interference, with the administration of law, or with the maintenance of law and order, or that it constitutes a danger to the public peace, the Provincial Government may, by notification in the official Gazette, declare such association to be unlawful.

Both the Provincial Governments had also taken further action against Jamaat-i-Islami. But one of the Jamaat's grievances was that the order declaring it an unlawful association had been passed without hearing it. Only Justice Hamoodur Rehman rejected this contention. The other Judges of the Court agreed with Justice S.A. Rehman who stated at p. 736:

This Court has held in Chief Commissioner, Karachi v Mrs Dina Sohrab Katrak, *Messrs Faridsons Ltd., Karachi v Government of Pakistan*, and *Province of East Pakistan v Nur Ahmed*, that the principle of natural justice requiring a hearing is to be granted to a person before being condemned applied not only to judicial or quasi-judicial proceedings but also to administrative proceedings provided that the relevant statute does not exclude its application and requires the administrative authority concerned to base its decision on an objective determination of facts.

After this judgement, the law is very clear, and the rule *audi alteram partem* was described by Justice Hamoodur Rehman in one of his judgements in Supreme Court as the golden thread which runs through the entire web of our jurisprudence.

However, Judges must practice the principles which they proclaim in judgements and Judges who condemn any person unheard undermine respect for the Courts. This leads me to the Supreme Court's judgement in *Malik Firoz Khan Noon v the State*. The facts of this case were that Mr Gurmani, a political leader who had been Governor of West Pakistan, had filed a complaint for criminal defamation against the editor of *the Karachi Times* and others. The *Karachi Times* had published the facsimile of a letter alleged have been written by Mr. Gurmani as Prime Minister of Bahawalpur state to the Indian Government in 1947. According to Mr. Gurmani, the letter was a forgery and was very

defamatory. Mr. Gurmani's complaint was transferred for hearing to the West Pakistan High Court and Mr. Justice Shabbir Ahmed was appointed to hear the complaint. Justice Shabbir Ahmed held that the facsimile letter published by the *Karachi Times* was false and the editor and the other accused were convicted to sentences of imprisonment and fines. Now one of the witnesses examined by Mr. Gurmani had said that the Prime Minister Malik Firoz Khan Noon had asked him to let the press have access to the letter published by the *Karachi Times*. In view of this evidence, Mr. Gurmani had filed an application to examine the Prime Minister as a witness, but Justice Shabbir Ahmed dismissed this application. Yet he had in his judgement passed very strong strictures against the Prime Minister, therefore, the Prime Minister filed a petition in the Supreme Court for the expungement of the remarks made against him by Justice Shabbir Ahmed in paras 81 to 88 of his judgement. These paragraphs have naturally not been reproduced in the judgement of the Supreme Court because they were extremely defamatory.

It is sufficient to state that Justice Munir observed in his judgement that paragraph 88 of Justice Shabbir Ahmed's judgement amounted to a conviction of the Prime Minister without his having been heard in his defence. Justice Shabbir Ahmed had even advised Mr. Gurmani in his judgement to file a complaint against the Prime Minister for defamation. Mr Gurmani did not follow this advice, because his reputation had been vindicated, whilst the Prime Minister's reputation had been damaged by Justice Shabbir Ahmed's observations. It was also pointed out that Justice Shabbir Ahmed had, after pronouncing his judgement, supplied copies of the judgement to newspapers and the some of these newspapers had published the observations against the Prime Minister. The Judge had done his utmost to do the maximum possible damage to the Prime Minister's reputation without hearing him, and the learned Judges of the Supreme Court were unanimous in ordering the expungement of paragraphs 81 to 88 of Justice Shabbir Ahmed's judgement.

2

THE AYUB KHAN ERA

I have referred to the Supreme Court's judgement not only because respect for the Courts is undermined by Judges who violate the rules of natural justice, but for another reason also. After deploring the fact that the contents of the expunged paragraphs were 'pure politics' Justice Munir observed at p. 362: '...when politics enter the portal of the Palace of Justice, democracy, its cherished inmate, walks out by the back-door.' These words were prophetic. About three months later, President Mirza announced on the night of October 1958 that he had put the whole country under Martial Law, that he had abrogated the Constitution, dismissed the Federal and Provincial Cabinets, dissolved the Federal and Provincial Assemblies and abolished all political parties. As the plan to declare this type of Martial Law had been worked out by the President with General Ayub, the Commander-in-Chief of the army, the President appointed General Ayub as the Chief Martial Law Administrator. General Ayub issued a proclamation on the same night that he would, as the Chief Martial Law Administrator, promulgate Martial Law Regulations and Orders and set up Courts for trial of persons who violated Martial Law Regulations and Orders.

On 10 October 1958 the President promulgated the Laws (Continuance in Force) Order, 1958. It came into force at once and was deemed to taken effect on 7 October 1958. This Order stated that notwithstanding the abrogation of the Constitution, Pakistan 'shall be governed as nearly as may be in accordance with the late Constitution', and that the superior Courts (namely the Supreme Court and High Courts) would have the power to issue 'the writs of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari*'. The Order further stated that 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 of jurisdiction under the authority of either.' Clause 3 of the Order is very important. It read

> No Court or person shall call or permit to be called in question...
>
> (i) the Proclamation: (ii) any Order made in pursuance of the Proclamation or any Martial Law Order or Martial Law Regulation; (iii) any finding, judgement or order of a special Military Court or a summary Military Court.

Many years after his retirement, Justice Munir had said in an interview that he had been asked by the President to come to Karachi on the nineth of October and had been shown a draft of a document to effect the transition from Constitutional Government to the Martial Law Government, and that he had suggested some corrections and

additions to the document in order to preserve the jurisdiction of the Courts, which had been accepted. The Laws (Continuance of Force) Order was therefore the document prepared by the Law Secretary with the changes and additions made in it by the Chief Justice.

Both President Mirza and General Ayub wanted to abolish the 1956 Constitution. They had only one other thing in common—ambition. So as soon as General Ayub was satisfied that the country had accepted Martial Law, he carried out a palace *coup* on 27 October. He forced President Mirza to resign and leave the country. He appointed himself the President, banned political activities and set up military Courts. He made Martial Law a reality. However, we were governed by the jurisprudence of the common law, and under the common law, the type of Martial Law imposed by a general could have been imposed only on territory which he had conquered. What led General Ayub to treat his fellow countrymen as enemies who had been conquered by the Pakistan Army? Ayub has given his explanation in his autobiography called Friends not Masters. According to General Ayub, President Ghulam Mohammad had asked him to take over the control of the country, but he had refused. General Ayub Khan wrote at p. 54:

> Chaudhri Mohammad Ali managed to produce a Constitution which was promulgated on 23rd March, 1956. It was a document of despair. The Prime Minister was so anxious to go down in history as the author of a Constitution that he was prepared to accommodate all points of view. What the country got was not a Constitution but a hotch-potch of alien concepts which had already brought enough confusion and chaos to the country. The Constitution, by distributing power between the President, the Prime Minister and his Cabinet, and the provinces, destroyed the focal point of power and left no one in a position of control.

General Ayub then described the political instability in the country for which he blamed ex-President Mirza as well as all politicians. Finally after pointing out that elections were to be held in 1957 and then in 1958, he wrote at p. 56:

> ...The President had thoroughly exploited the weaknesses 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.
>
> To the politicians, particularly those who had been debarred from political life, the prospect of general elections was enough temptation to start a countrywide campaign, ostensibly for political support but, in fact, to intimidate their opponents. The leading personality was Khan Abdul Qayyum Khan who was going round the country spitting fire and preaching civil war. He went about

> saying openly that if his party did not win the elections, rivers of blood would flow. He found eloquent associates in my own brother Sardar Bahadur Khan and Raja Ghazanfar Ali Khan.
>
> Khan Abdul Qayyum Khan built up the Muslim League National Guards, about 60,000 strong. They paraded in the streets, wearing uniforms and steel helmets and carrying rifles. On 20th September 1958 the government banned the wearing of military uniforms and the maintenance of military or paramilitary organizations by individuals or associations. Prime Minister Malik Firoz Khan Noon announced on 23rd September that there would be little chance of free and fair elections if every political party had a private army of its own. Qayyum Khan was not be deterred. He arrived in Karachi on the same day and thousands of his supporters defied the prohibitory orders issued by the government. The Working Committee of the Muslim League adopted a Resolution on 28th September that the government would be dislodged, if need be, by extra-constitutional methods.

General Ayub then stated that elections would lead to 'large-scale disturbances all over the country, and civil authority ...would be incapable of dealing with the situation.' Whether the army liked it or not, it would get embroiled.

The facts stated by General Ayub in these passages are correct. They help to explain why there was no opposition to his Martial Law. As democracy had not taken roots in the country, opposition to Martial Law could only have come from those who were politically conscious. Since the Muslim League was considered to be the largest and best financed political party in the country, those who were politically conscious were shocked by the threats of violence and the display of violence by the leaders of the Muslim League. These methods of electioneering reminded them of the method by which fascist parties had come into power in Europe during the interwar period.

Fear of Martial Law must have played a role in silencing criticism, but there were leaders like Miss Jinnah, the sister of the founder of the country, who could have criticized Martial Law with total impunity. She did not. On the contrary, she said:

> A new era has begun under General Ayub Khan and the armed forces have undertaken to root out the administrative malaise and the anti-social practices to create a sense of confidence and stability and eventually to bring the country back to a State or normalcy. I hope and pray that God may give them wisdom and strength to achieve their objective.
> (P. 156 of Mr Altaf Gauhar's biography of General Ayub)

After the Judges of the superior Courts had decided to continue functioning as Judge-, despite the abrogation of the Constitution, the Supreme Court heard and allowed

several appeals which turned on the validity of Martial Law and the abrogation of Constitution. The judgements in these appeals are generally referred to as the *State v Dosso and others* (PLD 1958 SC 533). The respondent Dosso and another person had been tried and convicted by a jirga under the Frontier Crimes Regulation. Cases under this regulation had also been instituted against the other respondents in the appeals. All the respondents had filed separate writ petitions in the West Pakistan High Court challenging the action taken against them under the Frontier Crimes Regulation, and the writ petitions were allowed on account of earlier judgements of the High Court in which it had been held that jirga trials under the Frontier Crimes Regulation violated the Fundamental Right of Equality conferred by Article 5 of the Constitution. The government's appeals against the judgements allowing these writ petitions came up for hearing, unfortunately for the respondents, after the proclamation of Martial Law and the abrogation of the Constitution. As the High Court had allowed the writ petitions on the basis of Article 5 of the constitution, the principal submission of the Advocate-General was that the appeals had to be allowed, as the Laws (Continuance in Force) Order prohibited the Courts from allowing any writ petitions on the basis of Fundamental Rights. This submission was accepted by all the Judges. But in the appeal against the judgement allowing Dosso's writ petition, Justice Cornelius pointed out that the High Court did not have any jurisdiction to set aside Dosso's conviction by a jirga, as the jurisdiction of the High Court did not extend to the Special Areas of Balochistan, and Dosso had been tried and convicted by a jirga for an offence committed in the Special Areas of Balochistan. The Government's appeal had therefore to be allowed on this ground. None the less Justice Cornelius examined the evolution of the system of jirga trials and praised this system as an excellent method for the administration of justice in the tribal areas of the country. The view of the learned Judge was contrary to the view taken in several judgements of the West Pakistan High Court, in which eminent Judges like Justice Kayani had held that the *jirga* system was arbitrary, because the Deputy Commissioner could select the members of the *jirga* in his sole discretion, and above all because persons could be convicted by *jirgas* on the basis of secret enquiries conducted by even one member of the *jirga*. This procedure of secret enquiries was a relic of medieval despotism and had become illegal in this century, except in police states.

These judgements of the High Court had, however, ceased to be valid, as Fundamental Rights had been abrogated by Martial Law, and therefore the Frontier Crimes Regulation had become good law again. And as the Frontier Crimes Regulation was good law again, it is difficult to understand why Justice Cornelius wrote a lengthy hymn of praise of *jirga* trials in his judgement. With respect, this was a function more appropriate for a politician than for a Judge. And the 'time was out of joint.' The country was ruled by a military dictatorship, which was bound to become harsh as it encountered opposition. That is what happened as General Ayub would not give up power. But jirga trials had been used from time to time even before Martial Law to harass critics of government. Therefore, to praise this system during a military

dictatorship was to encourage the military dictator to use jirga trials for consolidating his power.

Justice Cornelius's judgement in Dosso's case was a disaster for the human rights of millions of people living in the former provinces of Balochistan and the Frontier Province. However, the judgements in Dosso's case are remembered more for the views of the Judges on Martial Law, as this was the first case in which our superior Courts had to face this problem, and as he wrote the leading judgement in the case, Justice Munir has been criticized for having validated not only the *coup* of October 1958 but all future *coups*, provided they are successful. This criticism of the Chief Justice ignores the fact that the other four Judges of the Court had agreed with him. This criticism also assumes that a *coup* can be validated only by a judgement of the Court. I do not agree with this assumption. The Judges, who heard Dosso's case, had taken an oath to uphold the 1956 constitution, and when the constitution was abrogated by Martial Law, it was their duty to decide whether they should resign or continue working, because to continue working meant the validation of the *coup*. As they continued to work, their judgements were based on the premise that they had accepted Martial Law as valid. In this background, Justice Munir observed at p. 538:

> ...It sometimes happens, however, that a Constitution and the national legal order under it is disrupted by a abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order. A revolution is generally associated with public tumult, mutiny, violence and bloodshed but from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. The change may be attended by violence or it may be perfectly peaceful.
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> It may take the form of a *coup d'état* by a political adventurer or it may be effected by persons already in public positions. Equally irrelevant in law is the motive for a revolution, in as much as a destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends. For the purposes of the doctrine here explained a change is, in law, a revolution if it annuls the Constitution and the annulment is effective. If the attempt to break the Constitution fails those who sponsor or organize it are judged by the existing Constitution as guilty of the crime of reason. But 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 be reference to the annulled Constitution but by reference to its own success. On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled

> Constitution. Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change.

These observations state the implications of a successful *coup* for the guidance of Judges who have accepted the *coup* as valid, and have no relevance to the question whether Judges should continue to function as Judges after the abrogation of the Constitution under which they had been appointed. Justice Munir has not attempted to examine the question whether Judges should accept a *coup* as valid because it has been successful. He knew that was a question which every Judge had to decide according to his conscience, and he therefore refrained from referring to it. The criticism that he had validated future *coups* is therefore misconceived.

After stating his own views about the consequences of a successful *coup*, Justice Munir quoted two passages from Kelsen's General Theory of Law and State, which supported his own analysis of the consequences of a successful *coup*. They do not add anything to Justice Munir's bleak but correct analysis of the law to be followed by Judges who had decided to work under the new legal order created by General Ayub's successful *coup*. It could not, however, have been easy for any Judge to accept the bleak consequences of the new legal dispensation created by Martial Law, and the knowledge that his judgement was supported by the views of an eminent jurist like Kelsen helped Justice Munir to swallow the bitter pill of Martial Law. None of the other Judges of the Court referred to Kelsen in their judgements. But the acceptance of the principle that a successful *coup* becomes, in Justice Munir's words 'a law-creating fact' meant acceptance of Martial Law and of the Laws (Continuance in Force) Order. It was very clear from both these documents that the new legal order had abolished the Constitution, that the Courts could not question any Martial Law Order or Martial Law Regulation, and that Courts could not issue any writ against any order of the Martial Law authorities. All the Judges stated in these judgements that they had accepted these claims of the Martial Law authorities as valid, and for example Justice Cornelius pointed out that counsel had submitted that Fundamental Rights were deemed to be alive because the Laws (Continuance in Force) Order stated that the country 'shall be governed as nearly as may be in accordance with the Constitution'. But the learned Judge dismissed this submission with the observations:

> The argument is attractive, but does not take into account the discrepancy between the direct provision in the Order, which makes the Frontier Crimes Regulation a law with effect from the 7th October 1958 (in continuance of its previous existence as law under other instruments up to the 7th October 1958), and the equally direct exclusion of the provisions of the Constitution of 1956, from the laws of Pakistan. The Order does not furnish any indication which might tend to weaken the primary and basic proposition upon which the Order itself is based, namely that the Constitution of 1956 is abrogated. To say that the Government of the country shall be carried on 'in accordance with the late

> Constitution' is not equivalent to giving new life to that Constitution, or accepting that any of its provisions retained the slightest validity, of their own force. For that Constitution, as well as for the new dispensation which replaced it, the date 7th October 1958, marks a point of no return. The abrogation of the Constitution of 1956 represents an irrevocable act of the supreme authority by which it was performed.

However, eight pages later, the learned Judge observed that a number of Fundamental Rights did

> not derive their entire validity from the fact of having been formulated in words and enacted in that Constitution. A number of these rights are essential human rights which inherently belong to every citizen of a country governed in a civilized mode, and speaking with great respect, it seems to me that the view pressed before us by the learned Attorney-General involves a danger of denial of these elementary rights, 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.

With respect, governments and public authorities are the worst enemies of rights of all types. That was why Article 4 of the Constitution had enacted that laws and actions inconsistent with Fundamental Rights had to be declared void by the superior Courts. But Justice Cornelius had explained eight pages earlier that Article 4 had been abrogated by the will of the Supreme authority as he described the Chief Martial Law Administrator. Even essential human rights had therefore ceased to be enforceable, and as they could be violated with impunity on account of Martial Law, the words quoted were vain and empty words. Presumably, however, they enabled Justice Cornelius to swallow the bitter pill of Martial Law, just as quotations from Kelsen helped Justice Munir to swallow the bitter pill of Martial Law.

However, a year after watching the conduct of the Martial Law authorities, Justice Cornelius revised his view of Martial Law. He pointed out in his judgement in the Province of *East Pakistan v Mehdi Ali Khan* (PLD 1959 SC 387 at 436) that the Martial Law authorities were 'in actual practise' following the provisions of the abrogated constitution in many matters and that it was in their interest to do so. He then referred to Article 2 (1) of the Laws (Continuance in Force) Order which stated that the country was to be governed as nearly as may be in accordance with the constitution and observe:

> If this view be correct, then it must follow that the Fundamental Rights in Part II of the late Constitution have not become entirely devoid of validity, any more than the Preamble of that Constitution, or the Directive Principles of State Policy in Part III. The Fundamental Rights have indeed lost the operation which was

> conferred upon them by the provision in Article 4 of the late Constitution, but they nevertheless remain as provisions in the late Constitution, and are valid to the extent assured by Article 2 (1) of the Order. I cannot accede to the suggestion heard during the course of the argument that there has been conscious avoidance of explicit abolition of the Fundamental Rights from motives of policy. On the contrary, I find a clear expression in the Order of the policy of allowing them validity in the extent indicated above.

According to Article 3 of the Laws (Continuance in Force) Order no court could question Martial Law Regulations or Martial Law Orders and the orders of Martial Law authorities. There were Martial Law Regulations which did not curtail Fundamental Rights and there, were Martial Law Regulations which destroyed Fundamental Rights. Therefore, on the view taken by the learned Judge, that Fundamental Rights 'are valid to the extent assured by Article 2 (1) of the Order' he could have struck down a Martial Law Regulation which destroyed Fundamental Rights in the appeals which came up for hearing before the Court. That would have involved the risk of a confrontation with the Martial Law authorities. As the learned Judge was not prepared to risk such a confrontation, his observations about the survival of Fundamental Rights did not give any relief to those whose rights had been violated by the Martial Law authorities.

The seeds of a confrontation with the Courts had been sown by the Martial Law authorities as soon as Martial Law was declared. Mr Khuhro was the Defence Minister in the Federal cabinet, which was dismissed when Martial Law was proclaimed. He believed that the army was under the control of the elected Government through its Defence Minister, as the Constitution was a democratic one. The army looked upon Mr. Khuhro's views as *lese-majeste* and it would be an under-statement to say that relations between General Ayub and Mr Khuhro as the Defence Minister were not cordial. Mr. Khuhro was arrested within thirty-six hours of the Proclamation of Martial Law for buying a car at the controlled price and making an illegal profit out of its sale in the black market. Such a sale was an offence under the Hoarding and Black Marketing Order, 1956 but the prosecution case against Mr Khuhro rested on the evidence of an approver. In these circumstances Mr Khuhro was tried by the Court of the special judge under the Hoarding and Black Marketing Order, 1956 and also for offences under Martial Law Regulation Nos. 26 and 5. The Courts of the special judge sentenced him to five years rigorous imprisonment and a heavy fine. The proceedings of the Court of special judge had to be approved by the Martial Law Administrator under Martial Law Regulation No. 10 but they were approved by a Deputy Martial Law Administrator. Mr. Khuhro therefore filed a writ petition in the High Court of West Pakistan at Karachi challenging the sentence passed against him. As the High Court dismissed his writ petition, he filed an appeal in the Supreme Court which was accepted. This was a case of very great importance and as it involved a confrontation with the Martial Law authorities, the Chief Justice wrote the judgement of the Court. But when Justice Munir was the Chief Justice, his companion Judges often wrote their separate judgements, and

Justice Cornelius always did so. But in Mr Khuhro's appeal, only Justice Munir wrote the judgement.

In his judgement (PLD 1960 SC 237) Justice Munir pointed out that the Court of the special judge could not try any offence under any Martial Law Regulation as his jurisdiction was limited to the trial of offences under the Hoarding and Black Marketing Order. Justice Munir then pointed out that under the Criminal Procedure Code, only the High Courts and the Sessions Courts could try offences punishable by fourteen years imprisonment, and as offences under Martial Law Regulation No. 26 were punishable by fourteen years imprisonment, Mr. Khuhro could only have been tried by a Sessions Court or a High Court. Despite these fatal infirmities in Mr. Khuhro's trial and conviction, the proceedings of the case before the special judge had been placed for approval under Martial Law Order No. 10. Justice Munir therefore observed that the special judge 'had produced nothing which could be confirmed by a Martial Law Administrator under Martial Law Order No. 10.' But according to the State, as Article 3 (ii) of the Laws (Continuance in Force) Order prohibited all Courts from calling in question 'any Order made in pursuance of the Proclamation (of Martial Law) or any Martial Law Order or Martial Law Regulation', the Supreme Court was not competent to set aside Mr Khuhro's conviction, as it had been approved by the Martial Law authorities under Martial Law Regulation No. 10. Justice Munir therefore explained that the Laws (Continuance in Force) Order had drawn a distinction between a Martial Law Regulation and a Martial Law Order and that,

> so far as the jurisdiction of a Court to entertain an appeal was concerned, it was kept intact and could only be taken away by a Regulation...In plain language part (ii) of Article 3 means no more than that a Court cannot declare a Martial Law Regulation or a Martial Law Order as invalid or *ultra vires*. But calling in question an order (with a small 'o'), which is an executive 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. For instance, in this very case the order of conformation is by a Deputy Martial Law Administrator and we have not been shown on behalf of the State any provision by which an Administrator could delegate his responsibilities under Order 10 to a Deputy Martial Law Administrator. Therefore the order of confirmation not being under Martial Law Order No. 10 is not immune from attack.

Accordingly the Supreme Court allowed Mr Khuhro's appeal, and the principles laid down by Justice Munir in his judgement were a breakthrough for the superior Courts, because that would enable them to exercise some control over orders passed under Martial Law Orders. This judgement was a rebuff to the army, but it was immediately complied with and Mr Khuhro was released. The Supreme Court's confrontation with the Martial Law authorities was successful, but as all the powers was with the army,

credit must be given to General Ayub for having accepted the judgement of the Supreme Court with good grace.

Law of Contempt

Justice Munir retired a few months after this judgement. He was succeeded by Justice Cornelius as Chief Justice who retired in 1968. Justice Munir's retirement marked the end of an era of our jurisprudence, an era in which the High Courts and Supreme Court had a very liberal approach and enforced human rights with great vigour until the proclamation of Martial Law. But after Justice Munir's retirement, the Supreme Court took a conservative turn. This is evident from the judgement in *Sir Edward Snelson v the Judges of the High Court of West Pakistan, Lahore* (PLD 1961 SC 237). The appellant in this case, Sir Edward Snelson, was the Law Secretary of the Federal Government. He had been convicted for contempt by the Judges of West Pakistan High Court at Lahore for his criticism of judgements pronounced by the Judges of the West Pakistan High Court. Our law of contempt is based on the English Law of contempt, and as the appellant's contention was that the Courts of Pakistan should follow the contemporary English Law on the subject of contempt, and not the law of earlier centuries, it is necessary to outline briefly the changes in the English Law in the last two centuries. The English law of contempt dates back to the Middle ages when the English kings were absolute rulers and the courts were the king's Courts. The attempt of English kings to be absolute monarchs ended with the Revolution of 1688 and after 1688 the powers of English kings were gradually taken over by Parliament. But the law was a very conservative profession in England in the eighteenth century and some Judges tried to preserve the law of contempt of earlier centuries.

One of the most conservative English Judges in the eighteenth century was Justice Wilmot, and more than two hundred years before Snelson's appeal, he had to decide the question of contempt in a case called *R v Almon*. As this case was settled, he could not pronounce the judgement which he had written, and so the judgement was a mere opinion. It was published by Justice Wilmot's son after his father's death. Justice Wilmot wrote in his opinion that the object of the law of contempt 'was to keep a blaze of glory around the Courts', and that 'the arraignment of the justice of the Judges is arraigning the King's justice; it is an impeachment of his wisdom and goodness' reflects the values of an undemocratic society, and was more appropriate for the seventeenth century than the eighteenth century, because some Judges in England had accepted the doctrine of the divine right of Kings to rule England in the seventeenth century. Justice Wilmot's opinion was followed by English Judges in the wave of reaction that swept England after the French Revolution of 1789, and as criticism of Judges was treated as arraigning the King's justice, and an impeachment of the King's wisdom, contemners were not allowed to plead truth as a defence, nor were they allowed to defend themselves unless they submitted an apology for the alleged contempt.

Laws must change with the needs and aspirations of society, and the meaning of contempt and the procedure to be followed in contempt cases have been changed by English Judges in the last hundred years in order to bring the law into line with democratic values. Pronouncing the judgement of the *Privy Council in Ambard v The Attorney General of Trinidad and Tobago* (AIR 1936 FC 141), Lord Atkins observed:

> No wrong is committed by any member of the public who exercises the ordinary right of criticizing, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

The statement that 'the wrong-headed are permitted to err...' means that erroneous criticism of Judges and of judgements is not contempt unless it is malicious, and the law laid down by Lord Atkins in this case is inconsistent with Justice Wilmot's opinion, which English Judges had abandoned long before Ambard's case, and even after Ambard's case, English Judges have continued the process of liberalizing the law of contempt which had begun long before Ambard's case.

The fact in Sir Edward Snelson's appeal was that he was asked by the Federal Government to give a speech in February 1960 to Section Officers in Rawalpindi. The speech discussed the proclamation of Martial Law, the Laws (Continuance in Force) Order etc., but Sir Edward Snelson also criticized the judgements of the West Pakistan High Court, Lahore on service matters in the writ jurisdiction of the High Court. Sir Edward Snelson's criticism was that the judgements of the High Court had misinterpreted the law of writs and that all the appeals filed by the Government against these judgements had been allowed, except one. The question of the correct interpretation of the law of writs was a question of opinion and though the appellant's opinion was wrong, it could not furnish any grounds for a notice of contempt. But the second criticism turned on facts, which could have been verified, and the appellant's statements was incorrect. Sir Edward Snelson had been negligent in not checking the facts before he gave his speech, but the persons who heard him were bound by the Official Secrets Act 1923 not to disclose the speech to anyone. The President's Secretariat had later distributed copies of Sir Edward Snelson's speech, but only to persons who were in government service and were bound by the Official Secrets Act. Copies of the speech were also sent to provincial governments and someone in the provincial government had sent a copy of the speech to the West Pakistan High Court, Lahore. The High Court issued a contempt notice to Sir Edward Snelson, and the contempt notice, together with the speech, were published in the newspapers.

Sir Edward Snelson contested the notice, and the case was heard by a Bench consisting of Justice Shabbir Ahmed, Justice Yaqub Ali and Justice Ortcheson. Sir Edward Snelson's reply to the contempt notice was that he had given the speech at the request of the President's Secretariat to an audience bound by the Official Secrets Act on the condition that the speech 'shall not go outside government circles'. He then pointed out the while he had addressed a very small audience, the President's secretariat had sent copies of the speech to a larger number of persons, but all these persons were also bound by the Official Secrets Act. He also pointed out that publicity had been given to the speech by newspapers, and that he had nothing whatsoever to do with them. He therefore relied on the Privy Council's judgement in Ambard's case and stated that his speech did not exceed the limits 'of legitimate criticism of official acts, including judgements of Courts of justice' as applicable to progressive countries. But he did not follow the usual practise of submitting an unconditional apology with his defence. He submitted that this practise needed to be changed, as times had changed.

The contempt attributed to Sir Edward Snelson was scandalization of the Courts, and scandalization of Courts means criticism which undermines or impairs respect for the Courts, therefore, a letter sent to a Judge, marked private, does not amount to contempt, because it can only scandalize the Judge, and not the Courts. As Sir Edward Snelson had given his speech to an audience bound by the Official Secrets Act, even if his speech amounted to contempt, the Federal Government was guilty of grosser contempt, because it had subsequently circulated Sir Edward Snelson's speech to a much larger number of civil servants. However, these civil servants were also bound by the Official Secrets Act. On the premise that the speech amounted to contempt, the Judges of the High Court could have *suo moto* issued a notice of contempt to the Federal Government. But they did not. It was martial law, and confrontations with the Government had to be avoided. But as the newspapers had given far greater publicity to the speech than Sir Edward Snelson or the Federal Government, the High Court was required to issue *suo moto* notices of contempt to the newspapers which had published the speech. That was the settled law and the best illustration of this rule of practise is the Supreme Court's judgement in Mr Shabbir Ahmed's own case (PLD 1963 SC 610).

After he retired from the High Court, Justice Shabbir Ahmed practiced as an advocate. Although he was an expert on the law of contempt, he commented on a case which had been filed in the Supreme Court. Comments on cases pending in the Courts are a well known species of contempt, yet Mr. Shabbir Ahmed gave an interview about this case to a newspaper, which published the interview. Mr. Shabbir Ahmed had been a very senior Judge of the High Court. He had decided Sir Edward Snelson's case and other contempt cases as a Judge. Therefore, the editor of the newspaper was entitled to rely on his knowledge of the law and to assume that an interview given by such an experienced Judge would not amount to contempt. Yet contempt notices were issued not only to Mr. Shabbir Ahmed, but also to the editor and to the publisher of the

newspaper. They were all convicted for contempt by the Supreme Court, and fined. As the law is so clear, the omission of the High Court to issue contempt notices to the newspapers was inexplicable. It was also obvious that a mischief-maker in the High Court had leaked the contempt notice together with Sir Edward Snelson's speech to newspapers, and the omission of the High Court to issue contempt notices to the newspapers enabled this mischief-maker to get away with his contempt. Although the High Court had not issued a notice of contempt to the Federal Government, it allowed the Federal Government's request to be impleaded as a defendant with Sir Edward Snelson. It submitted that Sir Edward Snelson's speech had been made at its request for the benefit of persons bound by the Official Secrets Act and that it had distributed copies of the speech, but only to persons bound by the Official Secrets Act. According to the last para of the defence, the public was not aware of the speech 'till it appeared as an enclosure to the notice for contempt issued to Sir Edward Snelson'. The plea raised in this para was essential to the Federal Government's defence that it had taken all possible steps to prevent publicity being given to the speech.

The Judges of the High Court were not satisfied with the explanation of Sir Edward Snelson, and they held him responsible even for the circulation of his speech to persons not addressed by him, as he had allowed the Federal Government to do so. It would also appear that the Judges were shocked by his contention that the rule about the submission of an unconditional apology before the defence of contemner should be considered was an archaic rule, which needed to be abolished as times had changed. They also passed strictures against the Attorney-General and the Federal Government and convicted Sir Edward Snelson for contempt. He was fined Rs 2000 which was the maximum fine permissible under the Contempt of Courts Act, 1926. Justices Shabbir Ahmed and Yaqub Ali had referred to the plea taken by the Federal Government in its defence about the Official Secrets Act and the arguments advanced on this aspect of the case. They thought that the Federal Government had threatened them with prosecution under the Official Secrets Act, and this extraordinary reaction of the Judges led them to use very strong language against both the defendants. The Federal Government and Sir Edward Snelson, therefore, both filed appeals in the Supreme Court against the judgement of the High Court in which they sought expungement of the observations against them in the judgements of Justices Shabbir Ahmed and Yaqub Ali. Sir Edward Snelson also challenged his conviction for contempt.

The Supreme Court dismissed the appeals, and all the Judges expressed their regret at some of the observations against the appellants in the judgements. But they did not expunge them on the ground that they were not irrelevant to the issues raised in the High Court. The Chief Justice, Justice Cornelius, also examined very carefully the fears expressed by Justice Shabbir Ahmed and Justice Yaqub Ali that the Federal Government had threatened to prosecute them under the Official Secrets Act, and he pointed out that there was no justification whatsoever for these fears. This raised a further question. As the fears expressed by the two Judges of the High Court reflected

an excessive and unjustified reaction against the appellants for a legitimate defence pleaded by one of them, was it possible to rule out the possibility that the trial had not been fair? The Chief Justice did not go into this question.

Sir Edward Snelson had, in the Supreme Court, reaffirmed the stand taken by him in the High Court that he was entitled to defend a contempt notice without submitting an unconditional apology. This submission had outraged the Judges of the High Court. It also outraged the Judges of the Supreme Court, and the fate of the appeal might have been different if Sir Edward Snelson had recanted and apologized for a contempt which he denied. However, his main submission was that even if his criticism of judgement was erroneous, it was no longer treated as contempt in English Law, especially after the judgement of the Privy Council in Ambard's case. The appellant's first criticism of the High Court was that it had misread the law of writs. This criticism was erroneous, but it was protected by the observation of Lord Atkins in Ambard's case: 'the wrongheaded are permitted to err'. And Judges have often over-ruled principles of law laid down in earlier judgements only because they had the benefit of the criticism that those earlier judgements were based on a misinterpretation of the law. The only other criticism of the appellant was that the Supreme Court had allowed all the appeals filed by the Government, except one appeal. As Judges should not be hypersensitive to criticism, the question was not whether the Supreme Court had dismissed one appeal or twenty appeals. As the wrongheaded are permitted to err, the question was whether the criticism was broadly true. The appellant's criticism would not, therefore, be contempt if a clear majority of the Government's appeals had been allowed, but it would be contempt if the Government had lost the majority of its appeals, as this would have meant that Sir Edward Snelson had been reckless in his criticism, and reckless criticism of judgements can be evidence of malice and therefore, amount to contempt. However, as none of the learned Judges had said or implied that Government had been unsuccessful in a large number of its appeals, the only reasonable inference from their judgements is that the number of Government's appeals, which had been dismissed by the Supreme Court, was small. Sir Edward Snelson's defence was, therefore, supported by the judgement of Lord Atkins in Ambard's case. The learned Judges had considered this judgement, and they did not dissent from it. How then did they dismiss the appeals?

Some of the learned Judges discussed the law of damages for defamation, and they appear to have been of the view that Sir Edward Snelson's criticism of the judgements of the High Court amounted to libel of the Judges and, therefore to contempt. But even on the assumption that the criticism amounted to libel, that would not mean that it amounted to contempt. That is clear from the Privy Council's judgement in Ambard's case. But the view that a libellous statement about Judges amounted to contempt was supported by the opinion of Justice Wilmot. It is also clear from the judgements of the learned Judges that they subscribed to the views of Justice Wilmot, and in view of his opinion, Sir Edward Snelson had committed contempt. Justice Wilmot's views cannot

be reconciled with the view taken by Lord Atkins in Ambard's case, and it was unfortunate for our jurisprudence that our highest Court preferred the views of a Judge of the eighteenth century to the views of one of the great common law Judges of the second quarter of this century, Lord Atkins.

Even more unfortunate was the unanimous reaffirmation by the Judges of the principle that a contemner must submit an unconditional apology before submitting his defence. An unconditional apology implies that the contemner is guilty of the alleged contempt. But persons guilty of the most heinous offences are entitled to defend themselves without pleading guilty, therefore, the rule that a contemner must submit an apology before he can be heard in his defence is unfair and oppressive. This rule was evolved by the common law Courts in a harsh and autocratic age, and as times have changed, this archaic rule has been abandoned in England, because the enforcement of an unfair and oppressive rule undermines respect for the Courts. As the object of the law of contempt is to preserve and enhance respect for the Courts, it is essential for Judges to change rules laid down by them, which have become repugnant to the conscience of modern society. That was what Sir Edward Snelson was trying to do, but his attempt to bring the 'judge-made' law of contempt into line with the values of a modern society was misunderstood and the dismissal of his appeal was the price he paid for his views. But judgements cannot turn the tide back. The winds of change began blowing from the sixties through the very conservative societies of South Asia, and Sir Edward Snelson lived to see his position vindicated. In 1976, in Inayat Khan's case the Supreme Court allowed the contemners to defend themselves although, like Sir Edward Snelson, they had refused to apologize.

Locking Horns with the Press

political battles are fought in the Courts, but newspapers are discouraged from performing their duty of informing the public about matters debated in the Courts on account of the rule that the alleged contemners must submit an apology to the Court before they can be heard in their defence. Self-respecting journalists cannot understand why they have to submit an apology for an alleged contempt before submitting their defence, irrespective of whether they are guilty for contempt or not. Martial Law cannot coexist with a free press, therefore, within a year of the promulgation of Martial Law, General Ayub had promulgated the Press and Publications Ordinance in order to stifle criticism of his policies by newspapers. Although his Ordinance, had by and large intimidated the press, the newspapers owned by Progressive Papers Limited which included the daily, *The Pakistan Times*, continued to show some independence. This was too much for the government as it amounted to questioning the wisdom of General Ayub's policies. The Government, therefore, took action against the Progressive Papers Limited, and the steps thus taken make very depressing reading. They also throw a lurid light on the human rights situation. The facts are set out in the Supreme Court's

judgement in *Mian Iftikharuddin* and *Arif Iftikhar v the Government of Pakistan* (PLD 1961 SC 585).

General Ayub amended the Security of Pakistan Act, 1952 by an Ordinance in 1959 empowering the Federal Government to remove any person from the control or management of an undertaking which was publishing news likely to endanger the defence, external affairs or security of Pakistan, and to place any person appointed by it to take over such an undertaking. On 17 April 1959 the Federal Government dissolved the Board of Directors of Progressive Papers Limited and appointed its nominee to manage the company. A couple of weeks later the Government passed an order that the shares of the appellants in this company should be sold by auction. They were sold to an industrialist, loyal to General Ayub, for Rs. 6,440,000. Although this sale was confirmed by the Government, the industrialist paid only about 60 percent of the sale price. The balance was not realized from him, and no payment was made to the appellants, therefore, they filed a writ petition in the High Court for the enforcement of the Government's statutory duty to pay them Rs. 6,440,000 for the sale of their shares to the industrialist. The Government opposed the petition on the ground that the Courts jurisdiction was barred under Martial Law Order No. 72. It is sufficient to state that according to this Regulation, anything done or purported to have been done under the Security of Pakistan Act after 10 October 1958 'shall be deemed to be or to have been done under this Regulation, as if the provisions of the said Act as amended after (10 October 1958) were for the time being incorporated in this Regulation and shall have and shall be deemed always to have it an effect accordingly.' The Regulation also contained an Article ousting the jurisdiction of the Courts.

The High Court rejected the Government's contention on the ground that the appellants were only seeking the enforcement of an order under the Security of Pakistan Act. The Government challenged this judgement in an appeal in the Supreme Court, but as the High Court's judgement was supported by Justice Munir's judgement in Khuhro's case, the Government again amended the Pakistan Security Act on 24 April 1961. This amendment empowered the Government to confirm or cancel the sale of an undertaking under the Security of Pakistan Act at the instance of the former owner of the undertaking or of the vendee. The application of the appellants for the confirmation of the sale of their shares to the industrialist was confirmed on 24 April 1961. But despite this order, a week later the industrialist applied for the cancellation of the sale, and his application was allowed on 8 May 1961. The appellants filed another petition in the High Court against the Government's order of 8 May 1961. Their petition was dismissed, but they filed an appeal in the Supreme Court against the High Court's judgement, and this appeal and the Government's appeal against the earlier judgement of the High Court were disposed of by the Supreme Court's judgement in Mian Iftikharuddin and Arif Iftikhar's case. The appellants challenged the validity of the second amendment made in the Security of Pakistan Act on the 24 April 1961, as it had been made to nullify the earlier judgement of the High Court directing the Government

to pay the appellants the price of their share. The Supreme Court rejected this submission on the ground that Security of Pakistan Act, including its amendment, were deemed to be a part of Martial Law Order No. 72 and a Martial Law Order could not be challenged in the Courts. The appellants had, however, also pleaded malafides, but, according to Justice Kaikaus, who wrote the judgement of the Court, its plea 'must fail on the simple ground that there are no specific allegations of *malafides*'. With respect, the mere narration of the Government's orders and the amendment made in the Security of Pakistan Act in order to deprive the appellants of their rights furnished sufficient particulars of the Government's *malafides*. However, as power corrupts, *malafide* orders are inevitable under a dictatorship whether the dictatorship is called Martial Law or given some other name.

None the less, it would be extremely difficult to find a case during our Martial Laws of 1958 and 1969 in which the Martial Law authorities had acted in a manner as shocking as in Iftikharuddin's appeal. Since some of the Judges hearing the appeals had criticized Justice Munir's judgement in Dosso's case on the ground that Justice Munir had erred in holding that Fundamental Rights had been abrogated by the Laws (Continuance in Force) Order, 1958, the hearing of the appeals had roused the hope that the Supreme Court would overrule Justice Munir's view and enforce Fundamental Rights, because the action against the appellants was a flagrant violation of the Fundamental Right of the freedom of expression and of the Fundamental Right to own property. However, Justice Kaikaus merely observed:

> We have considered whether we should determine in the present case the correctness of the proposition that Fundamental Rights do not exist now in Pakistan and we are of the opinion that we should reserve this consideration for a more appropriate occasion because the determination of this question will not affect the decision of the present case.

As the Judges were not prepared to risk a confrontation with the Martial Law authorities, this rhetoric about Fundamental Rights only roused hopes which were never fulfilled.

1962 Constitution

Martial Law was lifted shortly after this judgement. General Ayub promulgated his own constitution in June, 1962. It was based on the principle of one man rule, as General Ayub thought that such a constitution was in accordance with Islamic traditions. The rejection of the Constitution by the people was immediate and an agitation for its repeal began, which ended only when President Ayub announced his retirement seven years later. The Constitution did not contain any Fundamental Rights, but the Judges of the Supreme Court, who had decided Iftikharuddin's appeal, immediately took the oath to uphold the Constitution. Although the judiciary thus lent its support to the

Constitution, the agitation against it continued. Therefore President Ayub, who loathed the system of political parties, allowed their revival. But the agitation continued unabated in East Pakistan, where people were politically conscious. In October 1962, Mr. Suhrawardy, who had been the country's Prime Minister a year before Martial Law, led this agitation with great courage. In his public speeches, he denounced detention laws as 'shakles of slavery' and called upon the people, and especially students to fight for the basic rights of the people. The Government of East Pakistan was afraid to take action against Mr Suhrawardy. It therefore passed a detention order under the East Pakistan Safety Ordinance against Mr. Tofazzal Hossain for publishing Mr. Suhrawardy's speech in a local newspaper run by him on the ground that Mr. Suhrawardy's speech incited hatred and contempt against the Government. Mr. Tofazzal Hossain's writ petition challenging his detention was allowed by the East Pakistan High Court. The Government went in appeal to the Supreme Court, but the appeal was dismissed. Justice Cornelius held in the case reported as the *Government of East Pakistan v Tofazzal Hossain* (PLD 1965 SC 250) that although the language used by Mr Suhrawardy was very strong, it did not amount to inciting hatred or contempt against the Government, because it was the right of citizens to express their grievances against the Government.

As the 1962 Constitution did not contain Fundamental Rights, the Frontier Crimes Regulation continued to be good law, and in *Muhammad Akram and others v the State* (PLD 1962 SC 373) the Supreme Court pronounced a judgement which had an adverse effect on the rights of people who could be tried under this Regulation. The facts of this appeal are not relevant, and it is sufficient to state that the appellants had filed a writ petition in the West Pakistan High Court against an order passed against them under the Frontier Crimes Regulation. As this writ petition was dismissed, they went in appeal to the Supreme Court, the appeal was also dismissed, but in dismissing it, the Chief Justice Justice Cornelius, went out of his way to criticize the High Court for dismissing the writ petition on wrong grounds. He stated that the writ jurisdiction of the High Court did not extend to orders passed under the Frontier Crimes Regulation, because such orders were in the nature of executive or administrative orders. Then he defined the scope of a writ petition against orders passed under the Frontier Crimes Regulation in the following words:

> In these circumstances, it should be obvious that for the Superior Courts to interfere, whether by approval or otherwise, with the operation of the system in any case, once a case is competently drawn into the system, would be a violation of the legislative intention. All action, in the writ jurisdiction, should be confined to action *in limine*, that is to say, in assertion of the jurisdiction of the ordinary Courts, and in vindication of the law, to scrutinize the process by which the case, if there be one, has been, or is sought to be, diverted into the ambit of the *jirga* system. If the legal requisites are satisfied, that is the last contact which the superior Courts can retain with the case, viz., by making such a declaration. All

> other processes taken in the disposal of the case, within the *jirga* system, are outside the purview of the Courts, in any of their jurisdiction.

According to the Chief Justice, interference by the superior Courts in proceedings under the Frontier Crimes Regulation beyond the point fixed by him 'would be a violation of the legislative intention'. The Chief Justice meant by 'the legislative intention' the intention of the legislature which had enacted the Frontier Crimes Regulation in 1901. But as we had our own Constitution, 'the legislative intention' of the legislature in enacting the Frontier Crimes Regulation was subordinate to the legislative intention of the framers of the Constitution in enacting Article 98.

It is obvious from the Chief Justice's admiration of the *jirga* system that he did not want any change in it, and he knew that the exercise of the writ jurisdiction of the superior Courts would ultimately lead to the end of that system, and he wanted to preserve it. But as the jurisdiction of the High Court extended to the areas where the Frontier Crimes Regulation was in force, orders without lawful authority had to be declared illegal under Article 98 of the Constitution, therefore Justice Cornelius's view that exercise of the writ jurisdiction under Article 98 had to be 'confined to actions *in limine*' involved reading into Article 98 a restriction not contained in it. And Judges can only interpret the Constitution, not alter it. But the next year (1964) President Ayub was compelled by the pressure of public opinion to restore Fundamental Rights. The Constitution was amended, and a chapter on Fundamental Rights incorporated into the Constitution was identical to that in the 1956 Constitution. The Frontier Crimes Regulation thus became void again and remained void until Fundamental Rights were suspended in September 1965 on account of the war with India.

A few days before the restoration of Fundamental Rights, the Governments of East and West Pakistan issued notifications under Section 16 of the Criminal Law Amendment Act 1908, declaring the Jamaat-i-Islami an unlawful association. The Jamaat-i-Islami filed writ petitions challenging these notifications on the basis of Fundamental Rights, which had meanwhile been restored, in the High Courts of East and West Pakistan. The East Pakistan High Court allowed the writ petition, while the High Court of West Pakistan dismissed it, therefore, the aggrieved parties challenged the judgements against them in the Supreme Court. The appeals were heard together and disposed by the judgement in *Abul A'la Maudoodi and others v the Governments of West Pakistan and East Pakistan etc*. (PLD 1964 SC 673). Section 16 of the Criminal Law Amendment Act reads:

> If the Provincial Government is of opinion that any association interferes or has for its objects interference, with the administration of law, or with the maintenance of law and order, or that it constitutes a danger to the public peace, the Provincial Government may, by notification in the official Gazette declare such association to be unlawful.

The next section, Section 17, provides for the punishment of persons who are members of unlawful associations, and the punishment may extend to six months imprisonment and a fine. The effect of Section 17-A is that the premises of an unlawful association can be taken over by the Government. The consequences of an order under Section 16 on the ground that orders under this section were executive and administrative orders, therefore, they could be passed without giving a hearing to the association declared unlawful. All the Judges, including Justice Cornelius, rejected this submission and Justice S.A. Rehman observed:

> On behalf of the Jamaat-i-Islami the argument was also advanced that the want of a notice and opportunity of hearing afforded to Jamaat-i-Islami before it was condemned as unlawful, was repugnant to the principle of natural justice and even on that score therefore the action taken could not be sustained in law. This Court has held in Chief Commissioner, *Karachi v Mrs. Dina Sohrab Katrak* (6); *Messrs Faridsons Ltd, Karachi v Government of Pakistan* (7) and *Province of East Pakistan v Nur Ahmad* (8), that the principle of natural justice requiring a hearing to be granted to a person before being condemned, applies not only to judicial or quasi-judicial proceedings but also to administrative proceedings provided that the relevant statute does not exclude its application and requires the administrative authority concerned to base its decision on an objective determination of facts. The present case seems to me to fall within the category of these three decided cases.

The Jamaat-i-Islami had challenged the impugned notifications inter alia on the further ground that they violated the Fundamental Rights guaranteed by Article 7 of the Constitution. This Article read 'Every citizen shall have the right to form associations or unions subject to any restrictions imposed by law in the interest of morality or public order.' The question therefore was whether the restrictions which could be imposed on associations and unions under the Criminal Law Amendment Act were reasonable. It was held they were not, and Justice S.A. Rehman compared the provisions of the Criminal Law Amendment Act with those of the Political Parties Act, 1962 and pointed out that under the Political Parties Act, even

> ...where a political party is created such as would endanger the security or integrity of Pakistan, the Legislature in its wisdom has thought it fit to provide in this Act that no action should be taken unless the highest tribunal in the country has first delivered its verdict on the questions raised. Judged in the light of this criterion, the 1908 Act confers a naked arbitrary power on a Provincial Government to put an end to all activities of a political party and thus to virtually kill it, on an *ex parte* and one sided view of its activities. This unguided discretion is subjected to no check, judicial or otherwise, 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. That such a party may succeed in assuming power at sometime, cannot be regarded as an impossibility. In a democratic set-up such as is visualized by our present Constitution, the presence of political parties is regarded as an essential feature so that it is conceivable that the opposition of today may be the Government of tomorrow. To place an instrument in the hands of the party in power by which they can effectually eliminate from the political scene any opposition, without let or hindrance, cannot be held to be consistent with healthy functioning of the body-politic on democratic lines.

The impugned notifications were, therefore, set aside and the majority view of the Court was that the Criminal Law Amendment Act was an act of a penal nature and had to be construed strictly.

Detention Laws

The other important judgement of the Supreme Court was the *Government of East Pakistan v Mrs Rowshan Shaukat Ali Khan* (PLD 1966 SC 286). Mrs. Rowshan Shaukat Ali Khan's husband, Mr. Shaukat Ali Khan, was a member of a political party opposed to President Ayub and his policies. As President Ayub was contesting elections for the post of Pakistan's President, the political party to which Mr. Shaukat Ali Khan belonged and four other opposition parties had a meeting in Karachi to nominate a candidate for the Presidential election, and they nominated Miss Jinnah. Mr. Shaukat Ali Khan flew to Dhaka on 20 September 1964 after attending this meeting, and he was arrested at Dhaka Airport under Section 41 of the East Pakistan Public Safety Ordinance, 1958, hereafter called the Ordinance. His wife, the respondent in the Supreme Court, filed a writ petition in the East Pakistan High Court challenging her husband's arrest as illegal and *malafide*. On 26 September, the East Pakistan Government passed an order under Section 17 of the Ordinance according to which Mr. Shaukat Ali Khan's detention was to continue until further orders. The respondent challenged this order of 26 September in another writ petition. Both these petitions were heard together. The learned Judges of the High Court held that the orders against Mr. Shaukat Ali Khan were orders under detention laws, but as the Government had, in breach of the mandatory provisions of Article 2 (5) of the Chapter on Fundamental Rights in the Constitution, failed to communicate proper grounds for his detention to the detenue, the learned Judges declared the orders of 20 September and 26 September illegal and ordered Mr. Shaukat Ali Khan's release. The Government filed an appeal in the Supreme Court against the judgement, which was dismissed by the judgement cited.

The leading judgement in the Supreme Court was written by Justice S.A. Rehman. According to Section 41 of the Ordinance, a police officer not below the rank of a Sub-Inspector 'may arrest without warrant any person whom he reasonably suspects of having done, or of doing, or of being about to do, a prejudicial act'. Prejudicial acts were

defined as acts calculated to endanger communal harmony, public safety, the maintenance of public order, or to bring into hatred or contempt or to excite disaffection against the Government or to disrupt the stability or integrity of the province. Justice S.A. Rehman followed the Privy Council's judgement in the *Emperor v Dashpande* (AIR 1946 PC 123) and held that the words 'reasonably suspects' in this section were justifiable, and as such the Government had to satisfy the Court that the police officer, who arrested Mr. Shaukat Ali Khan, was justified in entertaining a reasonable suspicion that Mr. Shaukat Ali Khan had committed or was about to commit a prejudicial act under the Ordinance. As the Government did not produce any evidence to justify Mr. Shaukat Ali Khan's arrest, Justice S.A. Rehman held that the arrest was a violation of Section 41. As he also took the view that Section 41 was not a detention law, he held that the Government should have informed Mr. Shaukat Ali Khan of the grounds of his arrest and produced him before a Magistrate within twenty-four hours of his arrest under the mandatory provisions of the first two clauses of Article 2 of the Chapter on Fundamental Rights. Since the Government had not complied with these provisions, the learned Judge declared the order of 20 September 1964 illegal. Further as the order of 26 September supported to be a continuation of the illegal order of 20 September, the learned Judge followed the Federal Court's judgement of 1954 in Wali Khan's case and declared the order of 26 September illegal. Justice Fazle Akbar agreed with this judgement, but the Chief Justice and the other two Judges did not agree with it. Justice S.A. Rehman also examined Section 41 of the Ordinance on the assumption that it was a detention law and on his assumption he held that the Government was required by clause 5 of the said Article 2 to communicate to the detenue the grounds for his detention, and as the Government had not complied with the provisions of Article 2 (5), he declared the order of 20 September illegal on this ground also, and except Justice Cornelius, all the other Judges agreed with this view.

The Judges were, however, agreed on one issue. They all held that Section 17 of the Ordinance was a detention law, and as it was a detention law, clause 5 of the aforesaid Article 2 stated '...The authority making the order (of detention) shall, as soon as may be, communicate to (the detenue) the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order'. No detenue can make his representation against the order for his detention if the grounds of detention are vague. The grounds of detention must be precise enough to enable the detenue to answer the allegations against him. The grounds of detention communicated to Mr. Shaukat Ali Khan stated that he was associated 'with the illegal activities of a secret association' in four districts of the province which were named, 'during the years 1957, 1958, 1959, 1961, 1962, 1963 and 1964.' It was also alleged that he 'carried on prejudicial acts and propaganda against the government amongst students and peasants with the ulterior object of disrupting the stability or integrity of the Province of East Pakistan and exciting disaffection towards the government.' Justice Cornelius held that these grounds were not vague. According to the Chief Justice, a person could remember in his prison cell in 1964 all his speeches, writings, and

conversations from 1957 onwards. The Chief Justice appears to have assumed that human memory is infallible. It is not, and Justice Cornelius had forgotten his own judgement on the Ordinance pronounced in the previous year in Tofazzal Hossain's case. The Chief Justice had held in that case that it was the right of the citizen to criticize the Government, and even if the criticism was in very strong language, it was not a prejudicial act under the Ordinance. Mr Shaukat Ali Khan could not therefore be detained merely for criticizing the Government, even if the language used by him was offensive, and the Government should have quoted in the grounds of detention the passages in his speeches, writings, etc. which amounted in Government's opinion, to prejudicial acts, or at least given the gist of these passages, as the Government was trying to rake up the past by relying on speeches, etc. made as far back as 1957.

The most important judgement by Justice Cornelius was his judgement in *Malik Ghulam Jilani v the Province of West Pakistan* (PLD 1967 373). But it is necessary to point out first that war had broken out with India in September 1965, and the President had, under Article 10 of the Constitution, proclaimed an Emergency and passed an Order suspending the right to move High Courts for the enforcement of most Fundamental Rights. He had also promulgated the Defence of Pakistan Ordinance, 1965, and the Defence of Pakistan Rules. The emergency and the Defence of Pakistan Ordinance and Rules remained in force for more than three years after the war with India, although the Declaration signed at Tashkent on 11 January 1966 by President Ayub and the Indian Prime Minister, Mr. Shastri, marked the formal cessation of hostilities between India and Pakistan. There was an agitation against President Ayub in Lahore, Multan and other towns of the Punjab because of the Tashkent Declaration, and the opposition parties supported it and also agitated for the repeal of the Constitution the President had imposed on the country. The Provincial Government passed orders banning processions under Section 144 of the Criminal Procedure Code but as these orders were defied, the Deputy Commissioner, Lahore passed an order under Rule 32 of the Defence of Pakistan for the arrest and detention of Malik Ghulam Jilani and several other leaders. The Deputy Commissioner stated in his order that he was satisfied that the detenues 'are or have been jointly engaged in activities which are likely to seriously prejudice the maintenance of public order and peaceful condition in the city of Lahore and elsewhere in the Province'. The detenues were arrested and they challenged their detentions in writ petitions in the West Pakistan High Court. The Provincial Government opposed the petitions and submitted that the High Court should dismiss them, as the Deputy Commissioner was satisfied that the detention of the petitioners was necessary in order to prevent him 'from acting in a prejudicial to the security, the public safety...the maintenance of public order...'. This rule implemented the mandate of Section 3 (2) (x) that a person could be arrested only if there were reasonable grounds for suspecting that he had acted or was likely to act in a manner prejudicial of the maintenance of public order or to the maintenance of peaceful condition in any part of the country. The Central Government had in accordance with Section 4 of the Defence of Pakistan Ordinance delegated its authority under the Ordinance to the Provincial

Government and in accordance with the Ordinance the Government of West Pakistan had sub-delegated its authority to the Deputy Commissioner of Lahore.

Now the word 'satisfied' in Rule 32 was copied from the Defence of India Ordinance and the Defence of India Rules promulgated during the Second World War, and the Defence of India Ordinance and Rules had been based on British war time legislation. This British war time legislation had been construed in *Liversidge v Anderson* by the House of Lords and the majority of the Judges had taken the view that as the Home Secretary, Sir John Anderson, had been satisfied that the detention of Liversidge was necessary, they could not review his decision, as the test of the Home Secretary's satisfaction for passing a detention order was subjective, and not objective. This judgement was criticized after the war by jurists in England and in the United States of America on the ground that the majority Judges had been influenced by the fact that Liversidge's detention had been ordered by the Home Secretary when England was fighting a war for its survival. Judges are a part of the society in which they live and they cannot but be influenced by the pressures of public opinion in the society in which they live. That was why Justice Kayani had, a decade before Malik Ghulam Jilani's case, declined to follow the majority view in *Liversidge v Anderson* in his own judgement in Mohammad Khan Loondhawar case (discussed earlier). Additionally the 1962 Constitution contained a provision which was not in the 1956 Constitution. According to Article 2 of 1962 Constitution:

> To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

In this background Justice Cornelius analyzed the provisions of Section 3 (2) (x) and of Rule 42 and observed:

> The ascertainment of reasonable grounds is essentially a judicial or at least a quasi-judicial function. It is too late in the day to rely, as the High Court has done, on the dictum in the English case of Liversidge (1) for the purpose of investing the detaining authority with complete power to be the Judge of its own satisfaction. Public power is now exercised in Pakistan under the Constitution of 1962, of which Article 2 requires that every citizen shall be dealt with strictly in accordance with law. If then rule 32 owes its vires to section 3 (2) (x), it must follow that by the use of the words 'reasonable grounds' clause (x) has unmistakably imported into this rule, controlling the exercise of public power, the requirement that to gain the protection of the rule for its action thereunder, the authority should be prepared to satisfy the Courts, to which the subject is entitled to have resort for determination of the question whether he has been treated in accordance with law, that it has acted on reasonable grounds.

The Chief Justice then examined the material produced by the Government in support of the detentions. As the material consisted of reports about the speeches and activities of the appellants, the defence of the appellants was that in criticizing President Ayub and his Constitution, they were only exercising their legitimate rights as the citizens of a democratic country. This argument was rejected by the learned Judges, and the Chief Justice (who wrote the judgement of the Court) observed that the plea of the appellants 'appears indeed to be a justification for politicians to play with fire in the hope that they will eventually be able to subdue the conflagration they cause. To bring about political changes by Constitutional means alone is legitimate.' The Chief Justice therefore held that the orders of detention of the appellants was based on sufficient evidence and all the appeals were dismissed, except one appeal, which was allowed on technical grounds.

The judgement pleased the government, as only one detention order was set aside, but it also pleased public, as the Supreme Court had at least agreed with the view taken a decade earlier by Justice Kayani in Khan Loondhawar's case that the majority judgement of the House of Lords in Liversidge's case was not correct, and that it was duty of the superior Court under our Constitution to set aside detention orders which were not supported by evidence.

Justice Cornelius retired in 1968 and after a few months Justice Hamoodur Rehman became the Chief Justice for about seven years. The agitation against President Ayub and his unwanted Constitution continued and the governments used their draconion powers under the Defence of Pakistan Rules to crush this agitation. A detention order under the Defence of Pakistan Rules was therefore challenged in a writ petition in the West Pakistan High Court by Mr. Abdul Baqi Baloch, a member of the Provincial Assembly, who lived in Karachi. The detention order was passed by the Deputy Commissioner Karachi on 11 August 1966 and it was challenged by Mr. Baqi Baloch on the ground that the case against him was false and malafide and on the further ground that his detention under the Defence of Pakistan Rules was illegal, because the allegations against him in the detention order had no connection whatsoever with the Defence of Pakistan. The learned Judges of the High Court followed the majority judgement of the House of Lords in *Liversidge v Anderson* and dismissed the petition on the ground that the High Court had no jurisdiction to examine the validity of a detention order. The petitioner challenged this judgement in an appeal in the Supreme Court and by it judgement reported as *Mr. Baqi Baloch v the Government of Pakistan and others* (PLD 1968 SC 313) the appellant's case was remanded to the High Court. The judgement of the Supreme Court was written by the Chief Justice, Justice Hamoodur Rehman. The judgement begins with an affirmation of the principle laid down by Justice Cornelius in Malik Ghulam Jilani's case that the superior Courts can in their constitutional jurisdiction, review all orders, including detention orders, and that the majority view in Liversidge's case was not correct. Justice Hamoodur Rehman examined and rejected the appellant's allegations of *malafides* and turned to his

contention that even on the assumption (which he denied) that the allegations against him in the detention orders were true, they did not fall under the Defence of Pakistan Rules. It is not clear from the judgement what the precise stand of the Government was to this objection, but Justice Hamoodur Rehman rejected the appellant's plea on the basis of clauses (1) and (4) of Article 30 of the Constitution read with the Proclamation of Emergency issued by the President in 1965 under Article 30. Clause (1) of Article 30 read:

> If the President is satisfied that a grave emergency exists... (a) in which Pakistan, or any part of Pakistan, is (or is in imminent danger of being) threatened by war or external aggression;
>
> (b) in which the security or economic life of Pakistan is threatened by internal disturbances beyond the power of a Provincial Government to control, the President may issue a Proclamation of Emergency.

This clause is free from all ambiguity. An emergency can be declared on account of a threat of war or external aggression under sub-clause (a) and it can also be declared to meet a threat of internal disturbances under sub-clause (b). Clause (2) of the Article, which was ignored by Justice Hamoodur Rehman stated 'A Proclamation of Emergency shall, as soon as is practicable, be laid before the National Assembly.' This clause is inconsistent with the view that an emergency proclaimed under sub-clause (a) can be continued under sub-clause (b) because that would be misguiding the National Assembly. Clause (4) read:

> If, at a time when a Proclamation of Emergency is in force (whether or not the National Assembly stands dissolved or is in session at that time), the President is satisfied that immediate legislation is necessary to assist in meeting the emergency that gave rise to the issue of the Proclamation, he may, subject to this Article, make and promulgate such Ordinances as appear to him to be necessary to meet the emergency, and any such Ordinance shall, subject of this Article, have the same force of law as an Act of the Central Legislature.

This clause empowered the President to promulgate Ordinances only if he was 'satisfied that immediate legislation is necessary to assist in meeting the emergency that gave rise to the issue of the Proclamation'. The words quoted mean that if an emergency has been declared on account of the threat of war, the President can only promulgate legislation to meet that threat, and not the threat of internal disturbances.

The President's Proclamation read: 'Whereas the President is satisfied that a grave emergency exists in which Pakistan is in imminent danger of being threatened by war; Now, therefore, in exercise of the powers conferred by clause (1) of. Article 30 of the Constitution, the President is pleased hereby to issue this Proclamation of Emergency.'

There is no ambiguity whatsoever about this Proclamation. It stated that an emergency had been declared on account of the imminent danger of war, and when the meaning of words in a document or instrument is clear, the Courts must give effect to that meaning. But the Chief Justice held that the Proclamation had been issued on the ground of the imminence of war and on the ground of a threat of internal disturbances, because the first para of the Proclamation was a recital and he observed:

> This does not mean that the emergency was circumscribed by the words of the recital contained in the Proclamation. What had to be looked at was the operative part of the Proclamation. Looked at in this way the power to legislate by Ordinance which accrued to the President thereby cannot be restricted to any particular operation of clause (1) of Article 30.

I cannot agree with these observations because a Proclamation of Emergency can be issued on more than one ground, therefore, the ground on which it is issued has to be stated in the Proclamation, and nothing turns on whether the ground for issuing the Proclamation is in its first para or in its second para, as the meaning of the Proclamation is clear. It is also not irrelevant to observe that there was no apprehension of internal disturbances when this Proclamation was issued, as the nation was united behind the government in the war against India.

In any event, the appellant was not interested in the legal niceties about Proclamations under Article 30. His contention was that the allegations in the detention order that he was inciting persons to resort to violence against the government were an abuse of the Defence of Pakistan Rules and the detention order was a colourable exercise of power under these Rules, because the illegal activities attributed to him were not even alleged to have any connection with the defence of the country. But according to the Chief Justice 'internal disorder, sabotage ... prejudicial acts threatening or disturbing law and order' could affect 'the measures needed to be taken for effectively meeting the threat or danger of war'. Unfortunately, the Chief Justice overlooked the fact that it was not the Government's case that the appellant's illegal activities had any effect on the measures taken by it for the country's defence. The judgement was therefore a bonanza for the Government to legalize an instrument of oppression (the Defence of Pakistan Rules) used by it to silence and terrorize its critics.

The Supreme Court had remanded the appellant's writ petition to the High Court for deciding the question whether the detention order against the appellant was supported by material. In the events that happened, the appellant's writ petition was heard at Karachi by a Division Bench consisting of Justice Ghulam Safdar Shah and myself in August 1968 and the judgement is a reported judgement. We allowed the parties to produce before us whatever evidence they wanted. We rejected the appellant's plea that the detention order was *malafide*, but there was no doubt that the order was arbitrary. In setting it aside, Justice Ghulam Safdar Shah observed that,

> the material upon which the impugned action was taken could not be said to have furnished any grounds, much less reasonable grounds, which, in line which the principles enunciated in Ghulam Jilani's case, could have induced the required satisfaction of the detaining authority in support of his impugned action under rule 32 of the Defence of Pakistan Rules.

Finally in November 1968, in the Government of West Pakistan versus Begum Kashmiri (PLD 1969 SC 14), the Supreme Court applied the principle laid down in Malik Ghulam Jilani's case and set aside a detention order passed against the appellant's husband on the ground that it was not supported by any material. This judgement is important because of the liberal interpretation placed by the Chief Justice upon Article 2 of the Constitution. The Chief Justice observed:

> It may well be, as has been suggested in some quarters, that in this sense it is as comprehensive as the American 'due process' clause in a new garb. It is in this sense that an action which is *malafide* or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not action in accordance with law. Action taken upon no ground at all or without proper application of the (mind) of the detaining authority would also not qualify as action in accordance with law and would, therefore, have to be struck down as being action taken in an unlawful manner.

It was unfortunate that the Chief Justice did not take this view six months earlier, because Mr. Baqi Baloch's case was that the detention order against him was a colourable exercise of power under the Defence of Pakistan Rules. However, times were also changing. At the beginning of 1968, it seemed that the tide had turned against the President, but by November 1968, it was clear that the tide had became a flood which would sweep the President away, unless he resigned.

3

THE JUDICIARY UNDER MARTIAL LAW

As the agitation against President Ayub became uncontrollable, his ministers demanded the imposition of Martial Law. As he was a very sick man, the President went on changing his mind. Mr. Altaf Gauhar was his Information Secretary, friend and admirer. According to Mr. Altaf Gauhar's biography of the President, the President had called a meeting of his ministers on 20 March and informed them that he had decided to impose Martial Law. They supported his decision and the President informed General Yahya, the Commander-in-Chief of the Army, that Martial Law had to be proclaimed. But, according to Mr. Altaf Gauhar, the President changed his mind the next day. Then, on 24 March he addressed the nation and stated that he had called upon General Yahya to carry out his constitutional duty of restoring law and order in the country. The next day, General Yahya proclaimed Martial Law, declared himself the Chief Martial Law Administrator, abrogated the Constitution, dissolved the National and Provincial Assemblies. He declared himself the President a few days later and Provisional Constitutional Order, 1969 was proclaimed by him as Chief Martial Law Administrator after a delay of more than one week on 4 April 1969. This Order was almost identical to the Laws (Continuance in Force) Order of 1958, but as some of the Judges of the Supreme Court had indulged in rhetoric, about human rights and Fundamental Rights in their judgments during the Martial Law of 1958, para (3) of this Order expressly stated that all Fundamental Rights of a political nature in the 1962 Constitution had been abrogated.

However, unlike the announcements of President Mirza and of General Ayub in October 1958, General Yahya also announced that he would hold elections for a Constituent Assembly which would frame a Constitution for the country. As the decision to hold elections raised difficult problems, General Yahya first took steps to carry out his further promise to dismiss corrupt civil servants. He appointed committees for the scrutiny of the assets of civil servants and of the member of the higher judiciary. He also appointed tribunals headed by retired High Court Judges to examine charges of corruption against civil servants on the basis of the reports of the scrutiny committees. In about one year, on the recommendations of these tribunals, 303 senior civil servants were dismissed. Speedy justice is always rough justice, and some of the recommendations of these tribunals were erroneous. But people were delighted that they had at last found a dictator who believed in fighting corruption.

The question of elections was complicated by the division of the country into the provinces of West Pakistan and East Pakistan. Although 56 per cent of the people of the

country lived in East Pakistan, both the provinces had equal representation in the legislature under the 1956 and the 1962 Constitutions. Now in order to create this parity between the two wings of the country, the provinces of West Pakistan had been forced in 1955 to merge into the provinces of West Pakistan and East Pakistan. The creation of the province of West Pakistan was resented by the people of smaller provinces of West Pakistan, and even the Provincial Assembly of the Punjab had turned against the creation of the province of West Pakistan. On the other hand, even though the principle of parity between East and West Pakistan had been supported by Mr. Suhrawardy, the manner in which the country was administered, especially after 1958, had completely alienated Bengalis against this principle of parity. General Yahya realized that the people of East Pakistan looked upon this principle of parity as a device to deprive them of their rights. So early in 1970 he took the first step of announcing the disintegration of the province of West Pakistan. The four provinces of West Pakistan which had existed before .1955 were restored on 1 July 1970. As these provinces were, on the whole, cultural and linguistic entities, the restoration of these provinces made General Yahya very popular in the smaller provinces of West Pakistan, but it made him unpopular with the bureaucracy of West Pakistan. After the restoration of these provinces, the next step was to restore universal adult franchise as the basis of elections for a new Constituent Assembly. I may explain here that elections to the Federal Assembly under the 1962 Constitution had been on the basis of indirect elections, but not on the basis of separate electorates. General Yahya announced that elections for the new Constituent Assembly would be on the basis of universal adult franchise without any distinction between Muslim and non-Muslim candidates and voters.

Elections for the Federal and Provincial assemblies were held in December 1970. They were the first free and fair elections held in the country, and General Yahya was extremely popular in the whole country for having kept his promise to hold elections. His popularity was, however, resented by the admirers of ex-President Ayub. General Yahya had also committed two unpardonable sins in the eyes of the religious parties and the diehards of the Muslim League. Those sins were that he had given full freedom to the National Awami Party to participate in the elections and that he had not held elections on the basis of separate electorates for Muslim and non-Muslims. Unfortunately for General Yahya, there were sympathizers of the Muslim League, in the higher judiciary and in the higher echelons of the army and of the civil service.

The results of the elections were a disappointment to the army because the Awami League had swept the polls in East Pakistan. But this proved that the elections had been on the whole, free and fair. The Awami League won 167 of the 169 seats in East Pakistan and had a majority in the Constituent Assembly consisting of 313 members. The situation in West Pakistan was complicated, because votes were divided between several parties. The PPP had won a majority of the seats, but obtained less than 45 per cent of the votes cast in West Pakistan. General Yahya should have convened the Constituent Assembly immediately and Mr. Mujibur Rehman, the Chairman of the

Awami League, should have been appointed Prime Minister. But Mr. Bhutto, the Chairman of PPP and some politically-inclined generals opposed this move, because they feared that the Awami League would make Pakistan a confederation. General Yahya gave in to their pressures. As he also delayed convening the Constituent Assembly for the same reason, this had a very adverse reaction in East Pakistan. And although after considerable delay, he announced dates for calling the Constituent Assembly, he cancelled these dates under the same pressures. Finally, a date was announced for calling the Constituent Assembly in March 1971, but when General Yahya again succumbed to pressures and postponed the meeting of the Constituent Assembly, the people of East Pakistan felt that the leaders of West Pakistan and military Junta were not prepared to end their domination of East Pakistan and to accept the rule of democracy. They started a mass civil disobedience movement, which became very violent.

Instead of seeking a political solution for a political crisis, General Yahya directed the army to restore law and order. The army arrested Mr. Mujibur Rehman and resorted to extreme violence to restore law and order. But brutality has also been counterproductive when the people are united by genuine grievances against an administration. Therefore, with the inevitability of a Greek tragedy, the military crackdown led to civil war in East Pakistan and to the war with India on 3 December 1971. Our army in East Pakistan surrendered to the Indian army at Dhaka on 16 December 1971, and with that surrender a new nation, Bangladesh, joined the comity of nations. The war with India ended the next day. Our defeat led to a *coup* within the army against General Yahya. General Yahya was forced to retire by his fellow-officers, who also called upon Mr. Bhutto to take over as the President and Chief Martial Law Administrator of Pakistan. Mar Bhutto accepted the offer and as Chief Martial Law Administrator he promulgated Martial Law Regulation 115 by which the maximum ceilings for landholdings were substantially reduced.

A Proclamation of Martial Law raises a problem of conscience for the Judges of the superior Courts, if accompanied with the claim that the Constitution has been abrogated. The Judges of the Supreme Court are the guardians of the Constitution, and silence speaks when there is a duty to protest. If, therefore, Judges of the Supreme Court continue to work as Judges, despite the abrogation of the Constitution, they validate the Martial Law regime through their conduct. Therefore, if Martial Law is illegal in the opinion of the Judges, they should immediately state so in a judgement, or resign, and their resignations would mean that the Martial Law regime was illegal.

I was a Judge of the Karachi seat of the West Pakistan High Court when General Yahya proclaimed Martial Law and abrogated the Constitution. On the first working day of the Courts after the Proclamation, Justice Qadeeruddin Ahmed, the senior Judge of the Karachi seat, requested us to come over to his chamber, which we did. He told us that we had to decide whether we could continue to work as Judges after the abrogation of

the Constitution, as we had taken an oath to uphold the Constitution. And he telephoned the Chief Justice of the High Court at Lahore Justice Wahiduddin Ahmed, about the dilemma before us. Justice Wahiduddin Ahmed told him that he had telephoned Justice Hamoodur Rehman about this, had told him that he and his companion Judges were discussing the same question and would inform him about their decision as soon as they had decided to do. We returned to our chambers but did not do any work. After more than two hours, Justice Qadeeruddin Ahmed again sent for us and told us that Justice Wahiduddin Ahmed had informed him that the Judges of the Supreme Court had decided to continue working as Judges, therefore, High Court Judges should follow the example of the Supreme Court. We agreed and decided to work as Judges under Martial Law and the people of Pakistan rightly took our decision to mean that we had validated General Yahya's regime.

Additionally, Judges of the Supreme Court are appointed by the President after consulting the Chief Justice of Pakistan, while the Judges of the High Court are appointed by the President after consulting the Chief Justice of the High Court concerned, the Governor of the province and the Chief Justice of Pakistan. During the period of nearly three years when General Yahya was the President and the Chief Martial Law Administrator, several Judges were appointed to the superior Courts. General Yahya had appointed Justice Salahuddin Ahmed to the Supreme Court after consulting Justice Hamoodur Rehman. Similarly he appointed Justice Sattar, a Judge of the Supreme Court, as the Chief Election Commissioner to hold the 1970 elections, after consulting Justice Hamoodur Rehman. He also appointed Additional Judges to High Courts and confirmed Judges to High Court after consulting Justice Hamoodur Rehman. Most important to the Judges was the question of the composition of the Scrutiny Committees for the scrutiny of their assets. General Yahya had appointed a committee of very senior civil servants for this purpose, but we as Judges had objected to the composition of this committee. Justice Hamoodur Rehman therefore took up the matter with General Yahya, who immediately acceded to Justice Hamoodur Rehman's request and appointed a committee consisting of a Supreme Court Judge and retired High Court Judges to scrutinize the assets of the Judges of the Supreme Court and of High Courts.

The legal recognition of a government by the Courts can be given through a judgement, and it can also be given through the conduct of Judges and especially the conduct of Judges of the highest Court of the country, and, in my opinion, in all the circumstances discussed, we, the Judges of the superior Courts, had given legal recognition to General Yahya's regime, and on his part, General Yahya had shown unfailing courtesy to the Judges. Justice Mushtaq Hussain of the West Pakistan High Court became the Federal Law Secretary for a couple of years after the promulgation of the 1962 Constitution, and at his suggestion (I am repeating what he had told me) President Ayub began the practice of interviewing the persons recommended for appointment as Judges of High Courts. This practise did not enhance the dignity of the Courts, and in 1969 the Karachi

High Court Bar Association had given a dinner in Karachi in honor of General Yahya as the President of the country. Justice A.S. Faruqui was asked to give the vote of thanks to the President. He did so and took advantage of this opportunity to tell the President that the practise of the President appointing Judges to High Courts after interviewing them was undesirable. I remember Justice Faruqui had used strong language to express his resentment at this practice. General Yahya immediately discontinued this practice.

Mr. Bhutto governed the country for nearly four months as the President and the Chief Martial Law Administrator and he used the repressive legislation of Martial Law to crush dissent. This led to a round of litigation in which the Supreme Court overruled its judgement in Dosso's case. On 22 December 1971 Malik Ghulam Jilani (of the famous 1967 judgement of the Supreme Court) was arrested under the Defence of Pakistan Rules. His daughter, Miss Asma Jilani, challenged this detention order in the High Court at Lahore. As the High Court gave notice to the Government to submit its reply on the 31 December, the Government withdrew its detention order of 22 December 1971. Instead the Marital Law Administrator of the Lahore Zone passed an order on the same day for Malik Ghulam Jilani's detention under Martial Law Order 78. Detentions under this order could be for an indefinite period and the authority passing the order was not required to disclose the grounds of detention, therefore, it was considered impossible to challenge detention orders under Martial Law Order 78, as the Supreme Court had held in several judgments that the Courts could not question the validity of Martial Law Orders. However, Miss Asma Jilani filed an application in the High Court to amend her petition in order to challenge her father's detention under Martial Law Order 78. This application was allowed, but the case was heard and dismissed on the basis of the Supreme Court's judgement in Dosso's case.

The facts in Mr. Altaf Gauhar's case was simpler. Mr Altaf Gauhar was the editor of the Karachi newspaper, the *Dawn* and it is believed that he had given offence to the government by criticizing it. He was arrested and detained in February 1972 under Martial Law Order 78. His wife, Mrs Zarina Altaf Gauhar filed a petition in the High Court at Karachi for setting aside this detention order. This writ petition was also heard and dismissed on the basis of the Supreme Court's judgement in Dosso's case. Miss Asma Jilani and Mrs. Altaf Gauhar challenged these judgments in the Supreme Court. Their appeals were admitted in order to examine the validity of the view taken by the Supreme Court in Dosso's case, and judgement of the Court is reported as *Miss Asma Jilani v the Government of Punjab and Central* (PLD 1972 SC 1 39). The common contention of the learned counsel was that the Martial Laws imposed by Generals Ayub and Yahya could only have been imposed, under the common law, on a country which had been conquered by these Generals and that under the common law, Martial Law could be imposed in a country for restoring the law and order only by the civilian Government. These submissions were supported by judgements of the superior Courts of the common law countries and by the views of jurist of the common law countries. The Chief Justice, Justice Hamoodur Rehman, and Justice Yaqub Ali approved of all these

citations in the lengthy judgements written by them, and Justice Hamoodur Rehman observed:

> From the above it is clear that we must distinguish clearly between Martial Law as a machinery for the enforcement of internal order and Martial Law as a system of military rule of a conquered or invaded alien territory. Martial Law of the first category is normally brought in by a proclamation issued under the authority of the civil Government and it can displace the civil Government where a situation has arisen in which it has become impossible for the civil Courts and other civil authorities to function. The imposition of Martial Law does not of its own force require the closing of the civil Courts or the abrogation of the authority of the civil Government. The maxim *inter arms legis silent* applies in the municipal field only where a situation has arisen in which it has become impossible for the Courts to function, for, on the other hand, it is an equally well-established principle that where the civil Courts are sitting and civil authorities are functioning the establishment of Martial Law cannot be justified. The validity of Martial Law is, in this sense, always a judicial question, for, the Courts have always claimed and have in fact exercised the right to say whether the imposition of Martial Law in this limited common law sense existed.

All the judgments cited were of Anglo-Saxon countries. Similarly the jurists, whose views were cited, were Anglo-Saxon jurists. Democracy has existed in Anglo-Saxon countries for generations, and as changes in governments have taken place peacefully in these countries for many generations, these countries have not experienced mass movements for the over-throw of governments such as we had in 1968-9, and the common law concept of Martial Law, evolved in different conditions, could not have restored law and order in March 1969, the more so as President Ayub had not been able to restore law and order, despite the ruthless use of the Defence of Pakistan Rules. But the Emergency proclaimed in 1965 had been revoked by the President before he announced his retirement on 24 March 1969. He had decided to impose Martial Law on 20 March. In these circumstance the hope that General Yahya would restore law and order without declaring Martial Law of the 1958 type was an illusion.

The learned did not think that the law and order situation was serious. But President Ayub's letter of 24 March 1969 to the General seems to have escaped their attention. In this letter the President wrote to General Yahya that,

> ...well-tutored and well backed elements had made it impossible for the government to maintain any semblance of law and order or to protect the civil liberties, life and property of the people... The result is that all social and ethical norms have been destroyed and instruments of Government have become inoperative and ineffective. The economic life of the country has all but collapsed...the members of assembly are no longer free agents... Indeed members

> are being threatened and compelled 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 break up Pakistan into little bits and pieces (pp. 478-80 of the Altaf Gauhar Biography of the President Ayub).

Similarly in his farewell broadcast to the nation, President Ayub said:

> People of Pakistan, this is the last time I address you as the President. The country is passing through a critical time. The mob has overwhelmed the administration and there is no one who can reason with the agitators...There is now no institution except the armed forces which can save the country. I have therefore asked the Commander-in-Chief of the army to carry out his legal obligations.

The learned Judges were, however, of the view that the disturbances should easily have been controlled, and the Chief Justice, Justice Hamoodur Rehman, referred to the observations in a judgement of the Lahore High Court that 'there was nothing to suggest that the existing machinery for dispensing justice was found wanting' and approved of them. The recollection of the Chief Justice and of his companion Judges of the situation from January to 25 March 1969 is different from that of many people, including my own. But President Ayub was in a better position to assess the law and order situation in the country than the Chief Justice, Justices or the people of the country, because he was the executive head of the country and it would be an understatement to say that his assessment of the situation contradicted the view of the learned Judges that the disturbances could have been controlled easily.

Their grossly over-optimistic view of the law and order situation led the Judges to hold that General Yahya was a usurper and traitor and that Martial Law was illegal. And as the view that Martial Law was illegal was inconsistent with the Court's judgement in Dosso's case, the learned Judges overruled that judgement. They held that the judgement in Dosso's case was based on Kelsen's 'doctrine', which had been universally accepted. They also held that Justice Munir had misread Kelsen's doctrine, because, according to Kelsen, a *coup* created a new legal order by which the Courts was bound only if the *coup* was accepted by the people of the country. But, according to the learned Judges, when Dosso's case was decided in October 1958, there was no evidence to show that the people of Pakistan had accepted the Martial Law declared earlier in the month. The learned Judges have not explained what evidence was required for a Court to hold that a *coup* was successful and had been accepted by the people. This was unfortunate, as the learned Judges were also of the view that General Yahya's Martial Law had not been accepted by the people. The question whether a *coup* has been accepted by the people depends on evidence. Silence speaks when there is a duty to protest, and the National and Provincial assemblies has been dissolved both in 1958 and in 1969. As all

the members of these assemblies had taken oath to uphold the Constitution and as they were the elected representatives of the people, it was for them to protest, if the people they represented, had not accepted Martial Law. They remained silent. Newspapers and leaders of political parties had also not criticized Martial Law on either occasion. In these circumstances, the criticism of the learned Judges that Justice Munir had acted rashly and erred in holding that Martial Law had been accepted by the country was not correct and was very unfair to Justice Munir.

Unfortunately all the Judges, who allowed Miss Asma Jilani's and Mrs Altaf Gauhar's appeals, had taken an oath to uphold the 1962 Constitution but had continued to work as Judges, despite the abrogation of the 1962 Constitution by the 1969 Martial Law. And it would have been better if they had followed the precedents of the Supreme Court of the United States of America and declared that although Dosso's case was not good law, it could not be given retrospective effect, but should not be followed in future. Be that as it may, as the Martial Law of 1969 was declared illegal, General Yahya's claim to have abrogated the Constitution became illegal and of no effect, as also the Martial Law Legislation enacted by him. But the elections of 1970 had put the country back on the road to Constitutional Government and those elections had been held under Martial Law, and as they had been held by General Yahya, the Chief Justice said that Martial Law Legislation, which was in public interest, would be valid, and he held that Martial Law Order 78 would not be validated as it was unjust and oppressive. This meant that all detention orders passed under Martial Law Order 78 were illegal, and the Chief Justice and three other Judges allowed both the appeals in this ground. But the question of the validation of Martial Law Legislation had been laid down in the interim Constitution, therefore, the observations of the majority Judges about the type of legislation which could be validated by Martial Law were unnecessary, and the appeals could have been allowed under the interim Constitution for the reasons given by Justice Yaqub Ali.

As General Yahya's Martial Law was declared illegal and he was declared a usurper and a traitor for abrogating the Constitution, it followed that the 1958 Martial Law was also illegal. The differences between the two Martial Laws was that the Mirza-Ayub combination had abrogated a democratic constitution framed by a Constituent Assembly, while General Yahya had abrogated a Constitution given by. General Ayub. On the view taken in Dosso's case, the 1962 Constitution was valid as it was the Constitution promulgated by the author of a successful *coup*, President Ayub. But on the view taken in Miss Asma Jilani's case, as General Ayub was a usurper, he could have put the country back on the road to a lawful government either by restoring the 1956 Constitution when he lifted Martial Law, or by holding elections for a Constituent Assembly which could frame a Constitution as in 1955. The learned Judges in Miss Asma Jilani's case took a different view for three reasons. They held that the people had accepted President Ayub's Constitution, that they had accepted his Government as he had been elected the President by the people through free and fair elections, and

because the Judges of the superior Court had taken the oath to uphold his Constitution. The first two reasons were of a political nature.

The majority of the people of the country lived in East Pakistan, and the view that they had accepted the extremely centralized constitution of 1962, which did not also contain any Fundamental Rights, was against reason. Similarly two opinions are possible on the validity of President Ayub's election. Except his admirers, most people thought that he had succeeded in defeating Miss Jinnah through rigged elections. It is true that the Judges of the superior Courts had taken the oath to uphold the Constitution as soon as it was promulgated. But, if the Constitution was not accepted by the people, than the oath taken by the Judges only plunged the country deeper into a Constitutional morass, and therefore the constitution did not legitimize President Ayub's rule. This means that General Yahya was a usurper and a traitor to those who believe that the 1962 Constitution had been accepted by the people of Pakistan and that he had defeated Miss Jinnah through free and fair elections in 1965. But to those who believe that the 1962 Constitution was an unwanted Constitution imposed on the country, and that President Ayub had defeated Miss Jinnah through rigged elections, General Yahya had removed an illegitimate government and put the country back on the road to a Constitutional Government by holding free and fair elections for a Constituent Assembly which would frame a Constitution in accordance with the wishes of the people.

However, on the view taken by the learned Judges, General Yahya was a usurper, because his duty was only to restore law and order and put ex-President Ayub back into power, and not to declare Martial Law. But on the assumption that General Yahya could have succeeded in restoring law and order without declaring Martial Law, the agitation against the ex-President would have been resumed, as the people wanted his retirement and the abolition of his unwanted constitution. Furthermore, as the Judges overruled Dosso's case, the Martial Law of 1958 was illegal, the only way of putting the country back on the road to constitutional government was to abolish the 1962 Constitution and to hold elections for a new Constituent Assembly to frame the country's Constitution. General Yahya abrogated the 1962 Constitution through Martial Law and if he had only declared Martial Law and abrogated the Constitution, it would have been a repetition of the 1958 Martial Law. However, he also announced and held elections for a new Constituent Assembly. That was the only way of getting the country out of the constitutional impasse created by the Martial Law of 1958 and the 1962 Constitution and a person who puts a country with a democratic constitution back on the road to democracy is not a usurper, much less a traitor. But even on the assumption that he was a usurper, the Supreme Court had held in Malik Firoz Khan Noon's case that Courts should not condemn anyone unheard. Therefore, General Yahya's position in these appeals was identical to that of Malik Firoz Khan Noon, the Prime Minister of Pakistan in 1958. Justice Shabbir Ahmed had passed very strong strictures against Malik Firoz Khan Noon, without hearing him, in his judgement in Mr. Gurmani's case. The Supreme Court ordered the deletion of Justice Shabbir Ahmed's strictures against Malik

Firoz Khan Noon from his judgement, because Courts should not condemn persons without hearing them. And if the Judges had heard General Yahya, he could have explained that he had no means of knowing in 1969 that the Supreme Court would overrule its judgement in Dosso's case in 1972 after he was kept as a prisoner without any charge being brought against him.

There was also a contradiction between the conduct of the Judges and their vehement denunciation of Martial Law. As they had continued working under Martial Law, the popular perception was that the Martial Law was valid in their opinion. Conversely, when a handful of Judges refused to take oath to uphold the Provisional Constitution Order in 1981, the popular perception was that the Provisional Constitution Order was illegal in the opinion of the Judges who had refused to take the oath. In both cases, this popular perception was correct. Now, according to the Attorney-General, as the learned Judges of the Supreme Court had worked without batting an eyelid during Martial Law, they were precluded denouncing Martial Law as illegal. This submission went too far, but as Dosso's case held the field until it was overruled, the fact that the Judges had continued to work during the Martial Law of General Yahya and of Mr Bhutto had led both to believe that the Supreme Court had validated their governments. This was another reason why the learned Judges should not have given retrospective effect to their judgments.

It is clear from Justice Yaqub Ali's judgement that an advocate had also submitted that if Martial Law was so patently illegal, the Judges should have resigned. The Chief Justice rejected this submission with the observation that the function of the Courts is only to decide the controversies raised before them. There are Judges and Judges, and cases and cases. There are Judges who follow the views of the Chief Justice. But when a case has not been well argued, there are Judges who believe that they cannot do injustice because of poor advocacy, and they supplement the arguments advanced before them by their own research into the law. But the further question before the Judges of the Supreme Court was that they had taken an oath to uphold the 1962 Constitution. This led the Chief Justice to observe:

> Incidentally it may also be mentioned here that a great deal that has been said about the oath of Judges is also not germane to the question now before us, for, in the view I take of the duty of a Judge to decide a controversy that is brought before him it cannot be said that any Judge of this Court has violated his oath which he took under the Constitution of 1962. He was not called upon to take any other oath thereafter and is still no doubt bound by that oath and will stand by it. But it must not be overlooked that since his own powers are limited to deciding a controversy properly brought before him by a litigant or on his behalf, and equal duty lay on the gentlemen of the Bar as well to raise this question.

I do not agree with these observations. If a Judge believed that the Constitution of 1962 had been abrogated by a Martial Law which was illegal, he violated his oath by continuing work as a Judge. Therefore when Martial Law was declared in 1969, it was our duty and our responsibility, as Judges to decide whether we should resign or continue work. That decision turned primarily on considerations of a moral nature and not on legal quibbles, and no person can shift his responsibility for deciding questions turning primarily on moral considerations to other persons. Justice Yaqub Ali tried to face this problem and observed:

> My own view is that a person who destroys the national legal order in an illegitimate manner cannot be regarded as a valid source of law-making. May be, that on account of his holding the coercive apparatus of the State, the people and the Courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and Courts will not recognize its rule and act upon them as de jure. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper, he should be tried for treason and suitably punished. This alone will serve as a deterrent to would be adventures.

I respect Justice Yaqub Ali's honesty in facing facts. His observation that 'the Courts are silenced temporarily' was an admission that he and his companion Judges had worked under General Yahya's Martial Law, just as Justice Munir and his companion Judges had worked under General Ayub's Martial Law. But as silence speaks when there is a duty to protest, the Courts are not 'silenced temporarily' when there is an illegal seizure of power, and if Judges resign in such a crisis, the public knows that the new government is illegal in their opinion. However, Justice Yaqub Ali also said that when the traitor falls from power, he should be tried for treason. But if the Courts 'were silenced temporarily' when the usurper was in power, can they sit in judgement on the traitor? It is unfortunate that the counsel who appeared in the appeals did not remind the Judges of the saying 'Let him who is innocent cast the first stone'.

The judgments also contain *obiter dicta*, observations not necessary for the decision of the appeals before the Court, and as a couple of these *obiter dicta* have had far-reaching consequences on our jurisprudence they need to be examined. It appears that the submission of one of the advocates was that the word law in Article 2 of the Constitution had to be given a liberal meaning. This submission was supported by Justice Hamoodur Rehman's observations in Baqi Baloch's case. Although it was not necessary for the learned Judges to give a finding on this submission, they did so, and Justice Hamoodur Rehman observed:

> So far as a Judge is concerned, if a definition is necessary, all that he has to see is that the law which he is called upon to administer is made by a person or authority legally competent to make laws and law is capable of being enforced

by the legal machinery. This, in my view, brings in the notion both of legitimacy and efficacy.

These observations are inconsistent with Supreme Court's judgement in Jibendra Kishore's case and also with Justice Hamoodur Rehman's observations in Baqi Baloch's case that Article 2 was like the due process clause of the American Constitution, but not identical to it. Unfortunately, later judgments of the Supreme Court followed Justice Hamoodur Rehman's formal view of the word law in this case.

It would appear that another submission before the Court was that the Objective Resolution was the *grund-norm* of Pakistan. The word *grund-norm* is a German word which means basic norm. A basic norm is a norm for testing the validity of laws, including a Constitution. Ever since the Constituent Assembly passed the Objective Resolution in 1949, there had been a political controversy about the importance of this Resolution, but it had been relegated to the preamble of the 1956 and 1962 Constitutions, and it is elementary that the preamble of a Constitution is a very unimportant part of a constitution, yet Justice Sajjad Ahmed Jan described the Resolution as the *grund-norm* of Pakistan, while Justice Hamoodur Rehman's reference to it was very ambiguous. A person who shared the views of the theocratic parties was likely to read his observations to mean that he supported the view that the Resolution was the country's *grund-norm*.

These observations of the two learned Judges also led to another round of litigation, which was decided by the Supreme Court's judgement in the *State v Zia-ur-Rehman and others* (PLD 1973 SC 49). The facts of these appeals were complicated, but is sufficient to state that Mr Zia-ur-Rehman and other respondents were being prosecuted in various military courts in the Punjab before the promulgation of the interim constitution. They had challenged their prosecutions in writ petitions in the Lahore High Court. These petitions had been admitted by different Judges, and stay orders had been issued against military courts for staying the proceeding before them in some petitions only. All the petitions were, however, heard together by a Bench of five Judges of the High Court after the interim constitution had come into force. As Article 281 of the interim constitution had come into force it validated all Martial Law legislation and prosecutions commenced during Martial Law under Martial Law legislation. One of the submissions of the petitioners was that Article 281 was illegal, as the Supreme Court had held in Asma Jilani's case that the Objective Resolution was the country's grund-norm, and Article 281 was inconsistent with the Objective Resolution. Three learned Judges held that Article 281 was valid, and they observed that the Resolution 'merely defined the goals and aims which the people had set before themselves'. But the other two learned Judges held, on the basis of the Supreme Court's judgement in Asma Jilani's case, that the Resolution was a supra-constitutional instrument and therefore Article 281 was invalid. The Government filed appeals in the Supreme Court which were disposed of on the facts of each case. The submission of Mr Zia-ur-Rehman and

others was that Article 281 was illegal as it was inconsistent with the Objective Resolution which was supra-constitutional provision, as observed by Justice Hamoodur Rehman and others in Asma Jilani's case.

Chief Justice Hamoodur Rehman wrote the judgement of the court. He observed that the Objective Resolution was 'an important document, but it was not a supra-constitutional document, nor it is enforceable as such, for having been incorporated in the preamble, it stands on the same footing as a preamble. It may be looked and to remove doubts of any provision of the constitution is not clear but cannot override or control the Constitution'. Next, to avoid misunderstanding in the future, he defined the duties of the Supreme Court in construing a constitution:

> Having said this much about the constitutional position of the Courts and their relationship with the other equally important organ of the State, namely the Legislature, it is not necessary to examine as to whether any document other than the constitution itself can be given a similar or higher status or whether the judiciary can, in the exercise of its judicial power, strike down any provision of the constitution itself either; because, it is in conflict with the laws of God or of nature or of morality or some other solemn declaration which the people themselves may have adopted for indicating the form of Government they wish to be established. I for my part cannot conceive of a situation, in which, after a formal written constitution has been lawfully adopted by a competent body and has been generally accepted by the people, including the judiciary as the constitution of the country, the judiciary can claim to declare any of its provisions *ultra vires* or void. This will be no part of its function of interpretation. Therefore, in my view, however solemn or sacrosanct a document, if it is not incorporated in the constitution, at any rate, the Courts created under the constitution will not have the power to declare any provision of the construction itself as being in violation of such a document.

These observations are the law declared by the Supreme Court and they have clarified and/or overruled the view to the contrary, if any, in Asma Jilani's case that the Objective Resolution was the *grund-norm* of Pakistan or that it was a supra-constitutional provision.

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THE 1973 CONSTITUTION

The 1973 Constitution was promulgated on 12 April 1973. The chapter on Fundamental Rights made some departures from the Fundamental Rights guaranteed in the Constitutions of 1956 and 1962. As in those Constitutions, it was stated that no property can be compulsorily acquired or taken possession of save for a public purpose, by a law which provides for compensation, and either fixes the amount of compensation for the property acquired or specifies the principles for fixing the compensation. Also, as in earlier Constitutions, there were exceptions to the direction to pay compensation for the property acquired, but the number of these exceptions was enlarged to protect the welfare legislation carried out by Mr. Bhutto's Government. During the period when Mr. Bhutto was the President and the Chief Martial Law Administrator, he had promulgated Martial Law Regulation 115 which had reduced the ceilings of agricultural land which could be owned by any person, and land in excess of these ceilings was taken over by the State without any compensation for distribution amongst the rural poor. As the Fundamental Right of owning property was conferred by Article 24, an exception to this Article read with Article 253 gave constitutional immunity to Martial Law Regulation 115 as well as to laws by which industries were nationalized, and further, according to clause (4) of Article 24, the adequacy of compensation provided for in a law for the acquisition of property could not be questioned in a new Court. Another new exception to Article 24 was any law for taking over property which had been 'acquired by or come into the possession of any person, by any unfair means or in any manner, contrary to law'. This is a provision which permits the taking over of property acquired dishonestly, but it does not appear to have been enforced by any Government.
The Fundamental Right to form political parties was guaranteed by Article 17. As originally promulgated, this Article was copied from earlier Constitutions, but with a new clause, which required every political party to account for the source of the funds. So subject to this provision for the disclosure of its funds by a political party, citizens were free to form associations or unions, subject only 'to any reasonable restrictions imposed by law in the interest of morality or public order'. But this Article was amended in 1974. The first clause defined the rights of associations and unions and was again amended a year later. The second clause of the amended Article conferred a right on citizens 'to form or be a member of a political party subject to any reasonable restrictions to be imposed by law in the interest of the sovereignty or integrity of Pakistan...' and will be examined later.

The country was a parliamentary democracy according to the Constitution, and essential to the parliamentary system is the principle that member of Assemblies should not vote according to the directions of the party to which they belong, if it is against

their conscience or against the national interest. This principle is an essential safeguard against Prime Ministers abusing their majority in Parliament in order to make themselves dictators. Article 96 of the Constitution recognized the right of a member of the National Assembly to vote according to his or her conscience, but by a very ingenious provision in this Article if a member casts his vote in support of a resolution for a vote of no-confidence against the Prime Minister, the vote was to be disregarded if the majority of the members of his party voted against the resolution. According to Article 96 of the constitution, as originally promulgated, the Article prescribed the manner in which a resolution of no-confidence can be moved against the Prime Minister, and clause 5 which deals with such resolutions had read,

> If the resolution referred to in clause (1) is passed by a majority of the total membership of the National Assembly, the President shall call upon the person named in the resolution as the successor to assume office and on his entering upon office his predecessor and the Federal Ministers and Ministers of State appointed by him shall cease to hold office.

Provided that, for a period of ten years from the commencing day or the holding of the second general elections to the National Assembly whichever occurs later, the vote of a member, elected to the National Assembly is a candidate or nominee of a political party, cast in support of a resolution for a vote of no-confidence shall be disregarded if the majority of the members of that political party in the National Assembly has cast its votes against the passing of such resolution.

The PPP had a clear majority in the National Assembly when the constitution was promulgated in April 1973. Mr. Bhutto was also extremely popular with the masses. The consequence of the proviso to clause (5) was that a resolution of no-confidence against Mr Bhutto had no chance whatsoever of being successful during the life of the National Assembly elected in 1970. This proviso was consistent with the system of parliamentary democracy, but as it made Mr Bhutto's position as Prime Minister completely secure, he was in a position to tolerate criticism. If he had, he would have laid the foundations of democracy in the country, but that was not to be.

Malik Ghulam Jilani and Mr. Altaf Gauhar were released on or after 21 April 1972 as their detention had been declared illegal by the Supreme Court in Asma Jilani's case and that was the end of Malik Ghulam Jilani's harassment. But shortly after his release, another detention order was passed against Mr. Altaf Gauhar and he was again arrested. Another writ petition was filed in the Sindh Balochistan High Court challenging his detention, which was allowed. The Chief Justice allowed the writ petition on legal grounds, but Justice Fakhruddin Ebrahim also examined the evidence on the record and held that the detention was not supported by any evidence. This probably saved Mr. Altaf Gauhar from another detention order. As Martial Law had been lifted, the case received great publicity in the newspaper, and as Mr. Altaf Gauhar

was editor of a leading newspaper, people were dismayed by the cross-examination which he had to endure. It was irrelevant and in bad taste. It was unfortunate that the Chief Justice did not stop the cross-examination on the ground that it was irrelevant. As such tactics could not possibly advance the Government's case against the detenue, the object of the cross-examination was probably to give a warning to the press to stop criticizing the Government.

Shortly afterwards the District Judge of Sanghar was arrested. It is believed that he was arrested because he had given bail to a minor politician on the basis of a judgement of the Sindh Balochistan High Court. He applied for interim bail in the High Court but as his application was dismissed, he went to the Supreme Court and the Supreme Court gave him interim bail. Nothing was ever heard thereafter of the case against the District Judge and it is obvious that he had been arrested on a false charge. And this attempt to prosecute a District Judge for performing his duties as a Judge had a traumatic effect on the subordinate Judiciary of Sindh.

The political atmosphere in the country was changing and the number of detention cases in the High Courts increased. Detention orders not supported by evidence were set aside, and sometimes Judges of High Courts gave interim bail, pending the hearing of a writ petition against a detention order. The Government, therefore, made two amendments in the Constitution divesting the High Courts of their jurisdiction to grant interim bail in detention cases. The West Pakistan Press and Publication Ordinance, 1963 had been promulgated in order to control the press. It prescribed the conditions which had to be complied with before a newspaper could commence publication. One of these conditions was a declaration which had to be filed before a District Magistrate, and if this declaration was annulled, the newspaper had to cease publication. Section 27 of the Ordinance empowered the Provincial Government to demand security from a newspaper and to impose punishment on newspapers whose publications fell within the mischief of Section 24 (1) of this Ordinance. The punishments were a warning, a suspension of the newspaper's declaration, and the annulment of that declaration. Section 24 (1) of this Ordinance and its explanations, were almost identical to the definition of sedition in the Penal Code, which together with its explanations have been examined earlier. Section 24 (1) applied to publications which tended 'directly or indirectly to bring into hatred or contempt the Government established by law in Pakistan or the administration of justice in Pakistan or any class or section of the citizens of Pakistan or to excite disaffection towards the said Government...' The expectations to the sub-section stated in terms that comments criticizing Government policies with a view to obtaining their alteration by lawful means without exciting disaffection or hatred etc. against the Government did not fall within the mischief of Section 24 (1).

The line between legitimate criticism of the Government, which was protected by the explanations to Section 24 (1), and criticism which was not protected by the

explanations was thin. But even after Martial Law had been lifted, newspapers followed a very cautious policy, except for newspapers owned by opposition parties and leaders. Opposition leaders had a very difficult time, and as they had their backs to the wall, their newspapers criticized the Government and Mr. Bhutto freely. *Mehran* of Hyderabad and *Jassarat* of Karachi were newspapers owned by opposition leaders and had been criticizing the Government in very strong language. Therefore both these newspapers were first ordered to furnish security under Section 27 of the Ordinance, and a little later orders were passed by the Provincial Government annulling their declarations. Both *Mehran* and *Jassarat* filed writ petitions in the Sindh Balochistan High Court challenging the orders passed against them and their petitions were allowed by the judgement reported in *Ali Hussain Jamali v Government of Sindh and another* (PLD 1974 Karachi 283).

The articles on account of which the Sindh Government had taken action against these two newspapers had criticized the Government and especially Mr. Bhutto, in very strong language. It was stated in these articles that Mr. Bhutto was a dictator and a fascist. It was suggested that he had been responsible for the breakup of the country in 1971, that he had dismissed the elected Government of Balochistan illegally, and that the brutal action taken by him in Balochistan would again lead to the breakup of the country. The economic policies of the Government were criticized, including the devaluation of the rupee, even though that was in the national interest. The Advocate-General's submission, therefore, was that the impugned articles far exceeded the limits of legitimate criticism of the Government's policies, and this submission was supported by judgements of Indian High Courts before the Government of India Act, 1935. However, the view taken in these judgements had been overruled by the Federal Court in Majumdar's case. Sir Maurice Gwyer had held in that case that criticism of the Government, which had been treated as sedition after the Government of India Act, 1935, as that Act had set up democratic Government, and citizens had a right to criticize Governments in a democracy discussed earlier. A similar view had been taken by the Lahore High Court in the case of the newspaper, the *Daily Ehsan* (PLD 1949 Lahore 282). We followed these judgements in Ali Hussain Jamali's case and held that although the criticism in the impugned orders was in very strong language, it was protected by the explanations to Section 24 of the West Pakistan Press and Publications Ordinance. Therefore, the orders passed by the Sindh Government against Mehran and Jassarat under Section 27 of the Ordinance were declared illegal and the petitions were allowed.
This judgement crippled the Government's power to harass newspapers through the Press and Publications Ordinance, but newspapers other than opposition newspapers, continued to follow a cautious policy, because the Defence of Pakistan Rules hung like the sword of Damocles over those who took the risk of criticizing the Government. Those risks are illustrated by the Supreme Court's judgements about the prosecutions filed against Choudhry Zahoor Elahi, a right wing opposition leader. In *Choudhry Manzoor Elahi v the Pakistan etc.* (PLD 1975 SC 66) the petitioner was the brother of Choudhry Zahoor Elahi. Choudhry Zahoor Elahi was arrested from his house in Lahore

by the Punjab police on 12 November 1973. As the Superintendent of Police had come without a warrant for his arrest he went away, and returned within an hour with a warrant issued by an Additional District Magistrate Kohli, a remote and inaccessible town in the tribal area of Balochistan. After his arrest, he should have been produced before the District Magistrate at Lahore but the police wanted to send him out of Lahore District. Since they did not do so their action was contrary to Sections 85 and 86 of the Criminal Procedure Code. But as Choudhry Zahoor Elahi had been arrested in Lahore, his family thought that he was in jail in Lahore. Choudhry Manzoor Elahi filed an application for bail for Choudhry Zahoor Elahi and for quashment of proceedings against him on the ground of malafides in the Lahore High Court under Sections 498 and 561-A of the Criminal Procedure Code. The Lahore High Court dismissed this application because of the statement of the Advocate-General of the Punjab that Choudhry Zahoor Elahi had been taken away to some place in Balochistan. On these facts, Malik Ghulam Jilani of the Jilani case filed a constitutional petition in the Sindh Balochistan High Court for a declaration that the entire proceedings against Choudhry Zahoor Elahi were illegal and for his immediate release on interim bail. The Balochistan Government opposed the grant of bail on the ground that the jurisdiction of the High Court did not extend to the tribal areas of Balochistan and that Choudhry Zahoor Elahi was being tried under the Frontier Crimes Regulation 1901 and other similar enactments. The High Court refused interim bail. Meanwhile a petition had been filed to challenge Choudhry Zahoor Elahi's detention directly in the Supreme Court under Article 184 (3) of the Constitution on two grounds. The first was that as the Lahore police had not produced Choudhry Zahoor Elahi before the District Magistrate Lahore before sending him to Kohli, the police had violated Sections 85 and 86 of the Criminal Procedure Code and had thereby violated the Fundamental Rights of Choudhry Zahoor Elahi guaranteed in Article 9 of the Constitution which had not been suspended. The second was that Choudhry Zahoor Elahi had also not been produced before a Magistrate within twenty-four hours of his arrest in breach of Article 10 (1) of the Constitution which had also not been suspended. Malafides was also alleged against the Government, and the petitioner's claim that six cases had been filed against Choudhry Zahoor Elahi's relations was not denied. These cases were against Choudhry Zahoor Elahi's son, his brother, his nephew and son-in-law, another nephew, another brother-in-law, and, even against his private secretary.

All the Judges, including Chief Justice Hamoodur Rehman, rejected the Government's contention that the jurisdiction of our High Courts did not extend to the tribal areas of the country. They also held that the Lahore High Court had not lost its jurisdiction to grant relief to Choudhry Zahoor Elahi, as he had been illegally taken out of the territorial limits of that High Court. Except the Chief Justice, the other Judges also accepted the contention in the petition that Articles 9 and 10 of the Constitution had been violated. Article 9 reads: 'No person shall be deprived of life or liberty save in accordance with law.' It does not appear to have been contested that this article had been violated because the Lahore police had flouted the provision of Sections 85 and 86

of the Criminal Procedure Code, but the further contention was that Choudhry Zahoor Elahi's arrest was in violation of Article 9 also, because the Frontier Crimes Regulation under which he was to be tried was not fit to be described as law within the meaning of the word 'law' in Article 9. Justice Salahuddin Ahmed and Justice Anwarul Haq accepted this convention and held that as the procedure prescribed for trials under the Frontier Crimes Regulation was arbitrary, this Regulation was not fit to be called law. This alone makes the case a landmark in our jurisprudence. Justice Salahuddin Ahmed also pointed out that the uncontroverted allegations of the cases filed against Choudhry Zahoor Elahi's family were evidence of malafides, and he was of the view that the Lahore High Court had erred in dismissing the petition filed on Choudhry Zahoor Elahi's behalf under Sections 498 and 561-A of the Criminal Procedure Code for bail and for quashment of the cases against him. He held that the Lahore High Court should have treated this application as a constitutional petition under Article 199 of the Constitution and heard it. The other learned Judges did not take this view, but it was followed fifteen years later by the superior Courts when they took up with fanfare what was called the Principle of Judicial Activism. Although there was a cleavage of opinion amongst the Judges on important questions of law, they all held that Choudhry Zahoor Elahi should be released on interim bail until the Sindh Balochistan High Court decided the writ petition filed by Malik Ghulam Jilani.

Unfortunately Choudhry Zahoor Elahi's victory was short-lived. He was again arrested in Lahore on 6 February 1976 on a murder charge, but released on bail by the Lahore High Court on 12 February 1976. This charge of murder was false, as nothing was ever heard of it thereafter. But before the Lahore High Court's order could be carried out, Choudhry Zahoor Elahi was arrested at the instance of the Karachi police on 13 February 1976 under the West Pakistan Maintenance of Public Order Ordinance. He was taken to Karachi, but as an Additional Session Judge granted him bail on 23 February 1976, he was rearrested, without being released, on charges under the Defence of Pakistan Rules based on speeches which he was alleged to have made in Karachi. Choudhry Zahoor Elahi challenged his arrest as illegal in a writ petition in the Sindh Balochistan High Court, as also on the facts established by him in the earlier round of proceedings reported as *Choudhry Manzoor Elahi v Pakistan*. Together with the petition, he applied for interim bail pending the trial of the case against him before tribunals under the Defence of Pakistan Rules. The Government opposed the application for interim bail on the plea that the jurisdiction of the superior Courts to grant interim bail in cases under the Defence of Pakistan Rules had been taken away by Rule 210 of those Rules. The Sindh Balochistan High Court accepted the Government's interpretation of Rule 210 on the basis of an old judgement of the Supreme Court which was inconsistent with later judgements of the Supreme Court. As the High Court accepted this plea, it should have examined the petitioner's plea of *malafides*, because the narration of the cases against the petitioner and his family was sufficient to make out a strong *prima facie* case of *malafides*. Yet the Court declined to go into this question.

The petitioner, therefore, challenged the dismissal of his bail application in a petition for leave in the Supreme Court. The Chief Justice, Justice Yaqub Ali, agreed with the view of the High Court that it had no jurisdiction to grant interim bail in a case withdrawn to a tribunal under the Defence of Pakistan Rules. Yet he declined to examine the petitioner's plea of *malafides* on the ground that it should first be decided by the High Court. This was very unfortunate. Justice Cheema agreed with the view of the Chief Justice that the High Court could not grant interim bail in view of Rule 210 of the Defence of Pakistan Rules. He therefore examined the plea of *malafides* and held that the case against the petitioner was *prima facie malafide*. The other learned Judges held; after a very careful examination of the innumerable judgements cited before them, that the jurisdiction of the superior Courts to grant bail under the Criminal Procedure Code had not been taken away by Rule 210. This was the majority view of the Court, and the difference between the majority view and the minority view was that the majority placed a strict construction on Rule 210. The result, therefore, was that with the Chief Justice dissenting, the four other Judges of the Court ordered the release of Choudhry Zahoor Elahi on interim bail, pending the trial of his case before the tribunals under the Defence of Pakistan Rules. The petitioner was released and nothing was thereafter heard of the case against him under the Defence of Pakistan Rules.

The allegations against Choudhry Zahoor Elahi did not have the remotest connection with the defence of the country. He was only criticizing the Government and Mr. Bhutto, and criticism of the Prime Minister of a country or of its Government does not jeopardize the defence of that country. In view of the Simla Agreement with India, there was also no possibility of a war, therefore it was unfortunate that the Court was not asked to review its judgement in Baqi Baloch's case that the Government could use the oppressive provisions of the Defence of Pakistan Rules to crush dissent and silence the opposition. A Proclamation of Emergency was in force during the period Mr. Bhutto was in power, and as these Proclamations had been renewed regularly by a supine Legislature, the Courts could not question their validity. But this only meant that the Defence of Pakistan Rules remained in force. It did not mean that the superior Courts could not declare a prosecution under these rules illegal, if the charge against the accused had no connection with the defence of the country, and, in my opinion, the charges against Choudhry Zahoor Elahi did not fall under these rules, as his criticism of the Government did not in any way jeopardize the defence of the country.

The next important judgement of the Supreme Court was in *Pakistan v Abdul Wali Khan, NINA and others* (PLD 1976 SC 53) and it was in painful contrast to the bold stand taken by the Court in Choudhry Zahoor Elahi's case. Unfortunately for our jurisprudence, Mr Wali Khan's father, Ghaffar Khan, had been one of the leaders of the Indian National Congress before independence. He was opposed to the partition of India before independence because he believed that India's partition would not solve the Hindu-Muslim problem, as millions of Muslims would have to continue living in India, and their conditions would deteriorate if India was divided on the basis of religion. The

Establishment therefore suspected the loyalty of Ghaffar Khan, his family and his followers to the country. Suspicion is the enemy of reason, but the persons who suffered from this prejudice included Judges of the superior Courts, leaders of the Bar, Generals, intelligence services and all the right of centre parties. Ghaffar Khan and Wali Khan had therefore spent many years of their lives after independence in prison under detention orders, and after his release Ghaffar Khan went into exile, while Wali Khan and the followers of Ghaffar Khan and some other progressive parties and groups formed the National Awami Party, hereafter called the NAP.

NAP's following was confined to the Frontier Province and Balochistan, and both these provinces were governed after Martial Law was lifted in 1972 by a coalition of parties in which the NAP was the senior partner. Mr Wali Khan was also the leader of the opposition in the National Assembly which began its sittings in 1972, and he and his party co-operated with the PPP in passing the 1973 constitution. However, this co-operation ended very soon, and as Mr Bhutto dismissed the NAP government in Balochistan, the NAP government in the Frontier Province resigned in protest, and thereafter, according to the Government, NAP began a campaign of terrorism against the Government.

The Political Parties Act was promulgated in 1962 by President Ayub. Political Parties propagating any opinion or acting in a manner prejudicial to the Islamic ideology or to the integrity or to the security of Pakistan could be dissolved by the Federal Government. As there are always diverse interpretations of ideologies, the power to dissolve a political party on the ground that it is against an ideology is an arbitrary power, and it is also a repudiation of democratic norms, but the law was enacted during the pendency of the 1962 constitution which was not intended to be a democratic constitution. In 1974 the PPP Government amended the Political Parties Act, so that a political party could be dissolved after this amendment only if it was propagating any opinion or acting in a manner prejudicial to the sovereignty and integrity of Pakistan. This amendment was a step forward, as it curtailed the scope of an arbitrary law.

In 1975 the Federal Government dissolved the NAP. It was the major opposition party in the country, and its leader, Mr Wali Khan, was the Leader of the Opposition in the National Assembly. After dissolving the NAP, the Government referred its decision for approval to the Supreme Court, as required by the Political Parties Act. The Government then filed its complaint in the Supreme Court, according to which the NAP and its leaders had been working for many years for the breakup of Pakistan by creating an independent state called Pakhtoonistan for the Pathans of the Frontier Province and the Balochistan. They had, after 1973, resorted to violence and terrorism, including an armed insurgency in Balochistan, in order to achieve their goal of an independent Pakhtoonistan. Mr Wali Khan and the other defendants explained in their replies that their demand for Pakhtoonistan was not a demand for a separate state but only for genuine provincial autonomy for the Frontier Province, and they believed that

it was desirable for the country to have a loose federation. They repudiated as absolutely false all the other allegations against them of violence, terrorism, subversion of the constitution, etc.

The Federal Government also alleged in its complaint that the NAP and its leaders were against the ideology of Pakistan. Mr. Wali Khan and the other leaders of the NAP emphasized their loyalty to the country and pointed out that they had spent many years in jail because they were fighting for a democratic Pakistan, and they rejected as false the Government's claim that Pakistan had an ideology. They submitted that this false claim had been advanced in order to convert the country, step by step, into dictatorship of the ruling party. Further, according to Mr Wali Khan, democratic states did not have official ideologies, and the alleged ideology of Pakistan had also not been defined in the constitution. Finally Mr. Wali Khan also specifically raised the plea that the policies of his party were supported by the historic speech made by Mr. Jinnah as Governor-General and President of the Constituent Assembly on 11 August 1947.

The Reference had a bad start. Article 248 of the Constitution gives complete legal immunity to statements made by the Prime Minister, Ministers, etc. in the performance of their duties. Taking advantage of this immunity, after he had moved his Reference against NAP and its leaders to the Supreme Court, Mr Bhutto made a speech at a public meeting in which he said 'the Opposition parties are dancing to the tune of Afghanistan and have joined the Afghanistan Government's demand for the release of the NAP leadership. In our country we have tolerated Afghans and Congress agents for several years but all our efforts have failed.' Then, after stating that he had referred the matter to the Supreme Court and would abide by its decision, he said that if the Supreme Court 'gives a decision against us, then it will not be my decision or that of the people. We will accept this decision but the responsibility of the consequence will be of the Supreme Court.' It was unfortunate that the Prime Minister took advantage of Article 248 to make a statement which would have amounted to gross contempt on the law declared by the Supreme Court, if the statement had been made by a person not protected by Article 248. As the statement also cast aspersions on the loyalty of Opposition parties, Choudhry Zahoor Elahi moved a contempt application against Mr. Bhutto in the Supreme Court. The Court held that Mr. Bhutto was protected from contempt proceedings by Article 248, and it was, therefore, not necessary for the Chief Justice to consider whether Mr. Bhutto's statement would have amounted to contempt if it had not been protected by Article 248. None the less, after pointing out that Mr. Bhutto had said that he would respect the Court's decision, the Chief Justice said: 'The Prime Minister did not intend to show any disrespect to this Court and to influence its decision in any way as he had himself stated publicly in a subsequent speech.' But if Mr. Bhutto had not intended to influence the Supreme, Court's decision, he would not have made a speech which had a direct bearing on the merits of the Reference made by him to the Court, and he would not have said that he would not be responsible for the consequences of the Court's decision if it went against him. The attempt of the Chief

Justice to defend Mr. Bhutto was unnecessary and unjustified. It had a disastrous effect on the image of the judiciary and the confidence of the defendants in the Court.

After the dismissal of Choudhry Zahoor Elahi's contempt application against Mr. Bhutto, there were a couple of misunderstandings between the Court and the defendants and after they had filed their replies to the Government's complaint, all the defendants withdrew from the Reference and did not thereafter participate in it. The Chief Justice appointed two advocates to represent the defendants. But as the case was pure politics, only advocates who believed in the NAP's secular policies could have contested the Reference properly. Further if this had been done, the misunderstandings between the Judges and the defendants might have been removed. This was not done, and going by the judgements of the Chief Justice and of Justice Gul, who wrote a separate judgement, it does not appear that the defences taken by the defendants in their replies to the Government's complaint were argued properly before the Court.

The Chief Justice wrote the leading judgement of the Court. He held that the Government had proved its allegations that the NAP and its leaders had been trying to breakup the country and had resorted to terrorism, armed insurgency, the subversion of the Constitution, etc., in order to create an independent Pakhtoonistan. These findings were based on intelligence reports and newspaper reports of the speeches of Mr. Wali Khan, of his father, and of members of the NAP. The Judges must have had some misgivings about the veracity of these reports, as the Chief Justice said that he had relied in his judgement only on intelligence reports whose authors had been cross-examined. But the advocates, who cross-examined the intelligence agents on their reports, were not members of the NAP and could not have been familiar with Mr. Wali Khan's speeches over a long period of time. Also, as the defendants had boycotted the proceedings in the Court, the advocates cross-examined witnesses without instructions from the defendants, therefore, the cross-examinations were an exercise in futility. The Chief Justice also said that he had relied on newspaper reports and books about the activities and speeches of Mr. Wali Khan and of the defendants as they had not issued statements to the press contradicting the speeches and statements attributed to them. It escaped the attention of the Chief Justice that the defendants had spent long years in prison, because they refused to bend to dictators, and prisoners have very limited access to newspapers and books. It also escaped the attention of the Chief Justice that newspaper reports are often biased and unfair through the negligence of reporters, or on account of the policies imposed on newspapers by their proprietors. Finally, as the press was not free, it could not risk annoying the Government by publishing contradictions by NAP leaders, who were the bane of every Government between 1947 and 1977.

Sometimes history moves very fast, and the events after the Supreme Court's judgement speak for themselves. The necessary implication of the findings of the Supreme Court that the NAP leaders had resorted to terrorism, an armed rebellion, etc. was that they

had committed offences like sedition, subversion of the Constitution, etc., and therefore, as night follows day, the Government set up a Tribunal of three Judges for the trial of the defendants for these offences. As the Judges of this Tribunal were selected by the Government from different High Courts, the prosecution of the defendants proceeded very slowly, and meanwhile General Ziaul Haq had removed Mr Bhutto and his Government and proclaimed our third Martial Law in July 1977. After several months, the Government announced that the cases against the defendants had been withdrawn and the Tribunal of three Judges was wound up. General Zia, who was the most conservative and orthodox of our rulers, hailed Mr Wali Khan and the defendants as patriots and the NAP, reformed under another name, joined the political mainstream.

The only possible inference from these facts is that the Supreme Court should not have relied on intelligence reports and newspaper reports for the purpose of accepting the Government's Reference.

The Chief Justice's findings about the alleged terrorist activities of the defendants were sufficient to justify the Governments dissolution of the NAP, and it was not necessary for the Courts to go into the further allegation in the Reference that the NAP and its leaders were against the ideology of Pakistan, and it would have been better if the Court had refrained from deciding this issue, as the defendants had withdrawn from the case and, on the other hand, the power to dissolve a political party on the vague ground of ideology can destroy democracy in countries like Pakistan in which democracy has not taken roots. The grounds on which a political party can be dissolved are stated in Section 3 of the Political Parties Act. This section has been amended more than once, but at the time of the Reference, a political party could be dissolved only if it was against the integrity and sovereignty of Pakistan. The word integrity is capable of more than one meaning, and on a liberal construction of the word, it can mean the ideology of a state if the state has an official ideology. But it is a long established principle of the common law that penal laws must be construed strictly. and Section 3 is a penal provision, therefore, the word integrity in it cannot be construed to mean any ideology. Unfortunately, neither the Chief Justice nor Justice Gul have explained how a political party could be dissolved after the amendment of Section 3 in 1974 on the ground that it was against the ideology of Pakistan, and in my opinion the Government did not have the power to dissolve the NAP on this ground, and the Supreme Court did not have the jurisdiction to uphold the Reference on this ground. However, as the Supreme Court held that a political party could be dissolved on this ground, it was the Court's duty to examine the very clear pleas taken by Mr Wali Khan and the other defendants on the question of ideology.

According to Mr. Wali Khan, democratic states did not have ideologies. A democratic society is a pluralist society, and it is difficult for an ideological state to be a pluralist society. On the other hand, ideological states have generally ended up as dictatorships, because criticism of the state's ideology is resented. But in democracy citizens and

political parties have the right to criticize the most cherished values of society. That was probably why the Constituent Assembly, which had framed a democratic Constitution, had rejected the demand for an official ideology for the country. But whatever be the reasons that led the Constituent Assembly not to impose an official ideology on the country, the question whether a country should have an official ideology is a purely political question, and therefore, the Constituent Assembly alone could decide it, and there was great force in Mr. Wali Khan's plea that it was not for the Courts to decide whether Pakistan should have an official ideology, and, if so, what that ideology should be. Mr. Wali Khan's objection went to the roots of the Reference and if his objection was correct, it meant that the Supreme Court was usurping jurisdiction in laying down an ideology for the country. Unfortunately, neither the Chief Justice nor Justice Gul examined this question, although it had been very clearly raised not only by Mr. Wali Khan but by the other defendants in their pleadings.

Although the Chief Justice accepted the Government's contention that Pakistan had an official ideology, he made no attempt to describe or define it, and his conception of the ideology of Pakistan has to be gathered from stray passages in his judgement. In summing up his conclusions in the Reference, the Chief Justice observed:

> ...We find on the material produced before us no difficulty in holding that the NAP and its leaders are not reconciled to Pakistan's existence, integrity and sovereignty, that they have consistently been attempting to create doubts about people's belief in the Ideology of Pakistan with a view to destroying the very concept which formed the basis of the creation of this country, that they have always been preaching the doctrine of four/five nationalities/nations to prepare the ground for the ultimate secession of NWFP and Balochistan on the pretext of demanding the right of self-determination for the different nationalities/nations inhabiting those Provinces.

The reference in this passage to the concept 'which formed the basis of the creation of this country' was to the Two Nation theory formulated by Mr. Jinnah in his speech in Lahore on the resolution for the partition of India on 24 March 1947. Mr. Jinnah said that Hindus and Muslims were separate nations, and as Hindus would always be in a majority in an independent India, they would oppress the Muslim nation, therefore, India should be partitioned so that the Muslim majority areas of India would be independent states. According to Mr. Wali Khan, the Two Nation theory was a means employed to create Pakistan and it had lost its relevance after the creation of Pakistan. It is clear from the observations of the Chief Justice that the Two Nation theory was sacrosanct to him, and he was shocked by Mr. Wali Khan's criticism of this theory because it would, according to the Chief Justice 'create doubts about people's belief in the Ideology of Pakistan'. I cannot understand how Mr. Wali Khan's statements or criticism of the Two Nation theory could create doubts about the ideology of Pakistan, unless this ideology was to be followed blindly by citizens. But criticism is the life blood

of democracy and the Two Nation theory was an analysis of history, and even if Mr. Wali Khan's analysis was wrong, he was entitled to express his views. Additionally, as Mr Wali Khan had expressly pleaded that his views were supported by Mr. Jinnah's historic speech on the inauguration of the Constituent Assembly, the Chief Justice should not have condemned Mr. Wali Khan without examining that speech. Mr. Jinnah had said in this speech:

> Now, if we want to make this great State of Pakistan happy and prosperous we should wholly and solely concentrate on the well being of the people, and especially of the masses and the poor. If you will work in co-operation, forgetting the past, burying the hatchet you are bound to succeed. If you change your past and work together in a spirit that everyone of you, no matter to what community he belongs, no matter what is his colour, cast or creed, is first, second and last a citizen of this State with equal rights, privileges and obligations, there will be no end to the progress you will make.

Mr Jinnah then said:

> You are free to go to your temples, you are free to go to your mosques or to any other places of worship in this State of Pakistan. You may belong to any religion or a cast or creed—that has nothing to do with the business of the State.

These passages supported the secular policies of NAP. Finally Mr. Jinnah said that if the ideals advocated by him were kept,

> in front of us as our ideal and you will find that in course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State.

These observations are very clear and if the Chief Justice had studied the speech, he might have rejected the Reference on the issue of ideology.

The Chief Justice also held that the NAP's claim that Pakistan consisted of four/five nationalities was an attack on the integrity and sovereignty of Pakistan and he rejected the explanation of the defendant that a state could consist of several nationalities. But about that time the. Reference was being argued in the Supreme Court, the Scots and the Welsh had made a demand that Great Britain consisted of three nationalities, the English, the Scots and the Welsh. Neither the British government nor the British people treated these demands as an attempt to undermine the integrity and sovereignty of Great Britain, and Great Britain today takes pride on saying that it consists of three nationalities. Two views are therefore possible on the question, but not according to the Chief Justice.

As a corollary of their view that Pakistan consisted of four/five nationalities, the NAP leaders had been advocating a very loose federation for Pakistan. The Chief Justice was shocked by the idea of a loose federation and observed that 'if such a loose federation were to come into existence, the sovereignty and integrity of Pakistan, as now prevailing, would not be there.' He thought that this demand too was an attempt to breakup Pakistan. But Pakistan was not the only federation in the world and the view of the NAP was supported by the experience of other federations. To take only one example, Canada was a federation with a strong centre, but it has been troubled for a quarter of a century by the threat of secession from the province of Quebec. Canada's neighbour, the United States of America, has grown from strength to strength, although it is a federation, with a weak centre. Because our leaders have tried to learn the lessons of history, no one today believes that a loose federation would undermine the country's integrity. The Chief Justice also forgot that it is the right of citizens and of political parties in a democracy to advocate changes in the Constitution of the country. The only inference from his harsh strictures on the NAP and its leaders for demanding a loose federation is that the concept of Pakistan as a federation with a strong centre was an essential part of the Chief Justice's ideology of Pakistan. But if a country is to have an ideology, that ideology must lay down the guidelines for more questions than whether the country is to be a federation with a strong centre or a weak centre. By accepting the Reference on the issue of ideology without defining that ideology, the judgement has given the Government horrendous power to eliminate opposition parties on the ground that they are against an undefined ideology. The requirement that the Government's decision to dissolve a political party can be enforced only if it is approved by the Supreme Court is a check on this power, but a very limited check. As the ideology of Pakistan has not been defined, there are no objective criteria for determining whether the policies of a political party are or are not against the ideology of Pakistan. Therefore, Judges can decide this question only on the basis of their own political views. This cannot but involve the judiciary in political controversies, and it would be a euphemism to say that the judgement in Wali Khan's case did not do any good to the image of the judiciary.

There is another aspect of this case which disturbed people. The strictures of the Chief Justice against the defendants were relevant to the decision of the Reference, but they led to the prosecution of the defendants for offences before a tribunal of High Court Judges. In view of the very strong observations of the Chief Justice, the apprehension of the public was that the defendants were bound to be convicted by a tribunal consisting of High Court Judges. But the Reference was treated as a civil suit, and the burden of proving allegations against the defendants in a civil suit, is higher than the burden of proving the guilt of the accused in a prosecution. However, Judges and lawyers were also deeply disturbed by the question whether High Court Judges would go against the very strong observations of the Chief Justice against the defendants. The provision in Article 17 of the Constitution and in Section 6 of the Political Parties Act that a reference

under the Act should be heard by the Supreme Court is, therefore, bound to lead to injustice sooner or later. But the remedy lies only with Parliament. If Article 17 and Section 6 of the Political Parties Act are amended, so that a reference under the Act is heard by High Court, it would eliminate this possibility of injustice, and the principle of one right of appeal in all important cases is a universal principle of jurisprudence. The result of such amendment would be that it would take longer to dissolve a political party, but that would be 'a consummation devoutly to be wished for', because the hurried dissolution of political parties is a danger to democracy.

The judgement in Wali Khan's case plunged the country into gloom, as it had made it easy to dissolve political parties, and thereby removed the legal barrier to a one party state. But the Supreme Court's judgement in the same year in *Inayat Khan v M. Anwar* (PLD 1976 SC 354) gave the country some relief, as it liberalized the law of contempt. Mr M. Anwar was a senior advocate of the country. He had given an interview to an Urdu newspaper in which he had criticized Justice Munir's judgement in Moulvi Tamizuddin Khan's case. He had also criticized Justice Munir and the other Judges who had decided Dosso's case in extremely offensive language. The petitioner, therefore, filed a contempt application against Mr M. Anwar and against the printer and the editor of the newspaper which had published Mr M. Anwar's interview, and although the Court held that the defendants were guilty of gross contempt, it merely reprimanded them.

Mr. M. Anwar's submission was that criticism of retired Judges could not amount to contempt, and that citizens were entitled to criticize judgements affecting the public interest. Justice Anwarul Haq, who wrote the judgement of the Court, held that maligning retired Judges did not amount to contempt, but as Dosso's case had been heard by the full Court, and as Mr M. Anwar had criticized all the Judges who decided Dosso's case, he held that Mr M. Anwar was guilty of contempt. The observation of the learned Judge that 'if a Judge has retired...it is difficult to hold that any criticism of his past judicial conduct would have the tendency to interfere with or obstruct the process of the Court to which he once belonged or that it would in any way lower the dignity and authority of the Court', was a step forward in the development of the law of contempt. The learned Judge then went on to observe that as Mr. M. Anwar had condemned to contempt, and the fact that the Judges, who had been criticized had all retired, made 'no difference to the nature of the offence committed' by Mr. M. Anwar.

I am not able to understand how maligning a Judge or some Judges of a Court does not amount to contempt if the Judges maligned have retired, but the same criticism of retired Judges becomes contempt if it extends to all the Judges of a Court. The Supreme Court had consisted of only five Judges until the seventies, and constitutional cases were generally heard by all the five Judges, while less important appeals were often heard by Benches of three Judges. On the distinction drawn by Justice Anwarul Haq, maligning the retired Judges who had pronounced the judgement of a Bench of three

Judges was not contempt, but maligning the five retired Judges for a judgement pronounced by them was contempt. I cannot agree with the distinction drawn by the learned Judge, and it is not an accident that this distinction was not supported by any judgement.

Mr. M. Anwar knew that the validity of Dosso's case would be challenged in the arguments in Asma Jilani's case (discussed earlier), and as he criticized Dosso's case on the eve of the hearing in Asma Jilani's case, he knew that he was committing contempt on the law declared by Justice Hamoodur Rehman in the case of Mr Shabbir Ahmed, ex-Judge, discussed earlier, and in several other judgements in which the Supreme Court had taken the same view. But the principle that comments on matters arising or bound to arise in cases pending in the Courts amount to contempt was a principle which had been evolved by English Courts in the eighteenth century when all criminal cases and the majority of civil cases were decided by juries on the basis of evidence recorded by them. Juries are likely to be influenced by newspaper reports, and so are witnesses. As Asma Jilani's case was to be heard by the highest Court of the country, and as there was no question of recording evidence about Dosso's case, the submission of Mr Sharifuddin Pirzada, Mr M. Anwar's counsel, was that the law laid down in Mr Shabbir Ahmed's case and other such cases needed to be reviewed, as Judges of the Supreme Court could not be influenced by newspaper reports, Mr Sharifuddin Pirzada also drew the attention of the Supreme Court to the judgements of English Judges, who had taken the view that comments on pending cases in newspapers should not be treated as contempt in cases tried by Judges without the aid of juries.

Justice Anwarul Haq rejected this submission, he held that comments on pending cases 'carried a real and substantial risk of prejudice being carried' to litigants, therefore, the English practise should not be followed as conditions in England were different from conditions in Pakistan, and judgements could be criticized only after they had become final. Conditions between different countries are always different, but the question only was of the consequences of newspaper comments on cases pending either in our superior Courts or in appellate Courts. And newspapers comments are not likely to prejudice the case of any litigant if a newspaper states the truth, but newspaper comments can prejudice the case of litigants if the newspaper resorts to sensationalism, or if its comments are unfair or false. There are irresponsible newspapers in Pakistan. There are also responsible newspapers in England and responsible newspapers in Pakistan. I therefore demur to the view that we should not follow the English practise because of differences in the conditions of our two countries, and reasonable and honest criticism in the public interest on matters pending in the superior Courts and in appellate Courts should not be treated as contempt.

Additionally the question of comments on a matter pending in the Supreme Court had been considered a few months before Mr. M. Anwar's case in *Choudhry Zahoor Elahi v Mr Zulfiqar Ali Bhutto* (PLD 1975 SC 383). After referring the Government's Order

dissolving the NAP to the Supreme Court, Mr Bhutto had made very critical remarks in a public speech about the NAP's policies. Choudhry Zahoor Elahi, a courageous opposition leader, had filed a contempt application against Mr. Z. A. Bhutto on the ground that Mr Bhutto's comments were likely to prejudice the Court against the NAP and its leaders. This contempt application was not admitted and was summarily dismissed by the Supreme Court after notice to the Attorney-General. The Supreme Court's decision was written by the Chief Justice, Justice Hamoodur Rehman, who discussed the law of contempt and approved of an Australian judgement in The King v Dumbalin in which Justice Rich had held that Judges 'are not at all likely deterred from administering justice according to law by expressions which appear in the public press'. Justice Hamoodur Rehman approved of these observations and all the Judges agreed with him that comments on cases pending in the Supreme Court are not likely to be influenced by such comments. While there could be exceptional cases justifying a departure from the principle, Justice Hamoodur Rehman's Order brought our law of contempt into line with the law of contempt in England, as it had been developed after the Second World War.

Since the Judges, who had heard Mr M. Anwar's case, had been parties to the order in *Choudhry Zahoor Elahi v Mr Z. A. Bhutto*, it is difficult to understand how they took a different view in Mr. M. Anwar's case. The view taken in Mr. M. Anwar's case is not good law, as it is inconsistent with the Full Court's judgement in Choudhry Zahoor Elahi v Mr. Z. A. Bhutto. Additionally, after holding that Mr M. Anwar was guilty of contempt, the Court only administered a reprimand to him, despite the offensive language used by him in his criticism of the Judges in Dosso's case. But a contemner is let off with a reprimand when the Court is of the opinion that the contempt committed is a technical contempt, and it is only a matter of time before a technical contempt is not treated as contempt. The decision in Mr. M. Anwar's case, therefore, means that comments which are relevant to cases in the superior Courts are not likely to influence Judges and that the practise of issuing contempt notices in such cases is to be deprecated. Finally, like Sir Edward Snelson, Mr. M. Anwar had refused to apologize for his contempt. Sir Edward Snelson was severely criticized by the Supreme Court for standing up for his rights and refusing to apologize. Mr. M. Anwar also stood up for his rights and refused to apologize, yet he was given the utmost latitude by the Supreme Court for defending himself, and he was let off with a reprimand. The judgement in Mr. M. Anwar's case has at last overruled the archaic rule that a contemner must submit an unconditional apology before being allowed to defend himself. This was a great step forward.

There was, however, another archaic rule which was followed with great vigour by the Lahore High Court in the interwar period. This rule was that truth was no defence to a contempt application. Whatever be the position sixty or seventy years ago, this rule is now against the conscience of society and was challenged in the Supreme Court in *Yousuf Ali Khan v the State* (PLD 1977 SC 482). The judgement of the Court was written

by me. Mr. Yousuf Ali Khan was an advocate of the Lahore High Court. He had filed a writ petition in the Lahore High Court against a Judge of that High Court in which he had made very serious allegations against the Judge. The writ petition was dismissed, but the publicity given to it had led to several contempt applications against newspapers in the Lahore High Court. One of these contempt applications was filed by the appellant. This application came up for hearing before a learned single Judge, who was a great friend of the Judge against whom the appellant had filed his writ petition. As the appellant had filed a transfer application before the Chief Justice of the High Court for the transfer of his contempt application to another Judge, he informed the learned single Judge of this transfer application and requested him not to hear the contempt application. The learned single Judge pressed him to explain why he should not hear the contempt application, and he replied that it would embarrass the learned single Judge to hear the contempt application, because he was a close friend of the Judge.

The Judge ordered the issue of a notice of contempt to the appellant and fixed this contempt application for hearing the next day. It is sufficient to state that the learned single Judge convicted the appellant for contempt and sentenced him to one week's imprisonment on the basis of some *obiter dicta* by the Supreme Court in Sir Edward Snelson's case, and because of the Supreme Court's judgement in *Khondkar v the State* (PLD 1966 SC 140) in which Mr. Khondkar had been convicted for contempt by a split verdict of three Judges against two. The *obiter dicta* of the Supreme Court in Sir Edward Snelson's case were based on the English law of contempt laid down for a different age and a different society. However, the Lahore High Court had held in the interwar period that an application for the transfer of a case from a Judge of the High Court to another Judge of that High Court amounted to an allegation of bias against a Judge and that by itself was contempt, regardless of whether the allegation of bias was true or false. This view had been followed by the Federal Court and by the majority Judges in Khondkar's case. Justice S.A. Rehman who wrote the judgement of the majority view in Khondkar's case observed:

> The reason of such protection to the superior judiciary against such allegations is understandable. It would bring the whole judicial system into disrepute and public confidence in the integrity of Courts at the judicial apex would be badly shaken if opportunity is provided to disgruntled but unscrupulous litigants to throw mud on High Court Judges in the hope that some of it will stick. If this class of litigant is given the latitude to arraign the justice of superior Courts...even innocent social incidents like the presence of a Judge at a dinner where a litigant unknown to the Judge happens to be present, may be twisted into sinister suggestions and the Judge may be put in the awkward position of defending himself against a baseless charge...Truth and justification are not valid defences to a charge of contempt of a Judge of a superior Court, where the contempt consists in scandalizing the Judge or attacking his impartiality.

With respect, erroneous allegations of bias which attribute false motives to Judges undermine respect for the Courts and will always be contempt. But as no human being is free from bias, I demur to the view that an allegation of *bias simpliciter* is contempt.

Khondkar's judgement was pronounced when the 1962 Constitution was in force. That was a very autocratic Constitution preceded by a long Martial Law which had a retrograde effect on society. But times have changed. People have become conscious of their rights and are no longer prepared to tolerate laws which are against the conscience of society. And as the function of Courts is to administer the law after ascertaining the truth, the proposition that truth cannot be pleaded as a defence to a contempt application seems oppressive and unjust to people. We, therefore, dissented from the *obiter dicta* in Sir Edward Snelson's case and from the majority view in Khondkar's case and observed:

> But I venture to think that if respect for the Courts rests only on the law of contempt, then it is resting on foundations of sand. In the long run, if public confidence in the Courts is to be maintained, it must rest on surer foundations than the sanctions available to us under the law of contempt, and, in the ultimate analysis, public opinion is the only sure foundation both for respect for the law and for maintaining public confidence in the Courts. Therefore, in so far as we have been entrusted with the task of laying down the law of contempt, and as we are also the Judges of our own cause when we exercise this jurisdiction, we should not lay down a principle which is shocking to the public conscience because this would not be a proper exercise of our discretion and because this would undermine public confidence in the administration of justice by alienating public opinion. And, in my humble opinion, the proposition that a litigant commits contempt by giving a truthful answer to an enquiry by the Court is a proposition so unconscionable that it will, in the long run erode public confidence in the administration of justice.

We therefore allowed Mr Yousuf Ali Khan's appeal and set aside his conviction.

The judgement in Yousuf Ali Khan's case was pronounced on 8 March 1977. Shortly thereafter, there were widespread disturbances in the country and the law and order situation became much worse than in the two or three months preceding President Ayub's retirement in 1969. In January 1977 Mr. Bhutto dissolved the National and Provincial Assemblies and announced that elections for the National Assembly would be held on 7 March 1977 while elections for the Provincial Assemblies would be held on 10 March 1977. He also lifted all the restrictions on the activities of political parties, and nine opposition parties formed an alliance called the PNA. However, for more than five years opposition parties had not been allowed to take out processions, meetings held by their leaders were often broken up by mischief makers who were never arrested by the

police and, throughout this period, until the elections of 7 March, radio and television acted as propaganda agents for the ruling party, the PPP. The opposition parties therefore contested elections, so to say, with one arm tied behind their backs. The PPP had a very great advantage over the opposition parties in the elections. After the elections of 7 March 1977, radio and television announced that the PPP had won 155 cut of 200 seats of the National Assembly but the Chief Election Commissioner withheld the announcements of the election results till 21 March. The PNA refused to accept the results and said they had been rigged in favor of the PPP, therefore they called for fresh elections for the National Assembly. They also called upon the people to launch a peaceful mass movement for fresh elections.

This mass movement began in Karachi, Lahore and Hyderabad. It gathered momentum slowly and extended to the majority of urban centres in the country. Unfortunately, all mass movements lead sooner or later to violence, and so did this movement. Many people were killed in the demonstration for fresh elections, but Mr Bhutto refused to negotiate with the PNA. Meanwhile on 21 March, the Chief Election Commissioner had officially announced the election results, but this announcement was made only after the Government had promulgated Amending Ordinance No. 15 (hereinafter called the Amending Ordinance). The Amending Ordinance gave summary powers to the Election Commission to examine the validity of individual elections and to set them aside for illegalities or corrupt practises. The Election Commission thereupon issued Show Cause Notices to twenty-six members of the National Assembly belonging to the PPP and within a short period I had unseated four members of the National Assembly elected on PPP ticket, including one Federal Minister. The result was that the agitation against the rigging of elections subsided. The Election Commission also ordered the record of the election results of eighty constituencies to be sealed and sent Show Cause Notices to Mr. Bhutto's Attorney-General Mr. Yahya Bakhtiar and to the Law Minister Mr. Malik Akhter. Mr. Bhutto thereupon repealed the Amending Ordinance and the result was that the mass movement launched by the PNA started again. Meanwhile, Article 245 of the Constitution was amended. This Article empowered the Federal Government to call the armed forces in aid of the civil power 'when called upon to do so'. By this amendment the writ jurisdiction of the High Courts was completely abolished 'in relation to any area in which the armed forces of Pakistan are, for the time being, acting in aid of civil power in pursuance of Article 245.'

Martial Law was eventually proclaimed in Lahore, Karachi, and Hyderabad where the Provincial Governments were not able to control the disturbances. It was also announced that Military Courts should be set up for the trial of persons who violated the law. The Army Act was also amended so that civilians could be tried for a very wide range of offences by the armed forces. The announcement setting up Military Courts was declared illegal by the High Courts of Lahore and Sindh on the basis of the Supreme Court's judgement in Asma Jilani's case. But although the Government was not able to set up Military Courts, it used the armed forces to restore law and order.

These draconian measures failed to control the disturbances, and Mr Bhutto began negotiations in the first week of June with the PNA about elections for the Assemblies. The negotiations proceeded slowly because the repeal of the Amending Ordinance had shaken public confidence in Mr Bhutto. It was also alleged that the PNA leaders were increasing their demands in the course of the negotiations, but that Mr. Bhutto and the PNA were going to sign an agreement on 5 July 1977. Before this could happen, the Chief of Army Staff, General Ziaul Haq, proclaimed Martial Law, assumed the office of Chief Martial Law Administrator and announced that he had proclaimed Martial Law only to restore law and order and to hold free and fair elections for the assemblies within ninety days of the Proclamation of Martial Law. He also announced the dismissal of the Federal and Provincial cabinets, dissolved the National and Provincial Assemblies, and repeated all the claims made under previous Martial Laws. Despite the imposition of Martial Law, the President agreed to continue as President. The Chief Justices of High Courts agreed to act as Governors of provinces and they took over as acting Governors almost as soon as Martial Law had been declared. The Judges of the superior Courts continued working as Judges and thereby validated Martial Law. So did the political parties, as they did not challenge the dissolution of the Assemblies and launched their election campaigns for elections to be held under Martial Law.

A few weeks after the imposition of Martial Law, Mr. Bhutto and ten other PPP leaders were arrested under Martial Law Order No. 12. As General Ziaul Haq had revoked the Proclamation of Emergency, Fundamental Rights had become enforceable, and so Begum Nusrat Bhutto filed a writ petition in the Supreme Court against the Chief of Army Staff and the Federal Government. She challenged in her writ petition the validity of Martial Law and sought the release of Mr Bhutto and the other PPP leaders who had been arrested with him. The defendants contested the petition, and the judgement of the Court are reported as *Begum Nusrat Bhutto v The Chief of Army Staff and others* (PLD 1977 SC 657).

The Chief Justice, Justice Anwarul Haq, wrote the leading judgement of the Court. He examined the very lengthy arguments of the learned counsel on Professor Kelsen's doctrine of necessity, on Dosso's case and on Asma Jilani's case and held that Dosso's case was not good law. He also examined the evidence produced by the Bhutto Government about the law and order situation after 7 March 1977 and pointed out that according to this evidence 241 people had been killed by the middle of May 1977. These figures were not accepted by the PNA. In any event many more people were killed between the middle of May and 4 July 1977. Further, according to the minutes of the meeting of the Law and Order Committee held on 27 June 1977, the PNA was building up a tempo of agitation, which was likely 'to take the form of sabotage and attempts on the lives of certain political leaders and Government officials'. Next, on 2 July 1977, the Director of the Intelligence Bureau gave a warning of large scale clashes between the PNA and the PPP and he also feared that the PNA leaders were losing control over their followers. The Chief Justice then pointed out that according to the popular perception,

there had been massive rigging in the elections. However, he also examined the orders of the Election Commission setting aside the election of four PPP members to the National Assembly and newspaper reports of interviews by the Chief Election Commissioner on the elections. According to one of these interviews, the Chief Election Commissioner had said that he 'is shocked to learn of the grave irregularities committed in regard to more than 100 of the seats during the elections'. The Chief Justice then explained that there was no provision in the Constitution for dealing with the crisis which had been created by election rigging. He therefore, validated Martial Law for the purpose of holding elections within a reasonable period on the ground of necessity.

But the Martial Law authorities had advanced three other claims. The first was that a Constitution had been suspended, the second was that Martial Law legislation could not be set aside by the Courts, and the third was that no Court could set aside any order of the Martial Law authorities on any ground whatsoever. These claims were almost identical to the claims advanced in the first two Martial Laws, and they had been accepted by the Supreme Court in Dosso's case in 1958, while during the second Martial Law the Supreme Court had avoided a confrontation with the Martial Law authorities about these claims. But because the doctrine of necessity justified the proclamation of Martial Law, it did not mean that the doctrine of necessity also justified these three claims advanced by General Zia. These three claims were rejected by the Chief Justice who observed:

> (i) That the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of State necessity.
>
> (ii) That the President of Pakistan and the superior Courts continue to function under the Constitution.
>
> (iii) That the Chief Martial Law Administrator, having validly assumed power by means of an extra-Constitutional step, in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognized by judicial authorities as falling within the scope of the law of necessity, namely:
>
> (a) All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it;
> (b) All acts which tend to advance or promote the good of the people;
> (c) All acts required to be done for the ordinary orderly running of the State; and
> (d) All such measures as would establish or lead to the establishment of the declared objectives of the proclamation of Martial Law, namely,

restoration of law and order, and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution;

(iv) That these acts, or any of them, may be performed or carried out by means of Presidential Orders, Ordinances, Martial Law Regulations, or Orders, as the occasion may require; and

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

The principle that the Constitution remained in force and that the superior Courts had the power of judicial review to judge the validity of any act or action of the Martial Law authorities was as much a part of the doctrine of necessity laid down in the judgement as the validation of Martial Law. Also because the superior Courts had this power of judicial review, they could, despite Martial Law, protect the rights of persons under laws like the Evidence Act and the Criminal Procedure Code, and also set aside orders of the Martial Law authorities if they violated the principles of justice laid down by the superior Courts, such as the rule that no one shall be condemned unheard. It was on the basis of the restrictions imposed on the powers of Martial Law authorities by the judgement that the superior Courts were able to set aside detention orders passed by the Martial Law authorities, including the detention orders passed against Begum Nusrat Bhutto, Ms Benazir Bhutto and the members of the PPP were set aside. It was also on the basis of this judgement that the superior Courts set aside convictions by Military Courts.

Justice Cheema wrote a separate judgement in which he explained that the doctrine of necessity was recognized by the Islamic jurisprudence. This judgement has been criticized because we gave the Chief Martial Law Administrator the power to amend the Constitution. It is our misfortune that we do not have law journals, which examine, and if necessary, criticize judgements of the superior Courts, therefore, Judges can and should, after the passage of time, examine with detachment criticism of their judgements, or judgements to which they have been parties. Having considered the criticism that we should not have given the Chief Martial Law Administrator the power to amend the Constitution, I am of the view that this criticism was correct. As the Chief Martial Law Administrator had given an undertaking to hold elections within a reasonable period, it was not necessary to give him the power to amend the Constitution for the period required to hold elections.

However, by itself, this power was a very limited power as it was circumscribed by the doctrine of necessity. But the judgement also stated that the Chief Martial Law Administrator was entitled to perform all acts and promulgate all legislative matters 'which tend to advance or promote the good of the people'. As the good of the people is a very vague concept, the power thus given was very likely to be used arbitrarily and to the detriment of human rights, and this was the real mistake in the judgement. And as Martial Law curtails the rights of people, its validation should be on objective grounds as far as is possible. The Chief Justice observed at page 702:

> The constitutional authority of not only the Prime Minister but also of the other Federal Ministers as well as of the Provincial Government was being repudiated on a large scale throughout the country...The representative character of the National and Provincial Assemblies was also not being accepted by the people at large.

He, therefore, concluded that the proclamation of Martial Law was the only solution for the crisis facing the country.

There were demonstrations against the Government on a large scale, but they were confined to the urban areas of the country, excluding some of the urban areas of Sindh. But there was no evidence before the Court of the percentage of the urban population which took part in these demonstrations. In any case, as the majority of our people lived in villages, the observation that the representative character of the Assemblies was 'not being accepted by the people at large' went too far. Further this observation was based on our opinion, which in turn was based on our subjective assessment of the situation. And in validating Martial Law on our subjective assessment, we laid down a dangerous precedent for the future. On the other hand, there were valid grounds based on objective considerations for validating Martial Law.

Mr. Sharifuddin Pirzada, the Attorney-General also submitted that Martial Law was not illegal, because elections to the Assemblies had not been free and fair, therefore, in dismissing Mr. Bhutto and his ministers, and in dissolving the legislatures, General Ziaul Haq had removed usurpers from office and dissolved legislatures which were not legally constituted bodies. Although elections, which are not free and fair, affect the legitimacy of a democratic government. Since the legitimacy of a government is not destroyed if election rigging is limited to a small number of seats, Mr. Sharifuddin Pirzada relied on the statement of the Chief Election Commissioner that there might have been rigging in about 100 out of the 200 seats for the National Assembly. As this statement was not based on a study of the election record, it was no more than an intelligent guess. However, Mr. Bhutto and Mr. Hafeez Pirzada had made a request that they should be allowed to put their case before the Court. They appeared before us on

two successive days. I asked both of them whether they would like to give their comments on the allegations about rigging by the PPP in the elections to the National Assembly. Mr. Bhutto's reply was brilliant. He said 'My Lord when have elections not been rigged in Pakistan?' He then said rigging had been limited to ten or five seats. The next day, Mr. Hafeez Pirzada said that the rigging was limited to twenty or twenty-five seats. These leaders could not but have a bias in favor of their own party. On the other hand, the promulgation of the Amending Ordinance was a very fair move by Mr. Bhutto. If he had allowed the Election Commission to take action under this Ordinance, the agitation against rigging would have subsided. But Mr. Bhutto repealed the Amending Ordinance. The only reasonable inference from the repeal of this Ordinance was that Mr. Bhutto knew that there had been rigging in much more than twenty or fifty seats or hundred seats will never be known as the Amending Ordinance had been repealed.

5

THE JUDGEMENTS DURING ZIA'S REGIME

The passage of time leads to a detached assessment of past events and it is possible that Mr. Bhutto would have had a slight majority in the National Assembly without any rigging, and that rigging was limited to about 50 seats. This could not justify Martial Law, as it did not by itself destroy the legitimacy of the Government. But free and fair elections are not the only requirement of a democracy. There are other requirements which must be fulfilled if a Government is to be accepted as democratic Government, and the election rigging by the PPP in 1977 would be a circumstance to be taken into account, if these other requirements of democracy were also not fulfilled by Mr Bhutto's Government.

An independent judiciary is an essential requirement of democracy. Judges of the superior Courts have been appointed under all our Constitutions by the President, but under the 1973 Constitution, as it then stood, the President was bound by the Prime Minister's advice. Appointments were made by Mr. Bhutto, and in appointing Chief Justices of High Court, he had to consult the Governor, who was his nominee, and the Chief Justice of Pakistan. In 1976 the tenure of Chief Justices was reduced by an amendment of the Constitution to four years and/or the age of superannuation for Chief Justices of High Courts, and to five years and/of the age of superannuation for the Chief Justice of Pakistan. At the end of 1976, the Chief Justice of the Lahore High Court retired, and his successor superseded more than half a dozen Judges of the High Court, some of whom were more competent than him. This appointment was intended to undermine the independence of the judiciary. In the summer of 1977, Mr. Bhutto made an even more arbitrary appointment. An advocate had been elected on the PPP ticket to a Provincial Assembly in 1970, and he was a provincial minister for seven years. But his election to the Assembly had been challenged on account of malpractices in his election campaign before an Election Tribunal. His election was set aside by. the Election Tribunal in 1977 and Mr. Bhutto appointed him, a Judge of a High Court. This appointment was a shock to the public, to the judiciary, and to the Bar, and to his credit the Judge resigned within a few days of his appointment. The process of undermining the independence of the judiciary had begun.

There are also other criteria for determining whether a Government is a democratic Government or not. A Government may be a democracy according to the Constitution, but if the media is not free, and if opposition parties are not allowed to function freely the Government of such a country is not a democratic, even if its repressive policies are based on laws passed by the legislature. Democracy does not mean merely the rule of the majority, otherwise Hitler would have been the greatest democrat of history as he

had the support of the majority of the German people. The press was not free under Mr. Bhutto and the radio and television projected only Mr. Bhutto's image as they were controlled by the Government. Further, although there was no possibility of war after 1972, the Defence of Pakistan Rules were kept in force and they hung like the sword of Damocles over journalists and over any person who criticized the Government. Additionally, the law-enforcing agencies were used to bring false charges against opposition leaders. That was, illustrated by the Supreme Court's judgements in the cases about Choudhry Zahoor Elahi. But these cases were only the tip of the iceberg. And although the claim of the Government was that it had won 155 of the 200 seats in the National Assembly, the Defence of Pakistan Rules remained in force after the election of 7 March. Inroads were also made on the rights of citizens after the election of 7 March. Article 245 of the Constitution was amended in April 1977. This was followed by the proclamation of Martial Law in Karachi, Lahore, and Hyderabad and the setting up of Military Courts. These Courts could not function as the High Courts of Lahore and of Sindh declared them illegal. But the object of setting up of Military Courts and of amendments in April 1977 in the Army Act was to intimidate and crush the opposition parties.

The country seemed to be heading for a one party state in the summer of 1977, and the cumulative effect of these circumstances was to destroy the Government's legitimacy, as it was not a democratic Government. And the only way of returning to the path of democracy was to have fresh elections for the Assemblies. The question, therefore, was of the Government which should hold elections. Mr. Bhutto's Government had lost its legitimacy, and according to the Minutes of the Law and Order Committee held on 2 July 1977, Mr. G. M. Khar's return to the PPP and his speeches on radio and television 'is a grave provocation to the blooded veterans of the PNA agitation'. The reinstatement of the Bhutto Government was, therefore, very likely to lead to bloodshed on a large scale. On the other hand, General Ziaul Haq had promised to hold free and fair elections and hand over power to the party or parties which would win the elections. The Supreme Court had to decide the validity of Martial Law in this background, and it would have been better if Martial Law had been validated for the purpose of holding elections, because Mr. Bhutto's Government did not fulfill the basic requirements of a democratic government.

On the basis of this judgement, validating Martial Law, the High Courts soon began exercising their powers of judicial review over the orders of the Martial Law authorities. Detention orders were set aside, convictions by Military Courts were set aside, and so the Supreme Court's judgement to control Martial Law and protect the rights of people under the laws seemed to be successful. But in April 1979 Mr Bhutto was hanged on a charge of murder by a majority judgement of the Supreme Court. Four Judges held that the charge of murder had been proved and confirmed the sentence of death pronounced by the Lahore High Court, while three judges allowed Mr. Bhutto's appeal against his conviction and acquitted him. Mr. Bhutto's elimination was to change the

political situation. None the less, elections for the Assemblies had been announced for the autumn of 1979. The Generals appear to have assumed that the elimination of Mr. Bhutto would lead to the disintegration of his party, the PPP. However, the hanging of Mr. Bhutto had the opposite effect, but elections could be held if the PPP was prevented from participating in the elections. As PPP leaders had been criticizing the army in very strong language and as they had also been denouncing the death sentence on Mr. Bhutto as a judicial murder, there was a case for contending that the PPP had brought into ridicule the judiciary and the armed forces. It is, therefore, sufficient to state here that the Political Parties Act was amended on 30 August 1979 and a political party which 'brings into ridicule the judiciary or the Armed Forces of Pakistan' would not be allowed to participate in elections. This amendment indicated that elections would be held, as announced. But within less than two months, General Ziaul Haq changed his mind, purported to amend the Constitution by inserting Article 212-A into it and cancelled elections. The jurisdiction of Military Courts was enlarged by Article 212-A and the Article stated that the jurisdiction of High Courts to issue writs, orders, injunctions, etc. against Military Courts or tribunals 'shall abate'. The Article did not curtail in any way the jurisdiction of the Supreme Court to issue writs, orders, injunctions, etc. against the orders of military Courts or tribunals.

Before the promulgation of Article 212-A, there was a public announcement by the Government that General Ziaul Haq had called Justice Anwarul Haq, the Chief Justice of the Supreme Court and Justice Mushtaq Hussain, the Chief Justice of the Lahore High Court to Rawalpindi for consultations. Justice Anwarul Haq, Justices Haleem, Safdar Shah and I were in Peshawar, and on his return to Peshawar he wanted us to know what had happened at this meeting with General Ziaul Haq. As Justice Mushtaq Hussain had found out that the Generals had decided to abrogate the Constitution, he had prepared a draft as an alternative to the abrogation of the Constitution. This draft was written by Justice Mushtaq Hussain in his handwriting and Justice Anwarul Haq scrutinized it and made some corrections in it in his handwriting. Both the Chief Justices then went to meet General Ziaul Haq, who was awaiting them with his senior Generals. The meeting was a difficult meeting, but in the end the Generals accepted the draft brought by the Chief Justices and abandoned the idea of abrogating the Constitution. This draft became Article 212-A and it saved the jurisdiction of the Supreme Court.

The provision in Article 212-A divesting the High Courts of their jurisdiction to issue writs against the orders of Martial Law authorities was inconsistent with the express direction in the Supreme Court's judgement in Begum Nusrat Bhutto's case, that the High Courts and the Supreme Court would continue to exercise their powers of judicial review against all orders of the Martial Law authorities. Writ petitions were filed in all the High Courts challenging the validity of Article 212-A on the ground that this Article was illegal, as it was inconsistent with the limited power given to the Chief Martial Law Administrator to amend the Constitution in the Supreme Court's judgement in Begum

Nusrat Bhutto's case and that the High Courts and the Supreme Court would continue to exercise their powers of judicial review against all orders of the Martial Law authorities. The Balochistan High Court held that Article 212-A was void to the extent to which it was inconsistent with the judgement in Begum Nusrat Bhutto's case. Unfortunately, the other High Courts took a different view, and appeals were filed against the judgements of all the High Courts on the validity of Article 212-A. The Supreme Court was going to hear these appeals at the end of March 1981, but before they could be heard, General Ziaul Haq, as the President and Chief Martial Law Administrator, promulgated on the night of 24 March 1981 the Provisional Constitution Order, by which, for all practical purposes, the Constitution of Pakistan was abrogated. The Order also contained a provision that no Court could question the validity of Martial Law legislation or orders of the Martial Law authorities 'notwithstanding any judgement of the contrary'. The judgement to the contrary was the Supreme Court's judgement in Begum Nusrat Bhutto's case, and the claims advanced by General Ziaul Haq in the Provisional Constitution Order were identical to the claims advanced by him when he declared Martial Law. The Supreme Court could have declared the Provisional Constitution Order illegal, as it was a repudiation of the Court's judgement in Begum Nusrat Bhutto's case. However, times had changed. The Martial Law authorities had become more powerful after the hanging of Mr. Bhutto, and the Provisional Constitution order contained a provision that Judges of the superior Courts had to take an oath to uphold the Order. The Chief Justice and I refused to take the oath and we ceased to be Judges. All the other Judges of the Supreme Court took the oath, therefore, the judgement in Begum Nusrat Bhutto's case was overruled by necessary implication and the country went back to Martial Law of the 1958 type.

The Provisional Constitution Order also contained a provision that Judges of the superior Courts could continue in service only if General Ziaul Haq offered to give them to oath to uphold this Order. An Acting Judge of the Supreme Court and ten or eleven Judges of High Courts were not offered this oath. They ceased to be Judges overnight and their summary dismissal had a traumatic effect on the entire judiciary. This summary dismissal of Judges was intended as a warning to the Judges of the superior Courts. This warning was given because the Provisional Constitution Order was followed by a long period of extreme repression. In 1985 General Ziaul Haq held elections for the Legislatures. He believed that Islam was against the party system, therefore, political parties were prohibited from contesting the elections and from supporting candidates for the elections. He also restored the 1973 Constitution, but with sweeping alternations in it, collectively known as the Eighth Amendment such as the setting up of the Federal Shariat Court which went far beyond the meaning of the word amendment. But as the Eighth Amendment was passed by the National Assembly, it became part of the Constitution. Finally Martial Law was lifted on the 1 January 1986, and Fundamental Rights were also restored. It is ironic that these Rights, which had been suspended by an elected leader, were restored by a military dictator. After the Provisional Constitution Order, the superior Courts kept a very low profile. On the

other hand, the Federal Shariat Court was active and pronounced some judgements which affected human rights.

Federal Shariat Court

The Federal Shariat Court was set up by an amendment of the Constitution by which Chapter 3-A was added to the Constitution. The Court had a revisional-cum-appellate jurisdiction and an original jurisdiction under Article 203-DD, the Court could examine the record of any case decided by any Court 'relating to the enforcement of Hudood' for determining the correctness of the Court finding. The Hudood laws prescribe punishments for offences like adultery, rape, kidnapping of persons for sexual purposes, aggravated forms of theft, etc. The punishment for adultery by Muslims is stoning to death at a public place. Almost as soon as the Federal Shariat Court was set up, it had to determine whether the punishment of stoning to death was Islamic or not. In every jurisprudence, which has existed for centuries, there is a cleavage of opinion between jurists with an orthodox outlook and those with a liberal outlook. The first Chief Justice of the Federal Shariat Court was Justice Salahuddin Ahmed, who had retired as a Judge of the Supreme Court in 1976 on reaching the age of superannuation. He had been a Judge of great integrity and courage and he wrote the judgements of the Federal Shariat Court. He followed the liberal view and held that stoning to death was not supported by Islamic law. This judgement roused the wrath of the religious parties which had always demanded this punishment of stoning to death for adultery. Meanwhile the Provisional Constitution Order had come into force, and as the Constitution was what the Chief Martial Law Administrator wanted it to be, General Ziaul Haq altered the Constitution, and reconstituted the Federal Shariat Court. The appointment of Justice Salahuddin Ahmed was terminated, a Judge of the Lahore High Court was appointed Chief Justice, and the Federal Shariat Court was to consist of Muslim Judges of the superior Court and not more than three ulemas. This reconstituted Court reviewed the judgement of Justice Salahuddin Ahmed and set it aside.

The standard of proof required for obtaining a conviction under the Hudood Ordinances is very high. Thus, for example a person could be convicted for adultery only if he or she makes a confession of adultery before a competent Court or if 'at least four Muslim adult make witnesses', about whom the Court is satisfied, having regard to the requirements of *tazkiyah al-shuhood*, that they are truthful persons and abstain from major sins (*kabair*), give evidence as eyewitnesses of the act of penetration necessary to the offence. Provided that, if the accused is a non-Muslim, the eyewitnesses may be non-Muslims. Hudood cases were tried in Sessions Courts, and as there were hardly any cases in which persons confessed their guilt, it was impossible for the prosecution to produce a prosecution witness, much less four male Muslim adult witnesses of absolute integrity and therefore the vast majority of prosecutions for adultery ended in acquitals. This roused the wrath of some religious parties and of General Ziaul Haq,

who made a public statement that Courts were frustrating his programme of Islamization. The Provisional Constitution Order and the summary dismissal of Judges of the superior Courts under this Order had a disastrous effect on the judiciary, and the subordinate Courts found ways of convicting women for adultery.

A blind servant girl was pregnant, because she had been raped by her employer's son. Her pregnancy was equated by a Sessions Court with a confession of adultery, and she was sentenced to imprisonment and whipping. Rape is always extremely difficult to prove, but the fact that a prosecutrix has failed to prove her allegation of rape is an assertion by the prosecutrix of her innocence. Unfortunately, in their zeal to convict for adultery, subordinate Courts very often treated a woman's failure to prove her allegation of rape as a confession of adultery. Such illegal convictions were set aside by the Federal Shariat Court, but the Court has always been very cautious about granting bail to the appellant, pending the hearing of the appeal, and further many women were too poor to furnish security for their bail-bonds. The result was that many innocent women remained in jail until their appeals were heard and allowed by the Federal Shariat Court. The law operates very harshly on women.

The original jurisdiction of the Federal Shariat Court is much more important than its jurisdiction to hear appeals under the Hudood Ordinances. Any citizen can, under Article 203-D of the Constitution, file a petition calling upon the Federal Shariat Court to decide whether a law is repugnant to Islamic injunction. The Court's judgement on this question is subject to a right of appeal to the Shariat Appellate Bench of the Shariat Court, and the President and the Governor are bound under the Constitution to give effect to the decision of the Shariat Appellate Bench of the Shariat Court declaring a law to be repugnant to the injunctions of Islam. The Federal Shariat Court can also *suo moto* examine whether a law is inconsistent with the injunctions of Islam, and from 1981 the Court took up the enormous task of indentifying laws repugnant to the injunctions of Islam and giving appropriate directions to the Government about the provisions, if any, in a law which were repugnant to Islamic injunctions. Thus, for example, the Court struck down some of the harsh provisions of the Press and Publications Ordinance on the ground that they were repugnant of Islamic injunctions. Perhaps the judgement of the Chief Justice on this Ordinance annoyed General Ziaul Haq. In any event the appointment of the Chief Justice was terminated abruptly just as Justice Salahuddin Ahmed's appointment had been terminated in 1981. A new Chief Justice was appointed, and thereafter, on the whole, the Federal Shariat Court has kept a low profile.

Restoration of Fundamental Rights

Fundamental Rights were restored in 1986, but as it took time for people to get over the shock of Martial Law, there was no important case on Fundamental Rights in 1986. By 1987 it was obvious that elections would be held soon and that political parties would be allowed to participate in these elections. However, as indicated earlier, the Political

Parties Act had been amended during Martial Law in 1978 in order to disqualify the PPP from contesting the elections. In these circumstances, Ms Benazir Bhutto filed a writ petition as co-chairman of the PPP directly in the Supreme Court under Article 184 of the Constitution in which she challenged the validity of the amendment made by General Ziaul Haq in the Political Parties Act. Many amendments in this Act were challenged by her but it would be sufficient to refer only to those amendments in the Political Parties Act which had a vital bearing on elections. In order to appreciate the questions decided in Ms Benazir Bhutto's case, it is necessary to refer to the second clause of Article 17 of the Constitution as the amendment in the Political Parties Act were challenged on the ground that they were repugnant to this clause. The 1973 Constitution was promulgated on 12 April 1973 and this clause, which will be referred to as the said clause, read

> 17 (2) Every citizen not being in the service of Pakistan shall have the right to form or be a member of a political party. Every political party shall account for the source of its funds in accordance with law.

Subject to the provision that a political party should account for the source of its funds, which was a very reasonable provision, the said clause did not permit any restrictions to be placed on the right of citizens 'not being in the service of Pakistan' to form or join political parties. The said clause was thus in accordance with the practice of western democracies. But as indicated earlier President Ayub had promulgated the Political Parties Act in 1962. According to Section 3 of this Act, the grounds on which the Federal Government could dissolve a political party were that a political party was against 'the Islamic ideology or the integrity or security of Pakistan' and this section, read with Section 6 of the Act, empowered the Federal Government to dissolve a political party on any of the three grounds specified in the section, subject to the Supreme Court's approval. This provision became void when the 1973 Constitution was promulgated, as the said clause did not permit any restrictions on the right of citizens to form and join political parties, or on the right of political parties to carry on their activities. In May 1974 the Legislature amended the said clause. According to this amendment, the citizen's right to join and form political parties was subject to 'any reasonable restrictions imposed by law in the interest of the sovereignty or the integrity of Pakistan'. Even though the said clause was amended, it did not make the Islamic ideology a ground for imposing restrictions on the citizen's right to form and join parties. The word 'integrity' was therefore used in the said clause in its narrower sense of territorial integrity, as in Section 3 of the Political Parties Act. None the less, as the said clause permitted restrictions on the rights conferred on citizens and political parties by the said clause after its amendment was a penal provision and has therefore to be construed strictly. Next, after the amendment of the said clause, the Legislature amended Section 3 of the Political Parties Act, and as the words Islamic ideology were omitted from the section, political parties could not be dissolved on the ground that they were against the Islamic ideology. Further, as Section 3 was amended after the

amendment of the said clause, the amendment of Section 3 was made in order to bring it into the line with the said clause after its amendment, and therefore the deletion of the words Islamic ideology from the section manifested the intention of the Legislature that the Islamic ideology was not a part of the meaning of the word integrity in the said clause.

General Ziaul Haq wanted to alter the Political Parties Act, but as the Supreme Court had held in Begum Nusrat Bhutto's case that the Constitution was in force, the amendments the General wanted to make were illegal. He therefore purported to amend the said clause by President's Order No. 20 of 1978. According to this Order, the right of citizens to join and form political parties was subject to 'reasonable restrictions imposed by law in the interest of the Islamic ideology, the sovereignty, integrity or security of Pakistan, public order or morality.' This order of the President also made it clear that the concept of the Islamic ideology was not a part of the connotation of the word integrity and, therefore, the Order contained an express reference to the Islamic ideology. Section 3 of the Political Parties Act was then amended, and political parties could be dissolved in the interest of 'the Islamic ideology or sovereignty, integrity or security of Pakistan or morality or the maintenance of the public order.' Additionally Sections 3-A, B and C were inserted in the Political Parties Act by this amendment. Section 3-B was important, as it made it compulsory for political parties to be registered with the Election Commission before they could contest elections, and the conditions which political parties had to fulfill in order to get themselves registered were specified in the section. They included the grounds on which a political party became liable to be dissolved under Section 3 and other grounds, such as the submission of accounts to the Election Commission and, as indicated earlier, a political party which brought the Courts or the army into ridicule could not contest elections. There was also a provision for cancelling the registration of a political party with the Election Commission if the party violated the conditions of Section 3-B, and a political party, whose registration was cancelled, could not participate in any elections.

Elections for the Legislature were expected by 1987 and political parties would be contesting these elections, but the PPP was not registered with the Election Commission and Fundamental Rights had been restored, Ms Benazir Bhutto, as Co-Chairman of the PPP, filed a writ petition in the Supreme Court under Article 184 (3) of the Constitution. She challenged in this petition the validity of President's Order of 1978. She also challenged the validity of the amendments made in the Political Parties Act in 1978 on the ground that they were void, as they purported to impose restrictions on political parties which were inconsistent with the said clause after its amendment in 1974.

All the Judges held that Pakistan was a parliamentary democracy and that democracies could not exist without the party system. They then examined the said clause and held that the provisions of Section 3-B of the Political Parties Act were arbitrary, unreasonable, and void, because they were inconsistent with the said clause. But the

PPP had promulgated Martial Law Regulation 155 to carry out land reforms, and as these policies had been denounced as un-Islamic by religious parties, although the petitioner challenged the amendments made in Section 3 of the Political Parties Act in 1978, her real objection was to the reinsertion of the words 'the Islamic ideology' in the section. The apprehension was that the PPP's specialist policies, would be declared to be against the Islamic ideology. In these circumstances, her submission was that the word integrity in the said clause did not include the Islamic ideology and that the words 'the Islamic ideology' in Section 3 of the Political Parties Act were ultra vires of the said clause. Although this submission was supported by the history of Section 3, all the Judges, except Justice Saifur Rehman, rejected this submission. The Chief Justice, Justice Mohammad Haleem, followed the judgement of the Court in Mr Wali Khan's case, referred to the Two Nation theory, and observed:

> This is in my view an affirmation of a two-nation theory. The concept of Islamic ideology is interwoven with the Ideology of Pakistan and is inseparable as it is the foundation of two-nation theory. Therefore, 'integrity of Pakistan' not only includes Ideology of Pakistan but also Islamic ideology. Any invasion of 'integrity of Pakistan' will inevitably lead to an invasion of its sovereignty and vice versa. I may here state that maintenance of public order is an aspect of exercise of sovereignty. (Encyclopaedia Britannica, Vol. 17, Ed. 15, p. 309). As will appear from the concussions of Hamoodur Rehman, C.J., 'public order' must be regarded to the included in the expression 'sovereignty or integrity of Pakistan'. This is not all. Any attempt to create doubts in the people's belief either vocally or by force against the comprehensive concept of Ideology of Pakistan which is the basis of the creation of the country will also be an invasion of the sovereignty or integrity of Pakistan as it would undermine the security and solidarity of the State by destroying the legal order.

The interpretation placed on the word integrity in the said clause by the Chief Justice is a very liberal interpretation of the word. But laws conferring rights have to be construed liberally, while laws curtailing rights have to be construed strictly. If the said clause, as amended in 1974, had been in Article 17 when the Constitution was promulgated, it could have been said that the said clause conferred rights. But as the amendment of the said clause in 1974 curtailed the Fundamental Right conferred by the said clause before its amendment, with due respect, I do not agree with the interpretation of the word 'integrity' by the Chief Justice and the majority Judges. Justice Shafiur Rehman did not agree with the interpretation of the word integrity by the Chief Justice and the other Judges. He observed:

> Besides, these enumerated concepts of Islamic Ideology, security of Pakistan, morality, maintenance of public order, foreign-aided Party in Political Parties Act, happen to be generic, wider in scope and more extensive, than the constitutional limitations contained in the aforesaid Fundamental Right

> mandating a nexus of all these and such other factors finding a place in the law to sovereignty of Pakistan or integrity of Pakistan. If the whole concept, in all its extensiveness is imported in the law then undoubtedly the Fundamental Right would stand greatly abridged.

Justice Shafiur Rehman was also aware of the anomalous consequences of stretching the meaning of the word integrity to include the Islamic ideology and observed:

> In the historical perspective that we have briefly noted there appears to be serious division among the learned of this country whether Political Parties are Islamic or un-Islamic, for the purposes of electing the Government. For those who hold that Political parties are repugnant to Quran and Sunnah and these must be banished totally from elections and government, it is impossible to make Political Parties survive and conform to the Islamic ideology because for them the very formation of a Political Party is negation of Islamic ideology.

It was unfortunate that the majority Judges did not examine the consequences of the view of 'the learned of the country' that 'the very formation of a political party is a negation of Islamic ideology'. If they had, they might also have examined the consequences of their view on the functioning of our parliamentary democracy.

Democracy cannot survive, unless political parties are free to advocate their policies peacefully, but the consequence of the view that the word integrity includes the Islamic ideology are disturbing. Thus, for example, in his historic speech on 11 August 1947 inaugurating the first Constituent Assembly of Pakistan, the founder of the country and the author of the Two Nation theory, Mr. Jinnah said that all citizens would be equal in Pakistan. He then said, You may belong to any religion or caste or creed—that has nothing to do with the business of the State. The statement that religion has nothing to do with the business of the State' is inconsistent with the Islamic ideology, and as the word integrity includes the Islamic ideology, a party formed to advocate the policy laid down by the founder of the country would come within the mischief of Section 3 of the Political Parties Act and would have to be dissolved.

The Hudood Ordinances were referred to earlier. The rule of evidence in these Ordinances is that women and non-Muslims can be convicted on the evidence of Muslim male witnesses of integrity, but Muslim males cannot be convicted on the evidence of women or on the evidence of non-Muslims, even though such witnesses are persons of absolute integrity. This discrimination against women and non-Muslims is a patent violation of Article 25 of the Constitution and of the Universal Declaration of Human Rights passed by the General Assembly of the United Nations in 1948, to which Pakistan is a party. But in a petition filed by women to challenge the discrimination against them in the Hudood Ordinances, the Federal Shariat Court held that the rule of evidence in these Ordinances is in accordance with Islamic injunctions. Therefore, a

political party which advocates the enforcement of Article 25 of the Constitution or of the Universal Declaration of Human Rights would be declared illegal. To take another example, Mr. Bhutto had advocated socialist policies and carried out land reforms, but many *ulemas* are of the view that socialism and land reforms are against Islamic injunctions. Therefore, a political party advocating socialism or land reforms would have to be dissolved under the Political Parties Act. The majority judgement has been acclaimed as an example of judicial activism because of its unusual interpretation of the word 'integrity' in the said clause. It is an example of judicial activism from the point of view of religious parties and of the orthodox sections of society. But it is a tragedy for human rights, as it has imposed sweeping restrictions on the rights of citizens and of political parties to advocate their views.

Elections for the Legislatures were held in the autumn of 1988. As President, General Ziaul Haq suddenly decided to dismiss the Prime Minister, Mr. Junejo, but even the Eighth Amendment did not confer on the President the power to do so directly. However, under Article 58 (2) (b) of the Constitution the President may dissolve the National Assembly,

> where in his opinion:
> (a) .....
> (b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.
> Clause (5) of the Article 48 of the Constitution reads 'Where the President dissolves the National Assembly, he shall, in his discretion
> (a) appoint a date, not later than ninety days from the date of the dissolution, for the holding of a general election to the Assembly; and
> (b) appoint a caretaker cabinet.

As the caretaker cabinet is appointed by the President in his discretion, General Ziaul Haq dissolved the National Assembly and appointed a caretaker cabinet, which did not include Mr. Junejo, but included most of the ministers of Mr. Junejo's cabinet. In other words, the National Assembly was dissolved in order to remove Mr. Junejo.

The Election Commission began its preparations for holding elections on the dissolution of the National Assembly, while political parties began their election campaigns. No political party challenged the validity of General Ziaul Haq's Order dissolving the National Assembly until after 17 August 1988. General Ziaul Haq died in an air crash on that day, and writ petitions were filed in the High Courts challenging his Order dissolving the National Assembly and it would be sufficient to refer to the Supreme Court's judgement in the *Federation of Pakistan v Saifullah* (PLD 1989 SC 166). In his Order dissolving the National Assembly, the President had given four grounds to justify his action. The first was that the object and purposes for which the National

Assembly was elected had not been fulfilled. The leading judgement of the Supreme Court was written by Justice Nasim Hasan Shah, who agreed with the view of the Lahore High Court that even on the assumption that the National Assembly had not been able to realize the hopes placed on it, no purpose would be served by dissolving it. Justice Saifur Rehman took a different view and observed:

> Therefore we are unable to endorse the view of the Attorney, General that the National Assembly had to earn its existing and continuance by maintaining such a pace and progress...as could satisfy the late President.

The view of Justice Shafiur Rehman is correct, because even the Eighth Amendment does not curtail Parliament's monopoly of legislation, and therefore, the President's claim to dissolve the National Assembly on the ground that he was not satisfied with its performance was a violation of the Constitution. The second reason for the dissolution of the Assembly was the deterioration in the law and order situation in the country. The law and order situation had deteriorated alarmingly in the country between 1985 and 1988, but the main reason for this deterioration was that Afghan refugees had been allowed during Martial Law to sell firearms without any restriction to persons not holding licences. Further, as pointed out by the Judges, law and order was the responsibility of the Provinces, therefore the Judges held that Mr. Junejo was not responsible for the law and order situation in the provinces. The third ground, that 'the life, property and honor of citizens was not safe.' This was only a repetition of the second ground. The fourth and last ground was that 'public morality has deteriorated to unprecedented level'. This allegation had no nexus at all with the conditions prescribed in clause 2 (b) of Article 58.

In the circumstances discussed, it could not possibly be contended that the Federal Government was not being carried on 'in accordance with the provisions of the Constitution' by Mr. Junejo. That was also the unanimous view of all the Judges, but it has to be pointed out that Justice Nasim Hasan Shah wrote the leading judgement of the Court. Justice Shafiur Rehman wrote a separate judgement but the majority of the Judges agreed with Justice Nasim Hasan Shah. All the Judges held that the President's Order dissolving the National Assembly was illegal, and they clarified that Article 58 (2) (b) could be invoked by the President only when there was a constitutional breakdown. As the dissolution of the National Assembly was therefore illegal, the question was whether it should be restored. Except in the case of writs of *habeas corpus*, the grant of relief in writ petitions is in the discretion of the Courts and all the Judges held that the writ petitions filed by the respondents should be dismissed as they were barred by laches. The principle that a writ petition can be dismissed on the ground of laches, which means delay in filing the writ petition, is a principle of the English Law of Writs. But England does not have a written Constitution, whilst we have a written Constitution, therefore, the application of the principle of laches to writ petitions seeking relief against the violation of by important provision of the Constitution means

an extension of the English principle for the issue of writs to a situation which could not arise in England. The Judges were, however, impressed by the fact that the respondents had filed their writ petitions in the High Courts only after the death of General Ziaul Haq, and meanwhile the Election Commission had incurred expenses in making arrangements for the elections. But even though respondents did not file their writ petitions promptly, as an erroneous interpretation of Article 58 (2) (b) can undermine parliamentary democracy it is to be hoped that the Supreme Court will, on an appropriate occasion, reconsider its view that writ petitions challenging the violation of major provisions of the Constitution should be barred by laches.

The two other grounds given by all the Judges for dismissing the writ petitions were that people had always wanted elections on a party basis and that it was in the supreme national interest to hold the elections on a party basis. Judges tread dangerous ground when they try to assess popular sentiments, and as the majority of our people live in rural areas, a different view about the popular view with regard to elections under the party system is possible. The other ground that it was in the supreme national interest not to cancel the elections held in November, under the multiparty system, is an application of the doctrine of necessity, which had been formulated by Justice Munir. However, as the test of necessity is subjective, resort to it should be confined to the minimum, and there was another very good reason for refusing to restore the National Assembly even though it had been illegally dissolved. While agreeing with the reasons given by Justice Nasim Hasan Shah for not cancelling the elections, Justice Shafiur Rehman placed very great emphasis on the fact that according to the Constitution, the country was a democracy, and democracy cannot survive without elections under a multiparty system. That view had been taken a few months earlier by the Court in Ms Benazir Bhutto's case, and it is submitted that the restoration of the dissolved National Assembly would have been against the spirit of the Constitution, as that Assembly had been elected on a non-party basis, and further the elections held in November 1988 had put the country back on the path of democracy after General Ziaul Haq had violated in 1979 his undertaking to the Supreme Court to hold elections.

The President can appoint a caretaker cabinet of his choice under clause 5 of Article 48 only when he 'dissolves the National Assembly'. But the words 'dissolves the National Assembly' means a valid Order dissolving the National Assembly, and as the Supreme Court declared illegal the Order passed by the President on 29.05.1988 dissolving the National Assembly, the caretaker cabinet appointed by the President became illegal and Mr. Junejo and his ministers became entitled to govern the country. Mr. Junejo had not taken any proceedings to enforce his rights, but in his writ petition, the respondent Haji Saifullah had pleaded that the cabinet headed by Mr. Junejo 'is constitutionally still in existence' as the Order dissolving the National Assembly was illegal. The Judges did not examine this plea, but it would appear that they were of the view that this relief was barred by laches. But the claim for the reinstatements of Mr. Junejo and his cabinet was not the right merely of Mr. Junejo or of the few ministers of his cabinet whom General

Ziaul Haq had not appointed to his care-taker cabinet. The right was of the people of Pakistan, because in a parliamentary democracy, it is the right of the people to be governed only by the leader of the majority party in parliament. As that leader was Mr Junejo, it is submitted that the right of the people to have him as their Prime Minister should not have been rejected on the ground of laches.

All the Judges have also pointed out that in breach of the Constitution, General Ziaul Haq had not appointed a Prime Minister of his caretaker cabinet and that elections were fixed for November, nearly six months after the Order of 29 May 1988 dissolving the National Assembly, although the President was required by clause (5) of Article 48 to hold elections of 'not later than ninety days from the date of the dissolution of the Assembly'. The Government's explanation of this delay was that a law had to be enacted for the allocation of seats in the National Assembly for Islamabad and the Federally Administered Tribal Areas, and that the National Assembly had failed to enact this law. Whatever be the reasons for the mandatory provisions of clause (5) of Article 48, the delay had to be condoned on the ground of necessity, and Justice Shafiur Rehman observed that he would condone the delay. But Justice Nasim Hasan Shah observed that the delay 'is excusable'. The view of Justice Nasim Hasan Shah is the law, as it was the majority view of the Court. But the word 'excusable' is ambiguous. It also means justifiable, and therefore, it would not be difficult for a future President to find reasons for holding elections after the period of ninety days.

6

LIVING WITH DEMOCRACY

In October 1988, the President, Mr. Ghulam Ishaque Khan, promulgated Ordinance XIV of 1988. The effect of this Ordinance was that no person would be allowed by election officers to vote unless he or she produced his or her identity card. So a man with a valid passport would not be allowed to vote, although he could identify himself with his passport. Additionally an identity card could not be obtained without clearance from the police, and therefore, many hundreds of thousands of people in the rural areas could not afford to get identity cards. Political parties had to get them for their followers, but on account of harassment by the police, it was very difficult for opposition parties to get identity cards in the very short period between the promulgation of Ordinance XIV and the elections. A writ petition was, therefore, filed by a PPP leader in the Lahore High Court challenging the enforcement of the direction to election officers about identity cards. The legal submission was that Ordinance XIV was illegal as it imposed an unreasonable restriction on the right conferred by Article 51 of the Constitution on citizens to vote. The submission on facts was that the right wing alliance, which was in power in the country, was making it almost impossible for followers of the PPP to get identity cards, while many thousands of its own followers had been issued more than one identity card. The writ petition was allowed by Justice Salam Chief Justice by his judgement reported as *Aitzaz Ahsan v Pakistan* (PLD 1989 Lahore 1). In a very well-considered judgement, Justice Salam held that Ordinance XIV of 1988 was illegal. He then examined the evidence produced by the petitioner to show that it was very difficult for followers of the PPP to get identity cards. He also examined the evidence to show that many thousands of fake identity cards had been issued to the followers of the right wing alliance in order to enable them to cast double votes, and held that the evidence proved the petitioner's contention about the difficulties faced by followers of the PPP in getting identity cards, and the petitioner's contention that many thousand of fake identity cards had been issued.

The Government challenged this judgement in the Supreme Court and applied for a suspension of Justice Salam's judgement. It is not customary for any appellate Court to suspend with the admission of the appeal the operation of a well-considered judgement which is under appeal, and according to Justice Shafiur Rehman, the Government had not made out the case for suspending the operation of Justice Salam's judgement. All the other Judges took a different view and suspended the operation of the impugned judgement. The result was that an unpredictable number of voters, probably some hundreds of thousands, were deprived of their right to vote by the stay order of the Supreme Court.

The elections produced a hung parliament, but as the PPP was the largest single party in the National Assembly, President Ghulam Ishaque Khan was compelled to invite Ms Benazir Bhutto to become Prime Minister. She accepted the invitation. Within a year, Mr G.M. Jatoi, the leader of the Opposition moved a vote of no-confidence against her, but the resolution was rejected by the National Assembly. At the end of July 1990 he again announced that he was going to the National Assembly to move another resolution of no-confidence against the Prime Minister. Perhaps the President felt that this resolution too would be defeated, so on 6 August 1990, he dissolved the National Assembly in the exercise of his powers under Article 58 (2) (b) and appointed Mr. Jatoi as the care-taker Prime Minister.

Elections for the National Assembly were held within ninety days of 6 August and the right wing alliance led by Mian Nawaz Sharif had a clear majority in the National Assembly. He therefore became the Prime Minister and Ms Benazir Bhutto became the Leader of the Opposition. Meanwhile writ petitions had been filed in the Lahore and Sindh High Courts challenging the President's Order dissolving the National Assembly. The President had given a large number of grounds for dissolution of National Assembly and as the High Courts held these grounds had been proved, they dismissed the writ petitions. Mr Tariq Rahim, who had filed the writ petition in the Lahore High Court, challenged the dismissal of his writ petition in the Supreme Court, but his petition was dismissed summarily by the Supreme Court by the orders reported as *Tariq Rahim v Pakistan* (PLD 1992 SC 646). The order of the Court was written by Justice Shafiur Rehman and nine Judges of the Court agreed with it. Although Justice Rustam Sidhwa agreed with Justice Shafiur Rehman's conclusion, he wrote his own order giving his reasons for reaching the same conclusion. Justices Salam and Sajjad Ali Shah declared the President Order of 6 August 1988 illegal, but they also dismissed the petition because meanwhile a new National Assembly had been elected. The main ground in the President's Order which led the majority Judges to dismiss the petition read:

> (a) The utility and efficacy of the National Assembly as a representative institution elected by the people under the Constitution, and its mandate, is defeated by internal dissensions and frictions persistent and scandalous 'horse-trading' for political gain and furtherance of personal interests, corrupt practices and inducement, in contravention of the Constitution and the law, and by failure to discharge substantive legislative functions other than the adoption of the Finance Bill, and further the National Assembly has lost the confidence of the people.

Horse-trading in ground (a) referred to members of the National Assembly who cast their votes on resolutions before the Assembly for personal gain, and no distinction has been drawn by the President in the matter of horse-trading between the PPP and the opposition parties. This was because both parties had resorted to horse-trading.

Secondly, there were a large number of independent members in the Assembly elected in 1988, and the expression 'horse-trading' included independent members who cast their votes for personal gain. On the other hand, crossing the floor occurs when a member of an Assembly votes against the political party to which he belongs. Horse-trading is always immoral, but crossing the floor can be on the ground of conscience or the national interest, and if so, it reflects the moral courage and the high moral standards of members of an Assembly. However, if a member of an Assembly votes against his party for personal gain, he is guilty of horse-trading. The President was aware of distinction between crossing the floor (which Justice Shafiur Rehman has described as defections) and horse-trading, and the President dissolved the National Assembly because 'of scandalous horse-trading' and not defections. In upholding the President's Order of 6 August 1988, Justice Shafiur Rehman observed:

> ...Defection of elected members has many vices. In the first place, if the member has been elected on the basis of manifesto, or on account of his affiliation with a political party, or on account of his particular stand on a question of public importance, his defection amounts to a clear breach of confidence reposed in him by the electorate. If his conscience dictates to him so, or he considers to expedient, the only course open to him is to resign to shed off his representative character which he no longer represents and to fight a re-election. This will make him honorable, politics clean, and emergence of principled leadership possible. The second and more important, the political sovereign is rendered helpless by such betrayal of its own representative. In the normal course, the elector has to wait for years, till new elections take place, to repudiate such a person. In the meantime, the defector flourishes and continues to enjoy all the worldly gains. The third is that it destroys the normative moorings of the Constitution of an Islamic State. The normative moorings of the Constitution prescribe that 'sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by him is a sacred trust' and State is enjoined to 'exercise its powers and authority through the chosen representatives of the people.' An elected representative who defects his professed cause, his electorate, his party, his mandate, destroys his own representative character.

Although the President had dissolved the Assembly on the ground of 'horse-trading', as Justice Shafiur Rehman upheld the President's Order on the ground on defections, the consequences of the Court's decision is that independent members of the Assembly are free to go on with their horse-trading. Unfortunate as this was, the learned Judge also did not lay down any guidelines for the exercise of the President's discretion under Article 58 (2) (b) of the Constitution. But on the assumption that the President can dissolve the Assembly on the ground of defections, when would he be entitled to do so? Would he be entitled to dissolve the National Assembly if five members defected or would he be entitled to dissolve the National Assembly if fifty members defected? As

the learned Judge has preferred to be silent on this question, he has given a blank cheque to the President to dissolve the Assembly, in his sole discretion. That was a very dangerous power to give to the President, and Justice Rustam Sidhwa has examined the contentions of the parties in his order and pointed out that there were only a few defectors. Now according to the judgement of the Full Court in Saifullah's case, the President can dissolve the National Assembly only when there is a constitutional break-down, and that was the view taken by Justice Shafiur Rehman in his own judgement in that case. As it cannot reasonably be contended that the defection of a few members of the Assembly can cause a constitutional break-down, Justice Shafiur Rehman's view in Tariq Rahim's case is inconsistent with the view taken by the Court in Saifullah's case.

The reasons given by the learned Judges for condemning defections also do not stand up to analysis. According to the learned Judge, a defection by a member is betrayal of the manifesto of the political party on whose ticket he was elected. Unfortunately, in Pakistan, leaders of political parties have betrayed the manifestos of their parties. In such situations, would a voter condemn a member of the Assembly for leaving his party or would he condemn the party? Secondly, in all countries in which democracies have been functioning successfully for a long time, voters expect members of parliament to vote firstly according to their conscience, secondly according to the national interest, and thirdly according to the party line, and Germany is the most striking example of the preference given by voters to moral considerations. Half the members of the Bundestag (the German National Assembly) are nominated by political parties in accordance with a formula prescribed in the German Constitution. But so great is the importance attached by the German people to moral considerations that even the nominated members of the Bundestag are free to vote according to their conscience. But Justice Shafiur Rehman assumed that Pakistani voters take a different view of morality and expect the member elected by them to resign if he votes against the party line on grounds of conscience. This assumption of Justice Shafiur Rehman is his opinion, and I do not agree with it. According to the learned Judge, a defector destroys the constitutional moorings of the country and of Islam by voting against his party. This opinion of the Judge is not shared by other scholars of Islam, and the late Justice Hamoodur Rehman in his book, Reflections on Islam, discussed at page 214 the qualifications of members of a Muslim legislature and observed:

> It is, therefore necessary that they should also be persons possessing special qualifications needed for this task and these should also be carefully laid down in the Constitution. Once elected they should function as independent members and not be tied to any political party or its programme. They should vote on the questions laid before them on the basis of their own honest conviction. No other consideration ought to be allowed to prevail.

The moral values of all religions impose the same obligation on members of Parliament to act according to their conscience, and to vote according to their conscience.

The President referred in ground (a) to corruption in the Assembly, but as corruption permeates every walk of life in the country, corruption will not be removed by dissolving the National Assembly, but it will be reduced if persons of integrity and self-respect contest elections. But a person who contests an election has to spend a lot of money, and no person of integrity and self-respect will stand for elections, if the price of voting according to his or her own conscience, is that he or she should resign his or her seat in the Assembly and contest elections again.

The other ground in the President's Order of 6 August, which appealed to the majority Judges, was the claim of the President that the Prime Minister had not allowed the Council of Common Interests to function, despite the demands of the provinces, and that the Prime Minister had never called a meeting of the National Finance Commission. Justice Shafiur Rehman accepted this claim in the following words:

> ...As regards the second ground, we find sufficient correspondence on record to indicate that persistent requests were made by the Provinces for making functional the Constitutional institutions like Council of Common Interests, National Finance Commission with a view to sort out disputes over claims and policy matters concerning the Federation and the Federating Units as such. In spite of the intercession of the President, no heed was paid, constitutional obligations were not discharged thereby jeopardizing the very existence and sustenance of the Federation.

It was unfortunate that the Judge accepted the President's claim in one sentence with the observation that there was sufficient correspondence to prove the President's claim. But Justice Sajjad Ali Shah examined that correspondence carefully and reached the opposite conclusion. According to Justice Sajjad Ali Shah, the President had written a letter to the Prime Minister advising her to call a meeting of the Council of Common Interests on account of complaints from the Chief Ministers of the Punjab and Balochistan. The Prime Minister wrote in her reply to the President that a meeting of the National Economic Council had been held in a congenial atmosphere, but that at the concluding stage of the meeting two Chief Ministers had expressed their reservations about some matters, and had wanted a meeting of the Council of Common Interests. The Council of Common Interests was not an appellate or supervisory body over the National Economic Council. This statement is correct. The Prime Minister's reply to the President escaped the attention of the majority Judges. In any event, the Prime Minister is not bound under the parliamentary system of democracy by the President's advice, and on the contrary the President is bound by the advice of the Prime Minister under Article 48 (1) of the Constitution, therefore the convening of meetings of the Council of Common Interests was in the Prime Minister's discretion, subject to Article 155 of the Constitution, on which the President did not rely. Similarly under Article 160 of the Constitution, it was for the Prime Minister to call meetings of the National Finance

Commission in her discretion, and merely because a hostile President or a hostile Chief Minister wanted a meeting of the Council of Common Interests or of the National Finance Commission did not mean that the Prime Minister had abused the discretion vested in her. The view of Justice Sajjad Ali Shah is therefore the correct view.

The difference between the majority view, expressed in the very brief order of Justice Shafiur Rehman, and the minority view of Justice Sajjad Ali Shah is based on their different interpretations of clause (2) (b) of Article 58 of the Constitution. Justice Sajjad Ali Shah has placed a strict construction of this clause, while Justice Shafiur Rehman has placed a very liberal interpretation on it. But Article 58 (2) (b) is a part of the Eighth Amendment and as the country is a parliamentary democracy, this clause must be construed strictly, as it imposes a very severe restriction on the functioning of parliamentary democracy. The further consequence of the very liberal construction placed on this clause is that it has given the President the power to dissolve the National Assembly, in his unfettered discretion, on the ground of defections. But corruption is a worldwide phenomenon, and when societies become corrupt, some members of parliaments are bound to be corrupt and as corruption has increased enormously in Pakistan in the last two decades, it was obvious that horse-trading would continue in the National Assembly which elected Mian Nawaz Sharif as Prime Minister, and as it continued, on the law declared in Tariq Rahim's case, the President became entitled to dissolve the National Assembly in 1993.

There was an element of melodrama in the events leading to the dissolution of the National Assembly in 1993. The Prime Minister was the head of a right wing alliance, which began breaking up by the end of 1992. Members of this alliance wrote their letters of resignation to the Speaker of the National Assembly and gave them for safe custody to the President. These letters of resignation were not forwarded directly to the Speaker, because the members who were submitting their resignations from the National Assembly were of the view that the Speaker was biased in favor of the Prime Minister. The newspapers gave publicity to some of these letters of resignation and the Prime Minister felt that the President was trying to bring about defections from the right wing alliance over which he presided. The strain of this war of nerves became too much for the Prime Minister and on 17 April 1993 he made a broadcast to the nation in which he criticized the President in very strong language. According to the judgement of the Chief Justice, Justice Nasim Hasan Shah, the Prime Minister accused the President in his speech of dirty horse-trading. This speech roused the anger of the President, who issued an Order the next day dissolving the National Assembly. The popular reaction to this Order of the President was that he had acted out of spite, and people felt that the President and the parliamentary system of democracy could not go together. The deposed Prime Minister thus became a national hero, and he challenged the President's Order of 18 April 1993 in a writ petition in the Supreme Court under Article 184 (3) of the Constitution.

According to Article 184 (3) of the Constitution, a petition can be filed in the Supreme Court only if it raises 'a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II' of the Constitution. Only Articles 8 to 28 are in Chapter I of Part II, and Article 17 confers the Fundamental Rights on citizens to form and join political parties, and imposes an obligation on political parties to disclose the source of their funds. The Constitution also confers other rights on citizens. However, the manner in which a member of the National Assembly is elected Prime Minister is set out in Chapter III of Part III of the Constitution and after a person has been elected Prime Minister, he has a right to continue as Prime Minister in the manner prescribed in Part III of the Constitution, and on the assumption that the Prime Minister had been dismissed illegally, an assumption which he denied, the Attorney-General raised a preliminary objection that the Supreme Court did not have the jurisdiction to entertain the petition as the petitioner's cause of action was not based on Fundamental Rights.

However, according to the petitioner, the President's Order dissolving the National Assembly was a violation of his right under clause (2) of Article 17 of the Constitution. The submission had the merit of novelty. The said clause (2) confers in terms the right on citizens only 'to form or be a member of a political party', and it is not possible to understand how the words quoted can include the alleged right of a citizen to become the Prime Minister of Pakistan because he or she has become a member of a political party. Therefore, Mian Nawaz Sharif could have challenged the President's Order of 18 April 1993 dissolving the National Assembly in the High Courts, but if he had done so, it would not have been possible for him to get a decision from the Supreme Court before the new Assembly had been elected. He, therefore, had a grievance, but that grievance could not justify an alteration of clause (2) of Article 17, and Justices Saad Saood Jaan and Sajjad Ali Shah rejected the petitioner's claim that his Fundamental Right under Article 17 (2) had been infringed. But the Chief Justice, Justice Nasim Hasan Shah, and eight other Judges accepted the petitioner's contention and held that the Supreme Court had the jurisdiction to entertain the petition under Article 184 (3) of the Constitution.

The Chief Justice stressed the fact that Fundamental Rights imposed a restraint on the arbitrary exercise of power. They are not only a restraint on the arbitrary exercise of power, but they are also essential for the protection of our fragile democracy, and any judgement which undermines Fundamental Rights undermines democracy. This may have led the Chief Justice to hold that clause (2) of Article 17 comprises the right of a political party to contest elections and also to form the government under its Chairman, if that party has a majority in the National Assembly. With due respect, the right of a political party to operate and contest elections gives that party only a claim to form the government, and this claim becomes a right only if that party has a majority in the National Assembly. Similarly when a person becomes a member of a political party, he does not acquire a right to become the country's Prime Minister. But if he is elected the

leader of his party and his party has a majority in the Assembly, then and only then, he is entitled to become Prime Minister. That is why the right to form the Federal Government has been defined in Chapter III of Part III of the Constitution and not in the Chapter on Fundamental Rights. That is also why the right of a Prime Minister is protected in Chapter III of part III of the Constitution, and not in the Chapter on Fundamental Rights, and to treat the violation of rights conferred in the Chapter on Fundamental Rights in Part II of the Constitution is to violate the letter and spirit of the Constitution, and the dismissal of Mian Nawaz Sharif was a violation of his constitutional right under Chapter III of Part III of the Constitution, but not of his Fundamental Right under clause (2) of Article 17.

The Chief Justice has also relied upon judgements in which a very liberal interpretation was placed on words in order to give relief to a litigant, but, with due respect, his interpretation of Article 17 (2) goes far beyond a liberal interpretation of the words 'the right to form or be a member of a political party' in this clause. Additionally the judgements cited are distinguishable, because the petitioner was not without a remedy. He could have filed a writ petition in any High Court to challenge the President's Order, but he thought his interests would be served better if he went to the Supreme Court directly. This did not justify any alteration of the meaning of Article 17 (2) and the minority view is correct.

However, as the majority view held that the petition was maintainable, the Judges examined the merits of the petition and allowed it, with only Justice Sajjad Ali Shah dissenting. The President had given a large number of grounds to justify his Order and many of these grounds were a repetition of the allegations made against Ms Benazir Bhutto in 1990. Thus, for example, he had accused Benazir Bhutto of corruption, misuse of public funds, etc. and he made the same allegations against Mian Nawaz Sharif. But while the allegations against Ms Benazir Bhutto had been based mostly on newspaper reports and intelligence reports, some of the allegations against Mian Nawaz Sharif were supported by independent evidence. The majority Judges rejected this evidence. A different view might have been better with regard to some of these allegations. Be that as it may, the majority view was based on the principle that the President had to prove his allegations against the deposed Prime Minister. This principle was correct, and it was unfortunate that the same view had not been taken by the Supreme Court in Tariq Rahim's case.

The President so relied on defections from the 'Treasury Benches' for dissolving the National Assembly. Eighty-eight members out of the 217 members of the National Assembly had left their letters of resignation with him, and a few of these letters made it clear that the authors of those letters could no longer remain in the right wing alliance of Mian Nawaz Sharif. In Tariq Rahim's case, decided a year earlier, the majority view of the Supreme Court had given a blank cheque to the President to dissolve the National Assembly if there was evidence of defections. In these circumstances there

were only two options for the majority Judges. They had either to follow the decision in Tariq Rahim's case and dismiss Mian Nawaz Shun writ petition, or they had to overrule the majority decision in Tariq Rahim's case. They did not overrule Tariq Rahim's case, yet they allowed Mian Nawaz Shun petition. Justice Sajjad Ali Shah, therefore, rightly pointed out that the majority Judges had used one yardstick for upholding President Ghulam Ishaque's order dismissing Ms Benazir Bhutto and a different yardstick for setting aside President Ghulam Ishaque's order dismissing Mian Nawaz Sharif. Justice Sajjad Ali Shah dismissed the petition because he held that the President's case against Mian Nawaz Sharif was supported by stronger evidence than the case against Ms Benazir Bhutto in 1990 and Tariq Rahim's case had not been overruled.

It is not possible to understand why the majority Judges did not overrule the decision in Tariq Rahim's case and the result is that two decisions, which cannot be reconciled with each other, hold the field. This will make it difficult for Presidents in future to know when they would be justified in dissolving the National Assembly. As the country is a democracy, according to the Constitution, the President would be under an obligation to dissolve the National Assembly, if, for example, it passed a bill for setting up a one-party state. But democracy can also be destroyed if it's essential features are destroyed. Some of these features have been discussed earlier. There are also other features essential to democracy, but on 5 November 1996, the President dissolved the National Assembly. Petitions have been filed in the Supreme Court challenging this Order, and it is to be hoped that the Supreme Court will re-examine its earlier decisions and clarify the principles for the exercise of the President's power to dissolve the National Assembly. It is also of interest to note that the Chief Justice, Justice Sajjad Ali Shah, has said that the Court would re-examine the question whether an Order under clause (2) (b) of Article 58 violates any Fundamental Rights conferred by Article 17 (2) of the Constitution.

7

PUBLIC INTEREST LITIGATION AND JUDICIAL ACTIVISM

As explained earlier, the writ jurisdiction was first conferred on our superior Courts in 1954, and as the concept of writs was borrowed from England, our Courts followed the English practice for the issue of writs, and, according to which except for writs of *Habeas Corpus*, a writ could be filed only by an aggrieved party, which meant, a person whose personal interests had been adversely affected by the order which was challenged in the writ petition. This practice made it extremely difficult for the poor to invoke the writ jurisdiction of the Courts. But the concept of an aggrieved party was slowly being enlarged by our Courts. A writ petition was filed in the late sixties in the Karachi seat of the West Pakistan High Court by Mr. Baqi Baloch, who was then a member of the West Pakistan Provincial Assembly. The hearing of this petition was delayed, as Mr. Baqi Baloch had been detained under the Defence of Pakistan Rules. Mr. Baqi Baloch challenged in his petition the transfer to Iran of some territory in Balochistan which he claimed was a part of Pakistan. The Attorney-General came over from Islamabad to oppose the petition on the ground that Mr. Baqi Baloch was not a aggrieved person as he did not live in the disputed territory and did not have any personal interest in it. Mr. Baqi Baloch's contention was that he was entitled to file a writ petition as a member of the Provincial Assembly. Although his petition was dismissed, as he failed to prove that the transfer of the disputed territory was illegal, we upheld his contention that he was entitled to file a writ petition as a member of the Provincial Assembly.

The principle of conferring the right to file a writ petition on persons who were not personally affected by the impugned order was developed in the early eighties with great vigour by the Indian Supreme Court. The Indian Supreme Court held that public spirited citizens and societies could file writ petitions on behalf of persons who were too poor to seek relief from the Courts, and the Court called it public interest litigation. Public interest litigation has enabled the Courts to do justice to the poor, and to those who are afraid of enforcing their rights lest they be harassed for so doing. Finally in Ms Benazir Bhutto's case, our Supreme Court referred to the Indian Judgements and approved of them and thereafter the High Courts and the Supreme Court have entertained public interest litigation.

It was pointed out earlier that the PPP lost the 1990 elections. After the new governments came into power, President Ghulam Ishaque and the then Chief Minister of Sindh, whose name will not be mentioned as he is dead, resorted to wholesale arrests of the leaders and of the followers of the PPP in Sindh. Those who could afford to apply for *habeas corpus* to the High Court did so. The Sindh High Court was initially reluctant to grant bail, but as it became clear that the Government was resorting to a reign of

terror, it came to the rescue of citizens by taking a robust view of its power to grant bail. Hundreds of people had been arrested in the interior of Sindh. As they could not afford to travel to the seat of the High Court to file their *habeas corpus* petitions, they began sending letters and telegrams to the Chief Justice through their relations. The Chief Justice gave a decision that these letters and telegrams should be treated as writ petitions and that the authors of the letters and telegrams should file affidavits in support of their allegations of illegal arrest. The Chief Justice then requested members of the Bar to take up these *Habeas Corpus* Petitions. But he complained after a while that the Bar was not fully responding to his appeal. This was because of the large numbers of petitions with which the Court was flooded. It was also sometimes alleged in the letters and telegrams sent by relatives of victims that the police were taking these victims to police stations and detaining them without filing any criminal complaint against them and without issuing warrants for their arrest. The High Court sent its officers to search the police stations and many of these complaints were found to be true and the detenues were released. There is no law under which the police can take citizens to police stations and detain them in this manner. This meant that the Government was directing the police to kidnap persons in order to break the opposition. Inevitably when the police commit crimes to please their superiors, some of them will commit crimes for their own benefit, and the police began picking up people illegally from their houses and detaining them in police stations in order to obtain money for their release. This evil practise still goes on, and many persons kidnapped by the police in this manner cannot afford to engage lawyers.

Judicial activism was an expression coined in the eighties. It has two meanings. One is that Judges of the superior Courts will inquire *suo moto* (which means on their own) into cases on the basis of reports in the media. This type of judicial activism is similar to the revisional jurisdiction of the High Courts and even before independence, Judges, with a zeal to do justice, used to send for the records of cases in the subordinate Courts on the basis of newspaper reports and correct erroneous judgements and orders. But, unlike the revisional jurisdiction of High Courts, judicial activism extends to taking action on violations of the law by any persons. In the exercise of this type of judicial activism, the Lahore High Court had ordered the release from prison of children under fourteen years in 1991. Newspaper reports had also given publicity to the deaths of young wives burnt to death, while cooking food on stoves. Such deaths can be accidental, but as it was clear that the rate of 'stove-burning' was higher in some parts of the Punjab than in other parts, a Judge of the Lahore High Court took action *suo moto* and gave directions to the police to investigate such cases. The police do not seem to have taken much interest in the matter. Longstanding social evils are difficult to eradicate, and, for example, although the Lahore High Court had ordered the release of children under fourteen years from Punjab jails, according to a report in the newspaper *The Dawn* of 9 December 1996, there were about 1000 children in jails in the Punjab in November 1996. Similarly, although deaths of young wives through 'stove-burning' have diminished, these fake accidents go on. But Courts have been doing their best to eradicate social

evils, and this type of judicial activism as well as public interest litigation have helped to bring justice according to law to the poor. This has raised the prestige of the superior Courts, but if public interest litigation and this type of judicial activism are confined to High Courts, it would give the aggrieved party a right of appeal in the Supreme Court.

There is, however, another type of judicial activism. This second type of judicial activism means that Judges should interpret laws in order to realize the objects of the laws, and the objects of the laws (including a country's Constitution) is what the Judges think those objects should be. Judges have always developed laws and adapted them to the needs of society through the interpretation of laws in accordance with the settled rules for the construction of laws. But judicial activism of this second type means to some of its devotees that Judges know better than parliament what the law should be, and therefore, Judges should place a very liberal interpretation on the meaning of words even if this interpretation does violence to the meanings of those words. In December 1996 a former Attorney-General had submitted his arguments in a petition in the Supreme Court that the Court should strike down the Eighth Amendment of the Constitution, as it was a fetter on the system of parliamentary democracy. But the values of society are changing, and as observed by Justice Shafiur Rehman in Ms Benazir Bhutto's case, there are persons who are against the party system without which democracy is impossible. If the Courts can declare the Eighth Amendment illegal, they can also declare the parliamentary system illegal. And the Chief Justice, Justice Sajjad Ali Shah told the former Attorney-General that Courts cannot declare illegal provisions of the Constitution.

Judicial activism of this second type is also likely to involve Judges in political and religious controversies. Furthermore, as it has become popular, this type of judicial activism may lead Judges to seek publicity. And in Mian Nawaz Sharif s petition against his dismissal by the President in 1993, the petitioner's advocate began his arguments with an irrelevant attack on the late Justice Munir. The advocate was not told to let the dead rest in peace, and according to newspaper reports, the reply from the Bench was that a judgement would be given which would please the public. This led Justice Sajjad Ali Shah to observe in his judgement that it is not the function of Court to please the public, but to uphold the laws. An independent judiciary means not only a judiciary which can resist the pressures of governments, but also the pressures of public opinion, and I do not think this second type of judicial activism is desirable.

The interpretation of the word 'integrity' in Article 17 (2) of the Constitution in Ms Benazir Bhutto's case and the interpretation of the right conferred on citizens to form and join political parties in Article 17 (2) are examples of this type of judicial activism. Another example of this type of judicial activism is a judgement of the Lahore High Court in Hakim Khan's case. This judgement was after the Objective Resolution passed by the Constituent Assembly in 1949, had been shifted from the preamble of the Constitution to Article 2 (A) of the Constitution. On 7/8 December 1988, on the advice

of the Prime Minister Ms Benazir Bhutto, the President had commuted all death sentences passed by, military or other Courts upto 6 December 1988 to imprisonment for life in the exercise of his powers under Article 45 of the Constitution. This Order was challenged in the Lahore High Court on the ground that it was inconsistent with Article 2 (A) of the Constitution, and that as Article 2 (A) was a supra-constitutional provision, Article 45 was illegal to the extent to which it was inconsistent with Islamic Injunctions. The High Court accepted these submissions and declared illegal the commutation of the death sentences passed under the Hudood, Qisas and Diyat Ordinances. The Government challenged the High Court's judgement in the Supreme Court on the ground *inter alia* that Article 2 (A) was not a supra-constitutional provision. The Supreme Court held in its judgement in *Hakim Khan's v the Government of Pakistan* (PLD 1992 SC 595) that Article 2 (A) was not a supra-constitutional provision. Justice Nasim Hasan Shah wrote the leading judgement of the Court. After approval of the settled principle that a Constitution should be read as a whole, he observed:

> This rule of interpretation does not appear to have been given effect to in the judgement of the High Court on its view that Article 2 (A) is a supra-constitutional provision. Because, if this be its true status, then the above quoted clause would require the framing of an entirely new Constitution. And even if Article 2 (A) really meant that after its introduction it is to become in control of the other provisions of the Constitution, then most of the Articles of the existing, constitution will become questionable on the ground of their alleged inconsistency with the provisions of the Objective Resolution....The role of the Objective Resolution, accordingly in my humble view, notwithstanding the insertion of Article 2 (A) in the Constitution (whereby the said Objective Resolution has been made a substantive part thereof) has not been fundamentally transformed from the role envisaged for it at the outset, namely that it should serve as beacon light for the Constitution-makers and guide them to formulate such provisions for the Constitution which reflect ideals and the objectives set forth therein.

He also examined in detail the debate in the Constitution Assembly about the Objective Resolution and held that the Resolution was only intended to lay down guidelines for legislation by legislatures. He, therefore, overruled the principle laid down by the High Court that Article 2 (A) was a supra-constitutional provision which empowered the Courts to strike down other provisions in the Constitution.

It is also necessary to observe that the Constituent Assembly was aware that the superior Courts did not have the jurisdiction under the Government of India Act, 1935 to declare any law illegal on the basis of religious or moral injunctions. If, therefore, the Constituent Assembly had intended to confer on the superior Courts the jurisdiction to declare laws illegal on the ground that they were inconsistent with the Objective Resolution, it would have amended the Government of India Act and conferred the

jurisdiction to declare laws illegal on the superior Courts. But the Constituent Assembly did not confer even the writ jurisdiction on the superior Courts for another five years. It is, therefore, clear that the Constituent Assembly did not want to alter the basic structure of a democratic Constitution by conferring legislative powers on the superior Courts.

Rights of Minorities including Women

There was no discrimination against women until the mid-sixties. On the contrary, Article 5 of the 1956 Constitution and Article 15 of the 1962 Constitution had read: All citizens are equal before law and are entitled to equal protection of law. The various communities in British India had been governed by their religious laws, if any, in matters like marriage, dower, divorce, inheritance, and succession. But the political and civil rights of citizens were not governed by their religious laws. These rights were governed by the regular laws and the right of a person of either sex to live where he or she wanted was protected by Section 491 of the Criminal Procedure Code, which was a secular law. The relevant part of the section reads:

> Direction of the Nature of a *Habeas Corpus*
> 491 (1) Any High Court may, whenever it thinks fit, direct—
> (a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;
> (b) That a person illegally or improperly detained in public or private custody within such limits be set at liberty;

If a wife leaves her husband, the husband has the right to prosecute his remedies against her under the relevant matrimonial law. But if he manages to get hold of her and gets her back to his house against her will, she has to be 'set at liberty' under the aforesaid Section 491. But this view is now past history, as there have been several judgements, mostly of the High Court at Lahore, in which Judges have refused to allow *habeas corpus* applications under the aforesaid Section 491 on behalf of a wife who did not wish to live with her husband and it is sufficient to refer here to a judgement of Justice Cheema in *Fateh Sher v Sarang* (PLD 1971 Lahore 128). The claim of the respondent Sarang was that he was the husband of Mst. Naziran and Justice Cheema held that these claims has been proved by Sarang. Mst. Naziran had, however, left the respondent and was living with the petitioner. The respondent somehow managed to get Mst. Naziran into his house and kept her there against her wishes. The petitioner therefore filed an application under Section 491 of the Criminal Procedure Code for her release from the respondant's custody. Justice Cheema dismissed the application. He observed:

> This positive injunction of the Holy Quran leaves one in no manner of doubt that under certain circumstances a husband can even go to the extent of giving a

> beating to his wife who persists in her rebellious conduct....Under Islamic law the husband, being the husband of the woman, is entitled to her custody as her guardian.

The Judge, therefore, held that although Mst. Naziran wanted to be 'set at liberty', so that she could go with the petitioner, he observed that 'the provision contained in Section 491 CPC cannot be given effect to in circumstances of this nature'. He dismissed the petitioner's application with the observation that the petition was in the exercise of his discretionary jurisdiction and he would not exercise his discretion in favor of Mst. Naziran.

The provisions of the said Section 491 are based on the English writ of *habeas corpus*. While the issue of other writs in England is in the discretion of the Courts, the writ of *habeas corpus* is a writ of right, which has to be issued against a person who is detaining another adult against his or her will. The writ of *habeas corpus* is a writ of right because of the supreme importance attached to the freedom of a person by the common law, and so writs have been issued even in favor of errant wives. It is, therefore, submitted that the Judge erred in holding that the issue of an application under the said Section 491 was in his discretion. Be that as it may, the tide had begun to turn against women from the mid-sixties. Mr Bhutto reversed the tide for the years he was in power. He created an awakening amongst women of their right to equality with men guaranteed by Article 25 of the Constitution. But the tide turned again after his overthrow, and in October 1996, a case was decided by the Lahore High Court which has only been reported in newspapers. Justice Cheema in another case held of an adult Muslim woman called Shabina that an adult Muslim woman cannot marry under Muslim Law without the consent of her father or her guardian. As Shabina had married without her father's consent, her marriage was declared illegal and the police now threaten to prosecute her for adultery under the Hudood Ordinance. Women have been jailed and whipped for adultery under this Ordinance. This judgement led to widespread protests in Lahore and Karachi, and as Muslim male adults can marry according to their own wishes, the judgement is inconsistent with the Fundamental Rights of equality between citizens, irrespective of religion or sex, guaranteed by Article 25 of the Constitution.

The year 1997 has not begun well for women's rights. The Afridis are one of the important Pathan tribes, and according to a report in the newspaper *Dawn* of 1 January 1997, the *jirgas* of the Afridis of the Frontier Province have announced that Afridi women should neither be registered as voters, nor be allowed to cast their votes. They have also resolved that any male member of a family who brings or allows a woman to vote will be fined Rs. 50,000 and his house would be burnt.

The Christians are the largest religious minority in Pakistan. They number more than two millions, and the majority live in the Punjab. Like all other religious minorities, their position has deteriorated after the introduction of separate electorates for religious

minorities by General Ziaul Haq. They have been harassed by the new law for the blasphemy of the Holy Prophet, Muhammad (PBuH). The definition of blasphemy under this law is a model of vagueness, yet the only penalty is death. The law is therefore being abused to settle old scores, and even Muslims have been charged for blasphemy on flimsy grounds. Although Christians in one or two districts of the Punjab have been harassed by threats of prosecutions for blasphemy, only five Christians have been charged for it. The number of prosecutions is trivial, and filing a handful of false criminal charges against religious minorities would, by itself, have been too unimportant a matter to discuss. But the manner in which four Christians were sentenced to be hanged by the subordinate Courts was frightening. Thus, for example, in Gul Masih's trial for blasphemy, the prosecution relied on the evidence of the complainant and two other witnesses who were present, according to the complainant, when Gul Masih used words amounting to blasphemy. One of the two witnesses denied that Gul Masih had criticized the Holy Prophet, while the other witness repudiated as false the complainant's statement that he was present at the time of alleged conversation. It was also proved that the complainant had a dispute with Gul Masih. But Sessions Court was always full of bearded gentleman when the case was heard. And in sentencing Gul Masih to death, the Judge said he had no reason to doubt the complainant's evidence as he was a pious Muslim with a beard. The Lahore High Court set aside the judgement of the Sessions Judge and acquitted Gul Masih, but he had spent one year in the death cell.

Salamat Masih, Rehmat Masih, and Manzoor Masih were tried for blasphemy on grounds so flimsy that the Lahore High Court granted them interim bail pending their trial in the Sessions Court. As they had been threatened by some religious groups, they asked for a police escort to take them from the High Court to the office of one of these advocates. They were defended by one Christian, and two Muslim ladies, who had received assassination threats for defending Christians on a charge of blasphemy. The police escorted them to their lawyer's office. They came out of his office, after what they thought was a safe interval, and were waiting at a bus stop. A man came on a motorcycle and fired at them at point-blank range. Manzoor Masih died on the spot, while Rehmat Masih was very seriously injured. No political leader condemned this murder. After Rehmat recovered from his injuries, the trial of Rehmat and Salamat was resumed and they were sentenced to death. When their appeals against their convictions was heard by the Lahore High Court, some religious groups created untruly scenes in the Court's premises, and a *fatwa* was issued for the assassination of the two Muslim ladies defending them. Salamat was a minor even at the time of the hearing of his appeal in the High Court, and both he and Rehmat were acquitted. But as they had also received assassination threats, they were given asylum by the German Government.

The Hindus are the other large religious minority in the country. They number more than a million and a half and live in Sindh. Their misfortune is that their women are

attractive when young. Sometimes they elope with their Muslim paramours and sometimes they are abducted by Muslims for obvious purposes. The police were very prompt in recovering abducted women before the Martial Law of 1977. After 1980 the police took at least a week to trace the abducted woman. Anything can happen when a woman is abducted and kept isolated from her own family, and when her parents filed a *habeas corpus* application, the woman said that she had become a Muslim and had married the man, who had taken her away. On this evidence, the Sindh High Court had no option but to dismiss the father's application for *habeas corpus*. But the situation is different when the abducted girl is a minor. Just as a minor Muslim girl cannot marry without her father's permission, so also a minor Hindu girl cannot marry without her father's consent. But the age of majority under Hindu law is eighteen years, while under Muslim law a girl who has attained puberty can marry. As after 1980, the police were very slack in recovering abducted Hindus, when the girl was finally traced, the police would not register a case for abduction if a doctor certified that the girl had reached the age of puberty. A National Minorities Commission was set up in 1993, but it has not had any success in making the police do their duty of acting promptly in abduction cases. But as the member of the Commission trying hard to fight this evil, the Commission was disbanded and reconstituted in 1995.

The Ahmadis were a sect of Muslims. The sect was founded in 1989. As they were a sect of Muslims, they followed many but not all the representations and symbols of Islam. Their places of worship were called *masjids* and they had voted as Muslims upto the elections of 1970. In 1974 the Constitution was amended and they were declared non-Muslims, but they continued to follow many of the rituals, symbols, and representations of Islam, as they had been Muslims from 1889 to 1974 and they still claim to be Muslims. They began having a difficult time under the Martial Law of 1977, and in 1984 the Ahmadi Ordinance was promulgated in order to prevent Ahmadis from passing off as Muslims, and the Penal Code was amended to make it a criminal offence for Ahmadis to refer to their places of worship as *masjids*. This amendment in the Penal Code also made it a criminal offence for Ahmadis to use or display the symbols, representations, and rituals of Islam and by 1992, 1790 prosecutions had been filed against Ahmadis under the amended Penal Code. Some writ petitions were filed in the Lahore High Court challenging those convictions as far back as 1984. Petitions were also filed in the Lahore High Court after the promulgation of Fundamental Rights to challenge the validity of the Ahmadi Ordinance and the amendment of the Penal Code on the ground that they were void, as they were inconsistent with Fundamental Rights 20 and 25 of the Constitution. All these petitions were dismissed and it is sufficient to state that the Supreme Court granted leave in all these cases dismissed by the Lahore High Court and all the appeals were heard together in the Supreme Court and dismissed.

The judgement of the Supreme Court were reported as *Zahiruddin v The State and others etc.* (1993 SC MR 1718). The leading judgement of the Court was written by Justice

Shafiur Rehman. The appellants relied in their appeals on Fundamental Rights 20 and 25 of the Constitution and the case-law on these Articles. The State relied on the words 'subject to law' which qualified the right conferred by Article 20 and submitted that the word law meant the injunctions of Islam. While Article 20 guaranteed the right to practise and propagate one's faith own, the Ahmadis were trying to mutilate and subvert the faith of Muslims. The further contention of the State was that as the Objective Resolution of 1949 had been made a substantive part of the Constitution as Article 2 (A) all the other provisions of the Constitution including all Fundamental Rights were subordinate to Article 2 (A) and to Islamic injunctions.

Justice Shafiur Rehman took up the argument about Article 2 (A) and held that the claim that this Article was a supra-constitutional provision, to which all the other provisions of the Constitution were subordinate, had been expressly rejected in Hakim Khan's case, to which the learned Judge was a party and he reaffirmed the view taken in it. He then examined Article 20 which reads:

> 20. Freedom to profess religion and to manage religious institutions—
> Subject to law, public order and morality—
> (a) every citizen shall have the right to profess, practise and propagate his religion; and....

The learned Judge then referred to Justice Munir's landmark judgement in Jibendra Kishore's case on the right to freedom of religion and cited with approval the passage of Justice Munir quoted earlier in which Justice Munir had held that it would be 'a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law'. As the contention of the State was that Islamic injunctions were laws, he held that they could not supersede Fundamental Rights. The learned Judge also held that the provisions challenged by the Ahmadis were void on the further ground that they discriminated against Ahmadis and thereafter they violated Article 25 of the Constitution. Clauses (d) and (e) of Section 298-B of the Penal Code prohibited Ahmadis from describing their places of worship as masjids and from describing their call to prayers as Azan'. The learned Judge declared these clauses illegal as they 'were an essential element of their faith'. Section 298-C of the Penal Code reads:

> 298-C. Person of Quadiani group etc calling himself a Muslim or preaching or propagating his faith—
> Any person of the Quadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name), who directly or indirectly—
> (a) 'poses himself as a Muslim',
> (b) 'or calls, or refers to, his faith as Islam',
> (c) 'or preaches or propagates his faith, by words, either spoken or written, or by visible representation,

(d) or invites others to accept his faith, by words, either spoken or written, or by visible representation.

(e) or in any manner whatsoever outrages the religious feelings of Muslims,

Shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine. Section 298-C has been broken in clauses in order to make its effect, examination and scrutiny easier.

The learned Judge held that clauses (a) and (e) of the section were valid, but he declared clauses (c) and (d) illegal, because they violated the Fundamental Rights of religious freedom and of equality between citizens. The learned Judge also observed that 'if the acts mentioned in clauses (c) and (d) are accompanied with what is provided in clause (e) or has the effect of clause (a) and (b) then the acts will be penal under these relevant clauses and not under clauses (c) and (d).'

Justice Saleem Akhter agreed with this judgement. Justice Chaudhry dissented from it and dismissed all the appeals. As the two other Judges of the Bench agreed with Justice Chaudhry, all the appeals were dismissed. Justice Chaudhry approached the appeals from a different angle. He first examined the objects of the Ahmadi Ordinance and the consequential amendments in the Penal Code and pointed out that our Company Law prohibits the registration of companies under names considered undesirable by the Central Government. He then observed:

> A law for protection of trade and merchandise marks exists, practically, in every legal system of the world to protect the trade names and marks etc. with the result that no registered trade name or mark of one firm or company can be used by any other concern and a violation thereof, not only entitles the owners of the trade name or mark to receive damages from the violator but it is a criminal offence also.

He further observed that the Ahmadis were trying 'to pass off their faith as Islam' and the impugned laws merely prevented them from posing as Muslims, and their attempt to pose as Muslims was illegal and offensive to Muslims. After examining the tenets of the Ahmadi religion, he observed at p. 1765 that Muslims think that the birth of the Ahmadi community 'among the Muslim society was a serious and organized attack on its ideological frontiers .... As a matter of fact, the Ahmadis, internally had declared themselves the real Muslim community, by alienating and excommunicating the main body of Muslims on the ground that as they did not accept Mirza Ghulam Ahmad as their prophet and the promised Messiah, they were infidels.' The Judge, therefore, held that the Ahmadi Ordinance and the consequential amendments in the Penal Code did not prejudice the rights of Ahmadis under Article 20, as those rights were subject 'to law, public order and morality'.

The Judge might have taken a different view, if he had considered the Supreme Court's judgement in Jibendra Kishore's case. He did not. That was unfortunate for another reason also. The Legislature is presumed to be aware of the judgements of the country's highest Court. Now the right to profess one's religion and the right of equality between citizens under the 1956 Constitution had been construed by the Supreme Court in Jibendra Kishore's case and in Waris Meah's case (discussed earlier), it follows that Articles 20 and 25 of the 1973 Constitution had to be given the meaning placed on them by the Supreme Court in Jibendra Kishore's case and in Waris Meah's case.

It is also self-evident that if the Constitution of a multi-religious country confers Fundamental Rights on all religious communities to practise their own faith, the law has to strike a balance between the rights of the religions followed by the people of the country. That was why Justice Shafiur Rehman took the view that the words 'subject to law, public order and morality' in Article 20 meant a reasonable law. And as the Ahmadis had been Muslims till 1974, some of the symbols and representations of their religion were bound to be the same as those of Muslims, and therefore, he declared illegal only those parts of the impugned laws which imposed unreasonable restrictions on Ahmadis to practise their faith. Justice Chaudhry held that even if Ahmadis displayed peacefully the symbols of their faith, they were posing as Muslims and insulting Muslims. This view imposes restrictions on Ahmadis which deprive them of their rights as citizens under Articles 20 and 25 of the Constitution.

However, on the assumption that the words 'subject to law, public order and morality' in Article 20 did not support their claims, the further contention of the Ahmadis was that the laws challenged by them were void, as they were inconsistent with the Fundamental Rights of Equality conferred by Article 25 of the Constitution, and Justice Shafiur Rehman held that some, but not all the legal provisions challenged by the Ahmadis were illegal, because they discriminated against them. Justice Chaudhry ignored the arguments of the appellants on Article 25. He did not even refer to Article 25 in his judgement. But he observed at p. 1774 that the injunctions of Islam 'are now the positive law' on account of Article 2 (A) of the Constitution and further observed: 'Therefore every man-made law must now conform to the injunctions of Islam...Therefore even the Fundamental Rights as given in the Constitution must not violate the norms of Islam.' As this view had been overruled a year earlier by the Supreme Court in Hakim Khan's case, Justice Chaudhry did not have the jurisdiction to overrule Hakim Khan's case. And even though two Judges agreed with him, these three Judges could not overrule Hakim Khan's case, it was also held that if a Judge thought that a provision in the Constitution was against the injunctions of Islam, he could not declare that provision illegal. He could only send a copy of his judgement to the Legislature, which alone could decide whether the Constitution should be altered on account of the view expressed by the Judge. Justice Chaudhry, however, did not refer to Hakim Khan's case. But Fundamental Rights are an essential part of our Constitution and if Judges can declare them illegal, they can also declare that women shall not have

the right to vote or that non-Muslims shall not have the right to vote or even that the parliamentary system of Government is illegal. If this view is correct, democracy cannot survive in the country, because it is not the function of Judges in a democracy to decide what a country's Constitution should be. In a democracy, it is the right of the people, through their elected representatives, to decide what the Constitution of the country should be.

Finally, there was an important change in the law about comments on questions of law in cases pending in the superior Courts. Such comments had been treated as contempt, but in Choudhry Zahoor Elahi's contempt application against Mr. Bhutto, the Supreme Court held that comments in newspapers could not influence Judges of the superior Courts and dismissed the contempt application without admitting it. In 1996 the Supreme Court heard a petition about the appointment of Judges in the superior Courts. This petition roused great public interest, and the arguments in the petition were reported in newspapers. The arguments were on questions of law, and newspapers commented freely on them. The Chief Justice and Judges of the Supreme Court did not issue any contempt notice, and this means that they decided to follow the law declared in Choudhry Zahoor Elahi's case. This is a very welcome development, which has removed a longstanding and genuine grievance of the press, and brought the right of freedom of expression into line with the norms of democracy.