

## CONSTITUTIONAL HISTORY OF PAKISTAN

### **Constitutional and Political Development (1947-1973)**

Pakistan came into being as an independent State in August, 1947 and continued to be governed under an interim constitutional arrangement (i.e. through the Indian Independence Act, 1947). Pakistan has had a troubled constitutional history since its very inception as a nation state. Not long after partition from India in 1947, Pakistan was plunged into a Constitutional crisis in 1954 when the Governor General dissolved the Constituent Assembly when he did not agree to the proposed constitution. This first major subversion of the constitutional process was challenged before the Federal Court, which validated the dissolution of the assembly in the *Moulvi Tamizuddin* case (1955 Federal Court 240). Although a new Constituent Assembly adopted the country's first constitution in March, 1956, it lasted only two years until the first President of Pakistan, Major-General Iskander Mirza, abrogated the Constitution, dissolved the national and provincial legislatures and imposed Martial Law in October, 1958, appointing General Ayub Khan as the Chief Martial Law Administrator.

This was the first time that the Supreme Court was confronted with an unprecedented situation. The Court faced a dilemma how to prevent the country to be governed purely by the dictate of an army ruler and ensure that the country was back on the rails of constitutional governance. The Supreme Court of Pakistan validated once again the extra-constitutional actions of the executive and enunciated the doctrine of 'revolutionary legality.' It (in case of *State v. Dosso* (PLD 1958 SC (Pak) 533) validated the imposition of martial law by invoking the Kelsenian theory and held that, "*a victorious revolution was itself a law creating fact.*" Although the application of Kelsenian theory in the facts and circumstances of that case has been subject of critical comment but the positive aspect of the judgment was that it unequivocally declared that the country would continue to be governed as nearly as possible under the Constitution which stood abrogated (*Province of East Pakistan v. Muhammad Mehdi Ali Khan* (PLD 1959 SC 387).

After passing a new Constitution in 1962 that empowered an autocratic executive, General Ayub Khan ruled until 1969. He was forced to hand over the reins of power to General Yahya Khan after widespread student protests led by Zulfiqar Ali Bhutto and his newly-founded Pakistan Peoples' Party (PPP). General Yahya Khan presided over a disastrous military campaign in East Pakistan, Pakistan's loss to India in the war of 1971, and ultimately the secession of East Pakistan to form Bangladesh. The Martial Law was however, lifted and a new Constitution was promulgated in 1973. There was constitutional democracy but in March 1979, the country plunged into yet another constitutional and political crisis leading to the imposition of Martial Law and the Constitution was abrogated. The political turbulence and war with India led to separation of East Pakistan which is now Bangladesh. The Chief Martial Law Administrator was forced to hand over power to the political party which commanded majority in the Western wing of the country i.e. the areas which now constitute Pakistan and Zulfiqar Ali Bhutto became President. The issue of legality of martial law once again came under

consideration before the Supreme Court (in the famous *Asma Jilani's* case PLD 1972 SC 139). Declaring the martial law to be illegal, the Court dubbed the Chief Martial Law Administrator as a usurper. It revisited the ratio laid down in the earlier judgment by holding that Kelsenian theory had been wrongly applied; that no valid law comes into force from “*the foul breath or smeared pen of a person guilty of treason against the national order.*”

### **The 1973 Constitution**

In 1973 Pakistan adopted its current constitution after thorough deliberation and consensus of all the political parties. The Constitution of Pakistan created a parliamentary form of government following the British model whereby the elected Prime Minister is the locus of executive power and the President is a figurehead. The other key foundational principle of the 1973 Constitution is that of federalism. Pakistan's four provinces each have their own provincial legislatures. Whereas the seats in the National Assembly, the lower house of the national parliament, are distributed between provinces on a demographic basis, each province is entitled to equal representation in the upper house, the Senate. Constitutional amendments require the approval of two-thirds majorities in both the National Assembly and the Senate. The superior courts, including the Supreme Court and the four provincial High Courts, complete the trichotomy of powers. The superior courts have been granted the power to judicially review legislation as well as executive action and ensure the enforcement of Fundamental Rights. The 1973 Constitution also incorporates a Bill of Rights, but the constitutional safeguards are weak and the text of some of the more important rights provisions make them subject to the law. Article 9, for instance, states that “No person shall be deprived of life or liberty save in accordance with law,” while the freedoms of expression and association are likewise subject to “reasonable restrictions imposed by law” in the interest of public order or national security. Article 10 permits the preventive detention, without judicial scrutiny, of “persons acting in a manner prejudicial to the integrity, security or defense of Pakistan or external affairs of Pakistan, or public order, or the maintenance of supplies or services” for an initial period of three months which may be extended if a Review Board (consisting of current and former superior court judges) authorizes such extension. Other basic rights, including freedom from slavery and forced labor, double jeopardy and retroactive punishment, self-incrimination, torture and gender discrimination are more absolutist.

### **The Zia Era and its Constitutional Legacy**

In 1973 the Parliament unanimously passed a new Constitution and it was because of this wide approval and acceptance that it continues to be the Constitution of the country. In 1977, General Elections were held, there were serious allegations of rigging, and there was country wide street agitation which prompted the Army to take over. Assemblies were dissolved and government was dismissed. But this time, the constitution was not abrogated but it was declared to be, “*held in abeyance*”. The Supreme Court of Pakistan validated the action taken (in *Begum Nusrat Bhutto's case* PLD 1977 SC 657) on the

ground of “*State necessity*” and the principle of *salus populi suprema lex*. The Court found that on account of massive rigging in the 1977 elections, the State machinery had crumbled down and the constitution did not provide remedy. This period of constitutional deviation continued till 1985 when the constitution was revived and with this came the 18<sup>th</sup> amendment in the Constitution which was approved by the Parliament

In 1977, after imposition of Martial Law in the country, the Constitution was held in abeyance and replaced by an interim Provisional Constitutional Order (PCO). In the *Nusrat Bhutto* case (1977) the Supreme Court once again validated the coup on the basis of the Common Law “doctrine of state necessity.” Zia then made several changes to the Constitution to strengthen the power of the president, including introducing Article 58(2)(b) to the Constitution *via* the notorious Eighth Constitutional Amendment. Article 58(2)(b) granted the President discretionary powers to dismiss the Parliament and call for fresh elections. After a decision by the Supreme Court challenging the jurisdiction of military courts, Zia also sought to undermine the independence of the judiciary by requiring judges to take a fresh oath of allegiance under the PCO. These actions, along with the Supreme Court’s capital conviction of Zulfikar Ali Bhutto – despite a widespread belief that the charges were fabricated – severely undermined the credibility of the legal process and the esteem of the judiciary. The prime legacy of the Zia era, namely enhanced presidential powers and Islamisation measures, continued to haunt the nation’s political landscape for another decade.

### **The 1990’s and Disenchantment with Politics**

In the 1988 elections Benazir Bhutto led the PPP to victory and became the first Prime Minister after the Zia era, ushering in a decade of alternation between the elected governments of Bhutto’s PPP and the Pakistan Muslim League (PML) led by Mian Nawaz Sharif. The military interfered several times in politics and backed presidential use of Article 58(2) (b) to dissolve the government, usually justifying its actions based on corruption charges against the political leaders. The Supreme Court ruled in most of these cases, mostly upholding the dissolution and other times in validating presidential action, as when it restored PM Mian Nawaz Sharif in 1993. *Mian Muhammad Nawaz Sharif VS. President of Pakistan* (P LD 1993 SC 473), *Federation of Pakistan Vs. Haji Saifullah Khan* (PLD 1989 SC 166), *Ahmed Tariq Rahim Vs. Federation of Pakistan* (PLD 1992 SC 646), *Federation of Pakistan Vs. Aftab Ahmad Khan Sherpao* (PLD 1992 SC 723), *Sabir Shah Vs. Federation of Pakistan* (PLD 1994 SC 738), *Benazir Bhutto Vs. President of Pakistan* (PLD 1998 SC 388), *Zafar Ali Shah Vs. Pervez Musharaf* (PLD 2000 SC 869).

Both Bhutto and Sharif had strained relations with the superior judiciary and may be accused of attempting to undermine its independence. Most notable in this regard is Bhutto’s disregard for constitutional tradition in her 1994 decision to appoint Justice Sajjad Ali Shah as the Chief Justice of the Supreme Court while superseding two senior judges. This led to the *Al-Jehad Trust* case (*Al-Jehad Trust through Habib Wahab Ali*

*Khairi, Advocate and 9 others Vs. Federation of Pakistan* (PLD 1996 SC 324), in which the Supreme Court elaborated key principles for the appointment process of the High Court and Supreme Court judges, enhancing the power of the Chief Justice and bolstering the independence of the judiciary (see Judicial Independence section below for an elaboration of these principles). In practice, these principles have not been consistently followed, and the judiciary has continued to be subject to pressure and manipulation. Tensions between Chief Justice Sajjad Ali Shah and Prime Minister Sharif, which started in 1997, eventually led to a division within the Supreme Court, an attack on the Supreme Court by PML party members, and the removal of the Chief Justice. This episode is viewed as a low-point in the judicial history of the country.

### **The Musharraf Coup and yet another ‘Transition to Democracy’**

Immediately after the military’s takeover of power in 1999, Pakistan began to experience the unfolding of a blueprint developed by the earlier military regimes and ratified by the superior courts. A Proclamation of Emergency was declared, the constitution was put in abeyance, a Provisional Constitutional Order (PCO) was issued to provide a temporary governing framework, and the general assumed the office of the Chief Executive. In January 2000, when the Supreme Court entertained a challenge to the military coup, the judges of the superior courts were compelled to take a new oath of office pledging to serve under the PCO. Six out of a total of thirteen judges of the Supreme Court refused to take the oath and resigned from the bench, including then Chief Justice Saeduzzaman Siddiqui and Justice (R) Wajih-ud-Din Ahmad, who was a candidate in the 2007 presidential elections. A reconstituted Supreme Court decided the case of *Zafar Ali Shah v General Pervez Musharraf* (PLD 2000 SC 869) 2000) and validated the coup on the grounds of the doctrine of state necessity. The court granted virtually unlimited powers to the military regime, including the power to amend the constitution. The court, however, required the military regime to hold general elections for the national parliament and provincial legislatures no later than three years from the date of the coup. The general elections were held on October 10, 2002. An alliance of religious parties, the Muttahida Majlis-e-Amal (MMA), emerged as the prime beneficiary, along with the party loyal to General Musharraf, the Pakistan Muslim League (Q). In December 2003, the regime mustered the two-third majority in parliament necessary to pass the Seventeenth Amendment to the Constitution, which validated almost all of the actions taken during the state necessity phase, including the revival of the presidential power to dismiss the parliament. Musharraf later garnered a simple majority to pass the President to Hold Another Office Act, 2004 (PHAA), which seemed to violate constitutional provisions in allowing Musharaff as the Chief of Army Staff (CoAS) to also assume the office of the President. In the *Pakistan Lawyers Forum* case (PLD 2005 SC 719) the Supreme Court validated both the Seventeenth Amendment and the PHAA, based on an extension of the doctrine of state necessity. In legitimizing the power of the military and executive over the Parliament, this case further strengthened the popular perception of the subservience of the Supreme Court to the military regime.

In October 2007, when his term of office was to expire, Musharaff wanted to contest for

the second term and his eligibility to do so was challenged by one of the candidates and this matter came up before the Court (an 11 Members Bench ) in *Wajihuddin v. the State* (PLD 1996 SC 324). The issues involved in the said petition were twofold: whether General Pervaiz Musharraf could contest the elections notwithstanding the Constitutional restraint that no holder of public office could contest the elections unless a period of two years has elapsed between his retirement and the elections. General Musharraf was still holding the office of the Chief of Army Staff; (ii) whether the Assemblies whose term was to expire in two months time or the succeeding Assemblies would form the Electoral College in view of Article 43 of the Constitution. The current Assemblies had elected the President for a term of five years which was about to expire. I was member of the 11-Members Bench which was hearing the case. The arguments dragged on and when the polling day approached nearer, on the application of General Musharraf the Court instead of postponing the elections (as that would have changed the complexion of electoral college by efflux of time) allowed him to contest the elections with the rider that the Election Commission of Pakistan shall not notify the result till the final disposal of the pending petition. On the 2<sup>nd</sup> of November, 2007, the counsel for the petitioner who happened to be the President of Supreme Court Bar Association as well filed an application for issuance of a restraint order against respondent General Musharraf, Chief of Army Staff, not to pass any order which had the effect of suspending the constitution or changing the composition of the court. The Court directed the office to put up the petition on the next working day which was 5<sup>th</sup> of November, 2007 as it was a long weekend and the Court was closed. In the afternoon of 3<sup>rd</sup> of November, 2007, the word went around in the Capital that martial law was being imposed. Apprehending this the Chief Justice of Pakistan with the available Judges in the Capital city Islamabad assembled in the afternoon (7-Members) and passed a restraining order which reads as follows:-

*“(i) Government of Pakistan, i.e. President and Prime Minister of Pakistan are restrained from undertaking any such action, which is contrary to Independence of Judiciary;*

*(ii) No judge of the Supreme Court or the High Courts including Chief Justice (s) shall take oath under PCO or any other extra-Constitutional step;*

*(iii) Chief of Army Staff, Corps Commanders, Staff Officers and all concerned of the Civil and Military Authorities are hereby restrained from acting on PCO which has been issued or from administering fresh oath to Chief Justice of Pakistan or Judges of Supreme Court and Chief Justice or Judges of the Provincial High Courts;*

*(iv) They are also restrained to undertake any such action, which is contrary to independence of Judiciary. Any further appointment of the Chief Justice of Pakistan and Judges of the Supreme Court and Chief Justices of High Courts or Judges of Provinces under new development shall be unlawful and without jurisdiction.*

*(v) Put up before full court on 5<sup>th</sup> November 2007.”*

Notwithstanding the order passed General Musharraf, the then Chief of Army Staff

imposed the “State of Emergency”, directed the constitution to be held in abeyance, issued a provisional constitutional order prescribing a special oath for judges of the superior courts with the stipulation that those who did not take oath would cease to hold office. Out of the 18 Judges, 13 did not take oath in the Supreme Court and out of 93 Judges from all over the four Provinces of the country, 61 did not take oath. Those who did not take oath were motivated by no reason other than defending the Constitution and upholding the Rule of Law.

After the general elections in February 2008, the Constitution was restored and an elected Government revived. General Musharraf resigned, and there was a growing demand for restoration of the Judges who had been removed from the Constitutional Courts. In September 2008, several of the deposed Judges rejoined the Court, and finally, on 16 March 2009, the Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry, was re-instated by an executive order of the Prime Minister of Pakistan.

### **Judicial Activism and the Judicial Crisis**

Soon after his appointment as the Chief Justice of Pakistan (CJP) in 2005, Iftikhar Muhammad Chaudhry began to exercise the court’s *suo moto* judicial review powers.<sup>2</sup> *Suo moto*, meaning "on its own motion,"<sup>1</sup> Beginning with the case of ***Darshan Masih v The State*** (PLD 1990 SC 513), where the Supreme Court converted a telegram sent by bonded laborers into a writ petition, the Supreme Court rapidly fashioned for itself the power to take up cases of its own accord, based on letters or media reports. The court also relaxed other procedural requirements and public interest cases have increasingly come to acquire an inquisitorial or administrative inquiry mode rather than the strict adversarial model of adjudication that a common law system envisages.<sup>2</sup> Articles 184(3) and 199 of the Constitution of the Islamic Republic of Pakistan, 1973, vest judicial review powers in the Supreme Court and the High Courts, respectively. The majority of these powers are based upon the prerogative writs of *certiorari*, *mandamus*, prohibition and habeas corpus. Under Article 199, the High Courts’ powers include the power to issue orders (i) directing any person performing “functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; (ii) declaring that any act or proceeding ... has been done or taken without lawful authority and is of no legal effect;” (iii) “directing that a person in custody ... be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner;” and (iv) “requiring a person ... holding or purporting to hold a public office to show under what authority of law he claims to hold that office.” In addition, Pakistani courts may, subject to certain restrictions, make an order giving “such directions to any person or authority ... as may be appropriate for the enforcement of any of the Fundamental Rights” conferred by the Constitution. Although these powers were conferred on the courts in 1973, it is an Indian legal term, approximately equivalent to the English term, *sua sponte*. It is used, for example, where a government agency acts on its own cognizance, as in "the Commission took *Suo Moto* control over the matter.” Following the Indian example, the Supreme Court of Pakistan had established in 1997 the

power for itself to initiate ‘Public Interest Litigation’ on its own accord under Article 184(3) of the Constitution.<sup>3</sup> The Court could use this power to respond to individual or collective petitions for a wide range of issues that were not being resolved through legal or administrative means. However the frequency and the robustness with which the CJP exercised these powers were unprecedented. Many of these cases involved abuse of police powers, manipulation of legal processes by rural landed elites and corruption in the bureaucracy. These cases won the Chaudhry-led court increasing popularity amongst the populace as well as grudging respect amongst the legal fraternity.<sup>4</sup> In November 2007, President Musharraf announced he would introduce a constitutional amendment to withdraw the Supreme Court’s *suo moto* powers under the authority of his Provisional Constitutional Order (PCO). The Pakistani courts continue to use the power: it was reported that the Chief Justice of the Lahore High Court in September 2008 referred the matter of police releasing an accused to one of the justices for a hearing pursuant to the *suo moto* power.<sup>5</sup> Two cases pursued by the Supreme Court in the latter part of 2006 became a source of significant unease within government circles. First, the Supreme Court invalidated the privatization of the Pakistan Steel Mills, rendering a judgment that painted a grim picture of economic mismanagement, failure to abide by rules and patronage of businessmen implicated in securities fraud ***Watan Party VS Federation of Pakistan (Pakistan Steel Mill Privatization Case PLD 2006 SC 587 & 697)***. In the second case, the Supreme Court began to pursue *habeas corpus* petitions brought by the relatives of the ‘missing persons’ who had allegedly been held by Pakistan’s feared intelligence agencies without legal process. This case brought unwanted attention to the government’s increasingly unpopular role in the US-led War on Terror and its prosecution of the campaign against separatists in the Baluchistan province. The Supreme Court’s decisions in these cases were preceded by several cases decided by the High Courts, which had challenged the abuse of powers by the executive.<sup>6</sup> It was only in 1988 when the Supreme Court decided ***Benazir Bhutto v Federation of Pakistan*** (PLD 1988 SC 416), that these broad constitutional powers were ‘discovered’ and the seeds of public interest or social action litigation were sown.

The court’s approach in these cases also caused some nervousness that the court might create difficulties for the government in the forthcoming elections. In particular, the issues of the President’s re-election and the continued occupation of dual office were likely to come up before the court. In a surprise move, General Musharraf, suspended the CJP from office declaring him to be ‘non-functional’ on March 9, 2007, and moved a reference for the CJP’s accountability before the Supreme Judicial Council (SJC) under Article 209 of the Constitution. This move was widely seen as a *de facto* dismissal of a sitting CJP and resulted in widespread protests from the legal community. The CJP’s suspension and the proceedings of the SJC were challenged before the Supreme Court of Pakistan. As the lawyers’ movement for the reinstatement of the CJP gained momentum, the SC announced its decision in a short order on July 20, 2007. The court invalidated the suspension of the CJP and reinstated him to his position. This case considerably enhanced the powers and the prestige of the position of the Chief Justice of Pakistan. In the aftermath of the reinstatement, the SC began to focus on political and constitutional issues. The court insisted on ensuring equal opportunities for electioneering to the

opposition political parties, including the return of the leaders of the main opposition political parties who had been in exile. The court supported Mian Nawaz Sharif's plea for return to Pakistan, and began to prosecute contempt of court charges against the highest levels of the Executive Office for deporting Sharif in violation of its judgment. Secondly, the SC granted an injunction against a presidential ordinance passed on the eve of the presidential elections, the National Reconciliation Ordinance (NRO), designed to grant immunity from corruption charges to Benazir Bhutto and her party members in return for a softer stance with regard to General Musharraf's re-election for a third term. The court began to display the confidence that it had by far the most 'democratic' support and legitimacy when compared to the outgoing civil executive, the legislatures, and a president whose approval rating had been plummeting in the aftermath of the confrontation with the CJP. It is in this context that General Pervez Musharraf contested the election for the office of the President of Pakistan on October 6, 2007, and secured more than fifty-five percent of the votes cast by the members of the national and provincial legislatures that form Pakistan's Electoral College. However, the SC declared that he may not take the oath of office until the SC decided a number of petitions challenging his candidacy on the grounds that his re-election while still being the CoAS violated the Constitution. On November 3, seemingly fearing an adverse decision by the SC, General Musharraf imposed a state of emergency. The blueprint of the legitimating of military takeovers was put into place once again, with a PCO and fresh oath of office required of the judges. However, an overwhelming majority of the judges of the Supreme Court and the High Court refused to take the oath or to validate the imposition of emergency. In the run-up to Parliamentary elections, which took place on February 18, 2008, both of the main opposition parties, the PPP and PML-N, elevated the issue of the reinstatement of the judges who had refused to take the oath under the PCO. The elections were an overwhelming rebuke of Musharraf and the PML-Q, which lost many of its Parliamentary seats. The PPP and PML-N formed a coalition government, with the issue of reinstating the judges high on their agenda. Initial efforts failed, however, when the two parties failed to reach an agreement on the appropriate legal process for reinstating the judges. The PPP subsequently drafted a package of constitutional amendments, which repealed many of the provisions of the Seventeenth Amendment to curtail executive power, and set the stage for reinstatement of the judges while limiting certain powers of the Chief Justice. This was passed in the form of 18<sup>th</sup> amendment which is currently is under challenge before the Supreme Court.

In August 2008, General Musharraf resigned as President amidst a threat of impeachment by the legislators. Subsequent Asif Ali Zardari, chairman of the PPP, was elected as President of Pakistan.

### **Islamization' of Laws in Pakistan**

The Objectives Resolution of 1949, adopted as the original preamble to the 1973 Constitution of Pakistan (and later incorporated as a substantive provision, Art. 2-A, during the Zia era) made explicit reference to the "principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam" as a foundational principle



of the constitution. The 1956 Constitution of Pakistan provided a specific mechanism for the 'Islamization' of laws. The powers of bringing the laws of the land into conformity with Islamic law were granted to the Parliament and an advisory body was created to provide suitable suggestions. The Constitution of 1973 preserved this approach to Islamisation. The project of Islamisation of laws did not gather impetus until the later half of the 1970's, when Zulfikar Ali Bhutto, under pressure from an opposition alliance that included the religious political parties, announced measures such as prohibition on the consumption of alcohol and declaration of Ahmadis to be non-Muslims. With the advent of General Zia ul Haq on the political scene, the landscape changed dramatically and the enforcement of *Shari'a* became the rallying cry of a military regime desperately in need of legitimacy and some level of popular support. Zia's Islamisation is most closely associated with the '*Hudood*' laws. These are five presidential ordinances that introduced new sexual and property offenses, maintained the prohibition on the consumption of alcohol, and provided for exemplary Islamic punishments such as stoning to death (for adultery), whipping and amputation (for fornication and theft). These laws caused immense controversy and were criticized for being misogynistic and discriminatory towards religious minorities. The real impetus for Islamisation came not through the above-mentioned legislative interventions but through the Islamic courts, which were created by an amendment to the constitution in exercise of the emergency powers. The Shariat Courts, including the Federal Shariat Court (FSC) and the Shariat Appellate Bench of the Supreme Court (SAB), both of which are appellate courts, were empowered to review any law for conformity with 'the injunctions of Islam' and declare any offending law, including parliamentary legislation, to be null and void. In reality, the court could exercise these powers in such a manner as to dictate to the legislature what Islamic law provisions would replace the voided legal provisions. The major decisions of the Shariat courts were delivered in the period immediately following Zia's demise and coincided with the first tenures of Prime Ministers Benazir Bhutto and Nawaz Sharif in the late 1980's and early 1990's. The late 1990's have been an era of emerging Islamic critiques that have pointed out not only the human rights violations resulting from these laws but also focus on their divergences from classical Islamic law in several respects. The Musharraf regime has sought to amend many of these Islamized laws, which have become increasingly notorious internationally. While in the West the Islamisation of the laws of Pakistan is generally perceived to be a retrogressive movement characterized by the introduction of discriminatory and sexist laws, another vital aspect of this movement is generally overlooked. The bulk of Pakistan's laws, especially the criminal laws, date back to the colonial era and they embody the assumptions of that era. Historically, the state and its laws have been perceived by much of the citizenry to be of mostly alien origin and are followed only to the extent that the coercive power of the state compels such obedience. With the Islamisation of laws a new discourse has begun to take shape questioning the legitimacy and moral authority of laws that govern citizens' conduct. This dimension is also beginning to be reflected in the jurisprudence of the superior courts, other than the Shariat courts, where references to Islamic principles are frequently made in justification of rulings concerning subjects as diverse as due process in administrative law, enforceability of contracts and environmental regulation, to refer to a few examples. This shifting discourse on the Islamisation of the law forms, along with

the constitutional crises and frequent shifts in the locus of authority, provides the backdrop for the current state of the rule of law in Pakistan.

In Pakistan, the independence of judiciary is enshrined in the Constitution. Like the U.S. we have a written constitution based on the principle of separation of powers. A separate part (part 7) is allocated to the judiciary, and it was made independent of the Executive by a constitutional mandate that was given effect to by a judgment of the Sindh High Court and upheld by the Supreme Court (*Government of Sindh v. Sharf Faridi*, PLD 1994 SC 105,

Besides being the last court of appeal both under the civil and criminal law, the Supreme Court under the Constitution has power to pass an appropriate order “*on any question of public importance with reference to the enforcement of Fundamental Rights.*” (Constitution of Pakistan of 1973 Article 184) To further buttress the authority and independence of the Supreme Court, the Constitution inter alia provides that the law or a principle of law declared by the Supreme Court shall be binding on all courts and all executive authorities in the country shall act in aid of the Supreme Court. (Article 190) The Judges of the constitutional courts have security of tenure, and they can, as per the Constitution, only be removed on proven charges of misconduct by the Supreme Judicial Council headed by the Chief Justice of Pakistan. It is under this constitutional dispensation that the Supreme Court and other courts function.

The Supreme Court in several judgments has given liberal interpretation to fundamental rights provisions of the Constitution and thereby promoted the Rule of Law and democratic norms. In one case it interpreted the right to freedom of association to include the rights of a political party to keep functioning. (*Abul Alamaudoodi v. the State*, PLD 1964 SC 673). It further expanded this right by holding that a political party, if in power, has the right to complete its term unless its Government is ousted under the Constitution. (*Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473).

In certain cases, the superior courts acted as “*social engineers*” and catalysts of change. Pakistan has been a male dominated society where instances are not lacking when women were deprived of their right to inherit property, despite the mandate of law, through involuntary surrender. There have been instances when they were denied the right to marry a person of their choice or when they were given in marriage without their consent. The court, when called upon to decide such matters, laid down law, which had the effect of changing the unjust customs and mores. For instance, in cases of denial of right to inherit property, the Supreme Court held that this being a gross violation of fundamental right of a socially disadvantaged gender, claims could be filed even long after expiry of the prescribed period of limitation. (PLD 1970 SC 1).

Similarly, there was a socially sanctified tradition under which even a sui-juris woman could not marry without permission of her guardian. In a case where an adult girl married a person of her choice, her father, relying on a document evidencing a fake and illegal marriage with her cousin, launched criminal prosecution for adultery against her, and she

was arrested. The matter was brought before the High Court; it not only declared counter marriage as illegal but quashed the criminal proceedings. (*Humaira v. State*, PLD 1999 Lahore 494).

In certain remote areas of Pakistan there is a custom of giving young and even minor girls in marriage as a settlement in blood feuds. The Supreme Court interfered in such cases, the state functionaries were reprimanded for apathy, and a direction was issued to the government to take preventive and punitive action in such cases. Because of the court interventions, the law was amended, and now it is a Penal offence to give a young girl in marriage as a settlement of a blood feud.

In terrorism related cases, the Supreme Court has been particularly strict. It upheld the Anti Terrorism Act by holding that the legislature could pass a special law to cater for such heinous crimes. (*Mehram Ali v. Federation of Pakistan* (PLD 1998 SC 1445)). It chided the High Court for being too liberal in cases under the Anti Terrorist Laws. (*Mirza Shaukat Baig v. Shahid Jamil* (PLD 2005 SC 530)). The court has always maintained, however, that while investigating such cases, cannons of due process should be duly observed. Because when the law enforcement agencies roughshod the law in the name of terror, it amounts to playing on the wicket of the terrorists who wreak violence in disregard to law. One of the most onerous functions of the judiciary in a constitutional democracy is to protect the liberty, the due process and the Rule of Law.

The brief overview of the powers and working of the Supreme Court would indicate that under the Constitution it has wide powers. But the magnitude of injustices it is confronted with is still wider both quantitatively and qualitatively. In absence of responsive and credible institutions of law enforcement, people tend to bring every cause, every grievance, and ever lie before the constitutional courts and in particular before the Supreme Court. The Supreme Court by and large has refrained from interfering in matters of public policy. We believe that it is not the function of the court to get embroiled in politics and passions of the day. Or perception on such matters has been, “the constitution does not constitute us as ‘Platonic Guardians’ nor does it vest in this court the authority to strike down laws because they do not meet its standards of, ‘desirable social policy’, ‘wisdom’, or ‘commonsense’.

While dispensing justice, the Supreme Court has broadly kept three considerations in view. First, that Judiciary is one of the three organs of the state, and good governance is possible only if the three remain within their defined limits. Second, the law may not keep pace with the changing times and may not respond to every situation. The Court has a role to bridge the gap between the law and the society. This consideration is particularly relevant to the powers of the Supreme Court under Article 184 of the Constitution. Third, the court has been conscious that as a member of the United Nations and being part of a global community, Pakistan has certain obligations under the international law. We live in an interdependent world. Any activity within the country that has or has a potential to have nexus with a crime committed outside the country, be it a financial crime or an act of terror, has to be brought to justice under the law. If laws are flouted, it breeds

contempt. The society becomes prey to stagnation, resentment, and violence, which is then exported. Dr. Martin Luther King was alluding to this chain reaction of injustice when he said, “Injustice anywhere is a threat to justice everywhere.”

### **Court structures**

**Superior Courts:** The **Supreme Court** is the apex court of Pakistan and consists of a Chief Justice, known as the Chief Justice of Pakistan, and such other judges (now 17) as may be determined by Act of Parliament. The court has limited original and extensive appellate jurisdiction. A special bench of the Supreme Court known as the Shariat Appellate Bench hears appeals from the orders/judgments of the Federal Shariat Court. The Supreme Court has important powers with regard to enforcement of Fundamental Rights. Judges of the Supreme Court hold office till the age of 65 and are appointed by the President in consultation with the Chief Justice of Pakistan.

There is one **High Court** for each of the four provinces in the country. The High Courts have a principal seat and one or more benches. The Lahore High Court has three added benches at Rawalpindi, Multan and Bahawalpur. Recently a fifth High Court was established for Islamabad. High Courts have extensive appellate and substantial original jurisdiction. They have powers to issue orders in the nature of writs.

High Courts are also entrusted with powers of superintendence and control over most courts.

The **Federal Shariat Court** comprises of not more than eight judges including the Chief Justice. The Court has appellate and revisionary jurisdiction in Hudood cases and jurisdiction to review laws to find out their compatibility with injunctions of Islam.

**Subordinate Courts:** Courts of general jurisdiction are courts which deal with the main body of civil and criminal law in Pakistan. These courts have jurisdiction over all civil and criminal matters unless provided otherwise by legislative enactment. Courts of general jurisdiction are provincial in character. Civil courts have general civil jurisdiction and try all suits pertaining to torts, lands and declaration of rights. Procedure in these courts is regulated by the Code of Civil Procedure 1908. Section 3 of the Civil Courts Ordinance provides for the following classes of courts:

#### **Court of District Judge**

#### **Court of Additional District Judge**

#### **Court of the Civil Judge**

In each district there is one district judge and varying number of additional district judges and civil judges. Based on pecuniary jurisdiction, courts of civil judges are divided into three types- courts of civil judge class I, courts of civil judge class II, courts of civil judge class III. In every district one of the civil judges is known as the senior civil judge. The Senior Civil Judge assigns cases among his colleagues.

Criminal courts of general jurisdiction are set up under the Code of Criminal Procedure, 1898. These courts can try all cases arising out of the Pakistan Penal Code. Criminal courts are of two types:

#### **Sessions Court**

#### **Courts of Magistrates**

The Sessions Court comprises one Sessions Judge who is in charge of the administration of the court and varying number of Additional and Assistant Sessions Judges. Additional Sessions Judges have same judicial powers as the Sessions Judge. Sessions judges are invariably District Judges and are known as District and Sessions Judges.

There are three types of courts of magistrates: Magistrate of the First class, Magistrate of the second class, and Magistrate of the third class. Magistrates do not always act as courts. In addition to the above noted types of magistrates there are special judicial magistrates and section 30 magistrates. These magistrates belong to one of the three classes mentioned above but because of special powers are known as Special Judicial Magistrates or section 30 magistrates.

**Specialist Courts:** Specialist courts deal with offenses relating to a particular subject and most but not all have both civil and criminal jurisdiction. Special courts are set up both by the federation and the provinces and in certain cases specialist courts are constituted by federal legislation but their finances are provided by the provincial government. Listed below are important federal and provincial specialist courts. This division is by statute of origin and not by provision of finances:

#### **Federal specialist courts**

The important specialist courts/tribunals set up by federal enactment are:

**Banking Courts:** Established under the Financial Institutions (Recovery of Finances) Ordinance, 2001

**Special Courts for banking offences:** Established under the Offences in respect of Banks (Special Court) Ordinance, 1984

**Anti-terrorism Courts:** Established under the Anti-terrorism Act 1997. Anti-terrorism court can be established by both the federal and provincial governments (§13)

**Accountability courts:** Established under the National Accountability Bureau Ordinance, 1999

**Drug Courts:** Established under the Drugs Act, 1976. In addition to establishing Drug Courts itself the federal government is authorized under this Act to direct a provincial Government to establish Drug Courts (s 31)

**Special Courts for emigration offences:** Established under the Emigration Ordinance, 1979 (s 24)

**Labour Courts:** Established under the Industrial Relations Ordinance, 2002(s 33). The Act however empowers the provincial government to establish Labour Courts.

**Court of Special Judge (Customs):** These Special Judges are established under section 185 of the Customs Act, 1969.

**Income Tax Appellate Tribunal:** This tribunal is established under the Income Tax Ordinance, 2001 (s130)

#### **Provincial Specialist courts**

**Revenue Courts:** Established under the Punjab Tenancy Act, 1887 (s 77)

**Consumer Courts:** Established under the Punjab Consumer Protection Act, 2005

**Rent courts:** Established under the Punjab Rented premises Act, 2007

**Family courts:** Established under the Family Courts Act, 1964(s 3).

It has been estimated that there are now nearly 2,000 judges in Pakistan at all levels of court, for a population of roughly 160 million. Each judge is burdened with an extremely high caseload. As noted in Section B 2 above, salaries and working conditions are poor

and are not regarded as sufficient to attract interest on the part of the elite bar, and some incumbents informed the team that they relied on family support to continue on the bench. Working conditions in the Subordinate Courts observed are generally inadequate, as these courts sit in small, un-cooled courtrooms with antiquated equipment and furniture. The High Courts are far better-equipped, including a plenitude of computers and staff. Subordinate courts may have one computer in a court, generally used by either the stenographic officer to record case results or by the judge. Subordinate court judges rarely are promoted to the superior courts: entering the Subordinate courts at the lowest level in effect limits their advancement to, at most, the position of District and Sessions Judge, which may require 30 years to reach.

### **ANT-CORRUPTION LAWS**

A glance at the efforts to develop anti-corruption institutions indicates that the ruling regimes, barring exceptions, have been tinkering with the anti-corruption departments, primarily with political opponents in focus. The anti-corruption institutions of the early 1960s took cognizance of the crime even if 'approved' by the ruling masters. The Prevention of Corruption Act-1947, Public Representatives (Disqualification) Act 1949(repealed), the Elected Bodies (Disqualification) Ordinance-1959 (Repealed), etc. were mostly labelled with exercise in victimisation.

Anti Corruption Establishments (ACE) were formed in all the provinces in 1970 and the FIA in the capital in 1975. These establishments are in existence for over four decades now with low key development priority, thus no meaningful results can be shown by these bodies to control corruption. ACEs are victims of political and bureaucratic controls. Poor investigation capacity, under-sourcing and lack of operational freedom have virtually rendered these outfits ineffective. The FIA mainly looks into immigration, financial crimes, cyber crimes and now anti-terrorism. The multiple mandates, politico-bureaucratic intrusions in the form of Federal Anti Corruption Committee (FACC) and host of other organisational difficulties have made the functioning of FIA an uphill task. Had we kept the development of anti-corruption bodies on our national agenda by allocating them top-class human resource, sufficient funds, and freedom in decision-making, the menace of corruption would have been significantly curtailed. The Ehtesab Bureau, which was formed in 1997, supplementing the Ehtesab Commission, was the first serious effort aimed at combating corruption in the country. The Bureau assumed the responsibility of investigation while prosecution was entrusted to the commission. Ehtesab law was a strong law where the prosecution of cases at two tiers, i.e. Ehtesab Courts under the judges of the High Courts in each province with right of appeal in the SC was a far better and speedy trial process than the three-tier prosecution approach followed by NAB under National Accountability Ordinance (NAO).

The Ehtesab Bureau investigated a significant number of White Collar Crime (WCC) cases and its performance was by and large commendable as evident from the statistics of

high profile prosecutions it undertook in a short span of time. It traced assets stashed abroad for the first time in the history of Pakistan and exhibited foreign documentary evidence on ill-gotten assets in trial courts. Unfortunately, Ehtesab Bureau was dismantled due to military takeover on October 12, 1999. The political opponents labelled this bureau as infested with agenda against political opponents. The Ehtesab Act-1997 was passed by the National Assembly with a two-third majority. It had all the merits and political support that justified its retention with certain amendments necessary for modernisation/functional improvements.

The NAB was established after Ehtesab Bureau. It was provided management on deputation from the armed forces. The bureau faced multifarious challenges in the formative years as it neither had the trained workforce of its own for investigating white collar crimes nor the capacity to handle substantially large portfolio of corruption/corporate fraud cases reported by the public as well as inherited from the Ehtesab Bureau. The NAB took the first challenge of recovery of defaulted loans. A list of top bank loan defaulters compiled by various banks/institutions was given by the State Bank of Pakistan to NAB for a countrywide crackdown. The nation witnessed arrest of influential personalities and retention in NAB custody till full/part payment of the defaulted loans. A handful of defaulters, however, managed restructuring of their defaulted loans. The drive against the loan defaulters was highly effective and widely appreciated by the public.

The hierarchy of NAB was conscious of the necessity for incorporating modern anti-Corruption Concepts and techniques in the system. For this, foreign consultants were engaged for organisational review. It succeeded in incorporating new initiatives in the orbit such as Awareness and Prevention Division, integration of FIA's Anti-Corruption and Economic Crime Wings, Research and Training Wing, IT Wing, Logistics Wing, Security wing and a mini secretariat for National Anti-Corruption Strategy (NACS) Committee to oversee implementation of Governance Reforms in the Country. The FIA transferred over 30 percent of their workforce to NAB after thorough scrutiny of their moral and professional reputation.

The transfer of FIA workforce also brought-in voluminous workload of Corruption Cases to the NAB. But as it was still at a nascent stage, the present government reversed the decision. The SC announced landmark judgment in favour of NAO-99, with directions to remove certain anomalies in the ordinance. It was the first legal validation of NAO by the apex court of Pakistan. The blow to the potency of NAB's operations came in year 2001-02, when NAB's power to take cognizance of bank default cases was clipped through an amendment moved by the federal government where NAB could deal with the default cases when referred by a committee headed by the governor SBP only. A final payment notice to the bank defaulter by the SBP was made mandatory. The net outcome was an abrupt decline in the bank default prosecution cases by the NAB, leading to loss of deterrence value of the bureau.

Allegations of favouritism in cases against the pro-government politicians could not be defended in the public. Pro-Government politicians were openly accused by the civil society to be the beneficiaries as complaints, probes, inquiries, investigations prosecution cases against them were either not pursued with due competence or were shelved. The bureau's anti-corruption operations against businessmen and politicians were drastically curtailed after November 2002 general elections. The corrupt bureaucrats, however, came on top of the agenda for criminal prosecution.

External influence/intervention leads to compromise, thus affecting the resolve to combat corruption. Shortfalls in investigation and prosecution skills also had the telling effect on organisational output that continued to decline. Perpetual delays in inquiries, investigations and prosecution in courts resulted in delays. Voluntary return and plea-bargaining concepts, although prevalent in many foreign countries, were also viewed by the public as instruments of compromise with the offender. The worst offender could get released after paying 1/3rd amount as the first instalment in case of plea bargain. The details of voluntary return cases never became public. The closure of inquiries, investigations, and withdrawal of cases from the courts remained a grey area throughout. The formulation of the first National Anti-Corruption Strategy (NACS) for Pakistan with the assistance of foreign specialists was good work that never got the attention it deserved. Resultantly, the reforms agenda for National Integrity System was not pursued by various stakeholders with due vigour.

The bureau also undertook research and analysis work on systemic weaknesses in governance; it trained prosecutors in prosecutorial skills for the first time in Pakistan. It worked as apex body for drafting anti-money laundering bill and ratification of International Convention against Corruption (ICAC). The NAB also worked as an institution to promote reforms in the provincial ACE's of all the provinces, including Ehtesab Bureau of AJK. It conducted numerous sessions with the concerned provincial ACEs and drafted changes in their charter of assignments.

In what had been billed as a verdict in NRO case, that may change the course of country's political history, the Supreme Court on 16.12.2009 declared the controversial National Reconciliation Ordinance (NRO) as never to have existed and against the Constitution by reviving all cases and reversing acquittals of its beneficiaries, thus putting the PPP parliamentarians and cabinet members and President Asif Zardari in a quandary. In a late-night short order that has no parallel in country's judicial history, the 17-judge bench, headed by Chief Justice Iftikhar Mohammed Chaudhry, ordered the federal government to take immediate steps to seek revival of the original requests or claims for mutual legal assistance to pursue money laundering cases pending in foreign countries, including Switzerland.

Historic as it is, the Supreme Court verdict has also raised as many questions as it has answered regarding the fate of the cases. Perhaps in coming days and weeks it may



become clear if the cases in Switzerland can at all be revived because, according to legal experts, the Swiss legal system does not have any such provision.

Since the verdict has not directly touched the immunity issue of the president, legal opinion remains divided on whether President Zardari can be prosecuted on the basis of corruption cases as they existed before the promulgation of NRO on Oct 5, 2007.

Similarly, fate of those who were convicted in absentia and are at present members of parliament or even in the cabinet also hangs in the balance and depends on the view and action of National Assembly Speaker Fehmida Mirza and Senate Chairman Farooq Naek. Equally important will be the reaction of the MQM as a number of its leaders and members were direct beneficiaries of the NRO in thousands of criminal cases that the party has always dismissed as politically motivated, but now stand revived as a result of the verdict.

Authored by the Chief Justice himself, the 18-page verdict was quite clear on many points as it also revived all convictions or sentences under section 31-A of the NAB Ordinance that deals with punishment to an absconder after declaring him proclaimed offender. Since the NRO has been declared void ab initio, any benefit derived by any person in pursuance of Section 6 (amendment in section 31-A of the NAB Ordinance) will also be deemed never to have legally accrued to any such person, and consequently, of no legal effect. It held that cases under investigation or pending inquiry and which had either been withdrawn or where the inquiry had been terminated on account of the NRO shall also stand revived and the authorities shall proceed in the said matters in accordance with law.

As a consequence of the declaration, the judgment said, all cases in which the accused persons were either discharged or acquitted under Section 2 of NRO (amendment in Section 494 of the Criminal Procedure Code) or where proceedings pending against the holders of public office had been wound up in view of Section 7 shall revert to the pre-Oct 5, 2007, position.

All courts, including the trial, the appellate and the revision courts, were ordered to summon the persons accused in such cases and then to proceed from the stage from where proceedings were closed under the NRO.

The federal government, all provincial governments and all relevant and competent authorities, including NAB Prosecutor General Dr Danishwar, the special prosecutors in accountability courts, the prosecutors general in the four provinces and other officers or officials involved in the prosecution of criminal offenders, were also directed to offer every possible assistance required by the courts in this connection.

The court also ordered the federal government and other competent authorities to proceed against former attorney general Malik Mohammad Qayyum by declaring unauthorised, unconstitutional and illegal his acts of writing to various authorities/courts in foreign countries, including Switzerland.

The court noted that no order or any authority was established authorising the former AG

to address unauthorised communications and thus the conduct of Malik Qayyum resulted in unlawful abandonment of claims of the government to huge amounts of the allegedly laundered money lying in foreign countries, including Switzerland.

The court also expressed its displeasure over the conduct and lack of proper and honest assistance and cooperation to the court by NAB Chairman Nawid Ahsan, the prosecutor general of the NAB and of Additional Prosecutor General Abdul Baseer Qureshi. It suggested the federal government to appoint competent, honest persons who fulfil the criteria outlined in Section 6 of the NAB Ordinance. The court asked the government to go through its observations in the Asfandiyar Wali case. The verdict regretted that the conduct of NAB's bosses made it impossible for the court to trust them.

However, till such fresh appointments the present incumbents may continue to discharge their obligations strictly in accordance with law, but obligated them to transmit periodical reports of the actions taken by them to the monitoring cell of this Court, which is being established through succeeding parts of this judgment.

The cell so established in the Supreme Court will comprise the chief justice or any judge to be nominated by him to monitor the progress and the proceedings in the cases under the NAB Ordinance. Similar cells will also be set up in the High Courts of all the provinces. The law secretary was directed to take steps to increase the number of accountability courts to ensure expeditious disposal of cases.

The removal of bottlenecks is the best approach rather than dismantling the entire system that demonstrated the capability far better than any other contemporary anti-corruption bureau in the SAARC region. The selection of directors and others strictly on the basis of high moral and professional standards can be an effective firewall against corrupt practices within the bureau. The need for introducing a check and balance system, involving the civil society, media, and judiciary to oversee closed cases will have a check on the discretionary powers of the competent authorities. Likewise, selection of prosecutors after carrying out consultations with various bar councils will have a salutary impact on the performance of the bureau. Introspection of the present workforce and elimination of non-professional officers in the bureau can also enhance their efficiency. The government should re-evaluate the NAO, its mandate and organisational shortfall. Any effort to dilute the law will be contrary to the spirit of accountability. A group of specialists from the judiciary and the executive can identify human resource of weak moral and ethical standards, allegedly involved in closure and delays of inquiries, complaints, investigations, prosecutions on external influences or vested interests. This screening exercise should also be undertaken for FIA and Provincial ACEs for across the board effects. We should also set up a national anti-corruption authority, headed by Chief Justice of the SC (retired), with chairman FBR, Accountant General, Auditor General, Chairman PAC, Chairman JCSC, Federal Secretary Cabinet/Establishment, and an MNA

each from the main political parties and few members from the civil society to act as a body to oversee federal anti-corruption institutions.