

AN ANALYTICAL STUDY OF JUDICIAL INDEPENDENCE
IN PAKISTAN 1988-99

Dr Khan Faqir
Dr Fakhr-ul-Islam

ABSTRACT

Judiciary is the most important pillar in any state of the world. It guarantees democracy, good governance, economic stability and the rule of law. Judiciary is a sandwich between the dictators and authoritarian rulers in Pakistan. Although, under the separation of powers judiciary to be a neutral institution enforcing rules and regulations. Unfortunately in Pakistan judiciary failed in performing its basic functions. The era under discussion in Pakistan was ruled by Benazir Bhutto and Nawaz Sharif the democratic rulers; still the independence of judiciary was a question mark. There was always a tug of war between the Prime Minister, the President and the superior judiciary. Both Nawaz Sharif and Benazir were blamed for extra judicial interference and the image of judiciary as an independent institution of the state never remained.

Keywords: Pakistan, Judicial Independence, Benazir Bhutto, Nawaz Sharif.

INTRODUCTION

After independence, Pakistan acquired a sound judicial system with a high status for competence, honour and integrity. It was mostly attributable to a fair system of judges' appointment in which appointments were usually on merit basis. Mian Abdur Rashid, the first chief justice was a man of blameless status and character and shunned appearance in gathering and public functions. His successor Muhammad Munir became greatly controversial because of his judgment but especially A.R. Cornelius and Shahabuddin, his later successors sustained high standard of judicial conduct. Appointments to the Superior Courts were made during the British India with great care. The leading lawyers and the Indian Civil Service were the two means and ways of such appointments. With a few exceptions, the High Court judges had a reputation for competency and integrity in the British India. If anyone hesitated, it was because of his inborn weaknesses and inadequacy and not due to lack of qualifications during appointment. The judgment quality was high. The judges usually led plain and lives, cautiously avoiding any allegation of favoritism. It is in this perception and

viewpoint that Pakistan adopted the judicial appointments system in 1956 constitution prevalent at the time of the British India (Hamid Khan, 2009:562).

In October 1958, President Iskander Mirza abrogated the 1956 Constitution. A successful coup d'état was recognized for changing a constitutional government. It was observed in Dosso case that military coup is a legal method to change the constitution. General Ayub Khan took over the government from Iskandar Mirza. After the decision of the court military takeover took place one day after by General Ayub Khan on October 27, 1958. The military government failed to follow the rules laid down in the constitutions. In 1969 again Ayub himself violated his own constitution of 1962 and handed over power to the General Yahya Khan. When Yahya Khan assumed the power, he introduced a Legal Framework Order in which the rules were introduced for holding of general elections and framing of the future constitution. However, his rule ended on December 20, 1971, with the fall of Dacca (Abbas & Jasam, 2009:6).

Zulfiqar Ali Bhutto a civilian ruler and the founder of 1973 constitution, ruled Pakistan i.e. 1972-1977. During his rule, the record of judiciary was mixed. The judiciary was transformed from state organ into a government department through constitutional amendments. Zia-ul-Haq came into power in 1977 when he deposed the elected government of Zulfiqar Ali Bhutto. Begum Nusrat Bhutto challenged the legality of Martial Law. The supreme court of Pakistan once again legalized the military government under the law of necessity (Abbas & Jasam, 2009:6). General Zia was elected for five years as the president through a Referendum in 1984. In 1985, general elections were held on a non-party basis. Muhammad Khan Junejo was elected as the Prime Minister and 1973 Constitution was heavily amended, including Article 58(2) (b). Consequently, the superior courts managed to assert themselves once again when the Martial Law was lifted. But from 29th May 1988 to 12th October 1999 the constitutional history of Pakistan is dominated by what can be called the era of "Presidential Authoritarianism" (Javid Iqbal, 2006).

BENAZIR FIRST TERM AS PRIME MINISTER AND THE JUDICIARY

On 29 May 1988, Zia-ul-Haq sacked Muhammad Khan Junejo the then Prime minister of Pakistan under Article 58(2)(b). A caretaker government was installed. In this care taker set there was no Prime minister so this led to some legal issues. Whether the federal government was functioning legally and constitutionally and whether the orders

passed during this period could be regarded as valid. This issue was raised in the Federation of Pakistan versus Mohammad Saifullah. The key question was that the Prime Minister office was constitutionally necessary. It was also observed that a caretaker cabinet changed the nature of the constitution. A parliamentary system changed into a presidential system of government. However, the legal consequences of the individual acts done or actions already taken and suffered were left to be decided in individual cases when they were brought before the court (Hamid Khan, 2009:400).

The judgments of the federal government concluded that all the appointments, including judicial ones were invalid during the time when there was no Prime Minister. The law ministry issued a press note to this result. Consequently, more than 30 judges of the superior courts appointed at the said period, did not function for about a week. This matter was resolved in a review petition. The Supreme Court held that the portion of the press note did not appear to reflect accurately the judgment of the Supreme Court. It stated the consequences of the judgment that the action taken were illegal between 29 May 1988 and 2 December 1988 by the president because it required the advice of the prime minister. The court held that such relief was in fact requested from the court but was not granted. The findings, it was observed, on all matters in controversy were recorded to remove all doubts and ambiguities with regard to distribution of functions and powers under the constitution for guidance in the future (Hamid Khan, 2009:400).

The superior courts showed independence after withdrawal of military rule of Zia-ul-Haq. In this connection, a prominent case was alliance of the Pakistan versus Malik Ghulam Mustafa Khar. According to the Supreme Court the military courts had granted immunity under article 270-A. The Supreme Court ruled that orders passed without authority or a specific constitutional provision is violation. Another case was Benazir Bhutto versus federation of Pakistan. According to this case, political parties Act 1962 had amended. It was held that those amendments were disobedience of the fundamental rights given under the constitution. The Supreme Court struck down the offensive changes of the political parties Act 1962. One of the cases was regarding the people Act 1976. According to this Act, election symbols had restricted. The Supreme Court also accepted this petition by holding the changes as violation of the basic right of political union (Javid Iqbal, 2003:71-72).

Besides other factors, the political history of Pakistan has been deeply shaped by the judiciary of the country because the right of

amendment and interpretation of constitution lies with it. Benazir Bhutto throughout in her political career had invoked the name of her father Zulfiqar Ali Bhutto because he was a popular leader among the masses. She had yet to build an independent political base of her own. This understandable dependence on the past made Benazir Bhutto amenable to the emotions, which swayed the party. Nevertheless, it seemed to close the door against any reconciliation with those who had either sided with the party's oppressors or who had chosen to remain aloof from the Pakistan People Party (PPP) struggle against Zia (Hamid Yousaf, 1999:224).

During the twenty months of its office (1988-1990) the government got bogged down in politics of confrontation on many fronts. Soon after assumption of office Benazir came out with strong condemnation of the 8th Amendment of the constitution. The PPP's opposition to the 8th Amendment was not new, but it seemed to be at variance with the understandings which had apparently preceded or attended her nomination as the Prime Minister. It was also not in harmony with the support given by the PPP in the presidential election of Ghulam Ishaq Khan in preference to Nawabzada Nasrullah Khan Chief of the National Democratic Party, who had been a prominent companion in the Movement for the Restoration of Democracy (MRD) (Hamid Yousif, 1999:225).

Besides the genuine opposition within the legislature, the situation was complicated by competing claims to her authority outside the legislature, by COAS (Chief of the Army Staff) in consort with the president of Pakistan. The military top brass became the silent spectator and continued politics behind the scene. The president also enjoyed full powers in the shape of eighth constitutional amendment. The government of Benazir Bhutto tried to repeal the eight amendment to restore the powers of the Prime Minister's office. However, she failed due to two third majority votes in parliament (Muhammad Anwar & Ebad Baig, 2013:13).

The PPP did not have the requisite two third majorities in the parliament to undo the amendment. On one hand, the government launched a campaign to mobilize political opinion favourable to the repeal of the amendment; on the other hand, it set itself on a course of confrontation with the *Islami Jamhori Ittihad* (IJI) government in the Punjab which ruled out consensus in the Assembly on this issue (Ian Talbot, 1999:320). The government's attack on the 8th Amendment turned out to be counter-productive. Its result was to undermine the moral

position and harden the attitude of Ghulam Ishaq who commanded a vast experience as a bureaucrat, had a mind of his own and meant to protect his newfound power (Ian Talbot, 1999:320).

During August 17-December 1, 1988, there was no caretaker Prime Minister. President Ghulam Ishaq Khan had appointed 11 judges of Lahore High Court. M.D. Tahir, an advocate challenged the validity of judges' appointments. The High Court upheld the validity of the appointments without the advice of Prime Minister. The central government filed an appeal in the Supreme Court. One of the contentions raised was that under Article 48(1) of the constitution the advice of the Prime Minister was necessary. A full bench of the Supreme Court commenced the hearing but the government withdrew the appeal under the pressure of the president on 10 December 1989 (Ian Talbot, 1999:320).

Crisis started in the province of Balochistan. Mir Taj Muhammad Jamali of the IJI had been appointed as the chief minister of Balochistan. Barely two weeks after his appointment as Chief Minister, Provincial Assembly dissolved by the Governor, Gen. (Retd:) Muhammad Musa Khan, on the advice of the chief minister. This led to a political uproar. It was termed as an attack on the IJI government in Balochistan and as a foretaste of PPP's long-term designs. Despite the unfavorable press that the PPP government received, barely two weeks after it had assumed authority, there was no hard evidence to establish the Centre's hand in the dissolution of the Provincial Assembly. It seemed that Mir Taj Muhammad Jamali was uncertain of his majority and found in the dissolution of the house a way out of the political impasse. The Balochistan High Court declared the dissolution as illegal. The Government did not appeal. Nawab Muhammad Akbar Khan Bugti was appointed as the chief minister who was able to promptly demonstrate his majority in the Assembly and the coalition ministry took office (Ian Talbot, 1999:227).

Pakistan People Party could not get the necessary parliamentary hold because of strong opposition. The eighth amendment, which was introduced by the military government of Zia, was a weapon against Pakistan People Party (Ikram Rabbani, 2005:270). The failures of Pakistan People Party led serious breach between the government and the establishment of Islamabad. President Ghulam Ishaq Khan dismissed her government in August 1990 under the provisions of Article 58(2)(b) of the constitution (Burki, S.J., 1988:89-90). The transfer of power to Benazir Bhutto was a new chapter in Pakistan's politics after a long

military rule. The military claimed that they had transferred power to political leaders (Selochan Viberto, 1991:172). Benazir's ambition to assume powers in every region brought her in conflict with the army, the judiciary and the president. This led to the dismissal of her government on August 6, 1990 by President Ghulam Ishaq Khan. Benazir's anger out broke against her dismissal more provoked those who represented these institutions. Moreover, she did not completely ponder on preparing for the elections. She requested to the Supreme Court for the restoration of her government, urging that her government had been illegally dismissed. Her followers hoped of a positive decision but the Supreme Court ruled against her contention (Saeed Shafqat, 1999:234-35).

NAWAZ SHARIF AND THE JUDICIARY (1990-93)

A caretaker government was formed after the dissolution of the National Assembly and the dismissal of Benazir Bhutto's regime. Ghulam Mustafa Jatoi took office as a caretaker Prime Minister. He was given with the responsibility of holding general elections. A political alliance *Islami Jamhoori Ittehad* was formed. Consequently, General Elections were held on October 24, 1990, in which Nawaz Sharif became the new Prime Minister (Hamid Yousaf, 1999:234-35).

Speedy trial and Justice were introduced under the 12th amendment to the constitution. A new clause of Article 212 B was introduced in the constitution. Special courts were establishment for heinous offenses trials (Rais, R.B., 1995:130). The 12th amendment created a hierarchy of the courts. According to this special courts were not subordinate to superior courts. An anomalous appellate court was established with three members one the chairperson and two members (Hamid Khan, 2009:415-16).

The performance of Nawaz Government was better than the previous political governments. The *Islami Jamhoori Ittehad* appreciated majority in the house. The economy was also on the recovery pathway. He intended to amend the constitution to reverse the powers of the president to dissolve the national assembly. Meanwhile the president dismissed the government in April, 1993. He exercised his discretionary powers (Mahmood, S., 2003:393). Nawaz Sharif, the deposed Prime Minister, still approached to the Supreme Court of Pakistan. He filed a petition on April 26, 1993 under Article 184(3) of the constitution. According to writ petition, the dissolution of the government was unconstitutional. On 19 April, a petition was filed against the dismissal of Nawaz government. The Supreme Court, some twenty-one days later, declared the dissolution of the National Assembly as invalid by declaring

in a 10-1 verdict. The National Assembly was reinstated. Nawaz may have struck a blow for democracy, but the position of the reinstated Prime Minister was much weaker than it had been before 18 April. The rug had been pulled from under his feet in the Punjab with the installation of a PML(J) coalition ministry under the leadership of the former Speaker, Mian Manzoor Wattoo. Nawaz once again successfully turned to the courts and secured a ruling from the Punjab High Court on 26 June 1993, which restored the Punjab Assembly (Mehmood, S., 2003). The President, supported by Acting Chief Minister Wattoo as he promptly dissolved it. The constitutional crisis intensified when, during a joint parliamentary session boycotted by the opposition, the Prime Minister responded by passing a proclamation under Article 234 which brought Punjab under federal rule. He then appointed a fresh Governor and Chief Secretary. Ghulam Ishaq supported Wattoo's contention that the proclamation was 'null and void' as they had not approved or signed it. This in effect left two parallel governments operating in Punjab with all the potential this carried for anarchy and bloodshed. The struggle between President and Prime Minister for control of the province could not have illustrated more graphically the region's crucial position in Pakistani political life. The war between Ghulam Ishaq and Nawaz Sharif alarmed the Pakistan Army, which shared the same power base. In time of economic and diplomatic crisis, Martial Law would have resulted (Dawood, 1994:123-124).

Nawaz Sharif addressed the Nation on April 17, 1993, in which he openly blamed President Ghulam Ishaq Khan of conspiring to remove him from power; at last sealed his destiny but it presaged a disobedient public stand by the dismissed Prime Minister. Crowds of supporters crowded the road of his train journey from Rawalpindi to Lahore. Sheikh Rashid beat the drum of Punjabi chauvinism, declaring: 'The people of Punjab had been really hurt and they have reason to believe that this act has been against their province. Nawaz was transformed at once from a 'cowardly businessman' to a 'fighter politician'. The Pakistan Muslim League (N) once regarded as a 'party of the king' confection of an army chiefs and the President was established as a genuine political force in the public mind (Ian Talbot, 1999:327-28). This was the time when the relation among the troika was tense. The reinstatement of Nawaz Sharif government sent shock waves through the political establishment. That was the reason that the Prime Minister was forced to resign on July 18, 1993. He was forced to advise the president to dissolve National Assembly under article 58(2) b of the constitution. The president quickly

acted upon the said advice. However, the president was also compelled to resign which he did on the following day on July 19, 1993. Thus, an unpleasant chapter in the judicial history of Pakistan ended. Moeen Qureshi became a caretaker prime minister (Ian Talbot, 1999:348).

BENAZIR'S SECOND TERM 1993-96

The relation between the Benazir government and the judiciary was also tense. Before her second term as prime minister, she criticized the reinstatement of Nawaz Sharif government. She condemned the Supreme Court on identical grounds. When she came into power for the second time as the prime minister, immediately after, she appointed Justice Sajjad Ali Shah a junior judge, as the Chief Justice of the Supreme Court. Justice Shah was the only judge in opposition when the Court had ruled in favor of Nawaz Sharif. Asif Ali Zardari asked Justice Sajjad Ali Shah for written resignation in advance if he failed to oblige the Prime Minister. Another severe blow was the appointment of 20 extra judges. The PPP government appointed 20 extra judges to the Lahore High Court in 1994. Another reason of clash was the Supreme Court ruling for the judiciary separation from the executive by March 23, 1994. The government of PPP forced the Chief Justice to modify this decision. This dark circumstance coincided with a destructive standoff between judiciary and the Government. The Supreme Court handed down an important and far-reaching judgment in *Al-Jehad Trust vs the Federation of Pakistan* (popularly known as the judges' case). The imperative of the constitution laid down in the objective resolution that is a substantive part of the constitution under Article 2-A was implemented. In the judges case the court held that the consultation of chief justice of Pakistan is necessary while appointing judges of the Supreme Court and of the High Court according to Article 177 and 193. Consequently, several judges were relieved of their posts (Hamid Yousaf, 1999:246).

The relation between the government of Benazir Bhutto and the judiciary further deteriorated. Her plan was to make the judiciary submissive to the executive. Different methods were adopted to pressurize the judiciary. The tenure and appointments of the judges was introduced by Zia-ul-Haq earlier. Benazir Bhutto used this method to her own help. The judges were appointed on temporary and adhoc basis. The length and tenure of these judges were depended upon the executive pleasure. Acting Chief Justices were appointed in Sindh and Punjab High Courts. This was the directives of the executive and appointed judges who

were their ideals. Most of those judges did not meet the constitutional requisites for promotion to the High Court (Hafiz Malik, 2003:73-74).

Relationship between the president and the Prime Minister “Farooq Leghari” became tense and the question was raised for the first time openly whether he would use his constitutional powers to move against the Government. On 21 September, the President filed a reference in the Supreme Court designed to expedite 20 March judgment concerning the power to appoint judges to the superior courts. After round about a week, he met with Nawaz Sharif. Their five hours discussions completed with a report in which Leghari notably mentioned Article 58(2) b under the Eight Amendment of the constitution that allowed the President to dissolve the Government (Dawood, 1994:347-48). Corruption and deteriorating law and order situation were the main reasons for the dissolution. Malik Miraj Khalid, an elder statesman and a veteran leader of the Pakistan People Party was appointed as the caretaker Prime Minister. Benazir Bhutto challenged the dissolution order in the Supreme Court. Consequently the court upheld the order of the president (Hamid Yousaf, 1999:246-47).

NAWAZ SHARIF SECOND 1997-99

The new government was installed under the leadership of Nawaz Sharif in February 1997 at federal level. Muslim league too created alliance governments in all provinces. The federal confronted great troubles in organization its dealings with the MQM that rejected to disassociate with itself from its terrorist elements (Mehmood, 1999:399).

The national assembly elected Nawaz Sharif as the new prime minister. In the largest province of Punjab Shahbaz Sharif was elected by the provincial assembly as the chief minister. Looking back to the political balance sheet of the country since 1988, it was observed that an uneasy sharing of power between the prime minister and the president had started. This was a tradition authoritarian rule over the decades, prescribed by the eighth amendment of the constitution. The military played the role as a major force in the body politic. These constraints were complicated by the inability or unwillingness of the political parties to observe democratic norms and to transcend mutual confrontation and the urge for authoritarians in the interest of democracy. The government was no longer a hostage to a coalition partner or to the members of the assembly (Mehmood, 1999: 399).

Nawaz Sharif made two basic changes in constitution of 1973. He introduced two major amendments i.e. thirteenth & fourteenth in the

constitution. The 13 amendments reinstated the parliamentary character of the constitution. According to this, the president became powerless to dissolve the national assembly. The role of the Prime Minister was increased for several major appointments like the services chiefs. The 14 amendment was associated to the dilemma of floor crossing. It had a major cause of political instability in Pakistan. Now the party leaders could remove their party colleagues to the assemblies on grounds of changing the party or for violation of the party directives. These amendments moved the balance of power in the support of the Prime Minister (Mehmood, 1999:400-401).

During the golden jubilee celebrations in 1997, there was another conflict between Sajad Ali Shah and Mian Nawaz Sharaif. It showed that the hostility created institutional imbalance. While putting down the appointment principles of the judges of the Superior Courts in the judges' case, the Chief Justice did not apply the legal procedure. Benazir Bhutto appointed him on political grounds. Consequently, some of the judges separated and he failed in carrying all the judges along with him. Primarily the clash between the Prime Minister and the Chief Justice was on functioning quick trial courts. The Chief Justice inquired for the promotion of judges. While the Prime Minister proposed to reduce the number of the judges. The prime minister was a powerful person because article 58(2)(b) had been struck down. Now the president was unable to dissolve the National Assembly and to dismiss the Prime Minister. Therefore, under the circumstances Sajad Ali Shah politicized the judiciary. People were of the view that president Farooq Laghari and the Chief Justice were mutually planning against the Prime Minister and his government. Meanwhile the president Farooq Laghari tendered his resignation (Hafiz Malik, 2003:75-76).

During these months, the relations between Nawaz Sharif and the judiciary were deteriorated. The resignation of the president and the removal of the Chief Justice were two big achievements for Nawaz Government. His position further strengthened when Rafiq Tarar became the new president in 1998 (Ian Talbot, 1999:362).

The next important post for Nawaz Sharif was the appointment of new COAS. He appointed General Pervez Musharraf, a general in the lower rank of commanding officers. He was sworn on October 7, 1998. Prime Minister believed that the new general was an Indian refugee. He would be more pliable than a Punjabi or Pashtun General. He was confident that Musharraf was obedient and that he had no political

background and was expected to join the community of the ruling party PML (N) (Lawrance Ziring, 2007:251).

Nawaz Sharif's political journey was moving fast. He introduced speedy amendment in the constitution and the body politics of the country. However, unluckily a clash developed between Nawaz Sharif and COAS Pervez Musharraf. He attempted to remove General Pervez Musharraf. Meanwhile COAS was on official visit to Sri Lanka; his flight of PIA carrying him was disallowed to land in the country. Thus, the General's life and other two hundreds passengers were in the mouth of death (Kashif, K.M., 2006:58). The important day was October 12, 1999 when General Musharraf removed Prime Minister Mian Nawaz Sharif and established a military government (Kashif, K.M., 2006:58).

CONCLUSION

During the period 1988-99 judiciary was under the control of civilian governments like in the past. In these circumstances, it remained no more an independent institution of the state. The presidential powers of Zia in the shape of eighth amendment lingered on and thus various governments were dismissed. During this period due to institutional imbalance, the decisions of the judiciary were highly controversial. There was imbalance in the relationships of the President and the Prime Minister. This affected the image of judiciary as an independent institution. Although during this era judiciary tried to remain an independent institution. It failed to strive for fundamental rights and to play the role as the custodian of the constitution.

REFERENCES

- Abbas and Jasam (2009), *A Ray of Hope: Democracy under Conditions of State Fragility*, Heinrich-Boll-Stiftung, London.
- Burki, S.J. (1988), *A Revisionist History of Pakistan*, Vanguard Publishers, Lahore.
- Hamid Khan (2009), *Constitutional and Political History of Pakistan*, Oxford University Press, Karachi.
- Hamid Yousaf (1999), *Pakistan: A Study of Political Developments 1947-97*, Sang-e-Meel Publication, Lahore.
- Ian Talbot (1999), *Pakistan a Modern History*, Vanguard Book Pvt. Limited Lahore.
- Ikram Rabbani (2005), *Pakistan Affairs*, Carvan Publisher, Lahore.
- Dawood, Jan M. (1994), *The Role of Superior Judiciary in the Politics of Pakistan*, Royal Book Company, Karachi.

- Justice Iqbal Javed (2003), *The Judiciary and the Constitutional Crisis in Pakistan*, Oxford, New York.
- Justice Javid Iqbal (2006), *The Independence of Judiciary*, (Paper presented in International Conference, Islamabad, Pakistan).
- Kashif, K.M. (2006), *Pakistan Almanac 2005-2006 Essential Dates on Pakistan*, Royal Book Company, Karachi.
- Mahmood, S. (2003), *Pakistan Political Roots and Development 1947-99*, Oxford University Press, Karachi.
- Muhammad Anwar & Ebad Baig (2013), *Pakistan: Time for Change UK*, Author House.
- R. B. Rais (1995), *Pakistan in 1995*, Lahore.
- Saeed Shafqat (1997), *Civil Military Relations in Pakistan*, Vanguard Books Pvt. Limited, Lahore.
- Selochan Viberto (1991), *The Military the State and Development in Asia and the Pacific*, Westview, UK.
-