

DAWN OF A NEW DEMOCRACY IN PAKISTAN: LEGAL AND POLITICAL IMPLICATIONS OF NADEEM AHMED v. FEDERATION OF PAKISTAN

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*In July 2009, a Fourteen-Judge Bench of the Supreme Court of Pakistan in **Nadeem Ahmed v. Federation of Pakistan**, headed by Chief Justice Iftikhar Mohammad Chaudhry, has come out strongly in support of democratic principles hitherto neglected in Pakistan, by issuing a stern and categorical rebuke to the constitutional excesses by the former President and Army Chief, General Pervez Musharraf during his rule. The judgment also facilitates the initiation of the subsequent parliamentary process of prosecution of the General for treason for violating the Constitution, which would ultimately seal the fate of not only the man, his regime and its sympathisers, but also the very future of the melange of constitutional breakdowns and political coups and martial law in Pakistan. Pakistan, born one day before the independence of India, is a namesake democracy where democratic values have remained as elusive as the political stability which successive generations of Pakistani citizens have yearned for. Four political coups, a dominant history of military rule, three wars with India and great internal instability in the form of indigenous terror outfits have distorted the existence and efficacy of democratic institutions in the country. Moreover, the repercussions of the internal political affairs in Pakistan have always had a nefarious influence on the strategically fragile relationships in the Indian subcontinent. In the course of this article we intend to primarily engage in a*

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critical analysis of the landmark judgment in light of the political and legal developments that unfolded in the run-up to the proclamation of Emergency in 2007 and those that ensued in the aftermath of this constitutional breakdown in light of persistent struggle for power and domination that has existed between the judiciary on one side and the legislature, executive and the military on the other since the inception of the State, and which remains unresolved till today.

I. INTRODUCTION

*“The whole of Pakistan will come under the control of the Armed Forces of Pakistan”.*¹

During Pakistan’s first forty-six years of existence, the military has directly ruled the country for twenty three years and has asserted dominant political control for another twelve more years, using extra-constitutional tools for assuming political power. With respect to its multiple (three)² Constitutions, in Pakistan’s sixty-two years history, constitutional evolution and state formation have been largely constrained by the institutional imbalances and weak political culture that the newly emerged country inherited at the time of its independence. Ironically more instances of constitutional aberrations than constitution-building have at regular intervals presented the Pakistani courts with complex constitutional issues and dilemmas.³

¹ *Proclamation of Emergency, October 14, 1999* available at http://www.pakistani.org/pakistan/constitution/post_12oct99/proclamation_of_emergency_14oct1999.html (Last visited on October 30, 2009).

² Pakistan adopted its first Constitution on March 23, 1956, after nine years of independence. Unfortunately this constitution lasted only two and a half years and was abrogated on October 8, 1958, when President Mirza announced the proclamation of martial law. Under General Ayub Khan’s regime, a second Constitution was adopted in 1962 and its most distinguished feature was the introduction of the presidential system of government. The third and current Constitution is the Constitution of 1973 that was adopted during a brief period of civilian rule. The Constitution of 1973 was the result of the eventual emergence of popular politics, which translated into sustained legislative activity with multiple stakeholders and political ideologies successfully culminating in a consensus document. It reversed the situation and made presidential power strictly subject to Prime Ministerial advice, while including safeguards against abuse of power of dissolution as a pre-emptive tactic against a potential vote of no-confidence or as a revenge measure, if the Prime Minister had already been unseated through such a successful vote. See Osama Siddique, *The Jurisprudence Of Dissolutions: Presidential Power To Dissolve Assemblies Under The Pakistani Constitution And Its Discontents*, 23 ARIZ. J. INT’L & COMP. LAW 615 (2006).

³ Tayyab Mahmud, *Praetorianism And Common Law In Postcolonial Settings: Judicial Responses To Constitutional Breakdowns In Pakistan*, UTAH L. REV. 1225 (1993).

Since its independence on August 14, 1947, Pakistan's political and constitutional evolution has been repeatedly interrupted by praetorian rule established through several impositions of martial law. Pakistan witnessed its first political coup in October, 1954 when Governor-General Ghulam Mohammad dissolved the Constituent Assembly and instructed Mohammad Ali Bogra, the Prime Minister, to form a Cabinet without the benefit of the Parliament. This cabinet, which included Major-General Iskander Mirza as well as General Mohammed Ayub Khan, the Commander-in-Chief of the Pakistan Army, signified the beginning of the supremacy of the military over civilians. Subsequently, when Ghulam Mohammad became too unwell to continue, Iskander Mirza took over as acting Governor-General. On the adoption of the Constitution on March 23, 1956, he assumed the office of the President under the new Constitution. In 1958, General Ayub Khan arrested President Iskander Mirza and sent him into exile to Great Britain.

The next political coup took place in July 1977 when Army Chief General Mohammad Zia-ul-Haq took over the administration of the country from Zulfikar Ali Bhutto and assumed the office of Chief Martial Law Administrator (*hereinafter* CMLA), once again placing the country under martial law. The 1977 martial law was the beginning of Zia's eleven-year long authoritarian rule, looked upon by many as an era that exacerbated the country's political instability and further confused its constitutional milieu. Most importantly, Zia assumed for himself the power of amending the Constitution. Judges of the superior courts were required to take a loyalty oath under the Provisional Constitutional Order (*hereinafter* PCO), which amounted to a pledge of allegiance to the new military order, to the exclusion of the earlier constitutional system. At the same time, the oath was used to purge independent-minded judges, who refused the oath or were not invited to take it.

The most recent coup occurred in October 1999, when General Musharraf announced that the Nawaz Sharif Government had been removed and that the Armed Forces were moving in and taking control of the affairs of the country. In the recent past, General Musharraf holding the dual position of President of Pakistan and Chief of Army Staff, epitomized the military's historically dual role in Pakistan. The primary tool employed by him for assuming control over the political process is the highly controversial Article 58(2)(b)⁴ of the Constitution

⁴ Article 58(2)(b) of the Constitution of the Islamic Republic of Pakistan reads as follows: Notwithstanding anything contained in clause (2) of Article 48 the President may also dissolve the National Assembly at his discretion where, in his opinion, (a) a vote of confidence having been passed against the Prime Minister, no other member of the National Assembly is likely to command the confidence of the majority of the members of the National Assembly in accordance with the provisions of the Constitution, as ascertained in a session of the National Assembly summoned for the purpose; or (b) a situation has arisen in which the Government of the Federation cannot be carried out in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. (New paragraph (b) added by the Legal Framework Order, 2002 (C.E's O. No. 24 of 2002), Art 3 and Sch.,)

of Pakistan, which entrenches tremendous political power in his person, by empowering him (i.e., the President) to dissolve the National Assembly.⁵

Pakistan is a praetorian state, one in which the military tends to intervene and potentially dominate the entire political system.⁶ Since the country's tumultuous first decade, usurpation of power by praetorian rulers has come through several impositions of martial law, at times preceded by traumatic *coups d'état*.⁷ According to Siddique, military intervention into politics, whether sporadic or institutionalized, raises serious questions of conventional understanding about constitutional governance, the rule of law, and the role of judicial review.⁸ Musharraf's coup was also legitimized by the Supreme Court,⁹ which has been habitually relegated to the task of validating army take-overs through questionable jurisprudence. An independent judiciary's review of governmental acts is an essential feature of democratic governance because such a review facilitates orderly functioning of different organs of the state and maintains the efficacy of constitutional guarantees of individual and collective rights. Judicial review of military usurpation thus brings into the sharpest possible focus the tension between law and force. This is particularly true of new post-colonial states whose search for stable and democratic constitutional frameworks is repeatedly derailed

⁵ *Supra* note 2.

⁶ *See supra* note 3 (The political processes of this state favour the development of the military as the core group and the growth of its expectations as a ruling class; its political leadership...is chiefly recruited from the military, or from groups sympathetic, or at least not antagonistic, to the military. Constitutional changes are effected and sustained by the military and the army frequently intervenes in the government. In a praetorian state, therefore, the military plays a dominant role in political structures and institutions. Others characterize praetorianism as the result of structural deformation of post-colonial societies, whereby economically dominant classes can maintain their position only under the protection of the military. Still others see the military in post-colonial societies as a self-aggrandizing power unto itself, seeking a dominant political role to ensure perpetuation of its disproportionate share of societal resources).

⁷ *Supra* note 2.

⁸ *Supra* note 3.

⁹ Musharraf's coup was legitimized by the Supreme Court in the case of *Syed Zafar Ali Khan v. General Pervez Musharraf* Chief Executive of Pakistan, PLD 2000 SC 869, wherein the military takeover was upheld. The petitioner challenged the takeover on a number of grounds, chief among which was that the axed Government was formed by duly elected representatives and in accordance with the Constitution and the law having vested with a legal right to complete its tenure unless replaced by another Constitutional Government, its sudden dismissal was unconstitutional. Moreover, General Pervez Musharraf and his colleagues had not only violated the oath taken by them under Article 244 of the Constitution (the Oath under which expressly forbids a member of the Pakistan Armed Forces or Navy or Air Force from taking part in any political activities whatsoever) but also committed the offence of high-treason by subverting the Constitution. According to the oath under Article 244, members of the Armed Forces are compelled to uphold the Constitution which embodies the will of people. It also forbids such members from engaging in any political activities. Lastly, the Chief Executive was performing his functions without taking oath of office and his actions being tainted with mala fide could not be justified on any ground whatsoever. However, it was held that General Pervez Musharraf,

by the military's extra-constitutional usurpations of power.¹⁰ Very often, courts, particularly in common law jurisdictions, are called upon to determine the validity and scope of extra-constitutional power. These judicial responses, while doctrinally inconsistent, typically validate the extra-constitutional assumption of power and hold the legislative power of extra-constitutional regimes as unfettered. The result is gradual institutionalization of permanent praetorian rule and blockage of all avenues towards representative democratic governance. Not surprisingly, the fate of the courts is diminished power, restricted jurisdiction and waning prestige.

In light of this historical jurisprudential legitimization of the illegal actions of the various regimes that have governed Pakistan, the judgement of the Supreme Court in *Nadeem Ahmed v. Federation of Pakistan*,¹¹ in which a Fourteen-Judge Bench of the Supreme Court, headed by Chief Justice Iftikhar Mohammad Chaudhry issued a stern rebuke to the constitutional excesses indulged in, by the former President and Army Chief, General Pervez Musharraf during his rule can be hailed as a hopeful sign of a new start for the judiciary. The decisive stand of the judiciary in this case is sure to have far-reaching consequences on the future of democracy in Pakistan.

A. BRIEF BACKGROUND TO THE CASE

In March 2007, Musharraf's illegal sacking of Chief Justice Chaudhry combined with the latter's defiant refusal to comply incensed the legal community, lawyers in particular, who poured out onto the streets in a mass protest against the General's intrusion into the affairs of the judiciary. This was the first sizeable outcry against Musharraf's military regime. On July 20, 2007, in a new-found spirit of judicial independence, an Eleven-Judge Bench of the Supreme Court reinstated Chaudhry as the Chief Justice of Pakistan (*hereinafter* CJI).¹² Interestingly, political parties did not play a role of any significance in the lawyers' protests and hence the movement remained popular rather than political.¹³

through the Proclamation of Emergency dated October 14, 1999 followed by PCO I, 1999 had validly assumed power since the situation that arose on October 12, 1999 was one for which the Constitution provided no solution and the intervention by the Armed Forces through an extra constitutional measure became inevitable. This was validated on the basis of the doctrine of State necessity and the principle of *salus populi suprema lex*. This landmark judgement also went on to discuss in detail the concept of independence of judiciary as has been provided for in the Constitution of Pakistan.

¹⁰ *Supra* note 3.

¹¹ Sindh High Court Bar Association through its Secretary. v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad, Constitution Petition No. 09 of 2009; Nadeem Ahmed Advocate v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others, Constitution Petition No. 08 of 2009, available at http://www.supremecourt.gov.pk/web/user_files/File/CONST.P9OF2009.pdf (Short Order); http://www.supremecourt.gov.pk/web/user_files/File/const.p.9&8of2009.pdf (Long Order).

¹² Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry v. The President of Pakistan through the Secretary, PLD 2007 SC 578.

¹³ S. Akbar Zaidi, *Musharraf And His Collaborators*, ECONOMIC AND POLITICAL WEEKLY, November 10-23, 2007, 8.

Prior to the Proclamation of Emergency on November 3, 2007, the Supreme Court of Pakistan, under Chief Justice Chaudhury, was considering the setting aside of Musharraf's re-election as the President of the National Assembly and the Provincial Assemblies of Pakistan on October 6, 2007.¹⁴ Not only were these deliberations taking place *after* the said elections but as the proceedings continued, it appeared as if the majority of the judges were disinclined to ruling in favour of Musharraf. Thus, in order to ensure his survival in power, Musharraf could either choose to await the judgement and then proclaim an emergency if the judgement went against him, in which case it might have been difficult to have it set aside by an executive order since he would have legally ceased to be President, or pre-empt the judgement by proclaiming an Emergency. Therefore, when on November 3, 2007, Musharraf declared a nation-wide Emergency, this 'second coup' was seen as a move to pre-empt the Supreme Court judgement on the legitimacy of his candidacy in the February Presidential elections. The grounds for imposing Emergency given in the proclamation¹⁵ make for a very interesting read and only strengthen this view, for they attack solely the judiciary by insinuating that "some members of the judiciary are working at cross purposes with the executive and legislature in the fight against terrorism and extremism thereby weakening the Government and the nation's resolve and diluting the efficacy of its actions to control this menace". This charge was substantiated on the grounds that "the police force has been completely demoralized and is fast losing its efficacy to fight terrorism and Intelligence Agencies have been thwarted in their activities and prevented from pursuing terrorists" as a result of constant interference by the judiciary in executive and legislative functions.

Chief Justice Iftikar Chaudhury reacted immediately to the Proclamation by convening a seven member Bench which issued an interim order against the action. Under the Interim Order, the chief of army staff, corps commanders, staff officers and all civil and military authorities were prevented from acting on the PCO and from administering fresh oaths to any Supreme Court or High Court Chief Justice or Judge.¹⁶

However, on the very day of the Proclamation, a PCO¹⁷ was issued which empowered the President, Musharraf, to amend the Constitution. Musharraf also removed from office, Chief Justice Iftikhar Mohammad Chaudhury and 60

¹⁴ See *Wajihuddin Ahmed v. Chief Election Commissioner*, PLD 2008 SC 25. (The Petition challenged his candidacy on the ground that a serving soldier cannot be a presidential candidate. Petition No. 73 of 2007 filed by Mr. Justice (Retd.) Wajihuddin Ahmad).

¹⁵ See *Tika Iqbal Muhammad Khan v. General Pervez Musharraf, Chief of Army Staff, Rawalpindi and others*, PLD 2008 SC 615.

¹⁶ Text of the Proclamation of Emergency available at http://www.pakistani.org/pakistan/constitution/post_03nov07/proclamation_emergency_20071103.html. See also *supra* note 14, wherein the said order was declared illegal and without jurisdiction. (Last visited on October 26, 2009).

¹⁷ *Provisional Constitutional Order, 2007*, available at http://www.pakistani.org/pakistan/constitution/post_03nov07/pco_1_2007.html, (Last visited on October 26, 2009).

other judges of the superior judiciary following their refusal to take a new oath under the Oath of Office (Judges) Order, 2007,¹⁸ issued by him after suspending the Constitution. Their taking the new oath would have implied their approval of his unconstitutional actions. The Supreme Court building was surrounded by security forces and the judges who refused to relent, were forcibly removed and placed under house arrest in their residences. Musharraf thus seized complete control over the country by suspending the Constitution and exercising executive power over the Supreme Court and the lawyers' movement morphed into a much larger, political movement.

Subsequently, in order to dilute the effect of above mentioned Seven-Judge Bench order, Mr. Justice Abdul Hameed Dogar, the new CJP under the Oath of Office (Judges) Order, 2007, constituted a Bench of eight Judges and by their order dated November 6, 2007 declared the order dated November 3, 2007 to be illegal and without jurisdiction as it was delivered after the issuance of the Proclamation of Emergency, when the judges had already ceased to exercise judicial powers. Moreover, it was also held that since the Order was passed without giving any notice or providing any opportunity of hearing to the Federation of Pakistan in utter disregard to the principles of natural justice, therefore, the same was otherwise not a legal order.¹⁹ Later, a Ten-Judge Bench headed by Mr. Justice Abdul Hameed Dogar, CJP dismissed the petition filed by Justice (Rtd.) Wajihuddin Ahmad calling in question the eligibility of General Pervez Musharraf to contest election to the office of President.²⁰ Also another seven member bench headed by Chief Justice Dogar took up hearing the case of *Tikka Iqbal Muhammad Khan and WATAN Party* and decided the same on the principle of '*salus populi supreme lex*' and granted that relief which was not even included in the prayer by the petitioner. The present Fourteen Judge Bench in *Nadeem Ahmed v. Federation of Pakistan* has held that these judgements were *per incuriam*, illegal and unlawful. Subsequently a time barred *Review Petition* was filed by Tikka Iqbal Khan which was heard by Thirteen-Judge Bench and was dismissed, deliberately to give the impression that a larger Bench decided the matter, to dilute the effect of a previous judgment handed down in case of *Syed Zafar Ali Shah*.²¹

The Emergency was finally lifted on December 15, 2007 after Musharraf had been sworn in as President under a second term. Before reinstating the Constitution however, Musharraf made several changes²² to it. Firstly, he altered the minimum age requirement to qualify to be a judge, from forty-five to forty

¹⁸ *Oath of Office (Judges) Order, 2007*, available at http://www.pakistani.org/pakistan/constitution/post_03nov07/judges_oath_order_2007.html (Last visited on October 26, 2009).

¹⁹ See *supra* note 14.

²⁰ *Jamat-e-Islami v. Federation of Pakistan*, PLD 2008 SC 30.

²¹ *Supra* note 9.

²² *Constitution (Second Amendment) Order, 2007*, available at http://www.pakistani.org/pakistan/constitution/post_03nov07/po6_2007.html (Last visited on September 29, 2009).

years of age. Analysts suspect that this gives the President a greater pool of friendly appointees; however the stated reason for the amendment is merely that it allows judges to serve longer tenures.²³ In addition, all Judges that resigned or were removed during the emergency period will not be eligible to return to office. He also amended Article 41 of the Constitution, allowing a person to run for President immediately after resigning a civil or military position, instead of being subject to the two year waiting period previously required.

Cornered by the U.S. administration into agreeing to a peaceful transition to elected civilian rule,²⁴ and under heavy domestic pressure, a reluctant Musharraf stepped down as head of the Armed Forces in mid December 2008, leaving him a civilian President. Following the assassination of Benazir Bhutto, leader of the Pakistan's Peoples Party (*hereinafter* PPP) on December 27, 2007, the General Elections finally took place on February 18, 2008.²⁵ Fears about the fairness of the Elections proved unfounded when, Asif Ali Zardari of the PPP, became the new President of Pakistan. A defeated Musharraf retired to London, where he now resides with his family.

The international community has lauded Pakistan's legal community for its display of strength. Roger Normand has commented, "Since the Chief Justice was arbitrarily dismissed from office, Pakistan's lawyers have stood firm at the forefront of popular protests, enduring police brutality, mass arrests, arbitrary detention, torture and ill treatment. Their struggle was not for the reinstatement of one man, but for the restoration of constitutionalism and the principle that even the powerful must be subject to the rule of law."²⁶

Popular protests for the restoration of the judiciary continued after the new Government was elected in March 2008. President Asif Ali Zardari reneged on a pledge to reinstate the Chief Justice, reportedly out of concern that the Supreme Court might review the Constitutionality of the National Reconciliation Ordinance passed by President General Musharraf, which summarily dropped hundreds of corruption and criminal cases against political figures, including President Zardari.²⁷

With respect to the position of the military in Pakistan, it has been observed in jest that "*All countries have armies, but here, an army has a*

²³ Jared M. Lee, *Pakistan's Political Upheaval: The Demise Of A Nuclear Democracy*, 17 J. TRANSNAT'L L. & POL'Y 177 (2007-2008).

²⁴ *The Bigger Picture in Pakistan*, ECONOMIC AND POLITICAL WEEKLY, November 10-23, 2007, 8.

²⁵ For a detailed report of the results see *Elections 2008*, available at <http://www.elections.com.pk/elecindex.php>, (Last visited on September 27, 2009).

²⁶ Press Release, International Commission of Jurists, *Pakistan-ICJ Welcomes Reinstatement of Chief Justice Chaudhry*, March 20, 2009 available at http://www.icj.org/IMG/Pakistan_PR_20_Mar_09_revised_3_.pdf (Last visited on September 30, 2009).

²⁷ *Id.*

country.”²⁸ Since independence, Pakistan has largely been governed by its Armed Forces. However, the question of why Pakistan has always succumbed to military rule requires one to look at the very beginning of the nation. Pervez Hoodbhoy writes that “the civilian system of power was never regarded by Pakistan’s citizens as just, appropriate, or authoritative. And despite Jinnah’s declarations, the idea of Pakistan was unclear from the start. Lacking any clear basis for legitimacy or direction, the state quickly aligned with the powerful landed class: the army leadership and the economic elite joined forces to claim authority in a nation without definition or cohesion.”²⁹ Now, the Army holds numerous properties in both urban and rural areas as well as vast commercial and industrial units.

Moreover, the U.S. has been giving financial aid to Pakistan since the 1950s. In fact, Islamabad received nearly \$2 billion in U.S. assistance from 1953 to 1961, of which \$508 million was for the military.³⁰ However, the international community remained largely indifferent to the happenings in Pakistan until the tragic events of September 11, 2001, following which Pakistan was abruptly thrown into the international limelight. Some of the major concerns regarding Pakistan are the regional and global terrorist elements harbouring within the nation, its role in improving stability in Afghanistan (which lies on Pakistan’s western border), domestic political stability and democratization, nuclear weapons proliferation and security and human rights protection. A former senior U.S. government official has opined that Pakistan may just be the most dangerous country in the world today. All of the nightmares of the twenty-first century come together in Pakistan: nuclear proliferation, drug smuggling, military dictatorship, and above all, international terrorism.³¹ With Musharraf aligning Pakistan with the US in the “war on terror”, Pakistan has become a key ally of the U.S. and receives military aid with the aim of combating militancy there. The Army thus, remains a powerful establishment.

B. AN OVERVIEW OF THE CASE NADEEM AHMED ADVOCATE V. FEDERATION OF PAKISTAN

1. The Petitioner’s Contention

*In Nadeem Ahmed Advocate v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and Others*³² (hereinafter

²⁸ Pervez Hoodbhoy, *Can Pakistan Work - A Country In Search Of Itself*, 83 FOREIGN AFF. 122 (2004).

²⁹ *Id.*

³⁰ US Congress Report, *Pakistan-U.S. Relations*, January 28, 2005, available at <http://www.globalsecurity.org/military/library/report/crs/44930.pdf> (Last visited on September 20, 2009). An updated report on Pakistan-US relations was released on February 26, 2009 available at <http://www.fas.org/sgp/crs/row/RL33498.pdf>, (Last visited on September 30, 2009).

³¹ Bruce Riedel, *Pakistan and Terror: The Eye of the Storm*, July 31, 2008 available at <http://www.fas.org/sgp/crs/row/RL33498.pdf> (Last visited on October 13, 2009).

³² See *supra* note 11.

Nadeem Ahmed) the main contention of the petitioners³³ was that, Justice Iftikhar Muhammad Chaudhry was still the CJP as per the Constitution and all appointments and reappointments made in the Supreme Court and High Courts without consultation of the *de jure* CJP was unlawful, illegal, *ultra-vires* of the Constitution as well as *mala fide*. The counsel for the Petitioners argued that the purported acts done by General Pervez Musharraf, between November 3, 2007 to December 16, 2007 aimed at suspending and amending the Constitution through several instruments were unconstitutional, invalid and without any legal consequence. On account of his acts taken during November 3, 2007 to December 15, 2007 relating to the superior judiciary, the General became a usurper. The removal of judges of Supreme Court and High Courts on November 3, 2007 not only violated Article 209 of the Constitution, 1973 but was against the rule laid down by the Twelve-Judge Bench of Supreme Court in the case of *Syed Zafar Ali Shah*. All the appointments of Judges to the superior judiciary on or after November 3, 2007 up till March 22, 2009 which were without consultation of *de jure* CJP were unconstitutional, invalid and without any legal consequence.

Also the subsequent validation in the case of *Tika Iqbal Khan v. General Pervez Musharraf*³⁴ by a smaller bench of the Supreme Court was *per incuriam* and was not by a *de jure* Supreme Court. Justice Abdul Hameed Dogar could not be treated as Constitutional head of the Supreme Court even after the decision in the case of *Tika Iqbal Khan* as he who had headed the Bench, was himself the real beneficiary of the said judgement and this was contrary to one of the cardinal principles of Natural justice, *nemo debet esse iudex in propria sua causa* or ‘no person should be judge in his own cause’. The Petitioners also challenged the two Judgments dated November 23, 2007 and February 15, 2008 on Constitutional Petitions No. 87 and 88 of 2007³⁵ and prayed to the Court in the

³³ In the Petition No. 8 of 2009 which has been filed by Nadeem Ahmad, a practicing Advocate, while criticizing the judgement delivered in case of *Tikka Iqbal Muhammad Khan v. Federation of Pakistan*, PLD 2008 SC 178, the petitioner pleaded that “All the persons who were not judges on November 3, 2007, but who were brought into Supreme Court and High Courts as ‘judges’ despite the fact that the Honourable CJP was never consulted before their appointment which meant that they were never appointed under the Constitution.” Also that “On the night of March 22, 2009, issuance of cause lists comprising persons who have not been appointed in strict adherence to Article 177 and who are therefore complete strangers to the Supreme Court, is a serious matter and it is incumbent on the Honourable Chief Justice, before proceeding with any other judicial work, to forthwith stop all these persons from hearing any cases till such time that he, along with other validly appointed judges, are able to look into and judicially determine validity of their appointments as judges.” The petitioner sought a declaration that all those persons, both in Supreme Court and High Courts, regardless of whether they have taken oath under PCO or the Constitution, who have been appointed without ‘consultation’ of Honourable CJP as not judges and therefore, not entitled to function as such.

³⁴ PLD 2008 SC 178.

³⁵ Filed by Tika Iqbal Muhammad and WATAN Party and the Review Petition No.7 of 2008. See also *supra* note 15.

present petition to declare them as nullity in law, on the grounds of being *per incuriam*, *corum-non judice*, without any legal basis and based on mala-fide proceedings rendered by biased persons of Tribunal, fraudulently calling themselves Judges of the Supreme Court.

2. Judgment Of The Court

Delivering the judgment on behalf of the Fourteen-Judge Bench, Chief Justice Iftikhar Muhammad Chaudhry, in a frank acknowledgment lamented on the repeated instances of the desecration of the Constitution which was either abrogated or put in abeyance while the system of democratic governance in the country was held at ransom. Extolling the virtues of an independent and strong judiciary as the back bone of viable democratic system all over the world, he admitted that the Constitution of Pakistan, 1973, too, provides the judiciary with guarantees that the judiciary shall be fully secured, but, unfortunately, to its great dismay, this organ of State has, all along been under the wrath of adventurers imposing their dictatorial terms to achieve ulterior designs. In this present case not only was the tenure of a Chief Justice of Pakistan curtailed but also through various extra-constitutional instruments, the favourites and pliant members of the superior judiciary were out rightly given underserved benefits while those who stood their grounds were unceremoniously sacked.

To contain the onslaught of the misrule targeted on the judiciary, a Seven-Judge Bench of the Court headed by the *de jure* CJP, had passed an order restraining the President and Prime Minister of Pakistan from undertaking any such action, which was contrary to the independence of the judiciary. Also the Judges of this Court and that of the High Courts were required not to take oath under the Provincial Constitution Order or any other extra Constitutional step. In contravention of this directive, Justice Abdul Hameed Dogar, who took the oath of CJP, although, the office was not vacant along with four other Judges of the Supreme Court took oath in pursuance of unconstitutional Provisional Constitution Order and the Oath of Office (Judges) Order, 2007. Some of High Courts judges too took oath likewise violating the constitution and the order of Seven-Judge Bench, legally and lawfully passed.³⁶ Treating it as a major sign of

³⁶ Subsequently, in order to dilute the effect of the seven member Bench order, Mr. Justice Abdul Hameed Dogar, the then CJP, constituted a Bench of eight Judges including those appointed afresh in pursuance of Provisional Constitution Order and took up CMA No.2874 of 2007 in Constitution Petition No.73 of 2007 and by their order dated November 6, 2007 illegally and unlawfully, without the mandate of the Constitution, declared the order dated November 3, 2007 to be illegal and without jurisdiction. Later, a ten member Bench was also constituted which was headed by Mr. Justice Abdul Hameed Dogar, CJP, as then he was called. This Bench again illegally and unlawfully took up and dismissed the Petition No.73 and Original Criminal Petition No.51 of 2007 filed by Justice (Retd.) Wajihuddin Ahmad calling in question the eligibility of General Pervez Musharraf to contest election to the office of President although, it already stood dismissed for want of instruction. Also another seven member bench headed by Chief Justice Dogar took up hearing the case of Tikka Iqbal Muhammad Khan and WATAN Party and decided the same on the principle of '*salus populi supreme lex*' and granted that relief which was even not prayed by the

the strong revival of democratic ideals in Pakistan, Chief Justice Choudhry, also acknowledged the fact that the chosen political representatives did not extend validation to the unconstitutional acts undertaken till November, 2007. In an unprecedented move the chosen representatives of the people, who took their offices as a result of election taking place on February 18, 2008 had retained a neutral political stand, refusing to tow the line and had not sanctified the unconstitutional acts and other instruments made and declared by General Pervez Musharraf.³⁷ In the past, the Courts used to extend favours empowering the adventurers to amend the Constitution in actual effect were to achieve their overt and covert agenda but this time such powers were acquired by General Pervez Musharraf (Retd.) himself through the PCO and brought a host of unconstitutional amendments for his own benefits. The present representative of people firmly believed in the strong and independent judiciary and the democratic system which is evident that the deposed Judges of Supreme Court, High Courts and the *de jure* CJP were restored with effect from November 3, 2007 implied that the present representatives of people denied the validity of the actions of the General taken from November 3, 2007 to December 15, 2007 during which the Constitution remained suspended. According to the Judges this was done in the belief that the political fortunes of the country and the prosperity of its people lies in a strong, independent and viable democratic system of governance. They were also optimistic that the current democratic set-up comprising of the President, the Prime Minister, Ministers and the Parliament would continue to uphold the Constitution, its institutions and sacred values.

3. Conclusions Drawn By the 14-Judge Bench

The Supreme Court of Pakistan concluded that, firstly General Pervez Musharraf had in the garb of Emergency, imposed the PCO and made amendments to the Constitution by self-acquired powers. Acts that were unconstitutional in nature, without any legal basis and therefore without any legal consequences.³⁸

petitioner. The present fourteen judge Bench held that these judgements was per incuriam, *corum-nonjudice* illegal and unlawful. Subsequently a time barred Review Petition was filed by Tikka Iqbal Khan which was heard by thirteen-member Bench and was dismissed, palpably to give impression that a larger Bench decided the matter to dilute the effect of a previous judgment handed down in case of Syed Zafar Ali Shah.

³⁷ Declaration of Emergency, the Provisional Constitution Order No.1, the Oath of Office (Judges), Order, 2007, the Constitution (Amendment) Order, 2007 (President's Order No.5 of 2007), the Constitution (Second Amendment) Order of 2007 (President's Order No.6 of 2007).

³⁸ The Proclamation of Emergency issued by General Pervez Musharraf as the Chief of Army Staff on November 3, 2007; the Provisional Constitution Order No.1 of 2007 issued by him on the same date in his said capacity; the Oath of Office (Judges) Order of 2007 issued by him also on the same date though as the President of Pakistan but in exercise of powers under the aforesaid Proclamation of Emergency and the Provisional Constitution Order No.1 of 2007; The Provisional Constitution (Amendment) Order, 2007 issued by him likewise on November 15, 2007; the Constitution (Amendment) Order, 2007 being President's Order No.5 of 2007 issued on November 20, 2007; the Constitution (Second Amendment) Order, 2007 being the President's Order No.6 of 2007 issued on December

Secondly, Mr. Justice Abdul Hameed Dogar, took oath as CJP in violation of the order dated November 3, 2007 passed by a seven member Bench headed by *de-jure* CJP and in pursuance of unconstitutional instruments introduced by General Musharraf, while the office of CJP was not lying vacant. Thirdly, the Judges who were either retired or were not holding any judicial office, beside those in High Courts took fresh oath on their appointment on and after November 3, 2007 till December 15, 2007 in Supreme Court where the full strength of Judges appointed under the Constitution was already working and thus there was no vacancy. Similarly, many Judges took oath in Provincial High Courts. All of them did so in violation of order dated November 3, 2007 passed by seven member Bench headed by *de-jure* CJP. Four incumbent Judges already functioning in the Supreme Court took fresh oath under the influence of and in pursuance of unconstitutional steps of General Musharraf.³⁹

The Court declared that the office of the CJP never fell vacant on November 3, 2007 and as a consequence the appointment of Mr. Justice Abdul Hameed Dogar as the CJP was unconstitutional, void *ab initio* and of no legal effect; Provided that subject to whatever is contained hereinafter, the said unconstitutional appointment of Mr. Justice Abdul Hameed Dogar as the CJP shall not affect the validity of any administrative or financial acts performed by him or of any oath made before him in the ordinary course of the affairs of the said office. Since Mr. Justice Abdul Hameed Dogar was never a constitutional CJP, therefore, all appointments of Judges of the Supreme Court of Pakistan, of the Chief Justices of the High Courts and of the Judges of the High Courts made, in consultation with him, during the period that he, unconstitutionally, were declared to be unconstitutional, void *ab initio* and of no legal effect and such appointees would cease to hold office forthwith.

Fourthly, the Petition No.73 of 2007 filed by Mr. Justice (Rtd.) Wajihuddin Ahmad challenging the eligibility of General Pervez Musharraf (Rtd.) to contest for the office of President and the decisions in the cases of Tikka Iqbal Muhammad Khan granting validity to the actions of the General were *per incuriam, corumnon-judice*, without any legal basis hence, of no legal consequences.⁴⁰

14, 2007; the Islamabad High Court (Establishment) Order 2007 dated December 14, 2007 being the President's Order No.7 of 2007; the High Court Judges (Pensionary Benefits) Order, 2007 being Presidents Order No.8 of 2007; the Supreme Court Judges (Pensionary Benefits) Order, 2007 being President's Order No.9 of 2007 dated December 14, 2007 were declared to be unconstitutional, *ultra-vires* of the Constitution and consequently being illegal and of no legal effect.

³⁹ On the contrary the Court held that the CJP ; the Judges of the Supreme Court of Pakistan; any Chief Justice of any of the High Courts and the Judges of the High Courts who were declared to have ceased to hold their respective offices in pursuance of any judgments or enactments, shall be deemed never to have ceased to be such Judges, irrespective of any notification issued regarding their reappointment or restoration.

⁴⁰ Disposing the petition, the Court held that that the judgment purported to have been delivered in Constitutional Petitions No. 87 and 88 of 2007 in the case titled as *Tika Iqbal Muhammad Khan v. General Pervez Musharraf* and the judgment dated February 15, 2008, purported to have been passed in C.R.P.No.7 of 2008 titled as *Tika Iqbal Muhammad*

Any judgments delivered or orders made or any decrees passed by any Bench of the Supreme Court or of any of the High Courts which comprised of or which included the afore-described Judges whose appointments had been declared void *ab initio*, are protected on the principle laid down in *Malik Asad Ali v. Federation of Pakistan and Ors.*⁴¹

Fifthly, the amendments in the Supreme Court (Number of Judges) Act, (XXXIII, 1997) 1997 by way of Finance Act, 2008 raising the strength of judges in Supreme Court from 17 (1+ 16) to 30 (1+29) is unconstitutional because the strength of judges of Supreme Court is to be increased only by the Parliament as defined in Article 50 to be read with Article 260 of the Constitution which defines the acts of Parliaments.⁴² The Constitution, through its Article 176, authorises only the Parliament to determine the number of Judges of the Supreme Court of Pakistan and since the Parliament had so done through the Supreme Court (Number of Judges) Act XXXIII of 1997, therefore, the increase in the strength of the Judges through the Finance Act of 2008 which Act was not passed by the Parliament but was passed only by the National Assembly would be deemed to be valid only for financial purposes and not for the purposes of Article 176 of the Constitution. It is resultantly declared that the number of Judges of the Supreme Court for purposes of the said Article 176 shall continue to remain sixteen. The Constitution (Amendment) Order, 2007 being the President's Order No.5 of 2007 and the Islamabad High Court (Establishment) Order being President's Order No.7 of 2007 establishing Islamabad High Court for the Federal Capital Territory, have been declared to be un-constitutional and of no legal effect, therefore, the said Islamabad High Court shall cease to exist forthwith. All judicial matters pending before the said High Court before the passing of this order shall revert/stand transferred to the courts which had jurisdiction in the said matters before the promulgation of afore-mentioned President's Order No.5 of 2007 and President's Order No.7 of 2007 promulgated on December 14, 2007.

One of the most significant holdings of the case was that in the Code of Conduct for the judges of the Superior Courts in terms of Article 209 (8) of the Constitution, a new clause would be added commanding that no such judge shall, in future offer any support in whatever manner to any unconstitutional functionary

Khan v. General Pervez Musharraf and any other judgment/judgments passed on the strength of the said two judgments were declared to be void *ab initio*.

⁴¹ PLD 1998 SC 161.

⁴² Under Article 50 of the Constitution of the Islamic Republic of Pakistan, 1973, there shall be a *Majlis-e-Shoora* of Pakistan consisting of the President and two Houses to be known respectively as the National Assembly and the Senate. Under Chapter V, Article 260 defines 'Act of *Majlis-e-Shoora* (Parliament)', to mean an Act passed by the *Majlis-e-Shoora* (Parliament) or the National Assembly and assented to, or deemed to have been assented to, by the President. Article 176 under Part VII of the 1973 Constitution determines the constitution of Supreme Court, which shall consist of Chief Justice to be known as the Chief Justice of Pakistan and so many other judges as determined by Act of the *Majlis-e-Shoora* (Parliament) or until so determined, as may be fixed by the President.

who acquires power otherwise than through the modes envisaged by the Constitution and that any violation of the said clause would be deemed to be misconduct in terms of the said Article 209 of the Constitution.⁴³ The judgment concluded with the court acknowledging the mandate given by the electorate, in whom rests the sovereign authority, to the democratically elected Government on February 18, 2008. The court solemnly avowed to continue to jealously guard the principle of tricotomy of powers enshrined in the Constitution, which is the essence of the rule of law. It categorically laid out that any declaration made in this judgment shall not in any manner affect the General Elections held and the Government formed as a result thereof i.e., the President, the Prime Minister, the Parliament, the Provincial Governments, anything done by these institutions in the discharge of their functions. These acts are fully protected in terms of the age old principle of *salus populi est suprema lex*.⁴⁴

As a parting note, the judges reiterated that to defend, protect and uphold the Constitution is the sacred function of the Supreme Court. The Constitution in its preamble, mandates that there shall be democratic governance in the country, ‘wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed; wherein the independence of judiciary shall be fully secured’, such abiding values have guided the judiciary in delivering this landmark judgment .

II. ANALYSIS OF JUDICIAL DISCOURSE ON CONSTITUTIONAL BREAKDOWN

Recurring constitutional breakdowns in Pakistan reflect the general malaise of post-colonial societies characterised by a tension between the locus of power in the politico-administrative machinery and the source of legitimacy in the Constitution.⁴⁵ Post-independence the State was at the receiving end of the demands of the newly enfranchised public, which sought to reshape politics along nationalist goals. According to Waseem, the institutional-constitutional framework of the post-colonial state was ill-equipped to accommodate much less

⁴³ Under Article 209 of the Constitution of the Islamic Republic of Pakistan, 1973, there shall be a Supreme Judicial Council of Pakistan which shall consist of the Chief Justice of Pakistan, the two next senior most judges of the Supreme Court and the two most senior Chief Justices of the High Courts.

⁴⁴ Asma Jilani v. Government of Punjab, PLD 1972 SC 139.

⁴⁵ Mohammad Waseem, *Constitutionalism in Pakistan: The Lingering Crisis of Dyarchy, CONFLICT, POWER AND THE LANDSCAPE OF CONSTITUTIONALISM*, 211 (Sanmada & Tarabout ed., 2008). See also PAULA R. NEWBERG, *JUDGING THE STATE* 3 (2002). (According to Newberg, early constitutional breakdowns in newly independent Pakistan combined two related problematic efforts at self definition. The use of colonial constitutionalism to define sovereignty juxtaposed with conflicting notions of territoriality, nationality and state authority and eventually paired with an executive-dominated state created by imperial instruments of governance).

sponsor and pursue these goals in earnest, ensuing in a general outcry of institutional decay and eventually leading to a crisis of democracy. As the crisis deepened between the parliamentary and extra-parliamentary forces on the issue of the constitutionality of certain policy and administrative measures taken by the government, the judiciary was brought in as referee and was treated as the ultimate source of legitimacy. The 1954, *The Federation of Pakistan v. Maulvi Tamizuddin Khan*⁴⁶ started a process whereby the higher courts recurrently interpreted the constitution throughout the following half-century. At the same time various attempts at constitutional engineering were taken up by extra-parliamentary forces, led by the civil bureaucracy during the first quarter and the military during the second quarter of a century after independence.⁴⁷

The inherent institutional imbalance between the bureaucracy and politicians in Pakistan made a mockery of constitutional tenets such as parliamentary sovereignty, procedural and substantive aspects of the legislative process and the principle of the government's accountability to public representatives. The Government of India Act, 1935 as amended by the Independence of India Act, 1947 remained operative for more than a decade after partition in Pakistan. The earliest coup in the history of independent Pakistan was scripted by the civil bureaucracy in 1954, with the then Governor-General dissolving the Parliament and dismissing the Prime Minister who enjoyed the support of the majority in the Constituent Assembly. The Federal Court upheld the ouster and subsequently in response to the Governor-General's reference to the Court, aimed at remedying the prevalent constitutional crisis as a result of the absence of a supreme law-making institution, the Court validated the dissolution of the Constituent Assembly based on the doctrine of necessity. Eventually this doctrine became wholly entrenched within the judicial lexicon of Pakistan, whereby maintaining public order was defined as the paramount function of the State even if it involved an extra-constitutional measure.

Over the decades, constitutional governance system in Pakistan has been left at the mercy of doctrinally inconsistent, judicially inappropriate, and at times politically timid responses of the judiciary, that has ultimately undermined constitutional governance. On occasions, when confronted with the question of the validity and scope of extra-constitutional power, the courts have vacillated between Hans Kelsen's theory of revolutionary validity, Hugo Grotius's theory of implied mandate, and an expansive construction of the doctrine of state necessity. The judicial failures to challenge praetorian tendencies have facilitated a systematic erosion of constitutional governance and the rule of law in Pakistan. This has resulted in not only institutionalization of a praetorian state but has also diminished the power and prestige of the judiciary, and led to the waning of judicial review.⁴⁸ Waseem observes that constitutionalism remained a consistent, latent, all

⁴⁶ PLD 1955 FC 240.

⁴⁷ *Supra* note 45, 213.

⁴⁸ *Supra* note 3.

pervasive and morally superior source of legitimacy under both civil and paradoxically, military rule. Subsequent to each successful military takeover, the *coup*-maker promised constitutional continuity excluding constitutional provisions such as the rule of public presentation and elective principles. Therefore looking beyond the subterfuge of constitutionalism, the casualty in the incessant dismissals of popularly elected assemblies were the principles of democratic constitutionalism and parliamentary sovereignty.⁴⁹ Judgments legitimizing the rule of military dictators beget cynicism and lack of faith in the ongoing democratic process in the country, more so when courts implore a quick return to civilian rule, expressing tremendous faith in the perpetrators of the *coups*. Such judicial pronouncements lend further credence to Pakistan's image as a failed state in the minds of some international observers, who refuse to acknowledge it as a legitimate nation-state, even several decades after its creation. These judgments also influence local commentators to describe Pakistan as a non-democratic state with an underdeveloped political culture and a judiciary that is pliant to the will of the military-political establishment. However, Pakistan's constitutional history is arguably much more complex than such a generalization would suggest, and in order to assess the future of constitutionalism and democracy in this geopolitically significant country, it is important to gauge the vibrancy of its democratic ethos and the historical attempts at entrenching such ethos.

An unstable Pakistan has negative ramifications on a scale that transcends its national boundaries.⁵⁰ Contemporary judicial trends emerging out of court judgments dealing with constitutional breakdowns, openly display that the judges were deeply troubled about such questions remaining inadequately answered, even after many decades of experimentation. The judges were frustrated, disillusioned, and at times scathingly critical about the anti-democratic forces that they blamed for the state of affairs. Nevertheless, they engaged in expansive and at times, impressive analyses of Pakistan's constitutional and political history, comparative constitutional law, and jurisprudential and political theories in order to reassess and restate the country's ethos, its constitutional-governance mechanism of popular choice, and the ingredients of its evolving constitutional culture.⁵¹ Though impressive in terms of outlook, these judgments also divulge disturbing fissures and polarizations at ideological and political levels. Such aspects of these judgments are difficult to reconcile with the valid notion that constitutional judgments, while inherently political on one level, ought not to be politicized.

⁴⁹ *Supra* note 45, 216. See also Dieter Conrad, *In Defence Of The Continuity Of Law: Pakistan's Courts In Crisis Of State*, ZWISCHEN DEN TRADITIONEN, 252 (1999). (For instance, In his Address to the Nation as the CMLA, broadcasted on July 5, 1977 General Zia emphasized that Constitution was not abrogated and only certain parts 'held in abeyance', that the elected President continued to officiate and the Chief Justice, was giving his advice and guidance on legal matters; and that the sole aim was to organize free and fair elections by October, 1977, in light of the doubtful legality of the composition of the Parliament following the judgment in the *Nusrat Bhutto* case which upheld the *prima facie* case of the systemic rigging of the elections).

⁵⁰ *Supra* note 2.

⁵¹ *Id.*

A. DOCTRINE OF NECESSITY

In Pakistan constitutional crises have led to landmark judicial pronouncements. In the earliest instance, in the aftermath of the dissolution of the first Constituent Assembly, its members brought their pleas to the Sind High Court in the case of *Maulvi Tamizuddin Khan v. The Federation of Pakistan*.⁵² In this case the High Court examined whether the Governor General's assent was needed to validate actions of the Constituent Assembly and whether the absence of assent invalidated them and also whether the Governor General had the right to dissolve the Assembly. Taking a politically progressive view, the Court decided in favour of legislative supremacy in the area of constitution making. Subsequently, on the Governor General announcing the creation of a new Constitutional Convention, there ensued an intense political scrambling among the majority and minority parties to exert maximum influence in this new constituent body. To impose order and to resolve the political deadlock the Governor General requested an advisory opinion from the Federal Court in the case of *Reference by His Excellency the Governor General*.⁵³ In this case the Court had to primarily determine the nature of the Governor General's office and whether he had 'rightly dissolved' the Constituent Assembly. Validating the Governor General's dissolution of the Assembly and the proclamation of emergency, Chief Justice Munir engaged in a judicial deliberation on the doctrine of necessity, by posing the fundamental question, "when can emergency justify the suspending the normal functioning of State institutions and who should determine this?"⁵⁴ The Court acknowledged that the action of the Governor-General, functioning under the Government of India Act 1935, in unlawfully dissolving the Constituent Assembly of Pakistan created a constitutional impasse. But some of the Governor-General's subsequent actions, including the creation of a new Constituent Assembly, were upheld by the Court on the principle *salus populi suprema lex*.⁵⁵ While this was the judiciary's first experiment with the doctrine of necessity it, it would soon firmly position itself within the very heart of the judicial discourse on constitutional breakdowns in Pakistan.

While the office of the President operating from outside the parliament wielded a plethora of powers, which firmly regulated political and administrative initiatives, his powers were nevertheless inherently constrained and he had to seek the legitimacy from the parliament as enjoined by the Federal Court in the constitution cases decided in 1954 and 1955. While the source of political legitimacy remained the jurisdiction of the Government of India Act, 1935 and the

⁵² PLD 1955 Sind 96. *Also see* *The Federation of Pakistan v. Maulvi Tamizuddin Khan*, PLD 1955 FC 240. (The Doctrine of Necessity was introduced by Justice Cornelius, the only dissenting judge).

⁵³ *Reference by His Excellency the Governor General*, PLD 1955 FC 435, (Advisory Jurisdiction).

⁵⁴ PAULA R NEWBERG, *JUDGING THE STATE* 35 (1995).

⁵⁵ Latin for 'Let the good of the people be the supreme law'.

Independence of India Act, 1947 providing for parliamentary law vested in the office of the Prime Minister, as chief executive, it led to the emergence of two polarized power centres within the political landscape of the Pakistan. While the bureaucracy struggled to usurp power in the form of an unsuccessful civilian coup in 1954, the Army in Pakistan emerged initially as a tactical ally and later as the most influential extra-parliamentary power-broker operating in the shadow of the instruments of the State. It gradually emerged as a constitution-framer and the king-maker of governments and the juggernaut that unceremoniously dethroned them according to its own whim's and fancies. The phenomenon of praetorianism in Pakistan highlights a dichotomy between constitutional representative politics and the military politics.⁵⁶ The 1958 military coup clearly identified the new locus of power in Pakistan. Military input in terms of political and constitutional engineering facilitated the transition from parliamentary to presidential system through promulgation of the 1962 Constitution.

B. DOCTRINE OF REVOLUTIONARY LEGALITY

The 1956 Constitution ensured a short period of peaceful constitutional rule but ultimately gave way to political instability across the country.⁵⁷ In October 1958, the Pakistan Supreme Court ruled on the legality of the usurpation of power and also examined the validity and scope of extra-constitutional power in the context of four criminal appeals pending before it in the case of *The State v. Doss*.⁵⁸ The Court, relying on Hans Kelsen's jurisprudential theory of revolutionary legality, ruled that the abrogated 1956 Constitution was no longer the governing instrument of the country, and that the new order was legitimate.⁵⁹ The factual history of the case unfolded when President Mirza on October 7, 1958 unilaterally declared in a Proclamation that the Constitution under which he was holding office had been abrogated, the legislative assemblies had been dissolved

⁵⁶ *Supra* note 45, 219.

⁵⁷ *Supra* note 54, 35.

⁵⁸ PLD 1958 SC 533.

⁵⁹ HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1945). (Kelsen explains that the significance of the *Grundnorm* or basic norm from which the entire legal system derives its validity. Kelsen proceeded to argue that a successful *coup d'etat* or revolution could create a new basic norm and therefore could support a new legal order in the juristic sense. Once the revolution was shown to be efficacious in nullifying the old basic norm, it had to be regarded as a law-creating fact giving validity to a new legal order. A revolution, occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been the 'legitimate' organs competent to create and amend the legal order. It is also equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through action from those in government positions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated).

and that ‘martial law’ would operate throughout the country and was to be administered by Gen. Ayub Khan, the then army chief. Subsequently he issued the *Laws (Continuance in Force) Orders (hereinafter LCFO)* which purported to avert the drastic consequences of an abrogated Constitution by continuing to recognize the pre-existent laws as valid unless expressly modified by the ‘martial law’ government. On the sixth day after the coup, the criminal appeals in *Dosso*⁶⁰ came up for hearing. The appellants who had obtained judgments in their favour in the lower courts on the basis of the Constitutional provisions before their abrogation, asked the Supreme Court to hold that, despite the abrogation of the Constitution in the meantime and despite the contrary intention manifested by the LCFO, their appeals should be decided by the Court on the basis of the 1956 Constitution. This raised a direct conflict between the Constitution and the LCFO, which traced its legitimacy to the *coup d’etat*. The Court, presided over by Munir C.J., held that there had been a successful revolution by President Mirza and, applying Kelsen’s theory, declared the document issued by him to be the law. The day after the judgment, Gen. Ayub Khan removed President Mirza and exiled him.

Having secured a stamp of validity and the license for unfettered legislative power in *Dosso*, the military regime flourished and proceeded to draft a new constitution for Pakistan.⁶¹ The 1962 Constitution established a model of praetorian “guided democracy”. The new regime dispensed with democratic representative government, fundamental rights, separation of powers, and provincial autonomy. Nevertheless, the new order did enjoy political stability and high economic growth for a few years. However, persistent demands for representation, fundamental rights, and democracy continued, erupting into a popular mass movement by fall of 1968. Mass demonstrations and civil disobedience paralyzed Pakistan’s economy and social life.

C. GUIDED DEMOCRACY AND THE DOCTRINE OF IMPLIED MANDATE

Fifteen years later, in *Asma Jilani v. Government of Punjab*⁶² the Pakistan Supreme Court held that Kelsen’s thesis on successful revolutions creating new *Grundnorms* could no longer be invoked in Pakistan. The cause célèbre *The State v. Dosso* had been reversed. In *Asma Jilani* the Court deliberated on the validity of the revolutionary legality doctrine and its applicability to the

⁶⁰ PLD 1958 SC 533

⁶¹ NEWBERG, *supra* note 45 (Under the 1962 Constitution, the executive power of the federation was concentrated in the president, who was to be indirectly elected by an electoral college consisting of 80,000 ‘Basic Democrats’. These Basic Democrats were directly elected to perform local governmental duties but had the additional function of serving as an electoral college for the presidency and members of the federal and provincial legislatures. The prime minister’s office was abolished, and the president’s cabinet members did not have to be members of the legislature).

⁶² PLD 1972 SC 139.

present instance of transfer of power to General Yahya Khan and came to the conclusion that the General had usurped power, and his actions could not be justified on the basis of the revolutionary legality doctrine and consequently his martial law regime was illegal.⁶³ In an unequivocal pronouncement on the relationship between political reality and judicial review the judges observed that that on account of the usurper holding the coercive apparatus of the State, the people and the Courts were silenced temporarily, but 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 high treason and suitably punished. This alone will serve as a deterrent to would be adventurers.⁶⁴

Dosso had commenced barely six days after the coup in October 1958, and that, no sooner had the decision been pronounced than the original initiator of the coup, Iskandar Mirza, was unceremoniously replaced by Gen. Ayub Khan; in a coup within a coup. The awkward question raised by Hamoodur Rahman C.J. in *Asma Jilani's* case⁶⁵ was what difference it made in Kelsen's terms that the man

⁶³ The second round of martial law rule began under Gen. Yahya Khan, after President Ayub Khan stepped down in March 1969. Gen. Yahya Khan's rule, who was the then Chief of the Army, began after the second Constitution of Pakistan (1962) was abrogated, in an atmosphere of widespread unrest against President Ayub Khan who called in the army to 'take-over' the government. The facts leading to the institution of this case involved the petitioners, a political leader and a newspaper editor, having been detained under Martial Law Regulation no. 78 of 1971 issued by Gen. Yahya Khan in his capacity as the CMLA. The Regulation enabled the military authorities to detain a person without trial for an indefinite period. None of the safeguards available to such detainees under the previous constitutions were provided. The High Court at Lahore had dismissed the Habeas Corpus petitions, pointing out that the courts' jurisdiction to entertain any matter arising out of Martial Law Orders and Regulations had been ousted by a specific decree of the regime, the Jurisdiction of Courts (Removal of Doubts) Order. Applying *Dosso*, the Lahore High Court held the decree to be binding and declined to interfere. On appeal, the Supreme Court overruled *Dosso* and declared the regime illegal and held that, unless the application of the decree in question could be justified on grounds of public necessity, it had no validity of its own. On the finding that there was no such necessity to justify it, the impugned decree as well as Regulation no. 78 of 1971 were held illegal. The Court also found that there was no basis under the 1969 Constitution for the 'passing over' of power to the army. According to Articles 12 and 16 of the Constitution (1962), the Speaker of the National Assembly should have taken over from the outgoing President. Admittedly, by the time judgment was pronounced in this case, Gen. Yahya Khan's illegal regime had come to an end after the General had resigned and Mr. Bhutto, now President under an interim Constitution had taken over.

⁶⁴ Similar to the current demand for initiating treason charges against General Pervez Musharraf (Retd.) under Article 6 of the 1973 Constitution. Article 6 of the Constitution reads as follows: "**High Treason:** (1) Any person who abrogates, subverts or attempts or conspires to abrogate or subvert the Constitution by use of force or show of force or by other unconstitutional means, shall be guilty of high treason. (2) Any person aiding or abetting the acts mentioned in clause (1) shall likewise be guilty of high treason. (3) [*Majlis-e-Shoora* (Parliament)] shall by law provide for the punishment of persons found guilty of high treason."

⁶⁵ *Supra* note 62.

responsible for the main *coup d'etat* was himself replaced, in a manner he would not have anticipated. He questioned whether even on the theory propounded by the learned Chief Justice Munir, was this subsequent change also a successful revolution? If so, by what test, because on this occasion there was no annulment of any constitution, or in Kelsenian terms, the *grundnorm* of any kind which had been created by President Iskandar Mirza? This observation revealed how judicial employment of Kelsen's thesis in this type of situation could result in absurdity.⁶⁶

Bearing in mind their own particular experience, the Court stated that Kelsen could not have intended to lay down that "every person who was successful in grabbing power" could claim to be the source of law and sovereignty. On the contrary, he meant to say that the State was not above the Law, that might did not make right. Besides, his theory required that an effective constitution be in existence in order to give validity to any rule made under it. According to Justice Yaqub Ali, after a change is brought about by a revolution or *coup d'etat* the State must have a constitution and subject itself to that order. Every single norm of the new legal order will be valid not because the order is efficacious, but because it is made in the manner provided by the Constitution of the State. Kelsen, according to him did not contemplate an omnipotent President and CMLA sitting high above society and handing his behests downwards. Therefore no single man could give a constitution to the society which, by nature, is an agreement between the people to live together under an Order which will fulfill their expectations, reflect their aspirations and hold promise for the self-realization. It must embody the will of the people which is usually expressed through the medium of chosen representatives.

The consequences of the Court in *Asma Jilani* pronouncing the illegality of the three-year long regime would have necessarily led to the invalidation of a considerable number of transactions that took place under its authority and seal. In order to avoid damage and inconvenience on so large a scale, the doctrine of necessity was invoked. A precedent for the application of the doctrine in Pakistan was found in the decision of the Federal Court of Pakistan in *Reference by His Excellency the Governor General*. The Court in *Asma Jilani* added an important gloss to the existing precedent for the application of the principle of 'public necessity', It held that the principle should be regarded as one condoning past illegal acts when their enforcement was justified in the interests of the general public.⁶⁷ Having overturned *Dosso*, and confronted with limitations on the

⁶⁶ The Court also went on to show how Kelsen's thesis itself was not beyond the pale of controversy from that applicable to determine the legality of a municipal government. 'An individual does not become the Head of State through the recognition of other States but through the municipal law of his own State.' Again the Court repudiated as misconceived the concept that the efficacy of a law would *ipso facto* confer legality upon it: 'the validity of a law and the law-constitutive medium were distinct questions.' It was through judicial recognition and acceptance of the legislative organ as competent to exercise that function that laws became valid.

⁶⁷ T.K.K. Iyer, *Constitutional Law In Pakistan: Kelsen In the Courts*, 21 THE AMERICAN JOURNAL OF COMPARATIVE LAW 642 (1973). (The doctrine of necessity when applied in this manner

application of the doctrine of state necessity as employed by the *Governor-General's Case*, the Court applied the doctrine of implied mandate first enunciated by Hugo Grotius.⁶⁸ The Court proceeded to pronounce four independent grounds upon which to condone the acts of an illegal usurper regime: (1) All transactions which are past and closed, for, no useful purpose can be served by reopening them, (2) all acts and legislative measures which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order, (3) all acts which tend to advance or promote the good of the people, (4) all acts required to be done for the ordinary orderly running of the State and all such measures as would establish or lead to the establishment of, in our case, the objectives mentioned in the Objectives Resolution of 1954.

The merits of *Asma Jilani* lie in its repudiation of Kelsen's theory of revolutionary legality and overruling of *Dosso*. In the list of condoned acts certain

has advantages over Kelsen's thesis: a) There is no need for judges to pronounce one way or the other on the delicate question of the status of the regime that had wrested power or to employ the language of 'recognition' and determine 'de facto' and 'de jure' status. b) In discussing Kelsen's thesis, writers have questioned, the judge's conscience in accepting such a total change in derogation of his oath to the previous constitution. c) Finally, the knowledge that not all acts of the unconstitutional regime would be ipso facto valid may conceivably bring some pressure, however mild, on the regime to respect some basic principles of human rights).

⁶⁸ According to Grotius, courts may validate certain necessary acts of a usurper done in the interest of preserving the state, because the lawful sovereign would also want these acts to be undertaken. The Court relied upon Lord Pearce's dissent in the Privy Council's decision in *Madzimbamuto v. Lardner-Burke*, [1969] 1 AC 645, to delineate the contours of the implied mandate doctrine. Accordingly, the *Asma Jilani* Court recognized that acts validated by implied mandate must (1) be directed to and reasonably required for ordinary orderly running of the State; (2) not impair the rights of citizens under the lawful Constitution; and (3) intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign. The Court stated that this re-fashioned use of the doctrine of state necessity, coupled with the doctrine of implied mandate was not a vehicle for validating the illegal acts of usurpers. Rather, the Court claimed that this was a principle of condonation and not legitimization. See also CONRAD, *supra* note 49, 256. (Therefore test indicated by Grotius is whether the governmental acts are such as even the true sovereign would prefer to be done by the usurper rather than not be done at all. The protection conferred by this doctrine extends beyond the scope of the doctrine of necessity, in so far as it extends beyond acts strictly necessary, to all normal acts not hostile to the legitimate order. This would include the ordinary administration of justice and other day-to-day functions of state authority. The doctrine of implied mandate is not concerned with the providing justification for extra-normal governmental powers necessary to effect a short transition to constitutional normalcy. It is designed to circumvent the question of governmental powers-either during civil war with rival factions competing for legitimacy or even in the case of clearly illegal and illegitimate government- in order to protect the citizens forced to live under the rule of an illegal government in their daily transactions unrelated to the political context. Therefore the doctrine is aimed at restoring the normalcy of non-political life in a civilized society and not constitutional normalcy. The doctrine of implied mandate confers validity on public acts which are political innocent and are reasonably required for the ordinary orderly running of the State and which do not further or entrench the usurpation. Eventually the doctrine of implied mandate was amalgamated with the doctrine of state necessity, by way of *obiter dicta* in the *Asma Jilani* case.)

headings fall within the scope of the doctrine of necessity as developed in the *Governor-General's Reference* case.⁶⁹ The condoned acts also validated the 1970 elections as a means of moving toward a representative, federal, and parliamentary system of government. A more suitable response would have been to decide the case on narrow grounds. The immediate issue in *Asma Jilani* was the validity of a martial law regulation providing for preventive detention. The Court upheld the regulation because identical regulations were present in the statutory scheme prior to the 1969 abrogation of the Constitution. By confining itself to this holding, the Court could have avoided the wider question of the validity and scope of legislative powers of the extra-constitutional regime.

D. EXPERIMENT WITH DEMOCRACY

The 1973 Constitution is unique for Pakistan because it is the nation's first constitution to be framed by elected representatives and in spite of ideological and other differences among political parties represented in the Constituent Assembly, the Constitution was passed unanimously. The 1973 Constitution provides for a parliamentary system in which the executive power is concentrated in the office of the Prime Minister. The formal Head of the State is the President, but he is bound to act on the advice of the Prime Minister. The 1973 Constitution ultimately provided for the elusive judicial review. Adoption of the 1973 Constitution provided Pakistan's superior courts with a new opportunity to assert judicial independence and enunciate the scope of judicial review conducive to stable constitutional governance.⁷⁰

In *State v. Zia-ur-Rahman*⁷¹ the Court upheld the ouster of jurisdiction over validated laws and made extended pronouncements about judicial review under a written constitution. The judgment delivered in the *Zia-ur-Rahman* has been hailed as 'a *tour de force* in judicial review' by some critics; while others have criticized the decision for implicitly falling back on the doctrine of revolutionary legality to validate the Interim Constitution of 1972. According to

⁶⁹ Reference by His Excellency the Governor General, PLD 1955 FC 435, (Advisory Jurisdiction.)

⁷⁰ The Court's designation of the military takeover of 1969 as an illegal usurpation left the civilian government, which had taken over as a martial-law government pending the adoption of a new constitution, without legal basis. This legal void was bridged by the 1972 Interim Constitution, which was promulgated one day after the announcement of the decision.

⁷¹ PLD 1973 SC 49. (A group of journalists and political workers, including the printer, editor and publishers of Urdu Digest, Zindagi and Punjab Punch, were arrested for demonstrating against the martial law during the court hearing of *Asma Jilani*. They filed petitions in the Lahore High Court challenging their arrests but were convicted and sentenced before their writs were considered. In their writ petition (*Zia-ur-Rahman v. State*, PLD 1972 Lahore 382) it was argued that the 1962 Constitution was unlawfully abrogated and the 1969 Martial Law and well as the continuing martial law were unconstitutional. The government justified its action on the basis of the necessity doctrine and claimed that the President's Order No. 3 of 1969 excluded the review of state action. The High Court refused the

the latter, the Court should have adopted a basic structure or essential features test to examine the validity of constitutional legislation. The Basic Structure test evolved by the Supreme Court of India provides that the theory of unfettered legislative power has no place under a written federal constitution. Additionally, due to implied and inherent limitations, the federal legislature cannot employ its power to amend, abrogate, or destroy the 'basic structure' and 'essential features' of the constitution.⁷² By the time the Court had delivered its judgment praetorian tendencies operating within the political theatre in Pakistan, were on the wane and on the verge of being entirely defeated and had also been repudiated by the Court itself in *Asma Jilani*. Pakistan during this time needed such a safeguard, and the instrument of control could be furnished by the principles of democracy, federalism, guaranteed fundamental rights, equality of opportunity before the law, and independence of the judiciary, as enshrined in the Objectives Resolution. *Zia-ur-Rahman* represented a unique historic opportunity for the Supreme Court of Pakistan to make a fresh start by defining the scope of judicial review.

Government's plea but at the same time it denied that the 1962 Constitution was in force. The court held that there was no justification to supplant civilian laws and courts by military orders and courts. Justice Afzal Zullah's, proposed a contextual condition for necessity: if the people accept civil court legitimacy, then martial law is unnecessary, if martial law is nonetheless imposed, then it is *de facto* unnecessary and thus unlawful. The government appealed against this decision of the Lahore High Court. The Supreme Court in search for an expeditious solution in determining the legitimacy of the interim constitution, considered the relation between the powers of the superior court and the legislature. The court reaffirmed the supremacy of a written constitution, the responsibilities of the court under it, and judiciary's duty to see that the constitution prevails. While reasserting its right of judicial review the Supreme Court also held that contents of the constitution remained for the legislature as the representative of the people to determine and the courts could not declare its provisions void. While the court looked into procedural validity of the constitutional amendment, it did not entertain an enquiry into its substantive contents. In this case the Interim Constitution passed by the Assembly was affirmed by the Court, as it had been validly passed by a competent body, despite the ruling in *Asma Jilani*, as the procedural framework of the Legal Framework Order had been followed and also because the court could not question its authority.

⁷² *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC 1461. (In later cases, the Indian Supreme Court has firmly held the position that it has the power to review constitutional amendments under the basic structure test. This test recognizes that a Constitution 'is an organic document which must grow and must take stock of the vast socioeconomic problems'. The test introduced flexibility in judicial review without giving the legislature excessive opportunity to bend the constitution out of shape. The Court found that the Preamble to the Indian Constitution furnished the primary key to the basic structure and has identified republicanism, democracy, equality of status and opportunity, secularism, adult franchise, separation of powers, and rule of law as basic features of the Constitution. Constitutional law commentators have characterized the basic structure/essential features test as 'an important safeguard against legislative despotism and the tyranny of shifting majorities' and as 'an instrument of control to prohibit a political party, ambitious of power with hatred of liberty and contempt of law, from destroying the democratic features of the Indian Constitution').

E. CONSTITUTIONAL DEVIATION DICTATED BY NECESSITY

On July 5, 1977, the Chief of the Army staff, General Zia ul-Haq, declared martial law, and subsequently removed the Prime Minister from office. He also dissolved the national and provincial assemblies and dismissed the provincial governors and their ministers.⁷³ The Court refused to resurrect *Dosso*, and rejected the government's argument that a political change not contemplated by the Constitution, if successful, is valid. The Court also rejected petitioner's prayer that it declare General Zia ul-Haq a 'usurper' and judge his regime by the terms dictated in *Asma Jilani*. Instead, the Court examined the 'total milieu' of the circumstances in which the extra-constitutional assumption of power occurred to determine the new regime's validity. It concluded that the general's assumption of power constituted an extra constitutional step, dictated by the highest considerations of State necessity and welfare of the people, terming the new legal order 'a phase of constitutional deviation dictated by necessity'. The Judges categorically asserted that the ultimate validity remained with 1973 Constitution as supreme law of the land and that the validity of Martial law was derivative and provisional and it depended on the presupposition that it had to lead to a restoration of the Constitution within the shortest possible time. Under the doctrine of necessity, in *Nusrat Bhutto* the superior courts were permitted to retain the power of judicial review to test all the acts committed during the the operation of Martial Law. This was pronounced as a direct challenge to the Laws (Continuance in Force) Order, 1977 which had been promulgated in the tradition of 1958 and 1969 as a provisional constitution by the CMLA and which excluded Martial Law acts

⁷³ Begum Nusrat Bhutto, wife of the deposed and detained prime minister, in a petition before the Supreme Court under Article 184(3) of the 1973 Constitution, challenged the former prime minister's detention under Martial Law Order No. 12 of 1977. The Supreme Court admitted the petition for hearing, in apparent defiance of the Martial Law Proclamation that expressly ousted the jurisdiction of the courts. The military regime expressed its disapproval quickly by removing the Chief Justice within two days of admission of the petition. The petitioner, relying on *Asma Jilani*, contended that General Zia ul-Haq had no authority under the 1973 Constitution to impose martial law, that the general's action amounted to treason under Article 6 of that Constitution; and, as a consequence, the Proclamation of Martial Law and the Laws (Continuance in Force) Order, 1977, lacked lawful authority. The petitioner further contended that even if any or all of these were justifiable under the doctrine of necessity, the former prime minister's arrest and detention was highly discriminatory and *mala fide*. The government argued that the petitioner could not maintain her action because Article 4 of the Laws (Continuance in Force) Order, 1977, precluded any court from questioning the validity of any martial law order. In addition, Article 2(3) of the same order provided for suspension of fundamental rights and their enforcement. Relying upon the Kelsenian arguments of *Dosso*, the government argued that the proclamation by General Zia ul-Haq established a new legal order, and that this new legal order, even if it were only temporary, had displaced the former legal order. In the alternative, the government argued that the circumstances prior to July 5, 1977, "fully attract the doctrine of State necessity and of *salus populi est suprema lex*." Consequently, the government argued, the Court must accept all actions taken by the martial law administrator as valid and not merely condone the actions, as it did in *Asma Jilani*.

from the scope of judicial review. Having once applied the doctrine of state necessity the Court proceeded to limit the doctrine.⁷⁴ Significantly, the Court held that the martial law regime was entitled to perform all such acts and promulgate legislative measures which fell within the scope of the doctrine of necessity, including the power to amend the Constitution.

In later years, the military regime amended the Constitution entirely and cited this judgment as an answer to all resulting charges of abuse of power, while the Supreme Court retained the jurisdiction to examine all acts and measures of the military regime on the criterion of necessity. But when there appeared a conflict between the regime's and the courts' view of what was necessary, the Military emerged victorious and the courts were clearly the vanquished. The military regime used the very sword supplied by the judiciary to strike at the latter's powers. Besides periodic assertions of judicial independence and power, as long as the military regime's legitimacy emanated from *Nusrat Bhutto v. Chief of Army Staff*,⁷⁵ its obligation to restore normal constitutional process remained. Encouraged by a favorable international climate, the military regime broke with the minimal limitations upon its legislative powers implied by *Nusrat Bhutto* and issued the Provisional Constitutional Order, 1981.⁷⁶ This blanket ouster of the courts' jurisdiction over any matter which fell under the various martial law enactments was coupled with the requirement that all superior court judges take a new oath of office. The text of this new oath included fidelity to the PCO. This situation, which sealed the defeat of the courts' constitutional endeavours, had been foreseen by perceptive commentators of judicial practice.

F. PRAETORIAN PREDILECTION

Early into General Musharraf's regime, in the case of *Zafar Ali Shah*, petitions against the military takeover and for the restoration of the Assemblies were heard by a Twelve- Judge Bench of the Supreme Court headed by Chief Justice Irshad Hassan Khan and the judgment was delivered on May 12, 2000. In

⁷⁴ For the doctrine to apply, the regime must demonstrate four criteria: (a) An imperative and inevitable necessity or exceptional circumstances; (b) No other remedy is applicable (c) The measure taken must be proportionate to the necessity; and (d) It must be of a temporary character limited to the duration of the exceptional circumstances. The Court held 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. The Court also asserted its power of judicial review in defiance of the Laws (Continuance in Force) Order, 1977, but dismissed the petition on the ground that the martial law regime's suspension of fundamental rights had the same effect as the Proclamation of Emergency contemplated in the 1973 Constitution.

⁷⁵ PLD 1977 SC 657.

⁷⁶ Dieter Conrad, *In Defence Of The Continuity Of Law: Pakistan's Courts In Crisis Of State*, ZWISCHEN DEN TRADITIONEN, 247 (1999). (A PCO was promulgated on March 24, 1981 to put a formal end to the necessity regime as sanctioned by the *Nusrat Bhutto* case. Article 15 of this Order contained a qualified validation of all Martial Law and all laws made on or after July 5, 1977 'notwithstanding any judgment of any court', and specifically excludes

response to the constitutional breakdown scripted on October 12, 1999, the Court held that the Constitution provided no solution, making the extra-constitutional intervention of the Armed Forces inevitable. In the unanimous 314-page judgment, the Supreme Court extended legitimacy to the army takeover. The intervention was validated on the basis of the doctrine of necessity and the principle of *salus populi suprema lex* as pronounced in the case of *Nusrat Bhutto*, all past and closed transactions, executive actions which were required for the orderly running of the State and all acts, which tended to advance or promote the good of the people, were also validated by the Court. General Pervez Musharraf, Chief of the Army Staff and Chairman Joint Chiefs of Staff Committee was held to be holder of a constitutional post.⁷⁷

The Supreme Court went all the way to justify the military takeover of October, 1999. The Government was allowed a period of three years to accomplish its seven-point programme as introduced in the General's speech delivered on October 17, 1999. In a glaring instance of political amnesia the Court forgot the bitter history when Zia as head of the military regime was allowed to amend the Constitution. He wantonly amended over sixty-five Articles of the Constitution, under the provision of the Revival of the Constitution Order of 1985. Conferment of similar powers via this judgment, on the Chief of Army Staff created the possibility of repetition of a similar scale of abuse.⁷⁸

the jurisdiction of any court to question its validity in any ground whatsoever. The import of *Nusrat Bhutto* was nullified by a provision in the 1973 Constitution which laid down that notwithstanding any judgment of any Court, including any judgment in respect of the powers of the courts relating to judicial review, any Court, including the Supreme Court and a High Court, shall not...make an order relating to the validity or effect of any Order or Martial Law Regulation made by the CMLA or any Martial Law Order made by the CMLA or a Martial Law Administrator or of anything done, or action taken, or intended to be done or taken, thereunder.

⁷⁷ The Musharraf government adopted a three-year time to accomplish its proclaimed agenda, as declared in the speech of General Musharraf on October 17, 1999. He was also allowed to go ahead with his controversial accountability process. Most importantly, the Supreme Court allowed the Chief Executive to amend the Constitution. This was very much *carte blanche*, as the legal limitations imposed on the power to amend the Constitution were vague and ineffectual. The Chief Executive was allowed to introduce amendments as long as such steps were dictated by imperatives of promotion of public good, the requirements of ordinary and orderly running of the state, and also for the fulfilment of certain broad declared objectives. The Court declared that the basic features of the Constitution, which it elaborated as "the independence of judiciary, federalism, and parliamentary form of Government blended with Islamic provisions," could not be altered even by the Parliament. The Court also made a token statement that the fundamental rights under the Constitution were also to continue in existence. The Court also allowed the State to make laws or take executive actions in deviation of several fundamental rights enshrined under Part II, Chapter 1 of the Constitution of the Islamic Republic of Pakistan, 1973).

⁷⁸ Subject to strict restraints on jurisdiction regarding admissibility of any legal challenges against the Chief Executive and persons acting under his authority, the judiciary was initially allowed to perform its functions. This situation changed, however, when the Supreme Court entertained petitions challenging the army takeover. The hearing was fixed on January 31,

The Court insisted that the martial law was a temporary constitutional deviation and, at the same time, demonstrated very little sympathy for Pakistan's democratic experience post-Zia's martial law: "It is, thus, to be seen that simply by casting periodic ballots, people do not get a democratic society. Instead, they may well create, what is the case in Pakistan, particularly since 1985, a terrible form of fascism of a group of powerful people. This form of Government, although superficially elected, actually creates an oligarchy". This is quite in contrast to the pro-parliamentary democracy rhetoric of previous Supreme Court judgments. The *Zafar Ali Shah* judgment, in its unanimous approval of martial law, is a source of despondence for many who regard it as one of the most retrogressive judicial decisions in Pakistan's history. Whatever independence and commitment to constitutional ethos had been displayed by the Court in some of the early judgments on constitutional breakdowns in Pakistan seems like ancient, forgotten history.

In the 1955 *Governor General's Reference* case the Court had dwelled on the doctrine of state necessity while in *Dosso* subsequently the Court instead deliberated on the effect of a successful revolution as a law creating fact and validated the military coup. According to Waseem, the subsequent history of constitution breakdowns and dissolution of parliaments in Pakistan moved along these two poles of jurisprudence. The subsequent 'necessity cases' such as the *Asma Jilani* case and the *Nusrat Bhutto* case where the Court focused on the argument of safeguarding the prevalent social and political order from total collapse through extra-constitutional action relied on the implied mandate of the State. The Kelsenian approach in *Dosso* by default brings in the question of acknowledgment of the *fait accompli*. Together both approaches provided 'legal' ways of resolving constitutional crises emerging out of the dissolution of elected assemblies.⁷⁹ The role essayed by the judiciary in attempting to resolve the struggle between parliamentary and extra-parliamentary forces transformed it into a symbol of ultimate legitimacy. By upholding the principle of constitutionalism over and above the principle of parliamentary sovereignty, the Courts have been observed to have supported the executive on the previous occasions. By continuously employing the doctrine of necessity to legitimise extra-constitutional actions of political usurpers the judiciary has vigorously defended its own right to overview and

2000. The Government, to ensure that the petitions were not accepted, promulgated the Oath of Office (Judges) Order of 2000. All the judges of the superior courts were required to take oath to the effect that they would discharge their duties in accordance with the Proclamation of Emergency of October 14, 1999, and the PCO. This nefarious practice was akin to Zia's tradition of utilizing such similar oaths to purge the judiciary of independent-minded judges, under which it was ordained that if a judge would not take the oath or would not be given the oath, he would cease to hold office.

Six judges of the Supreme Court, including the Chief Justice, refused to take the oath. Of the seven judges who took the oath, the senior-most judge, Justice Irshad Hassan Khan, was appointed as the new Chief Justice. Three judges of the Sindh High Court, two judges of the Lahore High Court, and two judges of the Peshawar High Court were not invited to take the oath.

⁷⁹ *Supra* note 45, 220.

review controversial and extra-legal state actions. Institutionalism and constitutionalism became the leading characteristics of the judiciary's perspective and approach to constitutional crisis. The instinctive response of the judiciary to the executive's overbearing attitude, which often amounted to emasculation of lawful opposition in the country, was to keep the latter's authority bound by the word of law and thus to maintain its own role and custodian and interpreter of law. This judicial trend observed in the case of the military takeovers of 1977 and 1999 and the dissolution of elected assemblies in 1988, 1990, 1993 and 1996 further consolidated the role of the judiciary as in making and breaking of governments.⁸⁰

According to Tayyab Mahmud, a more principled and realistic response of the Courts would have been to declare the validity of extra-constitutional regimes a non-justiciable political question. Besides ensuring doctrinal consistency, a refusal to furnish extra-constitutional regimes with judicial validity would have discouraged the flagrant disregard for constitutional governance. A steadfast refusal to pronounce upon non-justiciable political questions might have instead promoted a democratic constitution-building process and preservation of the essential tenets of constitutionalism.⁸¹ This approach does not necessarily imply subsequent unfettered legislative power of extra-constitutional regimes. Rather than employing theories of revolutionary legality and discontinuity-of-law which warrant abdication of judicial review, in order to examine the acts of extra-constitutional regimes, the courts could have sought to seek the basis of their power, scope of their jurisdiction, and standards of review in the aggregate legal system and the wider legal culture of constitutionalism.⁸² The Pakistani courts have perversely validated military governance rather than using the political question doctrine to stand aloof from extra-constitutional usurpations of power. Conversely, where a democratic regime could have been held to the standard of the rule of law, the courts abandoned their role as guardians of the constitutional order by unnecessarily retreating to the political question doctrine.

Mahmud also argues that effective judicial review in the context of incessant constitutional breakdowns demands the judiciary's adoption of a continuity-of-law approach. During the period that the body politic resolves the question of a suitable constitutional order, such active judicial scrutiny is essential to protect minimal basic rights of citizens against arbitrary and repressive exercise of power by extra-constitutional regimes. This will be facilitated if courts develop consistent yardsticks of judicial review when constitutional orders are in place. The courts must guard against whims of shifting majorities in order to promote stability and continuity of constitutional orders in post-colonial societies, remarkable for their cultural, linguistic, and regional diversity. Once a written constitution has been adopted through a representative process, courts must dispense with doctrines of unfettered legislative capacity and scrutinize any

⁸⁰ *Id.*, 221.

⁸¹ *Supra* note 3.

⁸² *Id.*

attempts to amend the constitution, by ensuring the survival of the basic structure and essential features of the constitution. In the end, continuity of constitutional frameworks promotes political stability, which is the best antidote for praetorian tendencies in any society.⁸³

III. CONCLUSION

One of the first consequences of this judgement is that Pervez Musharraf may now be facing the charge of treason. In *Nadeem Ahmed* the Supreme Court has left open the question of Musharraf's punishment and the issue has now become somewhat pressing. However, Pakistan's political parties are divided over the issue. Pakistan's second largest and opposition party, the Pakistan Muslim League-Nawaz (*hereinafter* PML-N) has demanded a trial of the former military dictator. However, Prime Minister Yousaf Raza Gillani of the Pakistan People's Party says his government will try Musharraf only if the parliament passes a unanimous resolution. The chief of the Pakistan Muslim League- Quaid (*hereinafter* PML-Q), Chaudhry Shujaat Hussain, has recently said that his party will oppose any move against Musharraf. Meanwhile, the Muttahida Quami Movement party (*hereinafter* MQM) has been defending Musharraf since he removed Chief Justice Iftikhar Chaudhry in March 2007. But the PML-N is adamant on Musharraf's trial and challenged his emergency in the Apex court.⁸⁴ The PML-N chief demands that Musharraf should be tried under Article 6 of the Constitution⁸⁵ for declaring a state of emergency on November 3, 2007.

However, it must be noted that a unanimous resolution such as the one the PPP desires, will be nearly impossible to achieve simply because there cannot be unanimity when there is even a single dissent and it is inconceivable that in the entire parliament there is not a single voice opposing the trial of Musharraf. Why then, is the PPP reluctant to level a charge of treason against Musharraf? The answer can be found in the context of the PPP's relationship with the establishment and the text of Article 6 of the Constitution, which deals with high treason. History has shown that the 'power behind the throne' in Pakistan is the military establishment, and any party that wants to secure its position in power must have the approval of this extraordinarily powerful establishment. The PPP's own experience after their majority win in the 1988 elections stands testimony to this fact. The 'troika' system – which is fundamentally opposed to a three-way sharing of power, but simply keeps a check upon the elected civilian government by the military - was first put together in 1988 as a precondition for the transfer of power to Benazir Bhutto when she won the election held following the end of Zia-

⁸³ *Id.*

⁸⁴ Omer Farooq Khan, *Musharraf Trial Sparks Controversies, Gossips*, THE TIMES OF INDIA, August 30, 2009, available at <http://timesofindia.indiatimes.com/NEWS/World/Pakistan/Musharraf-trial-sparks-controversies-gossips/articleshow/4950105.cms>, (Last visited on September 9, 2009).

⁸⁵ *Supra* note 64.

ul-Haq's military regime.⁸⁶ The PPP was allowed to take office after agreeing to the oversight of the president who was to protect the corporate interests of the military and ensure continuity of key strategic policy. Similarly, despite its win in 2008, effective power rested in the hands of the President due to the Seventeenth Amendment. By this time, Musharraf had completely been abandoned by his supporters and was thus shown the door. However, this was done on certain conditions, the foremost being that the retired army chief would not be tried for his unconstitutional acts. If the PPP leadership breaches the pact, its political future may be jeopardised.

Reinstating the sacked judges is only the first step towards reforming the judiciary and ensuring judicial independence. The Fourteen Judge Bench has also held that in the Code of Conduct prescribed for the judges of the Superior Courts in terms of Article 209(8)⁸⁷ of the Constitution, a new clause shall be added commanding that no such Judge shall, hereinafter, offer any support in whatever manner to any un-constitutional functionary who acquires power otherwise than through the modes envisaged by the Constitution and that any violation of the said clause would be deemed to be misconduct in terms of the said Article 209 of the Constitution. If an end to executive interference is an essential precondition for a judiciary that is capable of protecting the constitution and upholding constitutionally guaranteed fundamental rights, judges too will have to be held accountable for subverting the constitution.

In the Indian scenario, the concept of 'Basic Structure' was introduced in the case of *Keshavananda Bharti v. State of Kerala*.⁸⁸ Accordingly any part of the Constitution may be amended by following the procedure prescribed in Article 368 of the Constitution of India. But no part may be so amended as to "alter the basic structure" of the Constitution. Thus, any amendment to the Indian Constitution which directly or indirectly takes away these features has been invalidated by the Court. Independence of the judiciary and judicial review has been held to be part of the Basic Structure of the Constitution.⁸⁹ The Court has also invalidated a constitutional amendment which subjected the decision of a tribunal, which was not a court in the strict sense, to confirmation or rejection by the government.⁹⁰ Similarly, laws merely abrogating a judicial decision without retrospectively changing the legal basis of that decision have also been invalidated.⁹¹ Lastly, the courts have also expanded the scope

⁸⁶ Haris Gazdar, *Goodbye General Musharraf, Hello 'Troika'*, ECONOMIC AND POLITICAL WEEKLY, December 15, 2007, 8.

⁸⁷ Article 209(8) of the Constitution of the Islamic Republic of Pakistan, 1973 reads as follows: 'Supreme Judicial Council: (8) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts.'

⁸⁸ AIR 1973 SC 1461.

⁸⁹ L. Chandra Kumar v. Union of India, (1997) 3 SCC 261; *See also* S.C. Advocates on Record Ass'n v. Union of India, (1993) 4 SCC 441; *See also* S. P. Gupta v. Union of India, AIR 1982 SC 149.

⁹⁰ P. Sambhamurthy v. State of Andhra Pradesh, AIR 1987 SC 663.

⁹¹ *See, e.g.*, In the matter of Cauvery Water Disputes Tribunal, AIR 1992 SC 522, where it was held that the legislature has no power to enact a provision, the effect of which is to

of judicial review by liberalizing the requirement of *locus standi* and developing the concept of public interest litigation and by rejecting the concept of political questions.⁹² With Pakistan, the situation differs widely. As the country takes its first steps from authoritarian rule to democracy, the courts become powerful actors in the defence of constitutionalism. Until a few years ago, 'judicial activism' in Pakistan was largely limited to taking notice of human rights cases involving, for example, violence against women. But within the murky political realm, this activism has, at times, even validated and espoused undemocratic and extra-constitutional actions. But without this independence, the judiciary can be manipulated and with it, the courts may use more forceful methods for ensuring the submission of the Pakistani state to the law. However, political developments since March 2007 to February 2008 have augured well for Pakistan's rudimentary transition to a democratic system by overcoming key structural and constitutional obstacles, especially in a regime which has been dominated by political opportunism.

Georg Buechner describes a constitution as a 'transparent garment clinging to the body politic'. Constitutional tenets simultaneously reflect imperfections and the aspirations of a political community.⁹³ A constitution provides a legal framework for the State, a method of organizing authority and adjudicating power conflicts. When societal expectations do not support the ways power is distributed and exercised, relation between agencies of the State and civil society can undercut the constitution and the institutions conceived under it, to the extent of eroding the constitutional spirit as a whole. These conflicts are most often played out on the political stage, as observed in mass public action against the State and its agencies.⁹⁴ Often the state machinery absorbs the tension, restructuring political arrangements within its own establishments while grasping tightly to the framework that endows these institutions with their authority. All of these problems are dramatically illustrated in Pakistan, where incomplete constitution-making has placed the insurmountable burden of constitutional interpretation on not just the judiciary but also other parallel state instruments like the bureaucracy and the military.⁹⁵

Pakistan's history has been defined by uneasy relationships between State institutions and civil society. In this executive-dominated state, the superior courts have been recurrently instrumental in determining the country's political fate to the extent of reconstituting the state anew. Newberg explores the relationships between state and civil society through the medium of the superior

overrule an individual decision inter parties and affect their rights and liabilities alone. Such an act on part of the legislature amounts to exercise of the judicial power of the State and functioning as an appellate court or tribunal.

⁹² See *S.P. Gupta v. Union of India*, AIR 1982 SC 149; *State of Rajasthan v. Union of India*, AIR 1977 SC 1361.

⁹³ GEORG BUECHNER, *DANTON'S DEATH* 7 (Victor Price trans., 1971).

⁹⁴ PAULA R. NEWBERG, *JUDGING THE STATE* 1-8 (1995).

⁹⁵ *Id.*, 3.

judiciary, focusing on how the Courts have influenced the developments of its constitutions and the power structures operating in the State. By examining judicial decisions rendered during the times of political crisis, isolates discussions about constitutional rule between the judiciary and other state institutions, and its effect on civil society and on the formal democratic organization of the polity. Pakistan's political history is marred by frequent crisis and their incomplete resolution. With time these crisis gradually get woven not only into the texture of the nation's political history but also into the political aspirations of the citizens. Such disruptions and discontents of civil society have often skirted the edges of state violence, and have compelled citizens to re-examine their relationships to the state in which they live.

We must also not fail to take note of political actors and organised political parties in bringing about the current transition. In the words of Faisal Siddiqi, "*Roti, kapra aur makkhan* (food, clothing and shelter) will be delivered by our constitutional processes, not by our legal processes."⁹⁶ Political actors, despite being branded as *adventurists* and *confrontationists* have been instrumental in facilitating and carrying forward this democratic transition. While this was not a revolutionary situation, those who were arguing for far greater political action felt that the military was on the retreat, that there was an upsurge in political consciousness and support in favour of political parties, civil society and the lawyer's movement, and that this was a good opportunity.⁹⁷ According to political economist, Haris Gazdar, "it is easy to overlook their role in the lawyers movement until one realizes that nearly all of the 60 or so people who have lost their lives in that struggle have been political party activists."⁹⁸ With the military on the retreat, at least from the forefront of political processes, a golden opportunity lies in the hands of the civilian government.

Further with a paucity of substantive discursive fora, for instance universities, research organisations, or serious academic journal, the print and visual media have filled this gaping vacuum. While there exists a legitimate fear of the soap operafication of Pakistani politics, the obsession of the masses and mass media with political events and debate on democratic dispensation is a positive change from the decades of state censorship of media and all forms of cultural and artistic expression, during the ascetic and abstinence espousing dictatorship of Zia-ul-Haq. The 'free' media is experimenting with the role of influencing the ideological of the youth in Pakistan. Social and structural transformation in Pakistan is being spearheaded by new, emergent and assertive groups who orchestrated and participated in umpteen political and civil society movements during 2007-2009, being ably assisted by the resurgent Pakistan media. Validation of this is the fact that in 2002 when the last elections were held, there

⁹⁶ Faisal Siddiqi, *The Emergence of a People Sensitive Judiciary*, available at <http://mail.sarai.net/pipermail/reader-list/2009-May/019812.html> (Last visited on September 9, 2009).

⁹⁷ S. Akbar Zaidi, *An Incomplete Transformation in Pakistan*, ECONOMIC AND POLITICAL WEEKLY, November 8, 2008, 10.

⁹⁸ *Supra* note 90.

was only one private channel operating in the country, currently there are multiple private news and information channels, with constant critical analysis and public deliberation over even the slightest political tremor.⁹⁹

Tayyab Mehmud observes that courts are often confronted with questions that are beyond the constitutional order as fallout of extra-constitutional assumption of political power through *coups d'etat*, which are endemic in these settings. The fait accompli of a successful *coup d'etat*, coupled with the usurper's desire for judicially pronounced legitimacy, presents courts with a complex dilemma. With the status of the constitutional order in doubt, the choices available to the courts are neither obvious nor unproblematic. According to Baxi, the distinguishing characteristic of the judiciary in Pakistan is its jurisprudential ingenuity and its progressive contributions towards resolving complex constitutional deadlock and restoration of democratic governance in Pakistan. Faced with six martial law proclamations in less than a quarter century, the Pakistan Supreme Court has deftly applied at times the most resilient elements of western constitutionalism to political exigencies.¹⁰⁰ From legitimizing a coup in *Dosso* to undoing it all, thirteen years later in *Asma Jilani* by holding that a person claiming supreme political power is a 'usurper', his regime illegal and incompetent to make laws' and finally applying the doctrine of necessity to acts of martial law regime in *Nusrat Bhutto*. Also in this case the Court criticized the Kelsenian approach by observing the 'effectiveness of political change' cannot constitute a 'sole condition' or criteria of its legality. The element of morality is built in the notion of validity. Since the birth of Pakistan is grounded both in ideology and legality, a theory about law, which seeks to exclude these considerations, cannot be accepted as the binding rule of decision by the Courts of the country.

Courts in India have discussed constitutional structure in terms of parliamentary sovereignty and judicial powers, and their decisions have been interpreted as conflicts between executive-oriented authoritarianism and court-oriented liberalism. By the time superior courts in Pakistan heard major cases under the 1973 Constitution, Indian courts had moved far ahead, already having decided such issues in ways that the Pakistan courts found important but difficult to absorb in their own experience. Through its rulings in cases such as *Golak Nath* and *Keshavananda Bharti*, the Indian courts offered a new view of the parliament's legislative and constituent roles, and relations between parliamentary and judicial powers and state actions were both limited and given a new meaning by the judiciary. In Pakistan on the other hand, judicial rulings have at times reflected the weakness in the nation's constitutional heritage and the judiciary's ambivalence towards the transformative capacities of constitutions. Nevertheless one of the redeeming qualities of Pakistan's chequered constitutional discourse

⁹⁹ *Id.*

¹⁰⁰ Upendra Baxi, *Constitutional Interpretation and State Formative Practices in Pakistan: A Preliminary Exploration* in *COMPARATIVE CONSTITUTION LAW* (M.P. Singh ed., 1989).

is reflected in the persistence of legalistic effort directed towards ensuring a measure of continuity and legal coherence, when confronted with recurring irregularity and constitutional upheavals.

According to Baxi,¹⁰¹ the display of extraordinary sophistication, of jurisprudential technique and theory, in the judicial discourse of Pakistan, ought to be considered as a resource for the sustenance of constitutionalism, especially in nations which have experienced or are likely to be beset with the trauma of acute political upheaval and experimentation with military usurpation of power. Also the discourse is not mimetic as it simultaneously appropriates and disowns the cardinal elements of Anglo-American adjudication and jurisprudential theories. In *Nusrat Bhutto* case, the Court observed that the definitions of martial law given in the Western discourse were irrelevant and that the description given in the preamble of a formal statute is of limited relevance in judging the true legal character of an abrupt political change brought about by an extra-constitutional measure. The constant realigning and reshaping of the notions of martial law, the doctrine of necessity and of revolutionary constitutional breakdowns as a fundamentally law creative act, unprecedented in judicial discourse, supply a storehouse of theoretical thought and techniques for constitutionalism in societies where democracy is yet to take off. Drawing influences from divergent traditions, endows the Supreme Court of Pakistan not just with the enduring capacity to cope with immanent crisis of its own legitimacy but also endows it with a considerable role in influencing state formative practices and political transformation in contemporary Pakistan. Sadly, in order to ensure their self-interest, courts have often chosen to validate the coup. The historical and structural reasons that make *coup d'etat* a pervasive means of usurping political power, especially in post-colonial societies are beyond the power of courts of law. Faced with a successful coup, the best that the courts can do is to deny judicially pronounced legitimacy to the usurpers without jeopardizing their very own existence. The judgement in *Nadeem Ahmed* therefore ushers the dawn of a new democracy in Pakistan. We can only hope that this spirit of judicial independence permeates deep into the democratic bedrock of Pakistan and does not retire with the judges who have fought so hard for it.

¹⁰¹ *Id.* See also CONRAD, *supra* note 76, 259-261. (According to Conrad, the responses of the Court depended not so much on doctrinal predilections but on the assessment of the political situation to which it had to react and assert itself against dominant political forces. While maintaining their own independence and integrity, courts had to avoid being drawn into the political twilight and permitting itself to be used as a mere tool for perpetrating constitutional fraud. In such cases, the questions confronting a court will be whether to resign or to continue to function under the new regime. The answer will depend upon an assessment whether by concurring, i.e. by giving some sort of tacit or express, *de facto* or *de jure* recognition to the new order, the court will be able to secure a reasonable long term chance of promoting ends of law and justice).