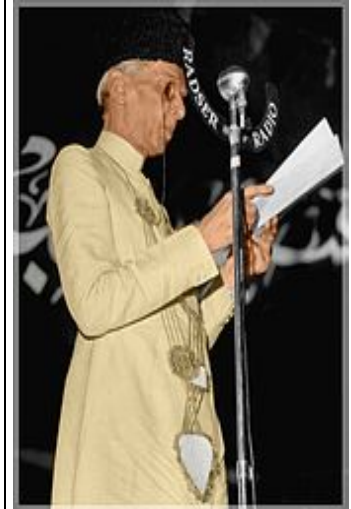


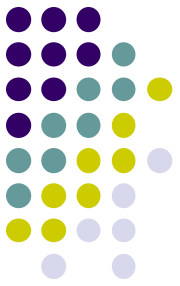
Constitutional History of Pakistan



Zafar Iqbal Kalanauri
Advocate Supreme Court of Pakistan



BACKGROUND



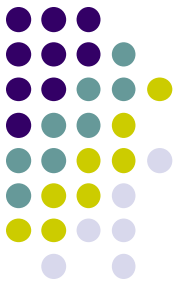
- Creation of Pakistan in 1947 was in many ways a unique event which at the same time was bound to have many difficulties primarily due to a consistently hostile attitude adopted by Indian leadership. The Indian leaders continued to create difficulties for Pakistan in the hope that Pakistan would not survive for long.
- One of the most uphill task for the newly created Pakistan was the framing of its comprehensive Constitution. Both India and Pakistan at their birth adopted Government of India Act of 1935 with essential amendments as the interim constitution i.e. Parliamentary and Federal in nature.
- Quaid-e-Azam with his vast and strong background of handling legal matters took up this problem with urgency however gravity of other issues compelled him to pay his attention to other matters which delayed this important process of constitution making.

MEASURES TAKEN BY JINNAH



- Appointed the first constituent assembly of Pakistan in August 1947 :
- 69 members elected in 1945-46 election.
- 10 members were included from princely states.
- Dual responsibility of acting as the federal legislature and constituent assembly.
- The members however lacked the essential requisites of high competence, commitment and political experience. Even though Jinnah wanted to improve this situation but his early demise in 1948 struck another blow to fledgling Pakistan.

LIAQUAT ALI KHAN AND HIS OBJECTIVES RESOLUTION OF 1949



- Objectives resolution was passed on 12th March 1949 while Liaquat Ali Khan was the Prime Minister and Khawaja Nazimuddin was the 2nd Governor General at the time.



NEWS/AL NAZIMUDDIN: Too good to be a politician



Main Features of Objective Resolution :



- **Sovereignty of Allah**
- **Democracy: Elected representation**
- **Federal Republic based on Islamic Principles, justice, equality and tolerance with an independent judiciary plus protection of minorities**
- **Muslim way of life according to teachings of Quran and Sunnah**
- **After sharp criticism by religious scholars a basic principles committee was setup to review the recommendations however the report was subject to widespread criticism over its recommendations in East and West Pakistan.**
- **Political crisis developed as the Prime Minister Liaquat Ali Khan was assassinated in 1952, after a three year delay general elections were held on 21st June 1955. Assembly met on 7th July 1955. Finally the first constitution was promulgated by the second constituent assembly on 23rd March 1956.**

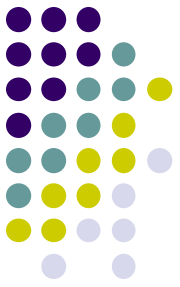
Pakistan, 1954: First use of the Doctrine of necessity



- After dismissing the second **Prime Minister Khwaja Nazimuddin's** Government in April 1953, G.G. **Ghulam Muhammad** appointed **Muhammad Ali Bogra** as premier (a diplomatic representative of Pakistan in USA) and against all the norms of parliamentary practices, he himself appointed other ministers in the cabinet.
- **Muhammad Ali Bogra** was naturally apprehensive of the possible repetition of the misuse of power by the G.G. and therefore with undue haste, passed a constitutional amendment through the Assembly on September 21, 1954.
- October 24, 1954 the Governor-General of Pakistan, **Ghulam Mohammad**, dissolved the Constituent Assembly and appointed a new Council of Ministers on the grounds that the existing one no longer represented the people of Pakistan.
- He did this in spite of the fact that at that time the work of constitution-making was almost over and the Prime Minister had publically announced that the constitution was to be launched on December 25, 1954, being the birth day of Quaid.

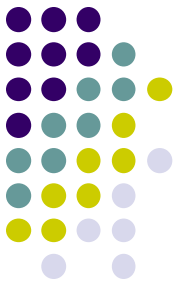


THE PROCLAMATION



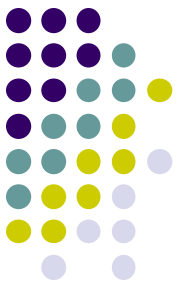
" The Governor General having considered the political crisis with which the country is faced has with regret come to the conclusion that the constitutional machinery has broken. He therefore, has decided to declare state of emergency throughout Pakistan. The constituent Assembly as at present constituted has lost the confidence of the people and can no longer function. The ultimate authority vests in the people who will decided all issues including constitutional issues through their representatives to be elected afresh. Election will be held as soon as possible."

TWO IMPORTANT POINTS



- The proclamation did not say that the constituent Assembly is dissolved. It simply said that it has lost the confidence of the people, and
- No where in the proclamation the provisions or section of the Government of India Act, 1935, under which this action was taken, was specified.

REAL MOTIVE BEHIND THE DISSOLUTION



The constituent Assembly had passed two important bills, which were said to have some bearing on the sudden proclamation of the Governor General.

- The constituent Assembly had amended section 9, 10, 10A and 10B of the Government of India Act, 1935 as adopted for Pakistan under which he was devastated of his power to dismiss Prime Minister.
- Secondly, the constituent assembly had repealed on September 21, 1954 the Public Representative Office Disqualification Act (PRODA), 1949, which was to the members of Constituent Assembly, by the constituent Assembly.

FILING OF WRIT PETITION



The president of the assembly **Molvi Tamizzudin** filed two writ petitions i-e **MANDAMUS** and **QUO-WARRANTO** in the Chief Court of Sindh against the Governor General's order of dissolution as unconstitutional, illegal, ultra virus, without jurisdiction, in-operative and void.

VERDICT BY THE CHIEF COURT OF SINDH



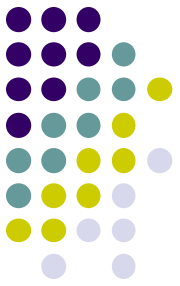
A full bench of chief court of Sindh decided unanimously (4 to 1 majority) that the Governor General had no power to dissolve the Constituent Assembly, It was a sovereign body created for a specific purpose to frame a constitution and and it was to function till that purpose was completed. Constituent Assembly can only be dissolved by two third majority of its members.

APPEAL BY FEDERATION OF PAKISTAN (1955 Federal Court 240)



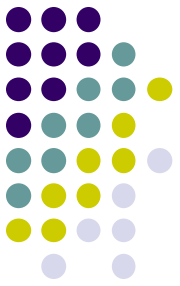
The Federation of Pakistan and certain federal ministers who were affected by the judgment, went in appeal against the verdict of the Chief court of Sindh. It was argued on behalf of the federal Government that the Constituent Assembly was rightly dissolved.

DECREE/DECISION BY THE FEDERAL COURT OF PAKISTAN



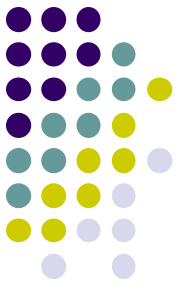
- On March 21, 1955. The Federal Court of Pakistan overruled the judgment of the **Chief Court of Sindh** on a technical point that section 223 of the Government of India Act, 1935 under which the Chief Court has issued the writs was not yet a law. This section 223 was added to the Government of India Act, 1935 through an amendment. The Constituent Assembly had passed the amendment but was not assented to by the Governor General.
- Thus the Federal court by majority of 4-1 gave its verdict in favour of the Federal Government and rejected **Molvi Tamizzudin's** petition challenging Governor General's proclamation of the October 24, 1954 by arguing that G.G was a constitutional part of the legislation and therefore, every act passed by Constituent Assembly required Governor General's assent.

CONSEQUENCES OF THE DECISION OF THE FEDERAL COURT



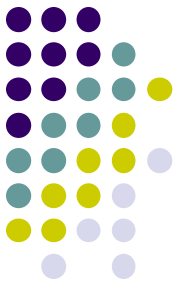
- The most significant point in the decision of the Federal Court was that it did not go into the question whether the Constituent Assembly was rightly dissolved by the Governor General.
- Many constitutional bills passed by the Constituent Assembly were authenticated without consent of GG.

EMERGENCY POWER ORDINANCE, 1955



- As the country was faced with legal vacuum, G.G proclaimed the Emergency Power Ordinance, 1955 and assumed power to,
- Make provision for formulating the provisional constitution of Pakistan
- Authenticate the central budget,
- Make provision to constitute provisions of West Pakistan,
- Name East Bengal as East Pakistan,
- Validate law, which have passed by Constituent Assembly but had not received G.G assent.

YOUSAF PATEL V/S CROWN CASE 1955

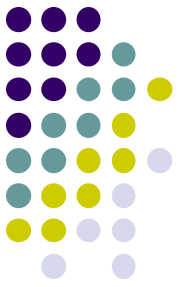


- The actions of G.G came for discussion before the Federal Court in **Yousaf Patel vs Crown** case.
- The court while dealing with the case criticized the action of the G.G in enacting Constitutional Legislation and in setting up a constitutional convention as being beyond his powers.

A SEVERE BLOW FOR G.G's EFFORTS:

- This judgment was a severe blow for the G.G efforts to revalidate the invalid laws and make constitutional provisions through an ordinance.

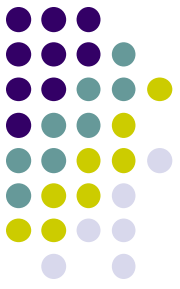
FILING OF A REFERENCE IN FEDERAL COURT BY G.G



He sought the court's opinion on the following points.

- Whether constituent Assembly was rightly dissolved by the G.G
- Whether the constituent assembly convention proposed to be setup by the G.G will be competent to exercise the power conferred on the Constituent Assembly by the Indian Independence Act, 1947.

OPINION OF THE FEDERAL COURT OF PAKISTAN



The court after careful consideration of the issues raised, came up with the following details.

- Reference of the dissolution of the constituent Assembly:

Regarding the dissolution of the constituent assembly the court said the dissolution had become imperative as the constituent assembly had failed to frame the constitution for Pakistan in reasonable time.

- Reference of the setting up of another constituent Assembly:

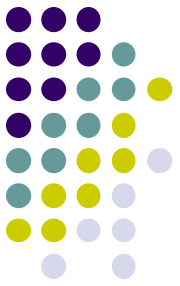
The court further held that the dissolved constituent assembly was set up under an executive order and not under law. Therefore, the new constituent Assembly can also be setup by similar order provided that it should be a representative body and the new Constituent Assembly could be competent to exercise all powers conferred by Indian Independence Act 1947.

CONCLUSION



- The decision of the Federal Court of Pakistan set the turn for all the future decisions.
- G.G decision to dissolve the constituent Assembly struck the first serious blow to the weak democratic institution in Pakistan.
- This decision has deep repercussion on the subsequent legal and constitutional development in Pakistan, the fruits of which we have eaten for a number of time throughout in our constitutional history.
- The Federal court in order to make the G.G's act valid through this case declared as many as 46 laws null and void.

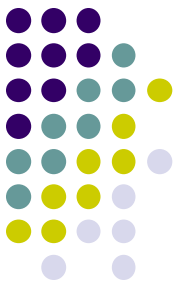
CONSTITUTION OF 1956



Main Features:

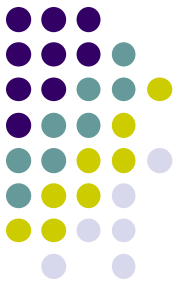
- **Name: Islamic Republic of Pakistan**
- **234 Articles divided in 13 parts**
- **Parliamentary Republic in Nature**
- **President to be a Muslim**
- **President to be elected by National Assembly and Provincial Assemblies**
- **President to appoint Prime Minister and Cabinet elected by the National Assembly**
- **Equal seats for East and West Pakistan in the legislative Assembly**
- **President could dissolve National Assembly on the advice of the Prime Minister**
- **2/3rd majority required to pass any bill and amend the Constitution.**
- **Principles of provincial autonomy and independence of judiciary were also incorporated.**
- **Islamic provisions that guaranteed legislations of laws in accordance of Islamic injunction.**
- **However this constitution was opposed by Sikander Mirza for its Islamic provisions and provincial autonomy. The martial law was imposed after two and an half years on 7th October 1958.**

Abrogation of 1956 Constitution:



The constitution of 1956 proved to be a short-lived one. The first general elections to be held under it were repeatedly adjourned from one date to another, till the Constitution was abrogated on October 07, 1958 and Martial Law was proclaimed. A Martial Law Government, headed by Muhammad Ayub Khan, came to power. It introduced a number of reforms in the country, such as the land reforms.

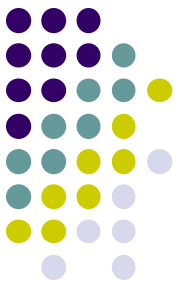
Why did the Constitution of 1956 fail to work?



1.Lack of popular elections: No election were held under the 1956 Constitution, with the result that the people lost faith in the 80-members Parliament that continued to work after it had framed the constitution.

2.Undue interference: Undue interference by the president, Sikandar Mirza, with the ministries and political parties. Under the 1956 Constitution, which established a parliamentary system of government, the President was to be a constitutional Head of State, while the Prime Minister was to be the real executive. But the undue interference by the President reduced the Prime Minister to that of a parliamentary secretary of the President. This interference disorganized the proper working of the Cabinet system and ministerial responsibility to the Parliament.

3.Unstable cabinet: Frequent Cabinet or ministerial changes also put the constitution into abrogation.



4.Lack of leadership: Lack of leadership both in the government and in the political parties and public.

5.Undue interference of bureaucracy: The growth of bureaucracy and under interference and influence of the permanent officers in the governmental policy and administration.

6.Lack of character: The general lack of character in the politicians and their undue interference in the day-to-day administration.

7.Lack of discipline: Lack of discipline and solidarity in the political parties. Their members frequently changed their loyalties for private ends and personal gains, with the result that political parties became mere coteries of selfish leaders and politicians, without any contact with the people.

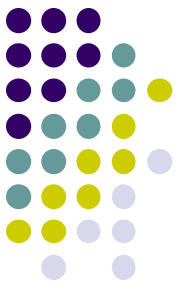
8.Lack of education: Lack of education and public spirit in the electorate.

9.Corruption: Widespread corruption in political life of the country, with the result that seats in the legislature became investment for acquiring wealth and influence.

SECOND CONSTITUTIONAL CASE

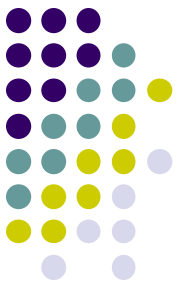
STATE V/S DOSSO CASE

(P.L.D. 1958 S.C. 553)



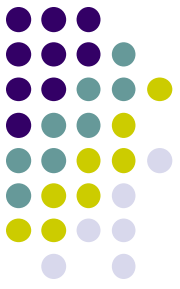
A murder took place in the **LORALAI** District of Baluchistan. The murder was committed by a person named Dosso. He was arrested by the Tribal authorities and was handed over to the council of elders or Grand Assembly called **LOYA JIRGA**, under the **FCR 1901**. The relatives of Dosso filed a petition in the Lahore High Court against FCR. They challenged the references and the convictions on the grounds that the relevant provision of the FCR were void being repugnant in the "Equity before Law" and the equal protection of Law" and the right to counsel embodied in Articles 5 and 7 of the 1956 Constitution.

Decision of Lahore High Court



- High Court decided the case in favour of Dosso and declared FCR repugnant to 1956 constitution. Article 5 and 7 of which ensured the equality of all before the law. Thus Lahore High Court decided the proceedings of council of elders as null and void under FCR, 1901
- The effects of this case were the question of the validity of FCR under which many old cases were decided and especially since 1956 when the new constitution was promulgated.

Appeal in the Supreme Court of Pakistan



- The Federal Government of Pakistan filed an appeal against the verdict of the Lahore High Court in the Supreme Court. The Supreme Court decided 13th October 1958 as the date for hearing the case. But before that on October 7, 1958, a drastic change came in the political history of Pakistan.
- On October 7th 1958 the President of Pakistan **Iskandar Mirza** declared Martial Law in the country and made AYUB KHAN as Chief Martial Law Administrator(CMLA). The central and provincial legislature were dissolved with the abrogation of the 1956 Constitution.

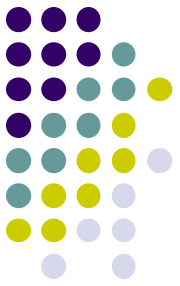


Laws (Continuance in Force) Order: (October 11,1958)



Three days later the Laws(continuance in Force) order was issued according to which all other laws except those of 1956 constitution were validated and also the jurisdiction of all courts were restored, Thus, (continuance in force) order 1958 was the NEW LEGAL ORDER, which replaced the old legal order i.e. the 1956 constitution.

SOME TECHNICAL POINTS



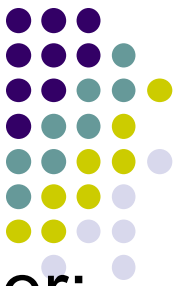
Followed by the imposition of Martial Law some technical points raised in **Dosso case** throughout the country.

- The points were that if Supreme Court would have upheld the decision of Lahore High Court in Dosso case, it means the 1956 Constitution was still in force as Lahore High Court decided the case in accordance with Article 5 and 7 of the 1956 constitution. And if 1956 constitution was still enforce then what was the role of Martial law regulation i-e Laws (Continuance in Force) Order 1958. In short it would have been a challenge to the Martial Law administration.

DECISION OF THE SUPREME COURT

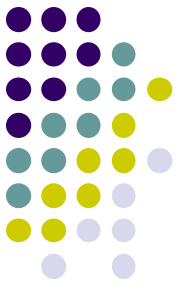


- The Supreme Court decided the case unanimously against the verdict of Lahore High Court. The Supreme Court decision was based on the **KELSON'S THEORY OF LEGAL POSITIVISM**.
- *" If there is no change in the constitution or the government with meta-legal means and ways and if there is no opposition resistant to this change internally by the people plus no disturbance in the territorial integrity of the country, then such a change is successful revolution and is recognised by the International law. "*
- Thus the Martial Law coup of 1958 was legalized by the Supreme Court under the Chief Justiceship of **JUSTICE MUNIR**.

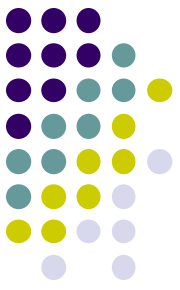


- Recognition of Laws (continuance in force) order:
- The Supreme Court held the Laws (continuance in Force) order 1958 was the NEW LEGAL ORDER and the validity of laws and the correctness in the judicial decisions would be determined according to it.
- Restoration of FCR:
- The Supreme court also held that as the 1956 constitution was abrogated therefore FCR 1901 was still in force in accordance with the laws (continuance in force) order, 1958.

CONCLUSION:

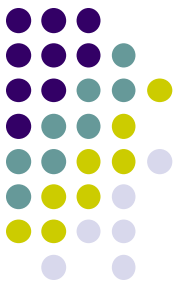


- It has far-reaching consequences on the judicial and political history of Pakistan.
- Due to this decision the FCR was restored which is termed as BLACK LAW. It was a chance to expel it once for all.

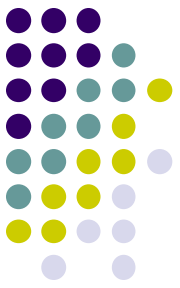


CONSTITUTION OF 1962

- General Ayub Khan wanted to introduce a controlled and limited democracy as he believed that western style democracy did not suit Pakistan. Therefore he introduced the constitution of 1962 on 1st March thereby abrogating the previous constitution.
- **Main Features of 1962 Constitution :**
 1. It consisted of 250 Articles and 5 schedules.
 2. Amendments could be made with 2/3rd majority.
 3. System of government was federal in which provinces are given autonomy under constitution. Separate lists are provided under this system for lawmaking and every unit is free within the limits prescribed in constitution. Cabinets were answerable to their respective assemblies.



-
- 4. Presidential government:** All the powers of government were vested to the President. He was all in all. He and his cabinet were not answerable to the legislature.
- 5. Unicameral legislature:** Central legislature was consisted on one house namely National Assembly. Members of cabinet were not necessarily members of the National Assembly.
- 6. Electoral College:** Electoral College for the election of President and the members of the assemblies either national or provincial was based on basic democracy. Elections were held indirectly.
- 7. Fundamental Rights:** At beginning Fundamental Rights were not provided in the constitution but later they were incorporated in the constitution with some exceptions.
- 8. Independence of judiciary:** Judiciary was independent from the executive.
- 9. Principles of policy:** First time principles of policy were introduced in the constitution, which were the guided principles for the governments.



10. Islamic: All the laws inconsistent with Islam or Fundamental Rights were liable to void. Council of an Islamic Ideology was constituted to review the existing laws whether they are in accordance with Islam. If not, they were liable, either void or Islamized.

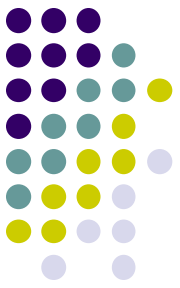
11. National languages: Urdu and Bengali were declared national languages with the provision of English as official language until the arrangements are made for making Urdu and Bengali as official languages.

12. Basic democracy: A new system of basic democracy was introduced in place of popular local government system. Members of basic democracy were responsible to elect President.

13. Council of Common Interests: It was constituted to protect the interest of federation and provinces.

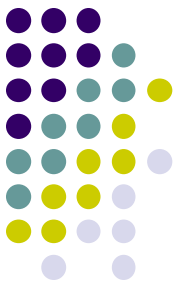
14. Capital territory: Federal capital was Karachi, which was too congested area. Islamabad was developed and selected as federal capital.

Breakdown of 1962 constitution:



Constitution of 1962 also did not last long. Various factors led to its failure, such as:

- 1. Autocracy:** One of the important factors was the growing autocracy of President Ayub Khan, with which the people became increasingly unhappy.
- 2. President-ship of Ayub Khan:** It was especially so after the general election of 1965, during which Ayub Khan got himself elected as President. People felt that his election was not legitimate.
- 3. Tashkent Declaration:** Popular dissatisfaction became all the more greater after the Tashkent Declaration of 1966, in which Ayub Khan was believed to have jeopardized the national interest of Pakistan, especially in regard to the Jammu and Kashmir Dispute with India. In West Pakistan, Z. A. Bhutto, who was then the Foreign Minister in Ayub Khan's Cabinet, led popular discontent. He resigned his office after the signing of the Tashkent Declaration on the plea that Ayub Khan had surrendered Pakistan's interests by signing it.



4. Lack of provincial autonomy: In East Pakistan, popular discontent was not on question of foreign policy but on that of provincial autonomy. Sheikh Mujibur Rehman, the leader of the Awami League, led it.

5. Agitation: Agitation was started in both East & West Pakistan and students played key role in decline of Ayub government.

6. Martial Law: Martial was enforced which also resulted in failure of the constitution of 1962.

7. Lack of check & balance: Presidential system of government was adopted keeping in view of its successfulness in America. America has check & balance in its system whereas its lack-ness put it into end.

8. Unlimited powers of President: Unlimited powers were granted to President and there was not check & balance over his powers which results it failure.

9. Difficult impeachment of President: Impeachment criteria which was suggested in constitution for President, was too difficult.

10. Concentration of wealth in few hands: In result of agricultural & industrial reforms wealth was concentrated in few hands which created unrest among the poor and labour class.

11. Inflation: Due to mismanagement prices of life commodities were gone high thus out of the reach of common person who took part in agitation against Ayub government.

1970 Legal Framework Order



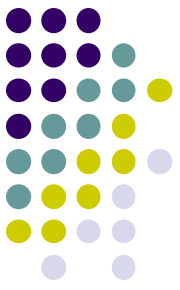
- President [Ayub Khan](#) invited [Chief of Army Staff General Yahya Khan](#) to enforce the [martial law](#) in country. On assuming the presidency, General Yahya Khan acceded to popular demands by abolishing the one-unit system in [West Pakistan](#) and ordered general elections on the principle of [one man, one vote](#).
- The [military government](#) and [President Yahya](#) himself made no efforts to frame a constitution, aside from issuing the [extrajudicial order](#) in 1970. In all over the country, the expectations were that a [National Assembly](#) would be set up by holding a [free and fair election](#). In order to hold the proposed elections, [President Yahya](#) promulgated a Legal Framework Order on 30 March 1970 that also spelled out the fundamental principles of the proposed constitution and the structure and composition of the national and provincial assemblies.

1970 Constitutional Crises



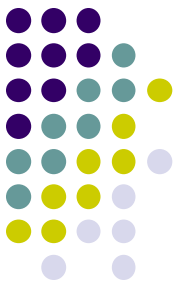
In December 1970, a national-wide general elections were held simultaneously for both the national and five provincial assemblies. The polling results turned out to be simply disastrous from the standpoint of national unity and demonstrated the failure of national integration. No party enjoyed the full confidence of the people of Pakistan. The nationalist Awami League (AL) secured the mandate of East Pakistan but failed to perform in any four provinces of Pakistan. The socialist Pakistan People's Party (PPP) under the leadership of Zulfikar Ali Bhutto gained mandate in the four provinces but failed in the East Pakistan. The general elections truly reflected the ugly political reality: the PPP's mandate in Pakistan and AL mandate in East Pakistan.

1970 Constitutional Crises (Continued...)



- **Constitutional crises grew further when AL refused to make concessions over its six points to draft the constitution and instead maintaining that AL had was quiet competent to frame a constitution and to form a central government on its own.**
- **The PPP was not willing to dilute the authority of the federal government in spite of assuring full provincial autonomy for all the provinces of Pakistan. Negotiations on framing the work on constitution were held between January and March 1971 between leaders of PPP, AL, and the military government of Yahya Khan, which turned out to be a failure. Under the LFO, the President Yahya was to decide when the National Assembly was to meet. By 13 February 1971, the President Yahya announced that the National Assembly was to meet at Dhaka on 3 March 1971. By this time the differences between the main parties to the conflict had already crystallized.**

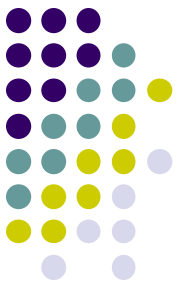
1970 Constitutional Crises (Continued...)



The East Pakistan Army which was operating more or less independently of Islamabad was committing human rights abuses and was making negotiations even more difficult. Over the six point issue, the PPP was convinced that a federation based on six point would lead to a feeble confederation in name only and was part of larger Indian plan to break up the Pakistan. On 14 January, President Yahya announced Mujibur Rahman as the Prime Minister of Pakistan which prompted Zulfikar Ali Bhutto to boycott the National Assembly on 15 February. Talking to the news media, Mujibur Rahman strongly asserted that "*Our stand is absolutely clear. The constitution will be framed on the basis of the six points*".

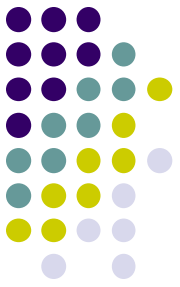


1970 Constitutional Crises (Continued...)

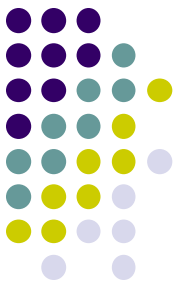


Such announcement led the [PPP](#) to demand the removal of the [National Assembly](#) session or opening session to be postponed. The [PPP](#) threatened to stage a large scale [general strike](#) in all over the country. Under pressured by [PPP](#), [President Yahya](#) postponed the [National Assembly](#) session on 25 March which came as a shattering disillusionment to the [AL](#) and their supporters throughout East Pakistan. It was seen as a betrayal and as proof of the authorities of the Pakistan to deny them the fruits of their electoral victory. This resulted in the outbreak of violence in East Pakistan. The Awami League launched a non-cooperation movement and virtually they controlled the entire province. Due to disturbances in [East Pakistan](#), no [National Assembly](#) session was called and the [military](#) moved in [East Pakistan](#) to control the situation. The [civil disobedience](#) movement turned into armed [liberation movement](#) backed by the [India](#).

1970 Constitutional Crises (Continued...)



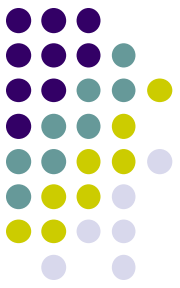
- With India successfully intervening in the conflict, the Pakistan military surrender to the Indian military and almost over 93,000 military personnel were taken as prisoners of war on 16 December 1971. Demoralized, gaining notoriety in the country, and finding himself unable to control the situation, President Yahya ultimately handed over the national power to PPP, of which, Zulfikar Ali Bhutto was sworn in on 20 December 1971 as President and as the (first civilian) Chief Martial Law Administrator.



Constitutional Convention

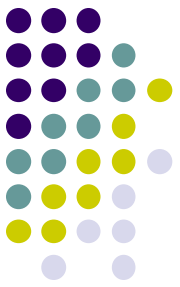
As Pakistan surrendered to India and Bangladesh being formed in 1971, The PPP formed the government and partially enacted the 1962 constitution. President Zulfikar Ali Bhutto called for the constitutional convention and invited the leaders of the all political parties to meet him on 17 April 1972. Leaders and constitutional experts of the Islamic political parties, conservative parties, socialists and communist parties were delegated to attend the constitutional convention in 1972.

Drafting and Ratification



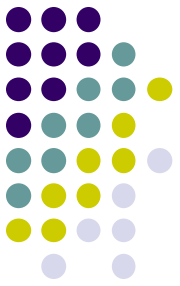
The law experts, constitutional analysts, and country's reputed clergymen worked on formulating the constitution that represents the will and desire of people. Unlike earlier attempts, the convention was not meant for new laws or piecemeal alterations, but for the "sole and express purpose of revising the [1956 articles](#)." Also, the convention was not limited to the religion, [exigencies](#) of government and the preservation of the State; rather it was intended to maintain delicacy in [commerce](#), [finances](#), issue of loans to federation, and [Separation of powers](#). Several key ideas of the [philosophy](#) of [John Locke](#) and Islamic provisions on civil rights were interchanged in the Constitution.

Drafting the 1973 Constitution

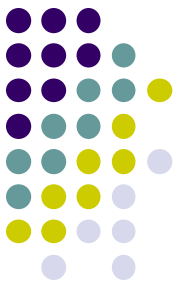


The Constitution ultimately established the "Bicameral Parliament"—National Assembly as Lower house and Senate as Upper house. It also established the parliamentary form of government with Prime Minister as its head of government; the elected National Assembly genuinely representing the will of the people. The Constitution truly maintained a delicate balance between traditionalists and modernists and reflected heavy compromises on fundamental religious rights in the country. The fundamental rights, freedoms of speech, religion, press, movement, association, thought, and intellectual, life, liberty and property and right to bear arms were introduced in the new Constitution. Islam was declared as the State religion of Pakistan. Geography and border statue of the country was redefined and "Pakistan was to be a Federation of Four Provinces." The Constitution was written in the point of representing the conservative Islam as well as reflecting a heavy compromise over the religious rights and humanism ideas, advocated by the extremist leftists of the PPP.

The 1973 Constitution



- On 20 October 1972, the draft was revived by all leaders of the [political parties](#) and signed the declaration of adopting the Constitution in the [National Assembly](#) on 2 February 1973. Ratified unanimously on 19 April 1973, the Constitution came into full effect on 14 August 1973. On the same day, the successful [vote of confidence](#) movement in the [Parliament](#) endorsed [Zulfikar Bhutto](#) as the elected [Prime Minister](#) after latter relinquishing the [presidency](#) after appointing [Fazal-i-Ilahi](#) to that stint.



Fundamental Rights

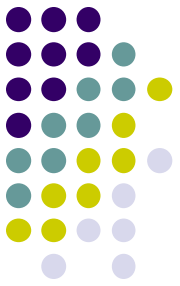
- Contrary to 1956 and 1962 articles, several ideas in the Constitution were new, and guaranteed security of the each citizens of Pakistan. First part of the Constitution introduce the definition of State, the idea of life, liberty and property, individual equality, prohibition of slavery, preservation of languages, right to fair trail, and provided safeguard as to arrest and detention as well as providing safeguards against discrimination in services.
- The due process clause of the Constitution was partly based on the British Common law, as many founding fathers of the country and the legal experts had follow the British legal tradition. The fundamental rights are supreme in the Constitution and any law that is ultra vires the fundamental rights can be struck down by the apex courts in their constitutional jurisdiction vested on them under Article 199 of the Constitution.

Provisions



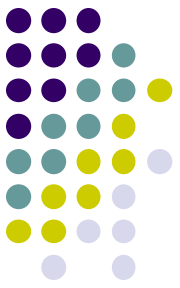
- As contrary to its compatible Constitution of India and Bangladesh, the Constitution reflected a heavy compromise over the several issues to maintain delicate balance of power in country's institutions. First time, the Constitution defines the role of Islam; Pakistan was to be a Federation of Four Provinces and shall be known as the Islamic Republic of Pakistan; introduction of check and balances, separation of powers, and provided the federal system under which the government should governed.
- The Constitution established a "Bicameral Parliament" as a legislative authority that consists of the Senate as Upper house (providing equal provincial representation), and National Assembly as Lower house (providing the will and representation of people). The Constitution put stipulation on the eligibility of becoming President and Prime Minister that only "Muslim" of not less than forty-five years of agenda is qualified for becoming the Prime Minister.

Provisions (Continued...)

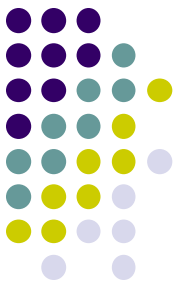


- No law repugnant to Islam shall be enacted and the present laws shall also be Islamised.
- The Constitution also introduced a new institution known as the "Council of Common Interests" consisting of Chief Minister of each four provinces and an equal number of Cabinet ministers of the Government nominated by the Prime Minister. The Council could formulate and regulate the policy in the Part II of the Legislative List. In case of complaint of interference in water supply by any province the Council would look into the complaint.
- Another major innovative introduction in the Constitution is the establishment of the National Finance Commission (NFC) consisting of the Provincial and Finance Ministers and other members to advice on distribution of revenues between the federation and the provinces.

Provisions (continued...)



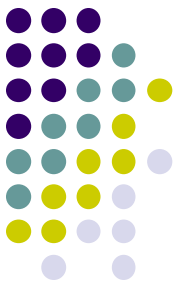
- The Constitution's first parts introduce the Islamic way of life, promotion of local government, full participation of women in national life, protection of minorities, promotion of social and economic wellbeing of the people, and strengthening the bonds with the Muslim world and to work for international peace.
- Under the Constitution, the Fundamental Rights include security of person, safeguards as to arrest and detention, prohibition of slavery and forced labour, freedom of movement, freedom of association, freedom of speech, freedom to profess religion and safeguards to religious institutions, non-discrimination in respect of access to public places and in service, preservation of languages, script and culture. The judiciary enjoys full supremacy over the other organs of the state. About national languages, Urdu was declared as national languages, and English as official language; all other languages were preserved by the Constitution.



Constitution of 1973

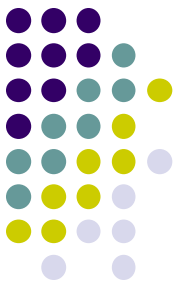
- The 1962 constitution was abrogated with the resignation of General Ayub Khan . A new constitution was approved on 14th august 1973 with overwhelming majority under the office of the then Prime Minister, Z.A.Bhutto.
- **Main Features**
- Parliamentary form of Govt.
- Prime Minister as the head and real executive of government, Ordinances to be counter signed by the Prime Minister
- Bicameral legislature
- Independence of judiciary
- Urdu as national language
- Provincial autonomy guaranteed residuary powers given to the provinces
- A clear and definite definition for Muslim was given.
- An Islamic ideology council was set up for framing of Laws for Islamic injunctions.

Asma Jilani vs Government of Punjab



- The two appeals , one filed by **Miss Asma Jilani** in the Punjab High Court for the release of her father Malik Ghulam Jilani , and by **Mrs Zarina Gohar** in the Sindh High Court for the release of her husband Althaf Gohar, under Article 98 of the Constitution of Pakistan 1962. The detention of Malik Ghulam Jilani and Althaf Gohar had been made under the Martial Law Regulation No.78 of 1971. So the detention of these persons were challenged in Lahore and Karachi High Court respectively.
- The High Court held that it had no jurisdiction because clause 2 of the Jurisdiction of Courts(Removal of Doubts) Order No.3 of 1969 barred the courts from questioning the validity of any act done under the Martial Law Regulation No.78 of 1978.

Asma Jilani appealed to Supreme Court (PLD 1972 SC139)

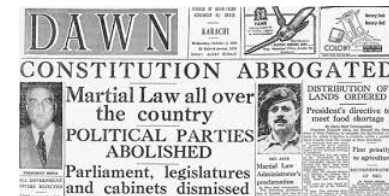


- Asma Jilani appealed to Supreme Court which held that this country was not a foreign country which had been invaded by any army with General Agha Mohammad Yahya Khan as its Head, nor was it an alien territory which had been occupied by the said Army. Martial Law could not have arisen in the circumstances. Pakistan had its own legal doctrine-The Qur'an, and the Objectives Resolution. Therefore Martial law was never superior to the Constitution.
- Supreme Court further held that Yahya Khan was neither a victor nor Pakistan was an occupied territory and thus declared him a "Usurper". All his actions were also declared illegal.
- When Asma Jilani's judgment was released, Yahya Khan was not in power, but now it was Bhutto's Martial Law and Bhutto was the chief Martial law Administrator and the president.

The Zia Era and its Constitutional Legacy



In 1977, General Elections were held, there were serious allegations of rigging, and there was country wide street agitation which prompted the Army to take over. Assemblies were dissolved and government was dismissed. But this time, the constitution was not abrogated but it was declared to be, “*held in abeyance*”. The Supreme Court of Pakistan validated the action taken (in *Begum Nusrat Bhutto’s case PLD 1977 SC 657*) on the ground of “*State necessity*” and the principle of *salus populi suprema lex*. The Court found that on account of massive rigging in the 1977 elections, the State machinery had crumbled down and the constitution did not provide remedy.





- Period of constitutional deviation continued till 1985 when the constitution was revived and with this came the **18th amendment** in the Constitution which was **approved by the Parliament in 1977**, after imposition of Martial Law in the country, the Constitution was held in abeyance and replaced by an **interim Provisional Constitutional Order (PCO)**.
- Zia then made several changes to the Constitution to strengthen the power of the president, including introducing **Article 58(2)(b)** to the Constitution *via* the notorious 18th Constitutional Amendment. It granted the President discretionary powers to dismiss the Parliament and call for fresh elections.
- Zia also sought to undermine the independence of the judiciary by requiring **judges to take a fresh oath of allegiance under the PCO**. These actions, along with the Supreme Court's capital conviction of **Zulfiqar Ali Bhutto** – despite a widespread belief that the charges were fabricated – severely undermined the credibility of the legal process and the esteem of the judiciary. The prime legacy of the Zia era, namely enhanced presidential powers and Islamisation measures, continued to haunt the nation's political landscape for another decade.

The 1990's and Disenchantment with Politics



In 1988 elections **Benazir Bhutto** led the PPP to victory and became the first Prime Minister after the Zia era, ushering in a decade of alternation between the elected governments of Bhutto's PPP and the Pakistan Muslim League (PML) led by **Mian Nawaz Sharif**. The military interfered several times in politics and backed presidential use of **Article 58(2)(b)** to dissolve the government, usually justifying its actions based on corruption charges against the political leaders.





- The Supreme Court ruled in most of these cases, mostly upholding the dissolution and other times in validating presidential action (***Federation of Pakistan Vs. Haji Saifullah Khan*** (PLD 1989 SC 166), ***Ahmed Tariq Rahim Vs. Federation of Pakistan***(PLD 1992 SC 646), ***Federation of Pakistan Vs. Aftab Ahmad Khan Sherpao*** (PLD 1992 SC 723), ***Sabir Shah Vs. Federation of Pakistan*** (PLD 1994 SC 738), ***Benazir Bhutto Vs. President of Pakistan*** (PLD 1998 SC 388), ***Zafar Ali Shah Vs. Pervez Musharraf*** (PLD 2000 SC 869).
- The only exception was when it restored PM Mian Nawaz Sharif in 1993. ***Mian Muhammad Nawaz Sharif VS. President of Pakistan*** (P LD 1993 SC 473).



Both Bhutto and Sharif had strained relations with the superior judiciary and may be accused of attempting to undermine its independence. Most notable in this regard is Bhutto's disregard for constitutional tradition in her 1994 decision to appoint **Justice Sajjad Ali Shah** as the Chief Justice of the Supreme Court while superseding two senior judges. This led to the ***Al-Jehad Trust*** case (***Al-Jehad Trust through Habib Wahab Ali Khairi, Advocate and 9 others Vs. Federation of Pakistan*** (PLD 1996 SC 324), in which the Supreme Court elaborated key principles for the appointment process of the High Court and Supreme Court judges, enhancing the power of the Chief Justice and bolstering the independence of the judiciary. In practice, these principles have not been consistently followed, and the judiciary has continued to be subject to pressure and manipulation. Tension between Chief Justice Sajjad Ali Shah and Prime Minister Nawaz Sharif, which started in 1997, eventually led to a division within the Supreme Court, an attack on the Supreme Court by PML party members, and the removal of the Chief Justice. This episode is viewed as a low-point in the judicial history of the country.

The Musharraf Coup and yet another 'Transition to Democracy'



- Military took over power in **1999**. A Proclamation of Emergency was declared, the constitution was put in abeyance, a Provisional Constitutional Order (**PCO**) was issued to provide a temporary governing framework, and the general assumed the office of the Chief Executive.
- In January 2000, when the Supreme Court entertained a challenge to the military coup, the judges of the superior courts were compelled to take **a new oath** of office pledging to serve under the PCO. 6 out of a total of 13 judges of the Supreme Court refused to take the oath and resigned from the bench





Supreme Court decided the case of ***Zafar Ali Shah v General Pervez Musharraf*** (PLD 2000 SC 869) 2000) and validated the coup on the grounds of the **doctrine of state necessity**. The court granted virtually unlimited powers to the military regime, including the **power to amend the constitution**. The court, however, required the military regime to **hold general elections** for the national parliament and provincial legislatures no later than **three years** from the date of the coup. The general elections were held on **October 10, 2002**.

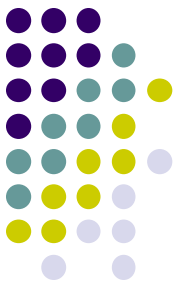


An alliance of religious parties, **the Muttahida Majlis-e-Amal (MMA)**, emerged as the prime beneficiary, along with the party loyal to General Musharraf, the **Pakistan Muslim League (Q)**. In December 2003, the regime mustered the two-third majority in parliament necessary to pass the **Seventeenth Amendment** to the Constitution, which validated almost all of the actions taken during the state necessity phase, including the **revival of the presidential power to dismiss the parliament**. Musharraf later garnered a simple majority to pass the **President to Hold Another Office Act, 2004 (PHAA)**, which seemed to violate constitutional provisions in allowing Musharaff as the Chief of Army Staff (CoAS) to also assume the office of the President. In the ***Pakistan Lawyers Forum*** case (PLD 2005 SC 719) the Supreme Court validated both the **Seventeenth Amendment and the PHAA**, based on an extension of the doctrine of state necessity. In legitimizing the power of the military and executive over the Parliament.

The Lawyers Movement



- In October 2007, when his term of office was to expire, **Musharaff** wanted to contest for the **second term and his eligibility** to do so was challenged by one of the candidates and this matter came up before the Court (an 11 Members Bench) in ***Wajihuddin v. the State*** (PLD 1996 SC 324).
- The issues involved in the said petition were twofold: whether General Pervaiz Musharraf could contest the elections notwithstanding the Constitutional restraint that no holder of public office could contest the elections unless a period of two years has elapsed between his retirement and the elections. General Musharraf was still holding the office of the Chief of Army Staff; (ii) whether the Assemblies whose term was to expire in two months time or the succeeding Assemblies would form the Electoral College in view of Article 43 of the Constitution.



- The current Assemblies had elected the President for a term of five years which was about to expire. The 11-Members Bench which was hearing the case. The arguments dragged on and when the polling day approached nearer, on the application of General Musharraf the Court instead of postponing the elections (as that would have changed the complexion of electoral college by efflux of time) allowed him to contest the elections with the rider that the Election Commission of Pakistan shall not notify the result till the final disposal of the pending petition.
- On the **2nd of November, 2007**, the counsel for the petitioner who happened to be the President of Supreme Court Bar Association as well filed an application for issuance of a restraint order against respondent General Musharraf, Chief of Army Staff, not to pass any order which had the effect of suspending the constitution or changing the composition of the court.

In the afternoon of 3rd of November, 2007, the word went around in the Capital that martial law was being imposed. Apprehending this the Chief Justice of Pakistan with the available Judges in the Capital city Islamabad assembled in the afternoon (7-Members) and passed a restraining order which reads as follows:-

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

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

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

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

(v) Put up before full court on 5th November 2007.”



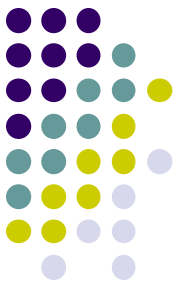
Chief of

- **Notwithstanding the order passed General Musharraf, the then Chief of Army Staff imposed the “State of Emergency”, directed the constitution to be held in abeyance, issued a provisional constitutional order prescribing a special oath for judges of the superior courts with the stipulation that those who did not take oath would cease to hold office. Out of the 18 Judges, 13 did not take oath in the Supreme Court and out of 93 Judges from all over the four Provinces of the country, 61 did not take oath. Those who did not take oath were motivated by no reason other than defending the Constitution and upholding the Rule of Law.**
- **After the general elections in February 2008, the Constitution was restored and an elected Government revived. General Musharraf resigned, and there was a growing demand for restoration of the Judges who had been removed from the Constitutional Courts. In September 2008, several of the deposed Judges rejoined the Court, and finally, on 16 March 2009, the Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry, was re-instated by an executive order of the Prime Minister of Pakistan.**

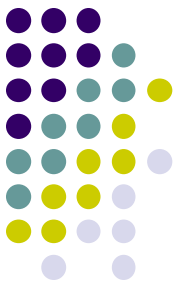


President's re-election and the continued occupation of dual office were likely to come up before the court. In a surprise move, General Musharraf, suspended the CJP from office declaring him to be non-functional" on March 9, 2007, and moved a reference for the CJP"s accountability before the Supreme Judicial Council (SJC) under Article 209 of the Constitution.

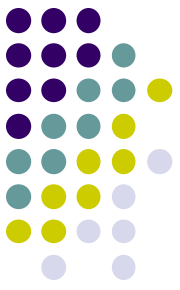
This move was widely seen as a *de facto* dismissal of a sitting CJP and resulted in widespread protests from the legal community. The CJP"s suspension and the proceedings of the SJC were challenged before the Supreme Court of Pakistan. As the lawyers" movement for the reinstatement of the CJP gained momentum, the SC announced its decision in a short order on July 20, 2007.



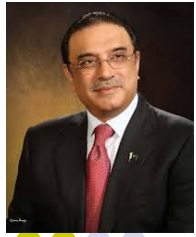
- The court **invalidated the suspension of the CJP** and reinstated him to his position. This case considerably enhanced the powers and the prestige of the position of the Chief Justice of Pakistan. In the aftermath of the reinstatement, the SC began to focus on **political and constitutional issues**.
- The court insisted on ensuring equal opportunities for electioneering to the opposition political parties, including the return of the leaders of the main opposition political parties who had been in exile. The court supported Mian Nawaz Sharif's plea for return to Pakistan, and began to prosecute contempt of court charges against the highest levels of the Executive Office for deporting Sharif in violation of its judgment.



Supreme Court granted an injunction against a presidential ordinance passed on the eve of the presidential elections, the [National Reconciliation Ordinance \(NRO\)](#), designed to grant immunity from corruption charges to Benazir Bhutto and her party members in return for a softer stance with regard to General Musharraf's re-election for a third term. The court began to display the confidence that it had by far the most, democratic support and legitimacy when compared to the outgoing civil executive, the legislatures, and a president whose approval rating had been plummeting in the aftermath of the confrontation with the CJP.

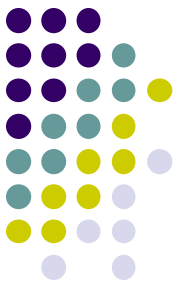


- General Pervez Musharraf contested the election for the office of the President of Pakistan on **October 6, 2007**, and **secured more than fifty-five percent of the votes** cast by the members of the national and provincial legislatures that form Pakistan's Electoral College. However, the SC declared that he may not take the oath of office until the SC decided a number of petitions challenging his candidacy on the grounds that his re-election while still being the COAS violated the Constitution.
- On **November 3**, seemingly fearing an adverse decision by the SC, General Musharraf imposed a **state of emergency**. The blueprint of the legitimating of military takeovers was put into place once again, with a PCO and fresh oath of office required of the judges. However, an overwhelming majority of the judges of the Supreme Court and the High Court refused to take the oath or to validate the imposition of emergency.



- In the run-up to **Parliamentary elections**, which took place on February 18, 2008, both of the main opposition parties, the **PPP and PML-N**, elevated the issue of the **reinstatement of the judges** who had refused to take the oath under the PCO. The elections were an overwhelming rebuke of Musharraf and the PML-Q, which lost many of its Parliamentary seats. The **PPP and PML-N formed a coalition government**, with the issue of reinstating the judges high on their agenda. Initial efforts failed, however, when the two parties failed to reach an agreement on the appropriate legal process for reinstating the judges. The PPP subsequently drafted a package of constitutional amendments, which repealed many of the provisions of the Seventeenth Amendment to curtail executive power, and set the stage for reinstatement of the judges while limiting certain powers of the Chief Justice. This was passed in the form of 18th amendment which is currently is under challenge before the Supreme Court.
- In **August 2008**, **General Musharraf resigned** as President amidst a threat of impeachment by the legislators. Subsequent **Asif Ali Zardari**, chairman of the PPP, was elected as **President of Pakistan**.

Judicial Activism and the Judicial Crisis



Soon after his appointment as the Chief Justice of Pakistan (CJP) in 2005, Iftikhar Muhammad Chaudhry began to exercise the court's *Suo moto*, meaning "on its own motion" jurisdiction. Beginning with the case of *Darshan Masih v The State* (PLD 1990 SC 513), where the Supreme Court converted a telegram sent by bonded laborers into a writ petition, the Supreme Court rapidly fashioned for itself the power to take up cases of its own accord, based on letters or media reports. The court also relaxed other procedural requirements and public interest cases have increasingly come to acquire an inquisitorial or administrative inquiry mode rather than the strict adversarial model of adjudication that a common law system envisages. Articles 184(3) and 199 of the Constitution of the Islamic Republic of Pakistan, 1973, vest judicial review powers in the Supreme Court and the High Courts, respectively. The majority of these powers are based upon the prerogative writs of *certiorari*, *mandamus*, prohibition and habeas corpus.



- Two cases pursued by the Supreme Court in the latter part of 2006 became a source of significant unease within government circles. First, the Supreme Court invalidated the privatization of the Pakistan Steel Mills, rendering a judgment that painted a grim picture of economic mismanagement, failure to abide by rules and patronage of businessmen implicated in securities fraud ***Watan Party VS Federation of Pakistan (Pakistan Steel Mill Privatization Case PLD 2006 SC 587 & 697)***.
- In the second case, the Supreme Court began to pursue ***habeas corpus*** petitions brought by the relatives of the, ***missing persons*** who had allegedly been held by Pakistan's feared intelligence agencies without legal process. This case brought unwanted attention to the government's increasingly unpopular role in the US-led War on Terror and its prosecution of the campaign against separatists in the Baluchistan province. The Supreme Court's decisions in these cases were preceded by several cases decided by the High Courts, which had challenged the abuse of powers by the executive.⁶ It was only in 1988 when the Supreme Court decided ***Benazir Bhutto v Federation of Pakistan*** (PLD 1988SC 416), that these broad constitutional powers were discovered and the seeds of public interest or social action litigation were sown.

Islamization' of Laws in Pakistan

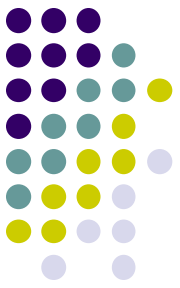


- **Objectives Resolution of 1949**, adopted as the original preamble to the 1973 Constitution of Pakistan (and later incorporated as a substantive provision, **Art. 2-A, during the Zia era**) made explicit reference to the “principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam” as a foundational principle of the constitution.
- **1956 Constitution of Pakistan** provided a specific mechanism for the, Islamization of laws. The powers of bringing the laws of the land into conformity with Islamic law were granted to the Parliament and an advisory body (**Islamic Ideology Council**) was created to provide suitable suggestions.
- **The Constitution of 1973** preserved this approach to Islamisation.

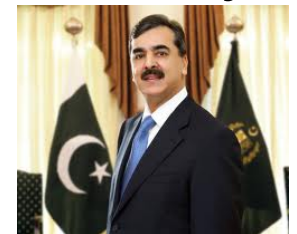


- In 1977, **Zulfiqar Ali Bhutto**, under pressure from an opposition alliance that included the religious political parties, announced measures such as prohibition on the consumption of alcohol and declaration of Ahmadis to be non-Muslims.
- **General Zia ul Haq** took steps for enforcement of *Shari'a*. The Hudood' laws were introduced. These are **five presidential ordinances** that introduced new sexual and property offenses, maintained the prohibition on the consumption of alcohol, and provided for exemplary Islamic punishments such as stoning to death (for adultery), whipping and amputation (for fornication and theft).
- The Islamic courts, which were created by an amendment to the constitution in exercise of the emergency powers. The Shariat Courts, including the **Federal Shariat Court (FSC)** and the **Shariat Appellate Bench of the Supreme Court (SAB)**, both of which are appellate courts, were empowered to review any law for conformity with, the injunctions of Islam" and declare any offending law, including parliamentary legislation, to be null and void.

Important Amendments in the 1973 Constitution.



- Zia-ul-Haq's Islamization process of 1977.
- 8th amendment and political crisis due to it which resulted in dissolution of assemblies and Governments (e.g. Junejo, Benazir and Nawaz Sharif)
- Nawaz Sharif 13th amendment.(restoration of 1973 constitution in its original form)
- Pervaiz Musharaf 17th amendment.(restoration of 8th amendment with extra powers for the President)
- Yousuf R Gilani 18th amendment.(curtailment of Presidential powers 58-2b and appointment of Army heads, governors etc)



Each one of you is a bright light of
creativity and intelligence

