

established by the three provinces.¹⁵ Similarly, on the request of the Provincial Assembly of Balochistan, the Parliament by statute extended the provisions of Article 212(2) of the constitution with effect from 19 May 1976 to the service tribunal established for Balochistan.¹⁶ Appeal was provided to the Supreme Court against the decisions of the administrative courts or tribunals only in case the Supreme Court grants leave to appeal on a substantial question of law of public importance.

The Bhutto regime initiated a programme of 'lateral entry' into the public service. Over a three-year-period, 514 men and women holding mid-career positions in government, business, industry, universities, and the professions were appointed to middle management and higher positions in the central and provincial governments.¹⁷ Appointments were made upon a scrutiny of the candidates' credentials in the Establishment Division, a written examination, an oral examination, or a combination of all of them. Waqar Ahmad, the establishment secretary at the time, maintained that 95 per cent of the 'political element' had been eliminated in these appointments and that Bhutto himself had rejected the recommendations of some of his ministers because the persons concerned were not worthy enough. Even if Waqar Ahmad had understated the number of political appointees, it seems that most of the lateral entrants were professionally competent.

The new appointees filled the vacancies created by the departure of Bengali officials following the separation of East Pakistan, especially in the foreign office, and those created by the retirements and dismissals ordered under martial law regulation number 114. Bhutto maintained that, in the first place, these large number of vacancies could not have been promptly filled through the usual entry level competitive examinations. Secondly, these appointments served to break open the CSP's fortress of special preserves. A lateral entrant placed as a permanent secretary or additional secretary in a ministry could be supervising CSP officers who had already put in twenty years of service. Thirdly, the new entrants were doubtless aware that they owed their positions to the Bhutto regime and had reason to be loyal to it. They could thus be counted upon to serve as a counterpoise to the conventionally established higher civil servants, particularly the CSP.

First Amendment: Recognition of Bangladesh

Ever since the secession of East Pakistan in December 1971, the question of recognition of Bangladesh was a sensitive political issue in Pakistan. Opposition parties were resisting the recognition of Bangladesh. Although Bhutto appeared to be inclined towards recognition and perhaps had released Mujib for the purpose, he was not confident enough to take a definite step in this difficult and sensitive matter particularly when his own role in the breakup of Pakistan was far from clear. He was under constant accusation for masterminding the breakup of Pakistan. He was looking for ways and means to resolve this issue without appearing too keen to recognize Bangladesh. Bhutto referred the matter for the opinion of the Supreme Court and some hearings were held but the matter was still pending when the 1973 Constitution was enforced.

The Constitution also kept the matter open. While describing the territories of Pakistan, East Pakistan was omitted, but it was laid down that the Constitution would be appropriately amended so as to enable the people of East Pakistan, as and when foreign aggression in that province and its effects were eliminated, to be represented in the affairs of the federation.¹⁸ Finally, the opportunity to recognize Bangladesh presented itself in February 1974. The Second Islamic Summit Conference was going to be held at Lahore. The absence of representation from Bangladesh, the second most populated Muslim country, would have been seriously felt. On this occasion, Bhutto, under the blessings of King Faisal of Saudi Arabia, Qaddafi of Libya, and others heads of state from Muslim countries attending the conference, invited Mujib to attend the conference. Mujib was not willing to come unless he was treated as head of the government of a Muslim country and that his country was recognized as a separate national entity. Keeping this difficulty in view, Pakistan recognized Bangladesh and this issue was put to an end once and for all. Whatever the role of Bhutto in the East Pakistan crisis, it can be said with all fairness to him that there was no justification to keep this matter pending endlessly, particularly when the creation of Bangladesh was a reality, howsoever bitter it might be. The recognition of Bangladesh was a recognition of reality.

Consequent to the recognition of Bangladesh, Article 1 of the Constitution was amended under the First Amendment, thus deleting Clause (2) from it which provided for representation of East Pakistan in the federation of Pakistan after the effect of foreign aggression over them were eliminated.¹⁹

Other important amendments to the Constitution brought about by the First Amendment were as under:

1. Article 17 pertaining to the freedom of association was amended providing for reasonable restriction on this freedom to form associations imposed by law in the interest of sovereignty or integrity of Pakistan. Such law was also to provide that where the federal government declared that any political party had been formed or was operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the federal government should, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference would be final. In keeping with this constitutional amendment, Political Parties Act, 1962 was also amended to the same effect and in addition to provide that on such declaration by the federal government, the political party, against which the declaration was made, would stand dissolved and all its properties and funds forfeited to the federal government.²⁰ It was under these provisions of the amended constitution and Political Parties Act that NAP was later dissolved in 1975 with the matter referred to the Supreme Court.
2. The maximum period intervening the two successive sessions of the Senate, the National Assembly, and the Provincial Assemblies, was reduced from 130 days to 90 days.
3. Chief Justice of a High Court could require a judge of another High Court to attend the sittings of his court provided the judge so asked consented to it and the President approved the same after consultation with the Chief Justice of Pakistan and the Chief Justice of the High Court of which he was the judge.
4. On the establishment of a service tribunal, all proceedings pending before any court, in relation to the terms and conditions of service

of employees to which the jurisdiction of such tribunal extended, would abate.

Second Amendment: Ahmadis Declared Non-Muslims

It has been discussed above that an anti-Ahmadiya movement in the early 1950s in Punjab turned into a rebellion against the state and martial law was imposed in the city of Lahore in March 1953 to control the riots. This anti-Ahmadiya agitation brought down the government of Mian Mumtaz Muhammad Khan Daultana in the province and severely shook the government of Prime Minister Nazimuddin at the Centre. Another such agitation erupted in 1974 and seriously threatened the Bhutto regime.

On 22 May, a group of 160 students from Multan boarded a train to Peshawar. As the train stopped at Rabwah, a predominantly Ahmadi town that housed the community's spiritual and organizational headquarters, it was alleged that hundreds of them came out and shouted slurs and offensive slogans. Upon their return from Peshawar on 29 May, they stopped at Rabwah again. This time, the Ahmadis were ready. Hundreds of them, armed with knives and sticks, fell upon the students and injured more than thirty of them. News of this event infuriated the Muslim community throughout the country. The Punjab government promptly arrested seventy-one men in Rabwah and appointed Mr Justice K.M.A. Samadani, a judge of the Lahore High Court, to investigate the incident and submit his findings. Hanif Ramay, the Chief Minister, appealed for calm and asked the people not to make this breach of public order into a sectarian issue.²¹

But calm was not to be had. Nor would the opposition parties and leaders forgo the opportunity of embarrassing Bhutto. Islamist parties, like the Jamaat-e-Islami, Majlis-e-Ahrar, the Khaksars, student groups, and prayer leaders in mosques demanded the dismissal of Ahmadis from key posts in government, the disarming of their youth organizations, and the making of Rabwah, which they alleged had become a 'state within a state', into an 'open city'. Violent demonstrations began and continued for a week in all major cities of the Punjab.

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Enraged crowds burnt down the houses of Ahmadis and their shops, gas stations, and factories. The leaders of the agitation called for a countrywide general strike on 14 June to protest the government's tardiness in meeting their demands which now included the designation of Ahmadis as a non-Muslim minority.²²

The agitation slowed down and became essentially non-violent after a week. This improvement resulted partly from the way Bhutto reasoned out the issue with the people in his statements and speeches, and partly from the provincial government's readiness to use force to discourage violence. The government imposed partial censorship to prevent commentaries on the subject from becoming inflammatory and arrested hundreds of demonstrators (most of whom were subsequently released).

Bhutto and other official spokesmen stated repeatedly that the government would protect the life and property of all citizens regardless of their religious affiliation and, to this end, they would use the army if necessary. In addition, Bhutto suggested that an Indo-Soviet 'lobby' had inspired the anti-Ahmadiya disturbances to weaken Pakistan. In a statement to the press on 31 May, Bhutto asked: 'Is our response to India's atomic blast to be that we shall quarrel among ourselves and attempt to tear ourselves apart?'²³ Speaking in the National Assembly on 3 June, he opposed discussion of the Ahmadiya question in the House until after public order had been restored. Those in the opposition who wanted immediate discussion wished only to intensify the agitation and ruin the country, he declared.

Bhutto maintained that there was no need for an agitation because the government, the opposition, and the people at large had the same belief on the issues. He asked the nation to consider the Ahmadiya question at the appropriate time and do so calmly and sensibly, without hatred and bigotry. Bhutto addressed the nation on radio and television on 13 June. He urged patience, peaceableness, and civility. The Ahmadiya question, he said, had been in the public domain for ninety years and it could not be resolved in a day. It must be settled with due regard to the feelings of the people and considerations of national solidarity. He assured his listeners that he would place the issue before the National Assembly which would then discuss it. He maintained that the

issue had already been settled in the 1973 Constitution but went on to suggest that the assembly might nevertheless refer it to the Advisory Council of Islamic Ideology. He added that the members of his own party in the assembly would be free to vote on the subject according to their conscience.²⁴

As one might have expected, the *ulema* and their associates did not find Bhutto's assurances satisfactory. Mufti Mahmood, head of the JUI, suspected that Bhutto did not intend to honour the Muslim nation's demand and that he meant to put it in 'cold storage'. The 'Action Committee' of an organization dedicated to preserving the belief in the finality of prophethood of Muhammad (PBUH), '*Tahaffuz-e-Khatm-e-Nabuwat*', asserted that it would not be enough for the assembly to pass a mere resolution or to refer the matter to the Advisory Council of Islamic Ideology; it must pass a Bill declaring the Ahmadis a non-Muslim minority. Leaders of the Islami Jamiat-e-Tulaba took the same position, demanded quick action, and warned that Bhutto would not remain in power if he continued his 'double talk' on the Ahmadiya question.²⁵ Opposition members in the Punjab Assembly spoke to the same effect, and so did Mian Tufail, '*amir*' of the Jamaat-e-Islami, and Nawabzada Nasrullah Khan, president of the Pakistan Democratic Party (PDP). It seemed the issue would not go away, and violence could begin again. Finally, Bhutto relented and took the issue to the National Assembly which, after extended considerations, passed the Second Amendment to the Constitution in September 1974.²⁶

Clause (3) was added to Article 260 explaining thereunder who is a non-Muslim. This Article pertains to definitions under the Constitution. The new clause stated that 'a person who does not believe in the absolute and unqualified finality of the Prophethood of Muhammad (PBUH) as the last of the Prophets or claims to be a Prophet, in any sense of the word or of any description whatsoever, after Muhammad (PBUH), or recognizes such a claimant as a Prophet or a religious reformer, is not a Muslim for the purposes of the constitution or law'. Still this definition or explanation did not specifically refer to the Ahmadis, therefore, Article 106, which pertains to the formation of provincial assemblies and distribution of the seats within such assemblies was also amended to make mention of Ahmadis amongst

conspirators, were found guilty by the special military court and were sentenced to heavy terms of imprisonment. These trials afforded an opportunity to Ziaul Haq to attract the attention of Bhutto. He worked closely with Bhutto who personally examined the relevant trial papers and intelligence reports.³⁰

Third Amendment: Victimization of Political Opponents

It has been discussed above that the Bhutto's government was becoming increasingly intolerant and repressive towards its political opponents who were being arrested and detained. These political opponents were forced to knock the doors of the judiciary which did not have too high a morale. The judgments were mostly in favour of the government and, once in a while, some relief was allowed to political opponents. Even this limited judicial interference in his dealing with political opponents was not seen with favour by Bhutto and his colleagues. A policy for the curtailment of powers and jurisdiction of courts, including a general plan to demoralize the judiciary, was adopted. An amendment was introduced in the Code of Criminal Procedure prohibiting the courts from granting bail before arrest to a person unless a case was registered and that an order of bail would be effective only regarding the case that stood registered against him and specified in the order.³¹ Previously, the courts had allowed blanket bail before arrest to political opponents in cases registered and to be registered as part of the process of such victimization.³²

A constitutional amendment was introduced to curtail the rights of a *detenu* detained under a law for preventive detention, extending the powers of the detaining authority. Article 10 of the Constitution which provided for certain safeguards against preventive detention was amended in February 1975 under the Constitution (Third Amendment) Act, 1975³³ to the following effect:

- (a) The period of preventive detention for a *detenu* was originally fixed at one month, beyond which period no law for preventive detention could authorize preventive detention unless the appropriate Review Board,³⁴ after affording the *detenu* an opportunity of being heard in person,

reviewed his case and reported that, in its opinion, there was sufficient cause for continuation of detention beyond one month. This initial period of detention was extended from one month to three months under the third amendment.

- (b) Under the constitution originally, it was required that a *detenu* held under a law for preventive detention should be communicated the grounds of his detention not later than one week of such detention so that he could make representations against the order of detention at the earliest. The Third amendment extended this period from one week to fifteen days.
- (c) The constitution limited the total period of preventive detention to the maximum of twelve months within a period of twenty-four months. However, an exception to this limitation was for a person who was employed by, or worked for, or acted on instructions received from the enemy. Such person could be detained indefinitely. This exception was extended under the third amendment to include any person 'who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a federal law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity'.

It is obvious that the Third Amendment curtailed the rights of political *detenus* and correspondingly enhanced the powers of the government. It also enabled the government to put political opponents under detention for an indefinite period after accusing them of indulging in anti-State activities. By the time the Third Amendment was passed, action against the NAP had already been taken and this amendment enhance of the powers of the government to deal with a political opponent firmly and to put its leadership under indefinite detention.

The Third Amendment also extended the period of Emergency proclaimed by the President. Under the Constitution in its original form, the period of such Emergency could be six months at the most and that also by the resolution of a joint sitting of the two

Houses of the Parliament.³⁵ The Third Amendment provided that the Emergency would continue indefinitely until a resolution disapproving the proclamation was passed by the votes of the majority of the total membership of the Houses in joint sitting. This amendment was also retrogressive in nature, extending the powers and period of emergency, particularly in view of the fact that Pakistan remained under Emergency for more than twenty years, for political rather than national reasons.

Fourth Amendment: Jurisdiction of Courts Curtailed

The Bhutto government's decision to curtail the powers and jurisdiction of the courts preventing them from granting relief to political opponents, particularly in exercise of constitutional jurisdiction under Article 199, came about under the Fourth Amendment to the Constitution.³⁶ High Courts were forbidden from prohibiting the making of an order for preventive detention of a person or to grant bail to any one so detained. This was a major curtailment of constitutional jurisdiction of High Courts denying them jurisdiction to come to the aid of political victims or even to grant such people bail during their detention.

The constitutional jurisdiction of the High Courts was also curtailed in the matter of stay of recovery, assessment, or collection of public revenues. Any stay order granted in such a matter would cease to have effect on the expiry of sixty days unless the matter was finally decided by the Court within such time. All such interim orders made by a High Court before the fourth amendment would also cease to have effect on the expiry of sixty days.

The only redeeming feature of this amendment was the allocation of six special seats to the minorities in the National Assembly and an increase in the number of seats for the minorities in the provincial assembly of the Punjab from three to five.

This amendment was passed in a very unfortunate manner. Members of the opposition in the National Assembly wanted to have a debate particularly regarding the curtailment of the powers of the High Courts. They were denied the opportunity to speak

and were physically thrown out of the National Assembly by the security staff led by Sergeant-at-arms. A vote on this amendment was then rushed through in the absence of the opposition.³⁷ It is indeed true that Bhutto had more than the requisite two-third majority in the National Assembly to push through any constitutional amendment but it was against all norms of decent democratic behaviour to gag the voice of the opposition in the assembly and to subject the members of the opposition to the humiliation of being physically maltreated and pushed and thrown out of the assembly.

National Awami Party (NAP) Banned and the Supreme Court Judgment

The Bhutto regime had projected the NAP-JUI governments as incapable of maintaining law and order, but the state of public order did not improve after their dismissal. An insurgency raged in Balochistan. In 1974 and later, several bomb explosions occurred in the NWFP. Bhutto, his ministers, and the pro-government media charged that the NAP leaders, had planned these explosions to spread chaos in the country and to damage its unity and integrity in collaboration with the government of Afghanistan. On 8 February 1975, an explosion killed Hayat Mohammad Sherpao³⁸ as he rose to address a gathering of students at Peshawar University. A few days later, the central government declared the NAP to be an unlawful organization, closed down its offices, and arrested many of its leaders in the NWFP and in Balochistan, including Wali Khan. Members of the National Assembly and the provincial assemblies of NWFP and Balochistan belonging to the NAP and unwilling to change their affiliation were removed, enabling pro-Bhutto groups to establish secure legislative majorities in these provinces.

The background of this swift and sweeping action against NAP and Wali Khan was the continuing rivalry between the PPP and the NAP and the underlying conflict between the personalities of Bhutto and Wali Khan who had emerged as a principal opponent at the national level having been designated as leader of the opposition in the National Assembly. One could see that, during the 1970s, for

right of self determination in the existing circumstances would amount to a breakup of the existing structure of the country and achievement of this goal by force, if necessary, amounted to operating in a manner prejudicial to the sovereignty and integrity of the country.

- (e) That the characterization of the two-nation theory as a spurious slogan raised to seek partition of India, and the suggestion that once the objective had been attained, the theory ceased to be of any validity, and the standpoint that the founder of the country had recounted his views about polity in the country and desired it to be a secular state were all complete distortion of facts.

The judgment of the Supreme Court in the NAP case suffers from several weaknesses:

- i. It was an *ex-parte* judgment based on *ex-parte* proceedings.
- ii. The objection to the two judges on the Bench was not without force and substance and they should have voluntarily withdrawn from the case rather than create the unpleasant situation of forcing one-sided proceedings.
- iii. The manner in which the objection was disposed of and the reasoning adopted give the impression of an unfriendly, if not hostile, attitude of the Court towards the respondent party and its leaders.
- iv. The conclusions reached by the Court against the NAP and its leadership were harsh and based upon inherently inadmissible evidence.
- v. The applications of certain politicians and political parties for being impleaded in the proceedings were summarily dismissed.

It was indeed the last major judgment given by Mr Justice Hamoodur Rahman who retired soon after its announcement. He had been a good judge and wrote some outstanding opinions. This judgment and the proceedings on which it was based were certainly a disappointment.

Fifth Amendment: Chastizing the Judiciary

The State of the Judiciary in 1976

Pakistan inherited a fairly good judicial structure with judges known for their competence and integrity. The first Chief Justice of Pakistan, Mr Justice Abdur Rashid, was known to be extremely discreet. He strictly followed the tradition of remaining aloof and avoided going to public functions. He was a man of unimpeachable character and reputation. His successor, Mr Justice Muhammad Munir, though a learned and competent man, proved to be controversial. He was responsible for certain disastrous judgments, which have been discussed above, that rocked the boat of Constitution during Pakistan's formative years. He was also known for having favourites amongst judges and lawyers, one of whom was Sardar Muhammad Iqbal. Mr Justice Munir was succeeded by Mr Justice Shahabuddin and Mr Justice A. R. Cornelius who were both men of character, integrity, and competence.

When Munir became Law Minister in 1962, he got Sardar Iqbal appointed as a judge of the West Pakistan High Court. Along with him was appointed Maulvi Mushtaq Husain. They soon became rivals and, in the process, extended their rivalry amongst judges in the West Pakistan High Court and amongst the members of the Bar. They caused the judges and the lawyers to be divided into factions led by either one of them.

Matters became worse when Sardar Iqbal was appointed as Chief Justice of the Lahore High Court in 1972 on the elevation of Chief Justice Anwarul Haq to the Supreme Court. It was a consistent practice and tradition of the court in Pakistan and India that Chief Justices of High Courts were elevated to the Supreme Court and they accepted such elevation with grace and gratitude. In defiance of this practice, Sardar Iqbal did not to accept elevation as a judge of the Supreme Court. He preferred as Chief Justice because he was administering huge judicial set-up in the province of Punjab with hundreds of civil judges and scores of district judges under him.

Maulvi Mushtaq also decided not to accept the elevation to the Supreme Court and stayed on as Senior Puisne Judge of the Lahore High Court, thus breathing down the neck of his opponent. They

were wary of one another and the grouping and factionalism amongst judges and lawyers further intensified and polluted the environment at the Bench and the Bar. In the meantime, a number of judges of the Lahore High Court junior to both of them were elevated to the Supreme Court.⁴⁵

The method and manner of appointment of judges were affected by considerations of political patronage, nepotism, and favouritism, particularly under Ayub. He appointed a brother of a politician from NWFP who had helped him in the Presidential election of 1965 as a judge of the West Pakistan High Court. He also held interviews for the recommendees and made appointments for political considerations or personal reasons which were highly subjective and whimsical.

Another unfortunate practice that developed amongst members of the judiciary was based on nepotism. The chief justices started promoting their own sons and sons-in-law or those of their colleagues on the Bench obliging one another for mutual benefit of their kith and kin. Whenever a son returned from abroad, with or without a foreign law degree, or started law practice, he was widely introduced by his judge father to his uncle judges with the understanding that he should be looked after. Naturally, law practice of the sons and sons-in-law of the judges flourished overnight to the chagrin and frustration of the less privileged members of the Bar. They were engaged on fabulous fees with the expectation that they would obtain relief due to personal reasons, which they actually did in many cases. Besides, they carried awe for the members of subordinate judiciary whom they easily frightened with their overbearing attitudes and arrogance. Those who did not make it in the law practice despite all advantages and benefits got appointed as law officers and were eventually elevated to the Bench.

Such was the state of judiciary when the Constitution (Fifth Amendment) Bill was moved before the parliament.

Debate on the Fifth Amendment Bill

Constitution (Fifth Amendment) Bill was introduced in the National Assembly on 1 September 1976 providing for the establishment of separate High Courts for Balochistan and Sindh, extending the period of separation of judiciary from the executive, fixed terms of the Chief Justices of the Supreme

Court and the High Courts, compulsory transfer of judges from one High Court to another, powers of punishment for contempt of court, and restriction of jurisdiction of the High Court to grant interim bail.⁴⁶ During the debate on the amendment Bill in the National Assembly, the judiciary came under severe criticism. Federal Education Minister, Mr Abdul Hafeez Pirzada, in his speech on the Bill said that the judiciary had been trying to encroach upon the functions of the legislature and the executive. He said that if the judges were not happy with their positions, then they should quit their office and contest elections to occupy seats in the parliament.⁴⁷ He said that the judiciary was the creation of the Constitution and drew powers from it to impart justice within the given jurisdiction. Any action outside the jurisdiction conferred by the Constitution would tantamount to subversion and high treason. He also said that there was an unfortunate confusion over the limits of the powers of the judiciary and it was the duty of the legislature to remove it. He defended the fixing of tenures of the Chief Justices of the Supreme Court and the High Courts because all other state positions like the President, the Prime Minister, and members of parliament had a fixed term of office. He said that in the present position, one could visualize the frustration of the other judges if the incumbent Chief Justice continued for fifteen years or more. According to him the appointment of a Supreme Court judge was given to the best talent and it was justified to retire a judge of the High Court if he did not accept appointment as Supreme Court judge.

Winding up the debate on the Fifth Amendment Bill, Bhutto said that his government wanted 'harmonious co-existence' of all three organs of the state, legislature, executive, and the judiciary with none of them transgressing into the orbit of the other. He stressed that independence of the judiciary did not mean the supremacy or sovereignty of the judiciary. In a parliamentary system, he said, sovereignty belonged to the legislature elected by the people. Bhutto emphasized that the fundamentals of the Constitution were not being touched upon though the parliament was empowered to change the Constitution, amend it, or even scrap it if it so liked. He endorsed Pirzada's speech and said that the judiciary had to be subordinate to the law. It could not become a parallel legislature or executive. He said

that the Fifth Constitutional Amendment had been necessitated by repeated decisions of the judiciary trespassing into the field of the executive.⁴⁸

The Constitution (Fifth Amendment) Bill was passed by the National Assembly on 5 September 1976 by 111 votes. The opposition staged a walk out during the second reading of the Bill.⁴⁹ The Bill was passed by the Senate on 8 September 1976 and became an Act on 15 September 1976 on receiving the assent of the President.⁵⁰

Constitution (Fifth Amendment) Act, 1976

The Fifth Amendment brought about the following major changes in the Constitution:

- (a) The Governor of a province was not to be a permanent resident of that province.
- (b) The period for separation of the judiciary from the executive was enhanced from three years to five years.
- (c) The Chief Justice of the Supreme Court, unless he retired earlier on attaining the age of sixty-five, would hold office for a period of five years.
- (d) In the same manner, the Chief Justice of a High Court would hold office for a period of four years.
- (e) On the completion of the term of office as the Chief Justice of the Supreme Court or a High Court, as the case may be, he would have either of the two options, to retire from his office and receive the pension to which he would have been entitled had he retired from office on attaining the age of retirement; or to assume the office of the most senior of the judges of the court concerned and to continue to receive the same salary which he was receiving while holding the office of Chief Justice.
- (f) A Chief Justice, who continued after the completion of his term of office as senior most judge, could not even be appointed as acting Chief Justice in the absence of the Chief Justice or when vacancy occurs in the office of Chief Justice.
- (g) The term of office of the Chief Justice was to apply to those Chief Justices too who were appointed prior to the enactment of the Fifth Amendment.
- (h) The power of the Supreme Court to issue directions, orders, or decrees was made subject to the Article 175(2) of the constitution, which states that 'No court shall have any jurisdiction save as is or may be conferred on it by the constitution or by or under any law'. Thus the Supreme Court's jurisdiction was restricted to what was expressly granted under the constitution or a law.
- (i) The common High Court of Sindh and Balochistan was dissolved and separate High Courts for these two provinces were to be established.
- (j) The Supreme Court and the High Court were forbidden from making any order under Article 199 prohibiting the making, or suspending the operation, of an order for the detention of any person under any law providing for preventive detention; releasing on bail any person detained under any law providing for preventive detention; releasing on bail, or suspending the operation of an order for the custody, of any person against whom a report or complaint had been made before any court or tribunal, or against whom a case had been registered at any police station, in respect of any offence, or who had been convicted by any court or tribunal; prohibiting the registration of a case at a police station, or the making of a report or complaint before any court or tribunal, in respect of an offence; or granting interim relief to any person referred to above.
- (k) All the orders, whether made by the Supreme Court or a High Court, making of which was being forbidden under the Fifth Amendment, were to become ineffective after the commencement of the Fifth Amendment and all applications for such orders were to abate.
- (l) A judge of a High Court could be transferred to another High Court for a period upto one year without his consent and without the consultation of the Chief Justices concerned.
- (m) Article 204, regarding contempt of court, was amended and the power of the High Courts to punish a person for contempt of court was made subject to ordinary law.

climate in the country leading to further flight of capital.

Then came the major step of nationalization of banks in March 1974. All banking companies registered under the Company Law in Pakistan were nationalized and the ownership, management, and control of all banks stood transferred to and vested in the federal government.⁵⁵ The federal government or a corporation wholly owned or controlled by the federal government, got the exclusive right to establish a bank. The compensation provided to the shareholders of the nationalized banks was neither adequate nor prompt. Like the previous nationalizations of the Bhutto era, it was also virtually expropriation of the assets of others. A Pakistan Banking Council was constituted to make policy recommendations to the federal government, formulate policy guidelines for banks, evaluate their performance, determine the area of co-ordination between them, and to assist them in the management of banks. The timing of nationalization of banks could not be worse. It came at a time when the Arab countries were in confrontation with the West due to Arab-Israel war of October 1973 and had cut off or reduced the supply of oil to western countries. This was an opportunity for Pakistan to encourage Arab countries to invest in banks in Pakistan or to establish their own banks. The Arab petro-dollars could have come in a big way into Pakistan which could have been made available for the development of the country.

Last in the series of nationalization was the most shocking of all. In July 1976, through three ordinances, flour mills, rice mills, and cotton ginning factories throughout the country were nationalized.⁵⁶ These ordinances were followed by identical Acts of the parliament on these subjects in September 1976.⁵⁷ The factories or nationalized units were generally very small, run by a few people or at times by the members of single family. Many of them were small businesses which could not even be described as industrial units. Many families were deprived of their only source of income and were even displaced and made homeless by the cruel and callous bureaucrats who took over these units, particularly where a family had its residential quarters within the premises of the unit. In the ultimate analysis, this nationalization caused colossal

loss to the national treasury and the people of Pakistan.

The question is why did Bhutto do all this? The nationalization of banks and heavy industry could be justified on an ideological plane, the PPP had socialist pretensions, but the nationalization of small seasonal industrial units like vegetable oil units, rice mills, flour mills, and cotton ginning factories could not be justified on any ground whatsoever. Whatever the reason this senseless nationalization did cost the country heavily and Bhutto and his party also paid dearly for it. These deprived and dejected traders, businessmen, and industrialists became the standard bearers, financiers, and front-liners of the PNA movement of 1977 because they were fighting for their survival and wanted to settle the issue with Bhutto and his party once and for all. They also became staunch supporters of the martial law regime of Ziaul Haq and co-operated with him in resisting the PPP's return to power.

Sixth Amendment to the Constitution

The Sixth Amendment to the Constitution was passed rather quickly and overnight. While the National Assembly was having its last session before its dissolution prior to fresh elections, the Constitution (Sixth Amendment) Bill was placed before the parliament and was passed. The main provision of the Sixth Amendment was extending the term of the Chief Justices of the Supreme Court and the High Courts beyond the age of retirement. It was provided that the Chief Justice of the Supreme Court who had attained the retirement age of sixty-five, and a Chief Justice of a High Court, who had attained the retirement age of sixty-two and had not completed their term of office of five years and four years, respectively, would continue to hold office until the completion of their respective term of office, as the case may be.⁵⁸ Other provisions of the Sixth Amendment were minor.

This amendment is another instance of the arbitrary style of working of the Bhutto government. On the one hand, by fixing a term of office for the Chief Justices, they were forced to retire before reaching the retirement age and, on the other hand, they were allowed to continue, under the Sixth Amendment,

even after the age of retirement to complete their term of office. This Amendment was brought about in the Constitution to favour the then Chief Justice of the Supreme Court, Yakub Ali, who was due to retire in the middle of 1977 after serving for less than two years as Chief Justice. He had been very close to Bhutto and prevailed over the latter by persistent requests to allow him to remain Chief Justice for more than three years after his retirement age, even if it meant an amendment to the Constitution. Bhutto thus had the Constitution amended to accommodate a friend.

Further Land Reforms

Days before the dissolution of the National Assembly, another set of land reforms were introduced through an ordinance,⁵⁹ soon followed by an Act of parliament in the same terms.⁶⁰

The main features of these land reforms were as under:

- (a) No person should own or possess more than one hundred acres of irrigated or two hundred acres of unirrigated land or an area equivalent to eight thousand produce index units of land, whichever would be greater.
- (b) Any transfers of land made by a person holding more than the ceiling fixed, before he had relinquished the excess land, should be void.
- (c) Compensation was to be paid for the surrendered land at the rate of Rs 30 per produce index unit and that also through negotiable bonds, redeemable in ten years and carrying interest from July 1977.
- (d) Land resumed by the government, unless required for public purpose, would be granted free of charge to tenants in cultivating possession.
- (e) Land not granted to the tenants in cultivating possession was to be granted to other landless tenants or persons owning less than twelve acres.

These land reforms were never acted upon due to the political conditions that ensued, and even the operation of land reforms of 1972 was not completed.

Important Constitutional Cases

Apart from the case of F. B. Ali that has been discussed above, there were some other important constitutional cases that were decided during this period. It has also been discussed above that the Supreme Court held in *State v Ziaur Rahman*,⁶¹ while discussing the validation clause of the interim Constitution of 1973 with ouster of jurisdiction clause that in its writ jurisdiction the High Courts were not precluded from scrutinizing the orders, proceedings, and acts made, taken, or done without jurisdiction, with malafide or which were *coram non judice*. This principle was once again upheld and reiterated in another case coming before the Supreme Court after the enforcement of the 1973 Constitution while discussing the validation clause thereunder and the clause ousting the jurisdiction of the superior courts.⁶² The Supreme Court elaborated the concept of 'malafides' in this judgment and held that 'malafides' literally means 'in bad faith'. Action taken in bad faith is usually action taken maliciously, that is to say, in which the person taking the action does so out of personal motives either to hurt the person against whom the action is taken or to benefit oneself. Action taken in colourable exercise of powers, that is to say, for collateral purposes not authorized by the law under which the action is taken is a fraud on the law and is also malafide.

There was dispute over the genuineness or voluntariness of a resignation of a member of an assembly submitted to its Speaker. The High Court, in writ jurisdiction, held that 'no duty is cast on the Speaker to satisfy himself about the genuineness, proper execution, or legal effect of a resignation, or to determine a dispute concerning it'. The matter finally came up before the Supreme Court which held as under:⁶³

1. It is the duty of the Speaker to decide the genuineness or validity of a resignation for resignation cannot be equated with disqualification suffered by a member under Article 63 of the constitution.
2. A Speaker is under a duty to enquire into the validity of a resignation to take effect, for the provision giving automatic effect to resignation once it reaches the Speaker implies that the resignation is genuine and voluntary.

martial laws of Ayub and Yahya, and was imposed by the federal government under the powers it enjoyed under the Constitution.³¹ The imposition of martial law was challenged before the Lahore High Court and a full bench of the Court accepted the writ petition and declared the martial law unconstitutional.³² The Court took notice of the fact that Article 196 of the 1956 Constitution, Article 223-A of the 1962 Constitution, Article 278 of the Interim Constitution of 1972, Article 237 of the 1973 Constitution and Article 34 of the Indian Constitution all related to the powers of the Parliament to make laws of indemnity. The Court found it noteworthy that while the word 'martial law' occurs in all the aforesaid relevant provisions of the previous constitutions of Pakistan and Article 34 of the Indian Constitution, it was conspicuous in its absence in Articles 234 and 245 of the 1973 Constitution. This clearly showed, the Court held, that the framers of the 1973 Constitution intended to bury martial law as was evident in the speech of the Prime Minister on 21 April 1972. Apart from this, the Court noticed that the Articles of other constitutions provided not only for passing laws indemnifying acts done by the concerned persons (including army officers) during the period of martial law, but also provided for making laws validating any sentence passed, punishment inflicted, and forfeiture ordered during the period. But Article 237 of the 1973 Constitution does not provide for making laws validating any sentence passed, punishment inflicted, and forfeiture ordered by them (the military courts). This glaring difference clearly indicates, the Court held, that the 1973 Constitution neither envisages the imposition of martial law nor the exercise by the armed forces of any judicial functions. The Court concluded that the operation being carried out by the armed forces in the district of Lahore was not 'martial law' in any of the recognized meanings of the term.

Seventh Amendment to the Constitution

In the early days of May 1977, there were contacts between Bhutto and his assistants in the PPP with the PNA leader which were mostly confined to Sihala near Rawalpindi. Bhutto's offer of dialogue and settlement was discussed by PNA leaders and a comprehensive response was given to the offer. The

PNA demanded the immediate lifting of emergency, martial law, and section 144 of the Code of Criminal Procedure, the release of all political prisoners, dissolution of special courts and tribunals, removal of Press curbs, dissolution of National and Provincial Assemblies not later than seven days after an agreement was reached, holding of general elections to the National and Provincial Assemblies simultaneously within a period of thirty days after their dissolution, the appointment of a new Chief Election Commissioner, and the constitution of a new Election Commission with mutual consent, appointments of Governors of all four provinces with mutual consent, and changes in certain key appointments with mutual agreement to ensure free and fair polls.³³

It is noticeable that the PNA leader dropped the basic demand of Bhutto's resignation which shows a shift in their thinking and that they were disposed to dialogue and settlement. Bhutto asked the PNA leader to stop issuing calls for further demonstrations and to reduce their charter of demand if they were sincerely interested in a meaningful dialogue with the ruling party. He asked four or five of his ministers to have preliminary discussions with the PNA leader in Sihala.³⁴ There was also Saudi Arabia's effort to mediate between the PPP and the PNA. Bhutto met the PNA Chief, Mufti Mahmood, in Sihala on 12 May and expressed the hope of a settlement. The PNA, in its press release on 12 May, said that it was sticking to its basic three demands and that there would be no compromise on them.³⁵

At this point, contacts between the PPP and the PNA were temporarily suspended. Bhutto informed the National Assembly about the opposition's final 'no' to two months efforts to start a dialogue. He said that fresh elections to the National Assembly, in the conditions prevailing, would be disastrous for the nation because of the threat of foreign intervention³⁶ and grave internal problems. He said that since he had been made the central figure of the opposition's campaign, he had decided to put the matter in the hands of the people through a referendum.³⁷ He proposed that a joint session of Parliament would pass a temporary amendment to the Constitution to provide for a referendum. Accordingly, the Seventh Amendment to the Constitution was passed and became effective on 16 May 1977.

The Seventh Amendment provided for a referendum to demonstrate confidence in the Prime Minister.³⁸ The referendum was to be held in accordance with a law made by Parliament. A Referendum Commission was set up to hold the referendum, count the votes, and declare its result. If, on the final count of the votes cast at the referendum, the Prime Minister failed to obtain a majority of the total votes cast, he would be deemed to have resigned from office. Another provision of the Seventh Amendment barred High Courts from exercising jurisdiction under Article 199 in relation to any area in which the armed forces were acting in aid of the civil power in pursuance of Article 245. However, the proceedings pending before the High Courts were saved.

The Seventh Amendment was not only a novel but a rather unusual constitutional provision and was inherently repugnant to the parliamentary system. A vote of confidence is to be obtained from the Parliament in a parliamentary system and not through a referendum. If a prime minister is obliged to go to the people for a vote of confidence, then he owes nothing to the parliament and should not be answerable to it. It tantamounts to a presidential system and the prime minister literally assumes the attributes of a president after winning any such referendum since referendum is conceptionally a part of the presidential system.

Why was the proposal of holding a referendum made and enacted? Why was it not pursued after the constitutional amendment? The answer to the first question is rather simple. At that point in time, the prospects of dialogue and settlement with the opposition had become more or less negligible. Both the PPP and the PNA had taken an uncompromising stance on the three basic demands of the dissolution of the National Assembly, holding of new elections, and removal of the Chief Election Commissioner. The answer to the second question is rather difficult and complex. Nothing was heard of the referendum soon after the passing of the Seventh Amendment and no law was enacted by Parliament for the constitution of the Referendum Commission.

Parleys for Political Settlement

On 18 May 1977, Bhutto visited Mufti Mahmood at the Sihala 'rest' house (a jail for dignitaries near Rawalpindi), reiterated his willingness to hold a new election, and once again invited the PNA to talks. Negotiations began on 3 June. Abdul Hafeez Pirzada and Kausar Niazi, both federal ministers, assisted Bhutto while Mufti Mahmood, Nawabzada Nasrullah Khan, and Professor Ghafoor Ahmad spoke for the PNA. The meetings took place in the Cabinet Room of the Prime Minister's Secretariat, often in the evenings, and proceeded in a pleasant environment. Each time the PNA spokesmen arrived at the Secretariat, the Prime Minister came out and greeted them at the steps of the main building. On a few occasions at least, he entertained them to a meal and ordered special desserts for Mufti Mahmood who was known to have a weakness for sweets. There were times when the two sides appeared deadlocked, and Bhutto broke spells of awkward silence by engaging Mufti Mahmood in light chit-chat. The PNA representatives had withdrawn their demand for Bhutto's resignation and while they were firm on most other issues, they yielded on matters of detail. Bhutto, too, was conciliatory.

Bhutto had a part, unwittingly, of course, in encouraging the idea of military intervention. He involved the generals in devising his responses to the PNA agitation, discussed the political situation with them as it developed from one week to the next, invited them to Cabinet meetings, kept them posted on the progress of his negotiations with the PNA, and solicited their reactions to its proposals. Twice in these meetings the possibility of a military coup was mentioned. On 31 May, Kausar Niazi referred to it as one of the possible ways of ending the current crisis. On 14 June, Bhutto lectured the Generals on the possibility of a coup, making the rather unconvincing argument that governing a country was 'no bed of roses'. On both occasions, General Zia stood up, pledged loyalty to the Prime Minister, and assured him that he and his colleagues had no thought of taking power.³⁹ In April, Zia had advised the imposition of martial law in certain cities, but in May the corps commanders protested that the army should not be asked to shoot down people. They

The Eighth Amendment

It has been discussed above that general elections to the National and Provincial Assemblies were held in February 1985 on a non-party basis. No political party was allowed to nominate candidates in the elections. Before the parliament could meet on 23 March 1985, the Constitution was comprehensively amended through a President's Order, known as Revival of the Constitution of 1973 Order (RCO), on 2 March 1985.¹ The RCO made fundamental alterations in the Constitution and made significant departures from its original premises and concepts. As many as sixty-five Articles were amended/substituted/added/modified/varied/deleted/omitted. RCO can be regarded with justification as part of the Eighth Amendment without which the significance and importance of the Eighth Amendment cannot be fully comprehended, appreciated, or analysed.

Revival of the Constitution Order (RCO): Main Features

Important changes brought about by the RCO are briefly enumerated below:

1. Article 2A was inserted, making the Objectives Resolution of 1949 a substantive and effective part of the Constitution. The Resolution, with some modifications, had already been adopted as a preamble to the constitutions of 1956, 1962, and 1973. Now the resolution was reproduced as an annex and made an operative part, with a significant change. The sixth paragraph of the Objectives Resolution in its original form read as follows:

Wherein adequate provision shall be made for the minorities freely to profess and practise their religions and develop their culture.

While reproducing the above paragraph in the Annex, the word 'freely' was omitted.

2. The electoral college for election to the office of the President was modified so as to comprise both Houses of Parliament and all four

provincial assemblies (with equal weightage given in terms of votes to each Provincial Assembly).

3. The President was supposed to act on the advice of the Cabinet, the Prime Minister, or the appropriate minister, but he could require the Cabinet to re-consider such advice.
4. The President was empowered to dissolve the National Assembly at his discretion where, in his opinion, appeal to the electorate was necessary. On such dissolution, elections were to be called within a hundred days.
5. On the dissolution of the National Assembly, the President could ask the Prime Minister to continue in office until his successor entered the office of Prime Minister. This apparently applied to the Prime Minister in the event of either his resignation from office or where the National Assembly was dissolved on his advice. Where the National Assembly was dissolved at the discretion of the President, a caretaker Cabinet would be appointed till such time that the election of the Prime Minister had taken place on the reconstitution of the National Assembly after the general elections.
6. The seats reserved for women in the National Assembly were increased from ten to twenty. These special seats for women were only available until the holding of third general elections to the National Assembly under the Constitution.
7. The number of members in the Senate was raised from sixty-three to eighty-seven, with five seats from each province reserved for technocrats, *ulema*, or professionals. The number of seats for federally administered areas was increased from five to eight. Seats for the federal capital were increased from two to three.
8. The period of time provided for the President to give assent to the Bills passed by Parliament was increased from seven to forty-five days. The

- President could return a Bill (other than a Money Bill) within forty-five days for reconsideration. This gave the President a power to veto a Bill, but this could be overridden by passing the same Bill again by a majority of the members, present and voting, of both Houses of parliament in a joint session.
9. The President could, at his discretion, appoint any member of the National Assembly as Prime Minister who, in his opinion, could command the confidence of a majority of the members of the National Assembly. However, a Prime Minister so appointed had to obtain a vote of confidence from the National Assembly within sixty days. The Prime Minister was to hold office during the pleasure of the President, but the President could not remove him unless he was satisfied that the Prime Minister did not command the confidence of the majority of the members of the National Assembly.
 10. Federal ministers and ministers of state were to be appointed by the President on the advice of the Prime Minister.
 11. Procedure for passing the motion of vote of no-confidence against the Prime Minister was altered and the requirement of giving the name of an alternative candidate in such a motion was omitted.
 12. The provision for amendment to the Constitution was modified and under the new provision, an amendment to the Constitution could only be passed by a majority of two-thirds of the total members in the National Assembly and the Senate and by an absolute majority in all four Provincial Assemblies. The procedure for amendment to the Constitution was further modified under President's Order 20 of 1985, and the requirement of laying the Amendment Bill before the Provincial Assemblies was dispensed with except where such amendment had the effect of altering the limits of a province. In such a case, the Provincial Assembly of the concerned province had to pass the amendment by two-thirds of its total membership.²
 13. The Governor was supposed to act on the advice of the Cabinet or the Chief Minister, or appropriate minister, but he could require the Cabinet to reconsider such advice.
 14. The period of time provided for the Governor to give assent to the Bills passed by the Provincial Assembly was increased from seven to forty-five days. The Governor could return a Bill (other than a Money Bill) within forty-five days for reconsideration. This gave the Governor power to veto a Bill but it could be overridden by passing the same Bill again by the votes of the majority of the total membership of the Provincial Assembly.
 15. The Governor could appoint a member of the Provincial Assembly as Chief Minister who, in his opinion, could command the confidence of the majority of the members of the Provincial Assembly. However, a Chief Minister so appointed had to obtain a vote of confidence from the Provincial Assembly within sixty days. The Chief Minister was to hold office during the pleasure of the Governor but the Governor could not remove him unless he was satisfied that the Chief Minister did not command the confidence of the majority of the members of the Provincial Assembly.
 16. Provincial ministers were to be appointed by the Governor from amongst the members of the Provincial Assembly on the advice of the Chief Minister.
 17. Procedure for passing the motion of vote of no-confidence against a Chief Minister was altered and the requirement of giving the name of an alternative candidate was omitted.
 18. The number of general constituencies (for Muslims) of the National Assembly was raised from 200 to 207. In addition to that, ten seats for minorities were reserved. Previously, under the Fourth Amendment, six seats were provided for non-Muslim minorities. However, previously the elections to the minority seats were held in the National Assembly itself, based on proportional representation with a single transferable vote. The RCO provided ten seats for minorities, four for Hindus and scheduled castes, one for Sikhs, Buddhists, and Parsi communities and other non-Muslims, and one for Ahmadis. These members were to be elected simultaneously with members from general constituencies, on the basis of separate electorates.

19. The seats in the Provincial Assemblies of Balochistan, the NWFP, the Punjab, and Sindh for minorities three, three, eight and nine, respectively. These members were to be elected, simultaneously with members from general constituencies, on the basis of separate electorates.
20. Separate electorates for minorities were given constitutional recognition for the first time in Pakistan. Zia had previously introduced separate electorates for minorities in 1979 by amendment to the Representation of the People Act, 1976.³ The RCO, however, gave constitutional status to the separate electorates.
21. There was, however, a strange contradiction in Articles providing seats in the National and Provincial Assemblies. In Article 51, providing seats in the National Assembly, it is stated that there would be 207 Muslim members in the National Assembly (which were previously known to be general seats representing constituencies on territorial and population basis). On the other hand, Article 106, providing for seats in the Provincial Assemblies, made no specific mention of general seats belonging to Muslims only.
22. One of the most striking changes brought about by the RCO was a large number of additions to the qualifications and disqualifications for membership to the parliament. Originally, the Constitution provided for a few qualifications which included requirements of citizenship and minimum age. The disqualifications provided originally in the Constitution were also few, which included insanity, insolvency, termination of citizenship, and holding of office of profit in the service of Pakistan. The RCO made wholesale additions to these qualifications and disqualifications.
- The qualifications added under Article 62 require a candidate for the parliament to be someone:
- (a) of good character and not commonly known as one who violates Islamic injunctions;
 - (b) with adequate knowledge of Islamic teachings and practices and obligatory

duties prescribed by Islam as well as abstaining from major sins;

- (c) sagacious, righteous, non-profligate, honest and *ameen*;
- (d) with no criminal conviction involving moral turpitude or for giving false evidence; and
- (e) after the establishment of Pakistan, never to have worked against the integrity of the country or opposed the ideology of Pakistan.

The disqualifications added under Article 63 require a candidate for the parliament not to:

- (a) be propagating any opinion, or acting in any manner prejudicial to the ideology of Pakistan, or the sovereignty, integrity, or security of Pakistan, or the maintenance of public order, or the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the armed forces of Pakistan; or
- (b) have been, on conviction for any offence which in the opinion of the Chief Election Commissioner involves moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release; or
- (c) have been dismissed from the service of Pakistan on the ground of misconduct, unless a period of five years has elapsed since his dismissal; or
- (d) have been removed or been compulsorily retired from the service of Pakistan on the ground of misconduct unless a period of three years has elapsed since his removal or compulsory retirement; or
- (e) have been in the service of Pakistan or of any statutory body or any body which is owned or controlled by the government or in which the government has a controlling share or interest, unless a period of two years has elapsed since he ceased to be in such service; or
- (f) have been found guilty of a corrupt or illegal practice under any law for the time being in force, unless a period of five years

has elapsed from the date on which that order takes effect; or

- (g) have been convicted under Section 7 of the Political Parties Act, 1962 (III of 1962), unless a period of five years has elapsed from the date of such conviction; or
- (h) have, whether by himself or by any person or body of persons in trust for him or for his benefit or on his account or as a member of a Hindu undivided family, any share or interest in a contract, not being a contract between a co-operative society and government, for the supply of goods to, or for the execution of any contract or for the performance of any service undertaken by, government.

It is noticeable that some of the qualifications and disqualifications are specific and can be adjudicated upon while others are so general that if they are strictly applied, hardly anyone would qualify.

- 23. The RCO also introduced the office of Adviser to the Prime Minister. The President could appoint up to five Advisers to the Prime Minister, on the advice of the Prime Minister. However, these Advisers could not participate in the proceedings of either House of the Parliament.
- 24. The executive authority of the federation would vest in the President which should be exercised by him, either directly or through officers subordinate to him, in accordance with the Constitution. This was a clear departure from the original scheme of the Constitution which provided that the executive authority of the federation should be exercised in the name of the President by the federal government consisting of the Prime Minister and the federal ministers which should act through the Prime Minister who was the chief executive of the federation. Thus, the President was given a preponderant position over the Prime Minister. A similar provision was made regarding the relationship between a Governor and the Chief Minister of a province.

- 25. The Supreme Court was empowered to transfer any case pending before any High Court to any other High Court.
- 26. It was provided for the first time that the President could request one of the judges of the Supreme Court to act as Chief Justice of a High Court. This provision of the RCO has been grossly abused ever since. At various points in time, at least five judges of the Supreme Court have been asked to be acting Chief Justices of the Lahore High Court and the Sindh High Court for extended periods of time running into several years. This provision caused great harm to the independence of the judiciary.
- 27. The permanent Benches of the High Courts, which were mentioned in the PCO, were incorporated in the Constitution and thus their establishment was made part of the permanent Constitution. An effort was also made to establish divisional courts and there was specific mention for their establishment.⁴ Fortunately, they were never established, otherwise it could have further undermined the position and prestige of the High Courts.
- 28. The President was conferred with the discretionary power to appoint the Chairman, Joint Chiefs of Staff Committee, and Chiefs of Army, Naval, and Air Staff. This was a very important power given to the President by the PCO.
- 29. All martial law regulations, martial law orders, laws framed during the martial law regime, and acts and orders made thereunder were validated under Article 270-A. Complete indemnity against suits and prosecution was extended to all people or authorities for or on account of or in respect of any order made, proceedings taken, or act done under such regulations, orders, laws, notifications and so on.
- 30. Appointment of the Governor of a province was left to the discretion of the President.
- 31. A National Security Council was to be constituted under Article 152-A which was to include the President, the Prime Minister, the Chairman of the Senate, the Chairman of the Joint Chiefs of Staff Committee, and the Chiefs of the three armed forces.

Zia thus made sweeping changes in the Constitution before reviving it. The amendment was made immediately after the general elections and before nominating the Prime Minister and prior to the formation of a civilian government. These amendments were based on his constitutional plan which he announced on 12 August 1983. The balance of power had clearly shifted in favour of the President after the RCO and the office of the Prime Minister was relegated to a subservient and subordinate position. Zia held that the powers of the President were enhanced without reducing the authority of the Prime Minister and a balance was struck between the two. He thought that the lacunae discovered in 1977 in the powers of the President had been removed according to the constitutional and political requirements of Pakistan.⁵ He referred to the Constitution of India and said that the provisions being incorporated through the RCO regarding the powers of the President were the same as contained in the Indian Constitution. He was of the opinion that the expression used in the 1973 Constitution 'the President will act on the advice of the Prime Minister and such an advice shall be binding on him' was an insulting manner of giving powers to the President. He said that his aim was not to enjoy maximum power. When asked under what conditions he would consider it necessary to exercise the right to dissolve the National Assembly, he replied when the government, the Prime Minister, and the National Assembly lose the confidence of the people. This would mean that a situation had arisen wherein the people and the Assembly were thinking along different lines and the President could adjudge the right time to dissolve the assembly and hold fresh elections. It would be only then, he said, that he would use his discretion.⁶ His explanation of the use of discretionary power of the President to dissolve the National Assembly was very different from the way in which it was actually exercised by him after three years.

Although the RCO brought some basic changes in the structure of the Constitution⁷ which were to create constitutional and political crises in the country later on.

Civilian Government formed under Martial Law

On 10 March, Zia promulgated a new order enforcing all but 27 Articles of the amended Constitution. Twenty-one of the Articles which were left suspended, related to the fundamental rights and writ jurisdiction of the High Courts. Also unenforced, was Article 6 which described the abrogation or subversion of the Constitution as high treason punishable under the law.⁸ Elections were held to the Senate on 12 March and Pakistan finally had a parliament.

Under the RCO, the President was given the authority to nominate and appoint the Prime Minister at his discretion from amongst members of the National Assembly. Similarly, the provincial Governors were vested with the power to appoint Chief Ministers of their respective provinces from amongst the members of the Provincial Assemblies. This power of the President and the Governors was qualified to the effect that the Prime Minister and the Chief Ministers being so appointed should command the confidence of the majority of the National Assembly and the Provincial Assemblies respectively. In the party-less assemblies, there was no question of any one commanding the confidence of the majority and, therefore, appointment by the President and the Governors (to whom all the members of these assemblies looked up to) was sufficient for them to obtain a vote of confidence. That was exactly what Zia wanted; divided and dependent assemblies, with all power gravitating in his own hand and in the hands of his nominated Governors.

Zia nominated a veteran politician from Sindh, Muhammad Khan Junejo, as Prime Minister on 23 March 1985. The next day, Junejo won a unanimous vote of confidence from the National Assembly. Addressing the National Assembly, Junejo said that a civilian government could not co-exist with martial law for a long time and that the transitional arrangement should end at the earliest.⁹ In the contest of Speakership of the National Assembly, the hand-picked Chairman of the erstwhile *Majlis-e-Shoora*, Khwaja Safdar, lost to a young MNA from Southern Punjab, Fakhra Imam. The defeat of Khwaja Safdar could be attributed to his close association with Zia.

While handing over power to Junejo and his government, Zia made it clear that it was not a transfer of power from a military to a civilian government. It was at best the sharing of some of the powers by the military with the newly formed civilian government. He had the audacity to state that the plant of democracy could grow under the tree of martial law. Zia envisaged a servile and subordinate civilian government working under the umbrella of the military with him being the ultimate repository of power. Thus the concept was not the establishment of a civilian government, rather it was the introduction of 'civilianized' government under military hegemony. However, as we learnt later, Junejo had other ideas.

In the provinces, the Governors appointed the Chief Ministers. In the largest province, the Punjab, a young man in his thirties who came from an industrialist family of Lahore, Mian Nawaz Sharif, was appointed Chief Minister by the military Governor, Lieutenant-General Ghulam Jilani Khan. The most unlikely appointment was made in Sindh. A judge of the Sindh High Court, Ghaus Ali Shah, who was still serving and not a member of the Provincial Assembly of Sindh, was appointed Chief Minister. It was only afterwards that he resigned as a judge and was elected as a member of the Sindh Provincial Assembly in a by-election. All the chief ministers easily obtained a vote of confidence from their respective provincial assemblies.

Zia was soon to discover that Prime Minister Junejo had a will of his own. The main divergence was on the party system. The new Prime Minister revived the Muslim League and other registered parties were allowed to function and participate in the elections. The stringent restrictions imposed on political parties by amendments made to the Political Parties Act of 1962 were not acceptable to the PPP and its allies in the Movement for Restoration of Democracy and they refused to comply with the registration process.

During 1985, Prime Minister Junejo enhanced his prestige and power. He was elected president of the All Pakistan Muslim League and also the leader of the Muslim League Parliamentary Party. His popularity increased when he lifted the emergency and restored fundamental rights. A vast majority of the members of the National Assembly joined the

Muslim League, further strengthening the Prime Minister. Under the rules of business, the Prime Minister was the final authority in the daily administration of the State. The Prime Minister controlled the purse strings and enjoyed the privilege of appointing and transferring officials except for the chiefs of staffs of the armed forces, who were appointed by the President at his discretion.

Eighth Amendment: Compromising the Constitution

As discussed earlier, the civilian government was running the day-to-day affairs of the state. There was evidently no justification for the continuation of martial law. Junejo had promised the nation he would lift martial law and restore the Constitution of 1973. This was not easy to come by. Zia, by then, had assumed the office of President for five years as a result of the referendum of 1984 and was in no hurry to lift martial law, certainly not without iron clad guarantees that he would continue to enjoy a preponderant position and sweeping powers, and that all the laws, regulations, and orders of martial law were protected and validated. In a nutshell, Zia wanted the National Assembly and the civilian government formed under Junejo to accept his constitutional package of the RCO.¹⁰

It was in these circumstances that the Constitution (Eighth Amendment) Bill was moved. The Eighth Amendment did not make extensive changes like the RCO, it modified some of the alterations already made under the RCO. Eighteen Articles in all were amended, added, modified, varied, or omitted. Their cumulative effect was to reduce the powers of the President a little bit and to correspondingly extend the powers of the Prime Minister and the Cabinet. While the powers of the President were not curtailed in material terms, the enactment of the Eighth Amendment led the way to the lifting of martial law. Certain material modifications brought about by the Eighth Amendment are discussed below:¹¹

1. The President was required to act on the advice of the Prime Minister or Cabinet (but not the appropriate minister). The President could, however, require the Prime Minister or the Cabinet to reconsider such advice.

2. The period for giving assent by the President to the Bills passed by the Parliament, was reduced from forty-five to thirty days, but the rest of the provisions of the RCO remained the same.
3. The President retained the power to dissolve the National Assembly at his discretion, but this power was conditional. He could dissolve the National Assembly provided that, in his opinion, the government could not be carried on in accordance with the provisions of the Constitution and an appeal to the electorate became necessary. However, the period for holding elections after the dissolution of the National Assembly was reduced from 100 to ninety days.
4. The President retained the power to appoint, at his discretion, Chiefs of armed forces and the Chief Election Commissioner.
5. The power of the President to appoint the Prime Minister was limited to a period of five years, that is, until 20 March 1990 after which date, the President was required to invite that member of the National Assembly who commanded the confidence of the majority of its members, as ascertained in a session of the assembly summoned for the purpose, to assume the office of the Prime Minister. In other words, the procedure for the election of the Prime Minister by majority of total membership of the National Assembly was restored.
6. The President retained the power to appoint, at his discretion, Governors of the provinces but in consultation with the Prime Minister.
7. The power of the Governor to appoint the Chief Minister was limited to three years, that is, until 20 March 1988 after which date, the Governor was required to invite that member of the Provincial Assembly to be the Chief Minister, who commanded the confidence of the majority of the members of the Provincial Assembly as ascertained in a session of the assembly summoned for the purpose. In other words, the election of the Chief Minister by majority of total membership of the Provincial Assembly was restored.
8. The Governor could also dissolve the Provincial Assembly at his discretion, but subject to the previous approval of the President where, in his opinion:
 - (a) a vote of no-confidence having been passed against the Chief Minister, no other member of the Provincial Assembly is likely to command the confidence of the majority of the members of the Provincial Assembly in accordance with the provisions of the Constitution, as ascertained in a session of the Provincial Assembly summoned for the purpose; or
 - (b) a situation has arisen in which the government of the province cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.
9. Article 152-A, regarding the Constitution and establishment of the National Security Council, was omitted.
10. Article 270-A, regarding validation of the laws, acts, and orders of martial law regime was extended to cover more cases. The word 'validation' was substituted by the word 'affirmation'. In addition to the President's order, ordinances, martial law regulations, martial law orders, Referendum Order, 1984, the RCO and other constitutional amendments by Zia from time to time were affirmed and validated. Article 270-A has the dubious distinction of including the name of Zia (as General Muhammad Ziaul Haq) and affirming him as President as a result of the referendum held on 19 December 1984. Thus, this Article covered up the fraud played by Zia on the nation in the name of referendum.

The Eighth Amendment was clearly a capitulation, or at least a compromise, on the part of the newly formed civilian government to get martial law lifted. Zia and his Generals, realizing the vulnerable position of the fledgling government of Junejo, took full advantage of it and forced them to make maximum concessions to the military regime. Despite getting iron clad guarantees by way of affirmation of all acts and orders of martial law and indemnity for all its functionaries, Zia ensured his preponderant position as President by reserving unto himself the power to dissolve the National Assembly at his discretion and to appoint a caretaker government. For a change, he was true to his word,

though for self-serving reasons, when he said that he was not transferring power to the civilian government but was only sharing some of his power with it.

Zia's unscrupulous tampering with and the addition of his commandments to the 1973 Constitution changed the entire complexion of the supreme law of the land. While retaining elements of both the parliamentary and the presidential forms of government, the Eighth Amendment tilted the balance of power in the latter's favour. While making the office of the President the fulcrum of power, the Eighth Amendment reduced the status of the Prime Minister, making him subservient to the desires of the former. Removing the 'excessive' powers of the Prime Minister in the original 1973 Constitution, the amendment grafted presidential 'discretion' without the protection of a system of checks and balances.

The 'balance' that Zia struck between the powers of the Prime Minister and the President began to tell immediately on the new political system. Popular will had been flouted and national politics had changed from parliamentary democracy to military dictatorship. Zia's main obsession was to retain power at any cost, even if this meant the negation of constitutional democracy, national integrity and national institutions. He deliberately contrived constitutional devices in which he, as life-long President of the country, was above the parameters of the Constitution and unaccountable to the people.¹²

Longest Ever Martial Law Lifted

After having made a deal with the parliament and the civilian government by way of the Eighth Amendment, and after having secured ultimate powers and validating all martial law regulations and orders with actions taken thereunder, General Zia lifted martial law on 30 December 1985.¹³ It had continued for eight-and-a-half years, the longest martial law in the history of Pakistan.

All martial law regulations and martial law orders by the CMLA and MLAs stood cancelled on 30 December 1985.¹⁴ However, nine martial law orders and four martial law regulations issued by the CMLA and specified in the schedule to the MLO 107 were saved with some modifications and would continue as law of the land and their contravention would

continue to be punishable. The cancellation of martial law regulations and martial law orders would not affect the previous operation thereof and anything done, action taken, or liability incurred, or punishment suffered, or proceedings commenced would be deemed to have been properly and validly done, taken, incurred, or commenced, as the case may be. Cases pending before special or summary military courts stood transferred to competent criminal courts. The President and the Governors retained power in regard to cases decided and disposed of by the special and summary military courts but were awaiting confirmation. They also retained the powers of review of sentences passed by such military courts before 30 December 1985.

Notes

1. Revival of the Constitution of 1973 Order, 1985. President's Order 14 of 1985. PLD 1985 Central Statutes 456.
2. Constitution (Second Amendment) Order, 1985. President's Order 20 of 1985. PLD 1985 Central Statutes 582.
3. Representation of the People (Amendment) Ordinance, 1979. Ordinance L of 1979. PLD 1979 Central Statutes 532. Section 47-A was added for the purpose.
4. Article 198(2).
5. Interview with General Mohammad Ziaul Haq by a panel of editors of national newspapers in Islamabad on 3 March 1985. Published by Ministry of Information, Government of Pakistan, Islamabad.
6. Ibid.
7. Even an old friend of Zia, former Chief Justice Anwar-ul-Haq, said that the RCO had changed the basic structure of the Constitution, *The Muslim*, 8 March 1985.
8. *The Muslim*, 11 March 1985.
9. *The Muslim*, 25 March 1985.
10. Khan, Hamid, *Eighth Amendment: Constitutional and Political Crisis in Pakistan*, 1994, Wajidalis Ltd., Lahore, p. 47.
11. Constitution (Eighth Amendment) Act, 1985. Act XVIII of 1985. PLD 1986 Central Statutes 1.
12. Maluka, Zulfikar Khalid, *The Myth of Constitutionalism in Pakistan*, 1995, Oxford University Press Karachi, p. 272.
13. Proclamation of Withdrawal of Martial Law. PLD 1986 Central Statutes 9.
14. Martial Law Order by CMLA No. 107. PLD 1986 Central Statutes 9.

widely condemned by the lawyers because it was motivated and meant to uphold the atrocious appointments recommended by Irshad Hassan Khan just before his retirement violating the principle of seniority in the matter of judicial appointment. Irshad had benefitted from such recommendation by having himself appointed as Chief Election Commissioner. His successor (who was also his relative) Riaz Ahmad upheld such appointment to favour him and at the same time, laying down wrong principle in the matter of seniority of judges for appointment to the Supreme Court. It was indeed sad to see Chief Justice Chaudhry, who was restored to his office on the basis of popular movement of the lawyers and the people, follow such a weak and tainted precedent.

The Eighteenth Amendment

It has been discussed in the previous chapters that the face of the Constitution of 1973 was radically changed by the military dictators Zia ul-Haq and Musharraf through Eighth and Seventeenth Amendments respectively. The Zardari government expressed its resolve to restore the Constitution to its original form.¹ The Senators from the government and the opposition demanded scrapping Seventeenth Constitutional Amendment which was brought about to accommodate a military dictator.² Consequently, in pursuance of the Motions adopted by the National Assembly on 10 April 2009 and the Senate on 29 April 2009, the Speaker of the National Assembly constituted Special Committee of the Parliament on Constitutional Reforms consisting of 27 members.³ Senator Mian Raza Rabbani of PPP was elected by the members of the Committee as its Chairman on 25 June 2009.

The special Committee had representation from all the political parties in the Parliament.⁴ The special committee renamed itself as the 'Parliamentary Committee on Constitutional Reforms' on 25 June 2009 and proceeded to frame its Rules of Procedure on 29 June 2009.

Parliamentary Committee framed its Terms of Reference as under:

'The committee shall propose amendments to the Constitution keeping in view the 17th Amendment, Charter of Democracy (CoD) and provincial autonomy,

in order to meet the democratic and Islamic aspirations of the people of Pakistan.⁵

The special Committee asked its members to submit their proposals for amendments to the Constitution by 10 August 2009. The Committee also invited suggestions/proposals and amendments from the public at large by 10 August 2009. The Committee received 982 recommendations/proposals and amendments through this process.⁶

The Parliamentary Committee in addition to its Terms of Reference, while examining various provisions of the Constitution, 1973, kept in view the following amongst other criteria:⁷

- (1) Transparency in system.
- (2) Minimizing individual discretion.
- (3) Strengthening Parliament and Provincial Assemblies.
- (4) Provincial Autonomy.
- (5) Independence of the Judiciary.
- (6) Further strengthening fundamental rights.
- (7) The question of merit.
- (8) Good governance.
- (9) Strengthening of Institutions.

The committee held a total number of 77 meetings, with each meeting at an average lasting 5 hours, thus the Committee spent about 385 hours during its deliberations. The Committee proposed amendments to 97 Articles in the Constitution which were contained in the proposed Constitutional (Eighteenth Amendment) Bill, 2010.⁸

The Committee decided to hold all its proceedings in-camera and no press release was ever issued by the Committee. The decisions of the Committee were taken by consensus. However, if in a certain case a particular Party or Parties were not in a position to resile from their stated positions, but in the interest of a consensus agreed not to oppose the Committee's decision, it was decided that in such a case the Party or Parties would reiterate their stated position without prejudice to the Committee decision, through a note to be called, 'a Note of Reiteration'. In this way a total number of 11 Notes of Reiteration from various parties, were submitted.⁹

Constitution (Eighteenth Amendment) Bill prepared by the Parliamentary Committee was passed by both Houses of the Parliament by more than two thirds majority of each House. It received the assent of the

President on 19 April 2010 and thus became Constitution (Eighteenth Amendment) Act, 2010.¹⁰

The Eighteenth Amendment amended, altered, modified, varied, substituted, added, omitted or deleted 97 Articles of the Constitution. It also amended, varied, modified or omitted Annex, Third, Fourth, Sixth and Seventh Schedules to the Constitution. In this way, it has become the most comprehensive Amendment since the adoption of the Constitution in 1973.

The salient features of the Eighteenth amendment are as under:

1. The Legal Framework Order, 2002 and its various amendments in 2002 were declared to have been made without lawful authority and of no legal effect and therefore stood repealed.
2. The Constitution (Seventeenth Amendment) Act, 2003 was repealed.
3. The 'North West Frontier Province', was renamed as 'Khyber Pakhtunkhwa'.
4. The definition 'High Treason' under Article 6 was substituted to include 'suspension' or 'holding in abeyance' of the Constitution in addition to 'abrogation' or 'subversion' as acts of high treason. Even 'attempt' or 'conspiracy' to do so can constitute high treason. Not only 'abettors' but also 'collaborators' would be guilty of high treason. Most significantly clause (2) to Article 6 has been added to postulate that an act of high treason would not be validated by any court including the Supreme Court or a High Court.
5. Fundamental Rights were added such as:
 - (i) Article 10A was added which provides for fair trial and due process in criminal trials or determination of civil rights and obligations.
 - (ii) Article 19A was added extending the right to every citizen to have access to information in all matters of public importance subject to reasonable restrictions.
 - (iii) Article 25A was added obliging the State to provide free and compulsory education to all children between five and sixteen years of age.
6. Article 58 was substituted omitting clause (b) which empowered the President to dissolve National Assembly in his discretion.
7. The strength of the Senate was increased from 100 to 104, adding 4 non-Muslim members, one from each Province.
8. Articles 62 and 63 pertaining to qualification or disqualification of the members of the Parliament respectively were substituted restating nearly all the previous contents of these Articles. The reason appears to be that the addition, substitution or variation of most of such qualifications or disqualifications was brought about by the Restoration of the Constitution of 1973 Order, 1985 (RCO) or Legal Framework Order, 2002 (LFO). The qualifications or disqualifications contained in the original Constitution were very few and were added by the military dictators (General Zia ul-Haq and General Musharraf) under the aforementioned instruments.
9. The power to remove a person from membership of a House of the Parliament or a Provincial Assembly has been conferred on "Party Head" under substituted Article 63A instead of the Parliamentary leader in the concerned House as was the case before the substitution. In this way-the "Party Head" even if not a member of any House (Parliament or a Provincial Assembly) has been empowered to have a recalcitrant member of his party removed from the House. This power, however, has been restricted to voting on three occasions, which are (i) election of the Prime Minister or a Chief Minister, (ii) vote of confidence or vote of no-confidence or (iii) a Money Bill or a Constitution (Amendment) Bill.
10. Article 70 regarding introduction and passing of Bills in the Parliament was substituted. Under the new provision, if any differences arise between the two Houses of the Parliament on any Bill, the House, where it originate, could refer the Bill to be considered in the joint sitting of the two Houses and it can be passed by the majority of the members present and voting in the joint sitting.
11. A slight variation in the procedure of passing of the Money Bills was brought about. When a Money Bill is presented before the National Assembly, a copy of it is supposed to be sent to the Senate which can make recommendation thereon within fifteen days and the National Assembly is supposed to consider such recommendation while passing the Bill.
12. The President can, under Article 72, withhold his assent on a Bill passed by both Houses of the Parliament and can send it back for reconsideration within ten days. The Bill would then be considered by the Parliament in joint sitting and can be passed by the joint sitting with or without any amendment.
13. An important amendment has been made in ordinance-making power of the President and Governors under Articles 89 and 128 respectively. An Ordinance passed by the President or a Governor can only be respectively extended by a resolution of a House of the Parliament for a further period of 120 days or by a resolution of the

concerned Provincial Assembly for a further period of 90 days. No further extension in the period of an Ordinance can now be made and, if not passed as an Act of the Parliament or a Provincial Assembly, it will expire at the end of such extended period. This provision has curtailed the abuse of Ordinance making power under which Ordinances after Ordinances were previously being passed *ad infinitum*.

14. Under substituted Article 91, restriction of two terms for the office of the Prime Minister was removed. The Cabinet was held to be collectively responsible to the Senate and the National Assembly (not to the National Assembly alone as was the case before).
15. Another progressive step was the reduction in the size of the Cabinet, federal as well as the provincial. According to Article 92, the strength of the Cabinet including Ministers of State would not exceed 11% of the total membership of the Parliament. According to Article 130, the strength of a provincial Cabinet would not exceed fifteen members or 11 per cent of the total membership of the concerned Provincial Assembly, whichever is higher.
16. Another positive change was brought about in Article 100. The Attorney General is forbidden from engaging in private practice. In the past, Attorney General, particularly Syed Sharifuddin Pirzada had been notorious in doing private legal practice while being an Attorney General and obviously he was accused of exploiting the office of Attorney General for gain in his private practice. Similar restriction has also been placed on the office of an Advocate General of a Province under amended Article 140.
17. The Speaker of a Provincial assembly can act as Governor in his absence from Pakistan or for any other reason under Article 104 of the amended Constitution.
18. Clause (b) of Article 112 which empowered the Governor to dissolve a Provincial Assembly, subject to previous approval of the President, in his discretion, has been omitted. This power had been repeatedly abused in the past.
19. Article 116 provided similar provisions for assent to a Bill of Provincial Assembly by the Governor as had been provided for the assent of the President to a Bill of Parliament under amended Article 75 of the Constitution.
20. Since the Concurrent Legislative List (with 47 entries) in the Fourth Schedule of the Constitution would be omitted under this Amendment, the subjects for legislation were strictly bifurcated between the Parliament and the Provincial Assemblies. However, concurrent power to legislate laws with respect to criminal law, criminal procedure and evidence have been conferred on the Parliament and the Provincial Assemblies specifically by amendment in Article 142 of the Constitution.
21. Although Article 143 was substituted, yet the substituted Article provides that Federal laws would prevail over the Provincial laws if they are on the same subject. In this way, Federal laws that were passed on account of the "Concurrent List" before the enactment of 18th Amendment would continue and would continue to prevail over the Provincial laws on the subject on which Provincial laws have exclusive application after the 18th Amendment.
22. The Council of Common Interests (CCI) was empowered by amendment to Article 154 by providing that it would be constituted within 30 days of a Prime Minister taking oath of his office. CCI would have a permanent Secretariat and would meet once in 90 days. Under Article 157, CCI has also been empowered to resolve disputes between the Federal government and a Provincial Government in respect of generation of electricity or construction of hydroelectric power stations.
23. In order to strengthen provincial autonomy in financial terms, certain measures have been adopted under the Eighteenth Amendment which include the following:
 - (i) The Federal government would have to consult the Provincial Government before constructing a hydroelectric power plant in that Province. (Article 157).
 - (ii) The share of a Province in any Award of National Finance Commission (NFC) would not be less than the share of that Province in the previous Award. (Article 160).
 - (iii) Both the Federal and Provincial Finance Ministers would be monitoring the implementation of the Award of NFC. (Article 160).
 - (iv) The net proceeds of Federal excise duty on oil and natural gas and royalty collected by the Federal Government on natural gas would be paid to the Province in which well-head of oil or natural gas are situated. (Article 161).
 - (v) The mineral oil and natural gas within a Province or the territorial waters adjacent thereto would vest jointly and equally in that Province and the Federal Government (Article 172).
24. Provinces have been authorized to raise domestic or international loans on the security of the

Provincial Consolidated Fund within the limits and conditions specified by the National Economic Council.

25. A High Court for Islamabad Capital Territory was to be established under Article 175 of the amended Constitution
26. A new procedure for appointment of judges of the Supreme Court and the High Courts was prescribed under the newly added Article 175A reproduced below:-

175A. Appointment of Judges to the Supreme Court, High Courts and the Federal Shariat Court:-

- (1) There shall be a Judicial Commission of Pakistan, hereinafter in this Article referred to as the Commission, for appointment of Judges of the Supreme Court, High Courts and the Federal Shariat Court, as hereinafter provided.
- (2) For appointment of Judges of the Supreme Court, the Commission shall consist of -
- (i) **Chairman**
Chief Justice of Pakistan
- (ii) **Members**
Two senior most Judges of the Supreme Court.
- (iii) **Members**
A former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by the Chief Justice of Pakistan, in consultation with the two member Judges, for a period of two years;
- (iv) **Member**
Federal Minister for Law and Justice;
- (v) **Member**
Attorney-General for Pakistan; and
- (vi) **Member**
A Senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council for a term of two years.
- (3) Notwithstanding anything contained in clause (1) or clause (2), the President shall appoint the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.
- (4) The Commission may make rules regulating its procedure.
- (5) For appointment of judges of a High Court, the Commission in clause (2) shall also include the following, namely:-
- (i) **Member**
Chief Justice of the High Court to which the appointment is being made;

- (ii) **Members**
The most senior Judge of that High Court.
- (iii) **Members**
The Provincial Minister for Law; and
- (iv) **Member**
A senior advocate to be nominated by the Provincial Bar Council for a period of two years.

Provided

That for appointment of Chief Justice of a High court, the most senior Judge of the Court shall be substituted by a former Chief Justice or former Judge of that Court, to be nominated by the Chief Justice of Pakistan in consultation with the two member Judges of the Commission in clause (2);

Provided

Further that if for any reason the Chief Justice of High court is not available, he shall also be substituted in the manner as provided in the foregoing proviso.

- (6) For appointment of Judges of the Islamabad High Court, the Commission in clause (2) shall also include the following, namely:-
- (i) **Member**
Chief Justice of the Islamabad High Court; and
- (ii) **Member**
The most senior Judge of that High Court
- Provided**
That for initial appointment of the Judges of the Islamabad High Court, the Chief Justices of the four Provincial High Courts shall also be members of the Commission:
- Provided**
Further that subject to the foregoing proviso, in case of appointment of Chief Justice of Islamabad High Court, the provisos to clause (5) shall, *mutatis mutandis*, apply.
- (7) For appointment of Judges of the Federal Shariat Court, the Commission in clause (2) shall also include the Chief Justice of the Federal Shariat Court and the most senior Judge of that Court as its members:
Provided that for appointment of Chief Justice of Federal Shariat Court, the provisos to clause (5) shall, *mutatis mutandis*, apply.
- (8) The Commission by majority of its total membership shall nominate to the

- Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court, as the case may be.
- (9) The Parliamentary Committee, hereinafter in this Article referred to as the Committee, shall consist of the following eight members, namely:-
- (i) four members from the Senate; and
 - (iii) four members from the National Assembly.
- (10) Out of the eight members of the Committee, four shall be from the Treasury Benches, two from each House and four from the Opposition Benches, two from each House. The nomination of members from the Treasury Benches shall be made by the Leader of the House and from the Opposition Benches by the Leader of the Opposition.
- (11) Secretary, Senate shall act as the Secretary of the Committee.
- (12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed:
Provided that the Committee may not confirm the nomination by three-fourth majority of its total membership within the said period, in which case the Commission shall send another nomination.
- (13) The Committee shall forward the name of the nominee confirmed by it or deemed to have been confirmed to the President for appointment.
- (14) No action or decision taken by the Commission or a Committee shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof.
- (15) The Committee may make rules for regulating its procedure.
26. The minimum age for appointment as judges of High Courts under Article 193 was raised from forty to forty-five years and would be deemed to be so from 21 August 2002 (the date when LFO was promulgated).
27. Article 209 has been amended empowering Supreme Judicial Council to take notice of the case of a judge who is incapable of performing the duties of his office by reason of physical or mental incapacity or has been guilty of misconduct.
- However, the power appears to be conferred to the extent of holding an inquiry but the reference for removal of a judge continues to be the exclusive power of the President.
28. The procedure for appointment as Chief Election Commissioner (CEC) was changed. The amendment in Articles 213, 215, 216, 218, 219, and 221 provided a new machinery for holding elections. In the first place, the responsibilities of Chief Election commissioner (CEC) were transferred to the Election Commission of Pakistan (ECP) which consisted of CEC as the Chairman and four members, one from each Province. Secondly, the CEC and the members of ECP (who were to be former judges of High Courts) were to be selected by a Parliamentary Committee consisting of no more than twelve members, half from the Treasury Benches and half from the Opposition Parties in the Parliament. The Parliamentary Committee would be constituted by the Speaker of the National Assembly. One third of the members of the Parliamentary Committee would be drawn from the Senate. The prime Minister, in consultation with the Leader of the Opposition in the National Assembly, would forward three names for the appointment of CEC and three names each for each appointment of members of ECP for hearing and confirmation of one person for each. If no consensus was reached between the Prime Minister and the Leader of the Opposition, each would forward separate lists to the Parliamentary Committee for consideration which may confirm any one name for each of the offices concerned. In this way, a permanent Election Commission would be constituted with the Chairman and each member to serve for a term of five years. Neither the Chairman nor a member of ECP could be removed except through the procedure provided under Article 209 of the Constitution for removal of judges of the superior Courts.
29. Article 224 was amended and certain substantial changes were brought about. On the completion of the term of an Assembly, National or Provincial, the elections to the Assembly would be held within sixty days of such expiry. A new procedure for appointment of caretaker government was adopted. The President would appoint caretaker Prime Minister and a caretaker Cabinet in consultation with the Prime Minister and the Leader of the Opposition in the outgoing National Assembly. Similarly, the Governor would appoint caretaker Chief Minister and Caretaker Cabinet for the Province in consultation with the Chief Minister and the Leader of the Opposition in the outgoing

- Provincial Assembly. However, the members of the Federal and Provincial caretaker Cabinets would be appointed on the advice of the caretaker Prime Minister or the caretaker Chief Minister, as the case may be. The members of the caretaker Cabinets and their immediate family members (Spouse and children) would not be eligible to contest elections to any of the assemblies.
30. All elections under the Constitution, except those of the Prime minister and the Chief Minister, would be held by secret ballot under Article 226.
 31. In respect of proclamation of emergency under Article 232, it has been provided that if such emergency is imposed on account of internal disturbances beyond the powers of a Provincial Government to control, a Resolution from the Provincial Assembly of that Province would be required. All such Proclamations would have to be placed before both Houses of the Parliament for approval by each House within ten days.
 32. Article 243 was substituted providing for the Federal Government to have control and command of the Armed Forces with the President as the Supreme Commander. The appointment of all Chiefs of Staff of Armed Forces and their Chairman would be made by the President on the advice of the Prime Minister. The requirement of advice by the Prime Minister appears to be redundant because all acts and appointments by the President under the Constitution have to be made on the advice of the Prime Minister. Nevertheless, this requirement has been stated keeping in view the chequered history of appointment of the Chiefs of armed forces in the past whereby such appointments had frequently become a cause of dispute or conflict between the President and the Prime Minister.
 33. By amendment in Article 270A, the name of and reference to General Zia ul-Haq was deleted.
 34. Article 270AA was substituted with the following effects:

- (a) The Proclamation of Emergency by General Musharraf on 14 October 1999, the Provisional Constitution Order of 1999, the Oath of Office (Judges) Order, 2000, Chief Executive's Orders of 2002 making amendments in the Constitution through Legal Framework Orders of 2002 were declared as having been made without lawful authority and of no legal effect regardless of any judgment of the Supreme Court or a High Court in this behalf.
- (b) All laws including President's Orders, Acts, Ordinances, Chief Executive Orders, regulations, notifications, rules, orders or

bye-laws made between 12 October 1999 and 31 October 2003 were saved and continued in force until altered, repealed or amended by the appropriate Legislature or the competent authority.

- (c) Judges of the Supreme Court and the High Courts who had been deposed for not taking oath or for not being given oath under Oath of Office (Judges) Order, 2000 would be deemed to have continued to hold office.
 - (d) All orders made, proceedings taken, appointments made and acts done by any authority in purported exercise of authority under a law were saved and validated.
 - (e) On the omission of the Concurrent Legislative List, the process of devolution of the matters contained in the said list to the Provinces would be completed by 30 June 2011.
 - (f) An Implementation commission would be constituted within 15 days of the commencement of the Eighteenth Amendment to oversee the devolution process.
35. The Objectives Resolution, which was made "Annex" to the Constitution under the Eighth amendment in 1985, the word 'freely' in respect of practice and propagation of religion was deliberately omitted by General Zia ul-Haq. It goes to the credit of the Eighteenth Amendment that the word 'freely' was inserted in accordance with the original Objectives Resolution.
 36. The Concurrent Legislative List including its 47 entries was omitted. However, some of its entries (10 of them) like electricity, major ports, census, legal, medical and other professions; and interprovincial matters etc. were added to Part II of the Federal Legislative List.

Eighteenth Amendment Analysed

One of the main impacts of the 18th Amendment was that amongst other changes, the Provincial Governments were given greater autonomy under the Constitution by abolishing the Concurrent List and other related provisions. The result of the abolition of concurrent list was that subjects of legislation which were within the common competence of Federal and Provincial legislatures were now given exclusively to the Provincial legislatures. Thus, Provincial legislatures have exclusive domain over laws governing marriage, contracts, firearms possession,

labor, educational curriculums, environmental pollution, and many other diverse areas. The Eighteenth amendment reduced the mandate of several Federal Ministers with corresponding increase in the roles and responsibilities of the related institutions at the Provincial level.

It is provided that National Finance Commission agreements, while distributing national revenues between the Federal and Provincial governments, would not reduce the share of any Province to below what was given in the previous agreement. Thus, the Provincial Governments have been given greater authority to raise domestic and international loans and give guaranties on the basis of security of Provincial Consolidated Fund. According to the critics, the Eighteenth amendment only made limited changes which can truly be regarded as cosmetic in character. It is alleged that the most important subjects have been assigned to the Federal Government and the Provinces have jurisdiction over less important subjects.

The Eighteenth amendment failed to respond to the demand of the smaller Provinces that regional languages like Baluchi, Pushto, Punjabi, and Sindhi be given the status of national languages of Pakistan. The critics believe that the character of the armed forces should have been altered to make it a truly national organization with balanced representation of all Provinces and all minorities. The armed forces at present are heavily lopsided with proportionately high representation from certain parts of Punjab and Khyber Pakhtoon Khawa. Similarly, it is prescribed that the Eighteenth amendment did not confer any powers on many matters to the Senate which is a representative house for the Provinces. The power extended to party head to have a member of the National and Provincial Assembly removed from such Assembly is deeply criticized because such power has been given to a party head who may himself not be member of Parliament or a Provincial Assembly. Thus, genuine dissent within the party has been stifled.

In the post-Eighteenth amendment scenario, the role of political parties in the decision-making process has increased in Pakistan. But it is still on the weak side in the matter of institutional bargaining, because the actual role of political elites is relatively stronger than the institutional paradigm. The political trends

in Pakistan are lopsided in favour of personalities while the traditional kinship is stronger than the political forces. This tendency reflects on decision-making in Pakistan. The tendency towards consensus making should have been promoted by giving more space to the political parties at the grassroots level.¹¹ However, the broader spectrum for institutionalism has emerged in Pakistan in the aftermath of Eighteenth amendment. The role of different institutions such as legislature (Parliament), executive and judiciary have been attempted to be formalized.

The post-Eighteenth Constitutional Amendment is gradually increasing the institutionalized, liberalized, decentralized, coordinated, and consensus-oriented federalism in Pakistan. It is now travelling from centralized governance to loose phase of federalism which relatively has a balance with US model of federalism in the constitutional paradigm. However, it has to focus on comprehensive design with the propensity of transparency and shared culture of policy-making between centre and the provinces to the grassroots echelon.¹²

Although the Eighteenth Amendment took a major step forward towards a federal system, yet the test of its efficiency would come once the system takes shape. Another test would come in terms of providing services for which the Provinces would have the responsibility with abolition of the concurrent list. The real test will be ability and responsibility of the Provinces to raise resources of their own.¹³ Theoretically, the federation has been reconstructed but much still remains to be done. There are several areas especially in the field of education, health, labour, and the environment where the CCI (Council of Common Interests) and the Interprovincial Coordination Ministry must act to harmonize and coordinate between the federation and the provinces, particularly where Pakistan is bound by international treaties and obligations.¹⁴

The political forces in the country believe that the Eighteenth Amendment represents the first step towards reinvigoration of relatively under represented clauses and social groups like those of Sindhis, Saraikis, Baluch, and other historically oppressed nationalities.¹⁵ The process of implementation of devolution in the Eighteenth Amendment has been difficult but the provincial governments have been co-operative and determined. The three-pronged

strategy adopted by all provinces for steering the process of devolution (forming a Cabinet sub-committee, a Committee of concerned Secretaries, and the designation of the IPO department as a focal office for devolution) has been effective in providing ownership and sustained focus to the whole process.¹⁶

Eighteenth Amendment Challenged

It has been discussed above that the Eighteenth Amendment introduced Article 175A providing for a detailed method of appointment of judges of the Supreme Court of Pakistan and the High Courts. It provided for a two-step process. The initial selection for such appointment had to be made by the Judicial Commission constituted under Article 175A and the same had to be confirmed by a Parliamentary Committee of eight members drawn from the government and the opposition from both Houses of the Parliament. Thus the process of appointment became complex and politicized. Many a Bar Associations including Supreme Court Bar Association of Pakistan decided to challenge Article 175A being *ultra vires* of the basic features and basic structure of the Constitution. The Chief Justice formed a Bench of all the seventeen judges of the Supreme Court, with himself as its head. The hearings on these petitions were held for several months and the entire court was bogged down with the hearing of these cases. The petitioners heavily relied on the judgments rendered by the Supreme Court of India on the theory of basic structure of the Constitution as discussed in several of its judgments. The leading judgment in this behalf was that of *Kesavananda Bharati v. State of Kerala*.¹⁷ It appeared during the course of hearing of these petitions that there was difference of opinion amongst the judges on the question as to whether the amendment to the Constitution passed under Articles 238 and 239 of the Constitution of Pakistan can at all be challenged. Nevertheless, it was expected that the entire Supreme Court sitting together as one Bench would render a historical judgment in these cases.

However, it was deeply disappointing that the cases after having been argued for months together were not finally decided and an interim order was passed

on 21 October 2010;¹⁸ extracts of which are reproduced below:

'10. Most of the petitioners who had challenged Article 175A of the Constitution raised serious issues regarding the composition of the Judicial Commission and Parliamentary Committee and veto power given to the latter. It was contended that there was a well-known practice, when the unamended provision was in vogue that Chief Justice would consult most senior Judges of the Supreme Court before finalizing the recommendations. Instead of bringing any drastic change, the said practice should have been formalized. It was, therefore, suggested during arguments that to ensure that the appointment process is in consonance with the concept of independence of judiciary, separation of powers and to make it workable, Article 175A may be amended in following terms:-

- (i) That instead of two most senior Judges of the Supreme Court being part of the Judicial Commission, the number should be increased to four most senior Judges.
- (ii) That when a recommendation has been made by the Judicial Commission for the appointment of a candidate as a Judge, and such recommendation is not agreed/agreeable by the Committee of the Parliamentarians as per the majority of 3/4th, the Committee shall give very sound reasons and shall refer the matter back to the Judicial Commission for reconsideration. The Judicial Commission upon considering the reasons if again reiterates the recommendation, it shall be final and the President shall make the appointment accordingly.
- (iii) That the proceedings of the Parliamentary Committee shall be held in-camera but a detailed record of its proceedings and deliberations shall be maintained.

'14. This is for the first time ever in our national, judicial and constitutional history that such a serious challenge has been thrown by a cross section of society including some premier Bar Associations of the country to a legislation which was no ordinary piece of legislation but was a constitutional amendment. By making this unanimous reference to the Parliament for reconsideration, we did not consider the sovereignty of the Parliament and judicial independence as competing values. Both the institutions are vital and indispensable for all of us and they do not vie but rather complement each other so that the people could live in peace and prosper in a society which is just and wherein the rule of law reigns supreme. We can also not lose sight of the fact that we, as a nation, are passing through testing times facing multidimensional challenges which could be best addressed only through measures and methods

where societal and collective considerations are the moving and driving force. We had two options; either to decide all these petitions forthwith or to solicit, in the first instance, the collective wisdom of the chosen representatives of the people by referring the matter for reconsideration. In adopting the latter course, we are persuaded primarily by the fact that institutions may have different roles to play, but they have common goals to pursue in accord with their constitutional mandate.' '15. Notwithstanding the pendency of these petitions, the constitutional provisions under challenge have come into effect. Prior to the Eighteenth Amendment, several appointments of Additional Judges have been made in various High Courts and the issue of fresh appointments is likely to come up in near future. In these circumstances and till such time these petitions are decided, Article 175A has to be given judicial enforcement by way of a construction which is in consonance with the other constitutional provisions underpinning judicial independence. While doing so we take note of the fair stand taken by Mian Raza Rabbani, Chairman of the Special Committee of the Parliament for Constitutional Reforms and the Attorney-General for Pakistan to which reference has been made in Para-12 above and hold that Article 175A shall be given effect to in the manner as under:-

- (i) In all cases of an anticipated or actual vacancy a meeting of the Judicial Commission shall be convened by the Chief Justice of Pakistan in his capacity as its Chairman and the names of candidates for appointment to the Supreme Court shall be initiated by him, of the Federal Shariat Court by the Chief Justice of the said Court and of the High Courts by the respective Chief Justices.
- (ii) The Chief Justice of Pakistan as head of the Judicial Commission shall regulate its meetings and affairs as he may deem proper.
- (iii) The proceedings of the Parliamentary Committee shall be held in-camera but a detailed record of its proceedings and deliberations shall be maintained. The Parliamentary Committee shall send its approval of recommendations of the Judicial Commission to the Prime Minister for onward transmission to the President for necessary orders. If the Parliamentary Committee disagrees or rejects any recommendations of Judicial Commission, it shall give specific reasons and the Prime Minister shall send copy of the said opinion of the Committee to the Chief Justice of Pakistan and the same shall be justiciable by the Supreme Court.'

The order was indeed disappointing and the important question of applicability of the theory of

basic structure was left unanswered. Secondly, it was widely believed that the judges hearing the case were only interested in enhancing their power and position in the matter of appointment of judges. They got their number on the Judicial Commission increased from two to four so that they have a comfortable majority in the Judicial Commission (6 out of 9 instead of 4 out of 7 for appointment of judges of the Supreme Court and 8 out of 13 instead of 6 out of 11 for appointment of judges of a Provincial High Court).

It was also ordered that in order to proceed and re-examine the matter in terms of what was recommended by the Supreme Court in the matter, the petitions were adjourned to a date in the last week of January 2011. However, the Nineteenth Amendment to the Constitution was passed on January 1, 2011 incorporating nearly all the recommendations of the Supreme Court.

These petitions against Article 175A remain pending before the Supreme Court for a long time. However, in the year 2015, Twenty First Amendment in the Constitution was passed by the Parliament incorporating Military Courts into the Constitution. The Twenty First Amendment was challenged before the Supreme Court by various Bar Associations and individuals and were heard by a Bench of full Court of 17 judges during the months of April, May and June 2015. Alongwith these petitions, the pending petitions against the Eighteenth Amendment (Article 175A) were also heard. Finally, a judgment was announced in all these petitions on 5 August 2015. The Petitions challenging the Constitution (Eighteenth Amendment) Act (X of 2010) were dismissed by a majority of 14 to 3. The petitions challenging the Constitution (Twenty First Amendment) Act (I of 2015) were dismissed by a majority of 11 to 6. The Bench/the Court during the hearing of these petitions and at the time of their decision, was headed by the Chief Justice Nasir-ul-Mulk. The decision on the question of applicability of the basic structure and basic features would be discussed while analysing the judgment on Twenty First Amendment.

Nineteenth Amendment

As a consequence of order of the Supreme Court dated 21 October 2010, the Constitution (Nineteenth

Amendment) Act, 2010 was passed by the Parliament at the end of December 2010 and was assented to by the President on January 1, 2011. Certain other necessary amendments were also made in the Constitution in this Amendment Act discussed as under:²⁰

Article 81 was amended to include the judges of the Islamabad High Court amongst the persons whose remuneration and expenditures would be charged upon the Consolidated Fund. Similarly, the administrative expenses incurred and remuneration payable to officers and servants of the Supreme Court, the Islamabad High Court, the department of Auditor General, the Office of the Chief Election Commissioner, and of the Election Commission and the Secretariats of the Senate and the National Assemblies would also be charged upon the Federal Consolidated Fund.

Article 175 was amended. The Islamabad High Court was included within the meaning of the expression 'High Court'. Article 175A was amended and the number of judges of the Supreme Court on the Judicial Commission of Pakistan was enhanced from two to four senior-most judges. The qualifications of a member of the Judicial Commission who was to be the nominee of the concerned Provincial Bar Council were clarified to mean an advocate having not less than fifteen years practice in the High Court. It was also provided that the Parliamentary Committee for confirmation of judges would consist of only the members of the Senate if at the given time the National Assembly stood dissolved. It was also provided that the Parliamentary Committee for appointment of judges may not confirm the nomination recommended by three-fourth majority of its total membership within a period of 14 days after such nomination is received from the Judicial Commission. However, the Parliamentary Committee has to record reasons for not confirming any nomination forwarded by the Judicial Commission. It was also provided that if a nomination is not confirmed by the Parliamentary Committee, it would forward its decision with reasons recorded to the Judicial Commission through the Prime Minister. The Judicial Commission in the event of a nomination not being confirmed could send another nomination.

Article 182 was amended and it was provided that the appointment of *ad hoc* judges of the Supreme Court was to be made by the Chief Justice of Pakistan in consultation with the Judicial Commission of Pakistan.

Article 213 was also amended and the Parliamentary Committee for appointment of the Chairman and the Members of the Election Commission of Pakistan is required to consist of twelve members out of which one-third would have to be from the Senate.

Article 246 was amended to include Tribal Areas adjoining to Lakki Marwat and Tank Districts within the meaning of Federally Administered Tribal Areas.

It is noticeable that the Supreme Court in the light of its order dated 21.10.2010 succeeded in getting two of its judges added to the Judicial Commission which gave the judges in the Judicial Commission more than two-third majority.

Twentieth Amendment

During the course of hearing of a number of cases in relation to the Election Commission of Pakistan, certain anomalies were discovered in respect of the provisions of the Constitution regarding Election Commission of Pakistan due to the Eighteenth Amendment in the Constitution establishing Election Commission of Pakistan consisting of a permanent Chairman and four members for a period of five years. Many provisions in these Chapters (Chapters 1 and 2 of Part-VIII) of the Constitution were left unamended with the result that several anomalies in the functions of the Election Commission and what was previously the Chief Election Commissioner became obvious and apparent. In order to resolve that, Constitution (Twentieth Amendment) Act, 2010 was promulgated on 28 February 2012.²¹ As a result, the following modifications in the Constitution came about:

Article 48 of the Constitution was amended providing for holding of general elections to the National Assembly and appointment of Caretaker Cabinet in accordance with the provisions of Article 224 or as the case may be, Article 224A.

Articles 214, 215, and 216 were amended to bring the provisions of these Articles in the proper context of

Election Commission of Pakistan in respect of Chief Election Commissioner.

Article 224 was amended in which a proviso was added that if the Prime Minister or a Chief Minister and their respective Leaders of the Opposition do not agree on any person to be appointed as Caretaker Prime Minister or the Caretaker Chief Minister, as the case may be, then the provisions of Article 224A should be followed.

Another amendment was made in Article 224 concerning reserved seats for women or non-Muslim in the National Assembly or a Provincial Assembly. It was provided that if at any time the party list submitted by a political party for such reserved seats at the time of general elections was exhausted, the concerned political party might submit a nominee for any vacancy which might occur thereafter.

Article 224A was inserted in the Constitution and it was provided that if the Prime Minister and the Leader of the Opposition in the outgoing National Assembly do not agree on any person to be appointed as the Caretaker Prime Minister within three days of the dissolution of the National Assembly, then they shall forward two nominees each to a Committee to be immediately constituted by the Speaker of the National Assembly comprising eight members of the outgoing National Assembly or the Senate or both having equal representation from the Treasury and the Opposition. Similar provisions were made in respect of a Chief Minister and the Leader of the Opposition in the outgoing Provincial Assembly in respect of appointment of Caretaker Chief Minister of the concerned Province. The Committee so constituted in this behalf had three more days to nominate a Caretaker Prime Minister or a Caretaker Chief Minister as the case may be. In case the Committee so constituted was unable to decide the matter in the aforesaid period, the names of the nominees would be referred to the Election Commission of Pakistan for final decision within two days. However, the incumbent Prime Minister and the incumbent Chief Minister would continue to hold office till appointment of the Caretaker Prime Minister or the Caretaker Chief Minister as the case may be.

It is noticeable that the Parliament went a long way and provided a detailed procedure for the appointment of Caretaker Prime Minister or a Caretaker Chief Minister as the case may be. The subsequent experience with regard to the resolution of such a dispute in the year 2013 on the dissolution of National and Provincial Assemblies made it obvious that even such detailed procedure was found to be inadequate when such a situation would arise.

Kayani's Term of Office Extended

General Ashfaq Parvez Kayani was appointed as Chief of Army Staff (COAS) with effect from 29 November 2007 for a term of three years. However, Zardari government appeared to have become comfortable with him and offered him extension with a full term of three years which he accepted whole heartedly. On 21 July 2010, Prime Minister Gilani surprised everyone by announcing on the national television around midnight that General Kayani had been given extension for a full term of three years as COAS which would be from 29 November 2010 to 29 November 2013.²²

The governments in Pakistan have a history of extending the term of office of Army Chiefs. General Ayub Khan got two extensions as Army Chief resulting in declaration of Martial Law by him on 7 October 1958. General Zia, after taking over power in July 1977, did not relinquish the office of COAS. He kept extending his own term as COAS every three years and remained COAS for more than 12 years till he met his end in an accident on 17 August 1988. General Musharraf, after military takeover in October 1999, did the same thing and kept extending his own term as COAS every three years (from 2001 to 2004 and from 2004 to 2007) and, like General Zia before him, held the offices of the President and COAS concurrently. It was only under pressure from the Armed Forces (and perhaps USA) that he handed over the baton of command as COAS on 29 November 2007 to General Kayani. The extension given to Kayani in 2010 was to please him so that he would desist from military takeover during the Zardari government.